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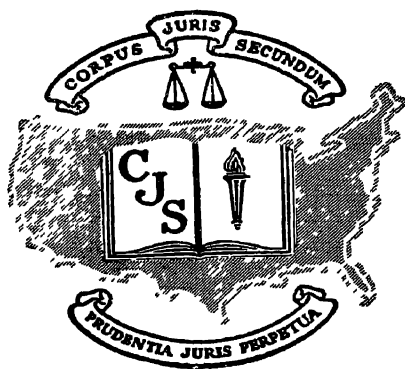














CITE BY TITLE AND SECTION

**Thus**

**94 C.J.S. Wharves § 2**

# CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE  
AMERICAN LAW  
AS DEVELOPED BY  
ALL REPORTED CASES

By  
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# EXPLANATION

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THE object in view in preparing *Corpus Juris Secundum* has been twofold. First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases. Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

*Corpus Juris Secundum* is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

*Corpus Juris Secundum* is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

*Corpus Juris Secundum* represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS



# TABLE OF ABBREVIATIONS

## REPORTS AND TEXTBOOKS

<b>A</b>	<b>A</b>	<b>Am L J N S</b>	<b>American Law Journal New Series (Pa)</b>
A 2d	Atlantic Reporter	<b>Am L Rec</b>	<b>American Law Record (Ohio)</b>
Abb	Atlantic Reporter Second Series	<b>Am L Reg</b>	<b>American Law Register</b>
Abb Adm	Abbott (U S)	<b>Am L Reg N S</b>	<b>American Law Register New Series</b>
Abb App Dec	Abbott's Admiralty (U S)	<b>Am Law Reg O S</b>	<b>American Law Register Old Series</b>
Abb Dec	Abbott's Appeals Decisions (N Y)	<b>Am L Rev</b>	<b>American Law Review</b>
Abb N Cas	Abbott's Decisions (N Y)	<b>Am L T Bankr</b>	<b>American Law Times Bankruptcy Reports</b>
Abb Pr	Abbott's New Cases (N Y)	<b>Am Law Inst</b>	<b>American Law Institute, Restatement of the Law</b>
Abb Pr N S	Abbott's Practice (N Y)	<b>Am Negl Cas</b>	<b>American Negligence Cases</b>
A'Beck Res Judgm	Abbott's Practice New Series (N Y)	<b>Am Negl R</b>	<b>American Negligence Reports</b>
	<b>A'Beckett's Reserved Judgments (Vict)</b>	<b>A M &amp; O</b>	<b>Armstrong, Macartney &amp; Ogle (Ir)</b>
[1917] A C	<b>[1917] Appeal Cases (Can)</b>	<b>Am Prob</b>	<b>American Probate</b>
[1918] A C	<b>Law Reports [1918] Appeal Cases (Eng)</b>	<b>Am Prob N S</b>	<b>American Probate New Series</b>
Acton	<b>Acton (Eng)</b>	<b>Am Pr</b>	<b>American Practice</b>
Adams	<b>Adams Reports (NH)</b>	<b>Am R</b>	<b>American Reports</b>
A D 2d	<b>Appellate Division Second Series (N Y)</b>	<b>Am R &amp; Corp</b>	<b>American Railroad &amp; Corporation</b>
Add	<b>Addison (Pa)</b>	<b>Am R Rep</b>	<b>American Railway Reports</b>
Add Eccl	<b>Addams' Ecclesiastical (Eng)</b>	<b>Am S R</b>	<b>American State Reports</b>
A & E	<b>Adolphus &amp; Ellis (Eng)</b>	<b>Am St R D</b>	<b>American Street Railway Decisions</b>
A & E Enc L	<b>American &amp; English Encyclopædia of Law</b>	<b>And</b>	<b>Anderson (Eng)</b>
A & E Enc L & Pr	<b>American &amp; English Encyclopædia of Law &amp; Practice</b>	<b>Andr</b>	<b>Andrews (Eng)</b>
Aik	<b>Aikens (Vt)</b>	<b>Ann Cas</b>	<b>American &amp; English Annotated Cases</b>
A K Marsh	<b>A K Marshall (Ky)</b>	<b>Ann Cas 1912A</b>	<b>American Annotated Cases 1912A, et seq</b>
Ala	<b>Alabama</b>	<b>Anstr</b>	<b>Anstruther (Eng)</b>
Ala App	<b>Alabama Appellate Court</b>	<b>Anth N P</b>	<b>Anthon's Nisi Prius (N Y)</b>
Alaska	<b>Alaska</b>	<b>App D C</b>	<b>Appeal Cases (D C)</b>
Alb L J	<b>Albany Law Journal</b>	<b>App Cas</b>	<b>Law Reports Appeal Cases (Eng)</b>
A L C	<b>American Leading Cases</b>	<b>App Div</b>	<b>Appellate Division (N Y)</b>
Alc & N	<b>Alcott &amp; Napier (Eng)</b>	<b>Ariz</b>	<b>Arizona</b>
Alc Reg Cas	<b>Alcock's Registry Cases (Eng)</b>	<b>Ark</b>	<b>Arkansas</b>
Aleyn	<b>Aleyn (Eng)</b>	<b>Ark Just</b>	<b>Arkley's Judiciary (Sc)</b>
Alison Pr	<b>Alison's Practice (Sc)</b>	<b>Arn</b>	<b>Arnold (Eng)</b>
Allen	<b>Allen (Mass)</b>	<b>Arn &amp; H</b>	<b>Arnold &amp; Hodges (Eng)</b>
Allen (N B)	<b>Allen, New Brunswick</b>	<b>Ashm</b>	<b>Ashmead (Pa)</b>
Alta L	<b>Alberta Law</b>	<b>Aspin</b>	<b>Aspinall's Maritime Cases (Eng)</b>
A L R	<b>American Law Reports</b>	<b>Atk</b>	<b>Atkyn (Eng)</b>
A L R 2d	<b>American Law Reports, Second Series</b>	<b>Austr C L R</b>	<b>Commonwealth Law Reports, Australia</b>
Am Bankr	<b>American Bankruptcy (U S)</b>	<b>Austr Jur</b>	<b>Australian Jurist</b>
Ambl	<b>Ambler (Eng)</b>	<b>Austr L T</b>	<b>Australian Law Times</b>
A M C	<b>American Maritime Cases</b>		
Am Corp Cas	<b>American Corporation Cases</b>	<b>Bacon Abr</b>	<b>Bacon's Abridgment (Eng)</b>
Am Cr	<b>American Criminal</b>	<b>Bail Eq</b>	<b>Bailey's Equity (S C)</b>
Am D	<b>American Decisions</b>	<b>Bailey</b>	<b>Bailey's Law (S C)</b>
Am & E Corp Cas	<b>American &amp; English Corporation Cases</b>	<b>B &amp; Ad</b>	<b>Barnewall &amp; Adolphus (Eng)</b>
Am & E Corp Cas N S	<b>American &amp; English Corporation Cases New Series</b>	<b>B &amp; Ald.</b>	<b>Barnewall &amp; Alderson (Eng)</b>
Am & Eng Ency Law	<b>American and English Encyclopedia of Law</b>	<b>Baldw</b>	<b>Baldwin (U S)</b>
Am & E Eq D	<b>American &amp; English Decisions in Equity</b>	<b>Balf Pr</b>	<b>Balfour's Practice (Sc)</b>
Am & Eng Pat Cas	<b>American and English Patent Cases</b>	<b>Ball &amp; B</b>	<b>Ball &amp; Beatty (Ir)</b>
Am & Eng R R Cas	<b>American and English Railroad Cases</b>	<b>Bank &amp; Ins R</b>	<b>Bankruptcy and Insolvency Reports (Eng.)</b>
Am Electr Cas	<b>American Electrical Cases</b>	<b>Bann</b>	<b>Bannister (Eng)</b>
Am & E R Cas	<b>American &amp; English Railroad Cases</b>	<b>Bann &amp; A</b>	<b>Banning &amp; Arden (U S.)</b>
Am & E R Cas N. S	<b>American &amp; English Railroad Cases New Series</b>	<b>Barb</b>	<b>Barbour (N.Y.)</b>
Am J Int L.	<b>American Journal of International Law</b>	<b>Barb Ch</b>	<b>Barbour's Chancery (N Y)</b>
Am L J	<b>American Law Journal (Pa)</b>	<b>B &amp; Arn</b>	<b>Barron &amp; Arnold (Eng)</b>

## B

<b>Bacon's Abridgment (Eng)</b>
<b>Bailey's Equity (S C)</b>
<b>Bailey's Law (S C)</b>
<b>Barnewall &amp; Adolphus (Eng)</b>
<b>Barnewall &amp; Alderson (Eng)</b>
<b>Baldwin (U S)</b>
<b>Balfour's Practice (Sc)</b>
<b>Ball &amp; Beatty (Ir)</b>
<b>Bankruptcy and Insolvency Reports (Eng.)</b>
<b>Bannister (Eng)</b>
<b>Banning &amp; Arden (U S.)</b>
<b>Barbour (N.Y.)</b>
<b>Barbour's Chancery (N Y)</b>
<b>Barron &amp; Arnold (Eng)</b>
<b>Barnardiston King's Bench (Eng)</b>
<b>Barnardiston Chancery (Eng)</b>
<b>Barnes' Practice Cases (Eng)</b>
<b>Barnes' Notes (Eng)</b>
<b>Batty (Ir)</b>
<b>Barron &amp; Austin (Eng)</b>
<b>Baxter (Tenn)</b>
<b>Bay (S C.)</b>
<b>Broderip &amp; Bingham (Eng.)</b>
<b>British Columbia</b>

**B & C.** Barnwell & Cresswell (Eng)  
**B & Macn** Browne & Macnamara (Eng)  
**B D & O** Blackham, Dundas & Osborne (Ir)  
**Beatty** Beatty (Ir)  
**Beav** Beavan (Eng)  
**Beav & Wal Ry** Beavan & Walford's Railway and Canal Cases (Eng)  
**Cas** English Railway and Canal Cases  
**Beav R & C Cas** Beaver County Legal Journal (Pa)  
**Beaver** Beawes Lex Mercatoria (Eng)  
**Beaw Lex Mer** Bee (U S)  
**Bee** Bellewe (Eng)  
**Bell** Bell's Appeal Cases (Sc)  
**Bell App Cas** Bell's Cases (Sc)  
**Bell Cas** Bell's Crown Cases (Eng)  
**Bell C C** Bell's Commentaries (Eng)  
**Bell Comm** Bell's Scotch Court of Session Cases  
**Bell Sc Cas** Benedict (U S)  
**Ben** Benloe (Eng)  
**Benl** Benloe & Dalison (Eng)  
**Benl & D** Berks County Law Journal (Pa)  
**Berks** Bennett & Heard Leading Criminal Cases (Eng)  
**B & H Cr Cas** Bibb (Ky)  
**Bibb** Bingham (Eng)  
**Bing** Bingham's New Cases (Eng)  
**Bing N Cas** Binney (Pa)  
**Binn** Bissell (U S)  
**Biss** Bittleston, Wise & Parnell (Eng)  
**Butt W & P** Black (U S)  
**Black** Blackford (Ind)  
**Blackf** Blackstone Commentaries  
**Blackstone Comm** Henry Blackstone's English Common Pleas (Eng)  
**Bla H** Blair County (Pa)  
**Blair** Bland (Md)  
**Bland** Bland's Chancery (Md)  
**Bland's Ch** Blatchford (U S)  
**Blatchf** Blatchford & Howland (U S)  
**Blatchf & H** Blatchford's Prize Cases (U S)  
**Blatchf Prize Cas** Bligh (Eng)  
**Blgh** Bligh New Series (Eng)  
**Blgh N S** B Monroe (Ky)  
**B Mon** Bond (U S)  
**Bond** Bouvier's Law Dictionary  
**Bouvier** Boyce (Del)  
**Boyce** Bosanquet & Puller (Eng)  
**B & P** Bosanquet & Puller's New Reports (Eng)  
**B & P N R** Bracton de Legibus et Consuetudinibus Anglæ  
**Bract** Bradford's Surrogate (N Y)  
**Bradf Surr** Brayton (Vt)  
**Brayt** British Ruling Cases  
**B R C** Brevard (S C)  
**Brev** Brewster (Pa)  
**Brewst** Brightly (Pa)  
**Brightly** Brightly's Election Cases (Pa)  
**Brightly El Cas** Brown's Chancery (Eng)  
**Bro Ch** Brockenbrough (U S)  
**Brock** Brockenbrough's Virginia Cases  
**Brock Cas** Broderip & Bingham (Eng)  
**Brod & B** Broderick & Fremantle's Ecclesiastical Cases  
**Brod & Fr** Brodix's American & English Patent Cases  
**Brodix Am & E** Brown's Judiciary (Sc)  
**Pat Cas** Brook's Abridgments (Eng)  
**Bro Just** Brook's New Cases (Eng)  
**Brook Abr** Brooke's New Cases  
**Brook N Cas** Brown's Parliament Cases (Eng)  
**Brooke N C** Brown's Admiralty (U S)  
**Bro P C** Brown's Chancery Cases (Eng)  
**Brown Adm** Brown's Ecclesiastical (Eng)  
**Brown, Ch** Brown's Michigan Nisi Prius  
**Brown Ecc** Brown Parliamentary Cases (Eng)  
**Brown N P** Browne (Pa)  
**Brown, Parl Cas** Browning & Lushington (Eng)  
**Browne** Brownlow & Goldesborough (Eng)  
**Brown & L** Bruce (Sc)  
**Brownl & G** Brunner's Collective Cases (U S)  
**Bruce** Best & Smith (Eng)  
**Brunn Coll Cas** Board of Tax Appeals (U S)  
**B & S** Buck (Eng)  
**B T A** Bucks County Law Reporter (Pa)  
**Buck** Buller N P  
**Bulstr** Bulstrode (Eng)  
**Bunb** Bunbury (Eng)  
**Burn** Burnett (Wis)  
**Buir** Burrows (Eng)  
**Burr S Cas** Burrows' Settlement Cases (Eng)  
**Busb** Busbee (N C)  
**Busb Eq** Busbee Equity (N C)  
**Bush** Bush (Ky)  
**B W C C** Butterworth's Workmen's Compensation Cases (Eng)

**C**  
**C A** Court of Appeals (U S)  
**Cab & E** Cababe & Ellis (Eng)  
**Cai** Caines (N Y)  
**Cai Cas** Caines' Cases (N Y)  
**Cal** California  
**Cal 2d** California Reports, Second Series  
**Cal App** California Appellate Reports  
**Cal App 2d** California Appellate Reports, Second Series  
**Cald.** Caldecott (Eng)  
**Call** Call (Va)  
**Calthr** Calthrop (Eng)  
**Cal Unrep Cas** California Unreported Cases  
**Cambria** Cambria County Legal Journal (Pa)  
**Cam Cas** Cameron's Cases (Can)  
**Campb** Campbell (Eng)  
**Canal Zone** Canal Zone Supreme Court  
**Can App Cas** Canadian Appeal Cases  
**Can Cr Cas** Canadian Criminal Cases  
**Can Exch** Canadian Exchequer  
**Can L J** Canada Law Journal  
**Can L J N S** Canada Law Journal New Series  
**Can L T Occ** Canadian Law Times Occasional Notes  
**Notes** Canadian Railway Cases  
**Can R Cas** Canada Supreme Court  
**Can S C** Cane & Leigh Crown Cases Reserved (Eng)  
**Cane & L** Carrington & Kirwan (Eng)  
**Car & K** Carrington & Marshman (Eng)  
**Car & M** Carrington & Payne (Eng)  
**Car & P** Carrow, Hamerton & Allen (Eng)  
**Car H & A** Carpmal Patent Cases (Eng)  
**Carp P C** Carter (Eng)  
**Carter** Carthew (Eng)  
**Carth** Cartwright's Cases (Can)  
**Cartwr Cas** Cary (Eng)  
**Cary** Casey (Pa)  
**Cas** Cases temp Hardwicke (Eng)  
**Cas t Hardw** Cases temp Holt (Eng)  
**Cas t Holt** Cases temp King (Eng)  
**Cas t King** Cases temp Talbot (Eng)  
**Cas t Talb** Common Bench (Manning, Granger & Scott) (Eng)  
**C B** Common Bench New Series (Manning, Granger & Scott New Series) (Eng)  
**CBNS** Circuit Court of Appeals (U S)  
**C C A** Court of Customs and Patent Appeals  
**C C P A** Cental Law Journal  
**Centr L J** Law Reports [1891] Chancery (Eng)  
**[1891] Ch** Chamber (Ont)  
**Chamb Rep** Chandler (Wis)  
**Chandl** R M Charlton (Ga)  
**Charlt R M** T U P Charlton (Ga)  
**Charlt T U P** Chase (U S)  
**Chase** Cases in Chancery (Eng)  
**Ch Cas** Chancery Chambers (U C.)  
**Ch Chamb.** Chalmers' Colonial Opinions  
**Ch Col Op** Law Reports Chancery Division (Eng)  
**Ch C** Chester County (Pa)  
**Chest.** Cheves (S C)  
**Chev** Chitty (Eng)  
**Chit** Choyce Cases in Chancery (Eng)  
**Choyce Cas Ch** Chancery Reports (Eng)  
**Ch Rep** Chancery Sentinel (N Y)  
**Ch Sent** Weekly Law Bulletin (Oh)  
**Cinc L Bul** Cincinnati Superior Court Reporter (Oh)  
**Cinc Super** City Ct R  
**City Ct R** City Hall Recorder (N Y)  
**City Hall Rec** Civil Procedure Reports (N Y)  
**Civ Proc Rep**

C J	Corpus Juris	Cranch Pat Dec	Cranch's Patent Decisions (U S)
C J Ann.	Corpus Juris Annotations	Cr App	Criminal Appeals (Eng)
C J S	Corpus Juris Secundum	Crawf & D	Crawford & Dix (Ir)
C & K	Carrington & Kirwan (Eng)	Crawf & D Abr	Crawford & Dix's Abridged Cases (Ir)
C & L	Connor & Lawson (Ir)	Cas	Cripp's Church and Clergy Cases
Cl App	Clark's Appeal Cases (Eng)	Cripp's Ch Cas	Criminal Law Magazine
Cl Ch	Clarke's Chancery (N Y)	Cr L Mag	Craig & Phillips (Eng)
Clark & F	Clark & Fennelly (Eng)	Ci & Ph	Christopher Robinson's Admiralty (Eng)
Clark & Fin N S	Clark's House of Lords Cases (Eng)	C Rob	Croke Charles (Eng)
Clarke	Clarke's Chancery (N Y)		Croke Elizabeth (Eng)
Clarke & S Dr Cas	Clarke & Scully's Drainage Cases (Ont)		Croke's Reports tempore James (Jacobus) (Eng)
Clarke Ch	Clarke's Chancery (N Y)	Cro Car	Crompton & Jervis (Eng)
Clayt	Clayton's Reports, York Assizes (Eng)	Cro Eliz	Crompton & Meeson (Eng)
		Cro Jac	Croswell's Collection of Patent Cases (U S)
C L Chamb	Chamber's Common Law (U C)		Craig & Phillips (Eng)
Clev L Rec	Cleveland Law Record (Oh)	Cromp & J	Court of Claims (U S)
Clev L Rep	Cleveland Law Reporter (Oh)	Cromp & M	Court of Customs and Patent Appeals
Cl & F	Clark & Fennelly (Eng)	Crow Pat Cas	Cumberland Law Journal (Pa)
Chf El Cas	Clifford's Southwick Election Cases		Cunningham (Eng)
Chff	Clifford (U S)		Curtis (U S)
C L R	Common Law Reports (Eng)	Cr & Ph	Curtis Ecclesiastical (Eng)
C & M	Carrington & Marshman (Eng)	Ct Cl	Cushing (Mass)
C M & R	Crompton, Meeson & Roscoe (Eng)	Ct Cust & Pat	United States Customs Appeals
Cock & Rowe	Cockburn & Rowe's Election Cases	App	Cyclopedia of Law & Procedure
Code Rep	Code Reporter (N Y)	Cumb	Cyclopedia of Law & Procedure Annotations
Code Rep N S	Code Reports New Series (N Y)	Cunn	
Coff Prob	Coffey's Probate (Cal)	Curt	
Co Inst	Coke's Institutes	Curt Eccl.	
Coke	Coke (Eng)	Cush	
Col Cas	Coleman's Cases (N Y)	Cust A	
Col & C Cas	Coleman & Caines' Cases (N Y)	Cyc	
Col C C	Collyer's Chancery Cases (Eng)	Cyc Ann.	
Coldw	Coldwell (Tenn)		
Coll	Collyer (Eng)		
Col L Rep	Colorado Law Reporter		
Col Law Review	Columbia Law Review		
Coll & E Bank.	Collier and Eaton's American Bankruptcy Reports		
		Dak	Dakota
Colles	Colles' Cases in Parliament (Eng)	Dal C P.	Dalson's Common Pleas (Eng)
Colo.	Colorado	Dall	Dallaman's Decisions (Tex)
Colo App.	Colorado Appeals	Dall	Dallas (Pa)
Colq	Colquit	Dall	Dallas (U S)
Coltm	Coltman (Eng)	Dah Dec.	Dalrymple's Decisions (Sc)
Comb	Comberbach (Eng)	Daly	Daly (N Y)
Com Cas	Commercial Cases (Eng)	Dan	Daniell (Eng)
Com L	Commercial Law (Can)	Dana	Dana (Ky)
Comptr Treas	Comptroller, Treasury Decisions	Dane Abr	Dane's Abridgment
Dec	Comstock (N Y)	Dan & L	Danson & Lloyd (Eng)
Comst	Comyns (Eng)	D'Anv Abr	D'Anver's Abridgment (Eng)
Comyns	Comyns Digest (Eng)	Dauph	Dauphin County (Pa)
Comyns Dig.	Comyns Digest (Eng)	Dav & M	Davison & Merivale (Eng)
Con & Law	Connor & Lawson (Ir)	Davys	Davys (Ir)
Conf	Conference Reports (N C)	Day	Day (Conn)
Conn	Connecticut	D B & M	Dunlop, Bell & Murray (Sc)
Conn Surr	Connolly's Surrogate (N Y)	D C	District of Columbia
Const	Constitutional Reports (N C)	D & C	District and County (Pa)
Cooke	Cooke (Eng)	D & C 2d	District and County, Second Series (Pa)
Cooke	Cooke (Tenn)		
Cooke & A	Cooke & Alcock (Ir)	D Chipm	D Chipman (Vt)
Cook Vice-Adm	Cook's Vice-Admiralty (L C)	D C Mun App.	Municipal Court of Appeals (D C)
Coop	Cooper's Chancery (Eng)	Deac	Deacon (Eng)
Coop Pr Cas	Cooper's Practice Cases (Eng)	Deac & C	Deacon & Clutty (Eng)
Coop t Brough.	Cooper's Cases temp Brougham (Eng)	Deady	Deady (U S)
		Dears & B	Dearsley & Bell (Eng)
Coop t Cott	Cooper's Cases temp Cottenham (Eng)	Dears C C	Dearsley's Crown Cases (Eng)
Coop t Eld.	Cooper's Cases tempore Eldon (Eng)	Deas & A	Deas & Anderson (Eng)
Co P C	Coke's Reports (Eng)	De Gex	De Gex (Eng)
Corb & D	Corbett & Daniell's Election Cases (Eng)	De G F & J	De Gex, Fisher & Jones (Eng)
		De G J & S	De Gex, Jones & Smith (Eng)
Court & MacI	Courtney & Maclean (Sc.)	De G & J	De Gex & Jones (Eng)
Cow	Cowen (N Y)	De G M & G	De Gex, MacNaghten & Gordon (Eng)
Cow Cr Rep	Cowen's Criminal (N Y)		
Cowp	Cowper (Eng)	De G & Sm	De Gex & Smale (Eng)
Cox Am T M Cas	Cox's American Trade-Mark Cases	Del	Delaware
Cox C C	Cox's Criminal Cases (Eng)	Del Ch	Delaware Chancery
Cox Ch	Cox's Chancery (Eng)	Del Co	Delaware County (Pa)
Cox & Atk.	Cox & Atkinson (Eng)	Dem Surr	Demarest's Surrogate (N Y)
C & P	Carrington & Payne (Eng)	Den	Denio (N Y)
C P C.	C. P. Cooper's Chancery Practice Cases (Eng)	Den C C	Denison's Crown Cases (Eng)
		Desaus Eq	Desaussure (S C)
C P D.	Law Reports Common Pleas Division (Eng)	Dev Ct.Cl	Devereux's Court of Claims (U S)
		Dev L	Devereux (N C)
Crabbe	Crabbe (U S)	Dev & Bat	Devereux & Battle (N C.)
Cranch	Cranch (U S)	Dick	Dickens (Sc)
Cranch C.C.	Cranch's Circuit Court (U S)	Dill	Dillon (U S)
		Dirl Dec.	Dirleton's Decisions (Sc)
		Disn	Disney (Oh)
		D & L	Dowling & Lowndes (Eng)
		Dods	Dodson's Admiralty (Eng)



Dom L R Dominion Law Reports (Can.)  
 Donnelly Donnelly (Eng)  
 Dorion Dorion (L C)  
 Dougl Douglas (Eng)  
 Dougl Douglas (Mich)  
 Dougl El Cas Douglas' Election Cases (Eng)  
 Dow Dow (Eng)  
 Dow & Cl Dow & Clark (Eng)  
 Dow & L Dowling & Lowndes (Eng)  
 Dow N S Dowling, New Series (Eng)  
 Dowl Dowling's English Bail Court (Prac-  
 tice) Cases  
 Dowl P C Dowling's Practice Cases (Eng)  
 Dowl P C N S Dowling's Practice Cases New Series  
 (Eng)  
 D & R Dowling & Ryland (Eng)  
 Draper Draper (U C)  
 Drew Drewry (Eng)  
 Drinkw Drinkwater (Eng)  
 D & R Mag Cas Dowling & Ryland's Magistrate Cases  
 (Eng)  
 D & R N P Dowling & Ryland's Nisi Prius (Eng)  
 Dr & Sm Drewry & Smale (Eng)  
 Drury Drury (Ir)  
 Dr & Wal Drury & Walsh (Ir)  
 Dr & War Drury & Warren (Ir)  
 D & Sw Deane & Swabe (Eng)  
 Dud Eq Dudley (S C)  
 Dudl Dudley (Ga)  
 Duer Duer's Superior Court (N Y)  
 Dunl B & M Dunlop, Bell & Murray (Sc)  
 Dunlop Dunlop (Sc)  
 Dunn Dunning (Eng)  
 Durie Durie (Sc)  
 Durn & E Durnford & East (Eng)  
 Duv Duvall (Ky)  
 Dyer Dyer (Eng)

## E

East East (Eng)  
 East L R Eastern Law Reporter (Can.)  
 East P C East's Pleas of the Crown (Eng)  
 East T Eastern Term (Eng)  
 E & B Ellis & Blackburn (Eng)  
 E B & E Ellis, Blackburn & Ellis (Eng)  
 E B & S Ellis, Best & Smith (Eng)  
 E C L English Common Law  
 Eden Eden (Eng)  
 Edgar Edgar (Sc)  
 Edm Sel Cas Edmond's Select Cases (N Y)  
 E D Smith E D Smith (N Y)  
 Edw Edwards (Eng)  
 Edw Edwards' Chancery (N Y)  
 Edw Edwards' Abridgment of Prerogative  
 Court Cases  
 Edw Adm Edwards' Admiralty (Eng)  
 E & E Ellis & Ellis (Eng)  
 Em App Emergency Court of Appeals (U S)  
 Enc Pl & Pr Encyclopædia of Pleading & Practice  
 Ency Law American and English Encyclopædia  
 of Law  
 Eng Ad English Admiralty  
 Eng C C English Crown Cases  
 Eng Ch English Chancery  
 Eng Eccl English Ecclesiastical Reports  
 Eng Ecc R. English Ecclesiastical Reports  
 Eng Exch English Exchequer Reports  
 Eng L & Eq English Law & Equity  
 Eng Rep R English Reports, Full Reprint  
 Eng Ry & C Cas English Railway and Canal Cases  
 Eng & Ir App Law Reports, English and Irish  
 Appeal Cases  
 Eq Cas Abr Equity Cases Abridged (Eng)  
 Eq Rep Equity Reports (Eng)  
 E R C. English Ruling Cases  
 Erie Erie County Law Journal (Pa)  
 Esp Espinasse's Nisi Prius (Eng)  
 Euer Euer (Eng)  
 Exch Exchequer (Eng)  
 Exch Cas. Exchequer Cases (Sc)  
 Ex D Law Reports Exchequer Division  
 (Eng)  
 Eyre Eyre's Reports (Eng)

## F

Falc Falconer's Court of Sessions (Sc)  
 Falc & F Falconer & Fitzherbert (Eng)  
 Far Farresley (Eng)  
 Fay L J Fayette Legal Journal (Pa)  
 F Cas No Federal Cases (U S)  
 F (Ct Sess) Fraser's Court of Sessions Cases (Sc)  
 F Federal Reporter (U S)  
 F 2d Federal Reporter Second Series  
 F R D Federal Rules Decisions  
 F Supp Federal Supplement  
 Ferguson's Consistory (Eng)  
 F & F Foster & Fmlason (Eng)  
 Fiduciary Fiduciary Reporter (Pa)  
 Fish Pat Cas Fisher's Patent Cases (U S)  
 Fish Pat R Fisher's Patent Reports (U S)  
 Fish Prize Cas Fisher's Prize Cases (U S)  
 Fitz Fitzgibbon (Eng)  
 Fitz Fitzherbert's Abidgment (Eng)  
 Fitz N. B. Fitzherbert's Natura Brevium (Eng)  
 Fla Florida  
 Flipp Flippin (U S)  
 Fl & K Flanagan & Kelly (Ir)  
 Fonb Eq Fonblanque's Equity (Eng)  
 Fonbl Fonblanque (Eng)  
 Fonbl R Fonblanque's English Cases  
 Forbes Forbes (Eng)  
 Forr Forrest (Eng)  
 Forrester Forrester's Cases (Eng)  
 Fortesc Fortescue (Eng)  
 Foster Foster (Eng)  
 Foster (N H) Foster (N H)  
 Foster & Finlason (Eng)  
 Fountainhall's Decisions (Sc)  
 Fox Reports (Eng)  
 Fox & Smith (Ir)  
 Freem Freeman's Chancery (Eng)  
 Freem Freeman's Chancery (Miss)  
 Freem K B Freeman's King's Bench (Eng)

## G

Ga Georgia  
 Ga App. Georgia Appeals  
 Ga Dec. Georgia Decisions  
 Gale Gale (Eng)  
 Gal Gallison (U S)  
 G Coop. G Cooper (Eng)  
 G & D Gale & Davidson (Eng)  
 Geld & M. Geldart & Maddock (Eng)  
 Gibb Surr. Gibbon's Surrogate (N Y)  
 Giffard Giffard (Eng)  
 Giff & H Giffard and Hemming (Eng)  
 Gil Gilfillan's Edition (Minn)  
 Gilb Gilbert's (Eng)  
 Gilb Cas Gilbert's Cases (Eng)  
 Gilb C P Gilbert's Common Pleas (Eng)  
 Gilb Exch. Gilbert's Exchequer (Eng)  
 Gill Gill (Md)  
 Gill & J. Gill & Johnson (Md)  
 Gilm Gilmer (Va)  
 Gilm & Falc Gilmour & Falconer (Sc.)  
 Gilp Gilpin (U S)  
 Glasc Glascock (Ir)  
 Glyn & J Glyn & Jameson (Eng)  
 Godb Godbolt (Eng)  
 Godo Godolphin's Abridgment of Ecclesias-  
 tical Law  
 Goeb Goebel's Probate Court Cases  
 Gosf Gosford (Eng)  
 Gouldsb Goulsborough (Eng)  
 Gow Gow (Eng)  
 Gow N P Gow's English Nisi Prius Cases  
 Grant Grant's Cases (Pa.)  
 Grant Ch Grant's Chancery (U C)  
 Grant Err & App Grant's Error & Appeal (U C)  
 Gratt Grattan (Va)  
 Gray Gray (Mass)  
 Green Cr Green's Criminal Law (Eng)  
 Greene Greene (Iowa)  
 Gwillm's Tithe Cases (Eng.)

## H

Hadd Haddington (Eng)  
 Hagg Adm Haggard's Admiralty (Eng)

Hagg Cons  
 Hagg Eccl  
 Hales Dec  
 Hale  
 Hale Eccl  
 Hale P C  
 Hall  
 Hall & T  
 Halsbury L Eng  
 Handy  
 Han (N B)  
 Hard  
 Hardies  
 Hare  
 Harp Eq  
 Harl  
 Harr Del  
 Harl Mich  
 Harr & G  
 Harl Ch  
 Harl & H  
 Harl & J  
 Harr & M  
 Harr & R  
 Harr & W  
 Hask  
 Havil  
 Hawan  
 Hawan Fed  
 Hawan Rep  
 Hawk P C  
 Hay Exch  
 Hayes  
 Hayes & J  
 Hay & M  
 Hayw  
 Hayw  
 Hayw & H  
 Haz Reg  
 H Bl  
 H & C  
 Head  
 Heisk  
 Hem & M  
 Hempst  
 Hen & M  
 Het  
 Het C P  
 H & H  
 Hill  
 Hill S C  
 Hill & Den  
 Hill & Den Supp  
 Hilt  
 Hilt  
 H L Cas.  
 H & N  
 Hob  
 Hodg El  
 Hodges  
 Hoffm  
 Hoffm Land Cas  
 Hog  
 Holmes  
 Holt's Adm Cas  
 Holt Eq  
 Holt K B  
 Holt N P  
 Home  
 Hope Dec  
 Hopk  
 Hopk Dec  
 Hopw & C  
 Hopw & P.  
 Hosea  
 Houst  
 Houst Cr.  
 How  
 How Miss.  
 How A Cas.  
 How N P  
 How Pr.  
 How Pr N S.  
 How St Tr  
 Hud & B  
 Haggard's Consistory (Eng)  
 Haggard's Ecclesiastical (Eng)  
 Hales' Decisions (Sc)  
 Hale's Common Law (Eng)  
 Hale's Ecclesiastical (Eng)  
 Hale's Pleas of the Crown (Eng)  
 Hall's Superior Court (N Y)  
 Hall & Twells (Eng)  
 Halsbury's Law of England  
 Handy (Oh)  
 Hannay's Reports, New Brunswick  
 Hardm (Ky)  
 Hardres (Eng)  
 Hare (Eng)  
 Harper (S C)  
 Harrison's Chancery (Mich)  
 Harrington (Del)  
 Harrington's Michigan Chancery Reports  
 Harris & Gill (Md)  
 Harrison's Chancery (Eng)  
 Harrison & Hodgins (U C)  
 Harris & Johnson (Md)  
 Harris & McHenry (Md)  
 Harrison & Rutherford (Eng)  
 Harrison & Wollaston (Eng)  
 Haskell (U S)  
 Haviland (P1 Edw Isl)  
 Hawaiian  
 Hawaiian Federal  
 Hawaiian Reports  
 Hawkins' Pleas of the Crown (Eng)  
 Hayes Exchequer (Ir)  
 Hayes (Ir)  
 Hayes & Jones (Ir)  
 Hay & Marriott (Eng)  
 Haywood (N C)  
 Haywood (Tenn)  
 Haywood & Hazelton (U S)  
 Hazard's Register (Pa)  
 Henry Blackstone (Eng)  
 Hurlstone & Coltman (Eng)  
 Head (Tenn)  
 Heiskell (Tenn)  
 Hemming & Miller (Eng)  
 Hempstead (U S)  
 Henning & Munford (Va)  
 Hetley (Eng)  
 Hetley's Common Pleas (Eng)  
 Horn & Hurlstone (Eng)  
 Hill (N Y)  
 Hill (S C)  
 Hill & Demo (N Y)  
 Lator's Supplement to Hill & Demo's (N Y)  
 Hilton (N Y)  
 Hilary Term (Eng)  
 House of Lords Cases (Eng)  
 Hurlstone & Norman (Eng)  
 Hobart (Eng)  
 Hodgins' Election (U C)  
 Hodges (Eng)  
 Hoffman's Chancery (N Y)  
 Hoffman's Land Cases (U S)  
 Hogan (Ir)  
 Holmes (U S)  
 Holt's English Admiralty Cases  
 Holt's Equity (Eng)  
 Holt's King's Bench (Eng)  
 Holt's Nisi Prius (Eng)  
 Home (Sc)  
 Hope's Decisions (Sc)  
 Hopkins' Chancery (N Y)  
 Hopkins' Decisions (Pa)  
 Hopwood & Coltman (Eng)  
 Hopwood & Philbrick (Eng)  
 Hosea (Ohio)  
 Houston (Del)  
 Houston's Criminal Cases (Del)  
 Howard (U S)  
 Howard (Miss)  
 Howard's Appeal Cases (N Y)  
 Howell's Nisi Prius (Mich)  
 Howard's Practice (N Y)  
 Howard's Practice New Series (N Y)  
 Howell's State Trials (Eng)  
 Hudson & Brooke (Ir)

Hughes  
 Hughes  
 Hume  
 Humphr  
 Hun  
 Hurl & Gord  
 Hurl & W.  
 Hutt  
 Hughes (Ky)  
 Hughes (U S)  
 Hume's Decisions (Sc.)  
 Humphreys (Tenn)  
 Hun (N Y)  
 Hurlstone & Gordon (Eng)  
 Hurlstone & Walmsley (Eng)  
 Hutton (Eng)

**I**  
 Idaho  
 Iddings D R D  
 Ill  
 Ill 2d  
 Ill App  
 Ill App 2d  
 Ill Cir  
 Ind  
 Ind App  
 Ind T  
 Ins L J  
 Int Com Commn  
 Int Com Rep  
 Int Rev Rec  
 Iowa  
 [1891] Ir  
 Ir Ch  
 Ir C L  
 Ir Eccl  
 Ired  
 Ir Eq  
 Ir Law Rep  
 Ir Law & Eq  
 Ir R 1894  
 Ir R C L  
 Ir R Eq  
 Irv Just  
 Idaho  
 Iddings Dayton Term Reports  
 Illinois Reports  
 Illinois Reports, Second Series  
 Illinois Appellate Court Reports  
 Illinois Appellate Court Reports, Second Series  
 Illinois Circuit Court  
 Indiana  
 Indiana Appellate Court  
 Indian Territory  
 Insurance Law Journal  
 Interstate Commerce Commission  
 Interstate Commerce Reports  
 Internal Revenue Record  
 Iowa  
 Law Reports [1891] Irish  
 Irish Chancery  
 Irish Common Law  
 Irish Ecclesiastical Reports  
 Iredell (N C)  
 Irish Equity  
 Irish Law Reports  
 Irish Law and Equity Reports  
 Irish Law Reports for Year 1894  
 Irish Reports Common Law  
 Irish Reports Equity  
 Irvine's Justiciary Cases (Eng)

**J**  
 Jac  
 Jac & W  
 J Bridgm  
 J & C  
 Jebb & B  
 Jebb C C  
 Jebb & S.  
 Jeff  
 Jenk  
 J J Marsh  
 J & L  
 Johns  
 Johns  
 Johns Cas  
 Johns Ch  
 Johns V C  
 Johns & H  
 Jones Exch  
 Jones T  
 Jones W.  
 Jones & Spen  
 Journ Jur  
 J P  
 Jur  
 Jur N S.  
 Just L R.  
 Jacob (Eng)  
 Jacob & Walker (Eng)  
 John Bridgman (Eng)  
 Jones & Carey (Ir)  
 Jebb & Bourke (Ir)  
 Jebb's Crown Cases (Ir.)  
 Jebb & Symes (Ir)  
 Jefferson (Va)  
 Jenkins (Eng)  
 J J Marshall (Ky)  
 Jones & La Touche (Eng.)  
 Johnson (Eng)  
 Johnson (N Y)  
 Johnson's Cases (N Y)  
 Johnson's Chancery (N Y)  
 Johnson's English Vice-Chancellors (Eng)  
 Johnson & Hemming (Eng.)  
 Jones Exchequer (Ir)  
 Sir Thomas Jones' English King's Bench Reports  
 Sir William Jones' English King's Bench Reports  
 Jones & Spencer (N Y)  
 Journal of Jurisprudence (Pa)  
 Justice of Peace (Eng)  
 Jurist (Eng)  
 Jurist New Series (Eng)  
 Justices' Law Reporter (Pa)

**K**  
 Kames Dec  
 Kames Elucid  
 Kames Rem Dec  
 Kames Sel Dec  
 Kan  
 Kan App  
 Kay  
 Kay & J  
 [1917] K B.  
 Keane & Gr  
 Kames' Decisions (Sc)  
 Kames' Elucidation (Sc)  
 Kames' Remarkable Decisions (Sc.)  
 Kames' Select Decisions (Sc)  
 Kansas  
 Kansas Appeals  
 Kay (Eng)  
 Kay & Johnson (Eng)  
 Law Reports [1917] King's Bench (Eng)  
 Keane & Grant (Eng)



## XIII

MacArthur & M. Mackey's District of Columbia Reports  
Maccl. Macclesfield (Eng)  
MacFarl. MacFarlane (Sc)  
Mackey Mackey's Reports, District of Columbia  
MacI & R. Maclean & Robinson (Eng)  
Macn & G. Macnaghten & Gordon (Eng)  
Macph. Macpherson (Sc)  
Macph S & L. Macpherson, Shurreff & Lee (Sc)  
Macq. Macqueen's Scotch Appeal Cases  
Madd. Maddock (Eng)  
Madd Ch Pr. Maddock's Chancery Practice (Eng)  
Malloy. Malloy (Ir)  
Man. Manitoba Law  
Man El Cas. Manning's Election Cases (Eng)  
Man Exch Pr. Manning's Exchequer Practice (Eng)  
Man G. & S. Manning, Granger & Scott (Eng)  
Man L J. Manitoba Law Journal  
Man & Ry. Manning & Ryland (Eng)  
Man & Ry Mag Cas. Manning & Ryland's Magistrates' Cases (Eng)  
Man & S. Manning & Scott (Eng)  
Man Unrep Cas. Manning's Unreported Cases (La)  
Manson. Manson (Eng)  
Man t Wood. Manitoba temp Wood  
March. March (Eng)  
Mar Prov. Maritime Province Reports (Can)  
Mars Adm. Marsden's Admiralty (Eng)  
Marsh. Marshall (Eng)  
Marsh J J. J J Marshall (Ky)  
Mart. Martin Old Series (La)  
Mart. Martin (N C)  
Mart N S. Martin New Series (La)  
Mart & Y. Martin & Yerger (Tenn.)  
Marv. Marvel (Del)  
Mason. Mason (U S)  
Mass. Massachusetts  
Maule & S. Maule & Selwyn (Eng)  
Mayn. Maynard (Eng)  
McAll. McAllister (U S)  
McC. McCahon (Kan)  
McClell. McClelland (Eng)  
McClell & Y. McClelland & Younge (Eng.)  
McCord. McCord (S C)  
McCrary. McCrary (U S)  
McG. McGlom (La)  
McLean. McLean (U S)  
McMul. McMullan (S C)  
Md. Maryland  
Md Ch. Maryland Chancery  
Me. Maine  
Mees & Ros. Meeson & Roscoe (Eng)  
Mees & W. Meeson & Welsby (Eng)  
Meg. Megone (Eng)  
Meigs. Meigs (Tenn)  
Menzies Cape of Good Hope. Menzies Cape of Good Hope  
Meriv. Merivale (Eng)  
Metc. Metcalf (Mass)  
Metc. Metcalfe (Ky)  
M & G. Manning & Granger (Eng)  
M & H. Murphy & Hurlstone (Eng)  
Mich. Michigan  
Mich N P. Michigan Nisi Prius  
Mich T. Michaelmas Term (Eng)  
Miles. Miles (Pa)  
Mill Const. Mill's Constitutional (S C.)  
Mill Dec. Miller's Decisions (U S)  
Mills. Mills (N Y)  
Milw. Milward (Ir)  
Minn. Minnesota  
Minor. Minor (Ala)  
Misc. Miscellaneous Reports (N Y)  
Misc.2d. Miscellaneous Reports, Second Series (N Y)  
Miss. Mississippi  
Miss Dec. Mississippi Decisions  
Miss St Cas. Mississippi State Cases  
M & M. Moody & Malkin (Eng)  
Mo. Missouri  
Mo App. Missouri Appeals  
Moak. Moak (Eng)  
Mo A R. Missouri Appeals Reporter  
Mod. Modern (Eng)  
M. A. L. Modern American Law  
Mod Cas L & Eq. Modern Cases at Law and Equity (Eng)  
Molloy. Molloy (Ir)  
Mon. Monaghan (Pa)  
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Mont. Montana  
Mont. Montagu (Eng)  
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Mont & A. Montagu & Ayrton (Eng)  
Mont & B. Montagu & Bligh (Eng)  
Mont & C. Montagu & Chitty (Eng)  
Mont D & DeG. Montagu, Deacon & De Gex (Eng)  
Montg. Montgomery County Law Reporter (Pa)  
Mont & M. Montagu & McArthur (Eng)  
Montr Cond Rep. Montreal Condensed Reports  
Montr Leg N. Montreal Legal News  
Montr Q B. Montreal Law Reports Queen's Bench  
Montr Super. Montreal Law Reports Superior Court  
Moody C C. Moody's Crown Cases (Eng)  
Moore C P. Moore's Common Pleas (Eng)  
Moore Indian App. Moore's Indian Appeals (Eng)  
Moore K B. Moore's King's Bench (Eng)  
Moore P C. Moore's Privy Council Old Series (Eng)  
Moore P C N S. Moore's Privy Council New Series (Eng)  
Moore & S. Moore & Scott (Eng)  
Moore & W. Moore & Walker (Tex)  
Mor Min Rep. Morrison's Mining Reports  
Morr. Morris (Iowa)  
Morr Bankr Cas. Morrell's Bankruptcy Cases (Eng)  
Morr St Cas. Morris' State Cases (Miss)  
Mosely. Mosely (Eng)  
M & P. Moore & Payne (Eng)  
M & R. Manning & Ryland (Eng)  
M & Rob. Moody & Robinson (Eng)  
M & S. Maule & Selwyn (Eng)  
Mun. Municipal Law Reporter (Pa)  
Mun Corp. Cas. Municipal Corporation Cases  
Munf. Munford (Va)  
Murph. Murphey (N C)  
Murr. Murray (Sc)  
M & W. Meeson & Welsby (Eng)  
Myl & C. Mylne & Craig (Eng)  
Myl & K. Mylne & Keen (Eng)  
Myr Prob. Myrick's Probate (Cal)  
N. National Bankruptcy Register (U S.)  
Nat Bankr Reg. National Corporation Reporter  
Nat Corp Rep. National Law Reporter  
Nat L Rep. New Brunswick  
N B. New Benloe (Eng)  
N Benl. New Brunswick Equity  
N B Eq. North Carolina  
N C. North Carolina  
N Chipm. N Chipman (Vt)  
N C Conf. North Carolina Conference  
N C T Rep. North Carolina Term Reports  
N D. North Dakota  
N E. North Eastern Reporter  
N E 2d. North Eastern Reporter Second Series  
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Neb Unoff. Nebraska Unofficial  
Nels. Nelson (Eng)  
Nels Abr. Nelson's Abridgment of the Common Law  
Nevada. Nevada  
Nevb Adm. Newberry's Admiralty (U S)  
Newfoundl. Newfoundland  
Newf Sel Cas. Newfoundland Select Cases  
NewRep. New Reports in all Courts (Eng.)  
NewSess Cas. New Session Cases (Eng)  
New Zeal L. New Zealand Law  
N H. New Hampshire  
N J. New Jersey Reports  
N J Eq. New Jersey Equity  
N J Law. New Jersey Law  
N J L J. New Jersey Law Journal  
N J Misc. New Jersey Miscellaneous  
N J Super. New Jersey Superior Court Reports  
N M. New Mexico  
N & M. Nevile & Manning (Eng.)

N & Macn  
Nolan  
North  
North  
Northumb Co Leg  
N  
Northumb L J  
Notes of Cas  
Nott & McC  
Noy  
N & P  
NS  
NS Dec  
NS Wales  
NS Wales L  
NS Wales L R Eq  
NW  
NW 2d  
NY  
NY 2d  
NY Ann Cas  
NY City Ct  
NY City Ct Suppl  
NY Civ Proc  
NY Civ Pr Rep  
NY Code Reports  
NS  
NY Cr  
NY Leg Obs.  
NY L Rec.  
NY Month L Bul  
NY S  
NY S 2d  
NY St  
NY Super  
NY Wkly Dig  
Neville & Macnamara (Eng)  
Nolan (Eng)  
Northington (Eng)  
Northampton County Reporter (Pa)  
Northumberland County Legal News (Pa)  
Northumberland Legal Journal (Pa)  
Notes of Cases (Eng)  
Nott & McCord (S C)  
Noy (Eng)  
Nevile & Perry (Eng)  
Nova Scotia  
Nova Scotia Decisions  
New South Wales  
New South Wales Law  
New South Wales Law Reports Equity  
North Western Reporter  
North Western Reporter Second Series  
New York  
New York Second Series  
New York Annotated Cases  
New York City Court  
New York City Court Supplement  
New York Civil Procedure  
New York Civil Procedure Reports  
New York Code Reports, New Series  
New York Criminal  
New York Legal Observer  
New York Law Record  
New York Monthly Law Bulletin  
New York Supplement  
New York Supplement Second Series  
New York State Reporter  
New York Superior Court  
New York Weekly Digest

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O Ben  
O Bridgm.  
Off Gaz  
Ohio  
Ohio App  
Ohio Cir Ct  
Ohio Cir Ct N S  
Ohio Cir Dec  
Ohio Dec Reprint  
Ohio F Dec  
Ohio L J.  
Ohio N P  
Ohio N P N S  
Ohio O  
Ohio Prob  
Ohio S & C P  
Ohio St  
Ohio Supp  
Okl  
Okl Cr  
Olcott  
Oliv B & L  
O'M & H.  
Ont  
Ont A  
Ont El Cas  
Ont L  
Ont L J  
Ont L J N S  
Ont Pr  
Ont W N.  
Ont W R.  
Op Atty - Gen  
Op Sol Dept  
Labor  
Or  
Orleans App.  
Overt  
Owen  
Old Benloe (Eng)  
Orlando Bridgman (Eng)  
Official Gazette  
Ohio  
Ohio Court of Appeals  
Ohio Circuit Court  
Ohio Circuit Court New Series  
Ohio Circuit Decisions  
Ohio Decisions (Reprint)  
Ohio Federal Decisions  
Ohio Law Journal  
Ohio Nisi Prius  
Ohio Nisi Prius New Series  
Ohio Opinions  
Ohio Probate  
Ohio Superior & Common Pleas Decisions  
Ohio State  
Ohio Supplement  
Oklahoma  
Oklahoma Criminal  
Olcott (U S)  
Oliver, Beavan & Lefroy (Eng)  
O'Malley & Hardcastle (Ir)  
Ontario  
Ontario Appeals  
Ontario Election Cases  
Ontario Law  
Ontario Law Journal  
Ontario Law Journal New Series  
Ontario Practice  
Ontario Weekly Notes  
Ontario Weekly Reporter  
Opinions of Attorneys-General (U S)  
Opinions of the Solicitor for the Department of Labor Dealing with Workmen's Compensation  
Oregon  
Orleans Appeals (La)  
Overton (Tenn)  
Owen (Eng)

## P

P  
P 2d  
[1891] P.  
Pa  
Pa Cas.  
Pa Co.  
Pa Corp.  
Pa C Pl.  
Pa Dist  
Pa D & C  
Pa D & C 2d  
Paige  
Paine  
Pa L J  
Pa L Rec  
Pa L J R  
Palm  
Pa Rec.  
Park  
Park Cr  
Park Exch  
Park Ins  
Pars Eq Cas  
Pa Super  
Paton App Cas  
Patrick El Cas  
Patt & H  
P D  
P & D  
Peake N P.  
Pearce C.C  
Pearson  
Peck  
Peck El Cas  
Pennew  
Pennyp.  
Pennypacker (Pa)  
Penr & W.  
Perry & Kn.  
Pet  
Pet Adm.  
Pet C C.  
Phil  
Phil  
Phila  
Philippine  
Phillim.  
Pick  
Pig & R.  
Pig Rec.  
Pinn  
Pittsb  
P & K.  
P L J  
P L J.N.S.  
Plowd  
Pollexf.  
Poph.  
Port  
Posey  
Puerto Rico  
Puerto Rico Fed  
Pow Surr  
P R & D El Cas  
Prec Ch  
Pr Edw Isl  
Price  
Price Pr Cas  
Prid & C  
Prob [1917]  
Prob Rep  
Pr Rep.  
P Wms.  
P U R.  
Pyke  
Pacific Reporter  
Pacific Reporter Second Series  
Law Reports [1891] Probate (Eng)  
Pennsylvania State  
Pennsylvania Supreme Court Cases (Sadler)  
Pennsylvania County Court  
Pennsylvania Corporation Reporter  
Common Pleas (Pa)  
Pennsylvania District  
Pennsylvania District and County  
Pennsylvania District and County Second Series  
Paige's Chancery (N Y)  
Paine (U S)  
Pennsylvania Law Journal  
Pennsylvania Law Record  
Clark's Pennsylvania Law Journal Reports  
Palmer (Eng)  
Pennsylvania Record  
Parker (Eng)  
Parker's Criminal (N Y)  
Parker's Exchequer (Eng)  
Parker's Insurance (Eng)  
Parsons' Equity Cases (Pa)  
Pennsylvania Superior Court  
Paton's Appeal Cases (Sc)  
Patrick's Election Cases (Can)  
Patton & Heath (Va)  
Law Reports Probate Division (Eng)  
Perry & Davison (Eng)  
Peake's Nisi Prius (Eng)  
Pearce's Reports in Dearsly's (Eng)  
Pearson (Pa)  
Peck (Tenn)  
Peckwell's Election Cases (Eng)  
Pennewill (Del)  
Pennypacker (Pa)  
Penrose & Watts (Pa)  
Perry & Knapp Election Cases (Eng)  
Peters (U S)  
Peters' Admiralty (U S)  
Peters' Circuit Court (U S)  
Phillips (Eng)  
Philip (N C)  
Philadelphia (Pa)  
Philippine  
Phillimore Ecclesiastical (Eng)  
Pickering (Mass)  
Piggott & Rodwell (Eng)  
Piggott's Recoveries (Eng)  
Pinney (Wis)  
Pittsburgh (Pa)  
Perry & Knapp (Eng)  
Pittsburgh Legal Journal (Pa)  
Pittsburgh Legal Journal New Series (Pa)  
Plowden (Eng)  
Pollexfen (Eng)  
Popham (Eng)  
Porter (Ala)  
Posey's Unreported Cases (Tex)  
Puerto Rico  
Puerto Rico Federal  
Powers' Surrogate (N Y)  
Power, Rodwell & Dew's Election Cases (Eng)  
Precedents in Chancery (Eng)  
Prince Edward Island  
Price (Eng)  
Price's Practice Cases (Eng.)  
Prideaux & Cole (Eng)  
Law Reports, Probate Division (Eng)  
Probate Reports (Eng)  
Practice Reports (Eng.)  
Peere-Williams (Eng)  
Public Utilities Reports  
Pyke (Can)

## Q

Q B

Queen's Bench (Adolphus & Ellis New Series) (Eng)

## XV

94 C J S —b

Strob  
Stuart Vice-Adm  
Stu M & P  
Style  
Sumn  
Susq Leg Chron  
S W  
S.W 2d  
  
Swab  
Swab & Tr.  
Swan  
Swanst.

Strobhart (S C)  
Stuart's Vice-Admiralty (L C)  
Stuart, Milne & Peddie (Sc)  
Style (Eng)  
Sumner (U S)  
Susquehanna Legal Chronicle (Pa)  
South Western Reporter  
South Western Reporter Second Series  
Swabey's Admiralty (Eng)  
Swabey & Tristram (Eng)  
Swan (Tenn)  
Swanston (Eng)

**T**

Taml  
Taney  
Tapp  
Taunt.  
Taylor  
T B Mon.  
Tenn  
Tenn App.  
Tenn Cas.  
Tenn Ch  
Tenn Ch A  
Tenn Civ.A  
Terr L.  
  
Tex  
Tex App.  
Tex A Civ Cas  
Tex Civ App  
Tex Cr  
Tex Suppl  
Tex Unrep Cas.  
Thach Cr  
Thoms & C.  
Thoms.Cas.  
Tinw  
T Jones  
T L R  
T M R.  
T & M.  
Toth.  
T R.  
  
Transer A.  
T Raym  
Tread Const.  
Treas Dec  
Tr & H Pr.  
Trint T  
Truem Eq Cas.  
Tuck Sel Cas.  
Tuck Surr  
T U P Charlt.  
Turn & R  
Tyler  
Tyrw  
Tyrw.&G.

Tamlyn (Eng)  
Taney (U S)  
Tappan (Oh)  
Taunton (Eng)  
Taylor (N C)  
T B Monroe (Ky)  
Tennessee  
Tennessee Appeals  
Unreported Tennessee Cases  
Tennessee Chancery  
Tennessee Chancery Appeals  
Tennessee Civil Appeals  
Territories Law (Northwest Territories)  
Texas  
Texas Court of Appeals  
White & Wilson's Civil Cases (Tex)  
Texas Civil Appeals  
Texas Criminal  
Texas Supplement  
Posey's Unreported Cases (Tex)  
Thacher's Criminal Cases (Mass)  
Thompson & Cook (N Y)  
Thompson's Cases (Tenn)  
Tinwald (Sc)  
Thomas Jones (Eng)  
Times Law Reports (Eng)  
Trade Mark Reports  
Temple & Mew (Eng)  
Tothill (Eng)  
Term Reports (Durnford & East) (Eng)  
Transcript Appeals (N Y)  
Thomas Raymond (Eng)  
Treadway Constitutional (S C)  
Treasury Decisions (U S)  
Troubat & Haly's Practice (Pa)  
Trinity Term (Eng)  
Trueman's Equity Cases (N B)  
Tucker's Select Cases (Newfoundland)  
Tucker's Surrogate (N Y)  
T U P Charlton (Ga)  
Turner & Russell (Eng)  
Tyler (Vt)  
Tyrwhitt (Eng)  
Tyrwhitt & Ganger (Eng)

**U**

U C  
U C Ch.  
U C Cham.  
U C C P  
U C E & A.  
U C K B  
U C Q B  
U C Q B.O S  
  
U S  
U S App D C  
U S Aviation Rep  
U S C A.  
Utah  
Utah 2d

Upper Canada  
Upper Canada Chancery  
Upper Canada Chamber  
Upper Canada Common Pleas  
Upper Canada Error and Appeal  
Upper Canada King's Bench Reports  
Upper Canada Queen's Bench  
Upper Canada Queen's Bench Old Series  
United States  
United States Appeal Cases (D C.)  
Aviation Reports (U S)  
United States Code Annotated  
Utah Reports  
Utah Reports Second Series

**V**

Va.  
Va Cas.  
Va Ch Dec.

Virginia  
Virginia Cases  
Chancery Decisions (Va.)

Va Dec  
Van Ness Prize  
Cas  
Vaugh.  
Vaux  
Vent  
Vern  
Vern Ch.  
Vern & S.  
Ves  
Ves & B.  
Ves Jr  
Ves Jr Suppl.  
Ves Suppl.  
Vict  
Vict L  
Vict L T.  
Vict Rep.  
Vict St Tr.  
Vin Abr  
Virgin Islands  
Vt.

**Virginia Decisions**

Van Ness Prize Cases (U S)  
Vaughan (Eng)  
Vaux's Decisions (Pa)  
Ventriss (Eng)  
Vernon's Cases (Eng)  
Vernon's Chancery (Eng)  
Vernon & Scriven (Ir)  
Vesey Senior (Eng)  
Vesey & Beames (Eng)  
Vesey Junior (Eng)  
Vesey Junior Supplement (Eng)  
Vesey Senior Supplement (Eng)  
Victorian  
Victorian Law  
Victorian Law Times  
Victorian Reports  
Victorian State Trials  
Viner's Abridgment (Eng.)  
Virgin Islands  
Vermont

**W**

Walk.  
Walk.  
Wall  
Wall C C.  
Wall Jr.  
Wall Sr.  
Wallis  
Ware  
Wash  
Wash 2d  
Wash  
Wash St  
Wash C C  
Wash Co.  
Wash T.  
Watts  
Watts & S.  
W B I  
W C C.  
  
Webb, A'B & W.I.  
P & M  
  
Web Pat.Cas.  
Welsh  
Wend.  
West  
West.  
  
West L J  
West L Month.  
West L R  
West L T.  
West R  
West t Hardw  
West Wkly  
[1917] West Wkly  
Whart.  
Wheat  
Wheel Cr  
White & T Lead.  
Cas Eq.  
  
Whitm Pat Cas.  
Wight.  
Wilcox  
Willes  
Wilm.  
Wils.  
Wils Ch.  
Wils C P.  
Wils Exch.  
Wils P C.  
Wils & S.  
Winch  
Winst.  
Wis  
W Jones  
W Kel  
Wkly L Gaz.

Walker (Pa)  
Walker's Chancery (Mich.)  
Wallace (U S)  
Wallace (U S)  
Wallace Junior (U S)  
Wallace Senior (U S)  
Wallis (Ir)  
Ware (U S)  
Washington  
Washington Reports, Second Series  
Washington (Va)  
Washington State  
Washington Circuit Court (U S)  
Washington County Reports (Pa)  
Washington Territory  
Watts (Pa)  
Watts & Sergeant (Pa)  
William Blackstone (Eng)  
Minton-Senhouse's Workmen's Compensation Cases (Eng)  
  
Webb, A'Beckett & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)  
Webster's Patent Cases (Eng)  
Welsh Registry Cases (Ir.)  
Wendell (N Y.)  
West (Eng)  
Westmoreland County Law Journal (Pa)  
Western Law Journal (Oh)  
Western Law Monthly (Oh)  
Western Law Reporter (Can.)  
Western Law Times (Can)  
Western Reporter  
West temp. Hardwicke (Eng)  
Western Weekly (Can)  
[1917] Western Weekly (Can)  
Wharton (Pa)  
Wheaton (U S)  
Wheeler's Criminal (N.Y.)  
  
White & Tudor's Leading Cases in Equity (Eng)  
Whitman's Patent Cases (U S)  
Wightwicke (Eng)  
Wilcox (Pa)  
Willes (Eng)  
Wilmot's Notes (Eng)  
Wilson (Ind)  
Wilson's Chancery (Eng)  
Wilson's Common Pleas (Eng)  
Wilson's Exchequer (Eng)  
Wilson's Privy Council (Eng.)  
Wilson & Shaw (Sc.)  
Winch (Eng)  
Winston (N C)  
Wisconsin  
William Jones (Eng)  
William Kelynge (Eng)  
Weekly Law Gazette (Oh.)

Wkly N C	Weekly Notes of Cases (Pa.)	W W & H.	Willmore, Wollaston & Hodges (Eng)
Wkly Rep	Weekly Reporter (Eng)	Wyo	Wyoming
Wms Saund.	Williams Notes to Saunders' Reports	Wythe	Wythe's Chancery (Va)
W N	Weekly Notes (Eng)	Wy & W	Wyatt & Webb (Vict)
Wolf & B.	Wolferstan & Bristow's Election Cases (Eng)	Wy. W. & A'Beck.	Wyatt, Webb & A'Beckett (Vict.)
Wolf & D.	Wolferstan & Dew's Election Cases (Eng)		
Woll	Wollaston (Eng)		
Woodb & M.	Woodbury & Minot (U S)		
Woods	Woods (U S)		
Woodw.	Woodward's Decisions (Pa)		
Woolw.	Woolworth (U S)		
Words & Phrases	Words & Phrases		
Wright	Wright (Oh)		
W Rob.	William Robinson's Admiralty (Eng)		
Wr Pa.	Wright (Pa)		
W Va	West Virginia		
W W Harr.	W W Harrington (Del)		
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)		
		Yates Sel Cas.	Yates Select Cases (N.Y.)
		Y B	Year Book (Eng)
		Y & C Exch.	Younge & Collyer's Exchequer (Eng)
		Y & Coll.	Younge & Collyer's Chancery (Eng)
		Yeates	Yeates (Pa)
		Yelv	Yelverton (Eng)
		Yerg.	Yerger (Tenn)
		Y & J	Younge & Jervis (Eng)
		York	York Legal Record (Pa)
		Young Adm.	Young's Admiralty Decisions (N S)
		Younge	Younge Exchequer (Eng)

## Y

## LAW REVIEWS AND LAW JOURNALS

A B A Jour.	American Bar Association Journal	Md L Rev	Maryland Law Review
Ala L Rev	Alabama Law Review	Mass L Q	Massachusetts Law Quarterly
Albany L Rev.	Albany Law Review	Mercer, Beasley	
American Law	American Journal of International Law	L Rev	Mercer, Beasley Law Review
Am Law S Rev.	American Law School Review	Miami L Q	Miami Law Quarterly
Ark L Rev.	Arkansas Law Review	Mich L Rev.	Michigan Law Review
Aust L J	Australian Law Journal	Minn L Rev.	Minnesota Law Review
B U L Rev	Boston University Law Review	Miss L J	Mississippi Law Journal
Brooklyn L Rev.	Brooklyn Law Review	Mo L Rev	Missouri Law Review
Calif L Rev.	California Law Review	Montana L Rev.	Montana Law Review
Camb L J	Cambridge Law Journal	Neb L B	Nebraska Law Bulletin
Chi -Kent Rev.	Chicago-Kent Review	N J L J	New Jersey Law Journal
Colum L Rev.	Columbia Law Review	N J L Rev	New Jersey Law Review
Com L J	Commercial Law Journal	N Y U L Q Rev.	New York University Law Quarterly Review
Cornell L Q	Cornell Law Quarterly	Notre Dame Law	Notre Dame Lawyer
Detroit L Rev.	Detroit Law Review	N C L Rev	North Carolina Law Review
Dick L Rev	Dickinson Law Review	Okla L Rev	Oklahoma Law Review
Fed B A J.	Federal Bar Association Journal	Oreg L Rev.	Oregon Law Review
Fla L J	Florida Law Journal	Phil L J	Philippine Law Journal
Fordham L Rev	Fordham Law Review	Rocky Mt L Rev	Rocky Mountain Law Review
Geo Wash L Rev	George Washington Law Review	Rutgers U L Rev	Rutgers University Law Review
Geo L J	Georgetown Law Journal	St John's L Rev	St. John's Law Review
Harv L Rev.	Harvard Law Review	St Louis L Rev.	St. Louis Law Review (now Wash-ton University Law Quarterly)
Ia L Rev.	Iowa Law Review		
Idaho L J.	Idaho Law Journal	So Calif L Rev	Southern California Law Review
Ill L Rev.	Illinois Law Review	Southwestern L J	Southwestern Law Journal
Ind L J	Indiana Law Journal	Stanford L Rev	Stanford Law Review
J Am Jud Soc.	Journal of the American Judicature Society	Temp L Q	Temple Law Quarterly
J Comp Leg.	Journal of the Society of Comparative Legislation	Tenn L Rev.	Tennessee Law Review
J N A Referees Bank	Journal of the National Association of Referees in Bankruptcy	Tex L Rev.	Texas Law Review
J Soc Pub Teach. Law	Journal of the Society of Pub Teachers of Law	Tul L Rev	Tulane Law Review
John Marshall L Q	The John Marshall Law Quarterly	U Chi L Rev	University of Chicago Law Review
Kan City L Rev.	Kansas City Law Review	U Ctn L Rev	University of Cincinnati Law Review
Kan St L.J.	Kansas State Law Journal	U Detroit L J	University of Detroit Law Journal
Ky L J.	Kentucky Law Journal	U Florida L Rev	University of Florida Law Review
L J	Law Journal	U Kan City L Rev	University of Kansas City Law Review
L Lib J.	Law Library Journal	U Pa L Rev.	University of Pennsylvania Law Review
Law Q Rev.	Law Quarterly Review	U of Pitts L Rev	University of Pittsburgh Law Review
Law Ser Mo Bull	University of Missouri Bulletin, Law Series	U Toronto L J	University of Toronto Law Journal
Law Soc J	Law Society Journal	Vanderbilt L Rev.	Vanderbilt Law Review
Lincoln L Rev.	Lincoln Law Review	Va L Rev	Virginia Law Review
La L Rev	Louisiana Law Review	Wash L Rev.	Washington Law Review
Loyola L Rev.	Loyola Law Review	Wash U L Q.	Washington University Law Quarterly
Marq L Rev.	Marquette Law Review	Wash & Lee L Rev.	Washington and Lee Law Review
		W.Va L Q.	West Virginia Law Quarterly and The Bar
		Wis L Rev.	Wisconsin Law Review
		Wyo L J.	Wyoming Law Journal
		Yale L J.	Yale Law Journal





# LIST OF TITLES

## IN

### CORPUS JURIS SECUNDUM

---

Abandonment	Associations	Colleges and Universities
Abatement and Revival	Assumpsit, Action of	Collision
Abduction	Asylums	Commerce
Abortion	Attachment	Common Lands
Absentees	Attorney and Client	Common Law
Abstracts of Title	Attorney General	Common Scold
Accession	Auctions and Auctioneers	Compositions with Creditors
Accord and Satisfaction	Audita Querela	Compounding Offenses
Account, Action on	Bail	Compromise and Settlement
Accounting	Bailments	Concealment of Birth or Death
Account Stated	Bankruptcy	Conflict of Laws
Acknowledgments	Banks and Banking	Confusion of Goods
Actions	Barratry	Conspiracy
Adjoining Landowners	Bastards	Constitutional Law
Admiralty	Beneficial Associations	Contempt
Adoption of Children	Bigamy	Continuances
Adulteration	Bills and Notes	Contracts
Adultery	Blasphemy	Contratos
Adverse Possession	Bonds	Contribution
Aerial Navigation	Boundaries	Conversion
Affidavits	Bounties	Convicts
Affray	Breach of Marriage Promise	Copyright and Literary
Agency	Breach of the Peace	Property
Agriculture	Bribery	Coroners
Aliens	Bridges	Corporations
Alteration of Instruments	Brokers	Costs
Ambassadors and Consuls	Building and Loan Associations	Counterfeiting
Amicus Curiae	Burglary	Counties
Animals	Business Trusts	Court Commissioners
Annuities	Canals	Courts
Appeal and Error	Cancellation of Instruments	Covenant, Action of
Appearances	Carriers	Covenants
Apprentices	Case, Action on	Creditors' Suits
Arbitration and Award	Cemeteries	Criminal Law
Architects	Census	Crops
Army and Navy	Certiorari	Culpa
Arrest	Champerty and Maintenance	Curtsey
Arson	Charities	Customs and Usages
Assault and Battery	Chattel Mortgages	Customs Duties
Assignments	Citizens	Damages
Assignments for Benefit of	Civil Rights	Dead Bodies
Creditors	Clerks of Courts	Death
Assistance, Writ of	Clubs	Debt, Action of

Declaratory Judgments	Federal Courts	Interpleader
Dedication	Fences	Intoxicating Liquors
Deeds	Ferries	Joint Adventures
Dependencies, Colonies, and British Possessions	Finding Lost Goods	Joint Stock Companies
Depositaries	Fines	Joint Tenancy
Depositions	Fires	Judges
Deposits in Court	Fish	Judgments
Descent and Distribution	Fixtures	Judicial Sales
Detectives	Flags	Juries
Detinue	Food	Justices of the Peace
Discovery	Forcible Entry and Detainer	Kidnapping
Dismissal and Nonsuit	Forfeitures	Landlord and Tenant
Disorderly Conduct	Forgery	Larceny
Disorderly Houses	Fornication	Levees and Flood Control
District and Prosecuting Attorneys	Franchises	Lewdness
District of Columbia	Fraud	Libel and Slander
Disturbance of Public Meetings	Frauds, Statute of	Licenses
Divorce	Fraudulent Conveyances	Liens
Domicile	Game	Limitations of Actions
Dower	Gaming	Lis Pendens
Drains	Garnishment	Livery Stable Keepers
Druggists	Gas	Logs and Logging
Drunkards	Gifts	Lost Instruments
Dueling	Good Will	Lotteries
Easements	Grand Juries	Malicious Mischief
Ejectment	Ground Rents	Malicious Prosecution
Election of Remedies	Guaranty	Mandamus
Elections	Guardian and Ward	Manufactures
Electricity	Habeas Corpus	Maritime Liens
Embezzlement	Hawkers and Peddlers	Marriage
Embracery	Health	Marshaling Assets and Securities
Eminent Domain	Highways	Master and Servant
Entry, Writ of	Holidays	Masters' and Employers' Associations
Equity	Homesteads	Mayhem
Escape	Homicide	Mechanics' Liens
Escheat	Hospitals	Mercantile Agencies
Escrows	Husband and Wife	Militia
Estates	Improvements	Mills
Estoppel	Incest	Mines and Minerals
Evidence	Indemnity	Miscegenation
Exchange of Property	Indians	Modern Civil Law
Exchanges	Indictments and Informations	Money Lenders
Executions	Industrial Co-operative Societies	Money Lent
Executors and Administrators	Infants	Money Paid
Exemptions	Injunctions	Money Received
Explosives	Innkeepers	Monopolies
Extortion	Insane Persons	Mortgages
Extradition	Insolvency	Motions and Orders
Extraterritoriality	Inspection	Motor Vehicles
Factors	Insurance	Municipal Corporations
False Imprisonment	Insurrection and Sedition	Names
False Personation	Interest	Navigable Waters
False Pretenses	Internal Revenue	Ne Exeat
	International Law	

Negligence	Railroads	Summary Proceedings
Neutrality Laws	Rape	Sunday
Newspapers	Real Actions	Supersedeas
New Trial	Receivers	Taxation
Notaries	Receiving Stolen Goods	Telegraphs, Telephones, Radio, and Television
Notice	Recognizances	Tenancy in Common
Novation	Records	Tender
Nuisances	References	Territories
Oaths and Affirmations	Reformation of Instruments	Theaters and Shows
Obscenity	Reformatories	Threats and Unlawful Communications
Obstructing Justice	Registers of Deeds	Time
Officers	Registration of Land Titles	Torts
Pardons	Release	Towage
Parent and Child	Religious Societies	Towns
Parliamentary Law	Removal of Causes	Trade-Marks, Trade-Names, and Unfair Competition
Parties	Replevin	Trade Unions
Partition	Reports	Trading Stamps and Coupons
Partnership	Rescue	Treason
Party Walls	Review	Treaties
Patents	Rewards	Trespass
Paupers	Right of Privacy	Trespass to Try Title
Pawnbrokers	Riot	Trial
Payment	Robbery	Trover and Conversion
Penalties	Sales	Trusts
Pensions	Salvage	Turnpikes and Toll Roads
Pent Roads	Schools and School Districts	Undertakings
Peonage	Scire Facias	United States
Perjury	Seals	United States Commissioners
Perpetuities	Seamen	United States Marshals
Physicians and Surgeons	Searches and Seizures	Unlawful Assembly
Pilots	Seduction	Use and Occupation
Piracy	Sequestration	Usury
Pleading	Set-Off and Counterclaim	Vagrancy
Pledges	Sheriffs and Constables	Vendor and Purchaser
Poisons	Shipping	Venue
Possessory Warrant	Signatures	War and National Defense
Post Office	Slaves	Warehousemen and Safe Depositories
Powers	Social Security and Public Welfare	Waste
Principal and Surety	Sodomy	Waters
Prisons	Specific Performance	Weapons
Private Roads	Spendthrifts	Weights and Measures
Prize Fighting	States	Wharves
Process	Statutes	Wills
Profanity	Steam	Witnesses
Prohibition	Stenographers	Woods and Forests
Property	Stipulations	Work and Labor
Prostitution	Street Railroads	Workmen's Compensation
Public Administrative Bodies and Procedure	Submission of Controversy	
Public Lands	Subrogation	
Public Utilities	Subscriptions	
Quieting Title	Suicide	
Quo Warranto		

## TITLES IN THIS VOLUME

---

	Page
Waters §§ 226—386 -----	1
Weapons -----	468
Weights and Measures -----	537
Wharves -----	566
Wills §§ 1—261 -----	641

# CORPUS JURIS SECUNDUM

## VOLUME NINETY-FOUR

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### WATERS

This Title includes bodies and streams of water not capable of ordinary navigation, and surface and subterranean waters, rights and liabilities of proprietors of lands in respect of such waters, their sources, beds, flow, and use, dams and other embankments and flowage of lands thereby, and ice formed on such waters, easements and other rights of property in such waters; construction and operation of works for supply, control, and use of water as a motive power, for irrigation, for domestic purposes, or other uses, whether under franchises granted therefor or directly by the government, organization, franchises, and powers of companies formed for such purposes; rights, duties, and liabilities of such companies or of municipalities in respect of the management and operation of their waterworks; and liabilities for obstruction, diversion, or pollution of watercourses, and remedies therefor.

**Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index**

#### *Analysis*

#### **I. NATURE, OWNERSHIP, AND CLASSIFICATION, §§ 1-2**

#### **II. NATURAL WATERCOURSES, §§ 3-85**

- A. DEFINITION; ELEMENTS, §§ 3-4
- B. RIPARIAN RIGHTS IN GENERAL, §§ 5-14
- C. OBSTRUCTION AND DETENTION, FLOODING AND FLOWAGE, §§ 15-40
  - 1. *Obstruction of Watercourse and Detention of Water*, §§ 15-23
  - 2. *Flowage of Lands*, §§ 24-30
  - 3. *Remedies*, §§ 31-38
  - 4. *Criminal Responsibility*, §§ 39-40
- D. DEEPENING NATURAL CHANNEL, §§ 41-42
- E. POLLUTION, §§ 43-57
- F. DIVERSION, §§ 58-70
- G. BED AND BANKS OF STREAM, §§ 71-85

#### **III. SUBTERRANEAN AND PERCOLATING WATERS, §§ 86-102**

#### **IV. NATURAL LAKES AND PONDS, §§ 103-111**

#### **V. SURFACE WATERS, §§ 112-128**

---

**See also descriptive word index in the back of this Volume**

**VI. ARTIFICIAL WATERCOURSES; PONDS AND RESERVOIRS, §§ 129-156**

- A. ARTIFICIAL CHANNELS, DITCHES, AND CANALS, §§ 129-140
- B. ACCUMULATION AND STORAGE OF WATER ON LAND; POOLS, TANKS, AND RESERVOIRS, §§ 141-143
- C. DAMS AND MILL PONDS, §§ 144-152
- D. INJURIES BY BREAKAGE, LEAKAGE, AND OVERFLOW OF DAMS, §§ 153-156

**VII. APPROPRIATION AND PRESCRIPTION, §§ 157-205**

- A. IN GENERAL, §§ 157-166
- B. APPROPRIATION OF PUBLIC WATERS AND STREAMS FLOWING ON PUBLIC DOMAIN, §§ 167-193
- C. ACTIONS OR PROCEEDINGS TO DETERMINE AND PROTECT RIGHTS, §§ 194-205

**VIII. CONVEYANCES, LICENSES, AND CONTRACTS, §§ 206-225****IX. PUBLIC AND MUNICIPAL WATER SUPPLY, §§ 226-313**

- A. ACQUISITION AND CONTROL OF WATER FOR PUBLIC USE, §§ 226-233
- B. MUNICIPAL WATERWORKS AND WATER DISTRICTS, §§ 234-243(9)
- C. FRANCHISE OF, AND OPERATION, CONTROL, AND DISPOSAL OF WATER SYSTEM BY, PRIVATE INDIVIDUAL, §§ 244-246
- D. PUBLIC SERVICE WATER COMPANIES, §§ 247-263
- E. SUPPLY AND DISTRIBUTION OF WATER, §§ 264-283
- F. WATER RENTS OR RATES AND OTHER CHARGES TO CONSUMERS, §§ 284-308
- G. LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE, §§ 309-313

**X. IRRIGATION, §§ 314-368**

- A. IN GENERAL, §§ 314-317
- B. IRRIGATION DISTRICTS AND SIMILAR DISTRICTS FOR PURPOSES OF IRRIGATION, §§ 318-338
- C. IRRIGATION AND DITCH COMPANIES, §§ 339-347
- D. IRRIGATION WORKS, AND RIGHTS APPURTENANT THERETO, §§ 348-351
- E. DISTRIBUTION AND SUPPLY OF WATER FOR IRRIGATION, §§ 352-363
- F. LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE, §§ 364-368

**XI. USE OF WATER FOR MECHANICAL AND MANUFACTURING PURPOSES, §§ 369-382**

- A. RIGHT TO USE OF WATER, §§ 369-375
- B. WATER POWER COMPANIES, §§ 376-382

**XII. ICE, §§ 383-386***Sub-Analysis***IX. PUBLIC AND MUNICIPAL WATER SUPPLY—p 7**

- A. ACQUISITION AND CONTROL OF WATER FOR PUBLIC Use—p 7
  - § 226 Rights of public as against riparian and other owners—p 7
  - 227. — Remedies—p 8
  - 228 Acquisition of waters for public supply—p 8
  - 229. — Regulation and control by state and state authorities; license tax on diversion—p 10
  - 230. — Nature and extent of rights and obligations—p 14
  - 231. Pueblo rights—p 17
  - 232. Pollution of, and other injuries to, water supply—p 18
  - 233. Proceedings to protect rights—p 22

**IX. PUBLIC AND MUNICIPAL WATER SUPPLY—Continued****B. MUNICIPAL WATERWORKS AND WATER DISTRICTS—p 23**

- § 234 Construction or acquisition of municipal waterworks—p 23
- 235. — Choice of methods and existence of other system—p 29
- 236 — Acquisition of existing system in general—p 31
- 237 — Option or offer and contract to purchase—p 34
- 238 — Valuation of property and fixing price—p 40
- 239 — Transfer of property, title, and possession; rights acquired and obligations assumed—p 45
- 240 Sale, lease, or abandonment of municipal waterworks—p 48
- 241 Operation, maintenance, extension, and control of plant—p 50
- 242 — Mains, connections, and rights of way—p 54
- 243 (1) Water districts—p 60
- 243 (2) — Organization and validity—p 62
- 243 (3) — Territory included—p 68
- 243 (4) — Governing body, officers—p 69
- 243 (5) — Powers, duties, contracts, property, and liabilities—p 71
- 243 (6) — Fiscal management and indebtedness—p 76
- 243 (7) — Taxes and assessments—p 82
- 243 (8) — Actions—p 88
- 243 (9) — Alteration of, abolishment of, and withdrawal of municipality from water district—p 90

**C. FRANCHISE OF, AND OPERATION, CONTROL, AND DISPOSAL OF WATER SYSTEM BY, PRIVATE INDIVIDUAL—p 91**

- § 244 In general—p 91
- 245 Duration of franchise or privilege, and revocation, cancellation, or forfeiture p 92
- 246 Control and regulation by state authorities—p 93

**D. PUBLIC SERVICE WATER COMPANIES—p 94**

- § 247 Status and character—p 94
- 248 Incorporation, organization, and consolidation—p 95
- 249 Officers and agents—p 96
- 250 Grants of privileges or franchises—p 96
- 251 — Proceedings to obtain, and nature and scope in general—p 98
- 252 — Exclusiveness of rights or privileges—p 99
- 253 — Duration and termination—p 100
- 254 Rights, powers, and duties—p 103
- 255 — Rights of way—p 103
- 256 — Streets and highways—p 104
- 257 — Pipes, mains, and other works in general—p 106
- 258 — Injuries to works, mains, or pipes—p 109
- 259 — Purchase, lease, sale, and mortgage of waterworks—p 110
- 260 — Proceedings to restrain company from exceeding rights or violating ties—p 112
- 261 Authority of public service commissions relative to construction and operation of waterworks—p 112
- 262. Licenses and taxes—p 114
- 263. Remedies of creditors and enforcement of liabilities—p 115

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**See also descriptive word index in the back of this Volume**



**IX. PUBLIC AND MUNICIPAL WATER SUPPLY—Continued**

**E. SUPPLY AND DISTRIBUTION OF WATER—p 116**

- § 264. To municipalities—p 116
- 265. — Power and authority of municipality to contract—p 116
- 266. — Form and requisites of contract—p 119
- 267. — Ratification of defective contract—p 120
- 268. — Terms and conditions of contract in general—p 120
- 269. — Purity and quality of water—p 123
- 270. — Hydrants and hydrant rentals—p 124
- 271. — Construction, operation, and assignment of contracts—p 125
- 272. — Modification, rescission, or abandonment of contract—p 126
- 273. — Performance or breach—p 127
- 274. — Implied and noncontractual obligations—p 128
- 275. — Rates—p 130
- 276. — Actions and proceedings—p 133
- 277. To private consumers—p 138
- 278. — Right and duty to supply—p 138
- 279. — Contracts with, or for benefit of, consumers—p 146
- 280. — Regulation of supply and use—p 149
- 281. — Actions—p 154
- 282. To water companies—p 157
- 283. Free supply or nominal charge—p 158

**F. WATER RENTS OR RATES AND OTHER CHARGES TO CONSUMERS—p 161**

- § 284 In general—p 161
- 285. Right to charge for water service—p 163
- 286. Establishment of rates—p 165
- 287. Contracts as to rates—p 167
- 288. Propriety and regulation of rates of municipal water system—p 172
- 289. — Amount and reasonableness of rates—p 172
- 290. — Regulation by public utility commission—p 177
- 291. Propriety and regulation of rates of water companies—p 179
- 292. — Power to regulate rates—p 179
- 293. — Reasonableness of rates—p 181
- 294. — Establishment, filing, and promulgation of rate schedules—p 191
- 295. — Proceedings for relief against unreasonable rates—p 192
- 296. — Regulation by board or commission—p 196
- 297. Uniformity and discrimination—p 200
- 298. Flat rates—p 206
- 299. What rate applies—p 207
- 300. Minimum charge—p 208
- 301. Charges for installation, meters, meter rent, reading meters, and other service charges—p 209
- 302. Amount, payment, and collection of rates and charges—p 210
- 303. Remedies—p 214
- 304. — Of water company or municipality supplying water in general—p 214
- 305. — Refusal to supply or cutting off supply for nonpayment—p 216
- 306. — Water wrongfully taken—p 219
- 307. — Of private consumer—p 220
- 308. Liens and enforcement thereof—p 228

**G. LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE—p 233**

- § 309. Injuries from construction or maintenance of works—p 233

---

**See also descriptive word index in the back of this Volume**

**IX. PUBLIC AND MUNICIPAL WATER SUPPLY—Continued****G. LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE—Continued**

- § 310. Insufficiency of supply or pressure—p 239
- 311 Liability for pollution of water used for domestic or drinking purposes—p 240
- 312. Actions—p 243
- 313 Criminal offenses; penalties—p 250

**X. IRRIGATION—p 251****A. IN GENERAL—p 251**

- § 314. Right to use of water for irrigation generally—p 251
- 315 Public rights, supervision, and control—p 253
- 316. — Reclamation of arid land by public authorities—p 255
- 317 Actions to establish and protect rights—p 260

**B. IRRIGATION DISTRICTS AND SIMILAR DISTRICTS FOR PURPOSES OF IRRIGATION—p 264**

- § 318 Character, status, and power of legislature to create—p 264
- 319 (1). Organization of district—p 269
- 319 (2). — Proceedings to establish—p 270
- 319 (3). — Lands included—p 278
- 319 (4). — Proceedings to determine validity—p 284
- 319 (5). — Confirmation proceedings—p 286
- 319 (6). — Collateral attack—p 288
- 319 (7) — Similar districts—p 288
- 320. Officers and employees—p 289
- 321 Powers and proceedings—p 293
- 322 Bonds and other obligations—p 307
- 323. — Preliminary proceedings—p 307
- 324 — Form, requisites, and validity—p 309
- 325. — Issuance, disposition, and proceeds—p 313
- 326. — Security—p 315
- 327. — Cancellation or return of bonds—p 317
- 328. — Confirmation proceedings—p 317
- 329. — Negotiability—p 319
- 330. — Payment and collection—p 319
- 331. — Actions—p 323
- 332. Assessments and taxes—p 327
- 333 — Power and duty to assess and levy—p 327
- 334 — Levy and assessment—p 335
- 335. — Objections to assessments, and review—p 343
- 336 — Lien—p 347
- 337. — Payment, collection, and disposition of proceeds—p 348
- 338. Dissolution or other termination of district—p 360

**C. IRRIGATION AND DITCH COMPANIES—p 362**

- § 339. In general—p 362
- 340. Unincorporated mutual associations and joint stock companies—p 363
- 341. Private corporations in general—p 364
- 342. — Incorporation and organization—p 364
- 343. — Capital, stock, and members or stockholders—p 365
- 344. — Officers and agents—p 374
- 345. — Corporate powers and liabilities—p 375
- 346. — Insolvency and receivers, reorganization, and dissolution—p 381
- 347. Quasi-public corporations—p 382

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**See also descriptive word index in the back of this Volume**

**X. IRRIGATION—Continued****D IRRIGATION WORKS, AND RIGHTS APPURTENANT THERETO—p 385**

- § 348 Acquisition of water rights—p 385
- 349 Rights of way—p 388
- 350 Irrigation works—p 395
- 351 Injuries to owners of irrigation works, and actions therefor—p 399

**E. DISTRIBUTION AND SUPPLY OF WATER FOR IRRIGATION—p 402**

- § 352 Right to supply of water—p 402
- 353 ——— Rights of particular persons to supply—p 408
- 354 ——— Priority of rights—p 410
- 355 ——— Discrimination—p 412
- 356 ——— Change in manner or place of delivery—p 413
- 357 ——— Transfer of right to supply—p 413
- 358 ——— Conveyance or transfer of irrigation system—p 415
- 359 Regulation of supply and use—p 416
- 360 Sale of water for irrigation—p 418
- 361 ——— Contracts with consumers—p 418
- 362 ——— Conveyance of water rights—p 422
- 363 ——— Rates and charges—p 422

**F. LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE—p 431**

- § 364 Civil liability—p 431
- 365 ——— Liability for injuries from construction, operation, and maintenance of works—p 432
- 366 ——— Liability for failure to supply water—p 437
- 367. ——— Remedies—p 441
- 368 Criminal responsibility—p 450

**XI. USE OF WATER FOR MECHANICAL AND MANUFACTURING PURPOSES—p 451****A. RIGHT TO USE OF WATER—p 451**

- § 369 Natural waters—p 451
- 370 ——— Acquisition of water rights—p 451
- 371 ——— Nature of right in general—p 451
- 372 ——— Extent of, and restrictions on, use—p 452
- 373 Artificial waters—p 454
- 374. Particular uses—p 455
- 375. Injuries—p 457

**B WATER POWER COMPANIES—p 458**

- § 376 Organization and nature—p 458
- 377. Charges by state for diversion of water—p 458
- 378 Rights and powers—p 458
- 379. Construction of plant—p 459
- 380 Sale or lease of water or power and supply to consumers—p 459
- 381. Tolls and other charges—p 460
- 382. Injuries incident to supply or use, and remedies therefor—p 461

**XII. ICE—p 462**

- § 383. In general—p 462
- 384. Right to cut and remove ice—p 462
- 385. Conveyances, licenses, and contracts—p 463
- 386. Injuries and remedies—p 464

## IX. PUBLIC AND MUNICIPAL WATER SUPPLY

## A. ACQUISITION AND CONTROL OF WATER FOR PUBLIC USE

## § 226 Rights of Public as against Riparian and Other Owners

The use of waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right

While there is authority for the view that inhabitants of a municipality who are entitled to use the waters of a stream flowing through or by the municipality for ordinary domestic and business purposes may employ another as their agent to distribute water by means of pipes,<sup>50</sup> the view usually taken is that neither a municipality<sup>51</sup> nor a water company<sup>52</sup> has the right to appropriate and divert the waters of a nonnavigable stream or other source of supply for the purpose of securing an adequate supply of water for the use of the inhabitants of the municipality, to the injury of the rights and privileges appertaining to riparian owners by virtue of such ownership, except on the condition of making full and just compensation to the riparian owners for all the injury which they sustain.<sup>53</sup> While the right of a municipality as riparian owner to use water for a public supply has apparently been recognized,<sup>54</sup> the view usually taken is that the fact that

a municipality<sup>55</sup> or a water company<sup>56</sup> owns lands bordering on a stream does not of itself affect the foregoing rules, in such case the municipality or the water company has only the rights of a riparian proprietor, which must be exercised with due regard to the similar rights of other owners.<sup>57</sup> In other words, the use of the waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right.<sup>58</sup> These rules have been applied even to a stream having its origin in springs on the property of the municipality.<sup>59</sup>

*Subterranean and percolating waters* A municipality as the owner of land acquired pursuant to some statutes for water supply purposes does not have the rights of an owner with respect to percolating waters within such land for purposes of its water supply.<sup>60</sup> So the view has been taken that a municipal corporation is not entitled, without making compensation, to pump water from wells on its own land and thereby lower the level of the waters under adjacent land,<sup>61</sup> or divert water from a stream on other lands.<sup>62</sup> In some jurisdictions a municipal corporation situated in a watershed over

50. Tenn—American Assoc v Eastern Kentucky Land Co., 2 Tenn Ch A 132

67 C J p 1118 note 32

51. NY—Hartzell v Village of Hamburg, 279 NYS 650, 155 Misc 345, affirmed Caudwell v Village of Hamburg, 289 NYS 910, 248 App Div 667 and Ferguson v Village of Hamburg, 289 NYS 910, 248 App Div 667, modified on other grounds 5 NE 2d 801, 272 NY 234, followed in Caudwell v Village of Hamburg, 6 NE 2d 411, 273 NY 476

NC—Pernell v City of Henderson, 16 SE 2d 449, 220 NC 79

Va—Town of Purcellville v Potts, 19 SE 2d 700, 179 Va 514, 141 ALR 633

67 C J p 1119 note 32

52. Fla—Tampa Waterworks Co v Cline, 20 So 780, 37 Fla 586, 53 AmSR 262, 33 LRA 376

67 C J p 1119 note 34

53. NC—Pernell v City of Henderson, 16 SE 2d 449, 220 NC 79

Va—Town of Purcellville v Potts, 19 SE 2d 700, 179 Va 514, 141 ALR 633

67 C J p 1119 note 35

54. Ohio—Canton v Shook, 63 NE 600, 66 Ohio St 19, 90 AmSR 557, 58 LRA 637

67 C J p 1119 note 36.

55. Me—Kennebunk, Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 71 A 2d 520, 145 Me 35

NC—Pernell v City of Henderson, 16 SE 2d 449, 220 NC 79

67 C J p 1119 note 37

56. Ind—Corpus Juris cited in City of Elkhart v Christiana Hydraulics, 59 NE 2d 353, 359, 223 Ind 242

67 C J p 1119 note 38

57. Ala—Ulbricht v Eufaula Water Co., 6 So 78, 86 Ala 587, 11 AmSR 72, 4 LRA 572

Pa—Irving's Ex'rs v Media, 10 Pa Super 132, affirmed 45 A 482, 194 Pa 648

58. Me—Kennebunk, Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 84 A 2d 433, 147 Me 149—Kennebunk, Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 71 A 2d 520, 145 Me 35

NC—Corpus Juris cited in Pernell v City of Henderson, 16 SE 2d 449, 451, 220 NC 79

Va—Corpus Juris cited in Town of Purcellville v Potts, 19 SE 2d 700, 703, 179 Va 514, 141 ALR 633

Wash—Van Dissel v. Holland-Horr Mill Co., 157 P 687, 91 Wash 239

59. Va—Town of Purcellville v

Potts, 19 SE 2d 700, 179 Va 514, 141 ALR 633

60. Mass—Spaulding v Inhabitants of Plainville, 105 NE 1006, 218 Mass 321

67 C J p 1120 note 42

#### Water district

Charter of water district authorizing it to take and hold sufficient water of any surface or underground brooks, streams, springs, or ponds in district was not a grant to district of a proprietary right and ownership in or to the use of waters mentioned, but charter merely authorized district to use as its source of supply, if proprietary rights are properly acquired, any waters named therein—Kennebunk, Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 71 A 2d 520, 145 Me 35

61. NY—Forbell v City of New York, 58 NE 644, 164 NY 522, 79 AmSR 666, 51 LRA 697—Westphal v New York, 70 NYS 1021, 34 Misc 684, affirmed 78 NY S 56, 75 App Div 252, affirmed 69 NE 369, 177 NY 140, reargument denied 69 NE 1123, 177 NY 570

62. NY—Smith v City of Brooklyn, 54 NE 787, 160 NY 357, 45 LRA 664

67 C J p 1120 note 44.

an underground basin or reservoir has no rights in the waters thereof as being subject to public use for the common benefit of its inhabitants or owners of the overlying lands, on the theory that the municipal corporation is the administrator of such public use and has become substituted to the individual rights of owners for the benefit of all,<sup>63</sup> such water is private property<sup>64</sup> and remains such until duly taken from the owners and devoted to public use<sup>65</sup> The right of town authorities to take the water of a spring in a highway for the purpose of supplying a watering trough, as against the owner of the fee of that part of the highway in which the spring is located, has been denied,<sup>66</sup> and a like rule has been applied in respect of the sinking of a well in a highway to obtain water for use in sprinkling the highway.<sup>67</sup>

### § 227. — Remedies

A permanent and uncompensated diversion of waters of a stream by a municipality or water company is a continuing wrong to the owners affected, for which damages are recoverable or, in a proper case, an injunction may be had.

The permanent and uncompensated diversion of waters of a stream or of other waters is a continuing wrong to the owners affected, for which damages are recoverable<sup>68</sup> Under such circumstances, redress may be sought in an action of trespass,<sup>69</sup> or, in a proper case, by application to a court of equity for an injunction.<sup>70</sup> A riparian owner may, however, by acquiescence in the construction and operation of a water plant for a public supply be estopped to maintain an action of ejectment<sup>71</sup> or to claim relief by injunction,<sup>72</sup> and may be left to his action for damages<sup>73</sup> Mere delay in bringing action is not sufficient to defeat plaintiff's right to an injunction where such delay was induced by defend-

ant,<sup>74</sup> and there is no estoppel which will prevent the grant of an injunction where the acts of defendant were not induced by any acts or statements of plaintiff<sup>75</sup> The right to a permanent injunction in respect of acts of defendant which do not cause any actual damage to plaintiff has been denied,<sup>76</sup> and an injunction has also been denied and plaintiff left to his remedy at law where defendant water company which was vested with the right to condemn had completed its water system and was supplying a municipality<sup>77</sup>

Under certain circumstances an injunction may be granted, conditioned on defendant's paying just compensation or damages,<sup>78</sup> or on defendant's acquiring plaintiff's rights in the stream.<sup>79</sup> No injunction should be granted in respect of certain waters where plaintiff never was entitled to any rights in such waters<sup>80</sup> The right of a railroad company to have a water company enjoined from appropriating the waters of a stream has been denied where there had been no appropriation of the waters by the railroad company.<sup>81</sup> The owner of real property in one state may have, as appurtenant to the real property, an interest in the waters of a stream in an adjoining state which may be protected by an action in the courts of the adjoining state against a municipality of such adjoining state, based on the municipality's diversion of water from the stream which so diminished the flow as injuriously to affect such real property<sup>82</sup>

### § 228. Acquisition of Waters for Public Supply

The right to appropriate and divert the waters of a stream or other source of supply for public use generally may be acquired by grant, prescription, and appropriation or condemnation.

63. Cal—City of San Bernardino v City of Riverside, 198 P 784, 186 Cal 7

64. Cal—City of San Bernardino v City of Riverside, *supra*.

65. Cal—City of San Bernardino v City of Riverside, *supra*.

66. Conn—Suffield v Hathaway, 44 Conn 521, 26 Am R 483

67. Cal—Wright v Austin, 76 P 1023, 143 Cal 236, 65 L R A 949, 101 Am SR 97

68. N Y—Smith v City of Brooklyn, 54 NE 787, 160 N Y. 357, 45 L R A 664

67 C J p 1120 note 52

69. Pa.—Wagner v Purity Water Co, 88 A 484, 241 Pa 328, L R A 1916E 981

67 C J p 1120 note 53.

70. Mass—Hittinger Fruit Co. v

City of Cambridge, 105 NE 868, 218 Mass 220

67 C J p 1120 note 54

71. Wash—Domrese v City of Roslyn, 154 P 140, 89 Wash 106

72. Cal—Barton v Riverside Water Co, 101 P 790, 155 Cal 515, 23 L R A NS, 331

67 C J p 1121 note 56

73. Cal—Barton v Riverside Water Co, *supra*.

Wash—Domrese v City of Roslyn, 154 P 140, 89 Wash 106

74. Wash—Rigney v Tacoma Light, etc, Co, 38 P 147, 9 Wash. 576, 26 L R A. 425

75. Wash—Rigney v Tacoma Light, etc, Co, *supra*.

76. Cal—Fifield v Spring Valley Water Works, 62 P 1054, 130 Cal 552

67 C J p 1121 note 60.

77. Wash—Habermann v Ellensburg Gas & Water Co, 170 P. 571, 100 Wash 229

67 C J p 1121 note 61

78. N Y—Gallagher v Kingston Water Co, 49 N Y S 250, 25 App Div 82, affirmed 58 NE 108, 164 N Y. 602

67 C J p 1121 note 62

79. Wash—Rigney v Tacoma Light, etc, Co, 38 P 147, 9 Wash 576, 26 L R A. 425.

80. N J—Exton v Glen Gardner Water Co, 129 A. 255, 3 N J Misc 613.

81. Pa.—Cambria, etc, R Co v. Blandburg Water Co, 75 A 595, 226 Pa. 402

82. Mass—Mannville Co v Worcester, 138 Mass 89, 52 Am R 261.

67 C J. p 1122 note 66.

There are various methods of acquiring the right to appropriate and divert the waters of a stream or other source of supply for supplying the public, as, for example, by legislative grant,<sup>83</sup> by purchase and grant from, or contract with, the owners controlling the stream or other source of supply, whose privileges will be destroyed or abridged by such diversion,<sup>84</sup> by adverse user continued for the necessary period to establish a title by prescription,<sup>85</sup> by appropriation under the rules or statutes applicable in some jurisdictions,<sup>86</sup> by dedication,<sup>87</sup> or by condemnation, as discussed in Eminent Domain, §§ 45, 71, and it has broadly been stated that the law recognizes three methods by which the right to take all the water of a stream may be secured, namely, grant, prescription, and appropriation or condemnation.<sup>88</sup> So also, a species of estoppel has been given effect in recognizing the right to use certain waters for a public supply.<sup>89</sup> The specific power granted to municipal corporations to acquire a suitable municipal water supply has been held to be independent of other powers granted in the same statute.<sup>90</sup>

Under certain constitutional provisions a municipal corporation may, in connection with the establishment of its water system, contract with the owners of certain water rights for the exchange of such rights for rights owned by the municipal cor-

poration where, under the contract, the municipal corporation will acquire the ownership and control of the water acquired on the exchange.<sup>91</sup> It has been held that, in order to raise the presumption of a grant of the right to take water for a public supply, there must be a continuous and adverse use for twenty years.<sup>92</sup> The mere incorporation of a water company possessing the power of eminent domain does not ipso facto give it the right to appropriate and divert the waters of a stream without condemnation.<sup>93</sup>

On the theory that the control of running streams, lakes, and ponds within the borders of a state rests in the state in its sovereign capacity as representative, and for the benefit of the people in common, it has been laid down generally that the only way in which a municipality can acquire the right to use and take such water is by grant directly from the state<sup>94</sup> or by the duly authorized purchase of such right from, or condemnation of such right in the hands of, a third person, either corporate or individual, to whom it has been granted by the state,<sup>95</sup> and that the legislature may, as discussed infra § 229, permit or prohibit the abstraction of water from fresh-water streams except to the extent that it is appropriated to riparian uses. Under some statutes governing the appropriation of waters

<sup>83</sup> US—St Anthony Falls Water-Power Co v St Paul Water Com'rs, Minn, 18 S Ct 157, 168 US 349, 42 L Ed 497

<sup>67</sup> C J p 1122 note 68

<sup>84</sup> Idaho—Beus v City of Soda Springs, 107 P 2d 151, 62 Idaho 1  
<sup>67</sup> C J p 1122 note 69

#### Contract between municipalities

Even if delivery by San Diego to Coronado of some water taken from wells near the mouth of the Otay river and later of other waters from the Otay system under oral and written agreement resulted in the "dedication" in a legal sense of a portion of the water of that river to the use of consumers in that area, that could not constitute a dedication of the entire water of that river and its tributaries, including water from outside sources which was brought into the Otay system, especially where equal or superior rights in favor of other communities had intervened and had been exercised and confirmed by long-continued use.—City of Coronado v City of San Diego, 119 P 2d 359, 48 Cal App 2d 160

**Public utility** could purchase appropriated water rights or compensate for damages arising because of the appropriation made by it without resorting to the courts.—Lamb v California Water & Telephone Co, 129 P 2d 371, 21 Cal 2d 83.

<sup>85</sup> Pa—Palmer Water Co v Leighton Water Supply Co, 124 A 717, 280 Pa 492  
<sup>67</sup> C J p 1122 note 70

<sup>86</sup> US—City of Pocatello v Murray, D C Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628  
<sup>67</sup> C J p 1123 note 71

<sup>87</sup> Tex—Coughran v Nunez, Civ App, 106 SW 2d 1101, set aside on other grounds 127 SW 2d 885, 133 Tex 303

<sup>88</sup> Pa—Palmer Water Co v Leighton Water Supply Co, 124 A 747, 280 Pa 492

<sup>89</sup> Cal—Miller & Lux v Enterprise Canal & Land Co, 147 P 567, 169 Cal 415  
<sup>67</sup> C J p 1123 note 74

<sup>90</sup> SD—Robbins v Rapid City, 23 NW 2d 144, 71 SD 171

#### Construction of statute

(1) Court, in construing statutory grant to municipal corporations of power to acquire a suitable supply of water, considers the object and purpose thereof and gives language used the apparent and natural meaning which will effectuate such object and purpose.—Robbins v Rapid City, supra

(2) The word "acquire," as used in statute giving municipal corporations power to acquire a suitable supply of water, is used in its broad-

est sense meaning to obtain in any manner, rather than in primary sense of to get as an owner.—Robbins v Rapid City, supra.

#### Acquisition by contract with United States

City under its statutory power to acquire a suitable water supply was authorized to contract with United States for erection of a dam and storage reservoir by the latter with provision for allocation to city of a specified number of acre feet of impounded water.—Robbins v Rapid City, supra.

<sup>91</sup> Utah—State v Salt Lake City, 81 P 273, 29 Utah 361

<sup>92</sup> NC—Geer v Durham Water Co, 37 SE 474, 127 NC 349  
<sup>67</sup> C J p 1123 note 76

<sup>93</sup> Pa—Wagner v Purity Water Co, 88 A 484, 241 Pa 328, L R A 1916E 981

<sup>94</sup> US—City of Trenton v State of New Jersey, N J, 43 S Ct 534, 262 US 182, 67 L Ed 937, 29 A L R 1471

N J—State v Jersey City, 111 A 544, 94 N J Law 431, 19 A L R 646

<sup>95</sup> US—City of Trenton v State of New Jersey, N J, 43 S Ct 534, 262 US 182, 67 L Ed 937, 29 A L R 1471

N J—State v Jersey City, 111 A 544, 94 N J Law 431, 19 A L R 646

of a stream, no precedence is given to a municipal corporation as such,<sup>96</sup> or to a private claimant who seeks an appropriation for a municipal or public supply,<sup>97</sup> as against prior claimants; and, under some constitutional provisions, a municipality cannot take water for domestic purposes which has previously been appropriated for a beneficial purpose, without fully compensating the owner.<sup>98</sup> A municipal corporation, by the mere exercise of its statutory authority, in the nature of the police power, to control and regulate watercourses and distribute the waters thereof to the persons having recognized rights thereto, acquires no proprietary right to the use of the water,<sup>99</sup> such control and regulation may not be made the basis of appropriation by the municipal corporation, since the necessary element of beneficial use is absent.<sup>1</sup>

The fact that a municipal corporation has contracted with a water company for supplying water does not necessarily prevent the municipal corporation from taking water from a particular source under statutory authorization even though the water company is thereby prevented from performing the contract where the company has no right to take water from the source.<sup>2</sup> The view has been taken that a water company may not legally take water from sources other than those from which by its charter it is authorized to take,<sup>3</sup> and a municipality which, pursuant to statute, purchases the franchise and rights of a corporation is limited to the same sources for its water supply as the corporation was.<sup>4</sup>

*Lake in state forest preserve* In New York the propriety of a grant by the state water power and control commission of the use of the waters of a lake in the state forest preserve for a municipal supply has been recognized.<sup>5</sup>

*Designation of agent to divert or take water* Where a municipality has the right to take or divert water from streams for lawful uses and purposes, and the right to contract for a water supply, the

view has been taken that, in contracting with a water company to supply water, the municipality makes such company its agent or instrumentality to take or divert such water,<sup>6</sup> and the water company may employ, or contract with, another company to perform the obligations or duties of such agency.<sup>7</sup> So also, where the sources of water supply available to a municipal corporation are limited, it has been recognized that it may properly enter into a contract with an individual by the terms of which he obligates himself to perfect his appropriation of the waters of a stream and to construct the necessary works to make such supply available for use.<sup>8</sup> The mere fact, however, that a municipality has authorized a person to lay water pipes through the streets of the municipality does not constitute such person the agent of the municipality to take water from a stream,<sup>9</sup> nor does it constitute the acts of such person the acts of the municipality.<sup>10</sup>

*Abandonment or loss of rights acquired* Mere nonuser of water rights previously acquired by a municipality does not work an abandonment of such rights.<sup>11</sup> Where a county had duly acquired from the owner of a spring the right to use sufficient water from such spring to supply public buildings, it was held that a mere temporary arrangement between the county authorities and the owner of the land on which the spring is located, for the purpose of conducting water to one of such buildings, did not constitute a surrender by the county of its rights in respect of such spring.<sup>12</sup>

## § 229. — Regulation and Control by State and State Authorities; License Tax on Diversion

Under the power and duty to control and conserve the use of water for the benefit of all its inhabitants, the state may regulate and control the diversion of waters by a municipality or water company, and may confer on a state agency the authority to do so.

96 Or.—In re Schollmeyer, 138 P 211, 69 Or 210

97. Or.—In re Schollmeyer, supra

98. Idaho—Montpelier Milling Co v City of Montpelier, 113 P 741, 19 Idaho 212

99. Utah—Mt Olivet Cemetery Ass'n v Salt Lake City, 235 P. 876, 65 Utah 193  
67 C J p 1124 note 86

1. Utah—Mt Olivet Cemetery Ass'n v Salt Lake City, supra.

2. NY—Stoly v Syracuse, 111 NY S. 467, 59 Misc. 600, affirmed 119 N

Y S 1146, 134 App Div 993, affirmed 94 NE 1099, 201 NY 512

3 Mass—Smith v Stoughton, 70 NE 195, 185 Mass 329

4 Mass—Smith v Stoughton, supra 67 C J p 1124 note 90

5. NY—Kenwell v Lee, 254 NYS 841, 142 Misc 413, affirmed 258 NYS 1000, 236 App Div 752, motion denied 184 NE 94, 260 NY 565, reversed on other grounds 184 NE 692, 261 NY 113

6. NJ—Wilson v East Jersey Water Co, 90 A 728, 83 NJ Eq 42—Wilson v East Jersey Water Co, 79 A 440, 78 NJ Eq 330

7. NJ—Wilson v East Jersey Water Co, 90 A 728, 83 NJ Eq 42

8. U S—City of Pocatello v Murray, D C Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628

9. Pa.—In re Haupt's Appeal, 17 A 436, 125 Pa. 211

10. Pa.—In re Haupt's Appeal, supra

11 Conn—Harvey Realty Co v Borough of Wallingford, 150 A. 60, 111 Conn 352  
67 C J p 1124 note 99

12. Pa.—Elk County v. Earley, 15 A 602, 121 Pa 496

The power<sup>13</sup> and duty<sup>14</sup> of a state to control and conserve the use of its water resources for the benefit of all its inhabitants has been recognized and upheld. In some jurisdictions at least, the state may grant or withhold the privilege of diverting waters as it sees fit,<sup>15</sup> and the power to determine the conditions on which water may be diverted is a legislative function,<sup>16</sup> the legislature may permit or pro-

hibit the abstraction of water from fresh-water streams except to the extent that it is appropriated to riparian uses<sup>17</sup>

In some jurisdictions statutes have been enacted conferring on certain state bodies the authority to determine whether permission shall be given to municipalities<sup>18</sup> or to a water company or an individual<sup>19</sup> to acquire a municipal or public water

13. NH—In re Opinion of the Justices, 114 A 2d 327

NY—Suffolk County v Water Power and Control Commission, 281 NYS 523, 245 App Div 62, modified on other grounds 199 NE 41, 269 NY 158

67 C J p 1124 note 3

#### Control for public purpose

A "natural want," within meaning of constitutional provision that the necessity of water for domestic use and for irrigation purposes is declared to be a "natural want," is one absolutely necessary to human existence, and therefore its legislative conservation and control for such uses is a public purpose—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb 410

The statutory policy of public necessity for diversion of water encompasses provision for reasonably foreseeable future public needs—Application of Plainfield-Union Water Co., 102 A 2d 1, 14 NJ 296

14. US—City of Trenton v New Jersey, NJ, 43 S Ct 534, 262 US 182, 67 L Ed 937, 29 ALR 1471

NJ—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 NJ Super 409  
NY—Maribu v Nohowec, 293 NYS 457, 161 Misc 944

Under local statutes creating waterworks system of city of Syracuse and permitting use of water supply from Skaneateles Lake, no exclusive dominion over the waters of Skaneateles Lake was given or intended to be given to city of Syracuse by the state—City of Syracuse v Gibbs, 28 NE 2d 835, 283 NY 275

15. US—City of Trenton v New Jersey, NJ, 43 S Ct 534, 262 US 182, 67 L Ed 937, 29 ALR 1471  
NY—City of Syracuse v Gibbs, 28 NE 2d 835, 283 NY 275

#### Grant of exclusive ownership

The legislature is without constitutional power to grant to city of Syracuse exclusive ownership of, use of, and control over waters of Skaneateles Lake, which was source of city's water supply—City of Syracuse v Gibbs, supra

16. US—City of Trenton v New Jersey, NJ, 43 S Ct 534, 262 US 182, 67 L Ed 937, 29 ALR 1471.

17. NJ—East Jersey Water Co v

Board of Public Utility Com'rs, 119 A 679, 98 NJ Law 449

NY—City of Syracuse v Gibbs, 28 NE 2d 835, 283 NY 275

#### 18. In New Jersey

(1) The creation of a water supply commission by the legislature was with the intent of laying down a broad and comprehensive policy for the conservation and protection of waters within New Jersey—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 NJ Super 409—Grobart v Passaic Val Water Commission, 47 A 2d 600, 134 NJ Law 325, cause remanded on other grounds 51 A 2d 24, 35 NJ Law 190

(2) The method by which sources of water supply adequate to meet current and reasonably foreseeable future public needs should be made available to water company was peculiarly within the province of Water Policy and Supply Council—Application of Plainfield-Union Water Co., 102 A 2d 1, 14 NJ 296

(3) Basic purpose of statute providing for State Water Supply Commission was to invest commission with jurisdiction over dams and reservoirs deemed essential for protection of life and property with incidental authority to protect shore landowners against impairment of property rights resulting from destruction or abandonment of dam or reservoir in existence for specified period of time—Jersey City v State Water Policy Commission, 191 A 456, 118 NJ Law 72

(4) A statute creating and defining powers of Water Policy Commission was designed to lay down broad and comprehensive policy for conservation and protection of surface, subsurface, and percolating waters of state through control and regulation of use, development, and diversion thereof, and is to be liberally construed to advance its beneficent policy and, while commission's jurisdiction is special and limited, it possesses such powers as by fair implication and intentment are incident to authority expressly granted for attainment of general legislative policy—Jersey City v State Water Policy Commission, supra

(5) Purity of potable water supply is preeminent factor in valid ex-

ercise of powers conferred by statute on Water Policy Commission—Jersey City v State Water Policy Commission, supra

(6) Other particulars of New Jersey rule see 67 C J p 1125 note 8 [a]

#### In New York

(1) The legislature may delegate performance of duty of state to control and conserve water resources for benefit of all inhabitants of state, to an agency or commission, but the agency or commission can act only within scope of powers delegated expressly or by necessary implication to enable agency or commission to carry out the powers expressly given—City of Syracuse v Gibbs, 28 NE 2d 835, 283 NY 275

(2) The Water Power and Control Commission's decision, within its jurisdiction, on testimony taken and facts presented at hearing on application by city to take additional water supply from lake, is conclusive on the courts—City of Syracuse v Gibbs, supra

(3) A statute authorizing county supervisors to create county water authority with consent of State Water Power and Control Commission was held constitutional—Suffolk County v Water Power and Control Commission, 199 NE 41, 269 NY 158

(4) Term "public uses" in statute giving Public Service Commission jurisdiction over furnishing of water for public uses meant use of water by municipality—City of New York v Maltbie, 8 NE 2d 289, 274 NY 90

(5) A statute establishing the board of water supply of New York City should be read in connection with a provision creating the state water supply commission and hence it was necessary for the board of water supply to obtain the state commission's approval of its plans for providing an additional water supply—In re Board of Water Supply of City of New York, 105 NE 213, 211 NY 174, motion granted 105 NE 1081, 211 NY 609

19. NJ—City of New Brunswick v Board of Conservation and Development, 108 A 865, 91 NJ Law 46, affirmed 111 A 925, 91 NJ Law 558

67 C J p 1125 note 9.



supply. Some statutes contain provisions prescribing the form and contents of the application<sup>20</sup> and provide for notice of a public hearing thereon to be given by a board or commission<sup>21</sup>. So also, in respect of the number of members necessary to transact business, the terms of the governing statute must usually be consulted<sup>22</sup>. The board or commission created by some statutes is not a purely administrative body but is invested with limited quasi-judicial functions<sup>23</sup> and, in order to invoke its jurisdiction, a compliance with the conditions prescribed by the statute must be alleged<sup>24</sup>. Under some statutes the commission is not confined to a consideration of the source of supply which is designated in the application of the municipality

which seeks an additional supply<sup>25</sup>. An increase of diversion of water has been held an additional water supply within the statute requiring approval of a state board to diversion of water for any new or additional supply for public use,<sup>26</sup> and the statute applies to any new or additional supply regardless of the source.<sup>27</sup> The power of the board to attach reasonable conditions to its consent to a diversion for a water supply has been recognized<sup>28</sup>. A body created by state authority to provide additional supplies of water for various municipalities within the jurisdiction of such body must proceed in accordance with statutory provisions defining its authority<sup>29</sup> and must give due regard to statutory provisions designed to protect the rights of the owner

#### In Pennsylvania

(1) The purpose of Act creating the Water and Power Resources Board is to establish a single tribunal to determine questions of appropriation and diversion of water from streams of the Commonwealth—*Borough of Collegeville v Philadelphia Suburban Water Co*, 105 A 2d 722, 377 Pa 636

(2) Provision of Administrative Agency Law that remedy at law provided by the Administrative Agency Law shall not in any manner impair right to equitable relief "heretofore" existing would not permit parties aggrieved by order of Water and Power Resources Board to maintain action to enjoin action under such order, in view of fact that Act creating the Board provided for review of Board order—*Borough of Collegeville v Philadelphia Suburban Water Co*, supra

(3) In order to determine whether water company should be permitted to erect dam so as to divert water to its franchised territory, the Water and Power Resources Board was required to consider not only the particular stream involved, but the availability of other sources of supply in order that the conservation, development and equitable distribution of water in the public interests should be effected, and the question whether the water company could invade watershed where it had no franchise and divert water to its franchised territory was necessarily considered by the board in approving proposed dam which would result in such practice—*Borough of Collegeville v Philadelphia Suburban Water Co*, supra

20. Cal—*Rich v McClure*, 248 P 275, 78 Cal App 209  
67 C J p 1125 note 10

21. NJ—*Borough of Oakland v Board of Conservation and Development of New Jersey*, 122 A 311, 126 A 534, 98 NJ Law 806.  
67 C J. p 1125 note 11.

22. NJ—*Borough of Oakland v Board of Conservation and Development of New Jersey*, supra  
67 C J p 1126 note 12

#### Designation of representative

Statute providing that if one of the members of the Water Power and Control Commission and his alternate are both unavailable on any particular occasion, member may designate a suitable employee of his department to represent and act for him on that occasion, is not invalid, on ground that it is an unconstitutional delegation of legislative power—*Rockland County Anti-Reservoir Ass'n v Duryea*, 123 NYS 2d 445, 282 App Div 457

23. NJ—*Borough of Chatham v Board of Conservation and Development*, 152 A 11, 107 NJ Law 101  
67 C J p 1126 note 13.

#### Power of inquiry

(1) The Water Policy and Supply Council has the broad powers of inquiry—*Application of Plainfield-Union Water Co*, 102 A 2d 1, 14 NJ 296

(2) At hearing before Water Policy and Supply Council on application of water company for approval of its plans for obtaining additional water supply, council's engineer was properly called as a witness by chairman of council and interrogated concerning his findings by chairman and the legal advisor of Department of Conservation and Economic Development and such inquiry did not show bias or prejudice of council or a predetermination of the issues—*Application of Plainfield-Union Water Co*, supra

24. NJ—*Borough of Oakland v Board of Conservation and Development of New Jersey*, 122 A 311, 126 A 534, 98 NJ Law 806.  
67 C J. p 1126 note 14

25. NY—*Board of Sup'rs of Ontario County v Water Power and Control Commission*, Department of Conservation, 238 NYS. 66, 227

App Div 345, affirmed 175 NE 300, 255 NY 531  
67 C J p 1126 note 15.

#### Comparative costs

Where Water Power and Control Commission, on application of water company for permission to construct impounding reservoir on river, found, on basis of substantial evidence, that drilling of additional wells by company was not an acceptable method of supplying water requirements of company, because of speculative character and unreliability of such a source and detrimental effect which additional wells would have on existing wells of company and on underground water table of the whole area, it was not necessary for Commission to make findings as to the comparative cost of supplying water from proposed reservoir and cost of supplying it from additional wells—*Rockland County Anti-Reservoir Ass'n v Duryea*, 123 NYS 2d 445, 282 App Div 457

26. NJ—*Grobart v Passaic Val Water Commission*, 47 A 2d 600, 134 NJ Law 325, cause remanded on other grounds 51 A 2d 24, 135 NJ Law 190

27. NJ—*Grobart v. Passaic Val Water Commission*, supra.

28. NJ—*Borough of Oakland v Board of Conservation and Development*, 118 A 787, 98 NJ Law 99, reversed on other grounds 122 A 311, 126 A 534, 98 NJ Law 806  
67 C J p 1126 note 16

29. NJ—*Lehigh Valley R Co v. North Jersey Dist Water Supply Commission*, 118 A. 342, 94 NJ Eq 94

#### Limitations on authority

The State Water Power and Control Commission had no power to authorize city water service corporation to sink as many wells as it found necessary to obtain sufficient water for its customers' needs—*New York Water Service Corp v Water Power and Control Commission of Dept. of*

of certain water rights<sup>30</sup> Its proceedings must not be arbitrary<sup>31</sup> It should make proper findings,<sup>32</sup> and its findings must be warranted by the evidence<sup>33</sup>

**Consent of state board of health** Under some statutes it is necessary for a municipal corporation to obtain the approval of the state board of health of the source of supply before it may distribute water from such source for potable purposes,<sup>34</sup> and, under a statute providing that no source of water supply for domestic purposes shall be taken by a town without the consent of the state board of health, a

taking of land by the town is not a valid taking of a water supply, where such board did not consent to the taking.<sup>35</sup>

**Order requiring additional supply** An order requiring individuals who are operating a water supply system to obtain an additional supply has been regarded as fatally defective where it is not supported by a finding that such additional supply is reasonably necessary.<sup>36</sup>

**Review by courts.** Usually, at least, the action of the board or commission in respect of an application

Conservation of New York, 9 NYS 2d 299, 256 App Div 80, motion denied 11 NYS 2d 671, 256 App Div 1030, motion denied New York Water Service Corporation v Water Power and Control Commission of Dept of Conservation, 21 NE 2d 624, 280 NY 801, affirmed New York Water Service Corporation v Water Power and Control Commission, 22 NE 2d 484, 281 NY 656

#### Legislative proceeding

Proceeding before Water Policy and Supply Council for approval of plans for a new or additional water supply is not one of ordinary administration, conformable to standards governing duties of a purely executive character, but a legislative proceeding having special attributes under the statute, which carries with it fundamental procedural requirements—Application of Plainfield-Union Water Co., 94 A 2d 673, 11 NJ 382

#### Public hearing

The public hearing which Water Policy and Supply Council must hold on application for approval of plans for new or additional water supply is the hearing of evidence and argument, and the council, in the application of the statutory policy and rule of action, is bound in conscience to consider the evidence, and to be governed by that alone, and to reach their conclusion uninfluenced by extraneous considerations which might be permissible in the executive but not in the quasi judicial field of action—Application of Plainfield-Union Water Co., supra.

30. NJ—Lehigh Valley R Co v North Jersey Dist Water Supply Commission, 118 A. 342, 94 NJ Eq 94  
67 C J p 1126 note 18.

#### Assurance of damages

Where Water Power and Control Commission, in approving application by water company for construction of impounding reservoir on river, found that intercompany plan had been agreed on between company and its parent for production of funds,

and, under statutes, financing plan would have to be approved by New York State Public Service Commission and New Jersey Board of Public Utility Commissioners before it could be consummated, and Water Power and Control Commission forbade company to initiate proceedings for acquisition of any lands until it obtained such approval, adequate assurance was afforded to owners of lands to be taken of all legal damages—Rockland County Anti-Reservoir Ass'n v Duryea, 123 NYS 2d 445, 282 App Div 457

#### Findings as to necessity of additional rights

Before issuing permit for acquisition of water rights, Water and Power Resources Board must find that the water rights proposed to be acquired are reasonably necessary for present purposes and future needs of agency making application therefor and that the taking of the water or the exercise of water rights will not interfere with navigation, jeopardize public safety, or cause substantial injury to the Commonwealth—Borough of Collegeville v Philadelphia Suburban Water Co., 105 A 2d 722, 377 Pa 636

31. NJ—Application of Plainfield-Union Water Co., 94 A 2d 673, 11 NJ 382

32. NY—Petition of New York Water Service Corp., 27 NE 2d 221, 283 NY 23

**In proceeding before Water Policy and Supply Council,** for approval of plans for obtaining new or additional water supply, council is required to make findings of fact in order to confine council to evidence and law and to insure against arbitrary action and acts ultra vires, and to render effective the statutory judicial review to that end—Application of Plainfield-Union Water Co., 94 A.2d 673, 11 NJ 382

**The New York Water Service Corporation** was entitled to challenge Water Power and Control Commission's determination by which corporation's application for temporary au-

thorization to use underground water in Flatbush area of borough of Brooklyn for domestic and other purposes was denied, and corporation was entitled to findings by which it might know on what factual basis the commission's determination rested—Petition of New York Water Service Corp., 27 NE 2d 221, 283 NY 23

33. NJ—Application of Plainfield-Union Water Co., 94 A 2d 673, 11 NJ 382

NY—New York Water Service Corp v Water Power and Control Commission of Dept of Conservation of New York, 9 NYS 2d 318, 256 App Div 883, motion denied 11 NYS 2d 671, 256 App Div 1030, motion denied 21 NE 2d 624, 280 NY 801—New York Water Service Corp v Water Power and Control Commission of Dept of Conservation, 9 NYS 2d 302, 256 App Div 858, motion denied 11 NYS 2d 671, 256 App Div 1030, motion denied 21 NE 2d 624, 280 NY 801—New York Water Service Corp v Water Power and Control Commission of Dept of Conservation, 9 NYS 2d 301, 256 App Div 858, motion denied 11 NYS 2d 671, 256 App Div 1030, motion denied 21 NE 2d 624, 280 NY 801

#### Evidence held sufficient

NJ—Application of Plainfield-Union Water Co., 102 A 2d 1, 14 NJ 296

34. NJ—Wilson v Mayor and Council of Borough of Collingswood, 80 A. 335, 81 NJ Law 634

35. Mass—Dorr v Sharon, 84 NE 446, 198 Mass 240

#### Purpose of statute

Statute vesting in state board of health general supervision with reference to purity of sources of public water supplies was not intended to eliminate such factor from consideration of water policy commission—Jersey City v State Water Policy Commission, 191 A 456, 118 NJ Law 72

36. Vt—Trustees of Newport Center v Niles, 146 A. 71, 102 Vt 121  
67 C J p 1127 note 22.

to it for permission to obtain a water supply is reviewable by the courts<sup>37</sup>

**License fee** Statutory provision has sometimes been made for the imposition on municipalities, corporations, and private persons of a license fee for taking water in the future from a stream in excess of what they are taking when the statute is enacted, provided no payment shall be required until the taking is in excess of a specified amount daily per capita<sup>38</sup>

**37. N.J.—Jersey City v State Water Policy Commission**, 191 A 456, 118 N.J. Law 72

**N.Y.—In re Water Supply Application No 1270**, 16 N.Y.S.2d 804, 258 App Div 1003  
67 C.J. p 1127 note 23

**Decision on review**

(1) Fact findings by supreme court on certiorari to review orders of Water Power Commission authorizing construction of dam, that avoidance of land losses in adjoining marsh lands would offset evaporation loss caused by construction of dam, was conclusive on appeal—*Jersey City v State Water Policy Commission*, 191 A 456, 118 N.J. Law 72

(2) Where determination of Water Policy and Supply Council approving water company's plans for obtaining additional water supply was reversed by supreme court and cause remanded for further proceedings, council was bound by judgment of supreme court and was under a peremptory duty to carry it into execution according to the mandate—*Application of Plainfield-Union Water Co.*, 102 A.2d 1, 14 N.J. 296

(3) Where supreme court reversed determination of Water Policy and Supply Council approving water company's plans for obtaining additional water supply on ground that evidentiary data had been received and used by council without sanction of oath and opportunity for cross-examination and rebuttal in contravention of the essentials of procedural due process and because council's findings did not disclose the considerations underlying the action taken and cause was remanded for further proceedings consistent with opinion, council had jurisdiction to hold further public hearings and receive new evidence pertinent to the issues—*Application of Plainfield-Union Water Co.*, supra

(4) Where plans of water company for obtaining additional subsurface water supply to meet public needs, as conditioned and approved by Water Policy and Supply Council, were not arbitrary or unreasonable or an abuse of statutory power, appellate court could not substitute its judgment for the specialized judgment of council, thus encroaching on administrative

function of council—*Application of Plainfield-Union Water Co.*, supra

(5) In certiorari proceeding to review resolutions adopted by water policy commission fixing rates for diversion of water for the purpose of public water supply where there was no satisfactory proof of the population of one of the municipalities involved at the time stated in the petition or of a legal diversion by such municipality at such time and there was no indication where such proofs might be found, special allowance as to such municipality would not be ordered—*North Jersey Dist Water Supply Commission v State Water Policy Commission*, 29 A.2d 617, 129 N.J. Law 326

**Costs**

In certiorari proceeding to review two resolutions of Water Policy Commission, where resolutions were found invalid in one respect but valid in all other respects, no costs would be allowed to prosecutors—*North Jersey Dist Water Supply Commission v State Water Policy Commission*, supra

**38. In New Jersey**

(1) The statute fixing charges for surface waters diverted was intended to increase the assessment for excess diversion proportionately as stream flow was decreased by reason of the diversion, and based the proposed charge on the average daily flow for the driest month as shown by existing records—*Passaic Val Water Commission v Department of Conservation, Division of Water Policy and Supply*, 55 A.2d 225, 136 N.J. Law 247, affirmed 61 A.2d 240, 137 N.J. Law 613

(2) Under the statute the Department of Conservation in fixing charges is restricted to the formula set up in the statute, and, where existing records are available, the tax is to be computed on the average daily flow for the driest month as shown by existing records, and the department is not given the discretionary power to fix the method of assessment on the basis of the number of gallons mentioned in the statute—*Passaic Val Water Commission v Department of Conservation, Division of Water Policy and Supply*, supra

**§ 230. — Nature and Extent of Rights and Obligations**

The scope or extent of a right to take or use water for a municipal or public supply is generally measured by the provisions of the statute or the contract or conveyance creating the right, or by the general rules with respect to waters.

In general, the extent or scope of a right to take or use water for a municipal or public supply is

(3) Since the statute is silent as to evaporation losses, the Department of Conservation in fixing the charges is not authorized to make any provision for evaporation losses from any watersheds above the point of diversion—*Passaic Val Water Commission v Department of Conservation, Division of Water Policy and Supply*, supra

(4) The statute requiring person diverting waters of streams or lakes with outlets for the purpose of a public water supply to make annual payments to the state treasurer for such diversion is not discriminatory or unconstitutional in that statute does not provide a uniform rate for diversion of surface and subsurface waters—*North Jersey Dist Water Supply Commission v State Water Policy Commission*, 29 A.2d 617, 129 N.J. Law 326

(5) Under statute directing water policy commission to fix minimum rate, for excess diversion of surface water, of not less than one dollar nor more than ten dollars per million gallons, where diverters had complied with all statutory conditions entitling diverters to the minimum rate of one dollar, commission would be ordered to fix such rate notwithstanding payment of excessive charge by diverters without objection over a period of from six to ten years—*North Jersey Dist Water Supply Commission v State Water Policy Commission*, supra

(6) Action of water policy commission, in crediting to each diverter of surface water, where municipality received surface water from more than one diverter, a free allowance for excess diversion in proportion to the amount of surface water supplied, instead of granting to each diverter a full free allowance for each municipality served by such diverter, was valid as complying with the statute since it was a legal calculation of such free allowance on the municipality as a benefited unit and was not subject to duplication—*North Jersey Dist. Water Supply Commission v State Water Policy Commission*, supra

(7) Other decisions applying New Jersey statute see 67 C.J. p 1127 note 24 [a]

measured by the provisions of the statute<sup>39</sup> or the contract or conveyance<sup>40</sup> creating the right, or by general rules of law with respect to waters<sup>41</sup> It has been held that power to regulate the flow of a stream merely as a part of a plan to improve a municipal water supply, given to a municipal corporation by statute, is not ultra vires<sup>42</sup> In some jurisdictions at least, the status and rights of a water company using the waters of a stream at a certain place, which it has not condemned, as against another company which seeks to appropriate water above such place, are only those of a lower riparian owner<sup>43</sup>

The supplying of water by a municipality for

manufacturing purposes is not rendered a domestic use merely because the product of the manufacturer is for domestic purposes<sup>44</sup> In a case in which the right of a municipal corporation as riparian owner to take water to supply its inhabitants for domestic purposes has been recognized, the view was taken that it is the duty of such corporation to return to the stream the water not consumed<sup>45</sup> and that it may not use the waters to supply persons outside its boundaries<sup>46</sup> On the other hand, the right of a municipal corporation which has, under statutory authorization, duly acquired the right to take an unlimited quantity of water from a stream for the use of its people and its general needs to use such

**39. Mass—Inhabitants of Town of Holliston v Holliston Water Co.**, 27 NE2d 194, 306 Mass 17 67 C J p 1128 note 26

#### Sources of streams

(1) Under statute authorizing water company to take, hold, and convey the water, so far as may be necessary, of any spring or springs or of any stream or streams within town, the words "spring or springs" should be read in connection with the words "stream or streams," and the intent of the statute was to authorize the taking of the water of streams including their sources in the springs which fed them—*Inhabitants of Town of Holliston v Holliston Water Co.*, supra

(2) Where water company entered on dry land and sank an eighteen-inch pipe through which it pumped water from a stratum of water-bearing earth lying between two impervious layers of clay twenty and forty-four feet below the surface by means of an engine, the completed result was a "well," and land did not contain a "spring" or a "stream" within statute authorizing water company to take, hold, and convey water of any spring or springs or of any stream or streams within town—*Inhabitants of Town of Holliston v Holliston Water Co.*, supra

**40. Tex—Grogan v City of Brownwood**, Civ App, 214 SW 532 67 C J p 1128 note 27

#### Grant of right to withdraw underlying water

(1) Where water company conveyed to city certain land overlying water basin and granted city, as an appurtenance to such land conveyed, right to withdraw water underlying land retained by water company subject only to right of company and its successors to use underground water for domestic and irrigation purposes, water rights granted to city were "covenants running with the land," thus burdening each successive owner and, insofar as grant thereby dim-

inished vested property right inhering in ownership of retained land, it created an easement on retained land as the servient tenement appurtenant to conveyed land as the dominant tenement—*U S v 4105 Acres of Land in Pleasanton*, DCCal, 68 FSupp 279

(2) The grant by owner of overlying land to city of right to divert underground water had effect of subordinating, in favor of city, power of owner to appropriate such waters which it had by virtue of its ownership of overlying land giving it means of access to such underground supply and gave city an appropriate right invulnerable to destruction or damage by, and paramount to, acquisition of prior appropriate or prescriptive rights by anyone using underground water through wells on retained lands, which right was not dependent on continued user, but city did not acquire right to deny to others surplus waters for beneficial use while city was not so using such water—*U S v 4105 Acres of Land in Pleasanton*, supra

(3) The estate of city in condemned parcel of land, arising from priority of user of underlying waters, did not attach to any greater quantity of underground waters than was being actually diverted, where city did not own subterranean basin as a storage reservoir and waters therein did not belong to city by right of appropriation—*U S v 4105 Acres of Land in Pleasanton*, supra

#### Rights acquired by deed

The North Jersey District Water Supply Commission, by virtue of deed from Morris Canal and Banking Company, acting in the name of, and as trustee for, the state, obtained the right to divert 77 cubic feet of water a second or approximately 50 millions of gallons of water a day from the Wanaque River, even though deed was silent with reference to water rights, and transfer by Passaic Valley Water Commission to the North Jersey District Water Supply Com-

mission of the transferor's easement and right to divert the flow of the Wanaque River and Post Brook and the tributaries thereof, was tantamount to right of transferee to divert 226 millions of gallons of water a day—*Grobart v North Jersey Dist Water Supply Commission*, 53 A2d 796, 142 NJ Eq 60

#### Points of diversion

Owner of riparian lands was not entitled to enjoin North Jersey District Water Supply Commission from diverting waters from Wanaque River because of fact that Commission used different points of diversion than its predecessors under which it claimed, in absence of showing that riparian owner was injured by change of points of diversion—*Grobart v North Jersey Dist Water Supply Commission*, supra

#### Purpose of diversion

Fact that one of the North Jersey District Water Supply Commission's predecessors, from which the commission obtained part of its rights to divert water, did not divert the water for potable purposes did not prevent the commission from diverting the water for potable purposes—*Grobart v North Jersey Dist. Water Supply Commission*, supra

**41. Kan—Wallace v City of Winfield**, 149 P 693, 96 Kan 35 67 C J p 1128 note 28

**42. Conn—In re Board of Water Com'rs of City of Hartford**, 87 A 870, 87 Conn 193, Ann Cas 1915A 1105, affirmed 36 S Ct 552, 241 US 649, 60 L Ed 1221 67 C J p 1128 note 30

**43. Pa—Philipsburg Water Co v Citizens' Water Co.**, 41 A 979, 189 Pa 23

**44. Pa—Gallagher v Philadelphia**, 4 Pa Super 60 67 C J p 1128 note 32

**45. Ohio—Canton v. Shock**, 63 NE 600, 66 Ohio St 19, 58 LR A 637, 90 Am SR 557

**46. Ohio—Canton v. Shock**, supra.

water to supply persons within its boundaries has been recognized notwithstanding some of the water so supplied is carried by the consumer beyond the limits of the municipality<sup>47</sup>

*Adverse user and prescription.* In case of the acquisition of the right to use water for a water supply on the theory of a lost grant<sup>48</sup> or prescription,<sup>49</sup> it has been held or recognized that the use is limited substantially to such amount as was used for that purpose during the period of adverse use or prescription. A prescriptive right acquired by a municipal corporation may include certain incidental rights or privileges conducive to the enjoyment of the prescriptive right<sup>50</sup>

*Presumption as to corporate action to acquire rights.* Where the state has granted to a municipal corporation the right to use a stream as a source of supply, and the corporation has diverted waters, has erected waterworks and other facilities, and has furnished such waters to its inhabitants over a long period of time, there is a presumption of such corporate action as was necessary to appropriate as much of the flow of the stream as would supply not only the present but also future requirements of the population,<sup>51</sup> and the municipal corporation is not limited to the use merely of as much water as it has acquired by prescription<sup>52</sup> A presumption of corporate action has been given effect in respect of a water company to the extent of permitting the taking of water for immediate and reasonable future use<sup>53</sup>

*Appropriation.* Where a municipal corporation has acquired the right of first appropriation of a certain quantity of water from a stream it has, prima facie, the right to divert the waters of such stream in sufficient quantity to supply the needs of itself and of its inhabitants<sup>54</sup> According to some cases an appropriation for a municipal water supply need not be limited in amount to the present or immediate needs of the municipality,<sup>55</sup> and the right may be held intact by the temporary application of the surplus to other beneficial uses<sup>56</sup> The view has been taken, however, that until a municipality which has acquired by purchase appropriation rights in a certain stream for the purpose ultimately of increasing its water supply makes use of the rights for the purpose of a water supply it holds such rights subject to the right of a subsequent appropriator to use the water<sup>57</sup> It has been held that a municipality which uses water, acquired by appropriation, in its sewage system must, after the water is purified by settling, return the purified water to the stream<sup>58</sup> and it has no right to sell such purified water to a third person.<sup>59</sup>

*License.* According to some cases, an oral agreement by a landowner to allow a municipality to connect its waterworks with an artesian well on his land for a period of time not specified, on condition that the city shall furnish him with water free of charge, which offer is accepted and acted on for more than twenty years, in view of the statute of frauds creates a mere license<sup>60</sup> revocable at the will of the landowner<sup>61</sup> and his grantee,<sup>62</sup> but on rev-

47. Pa.—Fahey v Kennett Square Borough, 42 Pa Super 460  
67 C J p 1128 note 36

48. NC—Geer v Durham Water Co, 37 SE 474, 127 NC 349

49. Cal—City of San Bernardino v City of Riverside, 198 P 784, 186 Cal 7  
67 C J p 1128 note 38

50. Cal—City of Gilroy v Kell, 228 P 400, 67 Cal App 734  
67 C J p 1129 note 39

51. Pa—City of Philadelphia v Philadelphia Suburban Water Co, 163 A 297, 309 Pa 130  
67 C J p 1129 note 40

52. Pa—City of Philadelphia v Philadelphia Suburban Water Co, supra.

53. Pa—Palmer Water Co v Lehigh Water Supply Co, 124 A 747, 280 Pa 492

54. Mont—Carlson v City of Helena, 114 P 110, 43 Mont 1

55. US—City of Pocatello v Murray, D C Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628.  
67 C.J. p 1129 note 45.

#### Future needs

(1) The statute governing leasing of water by municipal appropriator recognizes the difference between use of water for municipal purposes and use of water for irrigating, and does not attempt to change status of individual who has applied water to beneficial use, or attempt to grant right to any water held by others, but does recognize practical problems related to municipal water systems and city's right to appropriate sufficient water not only for immediate use, but for a reasonable time in the future—City and County of Denver v Sheriff, 96 P 2d 836, 105 Colo 193

(2) City having prior appropriation for municipal use of all waters of designated watershed prior to date of distinction between right of appropriation of water directly from stream and for appropriation from reservoirs was authorized to impound waters appropriated in reservoir for use in emergency as against claim of subsequent appropriator that water was not used for beneficial purpose—Van Tassel Real Estate & Lave

Stock Co v City of Cheyenne, 54 P 2d 906, 49 Wyo 333, certiorari denied 57 S Ct 38, 299 US 574, 81 L Ed 423

56. US—City of Pocatello v Murray, D C Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628  
Wyo—Holt v City of Cheyenne, 137 P 876, 22 Wyo 212  
67 C J p 1129 note 46

57. Or—Sherrard v City of Baker, 125 P 826, 63 Or 28  
67 C J p 1129 note 47

58. Colo—Pulaski Irr Ditch Co v City of Trinidad, 203 P 681, 70 Colo 565

59. Colo—Pulaski Irr Ditch Co v City of Trinidad, supra.

60. Minn—City of Hutchinson v Wegner, 195 NW 535, 157 Minn 41.

61. Minn—City of Hutchinson v Wegner, supra.

62. Minn—City of Hutchinson v Wegner, supra.

ocation a reasonable time to secure a supply of water from other sources should be given before the landowner may shut off the flow of water from his well to the waterworks <sup>63</sup>

**Tributary stream** A municipal corporation's right to sufficient water from a stream to meet its present and reasonable future needs has been held to include the right to an undiminished flow of the waters of a tributary of the stream to the extent necessary for such needs,<sup>64</sup> but the corporation is not entitled successfully to complain of a taking of water from such tributary by one junior in right, which does not diminish the supply necessary for its needs.<sup>65</sup>

**Lease of water right** The authority of a city to lease a water right to one who is to construct and operate a water system for municipal purposes has been recognized <sup>66</sup>

**Imposition of obligations** Statutes permitting a municipality to draw a water supply from a particular source sometimes impose obligations on the municipality in respect of maintenance of flow of the

streams involved <sup>67</sup>

### § 231. Pueblo Rights

A municipal corporation, as successor to a Spanish or Mexican pueblo organized under the laws, institutions, and regulations of Spain or Mexico, succeeds to the prior and paramount right of such pueblo to the use of the waters on or under its allotted lands.

A Spanish or Mexican pueblo organized in California under the laws, institutions, and regulations of Spain or Mexico acquired a prior and paramount right to the use of the waters of rivers or streams passing through and over or under the surface of their allotted lands as far as was necessary for the pueblo or its inhabitants,<sup>68</sup> and had the right to distribute to the common lands and to the inhabitants of the pueblo the waters of a nonnavigable river on which the pueblo was situated <sup>69</sup> A municipal corporation which is the successor to such a pueblo succeeds to its rights<sup>70</sup> and holds the water rights of its predecessor in trust for its inhabitants<sup>71</sup> The rights in question are governmental in character in respect both of the pueblo and its successor municipality,<sup>72</sup> superior to those of a

63. Minn.—City of Hutchinson v Wegner, supra

64. Pa.—City of Philadelphia v Philadelphia Suburban Water Co, 163 A 297, 309 Pa 130  
67 C J p 1129 note 55

65. Pa.—City of Philadelphia v Philadelphia Suburban Water Co, supra

66. Utah—Ogden City v Bear Lake, etc., Waterworks, etc., Co, 76 P 1069, 28 Utah 25  
67 C J p 1130 note 58

67. Mass—Nemasket Mills v City of Taunton, 44 NE 609, 166 Mass 540  
67 C J p 1129 note 59

68. Cal.—City of San Diego v Cuyamaca Water Co, 287 P 496, 209 Cal 15, certiorari denied La Mesa Lemon Grove & Spring Valley Irrigation Dist v City of San Diego, 51 S Ct 36, 282 US 863, 75 L Ed 763  
67 C J p 1130 note 60

69. Cal.—Vernon Irr Dist v Los Angeles, 39 P 762, 106 Cal 237.  
67 C J p 1130 note 61

70. Cal.—City of Los Angeles v City of Glendale, 142 P 2d 289, 23 Cal 2d 68  
67 C J p 1130 note 62

#### City of Los Angeles

(1) The pueblo right of the City of Los Angeles to take such water as needed from the Los Angeles river includes the right to take from the river to the extent of the needs of the city when the flow is at its peak as well as at any other time—City

of Los Angeles v City of Glendale, supra—67 C J p 1130 note 62 [a] (1)

(2) Where City of Los Angeles imported water by aqueduct and made water available to farmers in San Fernando Valley which contains a natural subterranean reservoir with knowledge that certain percentage of water used by farmers would seep into reservoir and be reclaimed at city's diversion works at lower end of valley, in determining city's prior right to water after use by farmers, it was immaterial whether farmers acquired their right to use water through transfer of land that included a water right or by other means or that city's contract indicated a sale of water to farmers—City of Los Angeles v City of Glendale, supra.

#### Waters included

(1) Generally—City of Los Angeles v City of Glendale, supra—67 C J p 1130 note 62 [c]

(2) Waters imported into watershed—City of Los Angeles v City of Glendale, supra.

#### Abandonment

(1) One who brings water into a watershed may retain a prior right to the water after permitting others to use the water for irrigation—City of Los Angeles v City of Glendale, supra

(2) Where City of Los Angeles made water, which had been transported to San Fernando Valley by aqueduct, available to farmers of valley for irrigation with knowledge that certain percentage of water would sink into natural underground

reservoir and flow to city's diversion works where it would be recovered, city did not abandon water so as to permit its appropriation by others—City of Los Angeles v City of Glendale, supra

#### Rights of other users

Where cities of Glendale and Burbank had at no time taken from waters in subterranean reservoir in San Fernando Valley forming part of Los Angeles river system more than their rightful portion under their right to take all waters of Los Angeles river in valley not needed by City of Los Angeles they acquired no prescriptive right to Owens Valley waters transported by City of Los Angeles to San Fernando Valley reservoir by aqueduct, or to take waters from Los Angeles river which City of Los Angeles might thereafter require—City of Los Angeles v City of Glendale, supra

71. Cal.—Lux v Haggin, 10 P 674, 69 Cal 255

72. Cal.—City of San Diego v Cuyamaca Water Co, 287 P 475, 209 Cal 105

The pueblo right of the City of Los Angeles to take waters from the Los Angeles river being measured by the needs of the city to insure a water supply for an expanding city with minimum of waste by leaving surplus water accessible to others until city needs it, the right is not violative of constitutional provisions against waste of water and limiting right to waters to amount reasonably necessary for beneficial use served—City

riparian owner or appropriator,<sup>73</sup> and such rights, as public rights, cannot be lost, or the public trust as to the administration and exercise of such rights cannot be destroyed, by adverse possession,<sup>74</sup> by laches,<sup>75</sup> by nonuser,<sup>76</sup> or by other negligence<sup>77</sup> on the part of the agent of the municipality who may from time to time be invested with the duty of protection and administration. In a suit by a municipal corporation, which has succeeded to the rights of a pueblo, to quiet title to its asserted paramount right in all the waters of a stream and to enjoin diversion, it is not necessary that its complaint should contain an allegation that any particular quantity of the waters of the stream is necessary for the use of the municipal corporation<sup>78</sup> or should set forth the boundaries and locations of irrigable land involved in the suit,<sup>79</sup> and the court will not determine the quantity of water to which the municipality may be entitled.<sup>80</sup> Where it is decided that plaintiff is entitled to the entire surface flow of the stream for municipal and domestic purposes, it is not necessary for the court, in a decree restraining defendants from diverting water from the stream at any time, to define the amount of water which would be required by plaintiff during a certain part of the year.<sup>81</sup> Where, in such suit, plain-

tiff seeks to quiet title as against defendants, the court being able fully to determine the controversy as between the parties litigant, others similarly situated to those who are defendants in the action are not necessary parties.<sup>82</sup> Pueblo rights may not be made the basis of an objection to any use of water which does not diminish such rights.<sup>83</sup>

In *New Mexico* the doctrine or rule as to pueblo rights does not apply where the land in the community or settlement which claims pueblo rights was obtained under a townsite grant from the United States.<sup>84</sup>

## § 232. Pollution of, and Other Injuries to, Water Supply

- a In general
- b Remedies

### a. In General

The duty of protecting its water supply from pollution rests primarily on the municipality or water company which controls the water.

The duty of protecting its water supply from pollution rests primarily on the municipality<sup>85</sup> or water company<sup>86</sup> which controls the water. In general,

of *Los Angeles v City of Glendale*, 142 P 2d 289, 23 Cal 2d 68

73. Cal—City of Los Angeles v City of Glendale, *supra*

74. Cal—City of San Diego v Cuyamaca Water Co., 287 P 475, 209 Cal 105

67 C J p 1130 note 65

75. Cal—City of Los Angeles v City of Glendale, 142 P 2d 289, 23 Cal 2d 68—City of San Diego v Cuyamaca Water Co., 287 P 475, 209 Cal 105

67 C J p 1130 note 66

76. Cal—City of Los Angeles v City of Glendale, 142 P 2d 289, 23 Cal 2d 68

**Provision of Water Commission Act** that failure to use all or part of water claimed for purpose for which it was appropriated or adjudicated for period of three years shall effect a reversion of water to public had no application to rights of City of Los Angeles in waters of Los Angeles river since pueblo rights to which city succeeded are not based on appropriation or adjudication—City of Los Angeles v City of Glendale, *supra*

77. Cal—City of San Diego v Cuyamaca Water Co., 287 P 475, 209 Cal 105

78. Cal—City of Los Angeles v Hunter, 105 P 755, 156 Cal 603

79. Cal—City of Los Angeles v Hunter, *supra*.

80. Cal—City of Los Angeles v City of Glendale, 142 P 2d 289, 23 Cal 2d 68

### Effect of judgment

(1) Where judgment stated without qualification that City of Los Angeles was owner in fee simple of a paramount right to surface and subsurface waters of Los Angeles river, provision therein allowing pumping of water to satisfy needs of unincorporated village of Burbank was not a determination that city of Burbank could meet its needs for water from San Fernando Valley basin holding subsurface waters of Los Angeles river paramount to rights of Los Angeles—City of Los Angeles v City of Glendale, *supra*

(2) Where City of Glendale was enjoined from pumping water from San Fernando Valley subterranean reservoir only while there was not a surplus of water at diversion works maintained by City of Los Angeles at lower end of valley acquiescence by Los Angeles in diversion by City of Glendale and City of Burbank while there was a surplus of water at diversion works was a mere compliance with decree establishing rights of City of Los Angeles against Glendale, and the reasonable supposition that in any future litigation the City of Burbank would be awarded same right to pump on its lands that Glendale had, and did not create an estoppel against Los Angeles or pre-

scriptive rights in favor of Glendale or Burbank—City of Los Angeles v City of Glendale, *supra*

**The retention of jurisdiction to meet future problems** is an appropriate exercise of equitable jurisdiction in litigation over water rights, particularly when adjustment of substantial public interests is involved, hence such retention of jurisdiction is not the granting of relief in excess of that available in an action for declaratory relief—City of Los Angeles v City of Glendale, *supra*

81. Cal—City of Los Angeles v Hunter, 105 P 755, 156 Cal 603

82. Cal—City of Los Angeles v Hunter, *supra*

83. Cal—City of Los Angeles v City of Glendale, 142 P 2d 289, 23 Cal 2d 68

84. NM—New Mexico Products Co v New Mexico Power Co., 77 P 2d 634, 42 NM 311—State v Tularosa Community Ditch, 143 P 207, 19 NM 352

85. Idaho—Bellevue v Daly, 94 P 1036, 14 Idaho 545, 125 Am SR 179, 15 L R A, NS, 992, 14 Ann Cas 1136

67 C J p 1131 note 74

86. US—Mann v Des Moines Water Co., Iowa, 202 F 862, 121 CCA. 220

67 C J p 1131 note 75.



there is no property right to pollute a stream which will prevent the taking of steps to protect the stream from pollution,<sup>87</sup> and the owner of land may not so use his property as to endanger the source of a municipal water supply<sup>88</sup>

The legislature may prevent the pollution of any reservoir or stream which supplies water for public use<sup>89</sup> Statutes and ordinances looking to the protection of public and municipal water supply have frequently been enacted,<sup>90</sup> as, for example, statutes conferring on municipal corporations authority to protect water used for domestic purposes, and the validity of such statutes or ordinances has been recognized or upheld<sup>91</sup> Thus, statutes, ordinances, and regulations prohibiting, under penalties, injury to,<sup>92</sup> or the pollution of,<sup>93</sup> streams or other sources from which communities draw their water supply are usually regarded as valid exercises of the police power Some statutes designed for the protection of the sources of a public or municipal water supply are aimed at pollution at the point of discharge of the polluting matter into the water<sup>94</sup> and condemn not only the actual discharge of polluting matter into the water<sup>95</sup> but also the threat and menace of such discharge resulting from depositing polluting matter near the banks<sup>96</sup>

*Public use* While the water must be used for a public supply, in order that protection may be given

under the rules or principles here discussed,<sup>97</sup> the use of the water of a stream by a water company to supply the public may be such a public use as will entitle such company to the protection of the stream from pollution even though there was no formal entry by it after a settlement of a proceeding to condemn the waters of a stream,<sup>98</sup> or even though such water company obtains its water from another company which had by purchase acquired the rights of lower riparian owners and which does not have the power of eminent domain<sup>99</sup>

*Purification and filtration plant* While the right to compel a water company to install a filtration plant has been denied where there is no contract obligation to do so, and it is not responsible for the impurity of the water,<sup>1</sup> where a contract requires that the water shall be filtered the fact that a filter put in by a water company was adequate when its works were constructed does not necessarily excuse it from putting in a new one after the old has become inadequate by reason of the municipal corporation's growth and the consequent increase in the demand for water<sup>2</sup> An irrigation company which has no right to discharge water from its canal into a stream used for a water supply may not insist that the water company which uses such stream shall enlarge its filtration plant to purify water improperly discharged from the canal into the stream<sup>3</sup> A resolu-

87 Pa.—Pennsylvania R Co v Sagamore Coal Co, 126 A 386, 281 Pa 233, 39 A L R 882, certiorari denied 45 S Ct 228, 267 US 592, 69 L Ed 803—Commonwealth v Emmers, 70 A 762, 221 Pa 298

#### Privilege

The privilege of discharging obnoxious sewerage into the waters of the state is a matter of public concern, and it is within the police power of the state to declare that this privilege is one which should not be exercised by private individuals, but only by the state or its governmental agents, the municipalities, acting under the direct control of the state—Dixon v Sheffer, 46 Pa Super Ct 452

*The right of a municipality to protect its water source from pollution* may be invoked as freely against people with superior rights on a stream as against those who have no rights—Adams v Portage Irr, Reservoir & Power Co, 72 P 2d 648, 95 Utah 1, rehearing denied 81 P 2d 368, 95 Utah 20

88 Ky—Daugherty v City of Lexington, 249 S W 2d 755

89 Pa.—Commonwealth v. Emmers, 70 A 762, 221 Pa 298, 12 C J p 915 note 78.

90 Tex.—Newton v City of Groesbeck, Civ App, 299 S W 518, 67 C J p 1131 note 77

#### Statutes regulating procedure before water commission

Mich.—L A Darling Co v Water Resources Commission, 67 NW 2d 890, 341 Mich 654

91. NC—Town of Shelby v Cleveland Mill & Power Co, 71 SE 218, 155 NC 196, 35 L R A, NS, 488, 67 C J p 1131 note 79

92. NC—State v Perley, 92 SE 504, 173 NC 783, affirmed 39 S Ct 357, 249 US 510, 63 L Ed 735, 67 C J p 1132 note 80

93. Mich.—L A Darling Co v Water Resources Commission, 67 NW 2d 890, 341 Mich 654, 67 C J p 1132 note 81

*Health department's rules and regulations* pertaining to streams which are tributary to or discharged into parts of city's water supply are lawful health enactments, and it is for the department of health, rather than the court, to determine whether they are necessary and when they may be abandoned, and they would not be abandoned on failure of city to institute condemnation proceedings within a reasonable time—Purdy v City of Newburgh, 113 N Y S 2d 376

94. NJ—State v Wheeler, 44 NJ Law 88—Department of Health of New Jersey v Chemical Co of America, 107 A 164, 90 NJ Eq 425, 67 C J p 1132 note 82

95 NJ—Department of Health of New Jersey v Chemical Co of America, supra

96. NJ—Department of Health of New Jersey v Chemical Co of America, supra, 67 C J p 1133 note 84

97. Pa.—Commonwealth v Yost, 46 A 845, 197 Pa 171, 67 C J p 1132 note 85

98. Pa.—Pennsylvania R Co v Sagamore Coal Co, 126 A 386, 281 Pa 233, 39 A L R 882, certiorari denied 45 S Ct 228, 267 US 592, 69 L Ed 803

99. Pa.—Pennsylvania R Co v Sagamore Coal Co, supra

1. Ky—City of Georgetown v Georgetown Water, Gas, Electric & Power Co, 121 S W 428, 134 Ky 608, 24 L R A, NS, 303, 67 C J p 1132 note 88

2. Iowa—Burlington v Burlington Water Co, 53 NW. 246, 86 Iowa 266

3. Mont—Missoula Public Service



tion of a municipal council providing for drawing plans for erecting a filtration plant for use in connection with a water system already established and in operation is not a step toward the construction and operation of a public utility within the meaning of constitutional provisions prescribing certain procedure and requirements<sup>4</sup>

*Prescriptive right to pollute water* There is authority for the view that no right to befoul a stream supplying water to a municipality can be acquired by prescription after it has been devoted to a public use<sup>5</sup> In any event, the existence of the right by prescription to render running water unfit for drinking and domestic purposes requires the strictest proof<sup>6</sup> Such an alleged right must be measured by the enjoyment and does not permit pollution to an extent greater than that enjoyed when the period of prescription began,<sup>7</sup> and occasional bathing for an extended period does not authorize the establishment of a bath house and a public pool for commercial purposes with resultant pollution of the source of a municipal water supply.<sup>8</sup>

*Review of orders looking to protection of waters* There is authority for the view that no appeal to the courts lies from orders of a state board establishing general rules and regulations looking to the prevention of the pollution of the public waters of the state, which are made pursuant to statute and are quasi-legislative in character,<sup>9</sup> notwithstanding the statute creating the board and authorizing the making of rules and regulations contains a provision that

any person aggrieved by any order of the board may appeal to the supreme court for a reversal thereof on the ground that it is unlawful or unreasonable<sup>10</sup> A like rule denying an appeal to a jury from general rules and regulations for the protection of a water supply, made by the state board of health, has been recognized notwithstanding the statutory provision permitting an appeal to a jury by any person aggrieved by an order passed under the act defining the authority of the state board of health.<sup>11</sup>

*Criminal or penal proceedings.* Under certain circumstances a criminal or penal proceeding will lie for wrongful pollution of waters from which a public supply is taken,<sup>12</sup> but the liability of an upper riparian proprietor to criminal prosecution for a reasonable use of the water has been denied<sup>13</sup>

#### b. Remedies

A municipality or water company may protect its waters from pollution by injunction, and may recover damages where permanent injury has resulted from pollution.

The right of a municipality<sup>14</sup> or water company<sup>15</sup> engaged in furnishing a supply of water to the inhabitants of a municipality to maintain a bill for an injunction against acts which tend to impair the natural purity of the water and render it unfit for use has been recognized Some statutes provide for a resort to the courts to protect the purity of a public water supply,<sup>16</sup> and some make specific provision for the remedy by injunction<sup>17</sup> An injunction against an upper riparian owner has been

Co v Bitter Root Irr Dist, 257 P 1038, 80 Mont 64

4 Ohio—Shryock v City of Zanesville, 110 NE 937, 92 Ohio St 375

5. NC—Town of Shelby v Cleveland Mill & Power Co, 71 SE 218, 155 NC 196, 35 LRA, NS, 488 67 CJ p 1133 note 93

6 Pa—McCallum v Germantown Water Co, 54 Pa 40

7. Pa—McCallum v Germantown Water Co, supra

8. Tex—Newton v City of Groesbeck, Civ App, 299 SW 518

9. RI—Standard Oil Co of New York v Board of Purification of Waters, 111 A 887, 43 RI 336 67 CJ p 1133 note 98

10. RI—Standard Oil Co of New York v. Board of Purification of Waters, supra

11. Mass—Nelson v State Board of Health, 71 NE 693, 186 Mass 330

12. Vt—State v Quattropani, 133 A 352, 99 Vt 360 67 CJ p 1133 note 3

13. Mich—People v. Hulbert, 91 N

W 211, 131 Mich 156, 100 Am SR 588, 64 LRA 265

14 NY—Village of Monroe v Benjamin, 181 NE 581, 259 NY 305 Pa—West Penn Water Co v Sunnyhill Coal Co, 93 Pittsb Leg J 541 67 CJ p 1133 note 5

#### Mayor

(1) In suit by mayor of city to enjoin defendant from polluting waters of stream from which city obtained its water supply, mayor was required to show that some statute had vested him with authority to vindicate the right of the public, otherwise his right to maintain the suit was no greater than that of any other private individual—Mayor of Cambridge v Dean, 14 NE2d 163, 300 Mass 174

(2) A mayor of Cambridge had no standing without the consent of the board of health of Lincoln to restrain the maintenance of a piggery which was allegedly polluting the city's water supply, and which was located partly in Waltham and partly in Lincoln—Mayor of Cambridge v Dean, supra

#### Bill held insufficient

Mass—Mayor of Cambridge v Dean, supra

15. Mont—Missoula Public Service Co v Bitter Root Irr Dist, 257 P 1038, 80 Mont 64 67 CJ p 1133 note 6.

#### Strip mining

A water service company was not entitled to injunction against further strip mining of coal on certain lands on ground of imminent danger of great and irreparable damage to company's water supply by contamination, in absence of evidence of proportion of water from branch of stream in danger of contamination to total intake of plaintiff's reservoir and amount or intensity of present and future contamination of such stream—Punxsutawney Water Service Co v Saricks, 46 A2d 673, 354 Pa. 106

16. Conn—Harvey Realty Co v Borough of Wallingford, 150 A. 60, 111 Conn 352 67 CJ p 1134 note 7

17. NJ—Department of Health of New Jersey v. Chemical Co of America, 107 A 164, 90 NJ Eq 425. 67 CJ p 1134 note 8.

denied, however, on the ground that such owner's use of his property was not unreasonable,<sup>18</sup> and on the ground that, regardless of the acts of defendant, plaintiff company is not obtaining and cannot obtain a supply of pure and wholesome water from the source then used<sup>19</sup>

In order to permit the grant of an injunction because of alleged violation of a statute, the facts must constitute a violation<sup>20</sup> While the right of a municipal corporation to protect by injunction its right to a limited use and control of a public highway outside of its limits, duly acquired in order to protect from pollution its water supply, has been recognized,<sup>21</sup> in the absence of such acquisition it is improper for a court to grant a permanent injunction sought by such corporation restraining the use of such a highway by the public<sup>22</sup> The right of a municipal corporation to maintain a suit for specific performance of a valid and enforceable contract with a water company requiring the filtering of water has been recognized<sup>23</sup>

*Action for damages* The right of a municipal

corporation to maintain an action for damages resulting from the permanent destruction of its water supply by pollution of the source has been recognized<sup>24</sup> In such action ordinary rules for measuring damages for permanent injury to realty by the pollution of a stream do not apply,<sup>25</sup> and it has been held that plaintiff is entitled to recover the cost of acquiring and installing another adequate and enduring supply of water of a similar quality, quantity, and dependability as that which was destroyed<sup>26</sup> The right to recover for damage to the quality of the water depends on whether plaintiff had the right to use the water as a source of supply for public distribution<sup>27</sup> In an action by an individual who has been furnishing water through pipes to certain consumers against a municipal corporation for damages based on defendant's pollution of the source of plaintiff's supply, evidence of prior pollution of the water by surface drainage is admissible, not to justify defendant's acts,<sup>28</sup> but to show that the water was so contaminated by causes other than the acts of defendant that such acts did not cause injury to plaintiff<sup>29</sup>

18 Md—Helfrich v Catonsville Water Co, 22 A 72, 74 Md 269, 13 L R A 117, 28 Am SR 245  
67 C J p 1134 note 10

19 Kan—Topeka Water Supply Co v Potwin, 23 P 578, 43 Kan 404

20 Mass—Selectmen of Rockport v Elwell, 106 NE 994, 219 Mass 287  
67 C J p 1134 note 12

21 Minn—Board of Water Com'rs v Belland, 129 NW 389, 113 Minn 292

22 Minn—Board of Water Com'rs v Belland, supra  
67 C J p 1134 note 14

23 Iowa—Burlington v Burlington Water Co, 53 NW 246, 86 Iowa 266

24 Okl—Roxana Petroleum Corporation v City of Pawnee, 7 P 2d 663, 155 Okl 141  
67 C J p 1134 note 16.

#### Permanent injury

Injury arising out of pollution of municipal water supply is permanent, with respect to right of municipality to recover damages therefor when cause of pollution could not be abated by reasonable expenditure, and introduction into sands of earth of salt water which seeps into source of municipality's water supply constitutes permanent injury to such water supply—Arkansas Fuel Oil Co v City of Blackwell, CCA Okl, 87 F 2d 50

#### Evidence held sufficient

(1) Evidence that oil company's

mining operations produced salt water which seeped from ponds in which it was stored into river above municipal waterworks warranted municipality's recovery of damages for destruction of its water supply—Arkansas Fuel Oil Co v City of Blackwell, supra

(2) Other evidence see 67 C J p 1134 note 16 [c]

25 Okl—Roxana Petroleum Corporation v City of Pawnee, 7 P 2d 663, 155 Okl 141

26 Okl—Arkansas Fuel Oil Co v City of Blackwell, CCA Okl, 87 F 2d 50  
67 C J p 1134 note 19

#### Duty of tort-feasor

(1) While Oklahoma municipality cannot arbitrarily build new water plant at extreme distance from municipality and charge cost thereof to tort-feasor which destroyed its former water supply, responsibility of so locating new plant that uninterrupted supply of wholesome water would be available to its citizens was vested with municipal authorities and not with tort-feasor—Arkansas Fuel Oil Co v City of Blackwell, supra

(2) Tort-feasor sued for damages for pollution which destroyed municipality's water supply has heavy burden of clearly and convincingly proving that municipal authorities acted arbitrarily in locating new water plant—Arkansas Fuel Oil Co v City of Blackwell, supra

27 Me—Kennebunk, Kennebunkport

and Wells Water Dist v Maine Turnpike Authority, 84 A 2d 433, 147 Me 149—Kennebunk, Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 71 A 2d 520, 145 Me 35

#### Acquisition of right

If control of watershed of a stream for purpose of protecting water supply is desired by a water company or water district, it should be acquired by purchase or, if the power is conferred on it, by exercise of the right of eminent domain, and it cannot, as against upper proprietors, be acquired by a prescriptive use of the water for such purpose—Kennebunk, Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 84 A 2d 433, 147 Me 149

#### Evidence of riparian ownership

Where the sole claim for damages set forth in declaration was based on water district's right as a quasi-municipal corporation to distribute water from named brook and an invasion of such right by turnpike authority, evidence that district owned riparian land on brook could be considered only for the purpose of determining whether such ownership conferred on district the right to use waters of brook as a source of supply for public distribution—Kennebunk Kennebunkport and Wells Water Dist v Maine Turnpike Authority, 71 A 2d 520, 145 Me 35

28 Ky—Kevil v City of Princeton, 118 SW 363

29 Ky—Kevil v. City of Princeton, supra.

*Remedies of persons affected by acts of municipality* While a municipal corporation may be enjoined from improperly interfering with the right of the owner of property to make reasonable use of it, in making a purported attempt to protect the municipal water supply,<sup>30</sup> the decree granting relief should be limited to restraining the municipal corporation from interfering with the recognized rights of such owner while exercised in a reasonable manner.<sup>31</sup> An injunction against the enforcement of a valid and applicable municipal ordinance looking to the protection of a water supply is properly refused.<sup>32</sup> Where a statute provides that when the state board of health, for the protection of a water supply from contamination, makes orders or regulations requiring the construction of a sewerage system, the municipality or corporation benefited shall pay all damages for injury to any manufacturing or industrial enterprise occasioned by the enforcement of the order or regulation of the board, a person may not recover damages under such statute in the absence of an order or regulation requiring the construction of any sewerage system affecting the property of such person for the benefit of the water supply of defendant municipality.<sup>33</sup>

### § 233. Proceedings to Protect Rights

An action at law, or a suit for injunction, may be maintained by a person or corporation owning water rights and engaged in supplying a municipality and its inhabitants to prevent unlawful diversion or other interference with its rights

An individual or corporation,<sup>34</sup> a municipal cor-

poration,<sup>35</sup> or a water district<sup>36</sup> owning water rights and engaged in furnishing a supply to a municipality and its inhabitants may maintain actions at law or suits for injunction against persons who unlawfully divert water or otherwise interfere with its rights. In order, however, that an injunction may be granted to prevent defendant from taking water from a stream, it must appear that plaintiff has duly acquired the right to use water from such stream,<sup>37</sup> and it must be shown that plaintiff's right is superior to that of defendant.<sup>38</sup> The right of the state through the attorney general to maintain a suit to prevent the unlawful diversion of waters of a stream has been recognized.<sup>39</sup> Thus, where the legislature has enacted a valid statute forbidding the diversion of water for a stated purpose,<sup>40</sup> as, for example, through pipes, conduits, and the like, into another state,<sup>41</sup> the unlawful diversion for that purpose may be restrained at the instance of the attorney-general, but a borough does not stand in such relation to the public or to the potable water of the state as to enable it to sue on behalf of the public to restrain the conveyance by pipe line of such water out of the state.<sup>42</sup> In a suit by the attorney-general to prevent a water company from diverting water from a stream, the court has declined to pass on the questions as to whether various municipalities had the power to appropriate water for a water supply,<sup>43</sup> and as to the validity of certain contracts by which various municipalities sought to obtain a supply from other parties to the contracts,<sup>44</sup> where the municipalities were not parties to the suit

30. NY—Heaton v Chester, 111 N YS 725, 59 Misc 558, affirmed 121 NYS 1135, 137 App Div 892, modified on other grounds 95 NE 768, 202 NY 603  
67 C J p 1135 note 22

**A town's exercise of discretion** in erecting fence around land in which it had easement for water supply purposes, as required to protect such supply from livestock of persons to whom grantors of easement subsequently conveyed land subject to easement, was proper use reasonably incident to easement, so that such persons were not entitled to mandatory injunction directing town to remove fence—Town of Fort Cobb v Robinson, 143 P 2d 122, 193 Okl 660

#### Misuser of easement

Grantees in deed conveying premises subject to easement, which grantors previously granted town for water supply purposes, had right to maintain action against town to enjoin, or recover damages for, alleged misuser of easement by erecting fence around premises—Town of Fort Cobb v Robinson, supra

31. NY—Heaton v Village of Chester, 95 NE 768, 202 NY 603—George v Village of Chester, 95 NE 767, 202 NY 398

32. Wash—Brown v City of Cle Elum, 255 P 961, 143 Wash 606

33. NY—Merritt v New York, 47 NYS 506, 21 App Div 165, appeal dismissed 59 NE 706, 166 NY 591

34. Pa.—Scranton Gas & Water Co v Delaware, L & W R Co, 88 A 24, 240 Pa 604, 47 LRA, NS, 710  
67 C J p 1135 note 27

35. US—Arkansas-Missouri Power Corp v City of Rector, Ark, CC A Ark, 164 F 2d 938  
67 C J p 1135 note 28

36. Cal—Coachella Valley County Water Dist v Stevens, 274 P 538, 206 Cal 400  
67 C J p 1136 note 29

37. Tex—Miller v City of Ballinger, Civ App, 204 S W 1173  
67 C J p 1136 note 30

38. Pa.—Philadelphia v Spring Garden, 7 Pa 348

Vt—Barre Water Co v Carnes, 27 A 609, 65 Vt 626, 21 LRA 769, 36 Am SR 891

39. NJ—Wilson v East Jersey Water Co, 79 A 440, 78 NJEq 329  
67 C J p 1136 note 33

40. NJ—McCarter v Hudson Water Co, 65 A 489, 70 NJEq 695, 14 LRA, NS, 197, 118 Am SR 754, 10 Ann Cas 116, affirmed 28 S Ct 529, 209 US 349, 52 L Ed 828, 14 Ann Cas 560

41. NJ—New York, etc, Water Co v Borough of North Arlington, Ch, 75 A 177—McCarter v Hudson Water Co, 65 A 489, 70 NJEq 695, 14 LRA, NS, 197, 118 Am SR 754, 10 Ann Cas 116, affirmed 28 S Ct 529, 209 US 349, 52 L Ed 828, 14 Ann Cas 560

42. NJ—New York, etc, Water Co v Borough of North Arlington, Ch, 75 A 177

43. NJ—Wilson v East Jersey Water Co, 79 A 440, 78 NJEq 329

44. NJ—Wilson v East Jersey Water Co, supra.

In a suit by a city, a prior appropriator, against a utility district, to prevent the lowering of the underground water strata from which the city obtains its water supply, the court will not consider the needs and requirements of other users in the area in determining the rights of the city and district.<sup>45</sup> In such a case, where the city has proved the extent of its rights to the water, the district must prove the existence of a surplus of water.<sup>46</sup> Evidence should be admitted relative to a possible physical solution of the question between the city and the district,<sup>47</sup> and it is the duty of the court,

in the absence of a satisfactory solution, to suggest on its own motion a physical solution<sup>48</sup> which it may enforce regardless of whether the parties agree.<sup>49</sup> The city, as a prior appropriator, may not be compelled to incur any material expense to accommodate the utility district as a subsequent appropriator.<sup>50</sup> A finding that serious damage to the city would result from the proposed permanent method of operation of the utility district is sufficient, when supported by substantial evidence, to warrant injunctive relief,<sup>51</sup> and the city is not limited to mere recovery of damages.<sup>52</sup>

## B. MUNICIPAL WATERWORKS AND WATER DISTRICTS

### § 234. Construction or Acquisition of Municipal Waterworks

- a In general
- b Funds and financing

#### a. In General

A municipality or county authorized to construct or acquire a waterworks may do so in accordance with statutory provisions

A municipal corporation having authority to construct or acquire a waterworks may do so in accordance with the applicable statutory provisions.<sup>53</sup> Thus, where the municipal council has been authorized, as by the proper popular vote, to construct a waterworks, it may do so either by ordinance or resolution.<sup>54</sup> Under statutes so providing, counties may have the authority to establish a waterworks system,<sup>55</sup> and artesian wells may be established on the application by freeholders to a designated county official.<sup>56</sup> It has been held that a corporation may not be organized having as its purpose to encourage municipal ownership of waterworks and to assist municipalities in acquiring water plants, since such

objects and purposes do not come within the objects and purposes for which a corporate charter may legally be granted.<sup>57</sup>

The authority of a municipality to provide for a water supply or construct a waterworks system is discussed in Municipal Corporations § 1051, whether a municipality shall construct a waterworks system or acquire an existing system, and the method of doing so, are discussed *infra* §§ 235-239, and the authority of a municipality to operate and maintain a waterworks system is discussed *infra* §§ 241, 242

Statutes providing for the organization of water districts and for the establishment or acquisition by them of waterworks systems, are discussed *infra* § 243

*Submission to voters* Where statutes so provide, a vote of the electors of a municipality is a prerequisite to the establishment or acquisition of a municipal or public system.<sup>58</sup> However, a city may, without evading the requirement of the statute to

<sup>45</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, 60 P 2d 439, 7 Cal 2d 316

<sup>46</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*

<sup>47</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*

<sup>48</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*

#### Adequacy of solution

Where city, a prior appropriator, claimed that utility district's storage of water resulted in lowering of underground strata from which city obtained water, drilling of new wells on new tracts nearer river was held not adequate solution of problem, since rights of other property owners might be affected.—City of Lodi v East Bay Municipal Utility Dist, *supra*.

<sup>49</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*

<sup>50</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*

<sup>51</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*.

<sup>52</sup> Cal.—City of Lodi v East Bay Municipal Utility Dist, *supra*

#### Intervention of public use

Where, when utility district first made application for permit to interfere with natural flow of stream, city filed protest, public use in district's favor could not intervene as against city so as to limit city to money damages notwithstanding large expenditures by district, where city had delayed institution of suit in reliance on district's representation that underground water levels would be raised rather than lowered.—City of Lodi v.

East Bay Municipal Utility Dist, *supra*

<sup>53</sup> Iowa.—Keokuk Water Works Co v City of Keokuk, 277 NW 291, 224 Iowa 718

<sup>54</sup> Iowa.—Keokuk Water Works Co v City of Keokuk, *supra*

<sup>55</sup> Va.—Kirkpatrick v Board of Sup'rs of Arlington County, 136 SE 186, 146 Va 113  
67 C J p 1137 note 45

<sup>56</sup> SD.—State v Dry Run Artesian Well Board of Assessment, 45 NW 38, 1 SD 62

<sup>57</sup> Pa.—In re Incorporation of Municipal Water Ownership League, 16 Pa Dist & Co 697, 26 Luz Leg Reg 237

<sup>58</sup> Neb.—Havelone v City of Beatrice, 234 NW 791, 120 Neb 618  
67 C J p 1137 note 55—44 C J. p 198 note 93 [a] (3).

submit questions to the voters, provide for the construction of a water distributing system at the cost of property specially benefited as a system independent of a water supply system, the question of the acquisition of which was submitted to the voters<sup>59</sup>

*Regulation or control by state commission or board* Under some statutes a municipality is not subject to the supervision and control of the public service commission, or other state body, in respect of the acquisition or construction of a water system by such corporation;<sup>60</sup> but under other statutes the consent of the public service commission must be secured by a municipality, under certain circumstances, where the municipality seeks to extend its mains into a locality already supplied by a water company, as discussed *infra* § 235, or where it seeks

to acquire an existing system, as discussed *infra* § 236 Where, pursuant to statute, a municipality has sought and obtained the consent of a state commission to the construction of a water plant, while a court in reviewing the determination of the commission cannot substitute its judgment for that of the commission,<sup>61</sup> if the commission's order is arbitrary, and palpably contrary to the facts, the court may prevent the unlawful assumption of power.<sup>62</sup> Under a statute so providing, before a water purification plant can be constructed, the municipality must obtain an approval of the plans and specifications from the state board of health<sup>63</sup> Under provisions to that effect, before a county water authority can come into existence concurrent action must be taken by the county supervisors and the state authorities<sup>64</sup>

#### **Preliminary requirements**

Where majority of electors voted in favor of authorizing city council to construct waterworks system to be paid for out of net earnings, only the contract was required to remain on file with city clerk for public inspection for one week, under statute, before finally entered into and adopted by council, and it was not necessary that resolutions calling election, establishing system, and ordering hearing on plans and specifications remain on file with the clerk—*Keokuk Waterworks Co v City of Keokuk*, 277 N W 291, 224 Iowa 718

#### **Propositions held properly submitted**

(1) A proposition submitting to electors question whether city should construct municipal waterworks system at a maximum expenditure not to exceed a stated sum, exclusive of any grant received from federal government, to be paid solely out of earnings, was not invalid for failure to state maximum amount to be expended, as required by statute, because of provision for grant, where proposition was submitted under statute providing for payment of public utility plants out of earnings instead of by bond issue, since expression "maximum amount which may be expended" refers to earnings and not to total cost, and matter to be submitted is maximum amount of initial cost of constructing plant and not maintenance cost, and hence taxpayers were not entitled to injunction restraining construction of waterworks plant on ground that city officials, if they could obtain a sufficient grant from federal government, might increase operating expenses and maintenance costs beyond city's means, since there must be some present, tangible, or threatened infringement of legal power with resulting damage to taxpayers to warrant injunctive relief—*Keokuk Water Works Co v City of Keokuk*, *supra*.

(2) A proposition submitting to city's electors question whether city should establish a municipal waterworks system by purchase and improvement of existing waterworks or by constructing a new system was not invalid as expressing duality of purpose, since purpose was the single one of establishing municipal ownership of system, and method of acquirement, whether by purchase or construction, related only to the means—*Keokuk Water Works Co v City of Keokuk*, *supra*.

(3) A proposition submitting to electors question whether city should construct waterworks system to be paid for solely out of earnings exclusive of any gift from federal government was not objectionable as failing to state exactly how system was to be paid for—*Keokuk Water Works Co v City of Keokuk*, *supra*

#### **Effect of pre-election campaign statements**

An election authorizing city council to construct waterworks system was not vitiated by fraud and false representations made by city officials in pre-election campaign carried on in same newspaper containing official notice of election, where statements were mainly refutations of positive statements made by corporation operating existing system against measure, and there was no showing that any individual was influenced thereby or that result of election was affected—*Keokuk Water Works Co v City of Keokuk*, *supra*

#### **Number of favorable votes required**

A majority of votes cast in favor of proposition submitting question whether city should construct waterworks system to be paid for out of earnings was sufficient, and it was not necessary that affirmative vote be as large as majority of all legal votes cast at preceding municipal election as required under statute relating to

contracting indebtedness by municipalities—*Keokuk Water Works Co v City of Keokuk*, *supra*

#### **Approval held not required**

Ordinances authorizing city to install waterworks and bond indebtedness and accept contractor's bid were held valid without necessity of assent of two-thirds of voters—*City of Sturgis v Christenson Bros Co*, 31 S W 2d 386, 235 Ky 346

59. Wash—*Matthews v Ellensburg*, 131 P 839, 73 Wash 272

60. Ala—*Culpepper v Phenix City*, 113 So 56, 216 Ala 318  
67 C J p 1138 note 56

#### **No approval necessary**

NY—*Westchester Joint Water Works No 1 v Village of Pelham*, 265 N Y S 491, 113 Misc 349, affirmed 269 N Y S 966, 241 App Div 687

**Corporation commission has no control over a municipality engaged in furnishing domestic water to its residents under a constitutional grant—***City of Tucson v Polar Water Co*, 259 P 2d 561, 76 Ariz 126

61. NY—*People ex rel Sidney Waterworks Co v Conservation Commission of State of New York*, 181 N Y S 522, 175 App Div 5

62. NY—*People ex rel Sidney Waterworks Co v Conservation Commission of State of New York*, *supra*  
67 C J p 1138 note 60

63. N J—*Travis v Borough of Highlands*, 55 A 2d 109, 136 N J Law 199

64. NY—*Suffolk County v Water Power and Control Commission*, 199 NE 41, 269 N Y 158

#### **Effect of supervisors' rescission of resolution**

Where county supervisors passed resolution purporting to create coun-

**Use and ownership.** Under power to provide a municipal water supply, a plant built or purchased and operated by a city may be used for the purpose of supplying water to the inhabitants of the city, as well as for public purposes.<sup>65</sup> Since a waterworks is dedicated to public use it is owned by the public, the inhabitants of the municipality, and not by the municipality in its corporate capacity,<sup>66</sup> and the only function of the municipality with reference to it is to hold it in trust and administer it for the service, use, and benefit of those they represent, those who own it, the inhabitants<sup>67</sup>

**Provision for payment by municipality of tax on property of a contractor who agrees to construct a supplemental water system and deliver water to the municipality has been upheld**<sup>68</sup>

**Extent and limits of authority** The authority granted to a city to provide an adequate water supply includes the power to do and perform every-

thing incident thereto necessary to attain that object.<sup>69</sup> Thus, under a statute authorizing the installation and maintenance of waterworks, municipalities may make all contracts reasonably necessary and expedient for the accomplishment of such a purpose,<sup>70</sup> provided all the essential elements of a valid contract are present,<sup>71</sup> and a municipal water commission may empower its chief engineer to determine certain technical questions as to the details of construction of city waterworks.<sup>72</sup> Where a city has acquired the use of water for its public water supply, it is entitled to restrain the diversion of such water by individuals.<sup>73</sup> A statutory authority to construct and establish waterworks and provide other fixtures, appliances, or facilities properly includes a railway track over the land acquired connecting through a private railway with a main line.<sup>74</sup>

**Contract for water supply** Under a power to

ty water authority, and thereafter petitioned state water power and control commission for consent to such creation, subsequent resolution rescinding resolution creating such authority was held to prevent authority from becoming de jure corporation, but did not affect commission's jurisdiction to render decision consenting to creation of proposed authority—*Suffolk County v Water Power and Control Commission*, 199 NE 41, 269 NY 158

65. Tex.—*Ysleta v Babbitt*, 28 SW 702, 8 Tex Civ App 432  
44 CJ p 175 note 47

66. La.—*Town of Farmerville v Commercial Credit Co*, 136 So 82, 173 La 43

67. La.—*Town of Farmerville v Commercial credit Co*, supra.

68. Neb.—*Hevelone v City of Beatrice*, 234 NW 791, 120 Neb 648

69. Idaho—*Corpus Juris cited in Durand v Clime*, 119 P 2d 891, 895, 63 Idaho 304—*Beus v City of Soda Springs*, 107 P 2d 151, 62 Idaho 1  
44 CJ p 174 note 20

#### **Municipality's delegation of powers**

City may delegate water improvement by contract not involving delegation of municipal powers—*Montgomery v City of Alamo Heights*, Tex Civ App, 8 SW 2d 258, error dismissed

70. US—*Pikes Peak Power Co v Colorado Springs, Colo*, 105 F 1, 44 CCA 333

Ga.—*Wells v Atlanta*, 43 Ga 67—*Rome v Cabot*, 28 Ga 50

Ind.—*Underwood v Fairbanks, Morse & Co*, 185 NE 118, 205 Ind 316

Miss.—*Tullos v Town of Magee*, 179 So. 557, 181 Miss 288.

Pa.—*Harlow v Beaver Falls*, 41 A 533, 188 Pa 263

#### **Statute as to use of domestic products and labor**

The statutes providing that state and municipal officials should use domestic products and labor do not apply to the letting of a contract for a public improvement such as a city's contract to construct a waterworks system—*Keokuk Water Works Co v City of Keokuk*, 277 NW 291, 224 Iowa 718

#### **Terms of contract**

Where city council, authorized by election to construct waterworks system, proposed to pay contractor in cash by issuing negotiable, interest bearing, revenue bonds, it was not necessary that contract specify rate of interest to be charged as provided in statute, and specifications calling for furnishing of articles for municipal waterworks system by trade name or other identification mark were not invalid as violating statute requiring use of general terms and prohibiting use of trade names or other individual marks, where in most instances specifications contained words "or equal" following trade names, named articles not followed by those words were of small value as compared with cost of entire contract, and it was not intimated that items mentioned were not accessible to all bidders—*Keokuk Water Works Co v City of Keokuk*, supra.

#### **Performance or breach**

Where contract for construction of well for city called for payment of bonus of twenty per cent of the contract price for delivery of more than one hundred twenty-one gallons of water a minute to city water plant, and city's action made impossible test of completed installation to deter-

mine whether contractor qualified for bonus, city could not escape payment of bonus on ground that test was not made, and such breach was not excused by city's desperate need for water immediately—*Layne Minnesota Co v City of Beresford*, C A S D, 175 F 2d 161

71. US—*Layne Minnesota Co v City of Beresford*, supra.

#### **Consideration**

Where contractor constructing well for city was under no obligation under terms of contract to leave test equipment in well, contractor's subsequent oral promise to do so, if made, was void for want of consideration—*Layne Minnesota Co v City of Beresford*, supra.

#### **Acceptance according to terms**

Where alleged oral offer of contractor constructing well for city to leave temporary equipment in well, if made, was conditioned on city's agreement to authorize order for, and permit installation of, a bowl and motor of sufficient capacity to deliver well's maximum production to city's water plant, so as to enable contractor to qualify for bonus provided under contract, city's insistence on permanent use of equipment on hand and its refusal to permit the installation of any other or different equipment showed that contractor's offer, if made, was not accepted according to its terms—*Layne Minnesota Co v City of Beresford*, supra.

72. Cal.—*Chase v Los Angeles*, 55 P 414, 122 Cal 540

Ohio—*Ampt v Cincinnati*, 17 Ohio Cir Ct 516, 9 Ohio Cir Dec 690

73. Utah—*Springfield v Fullmer*, 27 P 577, 7 Utah 450

74. Ohio—*Ampt v Cincinnati*, 2 Ohio NP, NS, 489.

construct waterworks<sup>75</sup> or to purchase waterworks with their privileges,<sup>76</sup> or to acquire water for existing needs,<sup>77</sup> a city may contract for the purchase of a supply of water. Although the legislature has power to authorize cities to contract with a waterworks company for a supply of water for the extinguishment of fires,<sup>78</sup> the legislature has no power to require municipalities to purchase water systems within their boundaries which would require the assessment and levy of a tax.<sup>79</sup> In the absence of express authority a municipal corporation cannot become a stockholder in a private water supply corporation,<sup>80</sup> or enter into a contract for the purchase of water from a private corporation, which amounts in effect to a pledge of the municipal credit for the support of a private enterprise.<sup>81</sup>

*Dams, water power* In connection with a power to establish waterworks the legislature may authorize a city to construct and maintain a dam,<sup>82</sup> and the power of a municipal corporation which is authorized to construct and operate a dam as part of a waterworks system to enter into a contract with another for the construction and operation of such dam by such other has been recognized even in the absence of direct legislative authority.<sup>83</sup> Moreover, the city may lease any surplus water power,<sup>84</sup> but the municipal corporation cannot maintain a dam for the purpose of leasing water to private persons for private uses.<sup>85</sup>

## b. Funds and Financing

In general, funds derived from the operation of a municipal waterworks system are subject to rules governing municipal funds generally. The manner in which a waterworks is to be paid for depends on the applicable statutes, and general rules governing municipal bonds have been applied to bonds to finance waterworks.

Except in so far as there may be statutory provisions otherwise providing,<sup>86</sup> funds derived from the operation of a municipal waterworks system are ordinarily subject to the same regulations and restrictions as municipal funds generally.<sup>87</sup> Thus, it has been held that a municipal waterworks system is a revenue-producing enterprise within the meaning of a statute requiring the net revenue of such enterprise to be applied to the payment of principal and interest due on the bonds issued for such enterprise,<sup>88</sup> and the governing body of the city may make any use of the waterworks revenue which it in its discretion wishes, provided it does not divert such revenues so as to dissipate the net revenues which must be applied to the payment of the principal and interest due on the bonds.<sup>89</sup> Accordingly, the amount of income and revenue from a municipal water plant to be distributed in each of three funds, namely, operation and maintenance, depreciation, and payment of principal and interest on waterworks revenue bonds, is a matter to be decided by the common council of the city rather than by

75. Colo—Colorado Springs v Pike's Peak Hydro-Electric Co., 140 P 921, 57 Colo 169.

14 C J p 175 note 37.

76. N J—Hackensack Water Co v Hoboken, 17 A 307, 51 N J Law 220.

77. Idaho—Beus v City of Soda Springs, 107 P 2d 151, 63 Idaho 1.

78. U S—Risley v Utica, C C N Y, 179 F 875.

44 C J p 175 note 27.

79. Ky—Kenton Water Co v Covington, 161 SW 988, 156 Ky 569.

80. Ind—Voss v Waterloo Water Co., 71 NE 208, 163 Ind 69, 106 Am SR 201, 66 L R A 95.

44 C J p 175 note 31.

81. Ind—Scott v Laporte, 68 NE 278, 162 Ind 34, 69 NE 675.

82. N Y—Walter v McClellan, 83 N E 1133, 190 NY 505.

Wis—Attorney General v Eau Claire, 37 Wis 400.

83. Wis—Eau Claire Dells Improvement Co v City of Eau Claire, 179 NW 2, 172 Wis 240.

67 C J p 1137 note 50.

84. Wis—Attorney General v Eau Claire, 37 Wis 400.

Authority of municipality to sell or lease waterworks generally see infra § 240.

85. Wis—Attorney General v Eau Claire, supra.

86. S D—Robbins v Rapid City, 23 NW 2d 144, 71 SD 171.

### Statute held inapplicable

The statute relating to investment of funds of municipality for payment of bonds and revenue bonds has no application to a fund created to receive revenues from operation of municipal waterworks of an amount to meet city's contract obligation to government in connection with the construction of a dam and allocation of impounded water to city—Robbins v Rapid City, supra.

87. Utah—Fjeldsted v Ogden City, 28 P 2d 144, 83 Utah 278.

### Budget law

City, by creating special waterworks fund into which are paid all moneys received from operation of waterworks system, cannot withdraw such fund from control of budget law—Fjeldsted v Ogden City, supra.

88. U S—George v City of Asheville, C C A N C, 80 F 2d 50, 103 A LR 568.

### Various bonds held entitled to share with water bonds

(1) Municipal funding and refunding bonds, to extent that they incorporated indebtedness evidenced by bonds of waterworks system or sewerage bonds constituting integral part of waterworks system which they retired, were to be considered waterworks bonds within statute—George v City of Asheville, supra.

(2) General improvement bonds of city, to extent that they incorporated indebtedness incurred for waterworks system or sewerage system constituting essential part of waterworks system, were to be counted with waterworks bonds for purpose of sharing in net revenue of waterworks system under statute—George v City of Asheville, supra.

(3) Bonds of annexed municipality issued for waterworks system or sewerage system constituting essential part of waterworks system taken over by annexing municipality were held entitled to share in net revenues of waterworks system under statute—George v City of Asheville, supra.

89. U S—George v City of Asheville, supra.

the public service commission<sup>90</sup> Where a city's waterworks system is combined with some other utility, such as a sewer system, the revenue from the combined systems may be allocated proportionately among the holders of bonds secured by a pledge of the net revenue of the various systems<sup>91</sup>

The manner in which a waterworks is to be paid for depends on the provisions of the applicable statutes,<sup>92</sup> and in the absence of provisions to the contrary a municipality may accept and utilize a voluntary contribution in payment for the plant<sup>93</sup> In a proper case, proceedings may be instituted to enjoin an unlawful diversion of funds to be used for waterworks<sup>94</sup>

The financing of a municipal waterworks in so far as operation and maintenance are concerned is discussed *infra* § 241

**Bonds and certificates** Rules governing the issuance of bonds by municipalities generally and the rights, remedies, and liabilities of holders of such bonds, as discussed in *Municipal Corporations* §§ 1902-1977, have been applied to municipal waterworks revenue bonds<sup>95</sup> Thus, the financing of municipal waterworks systems by the issuance of bonds or certificates, and the payment of such obligations, are governed by the terms of the bonds,<sup>96</sup> and the provisions of applicable statutes<sup>97</sup> as well as by the provisions of pertinent

**90** Ind.—Letz Mfg Co v Public Service Commission of Indiana, 4 NE 2d 194, 210 Ind 467

**91** US—George v City of Asheville, CCANC, 80 F2d 50, 103 ALR 568

Ark—City of Harrison v Braswell, 194 SW 2d 12, 209 Ark 1094, 165 ALR 845

**92** Iowa—Keokuk Water Works Co v City of Keokuk, 277 NW 291, 224 Iowa 718

Pa—McCandless Tp v Sanders, Com Pl, 46 Mun LR 68, 102 Pittsb Leg J 307

#### **Payment out of "net" earnings**

Under statute providing for payment of public utility plant constructed by municipality out of net earnings, "net" means what is left after operating expenses and maintenance costs are paid, and, until plant established under that statute is completely paid for out of earnings and plant is held free from restrictions of statute, municipality has no power under other statutes to pay out of tax money any expense of running, operating, or repairing plant—Keokuk Water Works Co v City of Keokuk, 277 NW 291, 224 Iowa 718

**93.** Iowa—Keokuk Water Works Co v City of Keokuk, *supra*

#### **Statutes held not to inhibit acceptance of gift**

Neither statute providing for payment of municipal utility plant by bond issue, nor statute providing for payment out of earnings, inhibits municipality from accepting a gift of money or property to be used in connection with earnings in construction of plant as long as gift does not increase amount of indebtedness or amount to be paid out of earnings, and contract price does not exceed amount authorized by voters to be paid out of earnings, plus amount of gift, and under statute providing for additional methods of paying for public utility plants constructed by municipalities other than by bond issue, requirement that proposition submitted to electors on question of con-

structing plant state the maximum amount to be expended was intended to protect consumers by limiting their liability and not to prevent municipality from accepting and utilizing a voluntary contribution in payment of plant—Keokuk Water Works Co v City of Keokuk, *supra*

**94.** Tex—Texsan Service Co v City of Nixon, Civ App, 158 SW 2d 88, error refused

#### **No presumption of diversion**

A showing that voters of city had authorized revenue and tax bonds in specific sums for waterworks, and for a sewage system, and that city had ordered issue of revenue bonds and tax bonds for waterworks and sewage raised no presumption, nor could court anticipate that there would be an unlawful diversion of the proceeds from the authorized object of the bonds, precluding interference by injunction—Texsan Service Co v City of Nixon, *supra*.

**95.** Tex—Hayward v City of Corpus Christi, Civ App, 195 SW 2d 995, error refused, no reversible error

#### **Bearer bonds**

Where city waterworks revenue bonds were payable to bearer and city had no record of names of their holders, two holders owning seventy-four thousand dollars of the one and one half million dollar issue and sued as a class were not authorized to waive the rights of other holders under contract binding city not to encumber the waterworks system while any of the issue was outstanding, so as to authorize issuance of similar bonds as liens subordinate to the prior issue while any of the prior issue was outstanding—City of Houston v Mann, 164 SW 2d 548, 139 Tex 640

**96.** Ariz—Crandall v Town of Safford, 56 P 2d 660, 47 Ariz 402

#### **Provision for payment from net revenues**

Town could make revenue bonds issued by it to raise money for purchase and improvement of water system payable exclusively from net, as distinguished from gross, water sys-

tem revenue—Crandall v. Town of Safford, *supra*

#### **Injunction proceedings based on invalid clause**

In suit to enjoin sale and delivery of municipal bonds, where there had been no attempt to enforce or avoid clause in bonds providing against further incumbrance of the property covered by the bonds while they were outstanding, a challenge to the validity of the clause was purely anticipatory and a decision would not be made, and where the clause did not legally injure plaintiff either as a taxpayer or as a public utility, the fact that such clause might have been void did not entitle plaintiff to an injunction—Texsan Service Co v City of Nixon, Tex Civ App, 158 SW 2d 88, error refused

**97.** Mo—Dodds v Kansas City, 152 SW 2d 128, 347 Mo 1193

#### **Subject to public service commission**

The provisions of ordinance authorizing issuance of water revenue bonds for extension of city waterworks system were subject to any authority vested in the Public Service Commission as to rates, services, and manner of operation—City of Lebanon v Schneider, 163 SW 2d 588, 349 Mo 712

#### **Revenue applicable for payment of bonds**

Provisions of local acts governing sewer bonds were held to make city's revenue from waterworks and sewerage system applicable to payment of principal and interest of such bonds, which were issued to procure funds to extend sewerage system and were not secured by mortgage or deed of trust, and mortgage or deed of trust covering all property of waterworks and sewerage systems and securing municipal bond issue was held not to cover income or revenue from property conveyed, and beneficiary was not entitled to rents or income of property prior to law day of instrument and intervention by beneficiary for purpose of enforcing it.—City of Mo-



ordinances.<sup>98</sup> Accordingly, in a proper case a municipality may issue revenue bonds secured by an incumbrance of the revenue of a waterworks system.<sup>99</sup> So, also, it has been held that a municipality may finance the purchase or construction of a waterworks system by the issuance of bonds secured

by the property itself,<sup>1</sup> and where there has been a substantial default in the payment of principal and interest which the municipality is unable to make up,<sup>2</sup> or where the city, authorized to furnish operating expenses to the waterworks, declines to do so,<sup>3</sup> the waterworks property may be subject

bile v Marx & Co, CCA Ala, 75 F 2d 569.

**Construction and operation of charter provisions**

City charter provision, requiring water commissioners to apportion from city revenue fund amount sufficient to pay sums due on city waterworks bonds providing for payment exclusively from taxes on property in improvement district, did not give bondholder additional security for payment of bonds or become part of contract thereof, nor can charter provisions be so construed as to result in double payment of bonds by taxpayers, as by holding that one bondholder may require payment from revenue fund while others may require levy of taxes for same purpose—McLaughlin v Department of Water and Power of City of Los Angeles, 62 P 2d 1402, 18 Cal App 2d 41.

**Priority of claims**

(1) Under section of city charter expressly authorizing the issuance of bonds solely on credit of income derived from any public utility, the city has implied power to make the net revenue from waterworks subject to a prior lien for payment of interest and principal of its revenue bonds, and provision of ordinance that, in event net revenue of waterworks should be insufficient to pay interest on all waterworks bonds, interest and sinking fund due each year on revenue bonds would have prior lien on net revenue for that year did not violate provision of charter providing for disposition of water department revenue, but not undertaking to establish priority as between revenue bonds and general obligation bonds—Dodds v Kansas City, 152 S W 2d 128, 347 Mo 1193.

(2) Where city's water revenue account contained ample funds to pay all past-due and accrued interest on bonds and leave a substantial balance, bondholder was not entitled to an order requiring city to restore to water revenue account funds diverted to pay out of turn bonds which in due course would have matured before any held by party seeking the order—Mott v City of Flora, D C Ill, 51 F Supp 963.

98. Fla.—State v. Town of River Junction, 169 So 676, 125 Fla 267.

**Ordinance as part of certificate holder's contract**

Fla.—State v. Town of River Junction, supra.

**Authorized provisions presumed valid**

Where provisions of ordinance authorizing issuance of water revenue bonds, that the net revenue from the waterworks must be devoted to payment of the bonds for their outstanding period of twenty-five years, that city should maintain such rates as would cover the necessary payments and should not mortgage the plant, that future issues should be subordinate to the bonds and that under certain conditions, a receiver might be appointed to operate the plant were expressly authorized by statute, they were presumed to be valid—City of Lebanon v Schneider, 163 S W 2d 588, 349 Mo 712.

**Provision held invalid**

Provision of city ordinance providing for extension of municipal waterworks plant and authorizing mortgage on improvements and extensions with pledge of revenue to secure bonds that, in event of foreclosure, purchaser should have exclusive franchise to operate waterworks system, was held invalid as the granting of an exclusive franchise against public policy—Ohio Power Co v Craig, 197 N E 820, 50 Ohio App 239.

99. La.—Miller v Town of Bernice, 173 So 192, 186 La 742.

**Ownership of system as prerequisite**

An essential prerequisite to the practical validity or enforcement of municipal revenue bonds secured by an incumbrance of revenue of a waterworks system is the ownership of a system by the municipal authority issuing the bonds—City of El Campo v South Tex Nat Bank of San Antonio, Tex Civ App, 200 S W 2d 252, error refused.

**Determination of value of improvements**

Generally, municipal determination of value of improvements to existing waterworks system as basis for determining proceeds applicable to payment of revenue bonds for improvement of system is conclusive and not subject to review, unless based on erroneous view of law, or demonstrably erroneous, arbitrary, corrupt, or fraudulent, or manifest abuse of legislative discretion—Wadsworth v Santaquin City, 28 P 2d 161, 83 Utah 321.

**Maintenance expenses as deductible**

Whenever the income of a municipal water system is incumbered in connection with issuance of revenue bonds for a permissible statutory

purpose, such bonds are a charge against the revenues of the water system, subject to the reasonable expenses of maintenance and operation of the system—City of El Campo v South Tex Nat Bank of San Antonio, Tex Civ App, 200 S W 2d 252, error refused.

**Mortgage provisions**

Where proposed bonds were payable solely from revenues of proposed waterworks system which was to be mortgaged to secure their payment, mortgage should contain the customary clauses assuring prospective purchasers that their rights would be protected and enforced—Miller v Town of Bernice, 173 So 192, 186 La. 742.

1. Ky.—Culbertson v Louisville, 128 S W 292, 129 S W 95, 138 Ky 747.  
Pa.—Realty Co v Borough of Port Vue, 178 A 466, 318 Pa 374.  
44 C J p 1238 note 42.

**Power of sale held valid**

A power of sale in a mortgage on a municipal water system executed in accordance with the applicable statutes is not invalid under the Texas constitutional provision protecting municipal property from forced sale—City of Hamlin v Brown-Crummer Inv Co, CCA Tex, 93 F 2d 680, certiorari denied Brown-Crummer Inv Co v City of Hamlin, Tex, 58 S Ct 831, 303 US 664, 82 L Ed. 1122.

2. Pa.—Realty Co v Borough of Port Vue, 178 A 466, 318 Pa 374.

**Receivership in absence of power to sell**

Where bonds for waterworks are secured by mortgage lien without authority to compel sale of waterworks, receiver may be appointed, in event of default, who may compel imposition of rates sufficient to pay interest on bonds and for their retirement—Bankhead v Town of Sulligent, 155 So 869, 229 Ala. 45, 96 A L R 1381.

3. Ala.—Bankhead v. Town of Sulligent, supra.

**Legal obligations of municipality**

Under statute authorizing municipalities to make voluntary appropriation out of its available income from other sources for operating expenses of waterworks system acquired, construed with following section, no legal obligation rests on town because of its agreement to operate the plant so that the gross revenues shall first be devoted to the matter of bonded indebtedness—Bankhead v. Town of Sulligent, supra.

to foreclosure Where the mortgage or trust deed securing the bonds or certificates so provides, additions to the waterworks system are included within the property covered by the lien <sup>4</sup>

*Certificates as negotiable instruments* While water fund certificates payable out of a special fund are not negotiable instruments within the meaning of the law,<sup>5</sup> they possess all the qualities of negotiable paper, as for all purposes involving title,<sup>6</sup> except that they are open to any defenses which might have been made to the consideration on which they originally were founded <sup>7</sup>

*Unenforceable bonds issued to contractor* Where bonds were issued in good faith to a waterworks improvement contractor completely performing his contract, but were unenforceable because the bonds and the trust indentures were not authorized by popular vote, the contractor is equitably entitled to recover the properties obtained by the city by and through him or just compensation therefor,<sup>8</sup> and bondholders who acquired all the bonds issued and delivered to the contractor become subrogated in

equity to all of the contractor's rights and equities.<sup>9</sup>

### § 235. — Choice of Methods and Existence of Other System

The methods by which a municipality may establish a waterworks depend on the municipality's powers; and the method actually chosen may depend on the circumstances in the particular case.

The methods by which a municipal corporation may establish a system of waterworks depend on the powers of the city under constitutional and statutory provisions,<sup>10</sup> and the method which a municipality actually chooses may depend on the circumstances in the particular case,<sup>11</sup> such as the price at which the private water company is willing to sell <sup>12</sup> There is authority for the view that where a municipal corporation is authorized by statute to establish a waterworks system by a certain method it may not establish a system by another method;<sup>13</sup> and the failure to comply with the statutory requirements applicable to such method of establishing a waterworks system will invalidate steps taken and the carrying out of the plan may be enjoined <sup>14</sup>

4. Wis—*Morris v Ellis*, 266 NW 921, 221 Wis 307

5. US—*Getz v City of Harvey*, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

6. US—*Getz v City of Harvey*, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

#### No equity arising in favor of city

Even though plaintiff as a bona fide purchaser for value of nonnegotiable water fund certificates issued by an Illinois city without notice of defense was bound by so-called proposal and negotiations between a broker and his associate on one hand and city on the other, no equity arose in favor of city, where broker was required to deliver to city no less than entire outstanding lot of certificates, and broker was never able to comply, since when that condition remained unsatisfied all obligations between city and broker were at an end—*Getz v City of Harvey*, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

7. US—*Getz v City of Harvey*, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

8. Tex—*Hayward v City of Corpus Christi*, Civ App, 195 SW 2d 995, error refused, no reversible error

9. Tex—*Hayward v City of Corpus Christi*, supra.

#### Credits against property values

City was properly allowed credits against value of properties obtained by city from and through contractor, and unbarred rents and interest for value of such improvements and for payments made by city on principal of bonds, but in allowing city a credit none of its payments on account of interest coupons attached to its water revenue bonds, illegally issued, without approval by popular vote, in consideration of execution and performance of contract, and no part of rentals barred by limitations or interest thereon, should have been allowed, but such credit should have been confined to city's proportionate part of unbarred rentals and interest thereon—*Hayward v City of Corpus Christi*, supra.

#### Liability for expenses and attorneys' fees

City water revenue bondholders, failing to recover on invalid trust indenture securing bonds, which were issued without required approval by popular vote, in consideration of waterworks improvement contractor's execution and performance of contract, were liable for all reasonable expenses and attorneys' fees necessarily incurred by trustee as party to bondholders' suit for such relief or recovery of properties received by city from contractor and rental value thereof while used by city, although trust indenture provided for payment of such fees and expenses out of revenues derived from trust property—*Hayward v City of Corpus Christi*, supra

10. Ind—*Hamilton v Public Service*

Commission, 19 NE 2d 235, 215 Ind 138

#### Statutes providing alternative methods

Where statute relating to construction and operation of municipally owned utilities provided that it should constitute an alternative authority for acquiring waterworks, such statute was not to be construed as repealing former act authorizing municipalities to acquire waterworks or as requiring an election, but was to be considered as providing an alternative method for acquiring waterworks—*Hamilton v Public Service Commission*, supra

11. US—*California Water Service Co v City of Redding*, D CC Cal, 22 F Supp 641, affirmed 53 S Ct. 865, 304 US 252, 82 L Ed 1323

#### City's motive as immaterial

A city was entitled freely to bargain with private water company serving city, to offer any price it chose for water plant, and to construct rival system if private company chose not to sell, regardless of motive of city—*California Water Service Co v City of Redding*, supra

12. US—*California Water Service Co v City of Redding*, supra.

13. Tex—*Austin v McCall*, 68 SW. 791, 95 Tex 565

14. NY—*Austin v De Volt*, 295 N Y. S 971, 251 App Div 58

#### Noncompliance with particular requirements

Village officers, publishing no notice of adoption of trustees' resolution to create water system as required by statute to limit time for

So, under some statutes, a municipality which is authorized to obtain a water supply either by constructing and operating its own works, or by contracting with a private corporation to furnish the supply, may not adopt both methods and have both systems in operation at the same time,<sup>15</sup> but this rule has apparently been so limited as to apply only to supplying water for the use of the inhabitants of the municipality<sup>16</sup> and not to supplying water for municipal purposes as distinguished from supplying water for the use of inhabitants.<sup>17</sup> Accordingly, where the purpose of a contract with a water company is to supply water for municipal purposes and not for the use of the inhabitants, the municipality is not thereby prevented from establishing its own system to furnish water to its inhabitants,<sup>18</sup> and a contract to supply water for a particular municipal purpose which does not require the laying of any additional mains or pipes by the water company does not prevent the municipality from constructing its own system.<sup>19</sup>

According to some cases, in the absence of the existence of any exclusive franchise or privilege, discussed *infra* § 252, the mere fact that there is an existing water system in a municipality,<sup>20</sup> or that a private water company has been permitted to construct its works and lay pipes,<sup>21</sup> or that the municipality has contracted with another for the construction and maintenance of a waterworks system,<sup>22</sup> or has reserved the right to purchase such system,<sup>23</sup> does not prevent the municipality from constructing its own system although the other system is still in operation. However, it has been held that a municipal ordinance granting, without limit

as to time, permission to a water company to enter the borough and lay its pipes in the streets, when accepted and acted on by the company, constitutes a contract between the borough and the company to supply water to the public which exhausts the power of the municipality to supply itself with water.<sup>24</sup> Moreover, it has also been held that an unexecuted charter power of a municipal corporation to supply its inhabitants with water is impliedly revoked by a law conferring the exclusive right of furnishing it to them on a corporation.<sup>25</sup>

The fact that a municipal corporation takes water from a particular source under statutory authorization does not constitute a breach by it of a contract with a water company by which the latter is to furnish a water supply, even though the company is prevented by such taking from performing the contract where the water company's franchise is not exclusive and it has acquired no right to take the water from such source.<sup>26</sup> The validity of a statute which authorizes a municipal corporation to extend its water system into territory of the municipal corporation served by a water company, but which forbids an extension into territory outside the municipality which is served by other companies, has been upheld.<sup>27</sup> While the rule is apparently otherwise under some statutes,<sup>28</sup> under other statutes a municipality may not lawfully extend its water mains into a locality which is being supplied by a water company unless it obtains the approval of the public service commission,<sup>29</sup> or shows that it had commenced the construction of the extension at the time the applicable public utilities act became effective,<sup>30</sup> and, in the absence of such

filing referendum petition, and providing in resolution for issuance of serial bonds running for maximum period of nearly forty years, although estimated cost of materials, supplies, etc., exceeded three per cent of assessed valuation of taxable property in village, and installment payments exceeding amount of smallest prior installment by over fifty per cent, must be enjoined from carrying out plan because of noncompliance with statutory requirements—*Austin v De Volt*, *supra*.

15. Pa.—*Dorrance v Bristol Borough*, 73 A 1015, 224 Pa 464 67 C J p 1138 note 62

16. Pa.—*Bethlehem City Water Co v Bethlehem Borough*, 80 A 984, 231 Pa 454

17. Pa.—*Bethlehem City Water Co v Bethlehem Borough*, *supra* 67 C J p 1138 note 65

18. Pa.—*Tarentum Water Co v Tarentum Borough*, 79 A 402, 230 Pa 148

67 C J p 1138 note 66.

19. Pa.—*Dorrance v Bristol Borough*, 73 A 1015, 224 Pa 464

20. Mich.—*North Michigan Water Co v Escanaba*, 165 NW 847, 199 Mich 286 67 C J p 1138 note 69

21. NC.—*Elizabeth City Water, etc., Co v Elizabeth City*, 124 SE 611, 188 NC 278 44 C J p 175 note 49

22. US.—*Knoxville Water Co v City of Knoxville, Tenn.*, 26 S Ct 224, 200 US 22, 50 L Ed 353 67 C J p 1139 note 70

23. US.—*Town of Glenwood Springs v Glenwood Light & Water Co*, Colo., 202 F 678, 121 CCA 88, L RA 1915C 438, appeal dismissed 34 S Ct 315, 231 US 735, 58 L Ed 459

67 C J p 1139 note 71

Right to construct where binding contract to purchase entered into see *infra* § 237 a

24. Pa.—*Pennsylvania Water Co v Pittsburg*, 75 A 945, 226 Pa 624 44 C J p 176 note 50

25. Pa.—*Downingtown Gas, etc., Co v Downingtown*, 34 A 799, 175 Pa 341

26. NY.—*Stolz v City of Syracuse*, 111 NYS 467, 59 Misc 600, affirmed 119 NYS 1146, 134 App Div 993, affirmed 94 NE 1099, 201 NY 512 67 C J p 1139 note 72

27. US.—*Norfolk County Water Co v City of Norfolk, Va.*, 246 F 650, 158 CCA 606, certiorari denied 38 S Ct 192, 245 US 672, 62 L Ed 540

28. Ala.—*Culpepper v Phenix City*, 113 So 56, 216 Ala 318

29. Pa.—*Bethlehem City Water Co v Borough of Bethlehem*, 98 A 646, 253 Pa 333 67 C J p 1139 note 75

30. Pa.—*Bethlehem City Water Co v Borough of Bethlehem*, *supra* 67 C J p 1139 note 76.

consent or showing, a water company which is supplying a locality into which a municipality seeks to extend its mains may, in a proper case, obtain an injunction against such extension<sup>31</sup> The mere fact that a proposed municipal system may injure a water company which owns and operates an existing system does not show bad faith on the part of the municipal authorities<sup>32</sup>

Under some statutes, where a municipality and its citizens are being supplied water under an existing franchise by a public utility, such municipality, before extending its service into such area of competition with the public utility must first purchase and take over the property of the utility,<sup>33</sup> but the statute is limited in its application to cases where both the municipality and the residents thereof are furnished water service<sup>34</sup> A statutory provision that a municipality shall have the exclusive right to supply with water the municipality and all persons, partnerships, and corporations therein, does not, it has been held, prevent a railroad company, which by a prior statute was given the right to procure its own water supply, from laying mains on its own lands within the municipality and connecting them outside the municipality with the mains of a water company in order to procure a supply for the railroad company.<sup>35</sup>

## § 236. — Acquisition of Existing System in General

The means by which a municipality may acquire an existing waterworks system depends on applicable statutory provisions

The means by which a municipality may acquire an existing waterworks system generally depends on the provisions of the applicable statutes<sup>36</sup> Thus, there is authority for the view that where a statute authorizes the acquisition by municipal authorities of the water system of an existing water company by a certain method such method must be followed in acquiring the system<sup>37</sup> However, where a city has the authority under general statutes to purchase and operate a water system it has authority to provide the means and methods of acquisition,<sup>38</sup> since the method laid down by statute is not necessarily exclusive,<sup>39</sup> and the courts cannot interfere, in the absence of an abuse of discretionary power, in the method adopted for the acquisition and operation of the system<sup>40</sup> Moreover, while express provision has sometimes been made by statute permitting municipalities to become the owners of existing waterworks owned by water companies,<sup>41</sup> there is authority for the view that it is not necessary that the power to purchase should expressly be conferred but it may be implied from other powers expressly conferred by the legislature.<sup>42</sup> Statutes may be

31. Pa—Bethlehem City Water Co v Borough of Bethlehem, supra—Heights Water Co v Lebanon, 28 Pa Dist 118

32. Ala—Culpepper v Phenix City, 113 So 56, 216 Ala. 318

33. Ariz—City of Tucson v Polar Water Co, 259 P2d 561, 76 Ariz 126

34. Ariz—City of Tucson v Polar Water Co, supra

### Utility's damage as *damnum absque injuria*

City has right, under constitutional grant carried into execution by charter, to furnish water to residents both within and without the corporate limits of city, in competition with public utility furnishing water to residents of addition to city under certificate of convenience and necessity granted by Corporation Commission, without purchasing property of such public utility, and any damage to utility thereby is *damnum absque injuria*—City of Tucson v Polar Water Co, supra

35. Pa—Harrisburg v Pennsylvania R Co, 33 Pa Co 641.

36. Mass—In re Opinion of the Justices, 14 NE2d 468, 300 Mass 607 Pa—Appeal of Borough of White Haven, Quar Sess, 35 Luz Leg Reg 201.

37. NY—In re White Plains Water Com'rs, 68 NE 348, 176 NY 239 67 C J p 1141 note 92

### In Wisconsin

(1) Provision for the acquisition of an existing system owned by a water company is made by the public utility law—Superior Water, Light & Power Co v City of Superior, 181 NW 113, 183 NW 254, 174 Wis 257—67 C J p 1142 note 4

(2) Ordinarily, at least, the proceedings for acquisition are in the nature of condemnation proceedings—Superior Water, Light & Power Co v City of Superior, supra—67 C J p 1142 note 5

(3) The authority of the legislature, under its power given by constitutional provision to repeal or alter laws or acts affecting corporations, to provide for a method by which a corporation may acquire an existing system owned by a water company has been recognized, notwithstanding the existence in the franchise granted by the municipality concerned to such water company of a provision as to purchase—Superior Water, Light & Power Co v City of Superior, supra

38. Ky—Cawood v Coleman, 172 S W 2d 548, 294 Ky 858

### Purchase of unified electric and water system

The City of Frankfort had power under general statutes to purchase a unified electric and water system without complying with restrictive provisions of special laws with respect to power, authority, and manner of acquiring an electric or water system separately, where systems had been operated as a unit for many years, could not be purchased separately and could be more economically operated as a unit—Cawood v Coleman, supra

39. Ky—Cawood v Coleman, supra.

40. Ky—Cawood v Coleman, supra.

41. Pa—Borough of Reynoldsville v Reynoldsville Water Co, 92 A 1082. 247 Pa. 26 67 C J p 1140 note 85

42. NM—City of Albuquerque v. Water Supply Co, 174 P 217, 24 N M 368, 5 A L R 519 Tex—Austin v McCall, 68 SW 791, 95 Tex 565

### Right to acquire "useful" undertaking

The statutes governing revenue-producing municipal undertakings and revenue bonds authorize city to make a contract for purchase of water company's property, rights, and franchises, as used in statute defining reve-

enacted validating purchases made by a municipal corporation<sup>43</sup>

Where duly authorized, a municipality may acquire an existing water system by the exercise of the power of eminent domain<sup>44</sup> or by purchase,<sup>45</sup> and it may enter into an executory contract to purchase, as discussed *infra* § 237. So, also, a municipality may enter into a contract to lease a system from the person to whom the municipality has granted a franchise to construct the system<sup>46</sup>. Some statutes in respect of the acquisition of existing systems have been construed as attempting to impose an obligation on the municipality concerned to acquire such a system under certain circumstances where it desires to obtain another or additional system,<sup>47</sup> and other statutes have been construed as mandatory and, therefore, as requiring the municipality to purchase if the franchise granted is not renewed after a specified period,<sup>48</sup> but still other statutes are permissive and not mandatory.<sup>49</sup>

The waterworks system which is to be purchased must be of the type which is contemplated by the statute providing for the purchase,<sup>50</sup> and the view has been taken that a statute which provides for the purchase by a municipality of the waterworks of a private or quasi-public corporation does not apply to a waterworks owned by an individual or partnership<sup>51</sup>. It has been held that the purchase by a municipality of a water company serving individual users not only in such municipality, but in other non-

contiguous communities as well, would be ultra vires,<sup>52</sup> even though the municipality intends to sell the distribution systems in the other communities as soon as possible,<sup>53</sup> but it has also been held that when necessary for its purposes a municipality may purchase an entire water system, so that after operating the system and supplying the persons entitled to use the water it may devote the surplus to the use of the inhabitants of the city.<sup>54</sup> The validity of a transfer to a municipality of a water system of a water company, the whole of whose capital stock is owned by the municipality, has been upheld where such transfer was duly effected by the municipal council and the custodians of the stock.<sup>55</sup> Notwithstanding the informality of the proceedings looking to the acquisition of certain mains laid by individuals to connect with a municipal water system, the proceedings, including a resolution by the governing body of the municipality providing for the raising of money to purchase the mains, have been held sufficient to support a claim against the municipality for the alleged agreed price.<sup>56</sup>

*Referendum.* While it seems that, in the absence of a constitutional or statutory provision requiring approval, approval by the voters of the purchase of a waterworks system by a municipality is not necessary,<sup>57</sup> such approval may be necessary in so far as constitutional or statutory provisions provide for the submission to the voters of the question as to the acquisition or purchase of an existing water-

nue-producing "undertakings" as including instrumentalities and properties used or useful in connection with the obtaining of water supply and the collection, treatment, and disposal of water, the word "useful" is broad and comprehensive, and its interpretation is largely a matter of judgment, and the words "used or useful" do not manifest intent to condemn a whole contract for purchase of water company's properties and franchises merely because a small part of the property was not within a strict and technical interpretation of the authorization—*Hanrahan v Corrou*, 12 N.Y.S.2d 536, 170 Misc. 922.

43. N.Y.—*Witmer v City of Jamestown*, 109 N.Y.S. 269, 125 App. Div. 43.  
67 C.J. p. 1140 note 83.

44. Ark.—*City of Helena v Arkansas Utilities Co.*, 186 S.W.2d 733, 208 Ark. 442.  
67 C.J. p. 1139 note 80.

45. Ark.—*City of Helena v. Arkansas Utilities Co.*, *supra*.  
Fla.—*State v City of St Petersburg*, 198 So. 837, 145 Fla. 206.  
67 C.J. p. 1139 note 81.

**Company's charter as controlling over general statute**

Where charter of water company contained provision authorizing town to purchase franchise and corporate property on vote of two thirds of voters present at town meeting, town could purchase company's franchise and corporate property pursuant to charter provision without also complying with general statute authorizing cities and towns as part of their municipal functions to obtain water supply from any corporation—*Cohasset Water Co v Town of Cohasset*, 72 N.E.2d 3, 321 Mass. 137.

46. Ohio—*Moore v Elmore*, 13 Ohio N.P.N.S., 65.

47. N.C.—*Asbury v Town of Albemarle*, 78 S.E. 146, 162 N.C. 247, 44 L.R.A.N.S., 1189.  
67 C.J. p. 1140 note 87.

48. U.S.—*National Waterworks Co v Kansas City, Mo.*, 62 F. 853, 10 C.C.A. 653, 27 L.R.A. 827.

49. Mont.—*Carlson v Helena*, 102 P. 39, 39 Mont. 82, 17 Ann. Cas. 1233.  
67 C.J. p. 1140 note 89.

50. N.C.—*Asbury v Town of Albemarle*, 78 S.E. 146, 162 N.C. 247, 44 L.R.A.N.S., 1189.  
67 C.J. p. 1141 note 90.

51. N.C.—*Asbury v Town of Albemarle*, *supra*.

52. Ark.—*Yancey v City of Searcy*, 212 S.W.2d 546, 213 Ark. 673.

**Expediency as justification**

Ultra vires purchase of water company by second class city could not be justified on plea of expediency based on fear that city would lose classification rating made by inspection and rating bureau if city failed to get better water protection—*Yancey v City of Searcy*, *supra*.

53. Ark.—*Yancey v. City of Searcy*, *supra*.

54. Cal.—*Durant v City of Beverly Hills*, 102 P.2d 759, 39 Cal. App. 2d 133.

55. Ky.—*Ryan v City of Louisville*, 118 S.W. 992, 133 Ky. 714.  
67 C.J. p. 1141 note 93.

56. N.Y.—*Hatch v President and Trustees of Village of Monticello*, 171 N.Y.S. 1050, 184 App. Div. 450, affirmed 126 N.E. 909, 227 N.Y. 644.  
67 C.J. p. 1141 note 94.

57. Cal.—*Orcutt v Pasadena Land, etc., Co.*, 93 P. 497, 152 Cal. 599.  
Submission of question as to contract for purchase see *infra* § 237 b.

works system<sup>58</sup> Accordingly, under certain circumstances an adverse vote of the electors may terminate the right of a municipal corporation to proceed further for the acquisition of a plant under the resolution by which the matter was submitted to the electors,<sup>59</sup> and undue delay on the part of a municipal corporation, after the initiating of proceedings, in submitting to electors the matter of acquiring an existing system may bar the municipal corporation from maintaining the proceeding so initiated<sup>60</sup>

*Consent of, and proceedings before, state author-*

58 Mich—Schurtz v City of Grand Rapids, 175 NW 421, 426, 208 Mich 510

67 C J p 1141 note 96

**Dependent on method of financing**

Where funds for defraying cost of acquisition or construction of water plants in third class city are to be raised by sale of direct obligation bonds, the question of acquisition or construction of plants must be submitted to voters of city at an election held for that purpose and appointment of city utility commission is not required—King v Rowland, 168 S W 2d 755, 293 Ky 198

**Exception as to extension of existing system**

(1) Where contemplated water system was an addition to an already existing system, the city council had authority to make such addition without a vote of electors—Holland v Heavlin, 300 NW 777, 299 Mich 465

(2) The construction of an intake crib, pumping stations, and pipe line from the city to the lake, and additional reservoirs was but the "extension of the existing water system" of the city rather than the "acquisition of a public utility," and hence the commissioners of the city were authorized to contract for the construction thereof without a vote of the electors of the city—White v Welsh, 289 NW 279, 291 Mich 636

**Propriety of ballot**

Ballot which required voter to express himself on question of whether all or none of electric utility, water utility, and gas utility should be purchased by municipality was fatally defective notwithstanding all three utilities were owned by the same public utility—Public Service Co of Indiana v City of Aurora, 19 NE 2d 255, 215 Ind 311

**Number of favorable votes required**

Under statute providing that two thirds vote of city council to acquire municipal waterworks must be confirmed by majority of qualified voters at a regular election, or at a special meeting, confirmation need merely be by majority of voters qualified and actually voting, and not major-

ity of those qualified and entitled to vote—Laconia Water Co v City of Laconia, NH, 112 A 2d 58

**Election held valid**

Or—City of Salem v Oregon-Washington Water Service Co, 23 P 2d 539, 144 Or 93

59. Pa—City of Williamsport v Williamsport Water Co, 150 A 652, 300 Pa. 439

60 Pa—City of Williamsport v Williamsport Water Co, supra

61. Pa—In re Acquisition of Water System in White Oak Borough, 93 A 2d 437, 372 Pa. 424—White Oak Borough Authority v Pennsylvania Public Utility Commission, 103 A 2d 502, 175 Pa Super 114—Versailles Tp Authority v City of McKeesport, Com Pl, 99 Pittsb Leg J 216, affirmed 90 A 2d 581, 171 Pa Super 377

67 C J p 1142 note 99

**No retroactive effect**

Retroactive effect has been denied to some statutes of this type in respect of proceedings to acquire which were actually pending when the public service act took effect—Borough of Reynoldsville v Reynoldsville Water Co, 92 A 1082, 247 Pa. 26—67 C J p 1142 note 1

**Method of acquisition or transfer as immaterial**

The provision of the public utilities law requiring Public Utility Commission's approval before utility can transfer to municipality by any method or device any property is broad enough to include any legal form or method of acquisition of property by municipality, and embraces the acquisition by a municipality of property of a public utility, whether the method of transfer is by agreement of purchase and sale or by proceedings instituted to compel its transfer to the municipality—Burgess and Town Council of Borough of Pottstown v Pennsylvania Public Utility Commission, 19 A 2d 610, 144 Pa Super 220

**Procedure on application for approval of acquisition**

(1) The Public Utility Commission's refusal of water company's mo-

ties. Under some statutes the consent of the public service commission is necessary in order that a municipality may acquire an existing water system,<sup>61</sup> and this is so even where the municipality has an option or statutory option to purchase the existing waterworks<sup>62</sup> However, in other jurisdictions the right of a municipal corporation to purchase a water system from a water company without the consent of the conservation commission has been recognized.<sup>63</sup>

*Time for acquisition* Statutory limitations as to the time within which the authority of a municipal-

tion to dismiss borough's application for approval of its acquisition of such company's plant as not containing description of plant, statements of cost of operation and revenue thereof, precise manner of financing purchase, and borough's borrowing capacity, or copy of borough's resolution authorizing purchase, was not an "order" reviewable by superior court on appeal under Public Utility Law, as commission had full authority over procedural matters raised by motion—Mercer Water Co v Pennsylvania Public Utility Commission, 46 A 2d 597, 159 Pa Super 69

(2) Examination of books of company in course of proceedings before public utility commission see *infra* § 238 c

**Statutory change pending application**

Where borough's application for certificate of public convenience evidencing approval of acquisition by the borough of waterworks was filed while the public service company law was in force, but was not completed before the enactment of the public utilities law of 1937 which provided that all proceedings pending under act repealed should continue and remain in full force and might be completed under the provisions of act of 1937, it was the duty of the Public Utilities Commission to proceed with the pending application just as though the public service company law still remained in force, and to follow the procedure laid down by the supreme and superior courts under such law governing applications by municipality to acquire works and property of water company—Burgess and Town Council of Borough of Pottstown v Pennsylvania Public Utility Commission, 19 A 2d 610, 144 Pa Super 220

62. Pa—White Oak Borough Authority v Pennsylvania Public Utility Commission, 103 A 2d 502, 175 Pa Super 114

63 N Y—Town of Mamaroneck v New York Interurban Water Co, 190 N Y S 580, 193 App Div. 396, motion denied 135 NE 933, 233 N Y 598 and affirmed 135 NE 962, 233 N Y. 666

ity to acquire an existing system is to be exercised are given effect <sup>64</sup>

*Joint acquisition by several municipalities* Under some circumstances two or more municipalities may act to acquire jointly a common water supply, the rights, liabilities, and relationship of the municipalities depending on the circumstances and the provisions of the applicable statutes and ordinances <sup>65</sup>

*City's acquisition of town's water system* In a proper case a city may take over the water system of a town whose territory has been annexed by the city <sup>66</sup>

# § 237. — Option or Offer and Contract to Purchase

- a In general
- b Popular or official approval
- c Property included
- d Payment or retention of price
- e Remedies

## a. In General

When duly authorized a municipality may generally

64. NY—Ziegler v Chapin, 27 NE 471, 126 NY 342  
67 CJ p 1142 note 3

65 Ill—People ex rel Morgan v Village of Berkeley, 98 NE 2d 743, 409 Ill 160  
67 CJ p 1139 note 81 [b]

## Control by commission; municipalities bound

Where villages enacted identical ordinances providing for joint acquisition and operation of a common water supply, and ordinances provided for appointment of commissioners to act as members of water commission with powers and duties as prescribed in Revised Cities and Villages Act, commission rather than villages had power to acquire water supply, and where one village entered into contract with commission for water, the other village could not withdraw from the joint undertaking, but had duty under statute to contract with commission for water supply for its inhabitants—People ex rel Morgan v Village of Berkeley, supra

66 Mich—Royal Oak Tp v City of Ferndale, 15 NW 2d 707, 309 Mich 458

## Possible impairment of township bonds

Where township water system produced substantial income after allowance for bond retirement, township, which had supplied water to former township territory for several years after its annexation by city, was not entitled to enjoin city from taking over operation of water system in such territory on ground that

rights of holders of township water supply system revenue refunding bonds would be impaired—Royal Oak Tp v City of Ferndale, supra

## Payment originally made by property owners

Where that portion of township water system in area which was a part of township prior to annexation by city was paid for with money obtained from property owners, water system when installed did not become property of township, and no absolute ownership passed to city on annexation of the area, and the fact that action of city in taking over water system in annexed territory would impair, to some extent, remaining portion of township's water system did not entitle township to enjoin city from operating water supply system in annexed territory—Royal Oak Tp v City of Ferndale, supra.

67. NY—In re White Plains Water Com'rs, 68 NE 348, 176 NY 239  
67 CJ p 1143 note 7

Existence of municipality's option or privilege to purchase as affecting water company's right to buy from, or sell to, third person see infra § 259

68. Mass—Inhabitants of Revere v Revere Water Co, 105 NE 628, 218 Mass 161  
67 CJ p 1143 note 8

69 Neb—Havelone v City of Beatrice, 234 NW 791, 120 Neb 648  
67 CJ p 1143 note 9

## Statutory condition, limitations

Statute providing that it should be lawful after twenty years from intro-

enter into an agreement for the purchase of an existing system, and the franchise or charter of a water company may generally provide for an option on the part of the municipality to purchase the plant under certain conditions

While some controlling statutes have not authorized the municipal corporations to which they apply to acquire by agreement a system owned and operated by a water company, <sup>67</sup> when duly authorized a municipality may generally enter into an agreement for the purchase of an existing system <sup>68</sup> So, also, when duly authorized, a municipality, in granting a franchise to construct and operate a water supply system to a corporation <sup>69</sup> or to a private individual <sup>70</sup> may reserve to itself an option to purchase the plant after a certain time, and such an option may, under due authority, be included in a contract between the municipality and a water company for a supply of water, <sup>71</sup> but the power of the municipality in this regard has been denied where such power is not expressly conferred <sup>72</sup> A statute empowering a town to purchase a water company under the company's charter contract with

duction of water into any place, for the town, borough, city, or district in which public service company shall be located to become owners of such work by paying net cost of erecting, and maintaining the work, makes it a condition of charter of public service company incorporated thereunder that municipality shall, after twenty years, have right to adverse and compulsory acquisition of waterworks operated by public service company, but the statute is operative only where acquisition by municipality is sought from public utility incorporated under, and deriving its powers through, the same act, and has no application where municipality operates public utility beyond its corporate limits, and act did not authorize Borough Authority to acquire, by compulsory process, water facilities owned and operated by city within the borough, and in absence of agreement by city to such acquisition, Public Utility Commission was without jurisdiction to issue certificate of public convenience approving acquisition of such facilities—White Oak Borough Authority v Pennsylvania Public Utility Commission, 103 A 2d 502, 175 Pa Super 114

70 Idaho—Jack v Grangeville, 74 P 969, 9 Idaho 291

71 NJ—Livermore v Millville, 59 A 217, 71 NJ Law 503, affirmed 62 A 408, 72 NJ Law 222  
67 CJ p 1143 note 11

72 NY—In re White Plains Water Commissioners, 68 NE 348, 176 NY 239  
67 CJ p 1143 note 12.



the state to which the town is not a party is not invalid<sup>73</sup>

Such a reservation is not in the nature of a provision for a forfeiture,<sup>74</sup> but has been regarded as imposing a contractual obligation on the owner of the water system<sup>75</sup> So also, courts have so construed some contract provisions as to impose on the municipality the obligation either to purchase, or to extend or renew, the contract or franchise,<sup>76</sup> but where the franchise ordinance in one clause reserves to the municipality the option to purchase and in another the option to renew the contract, the view has been taken that neither clause imposes on the municipality any obligation or duty unless it exercises the privilege or option given<sup>77</sup> While the above reservation does not necessarily prevent the municipality from subsequently constructing waterworks of its own, as discussed supra § 235, the view has been taken that where, pursuant to statute, a water company has elected to offer to sell its system to a municipality and the municipality has duly accepted such offer, the municipality cannot thereafter proceed to construct its own system under the alternative authority to do so given by the statute<sup>78</sup>

The franchise rights and privileges in the ordinance constitute a consideration for the option to purchase,<sup>79</sup> and the benefits accruing to the municipality and its inhabitants by service rendered, together with the option to purchase, constitute a consideration for the franchise<sup>80</sup> The reservation of an option is to be construed in the sense in which the language of the contract may be supposed to be understood by the parties when the contract was

made<sup>81</sup> Such reservation is not to be more strictly construed against the municipality than against the water company,<sup>82</sup> and in fact doubts as to the intention of the parties have been resolved in favor of the municipality rather than of the water company<sup>83</sup> The agreement of the owner of a water system, contained in an option, that the municipality shall have the right to purchase has been regarded as a continuing and irrevocable offer,<sup>84</sup> and if the municipality once positively elects to take the plant, there is then a complete contract to sell and purchase,<sup>85</sup> provided the prerequisites ordained by the contract containing the option have been observed, such as the giving of notice by the municipality of the intention to purchase,<sup>86</sup> or payment or tender of the price, if that has been fixed<sup>87</sup> The contract created by such an election cannot be rescinded without mutual consent.<sup>88</sup> In order, however, that there may be an enforceable contract to purchase under an option in a franchise ordinance<sup>89</sup> or other contract,<sup>90</sup> it must appear that the municipality has actually elected to exercise the option; and, in general, a municipality does not become obligated to purchase a plant before conditions precedent to the existence of such obligation have occurred<sup>91</sup>

Where the charter of a water company which gives a municipality the right to purchase the waterworks system of such company is accepted by the company, there exists in substance a continuing offer on the part of the company to sell,<sup>92</sup> and any contract by the company inconsistent with the right of the municipality to purchase is contrary to such charter and void as against the municipality,<sup>93</sup> and on due acceptance by the municipality there

73 Mass—In re Opinion of the Justices, 14 NE 2d 468, 300 Mass 607

74 Ind—Valparaiso City Water Co v Valparaiso, 69 NE 1018, 33 Ind App 193

75 Ind—Valparaiso City Water Co v Valparaiso, supra

76 Ky—Benjamin v Mayfield, 186 SW 169, 170 Ky 446  
67 CJ p 1143 note 15

Compulsory purchase under statute on failure to renew contract see supra § 236

77 US—City and County of Denver v New York Trust Co, Colo, 33 S Ct 657, 229 US 123, 57 L Ed 1101

67 CJ p 1143 note 16

78 Mass—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360

79 Ala—City of Andalusia v Ala-

bama Utilities Co, 133 So 899, 222 Ala 689

80 Ala—City of Andalusia v Alabama Utilities Co, supra

81 Ind—Valparaiso City Water Co v Valparaiso, 69 NE 1018, 33 Ind App 193

82 Ind—Valparaiso City Water Co v Valparaiso, supra

83 Ind—Valparaiso City Water Co v Valparaiso, supra

84 US—Slocum v City of North Platte, Neb, 192 F 252, 112 CCA 510

85 Ala—Alabama Water Co v City of Anniston, 110 So 36, 215 Ala 120  
67 CJ p 1144 note 25

86 Ind—Valparaiso City Water Co v Valparaiso, 69 NE 1018, 33 Ind App 193

67 CJ p 1144 note 27

87 NJ—Jersey City v Flynn, 70 A

497, 74 N JE 104, modified on other grounds 76 A 3, 76 N JE 607

88 Kan—Cherryvale Water Co v Cherryvale, 69 P 176, 65 Kan 219

89 US—City and County of Denver v New York Trust Co, Colo, 33 S Ct 657, 229 US 123, 57 L Ed 1101

67 CJ p 1144 note 30

90 Ky—Kenton Water Co v City of Covington, 161 SW 988, 156 Ky 569

67 CJ p 1144 note 31

91 Wis—Superior Water, Light & Power Co v City of Superior, 181 NW 113, 183 NW 254, 174 Wis 257

67 CJ p 1145 note 32

92 Mass—Braintree Water-Supply Co v Braintree, 16 NE 420, 146 Mass 482

93 Mass—Braintree Water-Supply Co v Braintree, supra



is a complete and binding contract of sale and purchase<sup>94</sup> However, where a water company's charter provision providing for the city's purchase of the company contemplated that the corporation would continue in existence, the option would die when the corporation went out of existence and the city would have no right, under such charter provision, to purchase the water system of a successor corporation<sup>95</sup> Under certain circumstances a municipality may contract under one of several statutes in purchasing an existing system<sup>96</sup>

*Construction of option in light of statute* While there is apparently authority for the view that a corporate assignee of a franchise containing an option to purchase, given by ordinance, may be bound by the terms of such ordinance notwithstanding a statutory provision gives water companies the right to enter municipalities and install a plant,<sup>97</sup> and an option in a franchise purporting to give the right to purchase on the expiration of a specified period has been construed as intending to give the municipality an absolute right to purchase after such period, notwithstanding a statute conferred on municipalities the right to acquire a water system after the lapse of a period greater than that mentioned in such option,<sup>98</sup> where the reservation of the right to purchase merely recognized powers conferred on the municipality by statute, the rights of the municipality under such reservation are no greater than those so conferred by statute<sup>99</sup>

*Abrogation or cancellation of option.* An option to purchase which provides that the purchase price should be payable in part by the municipality's assuming the payment of part of the vendor owner's mortgage bonds and in part by the exchange of municipal bonds for part of such mortgage bonds is not necessarily abrogated or canceled by the subsequent cancellation or retirement of such mortgage bonds<sup>1</sup>

*Inspection of books and vouchers.* Where the

purpose of a provision in a contract between the owner of a water system and a municipality giving the municipality the right to inspect the books and vouchers of such owner at any and all times is to give the municipality an opportunity to learn the true conditions before exercising its option to purchase, the municipality is entitled to such inspection even in the absence of the exercise of such option<sup>2</sup>

*Validation or ratification of ultra vires contract.* An ultra vires contract or option of a municipality to purchase a water system may be validated by a subsequent statute giving the necessary power<sup>3</sup> The validation or ratification by statute may be conditional<sup>4</sup> When the municipality attempts to avail itself of the granted power it must proceed in accordance with the requirements of the validating statute<sup>5</sup> Under certain circumstances a municipality may ratify and adopt a contract to purchase, the binding effect of which is doubtful because of alleged irregularities in proceedings for the purchase<sup>6</sup>

*Obligations imposed on contractor and vendor* Questions as to what obligations are imposed on the contractor and vendor by his contract with a municipal corporation to construct a water system, and to sell and convey to the municipal corporation if it elects to purchase are determinable by the terms and construction of the provisions of the contract<sup>7</sup>

#### b. Popular or Official Approval

Provisions requiring the approval of the electors or the municipal officers as a prerequisite to the acquisition of an existing waterworks must be complied with

A provision of a municipal charter making a vote of the electors a prerequisite to the acquisition by the municipal corporation of any public utility has been given effect where the municipal corporation has reserved in a franchise ordinance the option to purchase,<sup>8</sup> and an option to purchase may be ultra vires for failure to include an express provision for submission of the question of purchase to the voters

94. Mass—Braintree Water-Supply Co v Braintree, *supra*

95. Ky—Kentucky Water Service Co v City of Middlesboro, 247 S W 2d 40

96. Mass—Seward v Revere Water Co, 87 NE 749, 201 Mass 453 67 C J p 1145 note 36

97. Pa—New Cumberland Borough v Riverton Consol Water Co, 81 A 548, 232 Pa. 525

98. Pa—New Cumberland Borough v Riverton Consol Water Co, *supra*.

99. Pa—Borough of Monessen v Monessen Water Co, 89 A. 829, 243 Pa. 53.

1. Ala—Alabama Water Co v City of Anniston, 110 So 36, 215 Ala 120 67 C J p 1145 note 40

2. N J—Town of Boonton v United Water Supply Co, 91 A 814, 83 N J Eq 536, affirmed 93 A 1086, 84 N J Eq 197

Inspection to determine cost where statute gives right to purchase at cost plus interest see *infra* § 238 c

3. Me—Phillips Village Corp v Phillips Water Co, 71 A. 474, 104 Me 103 67 C J p 1145 note 42

4. Md—Havre de Grace Water Co

of Harford County v City of Havre de Grace, 132 A 768, 150 Md 241 67 C J p 1145 note 43

5. Me—Phillips Village Corp v Phillips Water Co, 71 A. 474, 104 Me 103

67 C J p 1145 note 44

6. Mass—Seward v Revere Water Co, 87 NE 749, 201 Mass 453

7. N J—Jersey City v Flynn, 70 A 497, 74 N J Eq 104, modified on other grounds 76 A. 3, 76 N J Eq 607

67 C J p 1145 note 46

8. U S—City and County of Denver v New York Trust Co, Colo, 33 S Ct 657, 229 U.S. 123, 57 L Ed. 1101.

of the municipality in accordance with the requirement of the municipal charter.<sup>9</sup> So, also, there must be due compliance with the provision of a contract giving a town the privilege to purchase if the town should, at a meeting duly called for that purpose, vote to purchase.<sup>10</sup> Where, after a failure of a water company and a municipality to agree on the terms of a proposed contract to purchase, the company offers to sell at a specified price and a municipal resolution is enacted accepting the offer, contingent on favorable action by the voters of the municipality, the view has been taken that a contract results when there is a favorable vote by the voters, at least against a taxpayer of the municipality.<sup>11</sup>

Under some statutes certain officers of the municipality may determine the provisions of a proposed contract for the purchase of an existing system, without the consent of the voters of the municipality,<sup>12</sup> and, while such officers may, in the absence of a provision to the contrary, obtain an expression of the views of the voters before proceeding to determine the provisions of the proposed contract,<sup>13</sup> the officers do not thereby limit their statutory authority.<sup>14</sup> Where, however, such a statute contemplates and requires that a majority or the prescribed proportion of the voters shall act either by ratifying or rejecting a proposed contract, a binding contract arises when,<sup>15</sup> and only when,<sup>16</sup> it is ratified by a majority of the voters, which contract may not thereafter be rescinded without the consent of both parties thereto.<sup>17</sup> The warrant for the election must show that a proposed contract of purchase is being submitted,<sup>18</sup> and an affirmative vote only on the general proposition whether a purchase shall be made does not create a binding contract.<sup>19</sup>

*Time for acceptance by electors.* Where pro-

vision is made by statute for an offer by a water company to sell to a municipality and for acceptance by the municipality by vote of the electors of the municipality, the necessity for the acceptance of the offer within a reasonable time has been recognized,<sup>20</sup> notwithstanding the absence from the statute of any provision as to the time for acceptance;<sup>21</sup> but, in the absence of a provision to the contrary, the mere fact that the offer has once been rejected by the voters does not prevent a subsequent acceptance by them which occurs within a reasonable time after the offer is made.<sup>22</sup>

*Effect of assent.* Where there is a continuing offer to sell and, under the applicable statute, the authority of a municipality to purchase is conditioned on the assent of a certain majority of voters at a town meeting, on due assent by the voters the water company acquires rights which may not be taken away by an attempted rescission of the vote.<sup>23</sup>

*Approval or consent of municipal officers.* Where a statute requires the consent of certain officers of a municipality to the purchase by it of an existing system, affirmative action by such officers is necessary to constitute consent;<sup>24</sup> and, in the absence of such action, a purported acceptance by popular vote of an offer of a water company to sell to the municipality does not create an enforceable contract.<sup>25</sup>

*Personal interest of officer conducting election.* The mere fact that an officer of the vendor company acted as moderator at a town meeting which by vote authorized him to appoint committees to consider and report on a proposed purchase does not render a contract of purchase void in the absence of a showing that such officer acted corruptly.<sup>26</sup>

*Number of favorable votes.* The view has been taken that, except as there may be a requirement to the contrary,<sup>27</sup> where the approval of a majority

9. Md—Havre de Grace Water Co of Harford County v City of Havre de Grace, 132 A 768, 150 Md 241

10. Me—Inhabitants of Strong v Strong Water Co, 85 A 1062, 110 Me 256

11. NJ—Adams v Horton, 116 A 426, 97 NJ Law 312  
67 C J p 1146 note 54

12. Mass—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360

13. Mass—Revere Water Co v Winthrop, supra.

14. Mass—Revere Water Co. v Winthrop, supra.

15. Mass—Cohasset Water Co. v Town of Cohasset, 72 NE 2d 3, 321

Mass 137—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360

16. Mass—Revere Water Co v Winthrop, supra

17. Mass—Cohasset Water Co v Town of Cohasset, 72 NE 2d 3, 321 Mass 137—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360

18. Mass—Revere Water Co v Winthrop, supra.

19. Mass—Revere Water Co v Winthrop, supra.  
67 C J p 1147 note 62

20. Mass—Revere Water Co. v Winthrop, supra.

21. Mass—Revere Water Co v Winthrop, supra.

22. Mass—Revere Water Co v Winthrop, supra

23. Mass—Braintree Water Supply Co v Braintree, 16 NE 420, 146 Mass 482

24. Mass—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360

25. Mass—Revere Water Co v Winthrop, supra.

26. Mass—Seward v Revere Water Co, 87 NE 749, 201 Mass 453

27. Mass—Cohasset Water Co v Town of Cohasset, 72 NE 2d 3, 321 Mass 137.

of voters looking to the acquisition of an existing system under a contract or option is required a majority of the votes cast is sufficient <sup>28</sup>

### c. Property Included

What property is included in a contract for the purchase of a water system depends on the terms of the contract and the power of the municipality

The determination of the question as to what property is included in a contract for the purchase of a water system depends on the terms of the contract and the power of the municipality <sup>29</sup> The fact that a water company, with the consent of the municipality which granted its franchise, extended a branch pipe line beyond the city limits does not prevent the operative effect of a contract by the municipality to buy the entire system, <sup>30</sup> and where, in such case, the municipality elects to exercise its option to purchase, such election includes a portion of the system outside the municipal limits <sup>31</sup>

In general, the municipality is obliged to pay for whatever property it assumes to take under the contract, <sup>32</sup> and the view has been taken that, even though certain pipes were not laid and approved in strict accordance with the contract, the municipality was obliged to take such pipes if they were still in use, with the rest of the system which it desired to take, where the voters of the municipality had elected to take the entire system <sup>33</sup> However, in such case the municipality is not obliged to pay for pipe which was not approved as required by the contract and which was not in use at the time of the purchase <sup>34</sup> The fact that a municipality has reserved the option to purchase a water system does not necessarily require the owner to keep its original equipment for the entire option period <sup>35</sup>

*Service pipes* As between the municipality and the vendor owners, the service lines between the mains and the property line of its consumers belong to such owners, whether put in by such owners or by consumers, where the franchise does not specify

who shall pay the expense of putting in such service lines <sup>36</sup>

### d. Payment or Retention of Price

In general, contract provisions as to the municipality's payment of the purchase price are controlling

In general, contract provisions as to the payment of the purchase price by a municipality for the purchase of an existing waterworks are controlling and must be complied with <sup>37</sup> Thus, where the purchaser's right to possession is dependent on payment or tender of the purchase price, payment or due tender must be made in order to give such right, as discussed infra § 239 Where a contract between a municipality and a waterworks company required that, if the municipality desired to purchase the works, the purchase price as determined by arbitrators should, to the extent of outstanding bonds, be paid to the trustees for the bonds, and the municipality made manual tender to the trustee under a mortgage securing the bonds of the amount determined, and after rejection thereof deposited the same as a separate fund in a public treasury and later deposited it in court, the tender was sufficient <sup>38</sup> The view has been taken that an amount for an item for laying certain extensions after the arbitration to determine value was commenced, and payable under a separate contract, need not be included in the amount of the tender <sup>39</sup> Assumption, by the municipality, of the payment of obligations of the vendor which are a lien on the water system may constitute payment pro tanto <sup>40</sup> Parties to a contract for the purchase of waterworks by a municipal corporation are charged with knowledge of conditions on which municipal bonds for the balance of the purchase price could be issued and are presumed to have contracted in the light of such conditions <sup>41</sup>

*Retention of part of purchase price as security for performance* Where the contract permits the retention by the purchaser of a specified amount out

28 Conn—*Southington v Southington*, 69 A 1023, 80 Conn 646, 13 Ann Cas 411  
67 C J p 1147 note 66

29. US—*City of Omaha v Omaha Water Co*, Neb., 30 SCt 615, 218 US 180, 54 LEd 991, 48 LRA, NS, 1084  
67 C J p 1147 note 68  
Power of municipal corporation as to acquisition, operation, and maintenance of waterworks beyond its limits in general see *Municipal Corporations* § 1059 f

30 US—*Ashland Waterworks Co v City of Ashland, Ky*, 251 F 492, 163 CCA 486

31 US—*Ashland Waterworks Co v City of Ashland*, supra  
67 C J p 1147 note 70

32. NJ—*Town of Boonton v United Water Supply Co*, 102 A 454, 88 N JE 61

33. NJ—*Town of Boonton v United Water Supply Co*, supra

34. NJ—*Town of Boonton v United Water Supply Co*, supra

35. Pa—*Borough of Monessen v Monessen Water Co*, 89 A 829, 243 Pa 53

36 Kan—*City of Baxter Springs v Bilger's Estate*, 204 P 678, 110 Kan 409

37 Wis—*City of Eau Claire v Eau Claire Water Co*, 119 NW 555, 137 Wis 517

38 Wis—*City of Eau Claire v Eau Claire Water Co*, supra

39 Wis—*City of Eau Claire v Eau Claire Water Co*, supra

40 Colo—*City of Trinidad v Trinidad Waterworks Co*, 184 P 368, 67 Colo 344  
67 C J p 1148 note 78

41. Ala—*Alabama Water Co v City of Anniston*, 135 So 585, 223 Ala. 355.

of the purchase price until the delivery of a valid release of the rights of a third person to divert the waters of a stream included in the system, the vendor becomes entitled to such amount when,<sup>42</sup> and only when,<sup>43</sup> such provision as to the release has been complied with. In order to avoid the retention by the purchaser of a part of the purchase price because of a failure by the vendor strictly to perform a provision of the contract, the vendor has been permitted to give a bond for reimbursement of the purchaser if the latter is subsequently obliged to make expenditures because of such lack of strict performance.<sup>44</sup>

*Provision for free use of water* Under a contract so providing, the seller of the water system may be entitled to the free use of water for the purposes mentioned in the contract.<sup>45</sup>

#### e. Remedies

Remedies available to parties to an option or offer or contract to purchase a waterworks depend on the particular circumstances.

The remedies available to the parties to an option or offer or contract to purchase a waterworks by a municipality depend on the circumstances of the particular case and the applicable provisions.<sup>46</sup> In the case of a valid and enforceable contract for the purchase of a water system, a suit for specific performance may usually be maintained<sup>47</sup> by the municipality as purchaser,<sup>48</sup> and, in a proper case, the municipality may compel the appointment of arbitrators by the vendor water company in accordance with the reservation of an option to purchase.<sup>49</sup> A municipality may by its offer, made in a bill to enforce performance of the offer to pur-

chase, to take such part of the complete system provided for by the contract as can be made useful by it for its water supply, waive its right to the complete system so provided for<sup>50</sup> and thus lose the right to maintain an action for damages for non-performance in respect of the part as to which there is a waiver,<sup>51</sup> and it may be compelled to take and pay for that portion which may be made useful to the municipality.<sup>52</sup> In a suit by a water company against a municipality in which plaintiff seeks to have the court fix the price and require the municipality to pay and take over the system, plaintiff's pleading must show a default by defendant.<sup>53</sup> In a suit by a water company to enjoin a municipality from prosecuting proceedings for the appointment of arbitrators to make a valuation or from taking any steps to acquire plaintiff's waterworks, the propriety of requiring from defendant municipality and undertaking to indemnify plaintiff for expenses which might be incurred in the arbitration as a condition precedent to rendering inoperative a preliminary injunction has been recognized.<sup>54</sup>

*Avoidance, cancellation, or rescission of contract or conveyance* A town which seeks by its bill in equity to rescind a purchase of the waterworks and plant of a corporation for alleged fraud of the corporation is not entitled to a decree eliminating one or the material elements of the agreement and the substitution of something else therefor,<sup>55</sup> and in such case the town cannot retain the property acquired by it under the agreement and have the stipulation as to the price set aside and the amount determined in another way.<sup>56</sup> Where no valid and binding contract of purchase had been made because of noncompliance with statutory requisites, a deed

42. N.J.—*Jersey City v Jersey City Water Supply Co*, 132 A 852, 99 N.J.Eq 36, affirmed 135 A 918, 100 N.J.Eq 580.

67 C.J. p 1148 note 81.

43. N.J.—*Jersey City v Jersey City Water Supply Co*, 117 A 626, 93 N.J.Eq 620.

67 C.J. p 1148 note 82.

44. N.J.—*Jersey City v Flinn*, 78 A 391, affirmed 82 A 732, 79 N.J.Eq 212.

67 C.J. p 1148 note 83.

45. Wash.—*Duus v Town of Ephrata*, 134 P 2d 722, 14 Wash 2d 426.

**Construction of provision as to purposes of use**

Under contract for sale of water system excepting pipe lines to seller's buildings and water flowing therein for domestic, stock watering, garden and lawn purposes, seller's free use of water was limited to service of buildings existing when contract was drawn or replacements thereof by

means of pipes intended at that time for seller's use or replacements, and to use of water for household purposes, for watering garden grown exclusively for use of occupant householder, and lawn reasonably limited in extent by standards of community and prior use, and for watering stock grown or maintained on premises, and water could not be used for commercial, industrial, or irrigation uses.—*Duus v Town of Ephrata*, supra.

46. Kan.—*Cherryvale Water Co v Cherryvale*, 69 P 176, 65 Kan 219.

47. Kan.—*Cherryvale Water Co v Cherryvale*, supra.

48. Mass.—*Revere Water Co v Winthrop*, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360.

R.I.—*Town of Bristol v Bristol & Warren Waterworks*, 49 A 974, 23 R.I. 274.

49. Pa.—*Borough of Huntingdon v*

*Huntingdon Water Supply Co*, 101 A 989, 258 Pa 309.  
67 C.J. p 1148 note 86.

50. R.I.—*Town of Bristol v Bristol & Warren Waterworks*, 49 A 974, 23 R.I. 274.

51. R.I.—*Town of Bristol v Bristol & Warren Waterworks*, supra.

52. R.I.—*Town of Bristol v Bristol & Warren Waterworks*, supra.  
67 C.J. p 1148 note 89.

53. U.S.—*Oregon-Washington Water Service Co v City of Hoquiam, C.C.*  
A Wash, 28 F 2d 576, 29 F 2d 566.  
67 C.J. p 1148 note 90.

54. Wis.—*Eau Claire Water Co v Eau Claire*, 106 NW 679, 127 Wis 154.

55. Mass.—*Inhabitants of Revere v Revere Water Co*, 105 NE 628, 218 Mass 161.

56. Mass.—*Inhabitants of Revere v. Revere Water Co*, supra.  
67 C.J. p 1149 note 93.

delivered to, and recorded by, municipal officers in purported compliance with an agreement for sale and purchase has been canceled at the suit of the municipality <sup>57</sup>

*Enforcing right to inspect books and vouchers*  
The right of a municipality to enforce in equity its right to inspect the books of the owner of a water system, given by contract for the purpose of permitting the municipality to learn the true conditions before exercising its option to purchase, has been recognized <sup>58</sup>

*Time to sue* It has been held that a suit by the vendor owner to fix the purchase price of a water system brought prior to the date of purchase fixed by the municipality's election to purchase under an option in the franchise ordinance is premature <sup>59</sup>

## § 238. — Valuation of Property and Fixing Price

- a In general
- b Basis of valuation; elements included
- c Proceedings and determination

### a. In General

The method of evaluating the property of a water company for sale to a municipality depends on the contract provisions, the company's charter, and applicable statutes or ordinances

The method of evaluating the property of a water company for sale to a municipality depends on the provisions of the contract, the company's charter, and applicable ordinances or statutes <sup>60</sup> Where a municipality has the power to acquire a water system either by purchase or by the exercise

of the power of eminent domain, in the event of purchase the price may be fixed by agreement without resort to the method of ascertaining the value in the event of acquisition under the power of eminent domain <sup>61</sup> Provisions of a binding and enforceable contract for the purchase by a municipality of an existing water system usually will govern where such provisions fix the price to be paid, <sup>62</sup> or provide for the method of valuation of the property for the purpose of determining the price, <sup>63</sup> as, for example, where the contract provided for a determination by appraisers or arbitrators chosen by the parties, <sup>64</sup> after the failure of the parties to agree on the price, <sup>65</sup> provided it is sought to acquire the property under the contract <sup>66</sup>

According to some cases, such a provision for valuation by appraisers or arbitrators is an essential or material part of the contract, <sup>67</sup> but there is authority for the view that, under certain circumstances, the manner of determining the price may be a matter of form rather than of substance, <sup>68</sup> and that the fixing of the value of the property by arbitrators or appraisers appointed by the parties, as provided for by the contract, is not necessarily of the essence of the contract after the municipality has duly elected to exercise its option to purchase, <sup>69</sup> at least where the arbitration provided for is applicable only to a minor or incidental portion of the water system <sup>70</sup> Under the latter view, the appointment of the arbitrators is not a vital or fundamental act, but is an act of administrative detail, incident to the contract itself. <sup>71</sup>

Under some statutes to that effect, provision is sometimes made for the appointment of appraisers

57. Mass.—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct 253, 207 US 604, 52 L Ed 360

58. NJ—Town of Boonton v United Water Supply Co, 91 A 814, 83 N J Eq 536, affirmed 93 A 1086, 84 N J Eq 197

Mandamus to compel inspection of corporate books in general see Mandamus § 223

59. US—Oregon-Washington Water Service Co v City of Hoquiam, C CA Wash, 28 F 2d 576, 29 F 2d 566

60. Mass.—In re Opinion of the Justices, 14 NE 2d 468, 300 Mass 607

61. Minn.—Backus v City of Virginia, 142 NW 1042, 123 Minn 48  
Measure of compensation in case of condemnation see Eminent Domain § 144

62. Ala.—Alabama Water Co v City of Anniston, 135 So 585, 223 Ala. 355

67 C J p 1149 note 98.

### Construction of agreement

Under written contract by which corporation agreed to install and transfer to town a system to connect with town's water supply houses built by corporation under federal restrictions preventing their sale, and town agreed to pay corporation entire cost of such installation or so much thereof as might be paid by refunding to corporation part of amount paid by corporation for water furnished the houses, corporation was entitled to refund on all charges paid for water furnished the houses, although corporation had subsequently sold some of them and purchasers thereafter paid water charges—Mitola Bros v Town of North Kingstown, 65 A 2d 41, 75 RI 218—Massasoit Housing Corp v Town of North Kingstown, 65 A 2d 38, 75 RI 211

63. Kan.—Leavenworth v Leavenworth City, etc, Water Co, 76 P 451, 69 Kan 82

64. Pa.—Borough of Huntingdon v

Huntingdon Water Supply Co, 101 P 989, 258 Pa 309

67 C J p 1149 note 1

65. Pa.—Borough of Huntingdon v. Huntingdon Water Supply Co, supra.

67 C J p 1149 note 2

66. Kan.—Leavenworth v Leavenworth City, etc, Water Co, 76 P 451, 68 Kan 82

67. Ala.—City of Andalusia v Alabama Utilities Co, 133 So 899, 222 Ala. 689

67 C J p 1149 note 4

68. RI—Bristol v Bristol, etc, Water Works, 34 A 359, 19 RI 413

69. Or.—City of Dallas v Gates, 239 P 497, 133 Or 300

67 C J p 1149 note 6

70. Ala.—City of Anniston v Alabama Water Co, 93 So 409, 207 Ala. 497

71. US—City of Fayetteville v. Fayetteville Water, Light & Power Co, CCNC, 135 F. 400.

67 C J p 1150 note 8.

by the court to determine the valuation at which a municipality may purchase or for the appointment of commissioners by the court to determine the price if the owner and the municipality are unable to agree.<sup>72</sup> Under a provision in an option that, in the event of the parties' inability to agree, the price is to be fixed by due process of law, before resorting to the courts a party must in good faith have used reasonable efforts to effect an agreement on a fair price.<sup>73</sup> It has been held that a charter provision determining the manner of evaluating the property of the water company for sale to a municipality cannot validly be amended so as to reduce such valuation.<sup>74</sup>

*Determination of price preliminary to or following decision to acquire or purchase.* While, under the terms of some options, the election to purchase is to be made before the ascertainment of the value of the property,<sup>75</sup> under other options the valuation may precede the decision of the municipality as to whether it will purchase,<sup>76</sup> and in such a case, it has been held that, under some statutes, it is not necessary for a municipality to obtain the consent of the state public service commission before proceeding to obtain an arbitration as to valuation, under the option to purchase, in order to decide whether or not to exercise the option.<sup>77</sup> So under certain statutes conferring the right to acquire a water system owned by a water company, the municipality may initiate the proceeding to ascertain the price before finally making the election to acquire.<sup>78</sup>

*Approval of appraisal by municipal officers.* Where a statutory ratification or validation of an ultra vires provision of a contract reserving an option to purchase is conditioned on the approval of the appraisal by the mayor and city council, such approval may be inferred from an ordinance passed pursuant to the statute submitting the question of purchase to the voters of the municipality in ac-

cordance with the statute, even though no express approval is shown.<sup>79</sup> Such validating or ratifying statute has been so construed as not to require a submission to the voters prior to approval of the appraisal.<sup>80</sup>

*Deductions or allowances.* Where a municipality has contracted for the construction of a water supply system by another under certain plans and specifications, and has reserved the right to purchase such system, the determination as to the amount of deductions from, or abatement of, the purchase price because of alleged noncompliance with the contract depends on the terms and construction of the contract,<sup>81</sup> but the view has been taken that no deduction should be made because of a failure to comply with a certain provision of the contract where the object of such provision has been attained notwithstanding such noncompliance.<sup>82</sup>

*Statutory methods of valuation in lieu of contract method.* The power of the legislature, under its reserved power to alter or repeal laws or acts affecting corporations, to provide by statute for a method of valuation different from that provided for in a franchise ordinance granted by the municipality concerned to the water company has been recognized, at least where no obligation of the municipality to purchase under the franchise ordinance has arisen.<sup>83</sup>

#### b. Basis of Valuation; Elements Included

The method used in determining the value of a water company, and whether consideration should be given to its value as a going concern or as the holder of an unexpired franchise, depend on the applicable statutes and ordinances.

There is authority for the view that a court, in determining the actual value of a water system under an option to purchase duly exercised, is not governed by the same principles as govern in valuing such property for purposes of rate making or taxation.<sup>84</sup> While the mere cost of reproduction

72. Mass.—Gardner Water Co v Gardner, 69 NE 1051, 185 Mass 190

67 C J p 1150 note 10

73. US—Oregon-Washington Water Service Co v City of Hoquiam, CC A Wash, 28 F 2d 576, 29 F 2d 566  
67 C J p 1150 note 11

74. Mass.—In re Opinion of the Justices, 14 NE 2d 468, 300 Mass 607

75. US—Slocum v City of North Platte, Neb, 192 F. 252, 112 CCA 510

Me—Inhabitants of Strong v Strong Water Co, 85 A. 1062, 110 Me. 256

76. Pa.—Borough of Huntingdon v

Huntingdon Water Supply Co, 101 A 980, 258 Pa. 309  
67 C J p 1150 note 13

77. Pa.—Borough of Huntingdon v Huntingdon Water Supply Co, supra

78. Pa.—Borough of New Brighton v New Brighton Water Co, 93 A 327, 247 Pa. 232—Waynesboro Water Co v Public Service Commission, 78 Pa Super 143

Inspection of books of company see infra subdivision c

79. Md.—Havre de Grace Water Co of Harford County v. City of Havre de Grace, 132 A. 768, 150 Md. 241

80. Md.—Havre de Grace Water Co

of Harford County v City of Havre de Grace, supra

81. NJ—Jersey City v Jersey City Water Supply Co, 76 A. 3, 76 N.J. Eq 607  
67 C J p 1150 note 18

82. NJ—Jersey City v Flynn, 70 A 497, 74 N.J. Eq 104, modified on other grounds 76 A. 3, 76 N.J. Eq. 607  
67 C J p 1150 note 19

83. Wis—Superior Water, Light & Power Co v City of Superior, 181 NW 113, 183 NW 254, 174 Wis 257

84. Kan—City of Baxter Springs v. Bilger's Estate, 204 P. 678, 110 Kan. 409.

has been rejected as too low in determining the fair and equitable value,<sup>85</sup> a valuation of the property at the cost of reproduction, less depreciation, has been approved,<sup>86</sup> apart from the consideration of the value of the franchise and other intangible property and the value of the system as a going concern, as discussed below. Where provisions of the contract of purchase fix the rate of depreciation which is to be allowed, such provisions will govern.<sup>87</sup> The view has been taken that the value of water rights or privileges owned by the vendor are to be included where the statute governing the purchase expressly or impliedly provides for the payment of the fair value of the property purchased.<sup>88</sup> It has been held that an amount for an item for laying certain extensions after the arbitration was commenced, and payable under a separate contract, need not be included in the amount of the award.<sup>89</sup>

*Value of system as going concern; unexpired franchise.* Where the contract, option, or applicable statute contains a provision for the payment by the municipality of the fair and equitable value or a like provision, the view has been taken that there should be considered as an element of value the fact that the plant is an established and going concern,<sup>90</sup> and the commercial value of a waterworks plant as a going concern may properly be included in the valuation of the plant by the board of appraisers, where the municipality has elected to exercise its option to purchase, although the ordinance exercising such option provides that nothing shall be paid for the unexpired franchise of the waterworks company.<sup>91</sup> So, according to some cases, the fact that the owner has an unexpired franchise should be considered,<sup>92</sup> at least where the contract especially provides for a consideration of the franchise granted.<sup>93</sup> If, however, the franchise has

expired,<sup>94</sup> or a valid statute regulating the purchase expressly excludes from the price to be paid the value of the franchise,<sup>95</sup> nothing may be allowed for the franchise, and the price cannot be fixed by capitalizing earnings.<sup>96</sup> So the earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a fair measure of the fair value of the property, apart from an exclusive franchise.<sup>97</sup> Under the provision of the applicable and governing statute directing the determination of the fair value of the property for the purpose of its use by the municipality, the water company's right to lay pipes in the street<sup>98</sup> or its right to collect water rents<sup>99</sup> is not to be considered, where the municipality had that right by virtue of legislative authority.

*Cost basis.* Some options contained in franchise ordinances provide for the so-called "cost plus" basis of computing the price or value.<sup>1</sup> So, also, applicable statutes have provided for the payment of the cost of the franchise, works, and property of the company involved and for certain additions or deductions therefrom,<sup>2</sup> such as the addition of interest at a specified rate unless the rate is reduced by agreement.<sup>3</sup> Where, under the contract, the purchase price is to be based on the cost of construction and the vendor company fails to comply with a provision of the contract that it shall keep an accurate account of expenditures for construction, the cost must be based on estimates.<sup>4</sup>

Under statutes permitting a borough in which a water company is located to become the owners of the company by paying the net cost of erecting and maintaining the company's works, the "net cost of erecting and maintaining" the works is the original cost of erecting plant facilities, additions thereto, or replacements therefor, plus the cost of repairs to

85 U.S.—National Waterworks Co v Kansas City, Mo., 62 F 853, 10 CCA 653, 27 LRA 827

86 U.S.—Wichita Water Co v City of Wichita, DCKan, 271 F 973, reversed on other grounds, CCA, 280 F 770  
67 C.J. p 1151 note 24

87. Ala.—Alabama Water Co v City of Anniston, 135 So 585, 223 Ala 355  
67 C.J. p 1151 note 25

88 Mass.—Gloucester Water Supply Co v Gloucester, 60 NE 977, 179 Mass 365  
67 C.J. p 1152 note 36

89. Wis.—Eau Claire v Eau Claire Water Co, 119 NW 555, 137 Wis 517

90. Mass.—Gloucester Water Supply

Co v Gloucester, 60 NE 977, 179 Mass 365  
67 C.J. p 1151 note 26

91 U.S.—Omaha v Omaha Water Co, Neb, 30 S Ct 615, 218 US 180, 54 LEd 991, 48 LRA, NS, 1084  
92 RI—Bristol v Bristol, etc., Water Works, 49 A 974, 23 RI 274

93 Kan.—Galena Water Co v Galena, 87 P 735, 74 Kan 644

94 U.S.—National Waterworks Co v Kansas City, Mo., 62 F 853, 10 CCA 653, 27 LRA 827

95 Mass.—Gloucester Water Supply Co v Gloucester, 60 NE 977, 179 Mass 365

96 U.S.—National Waterworks Co v Kansas City, Mo., 62 F 853, 10 CCA 653, 27 LRA 827

67 C.J. p 1151 note 32

97. Mass.—Gloucester Water Co v Gloucester, 60 NE 977, 179 Mass 365  
67 C.J. p 1151 note 33

98. Mass.—Newburyport Water Co v Newburyport, 47 NE 533, 168 Mass 541

99 Mass.—Newburyport Water Co v Newburyport, supra

1. Wash.—City of Bremerton v Bremerton Water & Power Co, 153 P 372, 88 Wash 362  
67 C.J. p 1152 note 38

2 Mass.—Falmouth v Falmouth Water Co, 62 NE 255, 180 Mass 325  
67 C.J. p 1152 note 39

3 Mass.—In re Opinion of the Justices, 14 NE2d 468, 300 Mass 607

4. N.J.—Town of Boonton v United Water Supply Co, 102 A 454, 88 NJEq 61

the extent that such cost of repairs has not been recouped from consumers<sup>5</sup> Under a statutory provision to that effect, in determining the value of the waterworks system, there must be added to the net cost of erecting and maintaining the property interest at a prescribed rate, deducting from the interest all dividends theretofore declared<sup>6</sup>

*Time as of which rights of parties determined*  
Under some statutes controlling a purchase by a municipality a valuation of the property as of the date of its transfer to the municipality,<sup>7</sup> with interest until the date of payment,<sup>8</sup> has been approved. However, it has also been held that the valuation of the property and franchise will be fixed as of the time of the requisite popular vote which authorized their purchase, rather than the time of the conveyance<sup>9</sup>

*Proceedings in nature of condemnation proceedings*  
In a proceeding in Wisconsin, where provision for the acquisition of a system owned by a water company is made by the public utility law, and the proceedings ordinarily, at least, are in the nature

of condemnation proceedings, as discussed supra § 236, the "just compensation" which is provided for means the fair and reasonable value at the time possession is taken,<sup>10</sup> and, where payment is deferred, payment of legal interest must be provided for from the time possession is taken until the payment is made.<sup>11</sup> In greater detail it has been laid down that, in the valuation of a utility for condemnation or sale, the main elements usually considered in making a valuation are the present value of the physical properties,<sup>12</sup> the present and prospective earnings of the business,<sup>13</sup> the "going value" thereof,<sup>14</sup> and the amount presently needed to put the plant in good condition.<sup>15</sup> The enumerated elements may not, however, in their aggregate represent the just value of the utility to which the water company is entitled under the statute,<sup>16</sup> and in some cases it may be necessary entirely to eliminate some of such elements.<sup>17</sup>

### c. Proceedings and Determination

In general proceedings to determine the value of

5 Pa.—Newport Home Water Co v Pennsylvania Public Utility Commission, 102 A 2d 221, 174 Pa Super 522

#### Double collection not permissible

Water company may not recover cost of ordinary repairs from its customers by way of charges for water service, and then collect such costs together with interest again when municipality in which customers reside seeks to acquire assets of company—Newport Home Water Co v Pennsylvania Public Utility Commission, supra

#### Repair costs properly excluded

In proceeding contesting order of Public Utility Commission granting borough a certificate of public convenience to acquire water company, and setting purchase price to be paid by borough, commission's refusal to include in purchase price the costs of making repairs to plant facilities, which costs had been recouped, was not error—Newport Home Water Co v Pennsylvania Public Utility Commission, supra.

6. Pa.—Newport Home Water Co v Pennsylvania Public Utility Commission, supra

#### "Dividends" defined

The term "dividends theretofore declared" means any return to investors for the use of their capital, without distinction between hire of money from shareholders and from bondholders—Newport Home Water Co v Pennsylvania Public Utility Commission, supra.

#### Particular items deductible as "dividends"

(1) In proceeding contesting order of Public Utility Commission granting borough a certificate of public convenience authorizing borough to purchase water company and setting price to be paid therefor, commission did not err in deducting as "dividends theretofore declared" interest on borrowed capital, redemption premiums on outstanding bonds, and undivided profits of company—Newport Home Water Co v Pennsylvania Public Utility Commission, supra

(2) Also amount of debt owing to water company by former president which was canceled at direction of former president's son, who was president and controlling stockholder, on ground that former president's estate was utterly insolvent, was properly treated as "dividend theretofore declared" for purpose of computing price to be paid by borough—Newport Home Water Co v Pennsylvania Public Utility Commission, supra

#### Items not deductible as "dividends"

Inclusion of difference between total salaries actually paid to water company officers and total found by commission to be reasonable as "dividend theretofore declared" within statute setting price for waterworks plant as net cost of erection and maintenance with interest less dividends theretofore declared was error, in absence of any evidence that waterworks ran itself, or any inference that actual salaries paid were gratuities—Newport Home Water Co v Pennsylvania Public Utility Commission, supra

7. Mass.—Gloucester Water Supply Co v Gloucester, 60 NE 977, 179 Mass 365

8 Mass.—Gloucester Water Supply Co v Gloucester, supra

9 Mass.—Cohasset Water Co v Town of Cohasset, 72 NE 2d 3, 321 Mass 137

10 Wis.—Appleton Water Works Co v Railroad Commission of Wisconsin, 142 NW 476, 154 Wis 121, 47 LRA, NS, 770, Ann Cas 1915B 1160

67 C J p 1152 note 45

11. Wis.—Appleton Water Works Co v Railroad Commission of Wisconsin, supra

67 C J p 1152 note 46

12 Wis.—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, 152 NW 859, 161 Wis 122 LRA 1916F 592

67 C J p 1152 note 47

13 Wis.—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra

67 C J p 1153 note 48

14 Wis.—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra

67 C J p 1153 note 49

15 Wis.—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra

16. Wis.—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra

17. Wis.—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra



the water company for sale to a municipality are in the nature of an appraisal.

According to some cases, where the option for purchase by a municipality duly exercised provides for purchase at an appraised valuation, to be ascertained by persons to be selected as provided, the valuation by such persons as appraisers is an appraisal and not a technical arbitration.<sup>18</sup> The appraisers do not act judicially,<sup>19</sup> and, as long as they act honestly and in good faith, have a wide discretion as to their methods of procedure and their sources of information.<sup>20</sup> The appraisal of a waterworks plant where a municipality elects, under legislative authority, to exercise its option to purchase at a value to be determined by three engineers, one each to be selected by the city and the waterworks company, and the third by the two so selected, is a matter of public concern,<sup>21</sup> and a decision of a majority of the appraisers is sufficient.<sup>22</sup> An appraisal of a large system of waterworks under a contract of purchase will not be invalidated because the title to a small part of the property not vital to the integrity of the system is afterward found to be defective,<sup>23</sup> or because it may include parcels of property not necessary to the system,<sup>24</sup> since a court which has equitable jurisdiction may adjust such matters.<sup>25</sup>

While it is the rule, under a statute to that effect, that the evaluation proceedings must conform to judicial methods,<sup>26</sup> rules governing proceedings in the case of submissions to arbitrators generally, as discussed in Arbitration and Award §§ 55-70, have more commonly been recognized or applied in the

case of a submission of the question of the value of a water system on a sale to a municipality.<sup>27</sup> Methods adopted by engineers in ascertaining the value of a waterworks plant are matters of evidence, when presented to a court, and not rules of law, in a proceeding in which the actual valuation is for the court,<sup>28</sup> and the court is not, of course, bound to accept a valuation made by engineers where the final determination is for the court.<sup>29</sup> However, where the determination of an administrative body as to the items to be included in evaluating the water system is supported by the evidence it cannot be disturbed on appeal.<sup>30</sup> The provisions of some contracts to purchase contemplate an accounting to ascertain the amount of municipal bonds necessary to pay a balance of the purchase price.<sup>31</sup> In proceedings under some statutes for the appointment of appraisers, the municipality need not allege in its petition ability to purchase without exceeding its debt limit.<sup>32</sup>

*Proceedings under Wisconsin public utility act.* In Wisconsin, under a provision to that effect in the public utility law, the state public utility or service commission determines the value of a water company which a municipality proposes to acquire,<sup>33</sup> but an action may be brought in the circuit court to amend or alter the order of the railroad commission fixing compensation.<sup>34</sup> The order will not be set aside in such an action in the absence of grave error in arriving at, and seriously affecting, the final result,<sup>35</sup> and the valuation will stand if plaintiff does not establish to the full satisfaction

18. US—Omaha Water Co v City of Omaha, Neb., 162 F. 225, 89 C.C.A. 205, 15 Ann. Cas. 498, affirmed 30 S.Ct. 615, 218 U.S. 180, 54 L.Ed. 991, 48 L.R.A., N.S., 1084.

19. US—Omaha Water Co v City of Omaha, supra.

20. US—Omaha Water Co v City of Omaha, supra.  
67 C.J. p. 1153 note 55.

21. US—City of Omaha v Omaha Water Co, Neb., 30 S.Ct. 615, 218 U.S. 180, 54 L.Ed. 991, 48 L.R.A., N.S., 1084.

22. US—City of Omaha v Omaha Water Co, supra.

23. US—Omaha Water Co v City of Omaha, Neb., 162 F. 225, 89 C.C.A. 205, 15 Ann. Cas. 498, affirmed 30 S.Ct. 615, 218 U.S. 180, 54 L.Ed. 991, 48 L.R.A., N.S., 1084.

24. US—Omaha Water Co v City of Omaha, supra.

25. US—Omaha Water Co v City of Omaha, supra.

26. Mass—Cohasset Water Co. v

Town of Cohasset, 72 N.E. 2d 3, 321 Mass. 137.

**Public utilities department substituted for commissioners**

Where charter of water company authorizing town to purchase franchise and corporate property originally provided that compensation to be paid should be determined by three commissioners to be appointed by supreme judicial court "whose award when accepted by said court shall be binding upon all parties," an amendatory statute providing for reference to department of public utilities instead of commissioners would be construed as requiring department to proceed by judicial methods—Cohasset Water Co. v Town of Cohasset, supra.

27. Wis—Eau Claire v Eau Claire Water Co., 119 N.W. 555, 137 Wis. 517.  
67 C.J. p. 1153 note 62.

28. Kan—City of Baxter Springs v Bilger's Estate, 204 P. 678, 110 Kan. 409.

29. Kan—City of Baxter Springs v. Bilger's Estate, supra.  
67 C.J. p. 1153 note 64.

30. Pa—Newport Home Water Co. v Pennsylvania Public Utility Commission, 102 A.2d 221, 174 Pa. Super. 522.

31. Ala—Alabama Water Co v City of Anniston, 135 So. 585, 223 Ala. 355.

32. Pa—Fleetwood Water Co v. Fleetwood, 19 Pa. Dist. 418.  
67 C.J. p. 1154 note 66.

33. Wis—Superior Water, Light & Power Co v City of Superior, 181 N.W. 113, 174 Wis. 257, reheard 183 N.W. 254, 174 Wis. 257.  
67 C.J. p. 1154 note 67.

34. Wis—Appleton Waterworks Co. v Railroad Commission of Wisconsin, 142 N.W. 476, 154 Wis. 121, 47 L.R.A., N.S., 770, Ann. Cas. 1915B 1160.  
67 C.J. p. 1154 note 68.

35. Wis—Oshkosh Waterworks Co. v Railroad Commission of Wisconsin, 152 N.W. 859, 161 Wis. 122, L.R.A. 1916F 592.

of the court that the compensation fixed is unlawful<sup>36</sup> A finding by the circuit court in such an action that the compensation fixed by the commission is lawful and equivalent to a finding that the compensation fixed by the commission is just and adequate and such finding is therefore sufficient<sup>37</sup>

*Information as to company's condition, inspection of books* A municipality which contemplates the exercise of its right to purchase the system of a water company, conferred by some statutes, may be entitled to an inspection of the books of such company in order to determine the cost of construction, maintenance, and other pertinent facts for the purpose of deciding whether or not it shall exercise the right given by the statute to acquire such water system, on payment of the cost of erecting and maintaining the system with interest as specified and less dividends declared<sup>38</sup> However, such inspection should be refused where, in advance of inspection, it clearly appears that the cost of the works and property of the company is such that the financial condition of the municipality would preclude the purchase or acquisition of such works and property,<sup>39</sup> and the view has been taken that, in the absence of statutory provision therefor, the company may not be compelled to furnish, at its own expense, a detailed statement containing such information<sup>40</sup>

The information formerly obtained by mandamus to inspect the books of the company, as the result of subsequent legislation requiring the approval of the public service commission as a condition precedent to the acquisition of an existing system by a municipality, is now obtainable in the course of the proceeding before the commission<sup>41</sup>

*Fees, compensation, and costs.* Questions as to the division of costs and as to the amount of compensation awarded to appraisers in an action to determine the value of a waterworks system to be purchased by a city under a franchise agreement with its owners have been adjudicated<sup>42</sup> Some statutes governing the purchase by a municipality of a water system make provision as to the fees of commissioners or appraisers<sup>43</sup>

### § 239. — Transfer of Property, Title, and Possession; Rights Acquired and Obligations Assumed

When or whether title to a water system passes to a municipality, and the right, title or interest, and the duties or obligations, passing thereby, depend on the circumstances of the particular transaction and the provisions of the applicable statutes or ordinances

When or whether title to a water system passes to a municipality depends on the circumstances of the particular transaction<sup>44</sup> In some jurisdictions

36. Wis—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra.

67 C J p 1154 note 70

37. Wis—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, supra.

38. Pa—Williamsport v Citizens' Water & Gas Co, 81 A 316, 232 Pa 232

67 C J p 1154 note 72

39. Pa—Williamsport v Citizens' Water & Gas Co, 81 A 316, 232 Pa 232

40. Pa—Borough of New Brighton v New Brighton Water Co, 93 A 327, 247 Pa 232—Williamsport v Citizens' Water & Gas Co, 81 A 316, 232 Pa 232

41. Pa—Waynesboro Water Co v Public Service Commission, 78 Pa Super 143

67 C J p 1155 note 76

#### Procedure to be followed

Under statutes, the proper and only procedure for borough to acquire plant and works of water company is to apply first for certificate of public convenience, and borough then may obtain necessary information concerning price to be offered for water company's property under public utility commission's order for examination of books of company—Womelsdorf Consol. Water Co. v. Pennsylvania

Public Utility Commission, 50 A.2d 548, 160 Pa Super 298

#### Matters considered on hearing of petition to examine

On borough's petition to public utility commission to examine books of water company to prepare for submission to commission of borough's case for acquisition of some of water company's properties, water company could not contend that borough had no legal right to acquire only a part of water company's property, since such matter could be presented to commission at hearing which must be held before entry of final order on borough's petition to purchase—Womelsdorf Consol. Water Co v. Pennsylvania Public Utility Commission, supra.

#### Company's remedy for order granting access

(1) Where boroughs seeking to acquire waterworks and properties owned by land company filed petitions before Public Utilities Commission for access to books, records, and property, and land company's motion to dismiss challenged jurisdiction of the commission over parties and subject matter, and commission took jurisdiction and granted petitions for access, land company's exclusive remedy at that stage was to attack jurisdiction by statutory suit for injunction, and company could not chal-

lenge jurisdiction by appeal from order granting access—Sayre Land Co v Pennsylvania Public Utility Commission, 74 A 2d 713, 167 Pa Super 1

(2) Order of Public Utilities Commission overruling land company's motion to dismiss, and granting boroughs' petitions for access to books, records, and property were not final, and hence not appealable—Sayre Land Co v Pennsylvania Public Utility Commission, supra—Womelsdorf Consol. Water Co v Pennsylvania Public Utility Commission, 50 A 2d 548, 160 Pa Super 298

42. Kan—City of Baxter Springs v Bilger's Estate, 204 P 678, 110 Kan 409

67 C J p 1155 note 77

43. Mass—Gloucester Water Supply Co v Gloucester, 60 NE 977, 179 Mass 365.

67 C J p 1155 note 78

44. Mass—White v. Treasurer of Wayland, 173 NE 701, 273 Mass 468

#### Bequest for construction of water system

Where water system contemplated by bequest to town was constructed and turned over to town and managed by officers of town, title vested in town—White v. Treasurer of Wayland, supra.

the view is taken that in equity it is usually proper to treat a contract for the sale of a waterworks system as if specifically executed on the day agreed on for completion,<sup>45</sup> so that the purchaser municipality at that time becomes the equitable owner of the property to be transferred<sup>46</sup> and the vendor then becomes the equitable owner of the purchase money,<sup>47</sup> and each is a trustee for the other from that date.<sup>48</sup> These rules will govern on an accounting in respect of the period intermediate the date fixed for transfer and the date of actual transfer where the delay was not caused by the vendor.<sup>49</sup> Where, under some statutes, the purchase is complete on due acceptance or approval by the voters of the municipality, title thereupon passes.<sup>50</sup> So also, it seems that title to the waterworks and plant may pass to the municipality on the exercise of its option to purchase<sup>51</sup> in advance of actual payment of the price or execution of a conveyance,<sup>52</sup> and, in some instances, the conveyance of the property relates back to the date on which the municipality duly exercised its option to purchase under the terms of the ordinance granting the franchise to construct and operate the system.<sup>53</sup>

On the other hand, according to some cases, title does not pass until the price is paid and the property regularly transferred,<sup>54</sup> and, where the contract confers on the purchaser the right to posses-

sion of the property only on payment or tender of the purchase price, due tender must be made in order that the purchaser may have the right to possession.<sup>55</sup> So, under certain circumstances, the property does not pass to the municipality on a favorable popular vote of approval, but only on a subsequent consummation of the transaction.<sup>56</sup> Furthermore, it has been held that under a franchise authorizing a municipal corporation to buy, it was not entitled to possession or to the profits until actually ready to pay therefor.<sup>57</sup> Where the vendor water company remains in possession of the property after the exercise of the option to purchase, pending an accounting to determine the amount of bonds which must be issued for purposes of payments, the company is not to be dealt with as a trustee *ex maleficio*,<sup>58</sup> but if the company resists a decree for specific performance to which the municipality is entitled and sets up a plea of non est factum, the municipality is entitled to an accounting for profits from the date of the filing of such plea, less interest on the purchase price.<sup>59</sup> Where both the offer of the owner to sell and the resolution of the municipal council to purchase are expressly subject to the statutory requirement that the purchase shall be approved by a majority of the electors of the municipality, the view has been taken that neither legal nor equitable title to the property passes to the municipality until the conveyance is made

45. N.J.—People's Water Co of Millville v City of Millville, 123 A 747, 95 N.J.Eq 732

46. N.J.—People's Water Co of Millville v City of Millville, *supra*

47. N.J.—People's Water Co of Millville v City of Millville, *supra*

48. N.J.—People's Water Co of Millville v City of Millville, *supra*

49. N.J.—People's Water Co of Millville v City of Millville, *supra*  
67 C.J. p 1155 note 84

50. Mass.—Rockport Water Co v Rockport, 37 NE 168, 161 Mass 279

67 C.J. p 1155 note 85

51. R.I.—Bristol v Bristol, etc., Water Works, 55 A 710, 25 R.I. 189  
67 C.J. p 1155 note 86

52. Mass.—Rockport Water Co v Rockport, 37 NE 168, 161 Mass 279

53. Kan.—Galena Water Co v Galena, 87 P 735, 74 Kan 644  
67 C.J. p 1155 note 88

54. Mass.—Cohasset Water Co v Town of Cohasset, 72 NE 2d 3, 321 Mass 137  
67 C.J. p 1156 note 89

55. N.J.—Jersey City v Flynn, 70 A. 497, 84 N.J.Eq 104, modified on

other grounds 76 A. 3, 76 N.J.Eq 607

67 C.J. p 1156 note 90

56. Mass.—Inhabitants of Revere v Revere Water Co, 105 NE 628, 218 Mass 161

67 C.J. p 1156 note 91

#### Care of property pending transfer

Water company, after town had voted to purchase company's franchise and corporate property as authorized by company's charter, would be held liable to obligation of "good husbandry" while it retained possession of the property, and that obligation would be defined with reference to special nature of the property involved and with reference to undoubted intention of Legislature that company's franchise and property should be turned over to town as a going concern in full operation, and parties, if they desired, could regulate such matters by proper voluntary contract between themselves—Cohasset Water Co v Town of Cohasset, 72 NE 2d 3, 321 Mass 137

#### Rights as to receipts and expenditures

(1) After town voted to purchase franchise and corporate property of water company pursuant to company's charter, the company was in po-

sition of a vendor under contract to convey to town at a future date and it would remain in possession until conveyance was made, in absence of agreement to contrary, and in interval, it would operate the waterworks for its own account and not as agent of trustee of the town—Cohasset Water Co v Town of Cohasset, *supra*

(2) Where waterworks and plant of a corporation, purchased by a town pursuant to contract and vote of the town, did not pass to the town until the consummation of the transaction, the town, on a suit to rescind the sale for the fraud, may not recover the amount received as income or the amount spent for new construction intermediate the vote and the consummation of the transaction—Inhabitants of Revere v Revere Water Co, 105 NE 628, 218 Mass 161

57. Wash.—City of Bremerton v Bremerton Water & Power Co, 153 P 372, 88 Wash 362

58. Ala.—Alabama Water Co v City of Anniston, 135 So 585, 223 Ala 355  
67 C.J. p 1156 note 92

59. Ala.—Alabama Water Co v City of Anniston, *supra*

and possession delivered after such approval,<sup>60</sup> and that, in such case, interest on the bonded indebtedness which, under the agreement and conveyance, the municipality assumes, accruing intermediate the offer by the vendor and the delivery of the deed, and of possession, is payable by the vendor and not by the municipality where the agreement and deed are silent as to the interest so accruing<sup>61</sup>

**Right, title, or interest passing** The municipality acquiring a waterworks can take only such right, title, or interest in the system as the prior owner was capable of conveying,<sup>62</sup> and takes such grant subject to the right, title, and interest possessed by another municipality which was exercising exclusive jurisdiction over the system and had installed some facilities<sup>63</sup> As to what property passes to a municipality where an ordinance providing for the purchase of a water system is submitted to the voters and adopted, as required by statute, and the water company subsequently accepts the purchase price, the ordinance will govern<sup>64</sup> and not a schedule prepared by the company and accepted by municipal officials after the election<sup>65</sup> A warranty of title contained in a conveyance of a water system to a municipal corporation may not be extended to include property not within the contemplation of the parties<sup>66</sup> notwithstanding the language used, taken

in its ordinary sense, might include such property<sup>67</sup> A deed of an entire water system given by a water company to a municipal corporation carries with it title to certain mains, title to which had vested in the water company under a contract between it and a third person who had advanced the money to the company for the laying of such mains, in the absence of any provision of the deed excluding such mains<sup>68</sup>

In general, whether a municipality acquiring the property of a water company is liable for the previously incurred obligations or liabilities of the company depends on the terms of the contract<sup>69</sup> Where, under a deed of a water system to a municipality, the municipality assumes the grantor water company's obligation to refund, on the happening of a certain contingency, to a third person the amount advanced by such third person for the laying of mains through certain property, the right of such third person to enforce the obligation against the municipality has been recognized<sup>70</sup>

**Duty to supply other municipality or nonresidents** Whether or not a deed or conveyance obligates a municipality to supply water to other municipalities may depend on the provisions of the deed or conveyance and the construction given thereto<sup>71</sup> How-

<sup>60</sup> Colo—Pueblo Water Co v City of Pueblo, 139 P 1125, 25 Colo App 551

<sup>61</sup> Colo—Pueblo Water Co v City of Pueblo, supra.

<sup>62</sup> Pa—Versailles Tp Authority of Allegheny County v City of McKeesport, 90 A 2d 581, 171 Pa Super 377

**Right to divert quantity of water**

Where Passaic Valley Water Commission acquired rights from its predecessors to divert a total of seventy-five million gallons of water per day, but such rights were limited by terms of grant to predecessors as might be necessary for specified uses which were seventy-one million six hundred twenty-two thousand gallons per day, the latter figure was the maximum right of diversion established by prior use—Grobart v Passaic Val Water Commission, 61 A 2d 166, 137 N J Law 587

<sup>63</sup> Pa—Versailles Tp Authority of Allegheny County v City of McKeesport, 90 A 2d 581, 171 Pa Super 377

<sup>64</sup> Wash—Tacoma Light, etc, Co v Tacoma, 42 P 533, 13 Wash 115

<sup>65</sup> Wash—Tacoma Light, etc, Co v Tacoma, supra

<sup>66</sup> Tex—City of Ranger v Hagan, Civ App, 4 S W 2d 597, 67 C J p 1156 note 99.

<sup>67</sup> Tex—City of Ranger v Hagan, supra  
67 C J p 1156 note 1

<sup>68</sup> Neb—John A Creighton Real Estate Co v City of Omaha, 201 S W 657, 112 Neb 802, reversed on other grounds 204 N W 66, 112 Neb 802

<sup>69</sup> Ind—State ex rel Thompson v City of Greencastle, 40 NE 2d 388, 111 Ind App 640

**Proceeding to recover preexisting obligation**

Where stockholders of water company transferred stock to intermediaries and resigned as directors and intermediaries immediately appointed new directors for sole purpose of executing deeds and bills of sale by which assets of the water company were transferred to city, in state auditor's action against city to recover costs assessed against water company in rate proceeding before Public Service Commission, lack of authority on part of attorney and agents representing city in purchase of assets of water company to make agreement for city to assume water company's obligations was matter of defense; but paragraph of complaint with respect to item as to which there was no allegation that city assumed and promised to pay was bad, and whether the city as-

sumed obligation of the water company due the state auditor was for the jury—State ex rel Thompson v City of Greencastle, supra

<sup>70</sup> Neb—John A Creighton Real Estate Co v City of Omaha, 201 S W 657, 112 Neb 802, reversed on other grounds 204 N W 66, 112 Neb 802  
67 C J p 1157 note 3

<sup>71</sup> Va—Town of Vinton v City of Roanoke, 80 SE 2d 608, 195 Va 881

**Provision held collateral covenant**

Instrument designated as a deed, and conveying to town a water distribution system for fixed sum of money, which also contained a provision that grantor covenanted to furnish all water necessary to supply any and all demands, at rate of 5 cents for each thousand gallons, as long as town should require the same to be furnished, was divisible and constituted a deed as to the conveyance but a personal covenant for the sale of water, collateral to the sale of the property described, when no part of the consideration was specified as relating to the covenant and no particular source from which water was to be furnished was designated—Town of Vinton v City of Roanoke, supra.

ever, under a statute so providing, a city which purchases a water plant operating in contiguous territory is obligated to serve the customers of the plant purchased,<sup>72</sup> and apart from statute it has been held that a city purchasing a water plant which furnishes water to another community and to persons residing outside the limits of the city assumes the duty to serve the persons outside the city limits<sup>73</sup>

*Time for conveyance.* A statutory provision that the vendor water company shall, within a specified time after the vote to purchase has been taken, execute and deliver proper deeds and conveyance does not necessarily prevent a conveyance after the expiration of such period.<sup>74</sup>

*Conveyance ineffective.* Where no binding and enforceable contract of purchase has been created because of noncompliance with statutory requirements as to preliminary steps, a subsequent conveyance of the property to the municipality does not

pass title,<sup>75</sup> notwithstanding the conveyance was accepted and recorded by certain municipal officers<sup>76</sup> and there was a semblance of taking possession<sup>77</sup>

*Acquisition under public utility law* In Wisconsin, where the compensation awarded in a proceeding under the public utility law for the acquisition of a system owned by a water company is sufficient to pay all outstanding liens which are due, the company must pay them and turn the property over to the municipality free from all such liens<sup>78</sup>

## § 240. Sale, Lease, or Abandonment of Municipal Waterworks

Whether a municipal corporation which owns a waterworks system can sell or lease it depends on the provisions of the applicable statutes.

A municipal corporation which owns a system of waterworks cannot sell or lease it without legislative authority.<sup>79</sup> However, where the necessary authority exists, a municipality may enter into a sale or lease of the waterworks or a contract there-

72. Va—City of South Norfolk v City of Norfolk, 58 SE2d 32, 35, 190 Va 591

Purpose of statute was "to protect people and communities previously dependent upon a public service company for water from the calamity of being deprived of water by the sale to a city or town of the properties of such company"—City of South Norfolk v City of Norfolk, supra.

### Duty to supply from surplus

Under general statute described in the text and under provision in the charter of the city authorizing the city to sell surplus water to consumers located outside of the city limits, the city, on acquiring water system through which water was furnished to consumers in another community, had duty to supply consumers in such community with water from any surplus that it might have, consonant with rights of other persons protected by the statute—City of South Norfolk v City of Norfolk, supra.

### Matters held not to avoid obligation

Where on exercise by the city of Norfolk of its option to take over part of water system that had been serving South Norfolk, the distribution system in South Norfolk was cut off from the Portsmouth source of supply and attached to the Norfolk source of supply, the city of Norfolk could not avoid its obligation to serve the city of South Norfolk on the ground that what it had acquired by its deed was not a water plant but only a water distribution system, and city of Norfolk which did not exercise its option until after the water company had conveyed all

its rights, franchises and properties to the city of Portsmouth was not relieved of its obligation to supply water to South Norfolk, as a former customer of the water company, by reason of fact that the deed to the city of Norfolk was from Portsmouth, a municipal corporation, and not from the water company—City of South Norfolk v City of Norfolk, supra.

73. Cal—Durant v City of Beverly Hills, 102 P 2d 759, 39 Cal App 2d 133

### Purchase of plant within own limits

Although city of Little Rock purchased only so much of water plant supplying both Little Rock and North Little Rock as lay within its own city limits, where part purchased was essential to service in North Little Rock, Little Rock assumed obligation to continue water service to North Little Rock—North Little Rock Water Co v Waterworks Commission of City of Little Rock, 136 SW 2d 194, 199 Ark 773

### Purchase of private plant

A city purchasing private water plant, furnishing water to persons residing outside limits of city, assumed a trust to perform the contract and meet obligations of private company, and assumed duty to continue to serve persons outside city limits at a reasonable rate—Durant v City of Beverly Hills, 102 P 2d 759, 39 Cal App 2d 133

74. Mass—Revere Water Co v Winthrop, 78 NE 497, 192 Mass 455, error dismissed 28 S Ct. 253, 207 US 604, 52 L Ed. 360.

75. Mass—Revere Water Co. v Winthrop, supra  
67 C J p 1157 note 5

76. Mass—Revere Water Co v Winthrop, supra

77. Mass—Revere Water Co v Winthrop, supra.

78. Wis—Oshkosh Waterworks Co v Railroad Commission of Wisconsin, 152 NW 859, 161 Wis 122, L R A 1916F 592  
67 C J p 1157 notes 8, 9.

79. Utah—Ogden City v Bear Lake, etc., Water-Works, etc., Co., 52 P 697, 16 Utah 440, 41 L R A. 305  
67 C J p 1157 note 11

Lease of water right by municipal corporation see supra § 230

Municipality's lease of surplus water power see supra § 234 a.

Sale or disposal of property of municipal corporation in general see Municipal Corporations §§ 961-970

### Construction of prohibition

The constitutional prohibition against municipality's sale of water rights or water sources should be construed not narrowly or strictly, but in accordance with purpose of securing to communities their water systems, and prohibiting sale or lease to private parties—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P 2d 790, 96 Utah 104.

### Particular transaction held not lease of waterworks

Utah—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P.2d 790, 96 Utah 104.

for,<sup>80</sup> subject to the conditions or limitations under which the authority is granted,<sup>81</sup> and in some jurisdictions, under statutory or constitutional provisions to that effect, a municipal corporation may exchange water rights or sources for other water rights or sources of equal value even though it is expressly forbidden to dispose of such rights or sources<sup>82</sup>

Limitations or restrictions as to the sale or lease of waterworks property do not apply to land which is not part of the municipal waterworks system<sup>83</sup> Moreover, when the necessary authority exists a contract may include a sale of the mains and pipes laid in the public streets<sup>84</sup> and the lease of a dam

and excess water power<sup>85</sup> Rules governing the construction of statutes generally have been applied to statutes relating to the right of a municipality to sell, lease, or otherwise dispose of a water system or part thereof<sup>86</sup>

In determining the question as to the fairness and reasonableness of a lease, the contract should be considered with reference to the conditions which surrounded the parties at the date of the contract<sup>87</sup> One making expenditures on a municipal water system under a lease subsequently declared void is entitled to recover under the common counts the money actually expended in improving and operat-

80. Cal—City of Santa Barbara v Maher, 77 P 2d 306, 25 Cal App 2d 325

81. Green v City of Rock Hill, 147 SE 346, 149 SC 234

#### Arbitration provision; approval of council

Provision for arbitration in a contract of sale of waterworks to a city is not void by reason of a stipulation that the finding of the arbitrators should be approved by the council to be binding on the city—Lidgerwood Park Waterworks Co v. Spokane, 53 P 352, 19 Wash 365

#### Power to "sell, convey, and dispose"

Power to lease waterworks plant and equipment was conferred by statute granting power to "sell, convey, and dispose" of such property—Green v City of Rock Hill, 147 SE 346, 149 SC 234

#### Duration of lease

In absence of legal inhibition, lease of waterworks may be made for any length of time—Green v City of Rock Hill, supra.

81. Cal—City of Santa Barbara v Maher, 77 P 2d 306, 25 Cal App 2d 325

#### Approval of public service commission

(1) In general—City of Allentown v Pennsylvania Public Utility Commission, Com Pl, 63 Dauph Co 61, exceptions overruled 64 Dauph Co 126, appeal quashed 96 A 2d 157, 173 Pa Super 219

(2) A purported contract of city to lease to plaintiff its water system for ten years executed without first obtaining approval of Public Service Commission or waiver thereof was void, and constituted no ground of action for loss of future profits for alleged breach of contract—Lockard v City of Salem, W Va., 32 SE 2d 568

82. Utah—Genola Town v Santaquin City, 85 P 2d 790, 96 Utah 104

#### Particular transactions held valid

(1) A municipal corporation may exchange some of its water rights or

water supply, even in constant flow, for other water or water rights, suitable for culinary and municipal purposes, even though acquired water may be received in intermittent flow, if acquired water may be devoted to culinary and municipal uses, when value of acquired water for such uses is equal to the value for such uses of the water with which the city parted—Genola Town v Santaquin City, supra.

(2) City's agreement to deliver fixed amount of culinary water to town, in exchange for irrigation water to be obtained from stock in irrigation company given by town to city, which was construable as requiring the city to deliver the culinary water regardless of whether the city had water in excess of its needs, was not violative of constitutional provision prohibiting disposal by city of water rights or sources but permitting exchange of water rights or sources for other water rights or sources of equal value—Genola Town v Santaquin City, 110 P 2d 372, 100 Utah 62

(3) Under constitutional provisions permitting municipalities to exchange water rights or sources for other water rights or sources of equal "value," the mere fact that money as well as water rights is given in exchange for water rights does not establish a difference in value that would bring the transaction outside of the constitutional provision, since money may represent other considerations than that of making up a deficiency of use value—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P 2d 790, 96 Utah 104

#### Particular transaction held invalid

A contract whereby a landowner granted town right of way for piping water, in exchange for tap rights, did not constitute a valid exchange of water rights and was violative of constitutional provision preventing a municipal corporation from leasing, selling or disposing of water rights or sources of water supply, and where a contract granting to town

right of way for piping water in exchange for tap rights, was void, town's right of way and landowners' tap rights were merely permissive—Hyde Park Town v Chambers, 104 P 2d 220, 99 Utah 118

83. Tex—Sayles v City of Abilene, Civ App, 290 SW 239, affirmed City of Abilene v Sayles, Com App, 295 SW 578

#### Commissioners' determination as binding

Tex—Sayles v City of Abilene, supra.

#### Approval of voters held unnecessary

Wash—City of Seattle v Pacific States Lumber Co, 7 P 2d 967, 166 Wash 517

#### Evidence

With respect to city's right to dispose thereof by contract, evidence was held to show that, when sold, timber standing on city watershed was not part of city water system—City of Seattle v Pacific States Lumber Co, supra.

84. US—Farmers' L & T Co v Galesburg, Ill, 10 S Ct 316, 133 US 156, 33 L Ed 573

85. Wis—Eau Claire Dells Improvement Co v City of Eau Claire, 179 NW 2, 172 Wis 240  
67 C J p 1157 note 13

86. Cal—City of Santa Barbara v Maher, 77 P 2d 306, 25 Cal App 2d 325

#### Provision for vote of electors

"Privileges in connection therewith" as used in provision of the city charter of Santa Barbara prohibiting the conveyance or alienation of the title to real estate or water, water rights and "privileges in connection therewith" except by a vote of the electors, relates under the doctrine of the "last antecedent," only to the words immediately preceding, namely, "water rights"—City of Santa Barbara v Maher, supra

87. US—Los Angeles City Water Co v. Los Angeles, 88 F 720, affirmed 20 S Ct 736, 177 US 558, 44 L Ed 886

67 C J p 1157 note 14.

ing the water system, and the reasonable value of his services, less net profits<sup>88</sup> Equity may decree a forfeiture of a lease of municipal waterworks for gross violations of the duties imposed on the lessee,<sup>89</sup> but the municipality may, under certain circumstances, be estopped to assert a forfeiture<sup>90</sup>

**Abandonment** As affecting the establishment of a prescriptive right by a municipality to lands on which its pumping station is located, the fact that for part of the prescriptive period the water system was operated by a committee of water takers who acted under the municipality did not show an abandonment of the waterworks by the municipality<sup>91</sup>

## § 241. Operation, Maintenance, Extension, and Control of Plant

The power of a city to maintain and operate a waterworks system depends on statute, and in operating such system it is generally recognized to be acting

in a private, nongovernmental capacity, and is subject to the rules applicable to private concerns in such business

The power of a city to maintain and operate a waterworks system depends on the provisions of the applicable statutes,<sup>92</sup> and under various statutes to that effect municipalities have been held authorized to operate, control, and manage a waterworks system<sup>93</sup> Moreover, a municipality authorized to maintain and operate a waterworks system has the power to do incidental essential acts relating to the maintenance and operation of the waterworks,<sup>94</sup> and the governing body of the municipality has discretion to determine various matters relating to the maintenance and operation of the municipal water system<sup>95</sup> Thus, a municipality may enter into reasonable contracts relating to the operation of the waterworks system,<sup>96</sup> and, within statutory limits, it may provide for a reasonable plan of control

88. W Va.—Lockard v City of Salem, 32 SE 2d 568

### Allowance of particular expenses

Money expended by purported lessee of municipal water system for counsel fees and expenses of obtaining witnesses in a proceeding before State Public Service Commission to procure approval by that body of a contract ostensibly leasing the water system to him was not recoverable from municipality on theory that such expenditure was a part of cost of maintaining and operating the water system, but interest on money borrowed and expended in good faith in operation and maintenance of a municipal water plant by lessee thereof under a lease subsequently held to be void could be recovered from the municipality—Lockard v City of Salem, W Va., 43 SE 2d 239

89. Mass.—Mahon v Columbus, 58 Miss 310, 38 Am R 327

90. Wis.—Eau Claire Dells Improvement Co v City of Eau Claire, 179 NW 2, 172 Wis 240  
67 C J p 1157 note 16

91. Mass.—Smith v Lincoln, 49 NE 743, 170 Mass 488

92. Ill.—Simpson v City of Highwood, 23 NE 2d 62, 372 Ill 212, 124 ALR 1459

### What constitutes "waterworks" within statute

The term "waterworks," as used in statute authorizing city owning and operating waterworks or water supply system to improve and extend such system, contemplates such projects for systems without complete facilities and hence includes system of water mains, hydrants and appurtenances owned and operated by city purchasing water from adjacent city—Simpson v. City of Highwood, supra

93. Kan.—Cooper v City of Goodland, 102 P 244, 80 Kan 121, 23 L.R.A.N.S., 410

Mo.—State ex rel City of Blue Springs v McWilliams, 74 SW 2d 363, 335 Mo 816

SC—Green v City of Rock Hill, 147 SE 346, 149 SC 234

94. SC—Green v City of Rock Hill, supra

95. Ala.—Water Works Board of City of Mobile v City of Mobile, 43 So 2d 409, 253 Ala 158

### Ceasing certain operations

(1) In general—Pyle v Oakmont Municipal Authority, 70 Pa Dist & Co, 1, 97 Pittsb Leg J 193

(2) Fact that city proposed to cease to operate its existing pumping stations, except in case of emergency, was a matter addressed to the discretion of governing body of the city—Water Works Board of City of Mobile v City of Mobile, 43 So 2d 409, 253 Ala 158

96. SC—Green v City of Rock Hill, 147 SE 346, 149 SC 234

### Construction of contract and bidding instructions

Where contractors were required by bidding instructions to determine actual conditions at site of proposed presettling basin by personal examination, the notation of "rock" on plans could not be construed as a warranty or representation that a solid level rock base existed at depth indicated on the plans by the word "rock," and contractors could not rely thereon for recovery of compensation for alleged additional services rendered by reason of alleged misrepresentation, and contractors who had had a wide experience in excavating and who were required by bidding instructions furnished by city to determine actual conditions at site of pro-

posed presettling basin by personal examination, and who were required by contract thereafter executed to submit monthly claims for extra work as authorized by city engineer could not recover on a claim submitted for the first time after they were declared in default, for alleged additional services rendered and expenses incurred by reason of alleged misrepresentations by city in plans and specifications regarding depth at which solid layer of rock underneath area to be excavated would be found at a uniform level—Furton v City of Menasha, D C Wis., 71 F Supp 568

### Construction of provision as to co-operative reservoir

In a contract between municipalities respecting the surplus waters of a reservoir constructed as a co-operative enterprise, providing that prior to actual consumption of the full amount of their respective allowances the municipalities shall be at liberty to enter into contract with any municipality for supplying water, the word "respective" is disjunctive and not collective—City of Newark v Passaic Val Water Commission, 192 A 835, 122 N J Eq 173

### Lease of reservoir and covenants thereof

(1) A township's use of water from reservoir, on land covered by lease assigned to it for purpose of supplying consumers in village and adjacent territory within township, amounted at most to breach of covenant to use water on leased premises, not breach of condition, and the fact that township, to which lessee of land as reservoir site assigned lease, tore down pump house thereon and replaced it with new and more modern one at large public expense, did not constitute violation of lessee's covenant to deliver demised premises to lessor at

and management of the system,<sup>97</sup> and it may contract that a company should manage the system<sup>98</sup> So also, the city has the right to acquire a water source and an easement over lands to lay its water mains and pipes<sup>99</sup>

In operating a waterworks system for protection against fire,<sup>1</sup> for flushing sewers,<sup>2</sup> or for other uses pertaining to the public health and safety,<sup>3</sup> a municipal corporation exercises a governmental power, and there is even authority for the view that the operation and maintenance of a waterworks generally pursuant to statute are governmental

functions.<sup>4</sup> On the other hand, it is usually recognized that in supplying water to consumers for general or domestic purposes a municipal corporation acts in the capacity of a private corporation and not in the exercise of the power of local sovereignty,<sup>5</sup> that is, the municipal corporation acts in a proprietary and only a quasi-public capacity,<sup>6</sup> or in a proprietary or private or business, and not in a governmental or legislative, capacity,<sup>7</sup> and in general, it is exercising proprietary and business powers,<sup>8</sup> and is engaged in a business of a private nature.<sup>9</sup> However, it has also been held that the rule that the municipality supplying consumers is acting

end of tenancy with reservoir and pump house thereon in good and substantial repair and condition—Howell v Sewickley Tp, 43 A 2d 121, 352 Pa 552

(2) Where original lessee of land and subsequent assignees of lease openly used water from reservoir on land to supply village residents without objection by lessor, lessor was estopped from asserting that similar use of water by township to which lease was subsequently assigned, constituted breach of covenant in lease to use water on leased premises, in absence of evidence that lessor was without knowledge of such fact—Howell v Sewickley Tp, supra

(3) A lessor, acquiescing in assumption and discharge of lessee's liabilities by land company to which lessee assigned lease, receiving and accepting rentals from such company, knowingly treating one to whom company subsequently assigned lease as lessee and receiving rentals from him, retaining warrant for year's rent from township, to which such assignee assigned lease, for nine months, during which time township had possession of, and obligated itself in respect to, premises without objection or remonstrance by lessor, was estopped from denying that lease was assigned by original lessee's deed to land company—Howell v Sewickley Tp, supra

97 Ky—Cawood v Coleman, 172 S W 2d 548, 294 Ky 858

#### Ordinance held valid

City ordinance creating an electric and water plant board to consist of five resident taxpayers and users of electric energy, possessing qualifications of council members, and to serve without salary, and providing for a plant manager and necessary employees with salary limitations enacted a practical combination of various statutory provisions with respect to management of such plants and did not provide for an invalid "delegation of power"—Cawood v. Coleman, supra.

98. S C—Green v City of Rock Hill, 147 SE 346, 149 S C 234

99. Ark—City of Springdale v Fleming, 89 SW 2d 602, 191 Ark 1058

1. Ill—Eastern Illinois State Normal School v City of Charleston, 111 NE 573, 271 Ill 602, L R A 1916D 991

2. Ill—Eastern Illinois State Normal School v City of Charleston, supra

3. Ill—Eastern Illinois State Normal School v City of Charleston, supra

4. Ark—Patterson v City of Little Rock, 149 SW 2d 502, 202 Ark 189

#### Waterworks taken over from improvement district

Where a city takes over for operation and maintenance a waterworks constructed by an improvement district, such operation and maintenance are governmental functions—Brown v City of Bentonville, 126 SW 93, 94 Ark 80

#### Making contract in governmental capacity

If operation and maintenance of municipal water plant was a "governmental function," action of city of Little Rock in making contract for purchase of water plant whereby it agreed to sell water to water company for distribution in North Little Rock was in such capacity, since the contract was executed in contemplation of performance of a "governmental function"—North Little Rock Water Co v Waterworks Commission of City of Little Rock, 136 S W 2d 194, 199 Ark 773

5. Pa—American Aniline Products v Lock Haven, 135 A 726, 288 Pa 420, 50 A L R 121

67 C J p 1158 note 22

6. Va—Leonard v Town of Waynesboro, 193 SE 503, 169 Va 376

67 C J p 1158 note 23

7. Ariz—City of Tucson v Sims, 4 P 2d 673, 39 Ariz 168

Ga—Lawson v City of Moultrie, 22 SE 2d 592, 194 Ga 699—Carruthers

v City of Hawkinsville, 156 SE 634, 42 Ga App 476

Ky—Electric Plant Board of City of Mayfield v City of Mayfield, 185 S W 2d 411, 299 Ky 375—City of Hazard v Duff, 154 S W 2d 28, 287 Ky 427

Mich—Taber v City of Benton Harbor, 274 N W 324, 280 Mich 522

Mont—Farmers State Bank of Conrad v City of Conrad, 47 P 2d 853, 100 Mont 415

N J—McAlpine v City of Garfield, 55 A 2d 666, 25 N J Misc 477, affirmed 59 A 2d 3, 137 N J Law 197

Ohio—State ex rel Mt Sinai Hospital of Cleveland v Hickey, 30 NE 2d 802, 137 Ohio St 474—State v Evans, 165 NE 380, 30 Ohio App 419

Pa—In re Petition of City of Philadelphia, 16 A 2d 32, 340 Pa 17—Madden v Borough of Mt Union, 185 A 275, 322 Pa 109—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

Tenn—Killion v City of Paris, 241 S W 2d 524, 192 Tenn 446

Tex—Wiggins v City of Texarkana, Tex, Civ App, 239 S W 2d 212, affirmed City of Texarkana, Tex v Wiggins, 246 S W 2d 622, 151 Tex 100—City of Crosbyton v Texas-New Mexico Utilities Co, Civ App 157 S W 2d 418, error refused

W Va—Wheeling v Benwood-Mechen Water Co, 176 SE 234, 115 W Va 353

67 C J p 1158 note 24—44 C J p 174 note 11

8 N J—City of Newark v West Milford Tp, Passaic County, 88 A 2d 211, 9 N J 295

Okl—Maney v Oklahoma City, 300 P 642, 150 Okl 77, 76 A L R 258

67 C J p 1158 note 25

9. Ky—City of Bowling Green v Kirby, 295 SW 1004, 220 Ky 839

Mich—Nelson v Wayne County, 286 N W 617, 289 Mich 284

67 C J p 1158 note 26

#### Commercial enterprise

N H—Chicopee Mfg Corp v Manchester Board of Water Com'rs, 81 A 2d 837, 97 N H 109



in a proprietary capacity applies only where water is supplied for the use of its inhabitants.<sup>10</sup>

In so far as a municipal waterworks is regarded as a business of a private, nongovernmental nature, the municipal corporation may, generally speaking, exercise such powers as a private concern engaged in like business may exercise.<sup>11</sup> So also, where a municipality engages in the business of selling water for profit, pursuant to statutes so providing,<sup>12</sup> it is governed by the same rules as control an individual or a business corporation under like circumstances,<sup>13</sup> and is subject to the same duties and liabilities.<sup>14</sup> Accordingly, in general, a municipal corporation which purchases the assets and franchise of a water company acquires the rights and privileges of,<sup>15</sup> and has no greater rights and powers than,<sup>16</sup> such company; it assumes the responsibilities of,<sup>17</sup> and is subject to the same obligations as,<sup>18</sup> such company. A municipal corporation which is authorized by statute to operate and maintain a water system constructed through the agency of an improvement district is authorized to repair the plant and to renew the parts which become worn out.<sup>19</sup> Accord-

ingly, where a town takes over and controls a water line built by others and uses it for the benefit of the town and consumers generally, and through it delivers water for a profit, it is obligated to pay, on a quantum meruit, those who constructed the line.<sup>20</sup>

*Control beyond territorial limits.* The power of a city to make ordinances and enforce them on the water supply system beyond the city's territorial limits is limited to such ordinances as are needful to protect the waters from pollution and contamination.<sup>21</sup>

*Regulation* While under some statutes the acquisition of a water supply system by a public agency removes such system from the field of utility regulation,<sup>22</sup> under other statutes, since a municipal plant is acting in a business, not governmental, capacity,<sup>23</sup> it is subject to reasonable regulation by the state public service or utilities commission.<sup>24</sup> Where a municipality has the power to operate a water system, the courts cannot interfere with its exercise in the absence of an abuse of discretionary power

10. Ill.—*Eastern Illinois State Normal School v. Charleston*, 111 N.E. 573, 271 Ill. 602, L.R.A. 1916D 991, 44 C.J. p. 174 note 12.

11. Wis.—*West Bend v. West Bend Heating & Lighting Co.*, 202 N.W. 350, 186 Wis. 184, 67 C.J. p. 1158 note 27.

12. Ga.—*Alford v. City of Eatonton*, 162 S.E. 495, 174 Ga. 169.

**Amount of profit**  
City was held entitled by charter to operate waterworks for such profit as, in municipal authorities' judgment, is proper—*Alford v. City of Eatonton*, supra.

13. Ark.—*City of Malvern v. Young*, 171 S.W.2d 470, 205 Ark. 886.

Mich.—*Nelson v. Wayne County*, 286 N.W. 617, 289 Mich. 284.

N.J.—*McAlpine v. City of Garfield*, 55 A.2d 666, 25 N.J. Misc. 477, affirmed 59 A.2d 3, 137 N.J.L. 197.

Ohio.—*State v. Evans*, 165 N.E. 380, 30 Ohio App. 419.

Tex.—*Wiggins v. City of Texarkana*, Tex. Civ. App., 239 S.W.2d 212, affirmed City of Texarkana, Tex. v. Wiggins, 246 S.W.2d 622, 151 Tex. 100.

Va.—*Leonard v. Town of Waynesboro*, 193 S.E. 503, 169 Va. 376, 67 C.J. p. 1158 note 28.

14. Or.—*Ebell v. City of Baker*, 299 P. 313, 137 Or. 427.

Tex.—*Wiggins v. City of Texarkana*, Tex. Civ. App., 239 S.W.2d 212, affirmed City of Texarkana, Tex. v. Wiggins, 246 S.W.2d 622, 151 Tex. 100.

Liability of municipal corporation for tort in connection with maintenance of waterworks see *Municipal Corporations* § 915.

15. Ark.—*Corpus Juris* quoted in *North Little Rock Water Co. v. Waterworks Commission of City of Little Rock*, 136 S.W.2d 194, 199, 200, 199 Ark. 773.

Pa.—*Reigle v. Smith*, 134 A. 380, 287 Pa. 30.

16. Ark.—*Corpus Juris* quoted in *North Little Rock Water Co. v. Waterworks Commission of City of Little Rock*, 136 S.W.2d 194, 199, 200, 199 Ark. 773.

Cal.—*South Pasadena v. Pasadena Land, etc., Co.*, 93 P. 490, 152 Cal. 579.

17. Ark.—*Corpus Juris* quoted in *North Little Rock Water Co. v. Waterworks Commission of City of Little Rock*, Ark., 136 S.W.2d 194, 199, 200, 199 Ark. 773.

67 C.J. p. 1158 note 32.

18. Ark.—*Corpus Juris* quoted in *North Little Rock Water Co. v. Waterworks Commission of City of Little Rock*, Ark., 136 S.W.2d 194, 199, 200, 199 Ark. 773.

67 C.J. p. 1158 note 33.

19. Ark.—*Arkansas Light & Power Co. v. City of Paragould*, 225 S.W. 435, 146 Ark. 1.

67 C.J. p. 1158 note 34.

20. Va.—*Leonard v. Town of Waynesboro*, 193 S.E. 503, 169 Va. 376.

**Right of owner to reimbursement**  
Owner of property determined by court to be within town limits, after

it had been treated by authorities through error as lying outside of town, was entitled to reimbursement, on theory of implied contract, for water line she constructed to enable her to obtain water from town, where town connected home to such line without her express consent, but with her knowledge, and collected water rents from her at increased rates and from homes so connected and exercised ownership over line—*Leonard v. Town of Waynesboro*, supra.

21. La.—*Dickson v. Hardy*, App., 144 So. 519, annulled on other grounds 148 So. 674, 177 La. 447.

22. N.J.—*In re Town of Harrison*, 151 A. 215, 8 N.J. Misc. 506.

Regulations as to furnishing water supply to private consumers see infra § 280.

23. W. Va.—*City of Wheeling v. Benwood-McMechen Water Co.*, 176 S.E. 234, 115 W. Va. 353.

24. Ky.—*City of Covington v. Sohio Petroleum Co.*, 279 S.W.2d 746.

Pa.—*First Nat. Bank of Strasburg v. Borough of Strasburg*, Com. Pl., 54 Lanc. L. Rev. 45.

W. Va.—*Lockard v. City of Salem*, 32 S.E.2d 568, 127 W. Va. 237—*City of Wheeling v. Benwood-McMechen Water Co.*, 176 S.E. 234, 115 W. Va. 353.

Wis.—*City of Milwaukee v. Public Service Commission*, 66 N.W.2d 716, 268 Wis. 116.

67 C.J. p. 1158 note 38—43 C.J. p. 283 note 79 [a].

in the method adopted for the operation of the system<sup>25</sup>

**Financing** The charter authority of a municipality to maintain a municipal waterworks in its proprietary capacity authorizes it to anticipate its water revenue collections in order to raise funds needed to provide for essential additions and facilities to its plant to enable the system to serve the purpose for which its maintenance was authorized,<sup>26</sup> and the city may raise funds in this manner as long as it does not without particular authorization undertake to mortgage, pledge, or obligate the plant itself, or obligate the taxing power or revenues of the city derived from other sources<sup>27</sup> Accordingly, city water revenue bonds are not obligations of the municipality,<sup>28</sup> and the holder thereof can look for payment only to the special fund which must be segregated and never becomes part of the city's general corporate funds<sup>29</sup> However, payment for an extension may not be made out of the earnings of an existing system at the expense of outstanding certificates,<sup>30</sup> but a city may authorize an extension of an inadequate system and pledge the earnings from such extension to the payment of the certificates issued in payment of its cost.<sup>31</sup> Where water certificates issued to finance

such additions and facilities are valid when issued it is immaterial that they do not comply with the requirements of the general municipal law as subsequently enacted<sup>32</sup> The right of county officers to pool the revenues from a joint water system in the county which runs through the various subdivisions of the county, for the purpose of applying such revenues to the payment of the indebtedness for the whole system, has been recognized<sup>33</sup> Under a statute so providing, a township is required to be charged with a reasonable sum for rental of water hydrants and for water used for fire fighting<sup>34</sup>

The funds and financing of municipal waterworks generally are discussed supra § 234 b.

**Privilege or franchise tax.** The liability of a municipal corporation under some statutes for a privilege tax for operating a waterworks system has been denied<sup>35</sup> On the other hand it has been held that a municipality is required to pay a tax on the income from sales of water in the absence of proof that the waterworks system was not installed for profit or gain,<sup>36</sup> even though the system was not actually self-sustaining<sup>37</sup> It has also been held that a municipality may be liable to the state under statutes imposing a sales tax on water furnished by the municipality to its patrons and customers<sup>38</sup>

25. Ky—Cawood v Coleman, 172 S W 2d 548, 294 Ky 858

26. Fla—State v City of Hollywood, 179 So 721, 131 Fla. 584—State v City of Daytona Beach, 158 So 300, 118 Fla. 29

27. Fla—State v City of Hollywood, 179 So 721, 131 Fla. 584—State v City of Daytona Beach, 158 So 300, 118 Fla. 29

28. Ill—Simpson v City of Highwood, 23 NE 2d 62, 372 Ill 212, 124 A L R 1459

29. Ill—Simpson v. City of Highwood, supra

30. US—Getz v City of Harvey, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

31. US—Getz v City of Harvey, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

**Proportional application to various issues**

(1) In general—City of Harrison v Braswell, Ark, 194 SW 2d 12, 209 Ark 1094, 165 A L R 845.

(2) Where Illinois city by ordinance authorized purchase of water distribution system then existing and

by subsequent ordinance approved plans for construction of an enlargement or extension of old system, it was only necessary that city, in distributing earnings, abide by its obligations under its respective trusts and apply the respective proportions to the respective issues of water fund certificates issued in payment of cost of old system and of extension—Getz v City of Harvey, C CA III, 118 F 2d 817, certiorari denied City of Harvey v Getz, 62 S Ct 59, two cases, 314 US 628, 86 L Ed 504

#### Valuation of improvements

In determining value of improvements to municipal waterworks system as basis for allocation of net revenues therefrom to payment of principal and interest on improvement bonds, appraisal of old waterworks system which omitted value of water rights owned by city, and which included appraised value of seepage through defective pipes in old system as improvement and betterment was held arbitrary, illegal and void—Wadsworth v Santaquin City, 28 P 2d 161, 83 Utah 321

32. Fla—Herbert v City of Daytona Beach, 163 So 565, 121 Fla. 212

33. Va—Kirkpatrick v Board of Sup'rs of Arlington County, 136 S E 186, 146 Va 113  
67 C J p 1159 note 41.

34. Kan—Fleming v Ferguson, 171 P 2d 274, 161 Kan 562

#### Determination of reasonable price

The statute relating to township water supplies authorizes township, in arriving at a reasonable price to pay itself for rental of hydrants and a reasonable price for water used for fire fighting, to consider cost of hydrants, labor of attaching hydrants to main, interest over bond period on such items, replacements costs, cost of effectively installing hydrants, including cost of larger mains, reservoirs, stand towers, special requirements and other items—Fleming v Ferguson, supra

35. Tenn—Smith v Nashville, 12 S W 924, 88 Tenn 464, 7 L R A. 469  
67 C J p 1159 note 43

Liability of municipalities for license, sales, privilege, or other excise taxes applicable to business or commercial enterprise in which they engage generally see Licenses § 29 b

Taxation of municipal waterworks in general see Taxation § 205

36. Ariz—Town of Somerton v Moore, 119 P 2d 239, 58 Ariz 279.

37. Ariz—Town of Somerton v. Moore, supra.

38. Ariz—City of Phoenix v State ex rel Conway, 85 P 2d 56, 53 Ariz. 28.

*Liability for personal property used in connection with plant* Where, pursuant to statute, a municipal corporation has taken over from an improvement district, for operation, a water plant, the municipal corporation is liable for the purchase price of personal property purchased for the maintenance and operation of the plant while being operated by the municipal corporation.<sup>39</sup> A creditor cannot foreclose his vendor's lien or chattel mortgage on indispensable machinery incorporated in the municipal waterworks, the machinery having become public property,<sup>40</sup> nor can a mechanic's lien be acquired on a municipal waterworks.<sup>41</sup>

*Damage to water system* Where damage is caused to a municipal waterworks system the municipality may be entitled to recover damages therefor in a proper case.<sup>42</sup>

39. Ark—Improvement Dist No 1 of Wynne v Brown, 109 S W 1010, 86 Ark 61

40. La—Town of Farmerville v Commercial Credit Co, 136 So 82, 173 La 43

With respect to right to foreclose, debt incurred by mayor and board of aldermen exceeding bonds voted, to complete waterworks, was held town's rather than inhabitants' debt, and mayor and board of aldermen could not create debt for machinery to complete waterworks exceeding bonds voted, enforcement of which, by seizure and sale, would disrupt waterworks, and vendor of machinery incorporated in municipal waterworks was held charged with knowledge that town in its corporate capacity would not own waterworks when constructed, or machinery after its merger into waterworks—Town of Farmerville v Commercial Credit Co, supra

41. Va—Fairbanks, Morse & Co v Town of Cape Charles, 131 S E 437, 144 Va 56

40 C J p 59 note 58 [a] (3)

42. Vt—Village of St Johnsbury v Cenedella, 194 A 382, 109 Vt 174

**Sufficiency of evidence**

Vt—Village of St Johnsbury v Cenedella, supra

43. N Y—Philgus v Hartman, 90 N Y S 2d 823, 275 App Div. 970 67 C J p 1159 note 46

Mains, connections, and rights of way as to

Individual operator see infra passim §§ 244-246

Public service company see infra §§ 254-258

**Easements; exclusivity**

(1) The right to lay underground pipes over the land of another is an

"easement" and is governed generally by the rules of law which govern ordinary easements of way—City of Pasadena v California-Michigan Land & Water Co, 110 P 2d 983, 17 Cal 2d 576, 133 A L R 1136

(2) Easements for the purpose of installing and maintaining water mains and connections thereto were not exclusive easements—City of Pasadena v California-Michigan Land & Water Co, supra

(3) The grant by owners of realty to city of easements five feet in width for the purpose of installing and maintaining water mains and connections thereto granted to the city the right to make the fullest necessary use of the five-foot strip for the purpose named—City of Pasadena v California-Michigan Land & Water Co, supra

**"Easement deed"**

Instrument described in conveyance itself as an easement deed and which conveyed to city an easement on land for purpose of submerging land for a municipal water reservoir, together with all water rights, riparian rights and other appurtenances for a period of forty years or so long as city maintained reservoir thereon, was an "easement deed"—City of Corpus Christi v State, Tex Civ App, 155 S W 2d 824, error refused

**Particular rights held included with grant**

"Floating" easement, acquired by city for conduit carried, with it so much of grantor's land on each side of conduit as might be reasonably necessary for purposes of maintenance, repair, and enjoyment of easement, doing no more injury than was necessary to insure enjoyment of easement, and city possessed of hillside right of way for conduit was en-

## § 242 — Mains, Connections, and Rights of Way

- a In general
- b Extension of mains
- c Maintenance and repair

### a. In General

In general the rights and obligations of a municipality under a grant or dedication of a right of way for water mains and facilities depend on the provisions of the grant or dedication and applicable statutes and ordinances

In general, the rights and obligations of a municipality under the grant of a right of way over private property for a conduit or pipe line as part of its water system are determined by the provisions of the grant,<sup>43</sup> as are the rights of the grantee of land the conveyance of which includes the right to the use of the water mains,<sup>44</sup> and in general the

titled to have hillside maintained at slope which would not only be safe for conduit but also for maintenance of right of way—Salt Lake City v J B & R E Walker, Inc, Utah, 253 P 2d 365

**What constitutes "abutting property owner"**

Where town granted an easement to city as a water utility to lay feeder water mains through town in consideration for which city agreed to give service to owners of property abutting on streets along which mains were laid, a corporation which acquired several parcels of land lying along street was an "abutting property owner" within contract regardless of fact that land of corporation was five hundred or six hundred feet in depth whereas at time of entering into contract, the largest abutting lot did not exceed one hundred seventy-five feet in depth, and even though at time of entering into contract utility contemplated that abutting lots would be used for homes and small businesses which would require only a small quantity of water, court could not write into contract a provision defeating right to water service of corporation which consolidated several small lots into a larger tract and built an industrial plant requiring more water than utility had contemplated would be required—City of Milwaukee v Public Service Commission, 31 NW 2d 571, 252 Wis 358

44. Ky—Lee v City of Park Hills, 174 S W 2d 539, 295 Ky 383

**"Appurtenances" as including right**

Where grantors platted land situated outside city limits into lots, streets and alleys and constructed water mains in the streets, and sold lots by deeds conveying all "appurtenances," the property conveyed in-

use of water mains and facilities dedicated by an individual to the city for the purpose of supplying water to a development depends on the terms of the dedication and applicable statutes and ordinances.<sup>45</sup> Such dedications, grants, or contracts are subject to general rules with respect to their validity, construction, and operation.<sup>46</sup> Accordingly, where an agreement by which the city was to use the mains

laid by a private corporation is without consideration in that it does not bind the city, the agreement confers no right on the city,<sup>47</sup> and the city cannot render the alleged agreement binding by incurring expense and becoming obligated by contracts with individual consumers to supply them with water through the mains.<sup>48</sup>

cluded the right to the use of the water mains without interference by grantors, and defendants were not justified in imposing a charge for the use of the system on ground that they expended a large sum of money and were entitled to a return thereon—*Lee v City of Park Hills*, supra.

#### **Exclusive easement subject to eminent domain**

Where petitioner acquired by deed exclusive easement for maintenance of water distribution system in certain streets, words "subject only to rights taken by eminent domain" qualified easement granted and petitioner's easement was not exclusive of rights taken by eminent domain by town for highway purposes—*Flower v Town of Billerica*, 87 NE 2d 189, 324 Mass 519.

**45 Tex—***City of Beaumont v Calder Place Corporation*, Civ App, 180 SW 2d 189, reversed on other grounds, 183 SW 2d 713, 143 Tex 244.

#### **Right of residents of development**

Where subdivider, contemplating that addition would in time be included in city, recorded a dedication deed and plat and executed conveyances to purchasers under which subdivider was to control sewers, gas and water mains until addition should be taken into the city, residents of addition acquired a right to have sewer and water system and disposal plant preserved for their own use to the extent of their requirements—*City of Beaumont v Calder Place Corp*, supra.

#### **Right to excess capacity**

Where subdivider installed water and sewer system sufficient to serve five hundred houses though connections for two hundred houses would be adequate for the addition, right to excess capacity of three hundred houses could not belong to subdivider but to adjoining city or residents of the addition, since a judgment authorizing subdivider of addition to use water and sewer facilities for connections to houses outside the addition, to the extent of excess capacity of such facilities over amount necessary to satisfy dedication for benefit of residents of addition, would violate charter of home-rule city of Beaumont by authorizing subdivider to operate waterworks and control sewer system in the city—*City of*

*Beaumont v Calder Place Corp*, 183 SW 2d 713, 143 Tex 244.

**46. Okl—***Reust v Oklahoma City*, 178 P 2d 92, 198 Okl 345.

#### **Particular contract construed**

Under contract between landowner and city which owned canal used to conduct water from river to reservoir, which provided that as consideration for granting of easement over landowner's land for purpose of laying and operating a tile water drainage line to drain water from canal to landowner's lake, landowner would be entitled to water coming from drainage tile without cost, landowner was entitled to water flowing through drainage tile constructed on his land, but not to water taken from canal on city's land before it entered drainage tile on landowner's premises—*Reust v Oklahoma City*, supra.

#### **Enforcement by action in replevin or conversion**

(1) Where municipality, which operated its own water system as a private utility and which had entered into a rental contract providing for payment to developers of housing project out of money received from sales of water through connections made with water mains installed by developers, asserted hostile ownership of water mains, denied developers' rights and interest in them, and refused to surrender possession or recognize right of possession in developers, it committed an act of conversion which gave developers right to recover lines by an action in replevin or in conversion for value of such lines—*Wichita Finance & Thrift Co v City of Lawton, Okl*, DCOkl, 131 F Supp 788.

(2) Where it was understanding and agreement that developers of housing project were to be paid the "cost" rather than the value of water lines used by municipality, damages to be paid by municipality for its wrongful conversion of such lines would be cost figure rather than actual value, which was in excess of cost—*Wichita Finance & Thrift Co v City of Lawton, Okl*, DCOkl, 131 F Supp 788.

#### **Injunction for failure to pay consideration**

Act of municipality in continuing to use water line easements without paying agreed consideration constituted continuing trespass, and

was enjoined in view of the multiplicity of suits that remedy at law would necessitate—*Boiles v City of Abilene*, Tex Civ App, 276 SW 2d 922, error refused.

#### **Sale to bona fide purchaser; notice**

(1) Where a pipe line, in which a municipality has, by contract, certain rights of use, is sold by the owner to a third person who is a bona fide purchaser without notice of the rights of the city, the rights of the city may thereby be lost—*Johnson City v Milligan Utility Dist*, Tenn App, 276 SW 2d 748.

(2) Recitals in chain of title to pipe line, conveying line together with all rights, interests and equities, of every kind and description, which first party had in and to contract or ordinance with city, permitting installation and maintenance of system and regulating flow of water therein, were not sufficient to give notice to purchaser of city's right to regulate flow of water to and within pipe line—*Johnson City v Milligan Utility Dist*, Tenn App, 276 SW 2d 748.

**47. Ga—***City of Atlanta v De Kalb County*, 26 SE 2d 334, 196 Ga 252.

#### **Agreement held without consideration**

The permission by city for corporation which laid water mains without limits of city to connect mains with city's existing mains did not of itself amount to a consideration for alleged agreement whereby corporation purported to grant to city exclusive right to flow water through mains constructed by corporation and to tap them for purpose of furnishing water to customers in locality, where connection was to be made for sole purpose of enabling city to flow water through mains and would be valueless to corporation unless city became bound in some way to use it for that purpose, and even if corporation, in laying water mains with city's consent, made an offer to allow city to use mains for purpose of furnishing water to residents of subdivision, a mutually binding agreement was not effectuated upon city actually beginning to use mains for such purpose, where city expressly refused to bind itself in any manner and gave notice to such effect in written agreement—*City of Atlanta v De Kalb County*, supra.

**48. Ga—***City of Atlanta v De Kalb County*, supra.

*Municipality as licensee.* It has been held that where a municipality merely has permission from a landowner to lay water mains on the land, it acquires no interest or easement in the land,<sup>49</sup> but only a license,<sup>50</sup> which is revocable at the will of a subsequent bona fide purchaser of the land,<sup>51</sup> and the city is not entitled to compensation for expenditures made on the premises,<sup>52</sup> and is in fact liable to the purchaser for reasonable compensation for the use of the easement pending such time as might be necessary to effectuate either the removal of the utility from the land or the acquisition of the easement by condemnation.<sup>53</sup> However, it has also been held that where a municipality enters private lands to lay its pipe line as licensee for a consideration and expends a considerable sum in laying and maintaining such line, such corporation has either an irrevocable license<sup>54</sup> or a license subject to revocation on notice with reasonable time to remove the pipe.<sup>55</sup> Accordingly, as affecting the right of a municipality to remove a pipe line laid through private land, it has been held that such pipe line, when laid by the municipality as a licensee and not as a trespasser, does not become a fixture and part and parcel of the land through which it is laid,<sup>56</sup> and that the municipality does not lose title to the pipe on the theory of adverse possession by the owner of the land in the absence of the existence of the elements of an adverse possession.<sup>57</sup> Likewise, mere nonuser does not constitute an abandonment of the right of way for a pipe line acquired by a deed of grant.<sup>58</sup> Where a contract is entered into between a county and a municipality whereby the county releases to the city water department rights of con-

trol and ownership of a water pipe system, the terms of the contract are controlling.<sup>59</sup>

*Use of streets and highways.* The powers of municipal authorities in respect of laying mains in the public streets are usually determinable from the applicable statutes,<sup>60</sup> and where a municipal corporation relies on a statutory grant for its right to the use of a highway for the construction of its water line, its rights are limited by the terms of such grant.<sup>61</sup> Under some statutes the right of the municipality under the statutes is merely a franchise,<sup>62</sup> and in a proper case the state may compel the municipality to relocate its pipe lines.<sup>63</sup> In the absence of a requirement that a municipal corporation shall formally accept a legislative grant of the right to maintain water pipes in any road, street, or highway, the question as to whether such a corporation which asserted the right has in fact accepted the offer must be determined from action taken with the view of acquiring such right,<sup>64</sup> and, in order to constitute an acceptance, actual use of the highway by laying pipes is not necessary.<sup>65</sup> Usually the municipal authorities are vested with discretion in respect of the place in the street where a main shall be laid,<sup>66</sup> and, where such discretion is exercised without fraud or corruption, it is not subject to judicial review.<sup>67</sup> The propriety of the insertion in a decree in equity of a provision for the grant of a right of way through the streets of a municipality for a pipe line of another municipality in order that the latter might furnish water to persons beyond the territory of the first-mentioned municipality has been recognized where such municipality consents to such use of its streets.<sup>68</sup>

49. Md—Mayor and City Council of Baltimore v. Brack, 3 A 2d 471, 175 Md 615, 120 A L R 543.

50. Md—Mayor and City Council of Baltimore v Brack, supra.

51. Md—Mayor and City Council of Baltimore v Brack, supra.

52. Md—Mayor and City Council of Baltimore v Brack, supra.

53. Md—Mayor and City Council of Baltimore v Brack, supra.

54. Cal—City of Vallejo v Burrill, 221 P 676, 64 Cal App 399.

55. Cal—City of Vallejo v Burrill, supra.  
67 C J p 1159 note 48.

56. Cal—City of Vallejo v Scally, 219 P 63, 192 Cal 175—City of Vallejo v Burrill, 221 P 676, 64 Cal App 399.

57. Cal—City of Vallejo v Burrill, supra.

58. Cal—City of Vallejo v Scally, 219 P 63, 192 Cal 175.  
67 C J p 1159 note 51.

59. Ohio—Wagner v City of Youngstown, App, 75 NE 2d 724.

Contracts having no specific expiration date were not "franchises" terminable at will—Wagner v City of Youngstown, supra.

60. N Y—St Mary of the Angels Church v Barrows, 124 N Y S 571, 68 Misc 545.  
67 C J p 1161 note 79.

**Municipality as trustee**

The right of a municipality in whose streets water mains are laid at expense of property owners is that of a trustee controlling system subject to beneficial interest of property owners—Royal Oak Tp v City of Ferndale, 15 N W 2d 707, 309 Mich 458.

61. N J—Town of Mt Pleasant v City of New York, 191 N Y S 741, 199 App Div 315.  
67 C J p 1162 note 82.

62. Cal—State v Marin Municipal

Water Dist, 111 P 2d 651, 17 Cal 2d 699.

63. Cal—State v Marin Municipal Water Dist, supra.

64. Cal—City of Beverly Hills v City of Los Angeles, 165 P 924, 175 Cal 311.

67 C J p 1162 note 80.

65. Cal—City of Beverly Hills v. City of Los Angeles, supra.  
67 C J p 1162 note 81.

66. N Y—Western New York Water Co v Laughlin, 157 N Y S 257.  
67 C J p 1162 note 83.

67. N Y—St Mary of the Angels Church v. Barrows, 124 N Y S 571, 68 Misc 545—Western New York Water Co v Laughlin, 157 N Y S 257.

68. Mich—Board of Water Com'rs of City of Detroit v. Village of Highland Park, 159 N W. 160, 192 Mich. 607.

67 C J p 1162 note 85.

*Use of natural facilities* A city has the right to use natural reservoirs and facilities for the storage and transportation of water.<sup>69</sup>

*Priority among easements.* Where the owners of realty granted an easement to a city to install and maintain water mains and connections thereto, and thereafter gave a water company a similar easement, as they properly may in certain circumstances,<sup>70</sup> the city's easement is paramount,<sup>71</sup> but until a point of irreconcilable conflict is reached,<sup>72</sup> the concurrent use by the city and the company should be governed by principles permitting an equitable adjustment of conflicting interests,<sup>73</sup> since the respective rights of the two parties are not absolute but are required to be construed to permit a due and reasonable enjoyment of both interests as long as possible.<sup>74</sup>

*Ownership as between two municipalities* Under a contract between two municipalities for the furnishing by one of a supply of water to the other, the terms of the contract will govern in determining the ownership of the system in the municipality to be so supplied with water in the absence of any statutory provision to the contrary.<sup>75</sup>

*Approval of voters* Under the construction given certain statutes controlling the action of municipal authorities in respect of laying new mains, the necessity of submitting the matter to resident

taxpayers for approval has been denied;<sup>76</sup> but it has also been held that the action of the water commissioners in entering into a lease for additional land in the improvement of the city waterworks must be approved by a vote properly held.<sup>77</sup>

*Taking or converting pipes laid by individual.* Where a person lays pipes in a street under license from the municipality, such corporation becomes liable for the subsequent conversion of such pipes by taking possession, without the consent of the owner, and incorporating the pipes into its waterworks system.<sup>78</sup>

*Cost of installing service pipes* While the right of a municipality to require all consumers to assume the burden of laying service pipes has been recognized,<sup>79</sup> the power of the duly authorized municipal authorities to make private water connections free of charge has been recognized in the absence of any statutory restriction in this regard.<sup>80</sup> Under an agreement with the municipality to that effect, where a deposit is required to secure the installation of water mains the depositor or his assignees may be entitled to a subsequent refund of the amount deposited.<sup>81</sup>

*Enforcement of rights* In a proper case the public service commission is the proper tribunal for the enforcement of the rights of parties under a grant to a municipality for its water system.<sup>82</sup>

69. Cal—City of Los Angeles v City of Glendale, 142 P 2d 289, 23 Cal 2d 68

**Rule not affected by statute**

The enactment of statute designed to encourage the use of natural facilities for transportation of water did not indicate legislative intent to abrogate right to use natural reservoirs for transportation and storage of water hence maxim "expressio unius alterius exclusio est" was inapplicable to construction of such statute—City of Los Angeles v City of Glendale, supra

70. Cal—City of Pasadena v California-Michigan Land & Water Co., 110 P 2d 983, 17 Cal 2d 576, 133 A L.R. 1186

71. Cal—City of Pasadena v California-Michigan Land & Water Co., supra.

72. Cal—City of Pasadena v California-Michigan Land & Water Co., supra.

73. Cal—City of Pasadena v California-Michigan Land & Water Co., supra.

74. Cal—City of Pasadena v California-Michigan Land & Water Co., supra.

75. Mich—Board of Water Com'rs of City of Detroit v. Village of High-

land Park, 159 NW 160, 192 Mich 607

67 C J p 1159 note 52

76. N.Y.—Western New York Water Co v Whitehead, 160 NYS 1020, 97 Misc 57, affirmed 162 NYS 1149, 176 App Div 901

67 C J p 1160 note 53

77. N.Y.—Smith v Newburgh, 77 N Y 130

43 C J p 1330 note 7 [b]

78. Ohio—Lakewood v Newell, 16 Ohio Cir Ct, N.S., 503

67 C J p 1160 note 54

79. N.M.—State v Water Supply Co of Albuquerque, 140 P 1059, 19 NM 36, L.R.A. 1915A 246, Ann Cas 1916E 1290

67 C J p 1160 note 55

80. N.Y.—Western New York Water Co v Laughlin, 157 NYS 257

81. N.J.—Fox v Haddon Tp., 45 A 2d 193, 137 N.J.Eq 394

**Failure to establish special equity**

In suit by assignee of real estate development company's rights under written contract to refunds on money deposited with township to secure installation of water mains in new development to be relieved of ten-year limitation imposed by contract on refunds to be made as each new house was connected with mains, as-

signee failed to establish as a special equity justifying relief that township solicitor had promised that sewer service, the lack of which allegedly prevented sale of houses, would be made available as and when each house was completed—Fox v Haddon Tp., supra.

**Suit held barred by laches**

Suit by assignee of real estate development company's rights, under written contract, to refunds or money deposited with township to secure installation of water mains in new development to be relieved of ten-year limitation imposed by contract on refunds to be made as each new house was connected with mains on ground that limitation provided for a forfeiture and failure of development was due to lack of sewer service, which township solicitor allegedly had promised, was barred by laches when not commenced until 18 years after execution of contract—Fox v Haddon Tp., supra.

82. Wis—City of Milwaukee v Public Service Commission, 31 NW 2d 571, 252 Wis 358

**Relief in courts not required**

Where town granted easement to city as a water utility to lay feeder water mains through town in consideration for which city agreed to give

**b. Extension of Mains**

Generally, whether an extension shall be made is to be determined by the municipal authorities in the light of the reasonableness of the extension, the demand for it, the number of subscribers, and the revenue obtainable.

In the absence of any statutory limitation or requirement<sup>83</sup> usually the decision of the question as to whether an extension shall be made is within the discretion of the municipal authorities,<sup>84</sup> and their decision is final if there has not been an abuse of such discretion<sup>85</sup>. The propriety of a proposed extension depends on the reasonableness of such extension, considering the demand for it, the number of water subscribers, and the revenue obtainable,<sup>86</sup> and a municipality is not obliged in every instance to extend its mains in order to supply water to every inhabitant however remote his land may be from the distribution system<sup>87</sup>. The measure of the duty of a municipal corporation to extend its pipes imposed by statute is determinable largely from the

terms of such statute<sup>88</sup>. Ordinances relating to the manner in which extensions or additions to a city water system may be made must, where applicable, be complied with<sup>89</sup>.

There is authority for the view that a city which has, pursuant to some statutes, taken over for operation and maintenance a waterworks constructed by an improvement district may not be compelled at the suit of a property owner to extend the mains in order to furnish fire protection<sup>90</sup>. Under certain circumstances a municipal corporation may be under the duty to notify a property owner of the necessity for installing a main in order that such owner might be permitted to pay the costs of such installation, in accordance with the applicable rules<sup>91</sup>. In some instances a municipality may authorize the extension of a water main on the condition that the people along the line will undertake certain obligations<sup>92</sup>. However, in the absence of authority therefor a municipality may not require the

service to owners of property abutting on streets along which mains were laid, public service commission had jurisdiction to require city to order the service installed as against contention that abutting owners entitled to service under the contract, should seek relief in the courts—*City of Milwaukee v Public Service Commission*, supra

**Appeal, request for remand**

Where city as a water utility appealed to circuit court from order of public service commission requiring utility to permit owners of property abutting on streets along which water mains were laid to connect to the main pursuant to contract between city and town, request that case be remanded to commission to enable city to offer evidence of inability to comply with the order because of inadequate water supply came too late when not made until the arguments were in progress—*City of Milwaukee v Public Service Commission*, supra

**83** Miss—*City of Greenwood v Provine*, 108 So 284, 143 Miss 42, 45 A L R 824  
67 C J p 1160 note 58

**84** Fla—*Trudnak v City of Fort Pierce*, 185 So 353, 135 Fla 573  
Miss—*City of Greenwood v Provine*, 108 So 284, 143 Miss 42, 45 A L R 824

N J—*Reid Development Corp v Parsippany-Troy Hills Tp*, 107 A 2d 20, 31 N J Super 459

N D—*Reed v City of Langdon*, 54 NW 2d 148, 78 N D 991

Utah—*Rose v Plymouth Town*, 173 P 2d 285, 110 Utah 358

Extension by individual operation on direction of state regulatory body see infra § 246

Extension of mains by water company see infra § 257

Power of municipality to extend system into territory served by water company see supra § 235

**85** Miss—*City of Greenwood v Provine*, 108 So 284, 143 Miss 42, 45 A L R 824

N D—*Reed v City of Langdon*, 54 NW 2d 148, 78 N D 991

Utah—*Rose v Plymouth Town*, 173 P 2d 285, 110 Utah 358

**Discretion held not abused**

Where municipality was operating at a deficit, and there were several areas with many homes within municipality in which municipality had not fully developed its water supply system, municipality's action in refusing to extend water system to area where there were no present consumers and no assurance of likelihood of early customer return and immediate need of area was questionable, did not constitute arbitrary, unreasonable or abusive exercise of discretion—*Reid Development Corp v Parsippany-Troy Hills Tp*, 107 A 2d 20, 31 N J Super 459

**86** Miss—*City of Greenwood v Provine*, 108 So 284, 143 Miss 42, 45 A L R 824

**87** Cal—*Marr v City of Glendale*, 181 P 671, 40 Cal App 748  
67 C J p 1160 note 62

**88** Conn—*Board of Water Com'rs of City of Hartford v Town of Bloomfield*, 80 A 794, 84 Conn 522  
67 C J p 1160 note 63

Right and duty to supply in general see infra § 278

**89** Minn—*State v Finley*, 64 NW 2d 769

**Ordinance held not violated**

Where master refrigeration install-

er connected pipes from refrigeration system to valves or openings left for that purpose connected with city water system, connection did not constitute violation of ordinance prohibiting extension or addition to water system except by master plumber and with written permit from supervisor of water works—*State v Finley*, supra

**90** Ark—*City of Bentonville v Browne*, 158 SW 161, 108 Ark 306  
—*Browne v Bentonville*, 126 SW 93, 91 Ark 80

**91** Md—*Merryman v Baltimore City*, 138 A 324, 153 Md 419

**92** NH—*Town of Claremont v Rand*, 79 A 689, 76 NH 116

**Guarantee of annual rental**

An instrument reciting that the signers thereof agree to guarantee the eight per cent required by a town to extend a water main, executed after the town authorized the extension of the people along the line guaranteed eight per cent on the expense of extension, guarantees an annual rental of eight per cent on the expenses of the extension—*Town of Claremont v Rand*, supra.

**Application of ordinance held invalid**

Even if municipal ordinance, requiring developer of area to extend at its own expense municipal water mains, was not invalid in itself, application thereof seeking to charge developer for full cost of extension of water mains to area which contained lots owned by others than developer would have been invalid—*Reid Development Corp v Parsippany-Troy Hills Tp*, 107 A 2d 20, 31 N J Super 459



developers of areas to extend the water mains at their own expense,<sup>93</sup> and where a municipality lacking authority therefor demands from a subdivision owner an advancement of the cost of installing water mains, and the advancement is made, the municipality will be liable therefor on quantum meruit as for money had and received.<sup>94</sup>

*Delivery of executed contracts by residents* Under a statute so providing, a city or its board of commissioners is prohibited from extending its water mains until half of the bona fide residents along the line of the proposed extension execute and deliver to the city a sufficient number of written contracts to insure the city a specified profit on the cost of the extension,<sup>95</sup> and deposit cash or a bond to secure performance.<sup>96</sup>

*Extension under contract with consumer* Where a town extends its water system under a unilateral contract with a landowner, the fact that no definite time was fixed for the termination of certain of the landowner's obligations did not invalidate such obligations,<sup>97</sup> and the fact that the liability of the

landowner, guaranteeing an annual return to the town, is limited to a certain number of years, does not, in the absence of any stipulation to that effect, limit to the same number of years other promises of the landowner.<sup>98</sup>

*Regulation* An order of a public utilities commission requiring a municipal corporation to extend its water mains will not be disturbed by the courts where the action of the commission was neither arbitrary nor capricious.<sup>99</sup>

*Extension outside municipal limits* Whether a municipality owning and operating a municipal waterworks system can extend its mains beyond the municipal limits depends on the provisions of the applicable statutes and the circumstances of the particular case.<sup>1</sup> Thus, it has been held that a city is without authority to extend its waterworks system outside its corporate limits for such purpose.<sup>2</sup> On the other hand, it has been held that in so far as a municipality has the authority to sell surplus water to persons outside its corporate limits it may provide for the extension of mains therefor,<sup>3</sup> but a statute

93 N.J.—Reid Development Corp v Parsippany-Troy Hills Tp, supra

**Ordinance held to exceed authority**

Under statute authorizing municipality to operate water supply system and install and maintain pipes and mains, and authorizing imposition of charge for stated installations and services not including mains, municipal ordinance requiring developers of areas to extend water mains at their own expense exceeded statutory authority to impose charges and was invalid—Reid Development Corp v Parsippany-Troy Hills Tp, supra.

94. U.S.—Brownell v City of St Petersburg, D.C.Fla., 128 F.2d 721

95 Kan.—Jayhawk Const Co v City of Topeka, 271 P.2d 769, 176 Kan 517

*Intention of statute was to assure city of permanent development of addition, which contemplates people living in community along line of proposed extension, before installation of mains therein, and to protect city against purely promotional projects*—Jayhawk Const Co v City of Topeka, supra.

**Limitation, not grant, of power**

The statute prohibiting boards of commissioners in first class cities from extending water mains until half of bona fide resident property owners along line of proposed extension execute and deliver to city sufficient number of written contracts to insure city a profit of ten per cent per annum on cost of extension, is not a grant of power to such cities, but a limitation of their power, to extend water mains, and such a city

had no authority to incur any liability or obligation to extend such mains into a new city subdivision developed by construction corporation until statutory provisions were met—Jayhawk Const Co v City of Topeka, supra.

**What constitutes "bona fide resident property owner"**

The term, "bona fide resident property owners along the line of the proposed extension," as used in statute means property owners who have established residences along line of proposed extension, and a city addition developer, owning entire addition, is not a "bona fide resident property owner" within statute—Jayhawk Const Co v City of Topeka, supra.

96. Kan.—Jayhawk Const Co v City of Topeka, supra.

**Sufficiency of bond**

The bond contemplated by statute prohibiting extension of water mains by first class city until half of bona fide resident property owners along line of proposed extension execute and deliver to city sufficient number of written contracts, performance of which is secured by cash deposit or sufficient bond stipulating for water supply for two years, to insure city ten per cent profit per annum on cost of extension, is for performance of contract to purchase water and must be in such amount as will insure adequate security for amount of water to be purchased for two years, and a bond, tendered to board of commissioners of first class city by applicant for extension of water mains into city subdivision developed by appli-

cant, to guarantee use of sufficient quantity of water in subdivision for two years to insure city ten per cent profit per annum on estimated cost of extension, was inadequate on its face as securing nothing, in absence of any contract between parties for purchase of water—Jayhawk Const Co v City of Topeka, supra.

97 Mass.—Moody v Inhabitants of Town of Weymouth, 177 N.E. 80, 276 Mass 282

98 Mass.—Moody v Inhabitants of Town of Weymouth, supra

99 Me.—Public Utilities Commission v City of Lewiston Water Com'rs, 123 A. 177, 123 Me 389  
67 C.J. p 1161 note 68

1. Va.—Corporation of Mt Jackson v Nelson, 145 S.E. 355, 151 Va 396

2. Ky.—Smith v City of Raceland, 80 S.W.2d 827, 258 Ky 671

**Certificate or authority of state Public Service Commission**, powers and duties of which are administrative only, was not conclusive, as respects city's authority to extend waterworks facilities beyond corporate limits to supply outside community—Smith v City of Raceland, supra.

3. Va.—Corporation of Mt Jackson v Nelson, 145 S.E. 355, 151 Va 396

**Town's contract for construction of main** to carry surplus water to inhabitants outside corporate limits was held within its authority as to contractors suing for balance due—Corporation of Mt Jackson v Nelson, supra.



empowering a city authorized by charter to own and operate waterworks, to sell water to persons and corporations outside the limits of the city, to prescribe the kind of water mains within or beyond the limits of the city, and to inspect and require such mains to be kept in good order, does not empower the municipality to extend the mains of its waterworks system to places and persons lying outside the city for the sole purpose of furnishing such places and persons with water <sup>4</sup>

### c. Maintenance and Repair

It is usually the duty of a municipality operating a waterworks system to furnish mains or pipes to which patrons may connect service pipes, and to maintain and repair and renew them.

Usually it is the duty of a municipality which operates a waterworks system to furnish water mains or pipes with which patrons may connect their service pipes<sup>5</sup> and to maintain such water mains or pipes,<sup>6</sup> and there has been recognition of the municipality's authority to control and maintain a water main<sup>7</sup> Under a statute authorizing a city to operate and maintain waterworks taken over by it, the power to maintain involves the repair and renewal of the parts of the system,<sup>8</sup> and does not restrict the repairs or reconstruction to the identical form in which the waterworks were originally constructed<sup>9</sup> In general, however, a municipal corporation is under no obligation to keep in repair a pipe which is not a part of its water system and which it does not own<sup>10</sup> As between the municipality and a private individual, the latter may by contract assume the obligation of maintaining water mains in proper condition<sup>11</sup> Where a city has been

permitted to construct a reservoir outside the city limits, the city may be required to construct and maintain highways in connection with it <sup>12</sup>

In respect of a service pipe connecting with a main, to supply a consumer, the consumer and owner of such pipe usually has the duty to maintain and repair,<sup>13</sup> although there is authority for the view that it is not necessarily the duty of a consumer to enter a street to make repairs to a lateral pipe branching from a main to the consumer's property,<sup>14</sup> and the duty of a municipal corporation to keep in repair a supply pipe laid along a street by the representative of a consumer to supply water to such consumers' houses has been recognized<sup>15</sup>

*Incidental rights.* A municipality sometimes acquires by the grant of a right of way over private lands certain rights in respect of the repair of a pipe line laid through such lands,<sup>16</sup> and the power of a municipal corporation to acquire a prescriptive right to enter on certain lands in order to repair a pipe line and other structures has been recognized <sup>17</sup>

### § 243(1). Water Districts

In numerous jurisdictions statutes authorize the formation of water districts for the purpose of acquiring and distributing a water supply Such districts are separate and independent political corporate entities, and although they are not municipal corporations in the strict sense, they resemble them and are regarded or referred to as quasi-public corporations or quasi-municipal corporations.

In numerous jurisdictions statutes authorize the formation of water districts for the purpose of acquiring and distributing a water supply,<sup>18</sup> and nu-

4. Tex.—Sweetwater v Hammer, Civ App, 259 SW 191.

5. Ala.—City of Montgomery v Greene, 60 So 900, 180 Ala. 322

6. Ala.—City of Montgomery v Greene, supra.  
67 C J p 1161 note 70

7. NY—Bradley v Village of Union, 150 NYS 107, 164 App Div 565, appeal denied 151 NYS 1106, 166 App Div 953, affirmed 117 N E 1062, 221 NY 591  
67 C J p 1161 note 71

8. Ark.—Arkansas Light, etc, Co v Paragould, 225 SW 435, 146 Ark 1

9. Ark.—Arkansas Light, etc, Co v Paragould, supra.  
44 C J p 175 note 43.

10. ND—Jackson v Ellendale, 61 N W. 1030, 4 ND 478

11. Mass—Moody v Inhabitants of Town of Weymouth, 177 NE 80, 276 Mass 282.

12. NY—Huie v City of New York, 137 NYS 2d 605, 285 App Div 922

**Manner of questioning maintenance in courts**

Although the supreme court is authorized to correct at any time any defect or informality in any pleading or proceeding brought in connection with construction by city of the water supply reservoir, where the supreme court, special term, had, in connection with construction of water supply reservoir by New York City, approved substituted highways and directed city to construct and maintain such highways, dispute between city and two towns concerning city's alleged duty to remove snow and ice from the highways could not be properly determined on town's motion to amend prior order—Huie v. City of New York, supra.

13. ND—Jackson v Ellendale, 61 N W 1030, 4 ND 478  
67 C J p 1161 note 73

14. Miss—Van Norman v. Meridian

Waterworks Co, 59 So 883, 102 Miss 736, 43 L.R.A., NS, 144

15. Miss—Brown v City of Meridian, 59 So 795, 102 Miss 384  
67 C J p 1161 note 75

16. Or—City of Portland v Metzger, 114 P 106, 58 Or 276.  
67 C J p 1161 note 77.

17. Cal—City of Gilroy v Kell, 228 P 400, 67 Cal App 734  
67 C J p 1161 note 78

18. Ga.—Dade County v. State, 42 SE 2d 439, 202 Ga. 191

Ky.—Louisville Extension Water Dist v Diehl Pump & Supply Co, 246 SW 2d 585

Mo.—Public Water Supply Dist No 2 of Jackson County v State Highway Commission, 244 SW 2d 4

#### Purpose

(1) Purpose of statute creating Fort Smith waterworks district, comprising territorial limits of city of Fort Smith, was to afford inhabitants of city sufficient source of water, and should be construed to effectuate that

merous cities and communities may be authorized to unite in a project of such magnitude that it would be impracticable or impossible for any one city or community to undertake the project alone<sup>19</sup>

Some statutes expressly provide that a water district shall be a separate and independent political corporate entity<sup>20</sup> Other statutes have characterized such a district as a "body politic and corporate,"<sup>21</sup> a "public corporation,"<sup>22</sup> a "municipal corporation,"<sup>23</sup> or a "body corporate"<sup>24</sup> Apart from the statutory characterization, the courts have regarded or referred to such a district as a "political subdivision,"<sup>25</sup> a "quasi public corporation,"<sup>26</sup> a "quasi municipal corporation,"<sup>27</sup> a "municipal corporation" in the broad sense of the term,<sup>28</sup> or as "to a limited extent, a municipal corporation,"<sup>29</sup> and it has been held that in many respects they resemble municipal corporations proper.<sup>30</sup> On the other hand, while a water district, authorized by some statutes, has, for the special objects of certain

statutes, been included as a matter of convenient reference within the term "municipal corporation"<sup>31</sup> or "municipality,"<sup>32</sup> it is essentially only a "special administrative area,"<sup>33</sup> and it is not a municipality or municipal corporation for all purposes.<sup>34</sup> It is not a county, incorporated city, town, or village,<sup>35</sup> or a subdivision of a city, town, or county<sup>36</sup> The view has been expressed that water districts are merely "taxing districts"<sup>37</sup> or local taxation districts designed for the purpose of making local improvements<sup>38</sup> A water district created by some statutes is regarded as a public corporation,<sup>39</sup> or as a state agency exercising governmental functions,<sup>40</sup> and, as such, according to some cases, is distinguishable from a municipal corporation<sup>41</sup>

*Regulation and control* Except as restricted by constitutional provision, the legislature has absolute control over the affairs of a water district created by it,<sup>42</sup> and a water district created by or under

purpose—*Bourland v City of Fort Smith*, 78 S W 2d 383, 190 Ark 289

(2) The object of the statute authorizing the creation of water conservation districts in counties of specified population is the creation of an agency to restore fresh water levels to their normal level and to provide an adequate supply of fresh water for all purposes—*City of Coral Gables v Crandon*, 25 So 2d 1, 157 Fla. 71

19. Utah—*Lehi City v Meiling*, 48 P 2d 530, 87 Utah 237.

#### Purpose of act

The purpose of the Metropolitan Water District Act was to provide means by which communities may contract with the United States government to obtain a large supply of water through a reclamation project for the storing of water from rivers—*Lehi City v Meiling*, supra

20. Utah—*Lehi City v Meiling*, supra.

21. Me—*Kennebec Water Dist v City of Waterville*, 52 A 774, 96 Me 234

67 C J p 1162 note 88

Corporate capacity of officers see *infra* § 243 (4)

Irrigation districts see *infra* §§ 318–338

De facto district see *infra* § 243 (2) a.

22. Mo—*Public Water Supply Dist No 2 of Jackson County v State Highways Commission*, 244 S W 2d 4

23. Me—*Woodward v. Livermore*, 100 A 317, 116 Me 86, L R A 1917D 678

67 C J p 1162 note 89

24. Ky—*Louisville Extension Water*

*Dist v Diehl Pump & Supply Co*, 246 S W 2d 585

25. Ky—*Louisville Extension Water Dist v Diehl Pump & Supply Co*, supra

Mo—*Public Water Supply Dist No 2 of Jackson County v State Highways Commission*, 244 S W 2d 4

Tex—*Banker v Jefferson County Water Control & Imp Dist No One*, Civ App, 277 S W 2d 130, error refused, no reversible error

26. Me—*Woodward v Livermore*, 100 A 317, 116 Me 86, L R A 1917D 678

27. Cal—*Morrison v Smith Bros*, 293 P 53, 211 Cal 36

Utah—*Lehi City v Meiling*, 48 P 2d 530, 87 Utah 237

67 C J p 1162 note 91

#### Reason for rule

They are constituted by the legislature to exercise, in a prescribed area, a very limited number of corporation functions, and they are said to be "low down in the scale or grade of corporate existence"—*Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann*, 142 S W 2d 945, 135 Tex 280

28. Mo—*Public Water Supply Dist No 2 of Jackson County v State Highways Commission*, 244 S W 2d 4—*State ex rel Halferty v Kansas City Power & Light Co*, 145 S W 2d 116, 346 Mo 1069

29. Wash—*Drum v University Place Water Dist*, 258 P 505, 144 Wash. 585, 266 P 1056, 147 Wash 699

67 C J p 1162 note 92

30. Cal—*Morrison v. Smith Bros*, 293 P 53, 211 Cal 36

#### Comparative resemblance

They more closely resemble municipi-

pal corporations proper than they do state agencies, such as irrigation and reclamation districts—*Morrison v Smith Bros*, supra.

31. N Y—*Kenwell v Lee*, 184 N E 692, 261 N Y 113

32. N Y—*Kenwell v Lee*, supra

33. N Y—*Kenwell v Lee*, supra

34. Mo—*Public Water Supply Dist No 2 of Jackson County v State Highways Commission*, 244 S W 2d 4

Utah—*Lehi City v Meiling*, 48 P 2d 530, 87 Utah 237

67 C J p 1162 note 96.

35. Mo—*State ex rel Halferty v Kansas City Power & Light Co*, 145 S W 2d 116, 346 Mo 1069

36. Utah—*Lehi City v Meiling*, 48 P 2d 530, 87 Utah 237

37. Cal—*Sacramento Municipal Utility Dist v All Parties and Persons*, etc., 57 P 2d 506, 6 Cal 2d 197

38. Tex—*State v Ball*, 296 S W. 1085, 116 Tex. 527.

39. Cal—*Morrison v Smith Bros*, 293 P 53, 211 Cal 36—*Laguna Beach County Water Dist v Orange County*, 87 P 2d 46, 30 Cal App 2d 740—*Galt County Water Dist v Evans*, 51 P 2d 202, 10 Cal. App 2d 116

67 C J p 1162 note 98

40. Cal—*Laguna Beach County Water Dist v Orange County*, 87 P 2d 46, 30 Cal App 2d 740

41. Cal—*Laguna Beach County Water Dist v Orange County*, supra.

67 C J p 1162 note 99

42. Cal—*Metropolitan Water Dist. of Southern California v Whitsett*, 10 P 2d 751, 215 Cal 400.

some statutes is a public utility subject to the supervision of the public utilities commission <sup>43</sup>

§ 243(2) — Organization and Validity

- a In general
- b Submission to voters
- c Review of proceedings and attack on organization

a. In General

The legislature of a state has plenary control over matters pertaining to the organization of water districts which have been created by special or private acts or under the procedure provided by general statutes

The legislature of a state has plenary control over matters pertaining to the organization of water

districts <sup>44</sup> Water districts are sometimes created by special or private acts, the validity of which has been upheld, <sup>45</sup> and which, as discussed infra subdivision b of this section, provide that the act shall become effective when approved or accepted by a majority vote of the inhabitants or voters of such territory Sometimes, however, provision for the organization of water districts is made by general statutes <sup>46</sup> which, subject to constitutional limitations and restrictions, <sup>47</sup> the legislature has authority to enact <sup>48</sup>

Substantial compliance with the proceedings required by statute to be taken for the formation of a water district is required <sup>49</sup> Under various statutes

<sup>43</sup> Me—City of Waterville v Kennebec Water Dist, 25 A 2d 475, 138 Me 307

67 C J p 1163 note 2

Regulation of rates see infra §§ 288-296

**Accounting**

The Kennebec Water District is subject in the matter of its accounting to the jurisdiction, control, and regulation of the Public Utilities Commission—City of Waterville v Kennebec Water Dist, supra

<sup>44</sup> Cal—Sacramento Municipal Utility Dist v All Parties and Persons, etc, 57 P 2d 506, 6 Cal 2d 197—Crawford v Los Angeles County, 17 P 2d 1017, 128 Cal App 368

Md—Dinneen v Rider, 136 A 754, 152 Md 343

67 C J p 1163 note 8 [c]

**The establishment of a district for control of state waters for the supply of water to its citizens is fully within the power and duty of the state—Lohr v Upper Potomac River Commission, 26 A 2d 547, 180 Md 584**

<sup>45</sup> Ark—Bourland v City of Fort Smith, 78 SW 2d 383, 190 Ark 289

Me—Norway Water Dist v Norway Water Co, 30 A 2d 601, 139 Me 311

Md—Dinneen v Rider, 136 A 754, 152 Md 343

Pa—Nagle v City of Erie, Com Pl, 21 Erie Co 282

67 C J p 1163 note 3

Lands included in general see infra § 243 (3)

**District held created**

Act empowering Board of Township Commissioners of Folly Island to issue waterworks revenue bonds of the township to defray costs of constructing a waterworks system for the township, and committing to board the function of constructing, operating and maintaining waterworks system, created of such township a special district for waterworks purposes, and constituted an administrative board therefor by designation

of township commissioners, who were agents for accomplishment of the legislative purpose—Wagener v Johnson, 76 SE 2d 611, 223 SC 470

<sup>46</sup> Fla—City of Coral Gables v Crandon, 25 So 2d 1, 157 Fla 71

Tex—Lovett v Cronin, Civ App, 245 SW 2d 519

67 C J p 1163 note 6

**Construction**

The Public Utility District Law should be liberally construed to carry out its purpose of furnishing a district, and the inhabitants thereof, with ample supply of water for all uses and purposes, and as an incident thereto, to furnish any other persons, including public and private corporations within or without its limits, with an ample supply of water for all uses and purposes—State ex rel Public Utility Dist No 1 of Skagit County v Wythe, 182 P 2d 706, 28 Wash 2d 113

<sup>47</sup> Cal—Crawford v Los Angeles County, 17 P 2d 1017, 128 Cal App 368

67 C J p 1163 note 7

**In Texas**

(1) The statute authorizing creation of fresh water supply districts is enabling act, responsive to constitutional provisions with respect to conservation and development of state's natural resources, and authorizes creation of such districts for purposes of conserving, transporting, and distributing fresh water from lakes, wells, etc, for domestic and commercial purposes—Ptacek v Hofheinz, Tex Civ App, 128 SW 2d 872, error refused

(2) Other decisions under Texas statutes see 67 C J p 1163 note 7 [a]

<sup>48</sup> Fla—City of Coral Gables v Crandon, 25 So 2d 1, 157 Fla 71

Or—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 55 P 2d 1107, 153 Or 382

67 C J p 1163 note 8

**Fresh water supply districts**

(1) There is no irreconcilable con-

flict between constitutional provisions for creation of municipal corporations and that relating to conservation and development of state's natural resources, so that incorporation of fresh water supply district under enabling act responsive to latter provision was not illegal as contemplating matters peculiarly and exclusively within powers of municipal government—Ptacek v Hofheinz, Tex Civ App, 128 SW 2d 872, error refused

(2) A fresh water supply district was legally created under constitution and enabling act, where ample supply of subterranean water, susceptible of being reclaimed and utilized by district for its purposes, existed in its area—Ptacek v Hofheinz, supra.

(3) Other decisions dealing with power to authorize districts see 67 C J p 1163 note 8 [b]

**Statutes held valid**

(1) Generally—First Suburban Water Utility Dist v McCanless, 146 SW 2d 948, 177 Tenn 128

(2) Metropolitan Water District Act was not unconstitutional as providing for interference with municipal improvements, money, property, or effects, since power of control vested in board of directors of district is over property, improvements, money, and effects of the district, and not that of any of cities or towns whose territorial boundaries may be coincidental with that of district or included therein—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237

<sup>49</sup> Iowa—Fiesel v Bennett, 280 N W 482, 225 Iowa 98

**Dispensable requirement**

The failure to meet a statutory requirement is not fatal if that requirement was such as could constitutionally have been dispensed with by the legislature—Stallsmith v Alderwood Water Dist, 222 P 2d 836, 37 Wash 2d 198

**Statement of cost**

Water district commissioners' duty

there is required an initiatory or preliminary petition, signed by a designated number of the landowners, inhabitants, or voters of the proposed district,<sup>50</sup> and addressed to a designated public body, officer, or officers,<sup>51</sup> containing a description of the territory or land, which it is proposed to include,<sup>52</sup> and other details.<sup>53</sup> The necessity for a definite and

accurate description, in the organization proceeding, in order to render the order of organization valid has been recognized.<sup>54</sup> Provision is generally made for the filing of the petition,<sup>55</sup> for publication of notice of the filing of the petition<sup>56</sup> and for a hearing in respect of the petition and protests or objections.<sup>57</sup> There must at least be substantial

to declare cost of local district improvements and proportions thereof to be borne by general district and local improvement district at commissioners' meeting in which resolution to create district was adopted was held sufficiently complied with in view of water district engineer's oral declaration of estimated cost at such meeting and explanation of project from plan exhibited thereat and commissioners' express declaration and resolution that all costs should be to local improvement district—*Stallsmith v Alderwood Water Dist.*, supra.

**50** Or—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 55 P 2d 1107, 153 Or 382

#### Number of signers

(1) Under statute requiring petition for organization of water control and improvement district to be signed by majority in number of holders of title to lands therein, and owners of majority in value of lands therein, provided that petition is sufficient if signed by fifty landowners if number of such landowners therein is more than fifty, proviso makes an exception not only to requirement of majority in number but also as to requirement of a majority in value—*Lovett v Cronin*, Tex Civ App, 245 S W 2d 519.

(2) Where original petition for establishment of water district was signed by twenty-five per cent of residents of proposed district, and amended petition requesting that additional territory be included in proposed district was signed by twenty-five per cent of residents of that territory, district including additional territory had not been petitioned for by twenty-five per cent of residents of district described in original petition—*Fiesel v Bennett*, 280 NW 482, 225 Iowa 98.

**Failure to secure signatures of majority of owners of property in proposed local improvement district to petition for creation thereof was not jurisdictional defect, but mere irregularity, which did not invalidate water district's proceedings for establishment of improvement district—***Stallsmith v Alderwood Water Dist.*, 222 P 2d 836, 37 Wash 2d 198.

**51.** Tex—*Lovett v Cronin*, Civ App, 245 S W 2d 519  
67 C J p 1164 note 10

#### Particular body or officer

Under statute relating to water

control and improvement districts, State Board of Water Engineers was held to have jurisdiction to create a water control and improvement district where the petition asked power to provide facilities for the disposal of sewage, even though the district lay wholly within the limits of the county, as against the contention that such district was required to be created by County Commissioners' Court—*Harris County Water Control and Imp Dist No 39 v Albright*, Tex Civ App, 263 S W 2d 911—*Lovett v Cronin*, Tex Civ App, 245 S W 2d 519.

**52** Iowa—*Fiesel v Bennett*, 280 NW 482, 225 Iowa 98

#### Amendment increasing area

Where water district as established contained thirty per cent more property than amount described in original petition, the original petition did not set out an "approximate" description of district to be served and statute was, therefore, not substantially complied with, notwithstanding additional property included in district was described in an amended petition—*Fiesel v Bennett*, supra.

**53** Iowa—*Fiesel v Bennett*, supra  
67 C J p 1164 note 12

#### Amended petition

Fact that original petition for establishment of water district contained all statutory requisites did not justify board of supervisors in establishing water district including not only territory described therein, but also additional property described in an amended petition which was inadequate in failing to state need of a public water supply in added territory, approximate number of families therein, proposed source of supply, and type of service desired—*Fiesel v Bennett*, supra.

**54.** Cal—*Yoder v Board of Sup's of Riverside County*, 281 P 393, 208 Cal 368

67 C J p 1164 note 14  
Land included in district in general see infra § 243 (3)

**55** Or—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 55 P 2d 1107, 153 Or 382

#### Where filed

Under some statutes, a petition for the creation of a water district is to be filed with the board which hears and determines it, and it should also be filed with the county clerk at least before the board's notices of the

hearing on the petition are posted and published—*Lovett v Cronin*, Tex Civ App, 245 S W 2d 519.

#### Irregularity

Failure to file petition for creation of water control and improvement district with county clerk until after State Board of Water Engineers had created district was at most an irregularity which did not make creation of district void—*Lovett v Cronin*, supra.

**56** Tex—*Lovett v Cronin*, supra  
67 C J p 1164 note 14

**57** Tex—*Lovett v Cronin*, supra  
67 C J p 1164 note 15

Notice of hearing as to assessment see infra § 243 (7)

**Constitutional rights of landowners** within district are not infringed where they are afforded an opportunity to be heard on all questions raised by their objections—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 55 P 2d 1107, 153 Or 382.

#### Time

(1) Statutes governing the time for hearing the petition and protests have been held directory—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 55 P 2d 1107, 153 Or 382—67 C J p 1164 note 15 [a].

(2) Under statute directing petition for election to be filed with county clerk and presented to court on first day of next regular "session" for county business, fact that petition was filed on same day order calling for election was made was held not to render subsequent proceedings invalid, since word "session" did not mean "term," but referred only to next temporary sitting—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, supra.

#### Record

Order establishing municipal corporation to supply water to community, reciting that petition was duly presented to county court on first day of next regular session for county business as required by statute, was not contradicted by record showing petition was filed and order calling election was made on same day, since next regular session may have been on same day petition was filed—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, supra.

compliance with statutory requirements in respect of the notice of hearing<sup>58</sup>

Under some statutes it has been held that the jurisdiction of the board which hears and determines a petition for the creation of a water district is initiated by the filing with the board of the petition,<sup>59</sup> but under other statutes the body designated to conduct the hearing does not acquire jurisdiction until the publication of notice of the hearing is complete.<sup>60</sup> Where a petition has duly been filed and the notice of hearing has been published as required by law, the designated body acquires jurisdiction<sup>61</sup>

Under some statutes a designated body or officer has authority to determine in the first instance the sufficiency of the petition<sup>62</sup> in respect of the capacity and number of signers<sup>63</sup> and in general the facts giving jurisdiction<sup>64</sup>. The body conducting the hearing must make the requisite findings<sup>65</sup>. A decision, after a hearing on protests against the formation of a district, under some statutes, is final and conclusive in the absence of fraud or an abuse of discretion so patent as to amount to fraud,<sup>66</sup> and the determination of the designated board as to the number and capacity of the signers is final and conclusive unless reviewed and set aside in a direct proceeding<sup>67</sup>. Authority is sometimes given to the board which has jurisdiction, to grant the petition in part by altering the boundaries of the contemplated district as set forth in the petition so that all property and property owners, and only such property and property owners, as are benefited shall be included within the limits of the district<sup>68</sup>

Other statutes, the validity of which has been upheld, have provided for the creation of water districts to include the territory of two or more municipalities and for the initiation of the proceeding for organization by the legislative body of a municipality which it is desired to include in the proposed district<sup>69</sup>. Still other statutes, the validity of which has been upheld, authorize certain public bodies on their own initiative to create waterworks districts<sup>70</sup>

*Matters subsequent to creation of district* A legally created water district is not invalidated by the subsequent failure to construct the water system as indicated on the original plans for the district or by the failure of the water district to obtain the consent of the water power and control commission to the operation of the water system<sup>71</sup>

*Place where proceedings conducted* The mere fact that the proceedings of a board of directors in the organization of a water improvement district, under some statutes, are conducted outside the confines of such district does not render such proceedings irregular and void<sup>72</sup>

*De facto district* Where the statute under which an attempt to organize a water district is made is violative of a constitutional provision, the so-called district is not, it has been held, a de facto corporation<sup>73</sup>

*Validating statutes.* Statutory provisions validating the organization of water districts, originally organized under an invalid statute, have been given effect,<sup>74</sup> rendering a particular district to which the

58. Cal—Los Angeles County v Payne, 255 P 281, 82 Cal App 210 67 C J p 1164 note 16

59. Tex—Lovett v Cronin, Civ App, 245 SW 2d 519

60. Cal—Los Angeles County v Payne, 255 P 281, 82 Cal App 210 67 C J p 1164 note 17

61. N.Y.—Floyd-Jones v Board of Town of Oyster Bay, Nassau County, 164 NE 330, 249 N.Y. 398 67 C J p 1164 note 18

62. Okl.—Price v Water Dist No 8, Tulsa County, 293 P 1092, 147 Okl 11

63. Okl.—Price v Water Dist No 8, Tulsa County, supra 67 C J p 1165 note 20

64. N.Y.—Kenwell v Lee, 254 N.Y.S. 841, 142 Misc 413, affirmed 258 N.Y.S. 1000, 236 App Div 752, reversed on other ground 184 NE 692, 261 N.Y. 113

65. Wash.—State ex rel Carr v Superior Court for King County, 69 P 2d 1052, 190 Wash. 553.

#### Benefit to lands

(1) Water district was held not legally organized, where county commissioners failed to enter as condition precedent to formation of water district finding that all land included in district would be benefited as required by statute—State ex rel Carr v Superior Court for King County, supra

(2) County commissioners' nunc pro tunc resolution could not show that finding required by statute, that all land included in proposed water district would be benefited was entered almost two years before date of resolution, where finding was not so entered—State ex rel Carr v Superior Court for King County, supra

66. Cal—Crawford v Los Angeles County, 17 P 2d 1017, 128 Cal App 368

67. N.Y.—Eastman Kodak Co v Richards, 204 N.Y.S. 246, 123 Misc 83

Attacking organization in general see infra subdivision c of this section.

68. N.Y.—Floyd-Jones v Board of Town of Oyster Bay, Nassau County, 164 NE 330, 249 N.Y. 398 67 C J p 1165 note 24

69. Utah—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237 67 C J p 1165 notes 25-27

70. La.—Middleton v Police Jury, Parish of Jefferson, 125 So 447, 169 La. 458

71. N.Y.—Seyfang v Reister, 277 N.Y.S. 695, 154 Misc 308

72. Okl.—Lowery v Water Improvement Dist No 5, Tulsa County, 251 P 748, 122 Okl 116

73. Wash.—Drum v University Place Water Dist, 258 P 505, 144 Wash. 585, 266 P 1056, 147 Wash. 699

74. Wash.—Rood v Water Dist. No 24 of King County, 48 P 2d 584, 183 Wash. 258 67 C J p 1165 note 32.

#### Extent of ratification

Statute was held to validate, not only formation of water district which had been organized under an

validating statute is applicable valid as of the date of its original creation<sup>75</sup> Where a proposed water district failed of formation because of insufficient favorable votes, the repeal of a validating or curative statute which was subsequently passed to declare the district properly formed caused any vitality the district may have had to cease<sup>76</sup>

### b. Submission to Voters

Under statutes so providing, the question as to whether or not a water district shall be created is submitted to the qualified voters of the proposed district

Although under some statutes it has been held unnecessary to submit to an election the formation of a local improvement district within a water district, where its formation constitutes a consummation of the purpose of the scheme of the water dis-

trict adopted by election to furnish water to consumers and the public,<sup>77</sup> under other statutes the question as to whether or not a water district shall be created is submitted to the qualified voters of the proposed district,<sup>78</sup> and its formation is dependent on the majority required by statute voting in favor thereof<sup>79</sup> The rules for conducting such an election have been held directory,<sup>80</sup> and under this view, an irregularity, if harmless, will not invalidate an election<sup>81</sup> The failure strictly to comply with the statutory provisions governing the submission does not necessarily invalidate the election where the electors were fully advised as to the question to be determined<sup>82</sup>

The governing statutes must be looked to in order to determine the requirements as to notice of the election,<sup>83</sup> and, where such notice complies with

unconstitutional statute, but also such acts, not excepted by the act, as were necessary to be done in the organization, establishment and existence of the water district, including adoption of comprehensive scheme and plan for installation of water system—*McKenzie v Mukilteo Water Dist.*, 102 P 2d 251, 4 Wash 2d 103

**Comprehensive plan for installation of water system by water district** which was organized under unconstitutional statute was held legally sufficient and binding on subsequent statutory validation and ratification of the organization of the district—*McKenzie v Mukilteo Water Dist.*, supra

#### Effect of proviso

Proviso in validating statute that nothing contained in the act should be deemed to validate the debts, contracts, bonds or other obligations executed prior to the act in connection with or in pursuance of attempted organization of districts, was construed to indicate legislative intention that all other acts of the validated districts were intended to be ratified and validated—*McKenzie v Mukilteo Water Dist.*, supra

**75** Tex—*Matlock v Dallas Arcadia Fresh Water Supply Dist No 1*, Civ App, 14 S W 2d 360

Wash—*McKenzie v Mukilteo Water Dist.*, 102 P 2d 251, 4 Wash 2d 103

**76.** Cal—*People ex rel Rowe v West Side County Water Dist.*, 246 P 2d 119, 112 Cal App 2d 228

**77.** Wash—*Stallsmith v Alderwood Water Dist.*, 222 P 2d 836, 37 Wash 2d 198

**78** Or—In re Incorporation of Communities of Rockaway and Seaview in Tillamook County, 55 P 2d 1107, 153 Or 382

Tex—*Lovett v Cronin*, Civ.App., 245 S W 2d 519

67 C J p 1165 note 35.

#### Under special or private acts

Me—*Kennebunk, etc.*, Water Dist. v Wells, 147 A 188, 128 Me 256  
67 C J p 1165 note 34

#### Character of election

(1) Provision that special election "shall be called, advertised and conducted according to the law relating to municipal elections" applies to town meeting for sole purpose of balloting on single referendum question submitted by legislature, in which method for notification and conduct of meetings is the same as in case of meetings for election of county, state, and national officers—*Norway Water Dist v Norway Water Co.*, 30 A 2d 601, 139 Me 311

(2) Under Water Code provision requiring question whether county water district should be formed and determination of persons to be its first directors to be submitted to vote, a single election and single ballot is provided for—*People ex rel Rowe v West Side County Water Dist.*, 246 P 2d 119, 112 Cal App 2d 228

**79.** Cal—*People ex rel Rowe v West Side County Water Dist.*, supra

#### Particular requirement

In order to authorize the formation of a county water district, a favorable majority of the votes cast at the election and not merely a favorable majority of the votes on the proposition was required—*People ex rel Rowe v West Side County Water Dist.*, supra

**80.** Me—*Norway Water Dist v Norway Water Co.*, 30 A 2d 601, 139 Me 311

#### Preliminary steps

Where election, resulting in approval of water district's charter, was honestly and fairly conducted and no one was injured by manner in which preliminary steps were taken, election will not be declared invalid—*Norway*

*Water Dist. v Norway Water Co.*, supra

#### Election of moderator

A referendum election in water district on question of approving district charter was not invalid because of failure to provide for election of moderator, as required by statute governing ordinary town meetings, in view of election statute giving selectmen all powers of moderators—*Norway Water Dist v Norway Water Co.*, supra

**81.** Tex—*Nueces County Water Control and Imp Dist No 4 v State ex rel Wilson*, Civ App, 270 S W 2d 672, error refused no reversible error

#### Number of polling places

The use of one polling place for entire district in violation of statute requiring separate polling places for municipality and area outside municipality was harmless irregularity not invalidating election, where opposite vote by all not voting could not have changed result—*Nueces County Water Control and Imp Dist No 4 v State ex rel Wilson*, supra

**82** Or—*State v Parker*, 190 P 319  
96 Or 499

67 C J p 1165 note 36

#### Amendment of notice

In proceeding by water district to condemn private water company's property, as authorized by district charter approved in local referendum election, at which ballots were cast only by district voters named on check list, notice, calling for election by voters of town embracing district, was properly amended to accord with fact—*Norway Water Dist v Norway Water Co.*, 30 A 2d 601, 139 Me 311

**83.** Or—*Smith v Hurlburt*, 217 P 1093, 108 Or 690  
67 C J p 1166 note 37.

the statutory requirements, the mere fact that certain landowners did not have actual notice is immaterial<sup>84</sup> In the absence of statute providing therefor, the inhabitants of a proposed water district are not entitled to notice and a hearing on the question, where it is submitted to the voters of the district for their approval<sup>85</sup> The body authorized to canvass the vote may and should, under some statutes, on a canvass of the vote and declaration of the result, declare that the district is not duly incorporated where such is the case<sup>86</sup>

### c. Review of Proceedings and Attack on Organization

Under varying statutes, matters with respect to the organization and validity of a water district, which have been passed on judicially by the body to which they have been duly submitted, may be reviewed directly in a certiorari proceeding, or on quo warranto, or by appeal, but such decisions are not subject to collateral attack, unless the body acted without jurisdiction or in violation of a constitutional provision

Under various statutes matters with respect to the organization and validity of a water district, which have been passed on judicially by the body to which they have duly been submitted, may be reviewed directly<sup>87</sup> in a certiorari proceeding,<sup>88</sup> but quo warranto by or on behalf of the state is the proper method of questioning the validity of the organiza-

tion of a water district organized under some statutes<sup>89</sup> An appeal to the courts from a finding and determination of the board vested with authority in the matter as to the sufficiency of a petition submitted to such board is sometimes authorized<sup>90</sup> The validity of the formation of a water district may not be considered in an action in which it is not the subject<sup>91</sup>

*Collateral attack* Where the body to which a petition for organization is made acts judicially in deciding certain matters, the decision of such body is not subject to collateral attack<sup>92</sup> On the other hand, where the acts of the board before which a proceeding to establish a district has been conducted are illegal and beyond the scope of the jurisdiction of such board, its decision is subject to collateral attack<sup>93</sup> Likewise, where there has been an attempt to create a water district under an act held invalid as violative of a constitutional provision, the validity of such district may be attacked in a collateral proceeding<sup>94</sup> A suit to enjoin the levying of assessments against property in a water improvement district and to remove a cloud caused by the creation of the district constitutes a collateral attack on the finding of county commissioners in the organization proceedings,<sup>95</sup> as does a suit to enjoin the collection of a tax on property in the district,<sup>96</sup>

#### Publication

Metropolitan Water District Act was not unconstitutional in providing notice of election on organization of district by publication in newspaper in each county in which any part of proposed district should be, instead of requiring that such notice should be printed in each of cities or towns within proposed district—*Lehi City v Meiling*, 48 P 2d 530, 87 Utah 237

84. Or—*Smith v Hurlburt*, 217 P 1093, 108 Or 690

85. Cal—*Crawford v Los Angeles County*, 17 P 2d 1017, 128 Cal App 368

#### Necessity for approval

86. Or—*Smith v Hurlburt*, 217 P 1093, 108 Or 690

67 C J p 1166 note 39

87. Or—*Smith v Hurlburt*, 217 P 1093, 108 Or 690

67 C J p 1166 note 44

88. N Y—*City of Rochester v Town Board of Town of Livonia, Livingston County*, 56 N Y S 2d 850, 185 Misc 518

67 C J p 1166 note 45

#### Exclusive remedy

The remedy provided by statute to persons deeming themselves aggrieved by acts of a town board with respect to the creation of a water district is exclusive—*City of Rochester*

*v Town Board of Town of Livonia, Livingston County*, supra

#### Filing order creating district

Review by certiorari was not authorized where no certified copy of any determination or order made by town board allegedly creating a water district had been filed or recorded in the county clerk's office as required by Town Law—*City of Rochester v Town Board of Town of Livonia, Livingston County*, supra

**Final determination or order by town board creating water district was prerequisite to review by certiorari—***City of Rochester v Town Board of Town of Livonia, Livingston County*, supra

89. Tex—*Nueces County Water Control and Imp Dist No 4 v State ex rel Wilson*, Civ App, 270 S W 2d 672, error refused no reversible error

67 C J p 1166 note 46

Propriety of quo warranto to attack existence of public corporation in general see *Quo Warranto* § 13

#### Judgment self-executing

Judgment declaring that proposed county water district failed of formation and ousting district of its corporate rights and privileges was self-executing—*People ex rel Rowe v West Side County Water Dist*, 246 P 2d 119, 112 Cal App 2d 228

90. Okl—*Price v Water Dist No 8, Tulsa County*, 293 P 1092, 147 Okl 11

#### Good faith

Court cannot determine whether county board of supervisors acted wisely in denying protests against formation of waterworks district, its good faith being presumed—*Crawford v Los Angeles County*, 17 P 2d 1017, 128 Cal App 368

91. Pa—*Howell v Sewickley Tp*, 43 A 2d 121, 352 Pa. 552

92. N Y—*Kenwell v Lee*, 254 N Y S 841, 142 Misc 413, affirmed 258 N Y S 1000, 236 App Div 752, reversed on other grounds 184 N E 692, 261 N Y 113

67 C J p 1166 note 40

93. N Y—*Eastman Kodak Co v Richards*, 204 N Y S 246, 123 Misc 83

67 C J p 1166 note 48

94. Wash—*Drum v University Place Water Dist*, 258 P 505, 144 Wash 585, 266 P 1056, 147 Wash 699

67 C J p 1166 note 49

95. Okl—*Wrightsmen v Stephenson*, 33 P 2d 499, 168 Okl 63—*Price v Water Dist No 8, Tulsa County*, 293 P 1092, 147 Okl 11

96. Or—*Smith v Hurlburt*, 217 P 1093, 108 Or 690

67 C J p 1166 note 42.

or a suit to enjoin the persons appointed directors of a water district from canvassing and declaring the results of the election for the confirmation of the district and to enjoin them from performing their duties as directors of the district<sup>97</sup> Such an attack, it has been held, is controlled by legal rules relating to collateral attacks on judgments of courts<sup>98</sup>

**Persons entitled to attack** Under some statutes any interested person affected thereby may attack the creation and organization of a water district<sup>99</sup> A suit by a taxpayer attacking the organization of a water district has been upheld<sup>1</sup> It has been held that plaintiff in a suit for a declaration of the illegality of proceedings for the creation and organization of a waterworks district cannot successfully complain of a matter which does not affect his interests<sup>2</sup> A mere ministerial officer holding office under the authority of the district may not in his official capacity dispute the existence, or the validity of the organization, of such district<sup>3</sup> A person may waive or be estopped to attack the organization and operation of a water district<sup>4</sup> Landowners who have consented to, or encouraged, the organization of a water district may thereby be

estopped to attack in equity the organization of the district on the ground of lack of opportunity to be heard as to the boundaries of the district and the inclusion of their lands<sup>5</sup>

**Time to sue** Under some statutes an action attacking the validity of a water district must be brought within a reasonable time<sup>6</sup> An attack on the organization of a waterworks improvement, under certain general statutes governing local improvements, on the ground that the petition was not signed by a majority in value of the property owners, is barred where suit is not brought within a certain time after the passage of the ordinance ascertaining that a majority in value of the owners had signed the petition<sup>7</sup>

**Pleading** In a suit to prevent further proceedings, under the applicable statute, looking to the organization of a water district, based on alleged defects in the preliminary proceedings before the public body designated by the statute, the complaint must allege facts sufficient to show grounds for relief<sup>8</sup>

**Evidence.** In actions attacking the organization of a water district the general rules of evidence apply<sup>9</sup>

97. Tex.—Lovett v Cronin, Civ App, 245 S W 2d 519

**Evidence** was held sufficient to establish that petition for creation of district was filed with county clerk when election was ordered and was available for inspection by public—Lovett v Cronin, supra

98. Okl.—Price v Water Dist No 8, Tulsa County, 293 P 1092, 147 Okl 11

#### Issues

Where the organization of a water improvement district is attacked in a collateral proceeding, the court may determine only two things, first, did the board or tribunal designated by the statute have jurisdiction to act, and, second did it act?—Wrightman v Stephenson, 33 P 2d 499, 168 Okl 63—Price v Water Dist No 8, Tulsa County, 293 P 1092, 147 Okl 11

99. Tex.—Board of Water Engineers v Colorado River Municipal Water Dist, 254 S W 2d 369, 152 Tex 77, certiorari denied Colorado River Municipal Water Dist v Board of Water Engineers, 74 S Ct 25, 346 U S 815, 98 L Ed 342

**City** which entered field of supplying water to customers without having obtained franchise and which carried on its operations pursuant to private contract was held not entitled to question sufficiency of notice of hearing before court creating separate water district or to ques-

tion validity of that decree—Johnson City v Milligan Utility Dist, Tenn App, 276 S W 2d 748

1. NY—Kenwell v Lee, 184 NE 692, 261 NY 113  
67 C J p 1167 note 53

2. La.—Middleton v Police Jury Parish of Jefferson, 125 So 447, 169 La 458  
67 C J p 1166 note 50

3. Cal.—Marin Municipal Water Dist v Dolge, 158 P 187, 172 Cal 724

4. Wash.—McKenzie v Mulkiteo Water Dist, 102 P 2d 251, 4 Wash 2d 103

#### Estoppel held shown

Wash—McKenzie v Mulkiteo Water Dist, supra

5. Wash.—Desimone v Shields, 277 P 829, 152 Wash 353  
67 C J p 1167 note 52

6. U S.—Board of Water Engineers v Colorado River Municipal Water Dist, 254 S W 2d 369, 152 Tex 77, certiorari denied Colorado River Municipal Water Dist v Board of Water Engineers, 74 S Ct 25, 346 U S 815, 98 L Ed 342

#### Legislative intent

Statutory provision that suits to contest the validity of orders of Board of Water Engineers shall be advanced for trial and be determined as expeditiously as possible, and no postponement thereof or continuance

shall be granted except for reasons deemed imperative by the court, evidences a legislative intent that such suits must be brought within a reasonable time—Board of Water Engineers v Colorado River Municipal Water Dist, 254 S W 2d 369, 152 Tex 77, certiorari denied Colorado River Municipal Water Dist v Board of Water Engineers, 74 S Ct 25, 346 U S 815, 98 L Ed 342

#### Delay held to bar action

A delay of seven months before filing suit was held to bar action—Board of Water Engineers v Colorado River Municipal Water Dist, 254 S W 2d 369, 152 Tex 77, certiorari denied Colorado River Municipal Water Dist v Board of Water Engineers, 74 S Ct 25, 346 U S 815, 98 L Ed 342

#### Order held res judicata

Ark—Mowrey v Coleman, 277 SW 2d 481

7. Ark.—Missouri Pac R Co v Waterworks Improvement Dist No 1 of Tillar, 203 SW 696, 134 Ark 315

67 C J p 1167 note 54

8. Cal.—Crawford v Los Angeles County, 17 P 2d 1017, 128 Cal App 368

67 C J p 1167 note 55

#### 9 Evidence held insufficient

Ark—Pruitt v Pine Bluff Water & Sewer Extension Dist No 2, 214 S W 2d 489, 214 Ark 64

Pa.—Appeal of Heininger, Quar Sess, 46 Mun L R 202, 103 Pa L J 97



§ 243(3). — Territory Included

Subject to constitutional prohibitions or limitations, the permissible territorial extent of a water district and what lands may be included therein are determined by the provisions of the statutes which authorize its formation or organization.

In the absence of constitutional prohibitions or limitations the legislature may decide how the boundaries of a water district may be determined,<sup>10</sup> and the questions as to what the territorial extent of a water district may be<sup>11</sup> and what lands may be included<sup>12</sup> are, in general, determined by the provisions of the statute authorizing the formation or organization of the district. Under some statutes lands capable of being benefited by the improvement, and only such lands, may be included within a water district,<sup>13</sup> and noncontiguous tracts of land may be included within the same district<sup>14</sup>. Also, under some statutes two or more water districts may be created which embrace the same area or portions of the same area<sup>15</sup>.

Dependent on the terms of the particular statute, it has been variously held that a water district may or may not include cities or towns,<sup>16</sup> or may be either greater, or smaller, or coterminous with another political subdivision or municipality,<sup>17</sup> or, on the other hand, that it may not include territory within an incorporated city or town,<sup>18</sup> or may not be organized so as to include areas within an incorporated village.<sup>19</sup> Where a water district is organized under a statute which prohibits the inclusion therein of areas within an incorporated village and subsequently an incorporated village is carved out of territory embraced within the district, the village in legal effect ceases to be a part of such district, except as to rights and liabilities already created.<sup>20</sup> Under some statutes, any municipality defined by the act may create a water district and construct, operate, and maintain a water system which may be located wholly within or wholly without the municipality, or partially within and partially without the municipality.<sup>21</sup>

10. Tex.—Ptacek v Hofheinz, Civ App, 128 S W 2d 872, error refused —Ball v Merriman, Civ App, 245 S W 1012, reversed on other grounds 296 S W 1085, 116 Tex 527

Benefits for purpose of assessment or taxation in general see *infra* § 243 (7)

Description of boundaries in organization proceedings see *supra* § 243 (2) a

**Boundaries held sufficient**

The act creating the Lower Nueces River Water Supply District is not void on ground that boundaries of district do not close and do not encompass a complete body of land—Lower Nueces River Water Supply Dist v Cartwright, Tex Civ App, 274 S W 2d 199, error refused no reversible error

**Part of forest preserve**

Water district cannot include lake and incidental lands for use as a reservoir, where they are owned by the state and are a part of the forest preserve—Kenwell v Lee, 196 NE 406, 267 N Y 481—Kenwell v Lee, 184 NE 692, 261 N Y 113

11. N Y—Kenwell v Lee, 184 NE 692, 261 N Y 113  
67 C J p 1167 note 58

12. Tex.—Ptacek v Hofheinz, Civ App, 128 S W 2d 872, error refused  
67 C J p 1167 note 59

13. Okl.—Wrightsmen v Stephenson, 33 P 2d 499, 502, 168 Okl 63

"The test in determining what lands may or may not be included within the same water improvement district is whether the land is benefited by the proposed assessment and

whether it may be served together with other lands in the district by a common distribution system"—Wrightsmen v Stephenson, *supra*

14. N Y—Town of Colonie v A C Allyn & Co, 286 N Y S 828, 246 App Div 354

- Okl.—Wrightsmen v Stephenson, 33 P 2d 499, 168 Okl 63

15. Ga.—Dade County v State, 42 SE 2d 439, 202 Ga 191, answer to certified question conformed to 43 SE 2d 434, 75 Ga App 330

**Consent**

A county may create a water district embracing therein a city lying within the boundaries of the county, without the assent of the city—City of Trenton v Dade County, 43 SE 2d 432, 75 Ga App 326

16. Tex.—Ptacek v Hofheinz, Civ App, 128 S W 2d 872, error refused

**Area contiguous to municipality** may be erected into fresh water supply district—Ptacek v Hofheinz, *supra*

17. Utah—Lehi City v. Meiling, 48 P 2d 530, 87 Utah 237

**One or many cities**

On the question of legislative power, it is not material whether the district is composed of the area included within one city or of many cities and towns—Provo City v Evans, 48 P 2d 555, 87 Utah 292.

**Town**

A water district may or may not be co-extensive in territory with a town—Grishaber v Town of Callicoon, 27 N Y S 2d 522, 176 Misc 323, reversed on other grounds 33 N Y S 2d 508, 263 App Div 471.

18. Or—State, on Inf of Flaxel, v Chandler, 175 P 2d 448, 180 Or 28

19. N Y—Rinas v Duryea, 106 N Y S 2d 151, 278 App Div 419, appeal denied 106 N Y S 2d 766, 278 App Div 419, affirmed 107 NE 2d 80, 304 N Y 586

**Statutory plan** created by legislature in provision of town law authorizing establishment and extension of water supply district and provision of village law conferring power on board of trustees of village to establish water supply system was that water district should render services to areas outside of incorporated village, but that villages should render such services within their territorial limits—Rinas v Duryea, *supra*

20. N Y—Rinas v Duryea, *supra*  
67 C J p 1176 note 20

**Permanency of rights**

There is no statutory authority granting special water district any permanent vested right to serve its territory—Rinas v Duryea, *supra*

**Right to serve**

Where village was incorporated in area which was part of water district, water district might continue to function within such portion of village as it was servicing prior to incorporation, but it had no vested right to furnish water to other areas within corporate limits which were previously undeveloped and unserved, and village had full authority to contract for water for such areas from such sources as it saw fit, subject only to approval of water power and control commission—Rinas v Duryea, *supra*

21. Ga.—City of Trenton v Dade County, 43 SE 2d 432, 75 Ga App 326.

**Right to object** In general, persons who are not owners of certain lands included in a water district may not object to the inclusion of such lands<sup>22</sup> Unreasonable delay or failure to object may estop a person from asserting, or waive, any right he may have had to object to the inclusion of his land in a water district in its formation, or by subsequent annexation<sup>23</sup>

**Review** Certiorari will not lie to review a determination by a body, acting within the scope of its jurisdiction, as to whether or not certain lands would be benefited by the creation and operation of the proposed district where such determination is based on conflicting evidence<sup>24</sup> Under some statutes the action of the board of county commissioners of a proposed water improvement district in the county in excluding certain land from the district may be appealed from, but the decision may not be attacked collaterally<sup>25</sup>

### § 243(4). — Governing Body; Officers

In general, the governing bodies of water districts and officers thereof are provided for by the statutes under which the districts are organized, which determine their method of selection, tenure, and powers

In the absence of constitutional provision to the contrary, the governing body of a water district, and the tenure of its members, are as provided by the statutes governing such bodies<sup>26</sup> Such bodies are

statutory, and they have no powers other than those given to them by statute<sup>27</sup> The powers conferred on the members of such a body as a body may not be exercised except as a body, that is, by the members acting collectively,<sup>28</sup> and then only in conformity with such procedure as may be prescribed by statute<sup>29</sup> Under some statutes, the board of directors of a water district is the governing body of such district in substantially the same sense as are city councils or boards of trustees of municipalities or of other quasi-municipal agencies<sup>30</sup> Officers to whom is intrusted the conduct of the affairs of a water district are public officers<sup>31</sup> They are not a municipal or a quasi-municipal corporation,<sup>32</sup> or a quasi corporation<sup>33</sup> where such a character is not expressly given by statute and a quasi-corporate capacity is not essential to the proper conduct of their office.

Under some statutes, it has been held that commissioners of a water district are merely administrative officers,<sup>34</sup> with power to make contracts in their official name and capacity,<sup>35</sup> and that they are not agents of the town in which the district is located or of the town board,<sup>36</sup> or town officers,<sup>37</sup> or agents of the district<sup>38</sup> The auditor of a water district has been regarded as a purely ministerial officer<sup>39</sup> and, as such, subject to the control of the board of directors of the district<sup>40</sup>

22. La—Middleton v Police Jury, Parish of Jefferson, 125 So 447, 169 La 458  
67 C J p 1167 note 60

23. Conn—Rocky Hill Incorporated Dist v Hartford Rayon Corp., 190 A 264, 122 Conn 392

#### **Waiver held shown**

Corporation which had actual or constructive knowledge of proceedings to establish water district and made no claim that its lands were not included therein until after bonds had been issued and four years taxes assessed on the lands was estopped to deny that its lands were in the district—Rocky Hill Incorporated Dist v Hartford Rayon Corp., supra

24. Cal—Dumbarton Land & Improvement Co v Murphy, 163 P 866, 32 Cal App 626

25. Okl—Wrightsmen v Stephenson, 33 P 2d 499, 168 Okl 63

26. La—State ex rel Barre v Fulton, App., 63 So 2d 21

#### **Jurisdiction of state commission**

Legislature was entitled to exempt from jurisdiction of Public Service Commission water districts existing by virtue of assessments on property contained in district for payment of purchase price thereof and its main-

tenance—Middendorf v Jameson, 95 S W 2d 1057, 265 Ky 111

27. NY—Amity Holding Corporation v Eden, 265 N Y S 23, 238 App Div 628

#### **Duty to know powers**

Individuals dealing with members of board of water district of town must ascertain the extent of their authority—Amity Holding Corporation v Eden, supra

#### **Water improvement districts**

The governing board of water improvement districts is composed of its directors and they control all matters pertaining to the business of the district—Snelson v Murray, Tex Civ App, 252 S W 2d 720

28. NY—Amity Holding Corporation v Eden, 265 N Y S 23, 238 App Div 628

#### **Requirements for valid action**

The board must act at a meeting where a quorum is present and a majority vote for favorable action obtained—Amity Holding Corporation v Eden, supra

29. NY—Amity Holding Corporation v Eden, supra

#### **Approval by electors**

Board of water district was not authorized to purchase water mains

in private development without approval of bonds to be issued for payment thereof by electors—Amity Holding Corporation v Eden, supra

30. Cal—City of Pasadena v Chamberlain, 269 P 630, 204 Cal 653  
67 C J p 1169 note 94

31. NY—Salmon v Rochester & Lake Ontario Water Co., 197 N Y S 769, 120 Misc 131

32. NY—Salmon v Rochester & Lake Ontario Water Co., supra

33. NY—People ex rel Farley v Winkler, 96 NE 928, 203 NY 445

34. NY—People ex rel Farley v Winkler, supra

35. NY—People ex rel Farley v Winkler, supra

36. NY—People v Stoll, 152 NE 259, 242 NY 453  
67 C J p 1169 note 98

37. NY—Bryan v Town Board of Brighton, 232 N Y S 18, 133 Misc 315  
67 C J p 1169 note 99

38. NY—People ex rel Farley v Winkler, 96 NE 928, 203 NY 445

39. Cal—Marin Municipal Water Dist v Dolge, 158 P 187, 172 Cal 724

40. Cal—Marin Municipal Water Dist v Dolge, supra.

*Method of selection* In the absence of constitutional provision requiring otherwise, the choice of methods by which the governing body of a water district and other officers thereof may be selected is within the discretion of the legislature, and is as provided by the statutes governing such bodies <sup>41</sup> The legislature may require that directors of a water district shall be chosen by a majority of the votes cast at the election <sup>42</sup>

*Transfer to town boards* Where the legislature abolishes the separate governing bodies of water districts within towns and vests their powers in the respective town boards, it is intended that the town boards shall perform the functions of the governing bodies which are abolished and manage the affairs and property of the water districts within their territory <sup>43</sup>

*Liability to third persons* Officers of a water district, organized under some earlier statutes, were themselves liable in their official capacity on contracts made by them in such capacity, <sup>44</sup> but were not personally liable on their official contracts <sup>45</sup> The right of a bank which is liable to a water district on the theory that it had received from an officer of such district funds of the district with no-

tice of their trust character, which were misappropriated by such officer, to recover over against other officers of such district because of their alleged failure to prevent such misappropriation, has been denied where there was no showing of direct participation by such other officers in the fraudulent acts of the defaulting officer <sup>46</sup>

*Bond for faithful performance of duties* Immaterial defects in recitals of a bond given, as required by law, for the faithful performance of the duties of an officer of a water district, as to the official designation of such officer do not invalidate the bond <sup>47</sup>

*Removal of officer* A special statute providing for the removal of officers of a water district usually takes precedence over an earlier general statute providing for the removal of officers <sup>48</sup> Under a statute authorizing the removal of an officer of a water district for neglect of duty on written charges and proper hearing, the charges should be specific so as to give the accused officer a fair opportunity to meet them <sup>49</sup> Under such statute the accused officer is entitled to a fair hearing <sup>50</sup> in which the witnesses must be sworn <sup>51</sup> and may be cross-examined <sup>52</sup> and in which the accused officer has the right to present testimony in his own defense <sup>53</sup> The view has

41. Utah—Lehi City v Meiling, 48 P 2d 530, 37 Utah 237

**Filling vacancy**

Under a statute intrusting the government of a waterworks district to a board of five members known as waterworks commissioners, three of whom are appointed by the police jury and two by the governor, the governor's right to fill a vacancy in office of any commissioner appointed by him was not bound by any petitions of the taxpayers of the district as to who the appointee should be, and it was not necessary that the appointee even be recommended—State ex rel Barre v Fulton, La App, 63 So 2d 21

**Qualifications of voters**

Statute which added to qualifications for electors in election for tax assessor and collector and for director of county water improvement district the qualification of ownership of taxable real property within the district and which eliminated the qualification that the elector must have resided in the district for the six months preceding the election was held unconstitutional—Snelson v Murray, Tex Civ App, 252 SW 2d 720

42. Cal—Martinelli v Morrow, 156 P 1017, 172 Cal 472  
67 C J p 1169 note 6

**Determination of election**

Fact that a majority of board of

directors of water improvement district assembled to canvass and declare result on an election held to elect members of the board were making an alleged incorrect declaration of the result of the election would not justify arbitrary conduct on part of the chairman of the board in refusing to permit a resolution favored by a majority to come to a vote—Williams v Sorrell, Tex Civ App, 71 SW 2d 944

**Right to contest election or sue for office**

Persons claiming that they were elected as members of board of directors of a water improvement district may contest the election or sue for the offices, irrespective of whether the board of directors of such district canvass and declare the result of such election—Williams v Sorrell, supra

43. NY—Grishaber v Town of Callicoon, 27 NYS 2d 522, 176 Misc 323, affirmed 33 NYS 2d 508, 263 App Div 471

44. NY—People ex rel Farley v Winkler, 96 NE 928, 203 NY 445  
67 C J p 1170 note 7

45. NY—People ex rel Farley v Winkler, supra

46. NY—Gilliland v Lincoln-Alliance Bank & Trust Co, 261 NYS 826, 145 Misc 827

47. Tex—State v. Stickle, Civ App, 11 SW 2d 837  
67 C J p 1170 note 10

**Defalcation after expiration of bond**

Where official bonds of directors of water improvement district were effective only until next regular election plus reasonable time for newly elected directors, whether same persons or different persons, to qualify and give new bonds, surety was not liable on such bonds for defalcation occurring eleven months after such election, which was an unreasonable length of time for new directors to give new bonds—American Surety Co of New York v Cameron County Water Improvement Dist No 15, Tex Civ App, 70 SW 2d 489, error dismissed

48. NY—Bryan v Town Board of Brighton, 232 NYS 18, 133 Misc 315  
Misc 315  
67 C J p 1170 note 11

49. NY—Bryan v Town Board of Brighton, supra

50. NY—Bryan v Town Board of Brighton, supra

51. NY—Bryan v Town Board of Brighton, supra

52. NY—Bryan v. Town Board of Brighton, supra

53. NY—Bryan v Town Board of Brighton, supra

been taken that a board which has commenced a hearing on charges is bound to proceed to a determination thereof,<sup>54</sup> and may not unduly harass the accused officer and subject him to unnecessary hearings<sup>55</sup>

If a hearing has proceeded to a final determination and the charges have been dismissed, the board, in the absence of express authorization, is without authority to retry the accused officer on the same charges<sup>56</sup> Under certain statutes a majority of the members of the body authorized to hear charges against such officer may hear and determine the charges<sup>57</sup> The right of such officer to a review by certiorari of a determination adverse to him by a board authorized to try him for neglect of duty on written charges and proper hearing has been recognized,<sup>58</sup> and in such proceeding the court may determine whether the charges, if proved, are sufficient to warrant removal<sup>59</sup>

## § 243(5). — Powers, Duties, Contracts, Property, and Liabilities

- a In general
- b Construction or acquisition of water-works

### a. In General

Water districts can exercise only such powers as are granted them by statute, and they have such duties and liabilities as are imposed on them by statute or assumed by valid contract

Water districts can exercise only such powers as they are authorized by statute to exercise,<sup>60</sup> and they can exercise no power that has not been clearly granted<sup>61</sup> They possess such powers as are expressly granted by statute,<sup>62</sup> and also those necessarily or fairly implied, or incident to the powers expressly granted,<sup>63</sup> or essential to the accomplishment of the declared objects and purposes of the water district<sup>64</sup> The legislature has plenary pow-

54. N Y—Bryan v Town Board of Brighton, supra

55. N Y—Bryan v Town Board of Brighton, supra

56. N Y—Bryan v Town Board of Brighton, supra

57. N Y—Bryan v Town Board of Brighton, supra  
67 C J p 1170 note 20

58. N Y—Bryan v Town Board of Brighton, supra

59. N Y—Bryan v. Town Board of Brighton, supra

60. Ky—Louisville Extension Water Dist v Diehl Pump & Supply Co., 246 S W 2d 585—Olson v Preston St Water Dist No 1, 163 S W 2d 307, 291 Ky 155

Debts see infra § 243 (6)

Power of water districts or officials to exercise right of eminent domain see Eminent Domain § 23

Supplying water to inhabitants of community as a public use for which private property may be taken under the power of eminent domain see Eminent Domain § 45

### Power of legislature

Legislature is without power to add to, or withdraw from, circumstances and purposes specified in constitution for which water control and improvement districts might be organized, but legislature can grant districts only such powers and rights as come within contemplation or provisions of constitution—Deason v Orange County Water Control & Imp Dist No One, 244 S W 2d 981, 151 Tex 29

### Examination of statutes

In determining the corporate powers of water districts, it is necessary to examine in some detail the legislative acts and the constitutional basis

on which they rest—Lower Nueces River Water Supply Dist v Cartwright, Tex Civ App, 274 S W 2d 199, error refused no reversible error

### Home rule

The people of water district did not have the power to determine for themselves such corporate functions as they might wish to inaugurate, such as are granted to cities and towns operating under home-rule charters—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, 142 S W 2d 945, 135 Tex 280

### Discretion

Where commissioners of water district undertake to do nothing except what they are authorized by statute to do, the manner in which their duty is performed is largely a matter within their discretion—Page v Highway No 10 Water Pipe Line Imp Dist No 1, 145 S W 2d 344, 201 Ark 512

### Facilities for fighting fires

(1) Water districts were not authorized to purchase, own, and operate fire engines, fire-fighting equipment, and appliances—Deason v Orange County Water Control & Imp Dist No One, 244 S W 2d 981, 151 Tex 29—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, 142 S W 2d 945, 135 Tex 280

(2) Constitutional provision was held not to authorize water control and improvement districts, created for purpose of conserving and developing natural resources of district, to provide fire-fighting equipment and appliances for towns within such districts—Deason v Orange County Water Control & Imp Dist No One, supra

(3) Water district was held to have no authority under statute to provide

fire-fighting equipment in addition to water distribution facilities and to pay for the equipment with part of the proceeds of bonds, but the district was held to have the power to install necessary or proper fire hydrants or other similar facilities making water available for fighting fires—Theobald v Board of Com'rs of Buechel Water Dist, 157 S W 2d 285, 288 Ky 720

### Sewerage system

Water district was not authorized to construct and operate a sewerage system—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, 142 S W 2d 945, 135 Tex 280

61. Tex—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, supra—Lower Nueces River Water Supply Dist v Cartwright, Civ App, 274 S W 2d 199, error refused no reversible error

62. Ky—Olson v Preston St Water Dist No 1, 163 S W 2d 307, 291 Ky 155

Tex—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, 142 S W 2d 945, 135 Tex 280  
Utah—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237

63. Ark—Page v Highway No 10 Water Pipe Line Imp D st No 1, 145 S W 2d 344, 201 Ark 512

Ky—Olson v Preston St Water Dist No 1, 163 S W 2d 307, 291 Ky 155  
Tex—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, 142 S W 2d 945, 135 Tex 280  
Utah—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237

64. Ky—Olson v Preston St Water Dist No 1, 163 S W 2d 307, 291 Ky 155

Utah—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237.

er within constitutional limitations to change<sup>65</sup> or revoke<sup>66</sup> powers conferred on a municipal utility district, involving matters of water supply

Where a water district is regarded as a municipal corporation or as a quasi-municipal corporation, as discussed supra § 243(1), in general its powers,<sup>67</sup> duties,<sup>68</sup> and liabilities<sup>69</sup> are measured by the same standards as are used in determining the powers and duties of a municipal corporation generally when exercising the same functions under the same circumstances. A water district has power to furnish water to a prior claimant outside its territory, where it is necessary so to do in order to operate its projects.<sup>70</sup>

Under some statutes, on the completion of a waterworks plant, the governing body of the water district continues to operate the plant until it has paid off all the indebtedness of the district, and then it is its duty to turn over the plant to the city in

which the district is located;<sup>71</sup> but any excess money remaining in the hands of the governing body after it has turned over the plant to the city is to be distributed to the property holders of the district and not turned over to the city.<sup>72</sup> Some statutes have made provision for an adjustment in respect of the property of a water district where a part of such district is included in the boundaries of a village incorporated after the creation of the water district.<sup>73</sup>

*Sale of property.* Notwithstanding the execution of an option to purchase land of a water district was not authorized, subsequent action of the board of directors of such district sustaining the option has been regarded as sufficient to render the option effective,<sup>74</sup> and the contention that the purchaser could not accept a secret profit because acting in a fiduciary capacity is not available, where the vendor water district has duly ratified the option with knowledge of the purchaser's claims.<sup>75</sup> On the sale

#### Purchase and sale of water

County water control improvement district was authorized to purchase water, either raw or filtered, from source beyond district's boundaries for purpose of distribution to users within district—*King v Jefferson County Water Control & Imp Dist* No 7, Tex Civ App, 281 SW 2d 185

65 Cal—General Engineering & Dry Dock Co v East Bay Municipal Utility Dist, 14 P 2d 828, 126 Cal App 349

67 C J p 1168 note 68

66. Cal—Metropolitan Water Dist of Southern California v Whitsett, 10 P 2d 751, 215 Cal 400—General Engineering & Dry Dock Co v East Bay Municipal Utility Dist, 14 P 2d 828, 126 Cal App 349

67. Cal—State v Marin Municipal Water Dist, 111 P 2d 651, 17 Cal 2d 699

Me—Woodward v Livermore Falls Water Dist, 100 A 317, 116 Me 86, L R A 1917D 678

#### Absence of police power

What is applicable to municipal corporations with respect to their powers is usually applicable to a water district, but with some limitations, since water districts do not possess broad police powers to do those things which are necessary to promote the public health and general welfare, which are ordinarily expressly delegated by statute to cities and towns—*Tri-City Fresh Water Supply Dist* No 2 of Harris County v Mann, 142 SW 2d 945, 135 Tex 280

#### Sale of water

It is a governmental function of water control and improvement districts, and one involving exercise of police power, to determine whether

they have or will have surplus water for sale, the people and lands most in need of and most entitled to such surplus, and the people to whom and conditions upon which any such surplus will be sold, and this duty and right may not be ceded, bartered, or contracted away—*Banker v Jefferson County Water Control & Imp Dist* No One, Tex Civ App, 277 SW 2d 130

68. Me—Woodward v Livermore Falls Water Dist, 100 A 317, 116 Me 86, L R A 1917D 678  
67 C J p 1167 note 65

#### To furnish water

Water improvement district could not refuse to furnish water to animal hospital, the maintenance of which was neither illegal nor violative of any rule of public policy, on the ground that maintenance thereof violated zoning standard with respect to use of land outside city but within water district provided for in contract whereby city sold water to district for distribution for domestic use and district agreed not to furnish water to persons using property in a manner contrary to zoning standard—*Nueces County Water Improvement Dist* No 1 v Spring, Tex Civ App, 162 SW 2d 155

69. Me—Woodward v Livermore Falls Water Dist, 100 A 317, 116 Me 86, L R A 1917D 678  
Actions see infra § 243 (8)

70. Cal—City of Lodi v East Bay Municipal Utility Dist, 60 P 2d 439, 7 Cal 2d 316

71. Ark—City of Malvern v Young, 171 SW 2d 470, 205 Ark 886

#### Alternative courses

Under statutes relating to water-work districts, if statute subsequent-

ly enacted does not repeal prior one, commissioners of waterworks district may turn over operation of waterworks plant to the city immediately on completion of the works, or commissioners themselves may continue to operate water plant until they pay off all bonded indebtedness and then turn over works to city—*City of Malvern v Young*, supra

#### Elective system of operation

Provision of statute providing for an elective system of operation of public utilities in cities of second class and incorporated towns was held not to apply to waterworks district created under prior statute where it did not appear that the statute was ever attempted to be put into effect in city, and especially where it appeared that city was a city of the first class so that the statute was not applicable—*City of Malvern v Young*, supra

72. Ark—City of Malvern v Young, supra

#### Delinquent assessments

The commissioners of waterworks district were required to collect all delinquent assessments and take the money so received, together with excess money on hand after paying indebtedness, if any, and make distribution to property holders—*City of Malvern v Young*, supra

73. NY—Village of Mill Neck v Town of Oyster Bay, 185 NE 91, 261 NY 252, 185 NE 797, 261 NY 696

67 C J p 1168 note 74.

74. Cal—Haight v Marin Municipal Water Dist, 284 P. 926, 208 Cal 753

75. Cal—Haight v Marin Municipal Water Dist, supra.

of a waterworks plant by a waterworks district which had previously purchased the plant of an earlier district whose territory with other lands is comprised in that of the district first mentioned, and had included such plant in an enlarged plant, a distribution, in an equitable proceeding, of the cash proceeds of such sale and of profits of the operation of the enlarged plant on hand, on a pro rata basis among all property owners of the enlarged district, has been approved.<sup>76</sup> A water district authorized to construct a pipe line and then sell it can enter into a contract to sell it before it is built.<sup>77</sup>

**Contracts.** The power of water districts organized under some statutes to contract<sup>78</sup> in their corporate names<sup>79</sup> has been recognized, and where a valid contract has been entered into the water district is liable thereunder in accordance with its terms.<sup>80</sup> In order to be valid and binding, a contract must be executed by an agency of the water district duly and legally authorized to execute it,<sup>81</sup> and one who contracts therewith does so at his peril,

unless the contract is executed in the manner provided by statute.<sup>82</sup> Such contracts, in order to be valid and impose liability on the water district, must be executed by the governing body of the district, acting as an official body,<sup>83</sup> and, hence, a contract made with an individual member of the governing body is invalid and unenforceable against the district,<sup>84</sup> even though the district received benefits from services or materials furnished thereunder.<sup>85</sup>

Contracts made by the governing body of a water district for it or on its behalf are invalid and unenforceable where a member or members of the governing body are interested, either directly or indirectly, in it,<sup>86</sup> as where the contract is made with a corporation in which a member of the governing body of the water district, or his spouse, is a stockholder.<sup>87</sup> In such case, the contract is void from its inception and cannot be ratified or vitalized,<sup>88</sup> although where a statute prohibits such contracts, but does not declare them null and void, and the contract has been performed by the parties in good

76. Ark—Ogan v Jackson, 300 SW 446, 175 Ark 820  
67 C J p 1168 note 77

77. Ark—Page v Highway No 10 Water Pipe Line Imp Dist No 1, 145 SW 2d 344, 201 Ark 512

78. Ark—Mississippi Valley Power Co v Board of Improvement of Waterworks Dist No 1 of Van Buren, 46 SW 2d 32, 185 Ark 32  
67 C J p 1168 note 70

**Other government agencies**

Public water supply district had power to contract with other governmental agencies—Public Water Supply Dist No 2 of Jackson County v State Highway Commission, Mo., 244 SW 2d 4

**Agreement not to exercise power**

Provision that district would not use water lines to supply water to anyone except those within subdivision was illegal and void as an attempt to abdicate district's police power—Banker v Jefferson County Water Control & Imp Dist No One, Tex Civ App, 277 SW 2d 130

79. Tex—State v Stickle, Civ App, 11 SW 2d 837

80. US—McCarthy v. Potts, CCA NY, 99 F 2d 784

**Condition**

A condition, in contract for employment of engineer by commissioners of water district, that engineer should have no claim for compensation if formation of district should be held illegal, was eliminated by decision of court that the water district had been legally created, notwithstanding subsequent action by State Water Control Commission rejecting the plans for the district.—McCarthy v. Potts, supra.

**Compensation to employee**

Where commissioners of water district arranged to pay cash to engineer for his work under former contract on plans rejected by State Water Control Commission, in addition to commissions for subsequent construction, the cash payment was not "extra compensation" forbidden by state Constitution, since it was for services not covered by the new contract—McCarthy v Potts, supra

**Liability of person employed**

Under statute governing reorganization of Massapequa Water District, and providing that obligation of existing contracts should be a charge on the new district, obligation of existing employment contract would not be binding on the person employed, so as to require him to do work of fundamentally different nature—McCarthy v Potts, supra

81. Ky—Louisville Extension Water Dist v Diehl Pump & Supply Co, 246 SW 2d 585

**Formalities required of municipalities**

A water district must observe the same formalities in the execution of contracts with third parties as are required of counties and municipalities—Louisville Extension Water Dist v Diehl Pump & Supply Co, supra

82. Ky—Louisville Extension Water Dist v Diehl Pump & Supply Co, supra

83. Ky—Louisville Extension Water Dist v Diehl Pump & Supply Co, supra

84. Ky—Louisville Extension Water Dist v Diehl Pump & Supply Co, supra

85. Ky—Louisville Extension Water

Dist v Diehl Pump & Supply Co, supra

**Implied contract**

A promise by water district to pay for benefits received from materials and services furnished it will not be implied—Louisville Extension Water Dist v Diehl Pump & Supply Co, supra

**Emergency**

Materials and services held not furnished during an emergency so as to constitute request therefor by a single commissioner a valid contract enforceable against the district—Louisville Extension Water Dist v Diehl Pump & Supply Co, supra

**Services in organizing district**

Freeholders seeking to organize city water district had no authority to bind it by contract with attorney for rendition of legal services in organizing district, and district and its board of water commissioners were not bound to pay reasonable value of such services because of their acceptance thereof—Louisville Extension Water Dist v Sloss, 236 SW 2d 265, 314 Ky 500

86. Ark—Gannt v Arkansas Power & Light Co, 74 SW 2d 232, 189 Ark 449

87. Ark—Gantt v Arkansas Power & Light Co, 109 SW 2d 1251, 194 Ark 925—Gannt v Arkansas Power & Light Co, 74 SW 2d 232, 189 Ark 449

88. Ark—Gantt v Arkansas Power & Light Co, 109 SW 2d 1251, 194 Ark 925

**By city council**

Contract cannot be vitalized by subsequent ratification by city council—Gannt v. Arkansas Power &

faith, the corporation may retain out of the proceeds received from the operation thereof the reasonable value of the services rendered.<sup>89</sup> The liability of a town on contracts made by officers of a water district in such town has been denied,<sup>90</sup> as has the responsibility generally of the town for the acts of the water district.<sup>91</sup>

*Extension of contract for electric service* Where a contract for furnishing electric current by a public service corporation to a waterworks district provides that the district may extend the term of the contract for an additional specified term by giving written notice of its intention so to do, no extension occurs where no notice of any kind is given by the district.<sup>92</sup>

*Nature of business.* There is authority for the view that in supplying water to its inhabitants a water district is engaged in a business of a private nature.<sup>93</sup>

#### b. Construction or Acquisition of Waterworks

The legislature may authorize a water district to construct and maintain a system of waterworks or to acquire an existing system by purchase.

The legislature may authorize a water district to

construct and maintain a system of waterworks,<sup>94</sup> and the legislative power of regulation and control of the affairs of a water district organized under statute, as discussed supra § 243(1), includes the power to prescribe the conditions on which the statute will permit public work to be done in connection with the construction of a water system.<sup>95</sup> Statutes have existed under which a water system belonged to the water district and not to the town in which the district was located,<sup>96</sup> and, under such a statute, a town had no power to construct a water system for a district in such town.<sup>97</sup>

The power of a waterworks district to construct a waterworks system implies power to buy material necessary for the construction of the system.<sup>98</sup> Under various statutes, water districts have been held authorized to construct dams and reservoirs,<sup>99</sup> and to acquire lands and property outside its boundaries for the construction of dams and reservoirs.<sup>1</sup> The power of a water district or the officials thereof to buy lands or other property necessary to the construction or extension of a water system by implication imports authority to make an agreement as to the terms of purchase, with reasonable provisions incidental thereto.<sup>2</sup> The rights and liabilities of

Light Co., 74 SW2d 232, 189 Ark 449

#### Not a franchise

Where contract whereby waterworks district surrendered privilege of furnishing consumers in district with water to corporation in which commissioners of district were stockholders was void from its inception, and at time it was ratified by city council, the void contract could not be considered as a franchise to operate waterworks system—*Gantt v Arkansas Power & Light Co.*, 109 SW2d 1251, 194 Ark 925

89 Ark—*Gantt v Arkansas Power & Light Co.*, 109 SW2d 1251, 194 Ark 925—*Gantt v Arkansas Power & Light Co.*, 74 SW2d 232, 189 Ark 449

90 NY—*People ex rel Farley v Winkler*, 96 NE 928, 203 NY 445 67 C.J. p 1168 note 72

#### Legal services

An item in town budget for services rendered by attorney for town in litigation against town and water district growing out of contract created by water commissioners for benefit of district was an existing obligation of water district, and was properly assessed upon district rather than upon town as a whole—*Coggeshall v Hennessey*, 18 NE2d 652, 279 NY 138

91. NY—*Holroyd v Town of Indian Lake*, 73 NE 36, 180 NY 318

92 Ark—*Mississippi Valley Power Co v Board of Improvement of Waterworks Dist No 1 of Van Buren*, 46 SW2d 32, 185 Ark 76 67 C.J. p 1168 note 78

93 Me—*Woodward v Livermore Falls Dist*, 100 A 317, 116 Me 86, LRA 1917D 678

NJ—*Corpus Juris* cited in *Seiden v Passaic Valley Water Commission*, 199 A 420, 423, 16 NJ Misc 301

#### Same liability as a private corporation

With respect to liability of public quasi corporation to subscriber for injuries to his plumbing system as result of sand in water furnished by corporation, corporation stood in the same position as a private corporation—*Seiden v Passaic Valley Water Commission*, 199 A 420, 16 NJ Misc 301

94 Me—*Mayo v Dover, etc, Fire Co.*, 53 A 62, 96 Me 539 67 C.J. p 1163 note 80

Sale by municipal corporation of system acquired through agency of improvement district see supra § 240

95 Cal—*Metropolitan Water Dist of Southern California v Whitsett*, 10 P2d 751, 215 Cal 400 67 C.J. p 1169 note 82

96 NY—*Holroyd v Town of Indian Lake*, 73 NE 36, 180 NY 318

97. NY—*Holroyd v Town of Indian Lake*, supra 67 C.J. p 1169 note 84

**Liability of town on a contract** made by the commissioners of the water district for the construction of a water system has been denied—*Holroyd v Indian Lake*, supra

98 La—*Maggiore v East Jefferson Waterworks Dist No 1*, 147 So 693, 177 La 88

99 Tex—*Lower Nueces River Water Supply Dist v Cartwright*, Civ App, 274 SW2d 199, error refused no reversible error

1. Tex—*Lower Nueces River Water Supply Dist v Cartwright*, supra

2. Mass—*Boston & A. R. Co v Commonwealth*, 6 NE2d 613, 296 Mass 426

#### Approval of contract

(1) Metropolitan district water supply commission was held authorized by statute in behalf of commonwealth to enter into agreement with railroad for abandonment and flooding of its right of way for purpose of establishing a metropolitan water supply without requiring the approval of governor and council as a prerequisite to its validity, where provisions of statute appropriating funds and limiting expenditures to such amount in the aggregate as the governor and council might approve were complied with—*Boston & A. R. Co. v Commonwealth*, supra

(2) Failure of governor and coun-

the parties under a contract by a water district for the construction of a water system, or a part thereof, are determined in accordance with the rules governing construction contracts generally<sup>3</sup>

The view has been taken that a statutory provision permitting a contractor to make application to a court for the payment to him of the balance of the amount due him, in the hands of a municipal corporation, in excess of the amount claimed in a notice of lien against the amount so due, does not apply so as to permit an assignee of the amount due to the

contractor from a water district for the construction of a dam and reservoir to claim the benefit of such statutory provision<sup>4</sup>

*Acquisition of existing system* In the absence of constitutional restrictions the legislature has authority to confer on a water or waterworks district the power to acquire by purchase or the exercise of the power of eminent domain an existing waterworks system,<sup>5</sup> and, when duly authorized, a water district may acquire an existing waterworks system<sup>6</sup> by purchase thereof from the owner of the

cil to approve agreement of metropolitan district water supply commission with railroad to alter, relocate, or discontinue railroad rights of way did not preclude railroad from recovering agreed compensation for abandonment of its right of way, in view of statutes requiring such approval only in other specific instances and statutes requiring agreements to be approved only by the federal authority and state authority—*Boston & A R Co v Commonwealth*, supra

#### Funds

Where there was an adequate appropriation for the general cost, bonds were issued, and funds were available in sum sufficient to pay railroad under agreement compensating it for abandonment of its right of way, which was to be flooded by metropolitan district water supply commission in establishing a water supply for the metropolitan water supply system, presumption obtained that railroad was entitled to be paid from such funds—*Boston & A R Co v Commonwealth*, supra

#### 3. Liability of surety on contractor's bond

Where bond of public improvement contractor to water district obligated contractor and surety to pay all persons for labor and materials and gave all persons performing labor or furnishing materials a direct right of action on bond, surety was liable to all claimants proving claims for furnishing labor or materials in connection with the construction contract, notwithstanding such claimants were not entitled to share in fund remaining in the hands of municipal officials—*American Surety Co of New York v Wells Water Dist*, 1 NYS 2d 614, 253 App Div 19, 254 App Div 717, affirmed *American Surety Co of New York v Wells Water Dist*, Town of Wells, 19 NE2d 926, 280 NY 528, motion denied 20 NE2d 1023, 280 NY 673

#### Agreement to pay bank advancing pay roll and other monies

Instrument whereby public improvement contractor authorized water district to pay bank, which had advanced money to pay pay roll and balance due for material, all moneys

earned or to be earned under construction contract did not constitute an "assignment" but merely authorized bank to act as agent for contractor, as against bank's contention that it was entitled to a lien—*American Surety Co of New York v Wells Water Dist*, 1 NYS 2d 614, 253 App Div 19, 254 App Div 717, affirmed *American Surety Co of New York v Wells Water Dist*, Town of Wells, 19 NE2d 926, 280 NY 528, motion denied 20 NE2d 1023, 280 NY 673

#### Contractor's failure to terminate for breach

Contractor could not recover on theory of rescission of construction contract almost two years after alleged breach by water district, in view of change of position rendering recovery inequitable, where district's suspending contract did not terminate all of contractor's obligations—*Wenzel & Henoch Const Co v Metropolitan Water Dist of Southern California*, CCA Cal, 115 F2d 25, certiorari denied 61 S Ct 834, 313 US 560, 85 L Ed 1520

#### Suspension for unreasonable delay

(1) The opinion of a water district's chief engineer that work on a tunnel was unnecessarily and unreasonably delayed within a provision authorizing suspension of the contract is final and conclusive on the contractor, in the absence of fraud—*Wenzel & Henoch Const Co v Metropolitan Water Dist of Southern California*, supra—*Wenzel & Henoch Const Co v Metropolitan Water Dist of Southern Cal*, DCCal, 18 F Supp 616

(2) A water district engineer's certificate of compliance with construction contract does not estop the district from charging unreasonable and unnecessary delay, where provision of contract precludes estoppel and provides that acceptance of work shall not constitute waiver of contractual requirements—*Wenzel & Henoch Const Co v Metropolitan Water Dist of Southern California*, CCA Cal, 115 F2d 25, certiorari denied 61 S Ct 834, 313 US 560, 85 L Ed 1520

(3) A geological report regarding probable conditions of work, and

specifications regarding materials probably needed, do not support claim of misrepresentation so as to preclude water district from suspending contract under terms thereof because of unreasonable delay, where the contractor is expressly required to bear losses resulting from unforeseen difficulties due to nature of ground, etc—*Wenzel & Henoch Const Co v Metropolitan Water Dist of Southern California*, CCA Cal, 115 F2d 25, certiorari denied 61 S Ct 834, 313 US 560, 85 L Ed 1520

(4) Breach of construction contract by water district's withholding monthly progress payment until satisfied as to status of construction fund was not such breach of entire agreement as would prevent district from subsequently suspending contract under terms thereof because of unnecessary and unreasonable delay, nor was contractor relieved from duty of surrendering possession of works, etc, pursuant to contract—*Wenzel & Henoch Const Co v Metropolitan Water Dist of Southern California*, CCA Cal, 115 F2d 25, certiorari denied 61 S Ct 834, 313 US 560, 85 L Ed 1520

4 NY—In re *Butting & Stanz*, 256 NYS 625, 143 Misc 381

5. La—*Middleton v Police Jury*, Parish of Jefferson, 125 So 447, 169 La 458

Me—*Kennebec Water Dist v Waterville*, 52 A 774, 96 Me 234

6 Cal—*East Bay Municipal Utility Dist v Railroad Commission of California*, 229 P 949, 194 Cal 603 67 CJ p 1169 note 89

#### Rights acquired

Where municipal water district acquired all assets and property of its predecessor in interest but the predecessor in interest possessed no more than a franchise from board of supervisors of county for construction of water main along street, the district acquired no rights greater than a franchise—*State v Marin Municipal Water Dist*, 111 P2d 651, 17 Cal 2d 699

#### Conveyance of streets containing water mains

Private development company's



system<sup>7</sup> Where, however, the legislature authorizes a water district to acquire an existing system by a certain method, the district is confined to such method,<sup>8</sup> and the legislature, in the absence of constitutional restrictions, may revoke the authority before it has been exercised by the district<sup>9</sup>

<sup>5</sup> *Use of streets and highways.* A water district has been held authorized to lay its water mains in public highways, roads, streets, and alleys included in the district,<sup>10</sup> but the right so to do is not absolute and is subject to the reasonable rules and regulations of governmental bodies having jurisdiction of such places<sup>11</sup> The duty to extend a water main into a private way is dependent on the controlling statute<sup>12</sup>

deed to town of streets did not convey title to water mains in streets laid out by company, with respect to validity of company's claim against town water district for reimbursement for laying water mains—*Amity Holding Corporation v Eden*, 265 N Y S 23, 238 App Div 628

7. Ky—*Ryan v Commissioners of Water Dist No 1 of Kenton County*, 295 S W 1023, 220 Ky 822 67 C J p 1169 note 90

#### Outside district

Under statute granting water supply districts power to obtain a supply of water and furnish it to residents of water districts as established by the court and expressly providing a method by which the territorial limits of established districts may be enlarged, a water supply district was without power to purchase a supply system which was partly within and partly without the boundary of the district as established—*Olson v Preston St Water Dist No 1*, 163 S W 2d 307, 291 Ky 155

8 Me—*Guilford & Sangerville Water Dist v Sangerville Water Supply Co*, 154 A 567, 130 Me. 217

#### Purchase held not shown

Statements and acts of individual members of town water board was held not construable as purchase or agreement to purchase by town water board of water mains installed by development company—*Amity Holding Corporation v Eden*, 265 N Y S 23, 238 App Div 628

9. Me—*Guilford & Sangerville Water Dist v Sangerville Water Supply Co*, 154 A 567, 130 Me 217

10. Mo—*Public Water Supply Dist No 2 of Jackson County v State Highway Commission*, 214 S W 2d 4

#### Nature of right

The right conferred by legislature on municipal water district to construct and operate pipe lines along public highway of state is a "fran-

chise"—*State v Marin Municipal Water Dist*, 111 P 2d 651, 17 Cal 2d 699

11. Mo—*Public Water Supply Dist No 2 of Jackson County v State Highway Commission*, 244 S W 2d 4

#### Permissive right

Water district's occupancy of highway was permissive and incidental to primary and dominant purpose of highways and public's right therein—*Public Water Supply Dist No 2 of Jackson County v State Highway Commission*, supra

#### Police power

Statute authorizing state department to require municipal water district which maintains pipe line on state highway to relocate it at its own expense, when necessary to permit improvement of highway or to insure safety of traveling public, was valid exercise of "police power"—*State v Marin Municipal Water Dist*, 111 P 2d 651, 17 Cal 2d 699

#### Safety provisions

A municipal water district does not have authority to maintain pipes on highway in a position which does not afford security to life or property—*State v Marin Municipal Water Dist*, supra

#### Cost of change

(1) The burden of the cost of removing or relocating installations of water district in highway necessitated by highway reconstruction was held to fall on the water district—*Public Water Supply Dist No 2 of Jackson County v State Highway Commission*, Mo., 244 S W 2d 4

(2) Statute authorizing state Department of Public Works to require any "person" who maintains pipe line, etc in state highway to relocate line at owner's expense, when necessary to insure safety of traveling public, or to permit improvement of highway, was applicable to municipal water district organized under stat-

*Changes in plans.* Under some statutes the governing body of a water district may make minor or immaterial changes in the plans filed for the water system in the district, but major or material changes are not allowed<sup>13</sup>

## § 243(6). — Fiscal Management and Indebtedness

a In general

b Bonds

### a. In General

The authority and powers of a water district with respect to its fiscal management and indebtedness are measured and determined, subject to constitutional limitations and restrictions, by the powers specifically enu-

te conferring on district right to maintain pipe line along highways only in such manner as to afford security for life and property—*State v Marin Municipal Water Dist*, 111 P 2d 651, 17 Cal 2d 699

(3) Statute authorizing state public works department to require person who had placed pipe line "upon" state highway to relocate line at its own expense applied to water main of municipal water district notwithstanding the main was below the surface—*State v Marin Municipal Water Dist*, supra

#### Subject to change

A water district's right to occupy parts of the highway is not superior to that of any other authorized occupancy by a public utility, and is subject to changes and conditions necessitated by improvements by the appropriate dominant government agency having jurisdiction of the highways—*Public Water Supply Dist No 2 of Jackson County v State Highway Commission*, Mo., 244 S W 2d 4

12 N Y—*Entress v Sours*, 70 N Y S 2d 232, 272 App Div 861

#### Easement

Where it was not shown that town had an easement in private way into which petitioner sought to compel board of commissioners of water district to extend water main, statute regarding proceedings for water main was not applicable—*Entress v Sours*, supra

#### Unimproved area

Where there were no occupied dwellings abutting on private way into which petitioner sought to compel board of commissioners of water district to extend water main, statute regarding powers of town board with respect to improvement district was inapplicable—*Entress v Sours*, supra

13. Ark—*Adams v Highway 10 Water Pipe Line Imp Dist No. 4*, 230 S.W 2d 956, 217 Ark 473.

merated and expressly granted to it by charter or statutory provision and such incidental implied powers as are necessary to carry out its express powers and the object of its creation

The authority and powers of a water district with respect to the incurring of indebtedness, the disposition of its income, and the management otherwise of its fiscal affairs are measured and determined, subject to constitutional limitations and restrictions, by the powers specifically enumerated and expressly granted to it in its charter or the statutes under which it was organized and such incidental implied powers as are necessary to carry out its express powers and the object of its creation<sup>14</sup> This rule applies with respect to its operating expenses,<sup>15</sup> and with respect to financing renewals, extensions, additions, and improvements<sup>16</sup> The

authority of a waterworks district to mortgage the system to borrow funds necessary to make improvements has been recognized<sup>17</sup> Even though the reasonable expense of the organization of a district includes the cost of circulating a petition, the fact that the person who circulated such petition is an engineer may not be considered in determining the value of his services in this regard<sup>18</sup> Under some statutes the necessity of providing for certain items of the district budget out of water rents has been recognized<sup>19</sup> Some statutes have made provision for the apportionment of the obligations of a water district where a part of such district is included in the boundaries of a village incorporated after the creation of the water district<sup>20</sup> The governing body of a district cannot contract

14 Me—City of Waterville v Kennebec Water Dist., 25 A 2d 475, 138 Me 307

67 C J p 1170 notes 23–24

**District held authorized to contract indebtedness**

Mo—Grossman v Public Water Supply Dist No 1 of Clay County, 96 S W 2d 701, 339 Mo 344

**Distribution of proceeds of sale**

Statutory provision that on annexation of all or any part of territory of any water district by municipality any and all sums paid out by city in the purchase of the district's property shall be used to pay the bonds of the district, if any, and the remainder, if any, distributed to persons owning realty within the district violated the constitutional provision prohibiting the granting of public money or property to any private person, association, or corporation—State ex rel Public Water Supply Dist No 7, Jackson County v James, 237 S W 2d 113, 361 Mo 814

**Surplus for distribution**

(1) Under water district charter providing that any surplus remaining after payment of current running expenses, interest, and sinking fund payments should be divided between the municipalities composing the district, the district was not entitled to offset its annual water rate deficit against surpluses of rate revenues in subsequent years in determining whether it had improperly failed to distribute surplus—City of Waterville v Kennebec Water Dist., 25 A 2d 475, 138 Me 307

(2) In determining whether water district had improperly failed to distribute its surplus, water rate revenues only were to be considered and not income from sinking fund investments or other income items—City of Waterville v Kennebec Water Dist., supra

(3) Where district on two occasions had changed its fiscal year, it

was necessary to make additional pro rata allowances for depreciation and sinking fund payments to cover the longer periods involved in each instance, and to allocate those additional amounts against an apparent surplus which would otherwise have existed—City of Waterville v Kennebec Water Dist., supra

(4) The district was not authorized to fix rates calculated to provide a surplus, but surplus provision was included only because of impossibility of foretelling income with mathematical exactness—City of Waterville v Kennebec Water Dist., supra

15. Me—City of Waterville v Kennebec Water Dist., supra

**Compensation of employee**

Where tax books of water district were kept open all year, on audit of books of employee of improvement district receiving \$25 a month as secretary and additional \$25 a month while collecting taxes, employee was entitled to a salary credit of \$50 a month for entire year—Murphy v Marshall, 159 S W 2d 741, 203 Ark 986

**Depreciation charge held proper as current expense**

Me—City of Waterville v Kennebec Water Dist., 25 A 2d 475, 138 Me 307

**"Maintaining"**

The word "maintaining" as used in water district charter authorizing water district to pay current running expenses for maintaining the water district out of income included not only the annual up-keep or current maintenance, but also the operation of the system—City of Waterville v Kennebec Water Dist., supra

16. Me—City of Waterville v Kennebec Water Dist., supra

**Sinking fund**

(1) A sinking fund is a "trust fund," and bondholders of water district are entitled to have its integrity

maintained and to compel the restoration of moneys unlawfully diverted from it to other uses—City of Waterville v Kennebec Water Dist., supra

(2) Under provision of water district charter authorizing board of trustees to establish rates for water service sufficient to provide funds for a sinking fund, nothing could be set apart for sinking fund in absence of available income from rates for that purpose, and no deficiency in sinking fund payments in one year could be made a direct charge upon rate revenues of any other year, although default could be repaired by increased payments in succeeding years—City of Waterville v Kennebec Water Dist., supra

(3) Under water district charter authorizing board of trustees to establish rates for water service sufficient to provide funds for a sinking fund, subject to priority charges against rates for current running expenses, extensions and renewals, and interest on indebtedness, money available to cover minimum charter requirements with regard to payments to sinking fund could not be lawfully diverted to other uses—City of Waterville v Kennebec Water Dist., supra

17. Ark—Brown v Waterworks Improvement Dist No 1 of Ft Smith, 228 S W 371, 147 Ark 584  
67 C J p 1171 note 29

18. N Y—Morrison v Mack, 247 N YS 498, 232 App Div 718, affirmed 184 NE 123, 260 NY 632

19. N Y—In re Assessment of Water Tax in Water Dist No 3 of Town of Niskayuna, Schenectady County, 258 NYS 745, 236 App Div 294  
67 C J p 1171 note 31

20. N Y—Village of Mill Neck v. Town of Oyster Bay, 185 NE 91, 797, 261 NY 252, 696.

away discretionary powers vested in it with respect to the fiscal affairs of the district <sup>21</sup>

Some constitutional provisions which limit the amount of indebtedness which may be incurred by municipal corporations and like entities do not apply to districts organized under some statutes to acquire or construct and to operate water systems,<sup>22</sup> and in such case for any limitation as to the amount of indebtedness it is necessary to look to the statute under which the district is organized, in the absence of other applicable statutory limitations <sup>23</sup> The view has been taken that a contract for the purchase of apparatus by a waterworks district to be used in connection with the water supply system, which is to be paid for out of the savings in cost of operation effected by such apparatus, does not create a debt of the district,<sup>24</sup> and that the district need not comply, as a condition precedent to making such contract, with statutory requirements as to borrowing money and levying taxes for making improvements, repairs, and extensions <sup>25</sup> In the absence of constitutional provision to the contrary, a water district may contract debt, without reference to other districts or corporations, up to the separate constitutional or statutory limit fixed for it, and without reference to any other corporation em-

braced wholly or in part within its area <sup>26</sup>

*Giving or lending credit* A constitutional prohibition against a political subdivision giving or lending its credit or subscribing to stock or bonds in aid of any private individual or corporate enterprise or undertaking is not violated by legislation granting a water district broad financial powers for the purpose of the acquiring, developing, and use of water for public benefit <sup>27</sup> Where a district organized to acquire, construct, and operate a water system purchases all the stock and property of a water company, subject to a mortgage indebtedness, and assumes the unsecured indebtedness of such company, there is no giving or lending of credit of such district within the prohibition of a constitutional provision that the legislature shall have no power to authorize the giving or lending of credit of any political corporation or subdivision of the state, in aid of any person or corporation <sup>28</sup>

#### b. Bonds

In the absence of constitutional restrictions, a water district may issue bonds for such purposes as are within the scope of its charter or statutory authorization

Under various statutes water districts have been held authorized to issue bonds for designated purposes,<sup>29</sup> but the right of a water district to issue

21 Mo—Grossman v Public Water Supply Dist No 1 of Clay County, 96 S W 2d 701, 339 Mo 344

22 Utah—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237  
67 C J p 1170 note 25

23 Utah—Lehi City v Meiling, supra  
67 C J p 1171 note 26

24 Ark—Mississippi Valley Power Co v Board of Improvement of Waterworks Dist No 1 of Van Buren, 46 S W 2d 32, 185 Ark 76

25 Ark—Mississippi Valley Power Co v Board of Improvement of Waterworks Dist No 1 of Van Buren, supra

26 Utah—Lehi City v Meiling, 48 P 2d 530, 87 Utah 237

27 Utah—Lehi City v Meiling, supra

#### Powers held not unconstitutional

Power of water district to join with other corporations, and to obligate itself in financing its operations and to become surety for payment of any indebtedness or performance of any contract of any corporation in which district shall have shares of stock, was held not invalid—Lehi City v Meiling, supra

28 Cal—General Engineering & Dry Dock Co v East Bay Municipal Utility Dist, 14 P 2d 828, 126 Cal App 349.

29 Ark—Simpson v Little Rock-North Heights Water Dist No 18, 86 S W 2d 423, 191 Ark 451

La—Bordes v East Jefferson Waterworks Dist No 1, 172 So 8, 186 La 249

NY—Town of Colonie v A C Allen & Co, 286 NYS 828, 246 App Div 354

Tex—King v Jefferson County Water Control & Imp Dist No 7, Civ App, 281 S W 2d 185  
67 C J p 1171 notes 38-39

#### Change of policy

Amendment to water district's charter authorizing it to issue bonds for making renewals, extensions, additions, and improvements granted a power which was thereafter to be exercised as if contained in original act creating the district—City of Waterville v Kennebec Water Dist, 25 A 2d 475, 138 Me 307

#### Mandatory or permissive

Where water district's charter authorized it to pay for extensions and renewals out of income, the power granted to district by subsequent act authorizing it to issue bonds for making renewals, extensions, additions and improvements was permissive as to renewals and extensions, but mandatory as to additions and improvements—City of Waterville v Kennebec Water Dist, supra

Annexation of county water district to municipal utility district did not

prevent water district from exercising power to incur bonded indebtedness—Galt County Water Dist v Evans, 51 P 2d 202, 10 Cal App 2d 116

#### Status of governing board

Act empowering Board of Township Commissioners of Folly Island to issue waterworks revenue bonds of the township to defray costs of constructing waterworks system for township, and committing to board the function of constructing, operating, and maintaining waterworks system, was valid, irrespective of whether status of board, under legislation incorporating township, was de jure, de facto, or null and void—Wagener v Johnson, 76 SE 2d 611, 223 SC 470

#### Negotiable bonds

(1) A water district had power to issue negotiable bonds although such bonds would have lacked quality of negotiability had they been secured by a pledge of special assessment liens only—Olson v Preston St Road Water Dist No 1, 149 S W 2d 766, 286 Ky 66

(2) Any doubt as to the power of a water district to issue negotiable bonds should be resolved in favor of the existence of the power—Olson v Preston St Road Water Dist No 1, supra

#### Refunding bonds

Water district existing by virtue

bonds is subject to constitutional and statutory limitations and restrictions<sup>30</sup> Statutory provisions governing the mode of advertisement and sale of such bonds,<sup>31</sup> and of the disbursement and use of the proceeds arising from their sale<sup>32</sup> must be followed Under the construction given some statutes the governing body of the district may employ, and pay a commission to, a broker to effect the sale of bonds,<sup>33</sup> and it has been held that a public sale of bonds is not invalid because a price less than par and accrued interest is accepted as the best price

obtainable therefor and adequate under the circumstances<sup>34</sup> Bonds of a water district, payable out of taxes levied on the property in the district, constitute a contract between the taxpayers of the district and the bondholders<sup>35</sup>

Dependent on the terms of the bonds and of the constitutional and statutory provisions under which they were issued, bonds of a water district are secured by, and made payable from, taxes or assessments levied on property in the district, or from revenues received from the water system, or from

of assessments on property contained in district for payment of purchase price and maintenance was authorized to issue and sell refunding bonds with which to satisfy original assessment bonds—*Middendorf v Jameson*, 95 S W 2d 1057, 265 Ky 111

#### **Additions and improvements**

(1) Under special act authorizing water district to issue bonds to pay for additions and improvements, the term "additions and improvements" included additions to plant to meet increased demands for water, replacement of inadequate or worn out parts of the plant with something better suited to present needs, or alterations which were not mere acts of restoration involved in renewals or repairs—*City of Waterville v Kennebec Water Dist*, 25 A 2d 475, 138 Me 307

(2) Where only method by which water district was authorized to pay cost of necessary additions and improvements was through issuance of bonds, those items were to be charged as capital expenditures and amount so expended could not properly be deducted from rate revenues by the district in determining its distributable annual surpluses—*City of Waterville v Kennebec Water Dist*, supra

#### **Gas system**

(1) Under statute, water district was authorized to issue bonds for acquisition of gas system—*Fraleigh v Beaver-Elkhorn Water Dist*, Ky, 257 S W 2d 536

(2) Unless water district which elects to exercise statutory power to acquire and operate gas distribution system chooses to issue revenue bonds for combined water and gas system, pledging revenues of both systems for one bond issue, gas system will be wholly independent of water system, except for administration, and will not impose any burdens on property within district that could not have been imposed had legislature authorized establishment of separate gas district embracing same territory as water district—*Fraleigh v Beaver-Elkhorn Water Dist*, supra

#### **Bonds held not authorized**

(1) For water district's purchase of fire fighting equipment—*Deason v Orange County Water Control & Imp Dist No One*, 244 S W 2d 981, 151 Tex 29

(2) To purchase and install equipment for fire protection, or to construct, equip, and operate a sewerage system—*Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann*, 142 S W 2d 945, 135 Tex 280

30 Tex—*Deason v Orange County Water Control & Imp Dist No One*, 244 S W 2d 981, 151 Tex 29  
67 C J p 1171 note 35

#### **Delay after authorization**

Where issuance of bonds by waterworks district has been duly authorized at election, bonds need not be sold within three years from date of election—*Bordes v East Jefferson Waterworks Dist No 1*, 172 So 8, 186 La 249

#### **Debt limitations**

(1) Water supply district's special obligation bonds payable out of revenue of waterworks system partly financed by general obligation bonds payable by taxation were not "debt" within constitutional limitation of indebtedness which district could incur—*Grossman v Public Water Supply Dist No 1 of Clay County*, 96 S W 2d 701, 339 Mo 344

(2) Refunding bonds proposed to be issued by water district payable solely out of revenue raised by assessments of property in district were not within inhibition of debt limitation of Constitution—*Middendorf v Jameson*, 95 S W 2d 1057, 265 Ky 111

(3) In constitution prohibiting political subdivision of state from issuing bonds in excess of ten per cent of assessed valuation of taxable property of subdivision to be "ascertained from the last assessment previous to incurring such indebtedness," quoted phrase was construed to mean previous to the election to incur the indebtedness—*Bordes v East Jefferson Waterworks Dist No 1*, 172 So 8, 186 La 249

(4) Water district was authorized to issue and sell bonds on basis of as-

essed valuation of property in district as shown by assessment previous to the election in which the bonds were authorized, notwithstanding they were not issued until a later date when the assessed valuation had decreased so that the bonds proposed to be sold plus outstanding bonds would exceed the constitutional debt limitation for that year—*Bordes v East Jefferson Waterworks Dist No 1*, supra

31 Cal—*Kennedy v McInturff*, 20 P 2d 315, 217 Cal 509

32 Cal—*Kennedy v McInturff*, supra

#### **Disbursement**

Under statutes which required the town board of a town to issue bonds and raise the amount needed for a duly organized water district within such town, the proceeds of the bonds were payable over by the town board to the water commissioners of the district for disbursement, and neither the town board nor any town officer was authorized to expend such proceeds—*Holloyd v Town of Indian Lake*, 73 NE 36, 180 NY 318—67 C J p 1171 notes 41–42

#### **Surplus**

Some statutes provide for the transfer to certain specified funds of the surplus of the proceeds of the sale of bonds of the district existing after the application of such proceeds to the purposes and objects for which the bonds were issued—*Kennedy v McInturff*, 20 P 2d 315, 217 Cal 509—67 C J p 1171 note 37 [a]

33 Cal—*Kennedy v McInturff*, supra  
67 C J p 1171 note 38

34 Ky—*Olson v Preston St Road Water Dist No 1*, 149 S W 2d 766, 286 Ky 66

35. Cal—*Security Trust & Savings Bank v City of Los Angeles*, 7 P 2d 1061, 120 Cal App 518

#### **Use of surplus**

A water district cannot be ordered to use surplus earmarked for debt service retirement except as permitted by bond resolution—*Rankin v Chester Municipal Authority*, 68 A 2d 458, 165 Pa Super 438

both<sup>36</sup> Under some statutes, it has been held that the bonds of a water district are not a general obligation of the political division within whose boundaries the district is located,<sup>37</sup> but under other statutes it has been held that bonds issued to pay for the water plant of a water district located within a town, although obligations of the town, are not paid by it, but by taxes levied on the property in the water district<sup>38</sup> The revenues of a water district may not be applied contrary to the provisions of a statute which requires that they be applied after payment of costs first to overdue interest and then to payment pro rata of all bonds issued by the dis-

trict<sup>39</sup> The law existing at the time the bonds are issued is a part of the contract by which the bondholders are bound,<sup>40</sup> and where the legislature fixes the method by which the bonds of a water district are to be paid, that method must be followed, and a bondholder's remedy is so restricted as to require him to seek payment of his bonds out of the revenues provided by statute<sup>41</sup>

*Submission to voters.* Under some statutes or charter provisions a water district may not issue bonds without first submitting the question to the people of the district and obtaining the approval of a specified majority<sup>42</sup> Statutory provision that, on

36. Fla.—State v Florida Keys Aqueduct Commission, 4 So 2d 662, 148 Fla 485

Wash—In re Local Imp Dist No 1 of Water Dist No 49, King County, 81 P 2d 289, 195 Wash 439

#### Particular issues

(1) Bonds authorized were held "revenue bonds" for the payment of which the credit and taxing power of the water district, or of the township within whose boundaries the district was established were not pledged—Wagener v Johnson, 76 SE 2d 611, 223 SC 470

(2) Bonds based on assessments on property within the district were held authorized—Ryan v Commissioners of Water Dist No 1 of Kenton County, 295 SW 1023, 220 Ky 822

(3) Bonds secured by pledge of operating revenue as well as by special assessment liens on property within the district were held authorized—Theobald v Board of Com'rs of Buechel Water Dist, 157 SW 2d 285, 238 Ky 720—Olson v Preston St Road Water Dist No 1, 149 SW 2d 766, 286 Ky 66

#### Creation of guaranty fund

Statute authorizing water districts to establish trust funds from their gross income to guarantee payment of local improvement bonds was held not unconstitutional as opening way to arbitrary acts by district commissioners, or invalid as authorizing special assessments against lands within such districts otherwise than in accordance with benefits received by owners—In re Local Imp Dist No 1 of Water Dist No 49, King County, 81 P 2d 289, 195 Wash 439

#### Net income after certain payments

(1) Requirement that bonds of water district should be payable only out of net income after payment of operating, depreciation, and betterment expenses of waterworks system was not violated by provision that funds credited to bond account should never be less than amount necessary to pay accruing principal and interest, where district covenanted to fix rates sufficient to meet bonds and in-

terest, thus showing intention to credit required amount to bond account only if available—Grossman v Public Water Supply Dist No 1 of Clay County, 96 SW 2d 701, 339 Mo 344

(2) Requirement that bonds of water district be payable only out of net income after payment of operating, depreciation, and betterment expenses of waterworks system was held not violated by provision limiting amount to be set aside monthly for depreciation and enlargements, where district set up separate accounts from which money was transferable to each other, pledged to fix adequate rates, and covenanted to comply with constitution and laws—Grossman v Public Water Supply Dist No 1 of Clay County, supra.

#### Security for refunding bonds

Security of original bonds was held to follow refunding bonds, even though statute authorizing refunding bonds did not expressly provide therefor, since power to provide for security of new obligations, which was essential to effect exercise of grant of power to refund bonds, must be implied—Simpson v Little Rock-North Heights Water Dist No 18, 86 SW 2d 423, 191 Ark 451

37. Mont—State ex rel Truax v Town of Lima, 193 P 2d 1008, 121 Mont 152

#### Authorization of district by voters

Fact that special improvement water district was created after authorization by vote of taxpayers affected did not make water system a city project as distinguished from a project of special improvement district so as to make district bonds a general obligation of city—State ex rel Truax v Town of Lima, supra.

38. N Y—Holroyd v Town of Indian Lake, 73 NE 36, 180 NY 318

39 Ark—Dickinson v Mingea, 88 S W 2d 807, 191 Ark 946

#### Purchase of bonds at discount

Order of court directing purchase of bonds not then due at a discount was held error—Dickinson v Mingea, supra.

#### Change of method of collection

Statute providing that taxes collected by receivers of improvement district should first be applied to payment of overdue interest and then to payment pro rata of all bonds issued by board which were due and payable after payment of costs was not affected by subsequent statute abolishing remedy of receivership for collection of such taxes and substituting remedy by mandamus or mandatory injunction against officers of district—Dickinson v Mingea, supra

40. Okl—Wrightsmen v Stephenson, 33 P 2d 499, 168 Okl 63

41. Colo—Gordon v Wheatridge Water Dist, 109 P 2d 899, 107 Colo 128

42. Tex—Nueces County Fresh Water Supply Dist No 1 v Texas State Bank & Trust Co, Civ App, 67 SW 2d 427, error refused

#### Majority sufficient

Under some statutes approval of the issuance of bonds by a majority of the electors voting is sufficient—In re Validation of East Bay Municipal Utility Dist Water Bonds, 239 P 38, 196 Cal 725

#### Notice of election

(1) Statutory requirements as to notice of election with respect to the issuance of bonds by a water district is directory in the sense that requirement need only be substantially complied with, where there is a large measure of general unofficial information concerning a coming election reaching the public through the newspapers, other circular matter, and discussions at public gatherings—Davies v Krueger, 219 P 2d 969, 36 Wash 2d 649

(2) Evidence held to show sufficient notice of election—Davies v Krueger, supra

#### Time for holding election

(1) Statute providing that after establishment of any fresh water supply district and the qualification of supervisors thereof, the board may order a bond election to be held within such district at a time not less

submission to voters of a water district of the question as to the incurrence of a bonded indebtedness, the submission ordinance shall recite the estimated cost of the public work or improvement does not require that the description in the ordinance should contain the precise location of the system,<sup>43</sup> and, in the absence of fraud, the fact that the estimate of the cost is too low does not affect the validity of the submission.<sup>44</sup> Under a particular statute it has been held that it was not improper to include in an ordinance for the submission to the voters of the questions as to the incurrence of a bonded indebtedness for constructing a water system and as to the levy and collection of a tax, the reference to the tax.<sup>45</sup> It has also been held that where the principal and interest of bonds issued by a water district are payable solely from water revenues, the statute authorizing the bond issue and the bonds issued thereunder are not invalid because of

the failure of the statute to require the approval of the bond issue by the voters of the district.<sup>46</sup>

**Validation** Statutory provisions validating bonds of a water district which were issued pursuant to a statute which was declared violative of a constitutional provision have been given effect.<sup>47</sup> Where authorized by statute, an action may be brought to determine the validity of bonds authorized by the voters of a water district.<sup>48</sup> Under some statutes, the governing body of a municipality, such as a city, county, or town, which has created a water district may maintain proceedings to validate and confirm certificates or bonds to be issued for the district's water system and the security for the payment thereof,<sup>49</sup> and the fact that two proposed districts embrace the same area or portions of the same area will not preclude the validation of their certificates.<sup>50</sup>

than twenty or more than thirty days from date of the order, was directory—*Ferrell v Harris County Fresh Water Supply Dist No 23*, Tex Civ App, 241 S W 2d 242

(2) Bond election held beyond time limit provided by statute was valid where voters had unconditional opportunity to express their will on the issue and no other or different result would have attended the election had its date been set within period fixed by the statute—*Ferrell v Harris County Fresh Water Supply Dist No 23*, supra.

#### Interest

Water district unauthorized to create debt without approval by vote of people could, without such vote, borrow money on note to supply deficiency in sinking fund and pay off interest due on bonds—*Nueces County Fresh Water Supply Dist No 1 v Texas State Bank & Trust Co*, Tex Civ App, 67 S W 2d 427, error refused

#### Election contest

(1) Proceeding contesting bond election was not a civil suit, but a special proceeding prescribed by law, and courts were limited in investigation to such subjects as were prescribed by statute—*Ferrell v Harris County Fresh Water Supply Dist No 23*, Tex Civ App, 241 S W 2d 242

(2) One who challenged validity of public transaction designed for speedy disposal assumed burden of preparation and presentation within time limited by law or reasonably fixed by court—*Morris v City of Fort Smith*, Ark, 276 S W 2d 36

(3) In election contest in which issues had been joined and trial had been set for a day two days prior to that on which the bonds authorized by the election had been adver-

tised to be sold, it was not error for trial court to overrule motion presented four days prior to trial date asking for thirty-day continuance for taking of discovery depositions, and its dismissal of the complaint was proper when plaintiffs stated in open court that they were not ready for trial—*Morris v City of Fort Smith*, supra

43 Cal—*Metropolitan Water Dist of Southern California v Burney*, 11 P 2d 1095, 215 Cal 582  
67 C J p 1172 note 46

44. Cal—*Metropolitan Water Dist of Southern California v Burney*, supra

45. Cal—*Metropolitan Water Dist of Southern California v Burney*, supra  
67 C J p 1172 note 48

46 Fla—*State v Florida Keys Aqueduct Commission*, 4 So 2d 662, 148 Fla 485

47 Tex—*Dallas County Fresh Water Dist No 9 v Connor*, Civ App, 14 S W 2d 363

48 Cal—*Metropolitan Water Dist of Southern California v Burney*, 11 P 2d 1095, 215 Cal 582  
67 C J p 1172 note 50

49. Ga.—*Dade County v State*, 42 S E 2d 439, 202 Ga 191, answer to certified question conformed to 43 S E 2d 434, 75 Ga App 330

#### Notice to start proceedings

Where attorney, employed by municipality to prepare proceedings for validating revenue certificates, prepared resolution of the municipality and served written notice of passage of it on solicitor general, it would be deemed sufficient notice to solicitor general to bring the validation proceedings—*Dade County v State*, 43 S E 2d 434, 75 Ga App 330

#### Process

Where mayor and counsel of municipality appeared, filed an answer and acknowledged service of petition for validating revenue certificates, if there appeared a defect in service of petition on them, such defect was waived by appearance and pleading—*Dade County v State*, 43 S E 2d 434, 75 Ga App 330

#### Issues

(1) The sufficiency of the anticipated revenue to be derived from the operation and maintenance of any proposed water system to retire its certificates is an issue of fact peculiar to each proceeding for validation and confirmation, which the judge must determine—*Dade County v State*, 42 S E 2d 439, 202 Ga 191, answer to certified question conformed to 43 S E 2d 434, 75 Ga App 330

(2) Objections to effect that purpose and terms of proposed construction of water works system was unsound, impractical, and unreasonable raised a proper issue of fact for trial court to determine under proper evidence—*Dade County v State*, 43 S E 2d 434, 75 Ga App 330

50 Ga.—*Dade County v State*, 42 S E 2d 439, 202 Ga 191, answer to certified question conformed to 43 S E 2d 434, 75 Ga App 330

#### Prior institution of proceedings

Municipality which institutes proceedings first for the validation of its certificates and the confirmation of the security for the payment thereof does not have superior rights over another municipality which may file proceedings to validate and confirm the security for its certificates subsequently thereto, even though the two proposed districts may embrace the same area or portions of the same area—*City of Trenton v Dade County*, 43 S E 2d 432, 75 Ga App 326

**Interest** Where a water district is authorized to acquire and construct a self-sustaining revenue producing water system and to finance it from the issuance and sale of bonds, it has implied power, unless specifically or by necessary implication denied by the act of its creation or by some other statutory or constitutional limitation, to pay interest on the indebtedness accruing during the construction of the water system from the proceeds of the sale of the bonds <sup>51</sup>

**Enforcement** The procedure in an action by the holder of local improvement district bonds to foreclose the lien evidenced by the bonds has been held the same as that in an ordinary civil action, <sup>52</sup> and a person who asserts the invalidity of a sheriff's deed to the purchaser of lands sold pursuant to such a foreclosure proceeding and who sues to set it aside has the burden of overcoming the deed by competent and controlling evidence <sup>53</sup>

**Objection by municipality within district**

Validation of revenue certificates to defray cost of water system in water district created by county may be made over objection by municipality boundaries of which lie wholly within the district—City of Trenton v Dade County, 43 SE2d 432, 75 Ga App 326

51. Cal—Metropolitan Water Dist of Southern California v Toll, 35 P 2d 519, 1 Cal 2d 421

**Effect of subsequent statutory authorization**

Amendment to waterworks district act providing that interest on bonds during construction period should be deemed construction cost payable from proceeds thereof was not legislative determination of denial of such power in original statute, meaning of which was not clear as to such effect—Metropolitan Water Dist of Southern California v Toll, supra

**Contract obligation**

Amendment to waterworks district act providing that interest on bonds during construction period should be deemed construction cost payable from proceeds thereof was held valid and not to impair any contract obligation between the taxpayer and the district or between the bondholders and the district—Metropolitan Water Dist of Southern California v Toll, supra

**Construction cost**

Interest accruing on the bonds during the construction period is considered a part of the cost of construction and may be paid from the capital account as a part of the cost of construction—Metropolitan Water Dist of Southern California v Toll, supra

**During limited period after completion**

Amendment to waterworks district act extending time for payment of interest on bonds from proceeds thereof for period of one year after completion was held valid—Metropolitan Water Dist of Southern California v Toll, supra

**Taxation**

The water district need not resort to taxation to pay interest accruing on its bonds during the construction of its water system—Metropolitan Water Dist of Southern California v Toll, supra

52. Wash—Chase v Carney, 90 P 2d 236, 199 Wash 99

**Service by publication**

(1) Reasonable effort was made to locate mortgagee who had mortgage on land located within the improvement district, so as to authorize service of summons by publication on the mortgagee, where person making the search examined city and telephone directories and inquired of mortgagors as to mortgagee's address, and was informed that mortgagee might be in another state—Chase v Carney, supra

(2) A published summons which recited that object of action was to foreclose lien of local improvement district assessments in local improvement district located within water district in King county, Wash, was sufficient, notwithstanding the published summons did not contain description of the property—Chase v Carney, supra

53. Wash—Chase v Carney, supra

**Necessary parties**

A mortgagee of land in local improvement district could not attack validity of foreclosure of local improvement district bonds on ground

**Waiver** The right to attack the validity of bonds issued by a water district may be waived <sup>54</sup>

**Evidence** In actions attacking the validity of bonds issued by a water district the general rules of evidence apply <sup>55</sup>

§ 243(7). — Taxes and Assessments

Subject to constitutional restrictions, a water district may be authorized to impose taxes or levy assessments on property in the district to pay the costs of its water system, and where such authority is granted it must be exercised in the manner prescribed

In the absence of constitutional restriction, the legislature may authorize the imposition of an assessment on the property in a water district to pay the cost of its water system, <sup>56</sup> and may delegate the power of taxation to the governing body of such district, <sup>57</sup> and, under various statutes, taxes

that mortgagee's wife was not made a party to foreclosure proceeding and that all property acquired during coverture is presumed to be community property as to which wife would have equal interest with her husband, in absence of evidence as to when mortgagee and wife were married, there being no presumption that they were married at time of execution of the mortgage—Chase v Carney, supra

54. Wash—Chase v Carney, supra

**Waiver held shown**

Where prior to time of execution of mortgage on land included in local improvement district created within a water district, certain of local improvement district assessments had been paid by mortgagors and their predecessors, mortgagees could not attack bonds issued by the local improvement district on ground that the water district was organized under an unconstitutional law—Chase v Carney, supra

**55. Evidence held insufficient**

To establish alleged irregularities in refunding bonds—Fruitt v Pine Bluff Water & Sewer Extension Dist No 2, 214 SW 2d 489, 214 Ark 64

56. Okl—Price v Water Dist No 8, 293 P 1092, 147 Okl 11

67 C J p 1172 note 52

57. Fla—Coral Gables v Crandon, 25 So 2d 1, 157 Fla 71

67 C J p 1172 note 53

**Delegation not within constitutional prohibition**

(1) A statute making board of county commissioners ex-officio board of commissioners of water conservation district and authorizing board to impose a tax for construction, installation, and support of conservation district was not unconstitutional as imposing a tax without authority



and assessments to pay the cost of construction and operation of a water system in a water district, or other obligations, are authorized<sup>58</sup> Power is sometimes conferred to levy a tax if the revenue from the operation of the water system is not sufficient to pay the principal or interest on the bonded debt of the district or to carry out the objects or purposes of the district<sup>59</sup> Under some statutes, the fact that the proposed water system is to consist

of an extension of the system of an adjacent city will not preclude the use of tax funds raised by the district for its construction<sup>60</sup>

Taxes and assessments must be levied in conformity with constitutional and statutory requirements,<sup>61</sup> including mandatory constitutional or statutory requirements as to what property is to be assessed or taxed<sup>62</sup> A general statute under which

of law—Coral Gables v Crandon, supra

(2) Other statutes held not unconstitutional see 67 C J p 1172 note 53 [a]

58 U S—Houck v Eastchester Public Utility Dist, D C Alaska, 104 F Supp 588

Cal—Helvey v Sax, 237 P 2d 269, 38 Cal 2d 21

Tex—Snelson v Murray, Civ App, 252 S W 2d 720

#### Nature of funds

Funds in possession of county treasurer which were collected from taxpayers within water storage district were public and county funds—Maryland Cas Co v Kern County, C C A Cal, 83 F 2d 774

#### Statute held valid

Objection that statute permitted residents of district to decide by referendum election whether county should be liable for local water supply improvements, was held obviated by amendment which provided for no referendum and authorized county commissioners to extend water mains on petition of three fifths of registered voters in particular area—Toomey v Shipley, 192 A 288, 172 Md 463

#### Anticipated obligations

Statute was construed to impliedly empower water district to provide annually for raising of funds by taxation to meet expenses reasonably to be anticipated during fiscal year without first incurring obligations therefor—Blacker v Bakersfield Municipal Water Dist, Cal App, 134 P 2d 277

#### Power to issue bonds

(1) The power of a water district to levy general taxes may not be presumed from the power to issue bonds conferred by statute on the district where a limitation is contained in the statute itself, which dispels the inference of such general grant of power—Gordon v Wheatridge Water Dist, 109 P 2d 899, 107 Colo 128

(2) The power conferred on a water district to issue bonds did not carry with it the power to levy general taxes on both realty and personalty, where the act creating the district purported to prescribe a complete method for the payment of the bonds in its provisions for the method and manner of levy of tax on real estate

only—Gordon v Wheatridge Water Dist, supra

#### Assessments held authorized

Ky—Fraley v Beaver-Elkhorn Water Dist, 257 SW 2d 536

Wash—Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326

#### Taxation held not authorized

(1) To raise money to construct equipment for fire protection or to construct a sewerage system—Tri-City Fresh Water Supply Dist No 2 of Harris County v Mann, 142 SW 2d 945, 135 Tex 280

(2) Where water and sanitation district was expressly authorized to levy ad valorem taxes on all taxable real estate in the district, succeeding provisions of statute authorizing "additional levies of taxes" and power "to levy taxes and collect revenue" for creating a reserve fund were referable to the limited tax on realty and did not authorize levy of general taxes on both real and personal property so as to meet constitutional requirements of uniformity and exemption—Gordon v Wheatridge Water Dist, 109 P 2d 899, 107 Colo 128

59 Cal—General Engineering & Dry Dock Co v East Bay Municipal Utility Dist, 14 P 2d 828, 126 Cal App 349

67 C J p 1172 note 54

60. U S—Houck v Eastchester Public Utility Dist, D C Alaska, 104 F Supp 588

61. Colo—Gordon v Wheatridge Water Dist, 109 P 2d 899, 107 Colo 128

Wash—Hargreaves v Mukilteo Water Dist, 224 P 2d 1061, 37 Wash 2d 522

#### Intent of taxing officials

If taxing officers of water district adopted an illegal plan or scheme of valuation calculated to result in a lack of equality or uniformity of taxation and which as to plaintiffs in fact had such effect, it would be immaterial whether the taxing officers acted with willful design or purpose, or with conscious intention to assess plaintiff's property at an excessive valuation—Brown County Water Imp Dist No 1 v McIntosh, Tex Civ App, 164 SW 2d 722, error refused

#### Deficiency assessment

Where certain property in a water district has been assessed in accordance with statutory requirements, it will not be liable for a deficiency assessment until all the rest of the property in the district has had assessments placed on it in accordance with the statutory requirement—Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326

#### Reassessment

Under some statutes, the reassessment of all the tracts of land within an entire district is authorized when the original assessment of all the tracts of land within the district is for some reason invalid, and where the assessments on a portion of the property within a district have been declared invalid that portion may be reassessed, but when the assessments on a portion of the property within the district have been declared invalid, the portion of the burden which should have been borne by that property cannot by means of reassessment be charged to the other property within the district against which original valid assessments still stand—Wrightsmen v Stephenson, 33 P 2d 499, 168 Okl 63

62 Neb—State v Metropolitan Water Dist of City of Omaha, 177 N W 836, 104 Neb 495

67 C J p 1173 note 57

All property, real and personal, within the district may be taxed—Snelson v Murray, Tex Civ App, 252 SW 2d 720

#### Distributable property of public utility

Wire transmission lines of public utility corporation engaged in producing and selling and distributing electric energy to public were not subject to assessment and levy of taxes for use of water district in which lines were located—State ex rel Halferty v Kansas City Power & Light Co, 145 SW 2d 116, 346 Mo 1069

#### Personalty

The statute providing for creation and organization of water and sanitation districts was void in so far as such act authorized the district to levy an ad valorem tax on real estate solely, thereby exempting per-



a waterworks system is established may, in a proper case, determine the mode of levying the tax rather than a provision of the charter of the municipal corporation in which the improvement district is located<sup>63</sup> Where the obligations of a water district remain its own and do not become the obligations of the town within which the district is located on the abolition of the separate governing body of the district and the vesting of its functions in the town board, taxes and assessments to obtain funds to pay the water district's obligations should be levied and assessed against the taxable property of the water district, and not against all the property of the town<sup>64</sup>

There must be a substantial compliance in all material particulars with statutory conditions precedent to the imposition of a valid tax or assessment<sup>65</sup> Procedural requirements in the imposition of the tax or assessment which are for the benefit and protection of the individual taxpayer are mandatory and compliance therewith must be regarded as con-

ditions precedent essential to a valid tax or assessment<sup>66</sup> Except where required by constitutional or statutory provision,<sup>67</sup> the terms and details of a proposed water system project need not be worked out in advance of the levying of a tax by the water district for the system or for preliminary work essential to the construction contemplated,<sup>68</sup> and it is not essential to the validity of the resolution making the tax levy that it contain a specification of the improvement<sup>69</sup>

**Benefits** Under some statutes, property in a water district may be assessed for a water system only on the basis of the benefits conferred,<sup>70</sup> and special assessments for special benefits cannot substantially exceed the amount of the benefits<sup>71</sup> It has been held that a special benefit which will sustain a special assessment must be immediate and of such a character that it may be seen and traced<sup>72</sup> Under other statutes, it has been held that the benefit which will support the inclusion of land in a water district need not be direct,<sup>73</sup> but it may be

sonality and violating the uniformity and exemption clauses of the constitution—Gordon v Wheatridge Water Dist, 109 P 2d 899, 107 Colo 128

63 Cal—Security Trust & Savings Bank v City of Los Angeles, 7 P 2d 1061, 120 Cal App 518  
67 C J p 1172 note 55

64 NY—Grishaber v Town of Callicoon, 27 NYS 2d 522, 176 Misc 323, reversed on other grounds 33 NYS 2d 508, 263 App Div 471

65 Cal—Blacker v Bakersfield Municipal Water Dist, App, 134 P 2d 277  
67 C J p 1173 note 56

#### Adoption of budget

(1) The statutory provisions for preparation, printing, and publication of preliminary municipal water district budget, notice and holding of hearings thereon, and adoption thereof before fixing district tax rate, are for taxpayer's benefit and mandatory, and if any of prescribed steps are omitted, district tax levy is invalid—Blacker v Bakersfield Municipal Water Dist, Cal App, 134 P 2d 277

(2) Where municipal water district's board of directors never furnished county auditor itemized estimates of district's revenues and expenditures during fiscal year, and board's statement of sum required with direction to levy tax at certain rate, was not given to county board of supervisors until after date fixed for consideration of preliminary budgets, county board's levy of district tax assessment was invalid—Blacker v Bakersfield Municipal Water Dist, supra

66. Conn—Rocky Hill Incorporated

Dist v Hartford Rayon Corp, 190 A 264, 122 Conn 392

#### Provisions held mandatory

Provisions for lodging of abstract of list of municipal tax district, for notices of assessment, or valuation, or meeting of assessors and selectmen for review of assessment, and for holding of such meeting, were mandatory—Rocky Hill Incorporated Dist v Hartford Rayon Corp, supra

#### Requirements held not mandatory

Where tax of water district of town was based on town assessment list with certain exceptions, and validity of procedure in making of town list was not attacked, failure to follow procedural requirements as to district list would not invalidate entire taxes levied on corporation by district, but only item for acreage, which was within such exceptions, in that town list included lands part of which were within district and part without—Rocky Hill Incorporated Dist v Hartford Rayon Corp, supra

67. Ark—Missouri Pac R Co v Waterworks Improvement Dist No 1 of Tillar, 203 SW 696, 134 Ark 315

67 C J p 1173 note 56 [a]

68. US—Houck v Eastchester Public Utility Dist, D Cal Alaska, 104 F Supp 588

69. US—Houck v Eastchester Public Utility Dist, supra

#### Grade level

Since establishment of grade level is essential to construction of water system, resolutions providing that tax levy by public utility districts is for construction, operation, and maintenance of a water system is a suffi-

cient specification—Houck v Eastchester Public Utility Dist, supra

70. Wash—Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326  
67 C J p 1173 note 60

71. Wash—Hargreaves v. Mukilteo Water Dist, Snohomish County, supra

**Entire cost of improvement** made by utilities district may be levied on property specially benefited, if not in excess of such benefits, and may be levied according to foot frontage where benefits are equal and uniform—Murphy v Metropolitan Utilities Dist, 255 NW 20, 126 Neb 663

#### Reduction

If special assessments substantially exceed benefits conferred by improvement they should be reduced to an amount that will reflect benefits conferred—Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326

#### Substantial excess required

Unless the excess of cost over special benefits is of material character it should not be regarded by court when its aid is invoked to restrain enforcement of special assessments—Hargreaves v Mukilteo Water Dist, Snohomish County, supra

72. Colo—Pomroy v Board of Public Waterworks, Dist No 2, of City of Pueblo, 136 P. 78, 55 Colo 476.  
67 C. J. p 1173 note 61.

73. NY—Syracuse, B & N Y R Co v Van Amburgh, 229 NYS 10, 223 App Div 485, affirmed 168 NE 422, 251 NY 548.  
67 C J p 1173 note 62

present or prospective,<sup>74</sup> and may result from general benefits to the surrounding community.<sup>75</sup> So, it has been held that, where all real property within water and fire districts is liable, under statutes, for the support and maintenance of such districts, real property within the districts is not exempt from taxation for such support where the districts are legally created, merely because there has been no direct service or benefit to the property from the districts,<sup>76</sup> and the fact that a property owner has an

adequate supply of water of his own does not necessarily show that no benefit accrues to him from the establishment of a district.<sup>77</sup>

Benefits must be assessed in the manner required by statute.<sup>78</sup> Ordinarily, the question of benefits is one of fact.<sup>79</sup> Under some statutes, the determination by a body, to which authority in this regard is duly delegated, as to whether certain property will be benefited is judicial in its nature<sup>80</sup> and is subject to review by the courts,<sup>81</sup> but, in the absence of

**74. NY—Syracuse, B & N Y R Co v Van Amburgh, supra**

**Present use of the property does not alone control the determination as to the existence of benefit—Ball v Merriman, Civ App, 245 SW 1012, reversed on other grounds 296 SW 1085, 116 Tex 527**

**It is sufficient if it is reasonably to be anticipated that benefit may accrue in the future—Rocky Hill Incorporated Dist v Hartford Rayon Corp, 190 A 264, 122 Conn 392**

**75. Tex—Ball v Merriman, Civ App, 245 SW 1012, reversed on other grounds 296 SW 1085, 116 Tex 527**

**76. NY—People ex rel Zerega v Markvart, 244 NYS 219, 230 App Div 767**

**77. Conn—Rocky Hill Incorporated Dist v Hartford Rayon Corp, 190 A 264, 122 Conn 392**

**NY—In re Assessment of Water Tax in Water Dist No 3 of Town of Niskayuna, Schenectady County, 258 NYS 690, 235 App Div 566, modified on other grounds 258 NYS 745, 236 App Div 294**

**78. Neb—Murphy v Metropolitan Utilities Dist, 255 NW 20, 126 Neb 663.**

#### **Incorporation by reference**

Statutes governing metropolitan cities as to method in making levy and assessment for public improvement was held incorporated into utilities district statute by reference and controlled in making levy and assessment for improvement of utilities district—*Murphy v Metropolitan Utilities Dist, supra*.

#### **Foot front rule**

Statute authorizing levy of cost of water main according to the foot-front rule, which contained provision for equalization of the special assessments was held not unconstitutional—*Murphy v Metropolitan Utilities Dist, supra*.

#### **Zone and termini method**

(1) Under the zone and termini method of assessment the assessments must be in proportion to area and proximity to the improvement—*Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326*.

(2) The zone and termini method in assessing cost of water system against property within local improvement district established by water district is not a method of spreading assessment without regard to benefits, but is a method of apportioning benefits, and assessments under this method may be reduced to an amount that will not substantially exceed benefits conferred—*Hargreaves v Mukilteo Water Dist, Snohomish County, supra*.

(3) A water district in creating local improvement district and assessing the cost of local improvement against property within the district may follow the termini and zone method provided by statute or, in ordering the improvement, the district may provide for assessments to be made against the property of the district in accordance with the special benefits such property will derive from the improvement, without regard to zone and termini method—*Hargreaves v Mukilteo Water Dist, 224 P 2d 1061, 37 Wash 2d 522*.

#### **Equalization**

A water district commission, in assessing cost of water system against property, can reduce assessments which are substantially in excess of benefits conferred, but if it reduces some assessments it must raise others, because under zone and termini method sum of all assessments equal cost and expense of improvement—*Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326*.

#### **Correction**

Where the taxing authorities are authorized by statute to correct, revise, raise, lower, change, or modify the assessment roll, or any part thereof, any such action must be done within the framework of the zone and termini method, and that method cannot be abandoned on a pretext of revising—*Hargreaves v Mukilteo Water Dist, Snohomish County, supra*.

#### **Change of method**

Where water district commissioners followed zone termini method in spreading assessments over property in local improvement district to pay for improvements that district was created to provide if a new assess-

ment roll was to be made up apportioning special benefits, it would have to be done under authority to set aside assessment roll and order assessment to be made de novo, and assessment de novo would not need to be by zone and termini method—*Hargreaves v Mukilteo Water Dist, Snohomish County, supra*.

**Assessment held improper where it was not made pursuant to zone and termini method—Hargreaves v Mukilteo Water Dist, 224 P 2d 1061, 37 Wash 2d 522**

**79. Wash—Hargreaves v Mukilteo Water Dist, Snohomish County, 261 P 2d 122, 43 Wash 2d 326 67 C J p 1173 note 67**

**80. NY—Syracuse, B & N Y R Co v Van Amburgh, 229 NYS 10, 223 App Div 485, affirmed 168 NE 422, 251 NY 548**

#### **Sufficiency of finding**

Finding of board of equalization levying special assessment for construction of water main that lands were specially benefited to full amount of assessment was held tantamount to finding that such benefits were equal and uniform, warranting adoption of foot-front rule—*Murphy v Metropolitan Utilities Dist, 255 NW 20, 126 Neb 663*.

**81. NY—Syracuse, B & N Y R Co v Van Amburgh, 229 NYS 10, 223 App Div 485, affirmed 168 NE 422, 251 NY 548**

#### **Collateral attack**

Finding of board of directors of metropolitan utilities district, sitting as board of equalization of special assessments for construction of water main, is in nature of judgment, and if board had jurisdiction, errors can be reviewed only in direct proceeding in error to district court, and are not subject to collateral attack—*Murphy v Metropolitan Utilities Dist, 255 NW 20, 126 Neb 663*.

#### **New apportionment**

(1) On appeal from apportionment of assessment, new apportionment should be made by commissioners appointed by court where original apportionment failed to allow for difference in distances of properties from water mains—*Seyfang v Reister, 277 NYS 695, 154 Misc 308*.

any statute or rule of law providing that the particular property involved is not benefited or of any evidence whatever that such property is benefited, the determination cannot be annulled as a matter of law on review by certiorari,<sup>82</sup> and in such case the sole question for the court is whether or not there is sufficient evidence to justify the determination.<sup>83</sup>

**Imposition not tax** The imposition of the burden of increased cost of construction of works connected with a water system of a water district, resulting from a statute requiring the payment of the prevailing rate of wages on public work, is not the imposition of a tax within the meaning of a constitutional prohibition against the imposition of a tax by the legislature.<sup>84</sup>

**Items for which tax or assessment levied** Under some statutes the propriety of apportioning the amount of principal and interest on bonds, issued for district purposes, according to benefit to the property within the district,<sup>85</sup> and of levying the amount of a water deficiency,<sup>86</sup> and the amount of the compensation of the managing officers of the district<sup>87</sup> against the property in the district in accordance with assessed valuation, has been recognized, but the view was taken that the amount of other items of the district budget could not properly be levied as a tax or assessment<sup>88</sup> and, as discussed supra § 243 (6) a, must be provided for by water rents to be collected from consumers

**Opportunity for hearing, notice.** Considering a water district as a taxing district, where the legislature does not establish the boundaries but delegates the authority to a local body, it is essential to due process of law that the owners of land affected shall be accorded an opportunity to be heard as to the location of the boundaries and the creation of the district,<sup>89</sup> and on the question of benefits and the proportion of the cost of the improvement which may be assessed by a special tax or assessment against him.<sup>90</sup> In the absence of constitutional restrictions, notice of every step in the tax or assessment proceedings is not necessary.<sup>91</sup> A notice which follows the language of the statute has been held sufficient.<sup>92</sup> Notice by publication, as provided for by the statute under which the district is organized, of the various steps in the organization of the district<sup>93</sup> and in other proceedings looking to the imposition of the tax or assessment<sup>94</sup> is a sufficient basis for such imposition. Where due notice has been given, a landowner who fails to appear and object in the course of the proceedings for organization and for the imposition of the assessment, and who does not appeal from a determination of the court which, under the applicable statute, has jurisdiction of such proceedings, waives his right to call in question the validity of the assessment.<sup>95</sup>

**Form of levy** Ordinarily, mere technical defects in the form of the levy will not render it ineffective,<sup>96</sup> and courts will sustain a levy, otherwise valid and authorized, whenever sufficient appears to

(2) Commissioners appointed by court to reapportion assessment of property for benefits in water district should be permitted to obtain expert assistance—*Seyfang v Reister*, supra.

**Assessment held erroneous**

Assessment of tax equally on acreage basis regardless of water main frontage or distance from mains was held erroneous as inequitable, where some of land was one and one-fifth miles from nearest water mains, and mains and water could not be brought to it except at an excessive cost—*Seyfang v Reister*, supra.

82. N.Y.—*Syracuse, B & N Y R Co v Van Amburgh*, 229 N.Y.S. 10, 223 App.Div. 485, affirmed 168 N.E. 422, 251 N.Y. 548.  
67 C.J. p 1173 note 70

**Questions not considered**

Taxpayer could not review formation of town water district or question benefit of water supply to him in certiorari proceeding against water commissioners—*People ex rel Smith v Parker*, 283 N.Y.S. 343, 246 App.Div. 674.

83. N.Y.—*Syracuse, B & N Y R Co*

*v Van Amburgh* 229 N.Y.S. 10, 223 App.Div. 485, affirmed 168 N.E. 422, 251 N.Y. 548.

67 C.J. p 1173 note 71

84. Cal.—*Metropolitan Water Dist of Southern California v Whitsett*, 10 P.2d 751, 215 Cal. 400.

85. N.Y.—*Seyfang v Reister*, 277 N.Y.S. 695, 154 Misc. 308.  
67 C.J. p 1174 note 73

86. N.Y.—*Seyfang v Reister*, supra.

87. N.Y.—*In re Assessment of Water Tax in Water Dist No 3 of Town of Niskayuna, Schenectady County*, 258 N.Y.S. 745, 236 App.Div. 294—*Seyfang v Reister*, 277 N.Y.S. 695, 154 Misc. 308.

88. N.Y.—*In re Assessment of Water Tax in Water Dist No 3 of Town of Niskayuna, Schenectady County*, 258 N.Y.S. 745, 236 App.Div. 294.

**Cost of maintenance of water system** is not properly assessable against property within water district and should be collected from water rates—*Seyfang v Reister*, 277 N.Y.S. 695, 154 Misc. 308.

89. N.Y.—*Floyd-Jones v. Board of*

*Town of Oyster Bay, Nassau County*, 164 N.E. 330, 249 N.Y. 398.

67 C.J. p 1174 note 78

Notice and hearing in connection with organization of water districts in general see supra § 243 (2) a.

90. Colo.—*Gordon v Wheatridge Water Dist*, 109 P.2d 899, 107 Colo. 128.

91. Or.—*Smith v Hurlburt*, 217 P. 1093, 108 Or. 690.  
67 C.J. p 1174 note 79

92. U.S.—*Houck v Eastchester Public Utility Dist*, D.C. Alaska, 104 F.Supp. 588.

93. Ky.—*Ryan v Commissioners of Water Dist No 1 of Kenton County*, 295 S.W. 1023, 220 Ky. 822.  
Or.—*Smith v Hurlburt*, 217 P. 1093, 108 Or. 690.

94. Ky.—*Ryan v Commissioners of Water Dist No 1 of Kenton County*, 295 S.W. 1023, 220 Ky. 822.  
67 C.J. p 1174 note 81

95. Ky.—*Ryan v Commissioners of Water Dist No 1 of Kenton County*, supra.

96. Or.—*Smith v Hurlburt*, 217 P. 1093, 108 Or. 690.

make plain the intent of the duly authorized officers to make the levy<sup>97</sup>

**Effect of validating statute** The view has been taken that statutory provisions validating the organization of a water district and bonds issued pursuant to the statute under which the attempted organization was made, which statute had been declared violative of constitutional provisions, rendered valid and effective the assessment and levy of an otherwise valid tax made prior to the enactment of the validating statute to pay the interest on, and provide a sinking fund for, the bonds<sup>98</sup>

**Suit or proceeding to attack tax or assessment** A property owner in a water district may challenge any assessment or tax on his property at the time and in the manner provided by statute<sup>99</sup> In the absence of a lack of power or jurisdiction on the part of the water district involved, the procedure provided by statute for questioning the validity of a tax or assessment imposed by a water district is exclusive<sup>1</sup> On appeal by property owners in a water district from an apportionment of assessment, the failure of the commissioners of the district to perform acts legally required of them does not constitute a ground of objection to the assessment<sup>2</sup> Under some statutes a property owner is not con-

fined to an appeal from the assessment but may institute a suit to invalidate the assessment<sup>3</sup>

Complainant in an action to void a tax and to recover back the amount of such tax must set forth facts sufficient to state a cause of action<sup>4</sup> In such action several taxpayers may properly be joined as plaintiffs under the code provision authorizing the joinder, as plaintiffs, of persons having an interest in the subject matter and in obtaining the relief demanded<sup>5</sup> Plaintiff in a suit to enjoin the collection of a tax, based on the theory that the district was not duly incorporated, is not entitled to relief because he had an adequate water system before the water district was organized, where it is found that the district was duly incorporated and the district has not been made a party to the suit<sup>6</sup> In an action to enjoin the collection of taxes and the enforcement of tax liens and to obtain a refund of taxes already paid, issues with respect to an alleged misapplication of a part of the tax funds and which do not involve the validity of the levy will not be considered<sup>7</sup> Willful design or purpose, or conscious fraudulent intent on the part of the taxing authorities has been held not an essential element of a cause of action for cancellation of tax assessments on the ground of discrimination<sup>8</sup> In a certiorari proceeding petitioner has the burden of establishing his case<sup>9</sup> A landowner may waive

97 Or—Smith v Hurlburt, supra  
67 C J p 1174 note 84

98 Tex—Matlock v Dallas County  
Arcadia Fresh Water Supply Dist  
No 1, 12 S W 2d 181, 118 Tex 120  
67 C J p 1174 note 85  
Validating of bonds in general see  
supra § 243 (6) b

99 Wash—Hargreaves v Mukilteo  
Water Dist, Snohomish County, 261  
P 2d 122, 43 Wash 2d 326

#### Statute of limitations

Action to cancel tax assessments as a cloud on title to land was held not subject to statute of limitations, since if the assessments were void, the apparent liens thereof constituting clouds on title to the land would constitute "continuing injuries" so that a suit to remove such clouds would not be subject to limitations—Brown County Water Imp Dist No 1 v McIntosh, Tex Civ App, 164 S W 2d 722, error refused

1. Wash—McKenzie v Mukilteo Water Dist, 102 P 2d 251, 4 Wash 2d 103

#### Failure to object

Where water district complied with statutory requirements, landowner who did not file written objections to assessment roll or appeal from action of water district confirming assessment roll was not entitled to

maintain action to restrain attempt to collect local improvement assessment in improvement district created in and by the water district and to have land declared free from lien of assessment and stricken from assessment roll—McKenzie v Mukilteo Water Dist, supra

2. NY—Seyfang v Reister, 277 N Y S 695, 154 Misc 308  
Proper remedy is by mandamus—Seyfang v Reister, supra

#### Approval of operation of water system

Failure of water district to obtain approval of water power and control commission for operation of town water system was no defense on appeal by property owners from apportionment of assessment—Seyfang v Reister, supra

3. Ark—Missouri Pac R Co v Waterworks Improvement Dist No 1 of Tillar, 203 S W 696, 134 Ark 315  
67 C J p 1174 note 86

4. Cal—Blacker v Bakersfield Municipal Water Dist, App, 134 P 2d 277  
67 C J p 1174 note 87

#### Complaints held insufficient

Cal—Blacker v Bakersfield Municipal Water Dist, supra  
67 C.J. p 1174 note 87 [c].

5. Cal—General Engineering & Dry Dock Co v East Bay Municipal Utility Dist, 14 P 2d 828, 126 Cal App 349

6. Or—Smith v Hurlburt, 217 P 1093, 108 Or 690

7. US—Houck v Eastchester Public Utility Dist, D C Alaska, 104 F Supp 588

#### Procurement of loan by city

A contention that a tax levy by a water district was invalid because the financing of the water system project was contingent on the procurement of a loan by an adjacent city whose system was to be extended into the district was not directed at the validity of the levy itself, and, hence, was not before the court—Houck v Eastchester Public Utility Dist, supra.

8. Tex—Brown County Water Imp Dist No 1 v McIntosh, Civ App, 164 S W 2d 722, error refused

9. Mass—Worcester Gas Light Co v Commissioners of Woodland Water Dist in Town of Auburn, 49 N E 2d 447, 314 Mass 60

#### Error of law

The burden was on petitioner to show an error of law apparent on its face—Worcester Gas Light Co v Commissioners of Woodland Water Dist in Town of Auburn, supra.

the right, or be estopped, to question the validity of an assessment against his land,<sup>10</sup> or that his lands are properly included within the district so as to be liable to a tax or assessment by the district,<sup>11</sup> and where he fails to make his protest against the tax or assessment at the time and in the manner provided by statute, he may waive his right to do so<sup>12</sup>

**Collection** Under some statutes, where officers whose duty it is to collect taxes and assessments imposed by water districts fail to do their duty, the remedy is by mandamus or mandatory injunction against such officers<sup>13</sup> Where taxes levied by a water district are not paid the district may sell the property taxed<sup>14</sup> The right of a water district to declare and enforce assessment and tax liens on

property within the district is purely statutory, and the terms of the statute must be substantially complied with in order for a lien to exist<sup>15</sup> In an action to quiet title by or against a water district which bases its title to the property involved on unpaid district taxes and a collector's deed to the property, the general rules governing such actions apply.<sup>16</sup>

**Taxation of district's property** Property of a district outside the district has been held not subject to taxation by the county wherein it is located.<sup>17</sup>

## § 243(8). — Actions

In a proper case, where authorized by statute, an action may be brought by or against a water district

### Exemption from tax held not established

Gas company was held not to have established right to exemption from tax by water district on the ground that its distributing system was not benefited by the water supply system—*Worcester Gas Light Co v Commissioners of Woodland Water Dist in Town of Auburn*, supra

10 Wash—*McKenzie v Mukilteo Water Dist*, 102 P 2d 251, 4 Wash 2d 103

11 Conn—*Rocky Hill Incorporated Dist v Hartford Rayon Corp*, 190 A 264, 122 Conn 392

### Waiver held shown

Corporation which had actual or constructive knowledge of proceedings to establish water district to include its lands, and made no claim that lands were not included in district until after bonds had been issued and four years' taxes had been assessed on lands was held estopped to deny lands were in district—*Rocky Hill Incorporated Dist v Hartford Rayon Corp*, supra

12. Wash—*Hargreaves v. Mukilteo Water Dist*, Snohomish County, 261 P 2d 122, 43 Wash 2d 326

### Estoppel held shown

Landowner who for many years without protest paid local improvement assessment in local improvement district created in and by the water district, was estopped to question validity of the assessments levied against the land—*McKenzie v Mukilteo Water Dist*, 102 P 2d 251, 4 Wash 2d 103

13. Ark—*Dickinson v Mingea*, 38 S W 2d 807, 191 Ark 946

**Appointment of receivers** to collect waterworks improvement district taxes to pay bonds was void under statute abolishing remedy of receivership to collect such taxes and substituting remedy by mandamus or mandatory injunction against officers of district—*Dickinson v. Mingea*, supra.

14 Cal—*Helvey v Sax*, 237 P 2d 269, 38 Cal 2d 21

### Consideration for deeds back to taxpayers

Where water district board by way of compromise to collect taxes had deeded lands to taxpayers who had permitted tax liens to be foreclosed and such deeds included in recited consideration contributions of taxpayers to the drilling of a well taken over by the district, on an audit of the books of the district, secretary who had received money paid for deeds was entitled to credit for such contributions as deductions from recited consideration charged to him—*Murphy v Marshall*, 159 SW 2d 741, 203 Ark 986.

15. Ky—*Theobald v Board of Com'rs of Buechel Water Dist*, 157 SW 2d 285, 288 Ky 720

### Potential lien

(1) Where water district proposed to pay bonds and interest with revenues exclusively, but if necessary to levy assessments against properties embraced in the district under plan calling for postponement of actual assessment until it should be needed to supplement revenues, there was only a potential lien and not a present lien during suspension of the procedure—*Theobald v Board of Com'rs of Buechel Water Dist*, supra

(2) Where water district's bonds and interest thereon were to be paid with revenues exclusively, but if necessary district was to levy assessments against properties embraced in the district, and assessment was in no event to exceed one tenth of the whole sum which, without use of the revenue payment plan, it would have been necessary to levy in the beginning, property owners had no right to pay annual partial assessments in installments—*Theobald v Board of Com'rs of Buechel Water Dist*, supra

### Redemption from tax sale

Where owner of realty, which was sold pursuant to judgment in tax suit,

did all that was required and all that could have been done to redeem the realty under statute, and judgment and sale of realty were specifically conditioned on right to redeem, water improvement district and those holding through and under it were in no position to say that redemption was not available to the owner—*Graham v Caballero*, Tex Civ App, 243 S W 2d 286, error refused no reversible error

16. Cal—*Taylor v. Coachella Val Water Dist*, 239 P 2d 454, 108 Cal App 2d 743

### Issues

Plaintiff could not successfully contend that taxes were void on ground that realty involved received no benefits by being included in the district, where assessed owners through whom plaintiff claimed, did not avail themselves of their statutory remedy to have their realty excluded from the district on ground that it was not benefited by inclusion therein—*Helvey v. Sax*, 237 P 2d 269, 38 Cal 2d 21

**Statute of limitations** held to bar action—*Helvey v Sax*, supra.

### Evidence

(1) Tax deeds were held properly admitted in evidence—*Helvey v Sax*, supra.

(2) Tax deeds from county water district were prima facie evidence that realty was assessed by the district as required by law—*Helvey v Sax*, supra

(3) Evidence held sufficient to show title in water district—*Taylor v Coachella Val County Water Dist*, 239 P 2d 454, 108 Cal App 2d 743

17. Cal—*Laguna Beach County Water Dist v Orange County*, 87 P. 2d 46, 30 Cal App 2d 740

**Land outside boundaries of district** Cal—*Laguna Beach County Water Dist v. Orange County*, supra.

in its corporate name, or by or against the officers of a water district in their official capacity

Where due provision is made therefor by statute a water district may sue<sup>18</sup> and be sued<sup>19</sup> in its corporate name<sup>20</sup> Questions as to the capacity of officers of a water district to sue or be sued in their official capacity,<sup>21</sup> and in respect of suits, involving district affairs, by or against a town in which such district is located<sup>22</sup> are dependent on the terms of the controlling statutes at the time of the action. The rule that public corporations, and agents, and officers thereof, acting as such, are an exception to the general rule that a person who pays money voluntarily without fraud, duress or mistake of fact cannot recover it back, as discussed in Payment § 139, has been recognized in upholding an action by the officers of a water district<sup>23</sup>

*Suits by taxpayers and others based on allegedly wrongful acts of officers of district* While the right of the taxpayer of a water district to sue in a representative capacity to compel the restoration of funds wrongfully disbursed or expended by officers of the district,<sup>24</sup> or to prevent waste, mismanagement, or improper diversion of funds of the district,<sup>25</sup> has been recognized, there is authority for the view that a taxpayer may not sue to prevent the consummation of an invalid contract by a waterworks district to purchase certain property where the obligation to pay would not create a debt of, or impose general liability on, the district and where there could be no levy of a tax to raise funds for payment for such property<sup>26</sup> Where the revenues of the district are raised, not by taxation, but by rates paid by individual consumers of water, and

the district is subject to regulation and control by the state public utilities commission, it has been held that individual rate payers may not maintain a bill to compel restitution of funds illegally paid out by trustees,<sup>27</sup> in such case suit should be instituted by the attorney general on his own initiative, or on a report of the public utilities commission, against all the trustees<sup>28</sup>

The right of a water district to recover on the official bond of an officer of such district, given for the faithful performance of his duties, because of such officer's wrongful acts in entering into a contract for the purchase of a water system at an exorbitant price and his making payments under such contract, has been recognized,<sup>29</sup> as has the right of the district to recover back from persons to whom such payments were made any sum or sums wrongfully received by them in violation of the rights of the district<sup>30</sup> Under some general statutes a district or county attorney is authorized to institute proceedings against an officer of a water district, intrusted with the collection or safekeeping of public funds, to compel the performance of duty by such officer and to protect the public interests<sup>31</sup> In giving effect to such a statute the view has been taken that suit should be brought in the name of the water district,<sup>32</sup> and not in the name of the state,<sup>33</sup> and that a taxpayer of the district, acting in a representative capacity, is a proper,<sup>34</sup> but not a necessary,<sup>35</sup> party plaintiff In an action based on defendant's participation in the misappropriation of the funds of a water district, it has been laid down in general terms that the defenses of estoppel, laches, and the like are not available against such district<sup>36</sup>

18. Cal—Coachella Valley County Water District v Stevens, 274 P 538, 206 Cal 400  
67 C J p 1175 note 91

19. Philippine—City of Manila v Posadas, 48 Philippine 309  
Tex—State v Stickle, Civ App, 11 S W 2d 837.

20. Tex—State v Stickle, supra.

21. N Y—Grishaber v Town of Callicoon, 33 N Y S 2d 508, 263 App Div 471  
67 C J p 1175 notes 94–95

22. N Y—Grishaber v Town of Callicoon, supra  
67 C J p 1175 note 96

**Abolition of governing body of district**

The statute abolishing board of water commissioners of water district and substituting town board was not intended to abolish remedies in force as to existing claims and causes of action, and a judgment against the town board as substituted would impose no obligation on the town, but

would impose on town board the obligation to pay judgment and then to levy and assess against property within water district a sum sufficient to reimburse board—Grishaber v Town of Callicoon, supra

23. N Y—Gilliland v Lincoln-Alliance Bank & Trust Co, 261 N Y S 826, 145 Misc 827

24. Tex—State v Stickle, Civ App, 11 S W 2d 837

**Complaint held insufficient**

Paragraph of petition by water improvement district against its directors and surety on their official bonds for sale by directors of district bonds for less than ninety per cent of their face value was held not to state cause of action—American Surety Co of New York v Cameron County Water Improvement Dist No 15, Tex Civ App, 70 S W 2d 489, error dismissed

25. Ark—City of Bentonville v Browne, 158 S W 161, 108 Ark 306  
67 C J p 1175 note 2

26. Ark—Mississippi Valley Power Co v Board of Improvement of Waterworks Dist No 1 of Van Buren, 46 S W 2d 32, 185 Ark 76

27. Me—Eaton v Thayer, 128 A 475, 124 Me 311  
Regulation in general see supra § 243 (1)

28. Me—Eaton v Thayer, supra

29. Tex—State v Stickle, Civ App, 11 S W 2d 837  
67 C J p 1175 note 7

30. Tex—State v Stickle, supra.  
67 C J p 1176 note 8

31. Tex—State v Stickle, supra

32. Tex—State v Stickle, supra

33. Tex—State v Stickle, supra  
67 C J p 1176 note 11

34. Tex—State v Stickle, supra.

35. Tex—State v Stickle, supra

36. N Y—Gilliland v Lincoln-Alliance Bank & Trust Co, 261 N Y S 826, 145 Misc 827.

*Breach of contract* The law of the state in which a water district is located and in which work on realty is to be done under a contract for the laying of pipe for such district's water system will determine the rule of damages in an action based on a breach of such contract by the district<sup>37</sup> In a contractor's action for breach of contract by a water district for failure to pay amounts due in the construction of a water system or parts thereof, a motion by the water district for a directed verdict at the close of the evidence is proper where the evidence is sufficient to show a breach of contract entitling plaintiff to at least nominal damages<sup>38</sup> In an action by a seller against a water district on obligations given in payment of equipment purchased by the district, a tender back of the property purchased must be unconditional and include all that is due<sup>39</sup> Under some statutes, where a water district in a town has been dissolved, the town board of the town is the proper party to be sued on an unfulfilled contract by the district for the purchase

of property<sup>40</sup> In a suit by taxpayers to recover money allegedly due a water district under a contract in which defendant agreed to furnish consumers in the district with water, defendant may not insist on a reasonable return on capital already lost, even though the loss was the result of decreased cost of materials or labor which entered into the original investment<sup>41</sup>

*Evidence.* In actions by or against water districts, the general rules of evidence govern as to admissibility<sup>42</sup> and the weight and sufficiency of the evidence<sup>43</sup>

### § 243(9). — Alteration of, Abolishment of, and Withdrawal of Municipality from, Water District

The legislature may provide for the dissolution or alteration of water districts

The legislature may provide for the dissolution of water districts, and the statutory procedure prescribed therefor should be followed<sup>44</sup> Where there

37 U.S.—Farnum v Kennebec Water Dist, Me, 170 F 173, 95 CCA 355

67 C.J. p 1176 note 15

What law governs in respect of damages in general see Damages § 4

38 Mass.—Newton Const Co v West & South Water Supply Dist of Acton, 93 NE2d 457, 326 Mass 171

39 U.S.—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, CCA Tex, 100 F2d 523

40 N.Y.—Grishaber v Town of Callicoon, 33 NYS2d 508, 263 App Div 471—Echo Lake Corp v Town of Mt Pleasant, 292 NYS 944, 249 App Div 736, affirmed 11 NE2d 315, 275 NY 500

#### Relief

Whether vendors who contracted with water district for sale of realty to district could recover from town for damages sustained when district was dissolved with contract unfulfilled depended on whether water board acted in good faith in attempting to fulfill conditions in contract, or in bad faith delayed action while awaiting dissolution of district—Echo Lake Corp v Town of Mt Pleasant, 285 NYS 545, 247 App Div 743

41. Ark.—Arkansas Power & Light Co v Gantt, 136 SW2d 180, 199 Ark 893

42. Ark.—Arkansas Power & Light Co v Gantt, 136 SW2d 180, 199 Ark 893

43. Evidence held sufficient

(1) To establish value of certain land—Arkansas Power & Light Co

v Gantt, 136 SW2d 180, 199 Ark 893

(2) To justify allowance of two cents per K W H for electric current used to supply water, and allowance of items for repairs, stationery, and office expenses by company furnishing consumers in district with water—Arkansas Power & Light Co v Gantt, supra

(3) To show use of a certain amount of electricity in pumping water—Arkansas Power & Light Co v Gantt, supra

(4) To support finding that water main in its original location interfered with construction of state highway and that its relocation was necessary to permit improvement of highway and to insure safety of traveling public—State v Marin Municipal Water Dist, 111 P2d 651, 17 Cal 2d 699

(5) To warrant allowance of specified amount as taxes in determining reasonable return to be allowed company furnishing water to consumers in district—Arkansas Power & Light Co v Gantt, 136 SW2d 180, 199 Ark 893

(6) To show that money paid to construction engineer by water district was a fair settlement, pursuant to arrangement made when engineer was employed for future work for reorganized district, for work done by engineer pursuant to contract with the old district—McCarthy v Potts, CCAN Y, 99 F2d 784

44 Procedures held not exclusive

The statute providing for dissolution of water districts in proceedings initiated by individual voters with

the final decision being made by voters at an election was not repealed by implication through the enactment of statute providing for such dissolution in proceedings initiated by majority of board of water district commissioners with the final decision being made by the superior court—State ex rel Reed v Spanaway Water Dist, 229 P2d 532, 38 Wash 2d 393

#### Right to vote in election

(1) One who is innocently mistaken or has a bona fide confusion as to location of precinct boundaries should not be and is not disfranchised, as long as he in fact lives within precinct where he presents himself to vote—Graham v Villareal, Tex Civ App, 242 SW2d 258

(2) Where voters purchased poll taxes for purpose of voting outside of their precinct and their receipts in fact show they lived outside water district, they in law had no poll tax receipts at all—Graham v Villareal, supra

(3) Burden is on voter to have his poll tax receipt reflect correct precinct information at time he presents himself at polls—Graham v Villareal, supra

(4) Fact that voters at election made oath required by statute that they were qualified voters of county and resident property taxpayers in district and had not voted before in election did not prevent invalidation of their votes on determination that poll tax receipts were obtained by voters by misrepresentation, rather than honest confusion or mistake—Graham v Villareal, supra

#### Validity of ballots

Fact that voter initialed stub to

is no statutory inhibition against the inclusion of a county water district within the boundaries of a utility district, its inclusion therein does not dissolve, terminate, or affect the legal existence of the included water district<sup>45</sup> Under some statutes, where a material change is made in the plans and specifications for a water system filed by a water district, an action for dissolution of the district may be maintained by property owners therein<sup>46</sup>

Where a statute so provides, the existing indebtedness of a water district which has been dissolved is a charge on the property in the district<sup>47</sup>

The legislature also has plenary control over matters pertaining to the alteration or change of boundaries of water districts<sup>48</sup> A grant of power by the legislature to a metropolitan utilities district

to extend its water mains beyond the limits of the city into adjacent territory has the effect of enlarging the boundaries of the district to include the territory served by such extension<sup>49</sup> Where the governing statute prescribes the method of withdrawal by a municipality from a water district in which it has duly been included, such method must be followed,<sup>50</sup> and, where such statute is a general statute whose general purpose is beyond the narrow scope of dealing with a merely municipal affair, its provisions in respect of withdrawal are superior to, and control, charter provisions of a municipality, the withdrawal of which is sought<sup>51</sup> In Rhode Island a fire district may be abolished and its territorial limits changed at the will of the legislature<sup>52</sup>

### C. FRANCHISE OF, AND OPERATION, CONTROL, AND DISPOSAL OF WATER SYSTEM BY, PRIVATE INDIVIDUAL

#### § 244. In General

A franchise to construct and maintain a waterworks system may be granted to an individual.

It has been stated in general terms that the right to sell water is not a governmental prerogative, but is a business in which any person may engage without legislative authority,<sup>53</sup> and under some statutes

a municipal corporation may grant to an individual a franchise to construct and maintain a waterworks system<sup>54</sup> Even though a permit or grant to an individual to lay and maintain pipes in streets to furnish a water supply is not authorized, such individual's claimed rights or privileges in this regard may be rendered effective by a subsequent recognition thereof by the state legislature<sup>55</sup> However,

ballot instead of signing it did invalidate the vote—*Graham v Villareal*, supra

#### Evidence in election contest

(1) Evidence was held to sustain finding that voters did not receive assistance in preparing their ballots in Spanish language—*Graham v Villareal*, supra

(2) Evidence was held to sustain finding that certain voters purchased their poll tax receipts for wrong precinct for political and personal reasons and not by reason of an innocent confusion—*Graham v Villareal*, supra

#### Waiver of objection to ballot

Where on opening of ballot and stub box, it was discovered that four stubs to ballots cast in election were not signed but neither defendants nor contestant contested ballots, each party, having taken calculated risk that votes were favorable to their respective causes and pursued that theory of trial, could not, without challenge or pleading, or proof, on unfavorable outcome of tally, be permitted to compel other side to try case again—*Graham v Villareal*, supra

45. Cal—*Sacramento Municipal Utility Dist v All Parties and Persons*, etc., 57 P 2d 506, 6 Cal 2d 197

46. Ark—*Adams v. Highway 10 Wa-*

ter Pipe Line Imp Dist No 4, 230 SW 2d 956, 217 Ark 473

47. NY—*Coggeshall v Hennessey*, 5 NYS 2d 312, 254 App Div 374, affirmed 18 NE 2d 652, 279 NY 438

#### Particular items

Legal expenses and disbursements necessitated by litigation resulting from dissolution of district were existing indebtedness constituting a charge on the property in the district—*Coggeshall v Hennessey*, supra

48. Cal—*Sacramento Municipal Utility Dist v All Parties and Persons*, etc., 57 P 2d 506, 6 Cal 2d 197  
67 C J p 1176 note 17

Alteration of boundaries in proceeding for organization see supra § 243 (2) a

49. Neb—*Murphy v Metropolitan Utilities Dist*, 255 NW 20, 126 Neb 663

50. Cal—*Riedman v Brison*, 18 P 2d 947, 217 Cal 383  
67 C J p 1176 note 18

51. Cal—*Riedman v Brison*, supra  
67 C J p 1176 note 19

52. RI—*East Providence Water Co v Public Utilities Commission*, 128 A 556, 46 RI 458

53. NJ—*Junction Water Co v Riddle*, 155 A 887, 108 NJ Eq 523  
67 C J p 1176 note 23

54. US—*Illinois Trust & Savings Bank v City of Arkansas City*, Kan., 76 F 271, 22 CCA 171, 34 LRA 518

Ohio—*Moore v Elmore*, 13 Ohio NP, NS, 651

Franchises in general see Franchises § 1 et seq

Franchise and privileges of public service water company see infra §§ 250–253

Franchises to use streets granted by municipal corporations in general see Municipal Corporations §§ 1716–1743

#### Franchise to sink artesian well

A person who obtains from a city a franchise authorizing him to sink an artesian well to supply water to the public therefrom for pay, through mains and pipes which he is authorized to lay over certain streets in a particular part of the city, is conducting a system of "waterworks," within the meaning of a statute imposing a privilege tax on waterworks—*Randall v. Smith*, 51 So 917, 96 Miss 647

55. Vt—*City of Barre v McFarland*, 73 A 577, 82 Vt 310  
67 C J p 1177 note 35.



it has been held that an individual does not obtain a statutory franchise by the mere entry on, and use of, the public highways with his water supply system under a statute limiting the use to which the public highways may be put to water power, telegraph, telephone, pneumatic tube, or light, heat, or power companies<sup>56</sup> While it has been held that under a statute providing that no prescriptive right may be obtained in a public street or highway, an individual who has a water supply system in the public highways of a municipality may not claim authority or franchise on the ground of municipal acquiescence for a long time,<sup>57</sup> it has also been held that, even though there was originally no formal authorization for the laying of pipes to supply water by an individual, he may, under certain circumstances, acquire certain rights in this regard as the result of acquiescence by the taxpayers and the municipality and by the latter's recognition of his rights<sup>58</sup> Since an easement is repugnant to the object of a utility, it has been held that the law will not imply an easement or enforce an express one in a waterworks system in favor of particular individual members of the public whereby they may acquire special rights in, or control over, the system to the exclusion of any other member of the public,<sup>59</sup> and certainly, in no case, over the power or authority of the builders and owners of the system<sup>60</sup>

The general rule as to the grant of a franchise that, where on a fair reading of the instrument reasonable doubts arise as to the intent of the parties, the grant must be construed in favor of the public applies to the grant of such a franchise to an individual,<sup>61</sup> or, as sometimes stated, such grant is to be construed strictly against the grantee<sup>62</sup> An

exclusive privilege granted to an individual in respect of furnishing a water supply is restricted in its operation by the terms of the grant<sup>63</sup> In general the question as to what obligations are imposed on the grantee of a franchise is determinable from the terms of the grant,<sup>64</sup> but in determining the question the long-continued practical construction of the franchise by the parties thereto is entitled to great weight and may, under certain circumstances, prevail<sup>65</sup> A permit to an individual to construct and maintain pipes in the streets to supply the inhabitants with water has been regarded as a license, carrying with it possibility of interest<sup>66</sup> An easement granted for the maintenance of a water distribution system in certain streets should be construed in accordance with the intent of the parties as determined by the language of the grant<sup>67</sup>

The right of an individual owner of a water system to recover from a municipal corporation damages naturally and necessarily flowing from the physical destruction of plaintiff's business has been recognized<sup>68</sup> The right of the owner of a water system to abandon operation has also been recognized<sup>69</sup> with the limitation that under certain circumstances patrons should be given a reasonable time in which to provide themselves with water<sup>70</sup>

## § 245. Duration of Franchise or Privilege, and Revocation, Cancellation, or Forfeiture

The privilege of laying and maintaining water pipes in streets may be limited to a grant for a reasonable time. A franchise may be forfeited and canceled under proper conditions.

Where the governing body of a municipality has no authority to grant in perpetuity the privilege of

56. Minn.—Kuehn v Village of Mah-tomedo, 292 NW 187, 207 Minn 518.

Water supply system not "water power"

An individual's water supply system in public highways of township did not come within term "water power" as used in statute—Kuehn v Village of Mahtomedo, supra.

57. Minn.—Kuehn v Village of Mah-tomedo, supra.

58. SC—Corpus Juris quoted in De Treville v Groover, 65 SE 2d 232, 241, 219 SC 313

67 CJ p 1177 note 30

59. Tex.—Harding v Watson, Civ App, 91 SW 2d 956

60. Tex.—Harding v Watson, supra.

Purchasers of lots in new town could not assert claim to easement in water system or right to control and operate it and fix rates by virtue of alleged parol representations and

promises made by owners of townsite, including water system, when they sold lots, even though purchasers had operated and repaired system at their expense from time to time—Harding v Watson, supra.

61. US—City of Pocatello v Murray, DC Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628

62. US—Stein v Bienville Water Supply Co, CC Ala., 34 F 145, affirmed 11 SCt 892, 141 US 67, 35 LEd 622

63. US—Stein v Bienville Water Supply Co, CC Ala., 11 SCt 892, 141 US 67, 35 LEd 622.

67 CJ p 1177 note 34

64. US—City of Pocatello v Murray, DC Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628.

67 CJ p 1177 note 36

65. US—City of Pocatello v Murray, supra.

67 CJ p 1177 note 37.

66. Vt.—Barre v McFarland, 73 A. 577, 82 Vt 310

67 CJ p 1176 note 28

67. Mass.—Flower v Suburban Land Co, 123 NE 2d 218

Easement construed

In deed granting exclusive easement for maintenance of water distribution system in certain streets "subject only to rights taken by eminent domain," quoted words qualified easement granted and such easement was not exclusive of rights taken by eminent domain by town for highway purposes—Flower v. Suburban Land Co, supra.

68. NY—Boyer v. Little Falls, 38 NYS 1114, 5 App Div 1.

67 CJ p 1177 note 29

69. Tex.—West v. Probst, Com App, 6 SW 2d 96

70. Tex.—West v. Probst, supra.

laying and maintaining water pipes in streets, a grant may properly be limited to a grant for a reasonable time in the absence of any restriction in this regard either in the municipal charter or in the grant itself,<sup>71</sup> and the question of the revocation of the grant, where it has been followed by a substantial expenditure for the benefit of the municipality, must be considered with reference to the time which will satisfy requirements of equity.<sup>72</sup> The view has been expressed that a permit to an individual to construct and maintain pipes in the streets to supply the inhabitants with water may become irrevocable.<sup>73</sup> An individual who maintains, under a revocable license, pipes in the streets of a municipality to deliver water, cannot, it has been held, recover damages from the municipality for not allowing him to carry on the business.<sup>74</sup>

*Cancellation or forfeiture of franchise* While forfeitures are not favored by the law,<sup>75</sup> under proper conditions equity will forfeit and cancel a franchise,<sup>76</sup> but a municipality which seeks forfeiture must come into court with clean hands and must be willing to do equity.<sup>77</sup> Notice to the grantee of the municipality's intention to bring suit to cancel for nonperformance of the grantee's obligations is not required,<sup>78</sup> at least where the grantee had, for some time prior to suit, knowledge of the municipality's claim that the grantee was not fulfilling his obligations.<sup>79</sup>

Failure of the grantee to furnish an adequate supply of water as required by the franchise may be ground for cancellation and forfeiture,<sup>80</sup> and in such case whether or not the grantee has furnished an adequate supply as required by his franchise

must be determined with reference to the rule of reasonable use.<sup>81</sup> A provision of a waterworks franchise that, if the grantee shall not furnish an adequate supply, the municipality may bring in an additional supply is not necessarily an exclusive remedy so as to preclude such municipality from maintaining a suit to forfeit the franchise for the grantee's failure to furnish an adequate supply,<sup>82</sup> nor is the fact that the municipality might rescind by resolution a defense to the suit.<sup>83</sup> Where in such case the grantee relied on waste of water on the part of consumers as defense it will be presumed, where he contracted for a flat-rate system, that he contemplated such extravagance of use as is ordinarily and necessarily incident to such system,<sup>84</sup> and he has the burden of proving waste where there is evidence of lack of sufficient water to supply all reasonable needs.<sup>85</sup> In a suit to cancel a franchise for nonperformance of the grantee's obligations, an absolute decree for cancellation rather than a conditional decree for cancellation unless the grantee should, within a reasonable time prescribed, comply with certain conditions has been deemed proper where such absolute decree would best serve the ultimate interests of the parties.<sup>86</sup>

## § 246. Control and Regulation by State Authorities

A waterworks system owned and operated by a private individual is subject to regulation by a state regulatory body.

While, under certain statutes, a waterworks system owned and operated by a private individual has been regarded as a public utility<sup>87</sup> and, as such, subject to regulation by the state regulatory body,<sup>88</sup> the

71. Vt—City of Barre v Perry & Scribner, 73 A. 574, 82 Vt 301 67 C.J. p 1177 note 40

72. Vt—City of Barre v Perry & Scribner, supra 67 C.J. p 1177 note 41

73. Vt—City of Barre v McFarland, 73 A. 577, 82 Vt 310

74. Ky—Kevil v Princeton, 118 S.W. 363

75. U.S.—City of Pocatello v Murray, D.C. Idaho, 206 F. 72, affirmed 214 F. 214, 130 C.C.A. 628

76. U.S.—City of Pocatello v Murray, supra 67 C.J. p 1178 note 45.

77. U.S.—City of Pocatello v Murray, supra

78. U.S.—City of Pocatello v Murray, supra

79. U.S.—City of Pocatello v Murray, supra

80. U.S.—City of Pocatello v Murray, supra

81. U.S.—City of Pocatello v Murray, supra

82. U.S.—City of Pocatello v Murray, supra

83. U.S.—City of Pocatello v Murray, supra 67 C.J. p 1178 note 52

84. U.S.—City of Pocatello v Murray, supra

85. U.S.—City of Pocatello v Murray, supra

86. U.S.—City of Pocatello v Murray, supra 67 C.J. p 1178 note 55.

87. U.S.—Van Dyke v Geary, Ariz., 37 S.Ct. 483, 244 U.S. 39, 61 L.Ed. 973 Vt—McFeeters v Parker, 30 A.2d 300, 113 Vt 139

Landowner supplying water to vendees and others The supplying of water by land-

owner and predecessors in interest, without franchise from county commissioners, to vendees and certain others in an unincorporated village for a nominal charge and not for profit, was held insufficient to constitute the water system a public utility—Clark v Olson, 31 P.2d 534, 177 Wash. 237, 93 A.L.R. 210

88. U.S.—Van Dyke v Geary, Ariz., 37 S.Ct. 483, 244 U.S. 39, 61 L.Ed. 973 Vt—McFeeters v Parker, 30 A.2d 300, 113 Vt 139

### Order to rehabilitate and reconstruct

The Public Service Commission's order authorizing individual owning water utility "to take whatever steps were necessary to rehabilitate and reconstruct the water works system," etc., did not authorize reorganization of a water corporation under statute relating to reorganizations—Webster v Joplin Water Works Co., 177 S.W. 2d 447, 352 Mo. 327

view has been expressed that an individual does not become a "public utility" within the meaning of some statutes so as to become subject to the regulatory authority of the board of public utility commissioners unless he owns, operates, manages, or controls a water plant or system for public use under privileges granted by the state.<sup>89</sup> The right of the owner of a water system to an injunction to prevent the enforcement of an order of the state regulatory body requiring such owner to extend the system to supply additional consumers in territory outside that already served has been recognized where the sufficiency of the supply for the territory already being served is questionable.<sup>90</sup>

Under some statutes the owner of a water system may not transfer it without the authorization of

the state public service or utility commission,<sup>91</sup> and a transfer without such an authorization is void.<sup>92</sup> Some statutes require that the owner of the system shall make the application to sell,<sup>93</sup> and the commission may not act, in this regard, on the application of the proposed transferee or purchaser.<sup>94</sup> So, the view has been taken that the commission is concerned only with the question as to whether the proposed transfer will be injurious to the rights of the public<sup>95</sup> and that it has no authority to determine whether or not a valid contract of sale has been made<sup>96</sup> or whether either party has a valid claim against the other on such a contract,<sup>97</sup> if an owner does not desire to sell the commission cannot compel him to do so,<sup>98</sup> nor can it determine that the owner should carry out his contract to sell on his refusal to do so.<sup>99</sup>

## D PUBLIC SERVICE WATER COMPANIES

### § 247. Status and Character

A corporation engaged in the furnishing of water to a municipality and its inhabitants is a public utility and subject to regulation and control.

A corporation engaged in the furnishing of a supply of water to a municipality and its inhabitants has been variously regarded as a quasi-public corporation,<sup>1</sup> a public service corporation,<sup>2</sup> and a public

utility,<sup>3</sup> serving a public use,<sup>4</sup> exercising in some degree at least, a governmental agency,<sup>5</sup> and is, therefore, entitled to the support and protection of the police power in discharging its functions.<sup>6</sup> Such a corporation is affected with a public interest,<sup>7</sup> and subject to regulation and control by the public authorities for the public benefit,<sup>8</sup> notwithstanding

89. N.J.—Junction Water Co v Ridge, 155 A 887, 108 N.J. Eq 523, 67 C.J. p 1178 note 58.

90. U.S.—Van Dyke v Geary, 112, 218 F. 111, affirmed 37 S.Ct. 433, 244 U.S. 39, 61 L.Ed. 973.

91. Cal.—Hanlon v Eshleman, 146 P. 656, 169 Cal. 200.

Mo.—Webster v Joplin Water Works Co, 177 S.W.2d 447, 352 Mo. 327.

92. Mo.—Webster v Joplin Water Works Co, supra.

#### Purchase in good faith

Where person who sold water utility to corporation was the majority stockholder, president, member of board of directors, and manager of the corporation, and knew or was charged with knowledge that no order of Public Service Commission authorizing the sale had been made, corporation was not a purchaser in good faith for value entitled to insist on validity of the sale.—Webster v Joplin Water Works Co, supra.

93. Cal.—Hanlon v Eshleman, 146 P. 656, 169 Cal. 200, 67 C.J. p 1178 note 61.

94. Cal.—Hanlon v Eshleman, supra.

95. Cal.—Hanlon v Eshleman, supra.

96. Cal.—Hanlon v Eshleman, supra.

97. Cal.—Hanlon v Eshleman, supra.

98. Cal.—Hanlon v Eshleman, supra.

99. Cal.—Hanlon v Eshleman, supra.

1. Cal.—Coast Counties Real Estate & Investment Co v Monterey County Water Works, 271 P. 415, 96 Cal. App. 269, 67 C.J. p 1179 note 69.

**Water company with power of eminent domain**

Pa.—Borough of Mt Union v Kunz, 139 A. 118, 290 Pa. 356.

2. Ky.—Rash v Louisville & Jefferson County Metropolitan Sewer Dist, 217 S.W.2d 232, 309 Ky. 442.

**Water corporations are sometimes referred to as public service corporations but are neither municipal corporations nor quasi-municipal corporations**—Kennelly v Kent County Water Authority, 89 A.2d 188, 79 R.I. 376.

3. N.Y.—City of New Rochelle, on Complaint of Conlon, v Burke, 43 N.E.2d 463, 288 N.Y. 406.

Tenn.—Nashville Water Co v Dunlap, 138 S.W.2d 424, 176 Tenn. 79.

4. Cal.—City of San Leandro v Railroad Commission, 191 P. 1, 183 Cal. 229, 67 C.J. p 1179 note 70.

5. U.S.—Moore v New Orleans Waterworks Co, C.C.La., 114 F. 380, 67 C.J. p 1179 note 71.

**Operating facility of city**

The Louisville Water Company,

though a corporation and a separate entity, is as a practical matter not only a public service company but an operating facility of the city of Louisville.—Rash v Louisville & Jefferson County Metropolitan Sewer Dist, 217 S.W.2d 232, 309 Ky. 442.

6. U.S.—Moore v New Orleans Waterworks Co, C.C.La., 114 F. 380—Walla Walla Water Co v Walla Walla, C.C.Wash., 60 F. 957, affirmed 19 S.Ct. 77, 172 U.S. 1, 43 L.Ed. 341.

7. N.J.—State v Traffic Tel Workers' Federation of N.J., 66 A.2d 616, 2 N.J. 335, 9 A.L.R.2d 854.

8. N.J.—Hackensack Water Co v Ruta, 69 A.2d 321, 3 N.J. 139.

N.Y.—City of New Rochelle, on Complaint of Conlon, v Burke, 43 N.E.2d 463, 288 N.Y. 406.

Tenn.—Nashville Water Co v Dunlap, 138 S.W.2d 424, 176 Tenn. 79.

67 C.J. p 1179 note 73.

**Regulation and control with respect to**  
Construction and operation of waterworks see *infra* § 261.  
Establishment of rates see *infra* §§ 291-296.

**Public utilities providing water are subject to special regulation by the state beyond that imposed on private industry generally**—State v Traffic Tel Workers' Federation of N.J., 66 A.2d 616, 2 N.J. 335, 9 A.L.R.2d 854.

it does not exercise all its powers and privileges<sup>9</sup>

*Determination of character as public utility* The fact that a corporation is, by its articles of incorporation, empowered to supply water does not, of itself, constitute proof that it is engaged in a public service,<sup>10</sup> and in determining whether a company supplying water is a public utility its mode of operation and the nature of its service are controlling.<sup>11</sup> It cannot be so classed until it engages in public service or holds itself out to serve the public for compensation,<sup>12</sup> it is not enough that it merely supply water to one individual or corporation or to a privileged few,<sup>13</sup> even though by its character it is authorized to distribute water in such a manner as would render it a public service corporation.<sup>14</sup> A company whose business is confined to selling water under contract to other companies or municipalities which in turn distribute and sell to the public is operating a water system for a public use<sup>15</sup> and it is immaterial that the sale of water is at wholesale.<sup>16</sup>

## § 248. Incorporation, Organization, and Consolidation

A water company may be incorporated or organized under general or special laws

In accordance with the requirements of the particular jurisdiction involved, a water company may be incorporated or organized under general<sup>17</sup> or special<sup>18</sup> laws. Under some statutes it is a prerequisite to the incorporation of such a company that it should obtain the consent of the municipality which it proposes to supply with water,<sup>19</sup> and under such a statute the city may lawfully condition its consent on terms protective of its public interest and germane to the subject.<sup>20</sup> The city's grant of its consent does not carry with it a grant of an exclusive franchise to the company.<sup>21</sup> A statute providing that after approval of an application for permission to form a water company the persons named therein shall organize as a water company has been held not to require that the original applicants shall alone be members of the corporation,<sup>22</sup> and the fact that names in addition to those contained in the application are contained in the certificate of incorporation does not make the incorporation invalid.<sup>23</sup>

An application for a charter must be made in accordance with statutory regulations and provisions.<sup>24</sup> Where a charter sets out the corporate purposes provided for in one statute, the company will be held to be organized under that statute.<sup>25</sup>

9. Tenn.—Nashville Water Co v Dunlap, 138 S.W.2d 424, 176 Tenn 79

10. Cal.—Del Mar Water, Light & Power Co v Eshleman, 140 P 591, 167 Cal 666

67 C.J. p 1179 note 75

Determination of public character of utilities generally see Public Utilities § 2

11. Miss.—Hinds County Water Co v Scanlon, 132 So 567, 159 Miss 757

12. Miss.—Hinds County Water Co v Scanlon, supra

67 C.J. p 1179 note 77

### Findings of commission

Under statute, findings of Railroad Commission that water company was public utility, and that it was operating a water system for compensation, was conclusive, unless the evidence was without conflict, and the question therefore one of law.—Del Mar Water, Light & Power Co v Eshleman, 140 P 591, 167 Cal 666, rehearing denied 140 P 948, 167 Cal 666

13. Pa.—Borough of Ambridge v Public Service Commission of Pennsylvania, 165 A 47, 108 Pa Super 298

67 C.J. p 1179 note 78

14. Miss.—Hinds County Water Co v Scanlon, 132 So. 567, 159 Miss 757.

15. N.J.—East Jersey Water Co v Board of Public Utility, 119 A 679, 98 N.J. Law 449—Acquackanonk Water Co v Board of Public Utility Com'rs, 118 A 535, 97 N.J. Law 366

16. N.J.—Acquackanonk Water Co v Board of Public Utility Com'rs, supra

17. Cal.—Pritchard v Crestline Village Mut Service Co, 212 P 2d 526, 95 Cal App 2d 151

Me.—Hodges v South Berwick Water Co, 26 A 2d 645, 139 Me 40

67 C.J. p 1180 note 83

Incorporation and organization of corporations generally see Corporations §§ 23-63

18. Mass.—Inhabitants of Town of Holliston v Holliston Water Co, 27 N.E.2d 194, 306 Mass 17

Pa.—In re Lower Ormrod Community Water Ass'n, 78 Pa Dist & Co 526—Application for Incorporation of Water Ass'n, Comp Pl, 24 Leh L J 390

67 C.J. p 1180 note 83

19. U.S.—Cunningham v Cleveland, Tenn, 98 F 657, 39 C.C.A. 211

67 C.J. p 1180 note 84

Resolution of common council as condition precedent to legal existence Mich.—Attorney General v Hanchett, 4 N.W. 182, 42 Mich 436

14 C.J. p 119 note 55

### Revocation of consent

Where franchise to use streets was

granted by legislature to water company, and city board of estimate succeeded to powers of authorities of old town, board of estimate could not by resolution without notice or hearing revoke consent previously granted by old town to incorporators of company, which approval the statute required merely as a step preliminary to incorporation, so that board of estimated resolution had no effect on right of company to use city streets.—In re New York Water Service Corp, 67 N.Y.S.2d 850, affirmed 69 N.Y.S.2d 508, 271 App Div 1019, affirmed 73 N.E.2d 724, 296 N.Y. 1016

20. N.J.—Lake v Ocean City, 41 A. 427, 62 N.J. Law 160

21. N.Y.—Matter of Brooklyn, 38 N.E. 983, 143 N.Y. 596, 26 L.R.A. 270 Grants of exclusive rights or privileges see infra § 252

22. N.Y.—Walton Water Co v Village of Walton, 203 N.Y.S. 343, 207 App Div 708, reversed on other grounds 143 N.E. 786, 144 N.E. 889, 238 N.Y. 46, 555

23. N.Y.—Walton Water Co v Village of Walton, supra

24. Pa.—In re Portland Water, etc., Co, 13 Pa Dist 659, 29 Pa Co 180. 67 C.J. p 1180 note 87

25. U.S.—Etowah Light & Power Co v Yancey, C.C. Tenn., 197 F 845, appeal dismissed 199 F 988, 117 C. C.A. 663.

and this is true, although an attempt is made in the charter to insert certain powers given under another statute<sup>26</sup> The charter of a water company conferring powers and imposing duties appropriate to a public utility is itself a public profession,<sup>27</sup> and when accepted becomes of binding force,<sup>28</sup> and must be taken as a whole with all its conditions and burdens, as well as its privileges<sup>29</sup>

**Members and stockholders** The eligibility of a person for membership in a water company may depend on the provisions of its charter and bylaws,<sup>30</sup> and where a person has qualified under such provisions, it has been held that the board of directors may not refuse to admit him to membership<sup>31</sup> The stockholders in a water company hold the same relation to the corporation that any stockholder holds to a private corporation<sup>32</sup> They have the same rights and liabilities,<sup>33</sup> and the same rules as to the maintenance of suits apply<sup>34</sup>

**Consolidation** A statute which authorizes the merger of corporations engaged in the same or similar line of business does not authorize a merger of a water company with an electric light, heat, and power company<sup>35</sup> After a merger of several water

companies the consolidated company has all the franchises, rights, and privileges of each of its constituent companies<sup>36</sup> A statute providing that water companies organized before a certain date may consolidate without losing the power of eminent domain is not invalid as discriminatory or class legislation<sup>37</sup>

## § 249. Officers and Agents

Officers and agents of private corporations are discussed in Corporations §§ 715-932

Examine Pocket Parts for later cases.

## § 250 Grants of Privileges or Franchises

A franchise to use the streets and highways for the purpose of maintaining and operating a system of waterworks is the subject of a grant from the state which can be made only by the duly constituted authorities to whom the legislative power in this particular has been delegated

The right or privilege to use the streets and highways for the purpose of maintaining and operating a system of waterworks is considered to be a franchise,<sup>38</sup> and is a subject of a grant from the

26. US—Etowah Light & Power Co v Yancey, *supra*  
67 C J p 1180 note 92

27. Tenn—Nashville Water Co v Dunlap, 138 S W 2d 424, 176 Tenn 79

28. Tenn—Nashville Water Co v Dunlap, *supra*.

### Contract

A water company entered into a contract with the commonwealth by accepting charter—In re Opinion of the Justices, 14 N E 2d 468, 300 Mass 607

29. Tenn—Nashville Water Co v Dunlap, 138 S W 2d 424, 176 Tenn 79

30. Ariz—Porterfield v Black Bill & Doney Parks Water Users' Ass'n, 210 P 2d 335, 69 Ariz 110

Pa—Usiak v Milnesville Water Co-op Ass'n, Com Pl, 42 Luz Leg Reg 171

31. Ariz—Porterfield v Black Bill & Doney Parks Water Users' Ass'n, 210 P 2d 335, 69 Ariz 110

32. Wash—Opportunity Christian Church v Washington Water Power Co, 238 P 641, 136 Wash 116

33. Cal—Pritchard v Whitelock, 212 P 2d 531, 95 Cal App 2d 144

### Contract for sale of stock

Del—Claude Santa, Inc, v Wilmington Suburban Water Co, 46 A 2d 876, 29 Del Ch 148

### Distribution of profits

A mutual stock corporation formed to furnish water to stockholders at

cost was a non-profit corporation in the sense that there could be no distribution of profits to shareholders prior to dissolution—Pritchard v Crestline Village Mut Service Co, 212 P 2d 526, 95 Cal App 2d 151

### Voting rights

(1) Where bylaws of nonprofit stock corporation formed under General Corporation Law to supply water to stockholders provided for voting rights in proportion to shares held and corporation had been formed and operated under General Corporation Law, voting rights were property rights not affected by revision of General Non-profit Corporation Law, and stockholders would not be required to vote as members—Pritchard v Crestline Village Mut Service Co, *supra*.

(2) Where city having right to be stockholder of private water company held majority of company's stock and voted it at annual stockholders' meeting by duly authorized officer, directors elected by such vote were duly elected—Peterson v Taggart, 36 P 2d 1086, 1 Cal App 2d 468

34. Wash—Opportunity Christian Church v Washington Water Power Co, 238 P 641, 136 Wash 116  
67 C J p 1180 note 94

### Injunctive relief

Where bylaws of nonprofit corporation formed to furnish water to stockholders at cost provided shares were to attach to lots in area serviced and pass with title thereof, as-

essment levied against lots, irrespective of whether lots had shares attached or service connection, as maintenance charge, not authorized under bylaws and not related to amount of water used or furnished to respective lots or to cost of production and delivery, was void as beyond power of corporation, and its collection would be enjoined on petition of minority shareholders, notwithstanding directors did not plan to enforce and collect levy—Pritchard v Whitelock, 212 P 2d 531, 95 Cal App 2d 144

35. Pa—In re Hummelstown Water Co, etc, 15 Pa Dist 532

36. N J—Plainfield-Union Water Co v Inhabitants of City of Plainfield, 87 A 448, 84 N J Law 634  
67 C J p 1181 note 98.

37. Pa—Reeves v Philadelphia Suburban Water Co, 135 A 362, 287 Pa 376, 136 A 526, 288 Pa 418  
67 C J p 1181 note 1.

38. US—City of Tulsa v Southwestern Bell Telephone Co, CCA Okl, 75 F 2d 343, certiorari denied 55 S Ct 656, 295 US 744, 79 L Ed 1690—Griffin v Oklahoma Natural Gas Corporation, CCA Kan, 37 F 2d 545

26 C J p 1012 note 62

Grants of franchises generally see Franchises §§ 9-19.

"It is everywhere agreed that the right to lay pipes in public highways is itself a franchise"—Nashville Water Co v Dunlap, 138 S.W.2d 424, 427, 176 Tenn 79.

state,<sup>39</sup> which can be made only by the duly constituted authorities to whom the legislative power in this particular has been delegated.<sup>40</sup> The legislative requirements for granting a franchise,<sup>41</sup> particularly directions as to the form and manner of granting,<sup>42</sup> must be strictly observed, and an agency of the state in making the grant cannot limit the authority of its principal.<sup>43</sup> The terms of a franchise, as proposed in the published notice of application, cannot be materially changed after the notice, or after the question has been submitted to a vote of the people as originally drawn.<sup>44</sup>

If required by statute, a company which supplies water to the public must obtain a permit from the health department of the state.<sup>45</sup> Under a statute which vests the city with the exclusive control and regulation of public utilities located within its boundaries or operated principally for its benefit, a water company so located or operated need not secure a certificate of authority to do business in that city from the public utilities commission of the state.<sup>46</sup> The question of the right of a water company to lay its mains in the public streets must

be raised by a direct action instituted for this purpose, and the right may not be attacked collaterally in another proceeding.<sup>47</sup> A grant of a franchise by a municipality cannot be avoided on any ground other than its illegality.<sup>48</sup>

*Necessity for obtaining consent of municipality*  
If a statute or the charter so provides, a water company must obtain the consent or permission of the local authorities before occupying the public streets for its purpose.<sup>49</sup> If the company has laid its pipes before the enactment of such a statute it need not secure the consent of the city.<sup>50</sup> Where the statute requires consent of the city to the incorporation of the water company, as well as to the privilege to lay pipes in the streets, the consent to laying the pipes may be given at the same time as the consent to the incorporation.<sup>51</sup>

A water company may obtain the right to lay and maintain pipes in streets and highways from the legislature of the state,<sup>52</sup> and if the right to lay its pipes and mains in the streets of a city or town is granted to a water company by its charter or the general statute regulating the subject, such

39. Mo—State ex inf McKittrick ex rel City of Springfield v Springfield City Water Co, 131 S.W.2d 525, 345 Mo 6  
67 C.J. p 1181 note 3

40. Wis—Washburn Water Works Co v Washburn, 108 N.W. 194, 129 Wis 73—State v Portage City Water Co, 83 N.W. 697, 107 Wis 441  
67 C.J. p 1181 note 3  
Grants of franchises or licenses to use streets generally see Municipal Corporations §§ 1716-1743

#### City

Where a city, in addition to a grant of general powers, has been expressly given the right to erect waterworks, it possesses the power to grant the corporation a franchise to supply the inhabitants with water—Andrews v National Fdy, etc, Works, Wis, 61 F. 782, 10 C.C.A. 60

41. Minn—Country Club District Service Co v Village of Edina, St Paul Fire & Marine Ins Co, Intervener, 8 N.W.2d 321, 214 Minn 26

#### Consideration

The possibility that village might acquire title to water system, including improvements made from funds obtained by loan, in case utility failed or neglected to operate the system constituted sufficient consideration within requirement of statute for issuance of original franchise and of amendment to franchise authorizing mortgage—Country Club District Service Co v Village of Edina, St Paul Fire & Marine Ins Co, Intervener, supra.

94 C.J.S.—7

42. Ky—Thomas v City of Horse Cave, 61 S.W.2d 601, 249 Ky 713  
67 C.J. p 1181 note 4

#### Ordinance

(1) Franchise to operate existing water plant and to make extensions and betterments may be granted by ordinance without referendum—Asplund v Santa Fe, 244 P. 1067, 31 N.M. 291

(2) City water franchise was valid although language of ordinance directing sale thereof indicated that council proceeded on theory that franchise could not be granted until after sale thereof—Thomas v City of Horse Cave, 61 S.W.2d 601, 249 Ky 713

#### Public bidding

Where several years had elapsed after granting of original water franchise to utility company and village had amended franchise so that any title which village might acquire to water system under provisions of franchise would be subject to mortgage and had adopted resolution approving mortgage, the village could not claim invalidity of original franchise because it was granted without public bidding as required by statute—Country Club Dist Service Co v Village of Edina, St Paul Fire & Marine Ins Co, Intervener, 8 N.W.2d 321, 214 Minn 26

43. U.S.—Southern California Utilities v City of Huntington Park, C.C.A. Cal, 32 F.2d 868, certiorari denied 50 S.Ct. 36, 280 U.S. 587, 74 L.Ed. 636

67 C.J. p 1181 note 5

44. Iowa—Hall v Cedar Rapids, 88 N.W. 448, 115 Iowa 199

45. Pa—In re Public Supply of Water, etc, 10 Pa. Dist & Co 570  
67 C.J. p 1182 note 12

46. U.S.—Kansas Gas & Electric Co v City of Cherryvale, Kan, 221 F. 237, 137 C.C.A. 93  
Jurisdiction of public service commissions over water companies see infra § 261

47. U.S.—Franklin Trust Co v Peninsular Pure Water Co, Va, 161 F. 855, 89 C.C.A. 49  
N.J.—Mueller v Egg Harbor City, 26 A. 89, 55 N.J. Law 245

48. Ky—Schoening v Paducah Water Co, 19 S.W.2d 1073, 230 Ky 453  
67 C.J. p 1181 note 10

49. N.J.—Woodbridge Tp v Middlesex Water Co, Ch, 68 A. 464  
67 C.J. p 1182 note 21  
Supervision and control by municipal authorities of use of streets by water company see infra § 256

50. N.Y.—City of New York v Citizens' Water Supply Co of Newtown, 198 N.Y.S. 816, 204 App. Div. 783, affirmed 143 N.E. 753, 237 N.Y. 587  
67 C.J. p 1182 note 22

51. N.J.—Woodbridge Tp v Middlesex Water Co, Ch, 68 A. 464

52. N.J.—Hackensack Water Co v Ruta, 69 A.2d 321, 3 N.J. 139.  
67 C.J. p 1182 note 16.

right cannot in the absence of constitutional provision be denied by the municipality, nor is it necessary to obtain its permission,<sup>53</sup> and this applies not only to the municipality which is to be supplied with water, but also to the laying of mains in the streets of a city or town which is situated between the source of supply and the city to be served,<sup>54</sup> but, if the water company has merely the right to lay its mains and pipes, it must obtain the consent of the municipality before it can supply it with water.<sup>55</sup> If the right to occupy the streets is given by statute and the city withholds its formal permit, it may be restrained by injunction.<sup>56</sup>

### § 251. — Nature and Scope in General

A franchise granted to a water company constitutes a contract after it is accepted and acted on in accordance with its terms. The franchise is governed by the same rules of construction as are applicable to franchises generally.

The grant of a franchise to a water company constitutes a contract after it is accepted<sup>57</sup> and acted on in accordance with its terms,<sup>58</sup> and the rights ac-

quired under it are property,<sup>59</sup> within the protection of the federal Constitution.<sup>60</sup>

*Rules of construction.* The same rules of construction that are applicable to franchises generally govern the construction of a grant of a privilege or franchise to a public service water company.<sup>61</sup> Such a grant of a privilege or franchise is to be strictly construed against the company,<sup>62</sup> and ambiguities and doubts are to be resolved in favor of the public,<sup>63</sup> but, in the construction of a grant of power to condemn private property by right of eminent domain, the tendency has been said to be liberally to construe grants in favor of the company.<sup>64</sup>

While a provision will not be read into a franchise by implication,<sup>65</sup> a franchise will not be construed so as to be meaningless,<sup>66</sup> and, if a strict construction would be highly penal and destructive as to both the city and the company, the court will favor a liberal construction to preserve the substantial rights of both parties.<sup>67</sup> If material rights have been acquired under a certain construction,

53. Pa.—New Cumberland Borough v Riverton Consol Water Co., 81 A 799, 282 Pa 531.  
67 C J p 1182 note 17

54. N Y.—Pelham Manor v New Rochelle Water Co., 38 NE 711, 143 N Y 533.  
67 C J p 1182 note 18

55. N Y.—Rochester v Rochester, etc., Water Co., 82 NE 154, 189 N Y 323.  
67 C J p 1182 note 19

56. Md.—Baltimore v Baltimore County Water Co., 52 A 670, 95 Md 232.  
67 C J p 1182 note 20

57. Ind.—Seymour Water Co v City of Seymour, 197 NE 701, 102 Ind App 56.  
67 C J p 1181 note 6

**Action for breach**  
Where water company's proceeding in nature of mandamus to obtain permits necessary to operate under its franchise was dismissed on ground that exercise of power of eminent domain had rendered the application academic, water company could maintain action against city for breach of its franchise.—New York Water Service Corp v City of New York, 116 NYS 2d 290, 201 Misc 594, affirmed 113 NYS 2d 260, 279 App Div 1048, affirmed 110 NE 2d 885, 304 N Y 945

58. Ark.—City of El Dorado v Citizens' Light & Power Co., 250 SW 882, 158 Ark 550.  
67 C J p 1181 note 7

59. U S.—Superior Water, Light & Power Co. v. City of Superior, Wis.,

44 S Ct 82, 263 US 125, 68 L Ed 204

67 C J p 1181 note 8

60. U S.—Superior Water, Light & Power Co v City of Superior, supra  
67 C J p 1181 note 9

61. Ky.—Prestonsburg Water Co v Dingus, 111 SW 2d 661, 271 Ky 240, followed in Prestonsburg Water v Neeley, 111 SW 2d 665, 271 Ky 247

W Va.—Mountain State Water Co v Town of Kingwood, 9 SE 2d 532, 122 W Va 374

Construction of grants of franchises generally see Franchises §§ 21-23

**Practical construction by parties**  
Mo.—State ex inf McKittrick, ex rel City of Springfield v Springfield City Water Co., 131 SW 2d 525, 345 Mo 6

#### Particular provisions construed

(1) The words "unrestricted use" in water franchise providing for city's unrestricted use of water for fire purposes meant that for the consideration recited, the city without additional obligation or charge should have free use of water for fire purposes without regard to quantity or to duration of use.—Prestonsburg Water Co v Dingus, 111 SW 2d 661, 271 Ky 240, followed in Prestonsburg Water Co v Neeley, 111 SW 2d 665, 271 Ky 247

(2) A provision in water franchise that pressure should be sufficient to force water through 2-inch fire hose vertically 45 feet contemplated that hose would be equipped with a proper nozzle.—Prestonsburg Water Co v

Dingus, 111 SW 2d 661, 271 Ky 240, followed in Prestonsburg Water Co v Neeley, 111 SW 2d 665, 271 Ky 247

(3) Where town in granting franchise for water plant for term of twenty years agreed not to erect or maintain plant except if it bought plant from franchise holder, the town agreed only to refrain from constructing a municipal plant during initial period of franchise, and did not agree to so refrain during any extension, the franchise providing that if, at expiration of franchise, town had not purchased property from franchise holder, the franchise should be renewed.—Kansas City Power & Light Co v Town of Carrollton, 142 SW 2d 849, 346 Mo 802

62. Tex.—City of Memphis v Browder, Com App, 12 SW 2d 160  
67 C J p 1183 note 26

63. Or.—Copeland v City of Waldport, 31 P 2d 670, 147 Or 60  
67 C J p 1183 note 27

64. Pa.—Reeves v Philadelphia Suburban Water Co., 135 A 362, 136 A 526, 287 Pa 376

65. Mo.—Kansas City Power & Light Co v Town of Carrollton, 142 SW 2d 849, 346 Mo 802

66. Or.—City of Joseph v Joseph Waterworks Co., 111 P 864, 112 P 1083, 57 Or 586  
67 C J p 1183 note 30

67. U S.—City and County of Denver v Denver Union Water Co., Colo., 38 S Ct 278, 246 US 178, 62 L Ed 649  
67 C J p 1183 note 31.

they will be protected by the courts<sup>68</sup> A construction of ambiguous provisions of the franchise by one consumer or beneficiary is not binding on others who have not acquiesced therein<sup>69</sup>

*Extent of territory* A water company, by its charter or by statute, may be limited to the supply of but one municipality or district,<sup>70</sup> but, even under such restrictions, by permissive merger with other companies similarly chartered, it may supply two or more<sup>71</sup> In the absence of statutory or charter restrictions a water company may supply more than one municipality<sup>72</sup> or even supply water outside the state of its domicile<sup>73</sup> If the right to supply a certain territory and vicinity is given, the water company may supply separate municipalities in that vicinity,<sup>74</sup> and this right is not lost by the acceptance of another incorporation act or statute which does not impair its franchise privileges<sup>75</sup> Where the charter of a water company authorizes it to supply water for a certain city and the towns adjoining, it has been held that the right to supply adjoining townships is given.<sup>76</sup> The territory of a water company is not extended by a consolidation of the town, which it is authorized to supply, with another town<sup>77</sup>

## § 252. — Exclusiveness of Rights or Privileges

A water company may be granted an exclusive franchise, but such a franchise will not be raised by inference or implication, or, when expressly granted, extended beyond the exact scope of the grant

An exclusive franchise may be granted to a water company by the legislature<sup>78</sup> or by a municipality if

legislative authority has been given to it<sup>79</sup> Where an exclusive franchise has been granted the company will be fully protected not only against other incorporated water companies, but also against individuals and unincorporated associations,<sup>80</sup> and the city will be bound not to operate a system of waterworks of its own during the life of the franchise,<sup>81</sup> if it does so it may be restrained by injunction<sup>82</sup> or the water company may obtain compensation in damages for the consequent diminution or destruction of the value of its franchise and property<sup>83</sup> Where a charter to supply water in a certain territory gives the exclusive right, a charter will not be granted to another company for that territory,<sup>84</sup> but, where the charter gives an exclusive right to only part of the territory, another company may be authorized to do business in that which is nonexclusive<sup>85</sup>

While a municipal corporation has no power to grant an exclusive franchise to a water company, unless authorized by the legislature,<sup>86</sup> it may exclude itself from constructing and operating waterworks of its own for the term covered by the contract<sup>87</sup> Notwithstanding a contract with a water company may be void in so far as it attempts to create an exclusive privilege, it will bind the city to pay the price stipulated in the contract as long as it accepts the service offered in pursuance of the contract<sup>88</sup>

Grants of exclusive privileges will not be raised by inference or implication, or, when expressly granted, extended beyond the exact scope of the

68. Pa—City of Bethlehem v City of Allentown, 118 A 643, 275 Pa 110 67 C J p 1183 note 32

69. NM—State v Water Supply Co of Albuquerque, 140 P 1059, 19 NM 36, L R A 1915A 246, Ann Cas 1916E 1290

70. Pa—Bly v White Deer Mountain Water Co, 46 A 929, 197 Pa 80 67 C J p 1183 note 34

71. Pa—Gring v. Spring Water Co, 20 Pa Dist 891

72. Pa—Forty Fort v. Forty Fort Water Co, 9 Kulp 241

73. Iowa—Dodge v Council Bluffs, 10 NW 886, 57 Iowa 560

74. Pa—Croyle v Johnstown Water Co, 103 A 303, 259 Pa 484

75. Pa—Croyle v. Johnstown Water Co, supra 67 C J p 1183 note 40.

76. NJ—Plainfield-Union Water Co v Inhabitants of City of Plainfield, 87 A. 448, 84 N J Law 634.

77. NY—In re Beauty Spring Water Co, 118 N Y S 659, 134 App Div 17, affirmed 91 NE 1101, 193 NY 413 67 C J p 1183 note 42

78. Del—Thoroughgood v Georgetown Water Co, 77 A 720, 9 Del Ch 84 67 C J p 1184 note 47

Exclusiveness of franchises generally see Franchises § 22 Grants of exclusive privileges to use streets generally see Municipal Corporations § 1724

79. Miss—Adams v Samuel R Bullock & Co, 47 So 527, 94 Miss 27, 19 Ann Cas 165 67 C J p 1184 note 47—44 C J p 223 note 63

Right of municipality to grant exclusive franchise generally see Municipal Corporations § 1082 d

80. Pa—Freeport Water Works Co v Prager, 3 Pa Co 371

81. US—Walla Walla v Walla Wal-

la. Water Co, Wash, 19 SCt 77, 172 US 1, 43 L Ed 341 67 C J p 1184 note 49

82. US—Vicksburg Waterworks Co v Vicksburg, Miss, 22 SCt 585, 185 US 65, 46 L Ed 808 67 C J p 1184 note 50

83. Pa—Bennett Water Co v Millvale, 51 A 1098, 202 Pa 616

84. Pa—In re Bryn Mawr Water Co, 1 Pa Dist 89, 10 Pa Co 670.

85. Pa—City of New Castle Water Co v West New Castle Water Co, 18 Pa Co 498 67 C J p 1184 note 45

86. Mo—Kansas City Power & Light Co v Town of Carrollton, 142 SW 2d 849, 346 Mo 802 67 C J p 1184 note 46

87. Mo—Kansas City Power & Light Co v Town of Carrollton, supra 44 C J p 179 note 6, p 223 note 65

88. US—Illinois Trust, etc, Bank v Arkansas City Water Co, CC Kan, 67 F. 196.



grant,<sup>89</sup> and, hence, unless a franchise granted is very clearly made exclusive, it will not prevent grants of similar privileges to a rival or competing company,<sup>90</sup> or prevent the municipality from constructing and maintaining its own water supply system.<sup>91</sup> A city is not precluded from constructing a water system of its own by a franchise which provides that it would not contract with anyone else for a supply of water,<sup>92</sup> or by a contract that it would not grant to anyone else the right to maintain water pipes in the streets.<sup>93</sup> The fact that a city had granted the exclusive right to conduct a waterworks plant in the city does not preclude it from permitting a railroad or manufacturing company to lay pipes in the streets so as to obtain water for its own consumption from another source.<sup>94</sup> An exclusive franchise for a definite term does not prevent the city from issuing bonds for and constructing its own waterworks to be operated after the franchise expires.<sup>95</sup> Although the franchise of a water company is not exclusive, the city may not distribute water in that territory if expressly forbidden to do so by statute.<sup>96</sup>

*Loss or termination of exclusive rights.* A water company may surrender its exclusive rights by laches and acquiescence in the invasion of those rights to the extent of the invasion.<sup>97</sup> Where a statute provides that the right to enjoy the franchise shall be exclusive until the company has paid from its earnings a dividend equal to a certain per cent of

its capital stock, the company no longer enjoys an exclusive right after it has paid the amount stated in the statute.<sup>98</sup>

## § 253. — Duration and Termination

### a. In general

### b. Forfeiture

### a. In General

The franchise of a water company may be perpetual, in the absence of a limitation by the terms of the grant or the law of the jurisdiction.

If the duration of a franchise of a water company is not limited by the terms of the grant or the law of the jurisdiction, it is perpetual,<sup>99</sup> but it is not perpetual if so limited.<sup>1</sup> Where a municipality is without power to grant a perpetual franchise to a water company, it will not be presumed to have intended to do so.<sup>2</sup> Where the powers of a municipal corporation with respect to the length of time for which a franchise of this kind may be granted is limited, it has no power whatever to exceed the specified period,<sup>3</sup> and this is also true with respect to granting an extension of such a franchise.<sup>4</sup> In the absence of such a limitation, the grant of a franchise for twenty or thirty years is not unreasonable or an abuse of discretion.<sup>5</sup> The duration of a franchise for a specified period or until the works should be purchased by the municipality has been construed to be indeterminate as to time.<sup>6</sup> Under a statute fixing the maximum length

89. Or—Copeland v City of Waldport, 31 P 2d 670, 147 Or 60  
Pa—In re West Eaton Spring Water Co, 9 Pa Dist 546.  
67 C J p 1184 note 52

**Certificate of convenience and necessity** granted public utility by Corporation Commission, under which utility furnished domestic water to residents of addition to city, was not an exclusive franchise to furnish such water.—City of Tucson v Polar Water Co, 259 P 2d 561, 76 Ariz 126

90. Pa.—Philpsburg Water Co v Philpsburg Borough, 53 A. 347, 203 Pa 562  
67 C J p 1184 note 53

91. N Y—Westchester Joint Water Works No 1 v Village of Pelham, 265 N Y S 491, 148 Misc 349, affirmed 269 N Y S 966, 241 App Div 687  
Or—Copeland v City of Waldport, 31 P 2d 670, 147 Or 60  
67 C J p 1185 note 54—44 C J. p 223 note 64

92. US—Washington-Oregon Corp v City of Chehalis, D C Wash, 202 F. 591.

93. Va—City of Norfolk v Norfolk

County Water Co, 74 SE 226, 113 Va 303

67 C J p 1185 note 56

94. La—New Orleans Waterworks Co v Louisiana Sugar Refinery Co, 35 La Ann 1111

Miss—Vicksburg Waterworks Co v. Yazoo, etc, R Co, 51 So 915, 96 Miss 807

95. US—City of Vicksburg v Henson, Miss, 34 S Ct 95, 231 US 259, 58 L Ed 209

96. N Y—Flatbush Waterworks Co v People, 222 N Y S 665, 220 App. Div 784, 129 Misc 746, appeal dismissed 159 NE 676, 246 NY 621

97. Pa—Edgeworth Water Co. v Borough of Sewickley, 164 A. 523, 309 Pa 425

98. Pa—Dorrance v. Bristol Borough, 73 A 1015, 224 Pa. 464

67 C J p 1185 note 62

99. US—City of Livingston v Monday Trust, CCA Mont, 261 F 966  
67 C J p 1186 note 73.

1. US—Bankers' Trust Co v City of Raton, N M, 42 S Ct 340, 258 U S 328, 66 L Ed 642  
67 C J p 1186 note 74

2. US—Boise City Artesian Hot,

etc, Water Co v Boise City, Idaho, 123 F 232, 59 CCA 236

Or—Joseph v Joseph Waterworks Co, 111 P. 864, 112 P 1083, 57 Or 586

3. US—City and County of Denver v. New York Trust Co, Colo, 33 S Ct 657, 229 US 123, 57 L Ed 1101

67 C J p 1186 note 70

4. Neb—Poppleton v Moores, 93 N W. 747, 88 N W. 128, 62 Neb 851, 67 Neb 388

5. Ala—Gadsden v Mitchell, 40 So 557, 145 Ala 137, 117 Am SR 20, 6 L R A, N S, 781

67 C J p 1186 note 72

6. Pa—Borough of Mt Union v Mt Union Water Co, 100 A 968, 256 Pa 516

### Right to maintain system until purchase

Under ordinances granting right to construct and operate waterworks "for the term of 20 years or until purchased by the city," and referring to and granting "the exclusive right and privilege to use all streets," giving city right to purchase waterworks system at end of 10 years or of any 5 year period thereafter, water com-

of time for which a franchise by the city may be granted, a grant for a specified longer period may be invalid,<sup>7</sup> but, if it is for an indefinite term, the grant is valid for the length of time named in the statute<sup>8</sup>

A grant of a franchise for the corporate life of the grantee has been construed as for a period of time for which the company is chartered to exist,<sup>9</sup> including extensions of corporate life which the company may be authorized to secure by its original charter,<sup>10</sup> and such construction is not altered by the fact that a grant to the company's predecessor was limited to a specified number of years.<sup>11</sup> A franchise is not invalid because it is to last longer than the term for which the councilmen voting it hold office.<sup>12</sup> Where a town for which a franchise to supply water has been given subsequently merges with another municipality, the consent of the municipality with which the merger has been made is not necessary for the continuation of the rights given in the franchise.<sup>13</sup>

*Effect of expiration* On the expiration of the franchise by limitation the rights under it of both the water company and the city cease,<sup>14</sup> but, where service is continued and accepted, a quasi-contractual relation arises which is terminable by either party<sup>15</sup> at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of the city,<sup>16</sup> but as long as the service continues the company is subject to regula-

tion by the state or the municipality,<sup>17</sup> and is bound to supply water adequate to its reasonable capacity and at reasonable rates.<sup>18</sup> An agreement to continue to act under the franchise after its expiration is invalid where the constitution of the state provides that such rights can be vested only through the acquisition of a franchise in a prescribed manner.<sup>19</sup> Under an agreement granting a franchise for a prescribed period and giving the municipality an option of buying the plant from the company, and providing that if, at the expiration of the franchise, the municipality has not purchased the property the franchise shall be renewed, it has been held that the failure of the municipality to exercise its option prior to the expiration of the franchise automatically renews the franchise.<sup>20</sup>

### b. Forfeiture

The franchise of a water company may be forfeited where the proper grounds are shown to exist.

A franchise to a water company cannot be recalled at will<sup>21</sup> unless, as drawn, it is made subject to legislative repeal,<sup>22</sup> and the legislature has no power to alter the time for its expiration.<sup>23</sup> A franchise may lawfully provide for forfeiture,<sup>24</sup> and such provision may be enforced.<sup>25</sup>

Apart from, or because of, an express provision for forfeiture, the privileges or franchise of a water company may be forfeited for failure to furnish an adequate supply of water,<sup>26</sup> or for fur-

pany had right to maintain system until city should purchase, as against contention that franchise expired by limitation after 20 years, especially in view of acts of the parties construing the ordinance as granting perpetual franchise and electors' rejection of proposal that city purchase—State ex inf McKittrick, ex rel City of Springfield v Springfield City Water Co, 131 SW 2d 525, 345 Mo 6

7. US—Boise Artesian Hot & Cold Water Co v Boise City, Idaho, 33 S Ct 997, 230 US 84, 57 L Ed 1400

8. US—Boise Artesian Hot & Cold Water Co v Boise City, supra 67 C J p 1186 note 78

9. US—City of Owensboro v Owensboro Waterworks Co, Ky, 37 S Ct 322, 243 US 166, 61 L Ed 650.

10. US—City of Owensboro v Owensboro Waterworks Co, supra

11. US—City of Owensboro v Owensboro Waterworks Co, supra

12. US—Illinois Trust, etc, Bank v Arkansas City, Kan, 76 F. 271, 22 CCA 171, 34 LRA 518. 67 C J p 1186 note 79.

13. NY—City of New York v Citizens' Water Supply Co of Newtown, 198 NYS 816, 204 App Div 783, affirmed 143 NE 753, 237 NY 587

67 C J p 1186 note 89  
Franchises and privileges as dependent on consent of municipality see supra § 250

14. US—City Water Co of Chillicothe v City of Chillicothe, Mo, 207 F 503, 125 CCA 165

67 C J p 1186 note 83

15. US—Hill v Elizabeth City, C C A NC, 298 F 67

67 C J p 1186 note 84

16. US—Hill v Elizabeth City, supra

NC—Elizabeth City Water & Power Co v Elizabeth City, 124 SE 611, 188 NC 278

17. Mo—Laughton v City of Carthage, Mo, 175 F 145

18. Mo—Laughton v City of Carthage, Mo, supra

19. Ky—Board of Education of City of Somerset v Kentucky Utilities Co., 21 SW 2d 817, 231 Ky 484

20. Mo—Kansas City Power & Light Co v Town of Carrollton, 142 S.W 2d 849, 346 Mo 802.

21. US—City of Livingston v Montidah Trust, CCA Mont, 261 F 966

67 C J p 1185 note 66

22. Me—Kennebec Water Dist v Waterville, 54 A 6, 97 Me 185, 60 LRA 856

23. US—Superior Water, Light & Power Co v City of Superior, Wis, 44 S Ct 82, 263 US 125, 68 L Ed 204

67 C J p 1185 note 68

24. Or—Newsom v City of Rainier, 185 P 296, 298, 94 Or 199

67 C J p 1187 note 91

Forfeiture of franchises generally see Franchises § 27

25. Wis—State v Portage City Water Co, 83 NW. 697, 107 Wis 441

26. US—Mercantile Trust, etc, Co v Columbus, Ga, 31 S Ct 105, 218 US 645, 54 L Ed 1193

67 C J p 1187 note 93

### Appointment of receiver

Where a receiver for the water company had been appointed with the consent of the city, the city had no right to insist on a forfeiture of the franchise for the nonsupply of water—Illinois Trust, etc, Bank v Burlington, 101 P 649, 79 Kan 797—67 C J p 1188 note 10

nishing impure water,<sup>27</sup> persistent overcharging,<sup>28</sup> refusal to connect fire hydrants with the main,<sup>29</sup> or other willful violations of public duty,<sup>30</sup> but a forfeiture will not be enforced where the legislature has specifically provided another remedy for the particular wrong complained of<sup>31</sup>

The interest of the public must be the foundation on which a forfeiture rests,<sup>32</sup> and to justify a forfeiture it must be shown that the company has willfully abused its franchise,<sup>33</sup> although particular breaches, even if willful, might not of themselves be ground for forfeiture<sup>34</sup> If a duty sought to be imposed on the water company does not arise by clear implication, a failure in good faith to perform it will not be regarded as a willful breach of duty<sup>35</sup> The proper procedure is to determine in an appropriate action whether the duty exists,<sup>36</sup> and, if it is determined to exist, a subsequent violation constitutes ground for forfeiture of the franchise<sup>37</sup> If insolvency of the water company is the ground for forfeiture, the company must be shown to be in such a financial condition as to make it reasonably certain that it is unable to perform its contract<sup>38</sup>

*Franchise separable from contract* Where a franchise and contract with a water company are separable, the city may enforce a forfeiture of the franchise, although it has failed to perform its part of the contract<sup>39</sup>

*Proceedings to enforce* Breach of duty will not

ipso facto terminate the franchise,<sup>40</sup> and, if no method of procedure for forfeiture is provided for, the city or state must resort to the proper judicial proceedings,<sup>41</sup> but where the franchise provides that it may be forfeited by the city council for breach, a repealing ordinance declaring the franchise ordinance void is sufficient<sup>42</sup> Long acquiescence by the city in the company's failure to fulfill certain of its obligations may operate as a waiver of the right to enforce a forfeiture by reason thereof<sup>43</sup> Under a franchise which contemplates that notice of breach of duty shall be served on the water company, the city need not serve notice on the trustee or president of the company, but service on the superintendent is sufficient<sup>44</sup> The remedy for the mere misbehavior of a water company in the exercise of its franchise is a proper proceeding at the instance of the commonwealth and not at the instance of an individual,<sup>45</sup> and if a constitutional provision limits the parties interested in the forfeiture of a franchise to the state and the city, a statute authorizing a forfeiture on the complaint of any person is unconstitutional<sup>46</sup> Mortgagees of a water company's plant are necessary parties to a suit by the city to annul the company's franchise<sup>47</sup> Although the court may adjudge a charter forfeited, it has the power, if public necessity demands, to suspend the enforcement of the judgment until arrangements can be made by the city to obtain another water supply<sup>48</sup>

27. US—Farmers' L & T Co v Galesburg, Ill., 10 S Ct 316, 133 U S 156, 33 L Ed 573  
67 C J p 1187 note 94

28. La—State v New Orleans Waterworks Co., 31 So 395, 107 La 1, error dismissed 22 S Ct 691, 185 US 336, 46 L Ed 936  
67 C J p 1187 note 95

29. NY—Village of Bolivar v Bolivar Water Co., 70 NYS 750, 62 App Div 184

30. Tex—City Water Co v State, Civ App, 33 SW 259  
67 C J p 1187 note 97

**Decree that franchise is perpetual** does not mean that it may not be lost or forfeited for breach of duty by the company—City of Livingston v Mondayah Trust, CCA Mont, 261 F 966

**Evidence held insufficient**

To show that equipment did not comply with the requirements of the franchise—Combs v Prestonsburg Water Co., 84 SW 2d 15, 260 Ky 169

31. Kan—State v Galena Water Co., 65 P 257, 63 Kan 317  
67 C J p 1187 note 98

32. Tex—Gainesville Water Co v City of Gainesville, 128 SW 370, 103 Tex 394

33. Tex—Gainesville Water Co v City of Gainesville, supra

**Willful and persistent refusal**

Where failure to supply wholesome water is a ground, the failure must be shown to have been willful and persistent—Gainesville Water Co v City of Gainesville, supra—67 C J p 1187 note 3

34. Ala—State v Birmingham Waterworks Co., 64 So 23, 185 Ala 388, Ann Cas 1916D 166  
67 C J p 1187 note 2

35. Ala—State v Birmingham Waterworks Co., supra  
67 C J p 1187 note 4

36. Ala—State v Birmingham Waterworks Co., supra

37. Ala—State v Birmingham Waterworks Co., supra

38. Tex—Gainesville Water Co v City of Gainesville, 128 SW 370, 103 Tex 394  
67 C J p 1188 note 7

39. US—Montana Water Co v City of Billings, D C Mont, 214 F 121, appeal dismissed 224 F 1021, 139 CCA 665  
67 C J p 1188 note 11.

40. Cal—Hatfield v People's Water Co., 145 P 164, 25 Cal App 711  
67 C J p 1188 note 12

41. Or—Newsom v City of Rainier, 185 P 296, 94 Or 199  
67 C J p 1188 note 13

42. Or—Newsom v City of Rainier, supra  
67 C J p 1188 note 14

43. Mo—Daly v City of Carthage, 128 S W 265, 143 Mo App 564  
67 C J p 1188 note 15

44. Ill—Illinois Trust, etc, Bank v Pontiac, 112 Ill App 545, affirmed 72 NE 411, 212 Ill 326

45. Pa—Bland v Tipton Water Co., 71 A 101, 222 Pa 285  
67 C J p 1198 note 86

46. Cal—Hatfield v People's Water Co., 144 P 300, 25 Cal App 502.

47. Okl—El Reno v El Reno Water Co., 76 P. 126, 14 Okl 53

48. Tex—Ennis Waterworks v City of Ennis, Civ App, 136 SW 513, affirmed 144 SW 930, 105 Tex. 63, appeal dismissed 34 S Ct. 767, 233 US 652, 58 L Ed 1139.  
67 C J p 1188 note 20.

## § 254. Rights, Powers, and Duties

A water company has such rights as are granted in its charter or franchise, and such incidental ones as are necessary to carry into effect those specifically conferred

A water company has only such rights as are granted in its charter or franchise,<sup>49</sup> including not only those expressly granted, but also such incidental ones as are necessary to carry into effect those specifically conferred.<sup>50</sup> It may enter into contracts and engage in transactions which are incidental or auxiliary to its main business,<sup>51</sup> such as cutting and storing ice from its reservoirs<sup>52</sup> or furnishing water power,<sup>53</sup> but it has no authority to engage in the sale of water power when such is outside of its legitimate corporate business.<sup>54</sup> Authority to engage in pursuits usually outside a water company's powers may be given by the legislature,<sup>55</sup> and so a company may supply both gas and water if incorporated for such a dual purpose.<sup>56</sup> A water company has the right to make and enforce reasonable rules and regulations for the conduct of its business.<sup>57</sup>

Ordinarily the water company may exercise control over the source of its supply,<sup>58</sup> but if it has no legislative grant to a source of supply, it has no right to it after the city to whom the grant had been given withdraws its permission,<sup>59</sup> and if it has never

condemned the stream or any portion of it relied on for the supply, its rights as against another company seeking to appropriate water from the stream<sup>60</sup> or against coal mine operators draining mine waters into the stream,<sup>61</sup> are merely those of a riparian owner. If prohibited by statute, a water company cannot transport or divert water out of the state.<sup>62</sup> A mere legislative permission to a municipality to buy water bestows no right to divert water from a stream on the seller,<sup>63</sup> but the water company may receive whatever right the municipality had to divert water by reason of its contract with it.<sup>64</sup> The fact that the ordinance granting the franchise does not directly refer to the rights granted in the charter does not prevent the company from exercising charter rights not inconsistent with the ordinance.<sup>65</sup>

A water company must fulfill all its obligations to the public arising directly or impliedly from its franchise.<sup>66</sup> It must render adequate service,<sup>67</sup> irrespective of its financial condition,<sup>68</sup> and must so maintain its plant as to be efficient for that purpose.<sup>69</sup>

## § 255. — Rights of Way

A public service water company may acquire a right of way for the purpose of conveying its product on or across private property by a grant or license from the owner of the property to be traversed, or the power of eminent domain may be exercised.

49. Ind—Terre Haute Paper Co v Terre Haute Waterworks Co, 110 NE 85, 62 Ind App 263

Mass—Inhabitants of Town of Holliston v Holliston Water Co, 27 NE 2d 194, 306 Mass 17.

67 C J p 1189 note 22

Grants of privileges or franchises generally see supra § 250

Rights and duties of public utilities generally see Public Utilities §§ 4-9

50. Conn—S O & C Co v Ansonia Water Co, 78 A 432, 83 Conn 611. 67 C J p 1189 note 23.

#### Sale of water to municipalities

The statute authorizing municipal water suppliers to take water from nonnavigable streams and condemn lands on which to build works for pumping, storage, distribution, and management of such water does not prevent water companies from selling to municipalities water from any private source legally acquired—State ex rel Missouri Water Co v Bostian, Mo App, 272 SW 2d 857, reversed on other grounds, Sup, 280 S W 2d 663

51. Conn—S O & C Co. v Ansonia Water Co, 78 A 432, 83 Conn 611. 67 C J. p 1189 note 24.

52. N Y—People ex rel Goff v Kirk, 122 NYS 604, 65 Misc 657. 67 C J p 1189 note 25.

53. Conn—S O & C Co v Ansonia Water Co, 78 A 432, 83 Conn 611. 67 C J p 1189 note 26

54. N J—Boonton v United Water Supply Co, 64 A 1064, 70 N J Eq 692

67 C J p 1189 note 27

55. N J—Olmsted v Proprietors Morris Aqueduct, 47 N J Law 311

56. Pa—Tyrone Gas & Water Co v Borough of Tyrone, 149 A. 713, 299 Pa 533

57. Ky—Combs v Prestonsburg Water Co, 84 SW 2d 15, 260 Ky 169

58. U S—Mann v Des Moines Water Co, Iowa, 202 F 862, 121 C.C.A. 220

Mass—Watuppa Reservoir Co v Fall River, 28 NE 257, 154 Mass 305, 13 L R A 255

67 C J p 1189 note 31

59. N Y—Stolz v Syracuse, 111 N Y S 467, 59 Misc 600, affirmed 119 NYS 1146, 134 App Div 993, affirmed 94 NE 1099, 201 N Y 512

60. Pa—Phillipsburg Water Co v Citizens' Water Co, 41 A 979, 189 Pa 23

61. Pa—Mountain Water Supply Co v Sagamore Coal Co, 3 Pa Dist & Co 187

62. N J—McCarter v Hudson County Water Co, 65 A. 489, 70 N J Eq

695, 14 L R A, N S, 197, 118 Am S R 754, 10 Ann Cas 116, affirmed 28 S Ct 529, 209 U S 349, 52 L Ed 828, 14 Ann Cas 560

67 C J p 1189 note 34

63. N J—Weidman Silk Dyeing Co. v East Jersey Water Co, 91 A. 338, reversed on other grounds 96 A. 1103, 88 N J Law 400

64. N J—Wilson v East Jersey Water Co, 79 A 440, 78 N J Eq 329

65. Pa—New Cumberland Borough v Riverton Consol Water Co, 81 A 799, 232 Pa 531

66. W Va—City of Wheeling v Benwood-McMechen Water Co, 176 S E. 234, 115 W Va 353

"Water companies are obligated not only to furnish the commodity, but to provide for its delivery"—Seiden v Passaic Val Water Commission, 199 A 420, 422, 16 N J Misc 301

67. Va—Alexandria Water Co v City of Alexandria, 177 S E 454, 163 Va 512

67 C J p 1189 note 37

68. N J—Middlesex Water Co v. Board of Public Utility Com'rs, 140 A 254, 6 N J Misc 51

67 C J p 1190 note 38

69. Del—Thoroughgood v. Georgetown Water Co, 77 A. 720, 9 Del Ch 84.

A public service water company has no inherent right to convey its product on or across private property,<sup>70</sup> but a right of way for this purpose may be acquired by grant or license from the owner of the property to be traversed,<sup>71</sup> or the power of eminent domain may be exercised.<sup>72</sup> Where the company obtains a right of way by grant, it must continue to fulfill the conditions of the grant as long as it enjoys the easement.<sup>73</sup> A license to lay water mains across land may be granted by parol,<sup>74</sup> but it may be revoked.<sup>75</sup> A grant of a right of way below the surface does not imply the grant of a right to make surface improvements.<sup>76</sup> The use of rights of way and reservoir sites by a water company is not exclusive, and another public service corporation may be permitted to use them jointly with the first company.<sup>77</sup>

A water company may acquire an easement by

prescription,<sup>78</sup> but where the use is permissive, an easement by prescription cannot be acquired,<sup>79</sup> and a recognition by the water company of a superior title refutes its claim of a prescriptive right.<sup>80</sup>

## § 256. — Streets and Highways

A water company is subject to reasonable supervision and control in its use of the streets and highways.

The use of the streets and highways by a water company is subject to reasonable supervision and control by the state<sup>81</sup> and municipal authorities,<sup>82</sup> but such regulation must not in fact amount to prohibition.<sup>83</sup> Although a municipality may have granted the privilege of occupying the streets, such rights are in subordination to such police ordinances as are reasonably necessary to protect the public health, safety, and convenience.<sup>84</sup> The company may be required to secure a permit in con-

70. Ill.—City Water Co v Silverfarb, 128 Ill App 215

71. Pa.—Ozehoski v Scranton Spring Brook Water Service Co, 43 A 2d 601, 157 Pa Super 437  
67 C J p 1190 note 41

### Additional pipe line

A water company acted within its rights in adding to four inch water pipe line, an eight inch line, where easement of right of way for line was created for purpose of supplying a city with water, and the additional line was reasonably within such purpose and additional line was laid entirely within right of way to which servient land was subject—Ozehoski v Scranton Spring Brook Water Service Co, supra

### Constructive notice

Where easement of right of way for water pipe line was mentioned as existing in recorded deed to one of plaintiffs' predecessors, plaintiffs could not question existence of easement, notwithstanding deed to plaintiffs made no reference thereto and reference in prior deed did not designate with definiteness part of land to which easement attached, where inquiry would have informed plaintiffs as to location of pipe line—Ozehoski v Scranton Spring Brook Water Service Co, supra

72. Mo.—State ex rel Missouri Water Co v Bostian, App, 272 S W 2d 857.

67 C J p 1190 note 42

Right of eminent domain for water supply purposes generally see Eminent Domain § 45

73. Cal.—Southern Pac R Co v Spring Valley Water Co, 159 P 865, 173 Cal 291

67 C J p 1190 note 43.

74. Mont.—Great Falls Waterworks Co v Great Northern R Co, 54 P 963, 21 Mont 487.

75. NY—Jayne v Cortland Water Works Co, 86 NYS 571, 42 Misc 263, reversed on other grounds 95 NYS 227, 107 App Div 517

76. Or.—Minto v Salem Water, Light & Power Co, 250 P 722, 120 Or 202

67 C J p 1190 note 48

77. NM.—City of Raton v Raton Ice Co, 191 P 516, 26 NM 300

78. Cal.—Chapman v Sky L'Onda Mut Water Co, 159 P 2d 988, 69 Cal App 2d 667

Creation of easement by prescription generally see Easements §§ 6-22

### Evidence

(1) Conflicting evidence supported finding of trial court that mutual water company had acquired an easement to maintain and operate reservoirs, pumps, and water lines on land which it had used for that purpose for more than nine years without objection by owner—Chapman v Sky L'Onda Mut Water Co, 159 P 2d 988, 69 Cal App 2d 667.

(2) Where mutual water company, the nature of whose original entry was not explained, had openly and exclusively used land of another for more than nine years maintaining reservoirs and distributing system thereon and exercising control and domination of the property, without recognizing record title owner's superior right to possession, adverse nature of claim and owner's notice thereof would be presumed—Chapman v Sky L'Onda Mut Water Co, supra.

79. Mont.—Great Falls Waterworks Co v Great Northern R Co, 54 P 963, 21 Mont. 487.

Or.—Minto v Salem Water, Light & Power Co, 250 P 722, 120 Or 202

### Change to adverse easement

Where permission to lay a water

main was originally given by the city, since it was to be laid in the bed of a street which had been laid out but not opened, and the street is subsequently vacated and the owners take no action, the easement changes from a permissive to an adverse one—Reading Co v Maguire, 82 Pa Dist & Co. 599

80. Or.—Minto v. Salem Water, Light & Power Co, 250 P. 722, 120 Or 202

67 C J p 1190 note 47

81. Pa.—Commonwealth ex rel Reno v Heidelberg Tp Water Co, 48 Pa Dist & Co 511, 54 Dauph Co 193

82. N J.—Hackensack Water Co v Ruta, 69 A 2d 321, 3 N J 139

NY—City of New Rochelle, on Complaint of Conlon, v Burke, 43 NE 2d 463, 288 NY 406

67 C J p 1190 note 51

Consent of municipality see supra § 250

"The local agency may not nullify the legislative franchise grant, it may regulate its exercise to serve the public convenience and necessity and the interests of the abutting landowners, but it may not destroy it by inaction. It may impose such conditions as shall be found necessary for the protection of the easement of passage and the public safety and welfare, and the streets and highways against injury and damage, and the contiguous landowners against loss or undue interference with their rights and interests"—Hackensack Water Co v Ruta, 69 A 2d 321, 324, 3 N J 139.

83. Pa.—Shryock v North Braddock Borough, 43 Pa Super. 508

67 C J. p 1190 note 52

84. Fla.—Anderson v Fuller, 41 So 684, 51 Fla 380, 6 L.R.A., N.S., 1026, 120 Am S R 170.

nection with its use of the streets and highways,<sup>85</sup> such as a permit to make an opening,<sup>86</sup> and where it fails to secure the required permit, it may be restrained by injunction.<sup>87</sup> The municipality may prohibit the company from laying its mains if it has not fulfilled the conditions precedent to that right,<sup>88</sup> or if it is doubtful if the company has been validly incorporated,<sup>89</sup> and a preliminary injunction to restrain the city from interfering will not be issued where the mains would be laid before the matter could be decided.<sup>90</sup> The use of the streets is not limited to present needs but the company may provide for the future.<sup>91</sup>

Although the consent of the municipality need not be obtained, a company is not entitled to excavate in streets or highways if its purpose is unlawful,<sup>92</sup> or if it is laying mains of excessive size,<sup>93</sup> or if it is insolvent and without adequate means to carry out the work.<sup>94</sup> After the right to excavate has been given, the city cannot prohibit the water company from making excavations necessary in order to work on its pipes.<sup>95</sup> Where a water company has merely a bare license to put water pipes in the street it has no right to keep them there without the consent of the owners of the fee in the street.<sup>96</sup> A private water company which supplies the municipal water company has been held not to have the right to use the ground under any street under a statute

which grants the right to a company acting under authority of the city.<sup>97</sup>

*Furnishing water beyond municipal limits.* A grant by a city to a water company of the right to use the streets for mains and pipes does not preclude the water company subsequently from supplying another city from extensions from those mains,<sup>98</sup> and an injunction will not be granted to restrain the company from using the street for an additional main to furnish water beyond the city limits where the main will also be of great use to the city.<sup>99</sup>

*Reconstruction of highway after flooding.* A statute requiring a water company which floods any portion of a public highway to reconstruct and relocate the same at its own expense is mandatory,<sup>1</sup> and such a statute gives a water company the absolute right to reconstruct and relocate any part of a public road when necessary for its corporate purposes.<sup>2</sup>

*Expiration of franchise.* After the expiration of the company's franchise it has an implied right to continue to occupy the streets for a reasonable length of time to negotiate a renewal of the franchise or to close out its business,<sup>3</sup> and it may enter on the streets to remove its pipes and appliances.<sup>4</sup> Where the company no longer has a right to occupy the streets, the city cannot be enjoined from requiring the removal of the system from the

85. Pa.—Beaver Valley Water Co v Conway Borough, 62 A 844, 213 Pa 225—Commonwealth ex rel Reno v Heidelberg Tp Water Co, 48 Pa Dist & Co 511, 54 Dauph Co 193

#### Denial of permit as arbitrary

Under statute authorizing water companies to lay pipes beneath public roads and streets with consent of municipalities through which pipes are laid, action of township in denying a permit to water company with legislative franchise to lay pipes and mains for an extension, unless a borough entered into an agreement with the township with respect to joint use of the utility, was invalid as an arbitrary exercise of power—Hackensack Water Co v Ruta, 69 A 2d 321, 3 NJ 139

86. Pa.—Commonwealth ex rel Reno v Heidelberg Tp. Water Co, 48 Pa Dist & Co 511, 54 Dauph Co 193

**Power to regulate openings in highways,** and to require permits therefor, rests in the commonwealth without regard to the time when pipes were laid under the surface of the highways—Commonwealth ex rel

Reno v Heidelberg Tp Water Co, supra

87. Pa.—Commonwealth ex rel Reno v Heidelberg Tp Water Co, supra

88. NJ—Somerville Water Co v Borough of Somerville, 78 A 793, 78 NJ Eq 199  
67 C J p 1191 note 57

89. NJ—Somerville Water Co v Borough of Somerville, supra

90. NJ—Somerville Water Co v Borough of Somerville, supra

91. Pa.—New Cumberland Borough v Riverton Consol Water Co, 81 A 799, 232 Pa 531  
67 C J p 1191 note 60

92. NJ—City of Bayonne v Borough of North Arlington, 79 A 357, 78 NJ Eq 283  
67 C J p 1191 note 53

Necessity for obtaining consent of municipality generally see supra § 250

93. NJ—Somerville Water Co. v Borough of Somerville, 78 A 793, 78 NJ Eq 199

94. Va.—Petersburg v Petersburg Aqueduct Co, 47 SE 848, 102 Va 654

67 C J p 1191 note 55

95. Pa.—Riverton Consol Water Co v Camp Hill Borough, 24 Pa Dist 453

96. NY—Wightman v Cottrell, 139 NYS 564, 155 App Div 76  
67 C J p 1191 note 62

97. NY—Richards v Citizens' Water Supply Co of Newtown, 125 NYS 116, 140 App Div 206

98. Minn.—Duluth v Duluth Gas, etc, Co, 47 NW 781, 45 Minn 210  
Duty to extend mains see infra § 257 b

99. Pa.—New Cumberland Borough v Riverton Consol Water Co, 81 A 799, 232 Pa 531  
67 C J p 1191 note 65

1. Pa.—Petition of Manufacturers' Water Co, 19 Pa Dist 728

2. Pa.—In re Spring Brook Township Road, 6 Pa Dist & Co 340

3. Iowa—Cedar Rapids Water Co v Cedar Rapids, 90 NW 746, 117 Iowa 250

Effect of expiration of franchise generally see supra § 253

4. US—Laighton v City of Carthage, CC Mo, 175 F 145.

67 C J p 1192 note 72.

streets,<sup>5</sup> whatever rights of property the company may have in its reservoirs and water rights<sup>6</sup>

§ 257. — Pipes, Mains, and Other Works in General

- a In general
- b Duty to extend mains and pipes
- c. Duty to install service connections
- d Duty to relocate mains and pipes

a. In General

Mains and pipes are generally considered to be the property of the water company.

Although mains and pipes may be privately owned, they are generally, at least as far as to the consumer's property line, the property of the water company,<sup>7</sup> and it alone has the right to tap the mains<sup>8</sup> The water company must lay all the mains and pipes that may be necessary at its own expense,<sup>9</sup> unless such is a matter of contract,<sup>10</sup> as where the city agrees to pay the cost of the fire hydrants or of grading or relaying the streets torn up,<sup>11</sup> it must furnish equipment of a kind necessary to supply all customers if a reasonable return is assured<sup>12</sup> Where there is no agreement to the contrary, if the company uses water pipes of the city, the latter is entitled to compensation<sup>13</sup> The municipality has authority, in the public interest, to prescribe the

plan and location of the pipes and hydrants,<sup>14</sup> and to require the completion of the works within a designated reasonable time<sup>15</sup>

*Composition of mains* The water company will not be compelled to replace wooden mains by iron ones if the former render satisfactory service,<sup>16</sup> even though the street above the main is about to be paved<sup>17</sup>

*Privately owned mains and pipes* Where an abutting property owner installs the appliances constituting the conduit from a street water main to his premises, such appliances belong to him as appurtenant to his realty<sup>18</sup> A privately owned water main may be a facility of the water company with whose main it connects,<sup>19</sup> but this fact does not destroy its private character or impress it with a public use,<sup>20</sup> and the owner of the main may contract to furnish water to others,<sup>21</sup> and the water company cannot be compelled to supply from the main those who have not contracted with the owner<sup>22</sup> Where water is furnished under a contract through a private pipe line, if there is nothing in the contract to the contrary, the duty of keeping the pipe line in repair is on the owner and not the water company<sup>23</sup>

*Pipes on consumer's premises* Where, by the terms of a contract between a water company and the city, the consumers are required to install the pipes

5. US—Bankers' Trust Co v City of Raton, NM, 42 S Ct 340, 258 US 328, 66 L Ed 642

6. US—Bankers' Trust Co v City of Raton, supra

7. US—Moore v New Orleans Waterworks Co, CCLa, 114 F 380 67 C J p 1192 note 76

8. Idaho—Pocatello Water Co v Standley, 61 P 518, 7 Idaho 155

9. Idaho—Pocatello Water Co v Standley, supra

Pa—Sinking Spring Water Co v Wyomissing Borough, 22 Pa Dist 716

Duty as to service connections see infra subdivision c of this section

**Participation in cost**

(1) Although it is not ordinarily the obligation of a water consumer to construct any part of a public utility's system, the Public Utility Commission may, in special circumstances and in exercise of its administrative discretion, withhold exercise of its power with respect to such utility unless patrons offer to participate in the cost of construction—Ridley Tp v Pennsylvania Public Utility Commission, 94 A 2d 168, 172 Pa Super 472

(2) An order of Public Utility Commission requiring water consumers to participate in cost of construction of extension to the public utility's system must rest on evidence which shows that, without the contribution of the consumers, the cost of construction would materially handicap the utility in securing a fair return on all its operations—Ridley Tp v Pennsylvania Public Utility Commission, supra

10. Ala—Birmingham Slag Co v Birmingham Water Works Co, 48 So 2d 193, 254 Ala 211

11. Ill—Bull v Quincy, 40 NE 1035, 155 Ill 566

Minn—Stillwater Water Co v Stillwater, 52 NW 893, 50 Minn 498 67 C J p 1192 note 79

12. Cal—Coast Counties Real Estate & Investment Co v Monterey County Water Works, 274 P 415, 96 Cal App 269

67 C J p 1192 note 80

13. NJ—East Newark v Jersey City, 64 A 1132, 68 N J Eq 783

14. Neb—State v Crete, 49 NW 272, 32 Neb 568

15. Neb—State v Crete, 49 NW 272, 32 Neb 568

**Public utility easement area**

Where public utility easement area at rear of lots in subdivision were used for telephone and electric wires and poles and city had located public sewer therein, water mains rendering public service might also be located within such areas with city approval or by city's action—Detroit Edison Co v City of Detroit, 51 NW 2d 245, 332 Mich 348

16. Ind—Jeffersonville Water Supply Co v Riter, 37 NE 652, 138 Ind 170

Mass—West Springfield v West Springfield Aqueduct Co, 44 NE 1063, 167 Mass 128

17. Wash—State v Kuykendall, 201 P 777, 117 Wash 406

18. Wash—State v Kuykendall, supra

19. Mo—Fisher v St Joseph Water Co, 132 SW 288, 151 Mo App 530

20. Pa—Overlook Development Co v Public Service Commission, 158 A 869, 306 Pa 43

21. Pa—Overlook Development Co v Public Service Commission, supra

67 C J p 1192 note 88

22. Pa—Overlook Development Co v Public Service Commission, supra

67 C J p 1192 note 89

23. Tex—Josey v Beaumont Waterworks Co, Civ App, 183 S.W. 26.

and fixtures on their premises, the water company has no power to prevent a plumber who has not been licensed by it from laying connecting pipes on the premises at the instance of the owner<sup>24</sup>

### b. Duty to Extend Mains and Pipes

A water company may be compelled to make reasonable extensions of its mains.

A water company may be compelled to make reasonable extensions of its mains to accommodate the growing needs of the public,<sup>25</sup> but it is not under an absolute duty to extend its mains irrespective of circumstances or conditions.<sup>26</sup> Whether extension should be required depends on the test whether it is reasonable to call on the company to give such service,<sup>27</sup> with consideration to the return which will be derived therefrom.<sup>28</sup> So it is not required to extend its mains at the request of individual users<sup>29</sup> or to extend its pipes to remote places for fire protection.<sup>30</sup>

The water company may be compelled to extend the service before the extension itself will be profitable,<sup>31</sup> even though the immediate result of the extension may entail financial loss,<sup>32</sup> and the fact that the rate of return will be low is not sufficient

to show confiscation if the company makes an adequate return on all its operations.<sup>33</sup> While it has been held that if an extension is otherwise necessary and proper, the water company cannot refuse to make it on the ground of financial inability<sup>34</sup> or on the ground that the rates paid by all consumers are inadequate,<sup>35</sup> in some cases it has been held unreasonable to demand an extension when the company is unable to finance it,<sup>36</sup> and to require the extension would force it into bankruptcy.<sup>37</sup>

A water company will not be compelled to extend its facilities to districts not contemplated in its charter,<sup>38</sup> and the rule is not changed by the fact that voluntary extensions have been made beyond the chartered territory.<sup>39</sup> Where a company has dedicated its property only to the public use of the inhabitants of a certain territory, it may not be compelled to extend its facilities to such additional territory as may be in need of water.<sup>40</sup>

The duty and power of determining the need of the extension is a ministerial or administrative function of the proper authority,<sup>41</sup> and the discretion of the authorities ordering the extension will not be reviewed by the court further than to see if there is sufficient evidence to support it.<sup>42</sup> In the

24. Ky—*Fianke v Paducah Water Supply Co.*, 11 SW 432, 718, 88 Ky 467, 11 Ky L 17, 4 LRA 265

25. N.J.—*Reid Development Corp v Parsippany-Troy Hills Tp.*, 89 A 2d 667, 10 NJ 229

Pa—*Ridley Tp v Pennsylvania Public Utility Commission*, 94 A 2d 168, 172 Pa. Super 472  
67 C.J. p 1193 note 94

Authority of public utility commission to order extensions see *infra* § 261

#### Authority of city commissioner

Under charter provision authorizing New York City commissioner of water supply, gas, and electricity to exercise superintendence, regulation, and control in respect of supply of water by water companies supplying water to portion of city, commissioner could order such a company to extend its equipment, and corporation had duty of complying—*City of New York v New York Water Service Corp.*, 3 NE 2d 294, 274 NY 100

26. Mo—*State ex rel Kennedy v Public Service Commission*, 42 S W 2d 349

67 C.J. p 1193 note 95

27. Pa—*Morris Water Co v Public Service Commission*, 180 A 72, 118 Pa. Super 416

67 C.J. p 1193 note 96

Company should not be subjected to unreasonable expenditures or the consuming public be unduly burdened, because of over development or

premature development of scattered sections of the city in advance of its normal growth, when there is no rational expectation of the event justifying the expenditure—*Ridley Tp v Pennsylvania Public Utility Commission*, 94 A 2d 168, 172 Pa. Super 472

28. Miss—*Ladner v. Mississippi Public Utilities Co.*, 131 So 78, 158 Miss 678

67 C.J. p 1193 note 97

29. Me—*Watson v French*, 92 A 290, 112 Me 371, LRA 1915C 355  
Miss—*Ladner v Mississippi Public Utilities Co.*, 131 So 78, 158 Miss 678

30. Pa—*Columbia Borough's Appeal*, 12 Lanc Bar 33

31. Pa—*Ridley Tp v Pennsylvania Public Utility Commission*, 94 A 2d 168, 172 Pa. Super 472  
67 C.J. p 1193 note 1

32. Pa—*Ridley Tp v Pennsylvania Public Utility Commission*, *supra*

33. Pa—*Riverton Consol Water Co v Public Service Commission*, 159 A 177, 105 Pa. Super 6

The burden of showing confiscation in such cases is on the company—*Riverton Consol Water Co v Public Service Commission*, *supra*—67 C.J. p 1193 note 3

34. N.J.—*Middlesex Water Co v Board of Public Utility Com'rs*, 140 A 254, 6 NJ Misc 51.

67 C.J. p 1194 note 6

35. N.J.—*Middlesex Water Co v Board of Public Utility Com'rs*, *supra*  
67 C.J. p 1194 note 7

36. Pa—*Morris Water Co v Public Service Commission*, 180 A 72, 118 Pa. Super 416  
67 C.J. p 1194 note 8

37. Ky—*Mountain Water Co v May*, 231 SW 908, 192 Ky 13  
Pa—*Morris Water Co v Public Service Commission*, 180 A 72, 118 Pa. Super 416

38. Pa—*Cole v Pennsylvania Public Utility Commission*, 22 A 2d 121, 146 Pa. Super 257  
67 C.J. p 1194 note 15

Extent of territory generally see *supra* § 250

39. Pa—*Johnstown Water Co v Public Service Commission of Commonwealth of Pennsylvania*, 34 A 101, 107 Pa. Super 540

40. Cal—*Del Mar Water, Light & Power Co v Eshleman*, 140 P 591, 948, 167 Cal 666

41. N.Y.—*Town of Mamaroneck v New York Interurban Water Co.*, 196 NYS 438, 203 App Div. 122, affirmed 139 NE 735, 235 NY 563  
Pa—*Riverton Consol Water Co v Public Service Commission*, 159 A 177, 105 Pa. Super 6

42. Pa—*Riverton Consol Water Co v Public Service Commission*, *supra*.



absence of fraud, violation of law, or invasion of private rights<sup>43</sup> A town board may order extensions if express or implied authority is given it by statute.<sup>44</sup> Where, by the terms of the statute, the company must extend its mains when demanded by popular vote, a vote which fails of the necessary majority does not impose the obligation on the company<sup>45</sup>

The company may make reasonable rules and regulations governing the extension<sup>46</sup> or may take an agreement whereby it will be guaranteed a fair return on the investment<sup>47</sup>

*Contractual obligations* A water company may bind itself by contract to extend its mains,<sup>48</sup> or it may agree to reimburse a real estate development company for the cost of laying mains within a subdivision on the performance of certain conditions<sup>49</sup> Where a water company binds itself by contract to install new mains when needed, it must do so pursuant to its agreement unless the demand is arbitrary, capricious, or unreasonable,<sup>50</sup> and the fact that the company's rights are founded on a contract instead of a technical franchise will not absolve it from that duty.<sup>51</sup>

#### c. Duty to Install Service Connections

A water company may be required to construct and

pay for service connections from the main to the consumer's property line.

Franchises and charters, not providing otherwise, have been held to impose on the water company the duty to construct and pay for service connections from the main to consumer's property line,<sup>52</sup> since the company has been granted the right to occupy and excavate the streets,<sup>53</sup> and its full duty of supplying water is not fulfilled except by conveying the water to the premises of the consumer,<sup>54</sup> and, if the consumer must pay the cost of the connections, water is not being furnished at a fixed<sup>55</sup> and uniform<sup>56</sup> rate Hence, a regulation of the company compelling the consumer to pay for the connections has been held to be unreasonable<sup>57</sup> There is authority, however, holding that, in the absence of contract or provisions in the charter or franchise providing otherwise, the company need not bear the cost,<sup>58</sup> and that the duty to construct service pipes and pay the cost is not imposed by the fact that the company has a right to excavate the streets,<sup>59</sup> nor is it imposed by the obligation to extend the same public service without discrimination<sup>60</sup>

Municipalities may, if authorized by statute, require the water company to connect service pipes with the mains as part of the consideration for the franchise<sup>61</sup> Where the franchise requires the com-

43. N.Y.—Town of Mamaroneck v. New York Interurban Water Co., 196 N.Y.S. 438, 203 App.Div. 122, affirmed 139 N.E. 735, 235 N.Y. 563 —Village of Massena v. St. Lawrence Water Co., 214 N.Y.S. 113, 126 Misc. 524

44. N.Y.—Town of Mamaroneck v. New York Interurban Water Co., 196 N.Y.S. 438, 203 App.Div. 122, affirmed 139 N.E. 735, 235 N.Y. 563

45. Kan.—Illinois Trust & Savings Bank v. City of Burlington, 101 P. 649, 79 Kan. 797  
67 C.J. p. 1194 note 14

46. Va.—Commonwealth ex rel. Green v. Alexandria Water Co., 65 S.E.2d 521, 192 Va. 512  
67 C.J. p. 1193 note 4

#### Notice

Water company's rule with respect to extension of water mains which provided more favorable terms than previous rules was properly permitted to become effective without notice to public.—Commonwealth ex rel. Green v. Alexandria Water Co., supra.

47. Minn.—City of Crookston v. Crookston Waterworks Power & Light Co., 185 N.W. 380, 150 Minn. 347  
67 C.J. p. 1193 note 5.

48. N.Y.—Elmore Villa & Home Bldg. Co. v. Plainfield-Union Water Co., 178 A. 748, 118 N.J.Eq. 317.

#### Contract held not subject to rescission

Contract by which water company extended its mains through residential development in consideration of deposit of sum of money to be returned to owners of development as houses were built, or to become property of water company at expiration of ten years, was not subject to rescission because of sale of water company's property and transfer of deposits to municipality, where water company had built mains and nothing remained to be done except to adjust deposits as provided.—Elmore Villa & Home Bldg. Co. v. Plainfield-Union Water Co., 178 A. 748, 118 N.J.Eq. 317.

49. U.S.—Sterling Homes Co. v. Stamford Water Co., C.C.A.N.Y., 79 F.2d 607

50. N.Y.—Baker v. New York Interurban Water Co., 184 N.Y.S. 833, 113 Misc. 459  
67 C.J. p. 1194 note 18

51. N.Y.—Baker v. New York Interurban Water Co., supra  
67 C.J. p. 1194 note 19

52. Ark.—Pine Bluff Corporation v. Toney, 131 S.W. 680, 96 Ark. 345, Ann. Cas. 1912B 544.  
67 C.J. p. 1194 note 21.

53. Idaho.—Hatch v. Consumers' Co., 104 P. 670, 17 Idaho 204, affirmed

32 S.Ct. 465, 224 U.S. 148, 56 L.Ed. 703

67 C.J. p. 1195 note 22

54. Cal.—Title Guaranty & Trust Co. v. Railroad Commission of California, 142 P. 878, 168 Cal. 295, Ann. Cas. 1916A 738

67 C.J. p. 1195 note 23

55. Ark.—Pine Bluff Corp. v. Toney, 131 S.W. 680, 96 Ark. 345, Ann. Cas. 1912B 544

67 C.J. p. 1195 note 24

56. Pa.—Panther Valley Water Co. v. Public Service Commission, 70 Pa. Super. 8

67 C.J. p. 1195 note 25.

57. N.M.—State v. Water Supply Co. of Albuquerque, 140 P. 1059, 19 N.M. 36, L.R.A. 1915A 246, Ann. Cas. 1916E 1290  
67 C.J. p. 1195 note 26

58. Ind.—City of Indianapolis v. College Park Land Co., 118 N.E. 356, 187 Ind. 541

67 C.J. p. 1195 note 27.

59. Ala.—Birmingham Waterworks Co. v. Hernandez, 71 So. 443, 196 Ala. 438, L.R.A. 1916E 258  
67 C.J. p. 1195 note 28.

60. Ala.—Birmingham Waterworks Co. v. Hernandez, supra

61. Ala.—Birmingham Waterworks Co. v. Hernandez, supra.

pany to pay the cost of service pipes, an ordinance punishing the failure to do so is valid,<sup>62</sup> but, if the franchise is silent on this matter, an ordinance requiring the company to pay the cost cannot be sustained as an exercise of the police power to regulate the use of the streets<sup>63</sup> or as an exercise of the power to regulate rates,<sup>64</sup> and, where the city and the company for many years have treated the duty as not imposed, a subsequent ordinance imposing the duty is invalid<sup>65</sup>

When, prior to the granting of a charter to a water company, it has been clearly settled by statute law and decisions that such a corporation must furnish service connections, the compelling of such a duty does not amount to an impairment of the charter contract,<sup>66</sup> nor does it deprive the corporation of its property without due process of law.<sup>67</sup>

*Acquiescence of consumers* It has been said that the court will be slow to hold that a consumer of water has become bound by acquiescence of other consumers, over whom he has no control, in a custom requiring consumers to pay for connections with the water mains<sup>68</sup>

*Maintenance* The duty to maintain service pipes for supplying private consumers has been held to be the same as that to lay them, and rests on the same party, whether the company or consumer,<sup>69</sup> but there is authority that, even though the consumer has paid for laying the pipes, the water company may be compelled to maintain them<sup>70</sup>

*Connections with competitors* A water company will not be required to install connections from

its water system to that of a competitor so that the latter will have ample water in case of emergency.<sup>71</sup>

#### d. Duty to Relocate Mains and Pipes

A water company may be required to shift or relocate its mains or pipes.

When demanded by the public good or necessity, a water company may be required to shift or relocate its mains or pipes,<sup>72</sup> and, in the absence of a contract providing otherwise, the water company must bear the expense<sup>73</sup> The rule that the company must bear the expense has been applied when it is necessary that the mains and pipes be readjusted because of a change in the grade of the street<sup>74</sup> or when relocation is necessary to conform to another public utility subsequently established<sup>75</sup> It has been held that the expense of relocating the pipes when a new sewer or drainage system is to be constructed by the city should be borne by the water company,<sup>76</sup> but there is other authority to the effect that the city should compensate the company therefor as a seizure of property under eminent domain<sup>77</sup>

### § 258. — Injuries to Works, Mains, or Pipes

A water company may recover damages for injuries to its mains, pipes, or other works.

A water company may maintain an action to recover damages for injuries to its mains, pipes, or other works,<sup>78</sup> and where a pipe line has been broken by reason of defendant's blasting operations, the water company is not necessarily precluded from

62. Mo—City of Joplin v Wheeler, 158 S.W. 924, 173 Mo App 590

63. Mo—City of Joplin v Wheeler, supra.

64. Mo—City of Joplin v Wheeler, supra.

65. Mo—City of Joplin v Wheeler, supra.

66. U.S.—Consumers' Co v Hatch, Idaho, 32 S.Ct 465, 224 U.S 148, 56 L.Ed 703  
67 C.J p 1195 note 35

67. U.S.—Consumers' Co. v Hatch, supra.

68. Ala.—Birmingham Waterworks Co v. Hernandez, 71 So 443, 196 Ala 438, L.R.A 1916E 258

69. Ala.—Birmingham Waterworks Co v Hernandez, supra.

70. Pa.—Pottsville Water Co v Public Service Commission, 78 Pa Super 56, 67  
67 C.J p 1196 note 39.

71. Mo—Rogers Iron Works v. Jop-

lin Waterworks Co, 18 S.W 2d 420, 323 Mo 122

67 C.J p 1196 note 40

72. N.J.—Walker v North Bergen Tp in Hudson County, 86 A 63, 84 N.J.Law 248

Pa.—Commonwealth ex rel Reno v Heidelberg Tp Water Co, 48 Pa Dist & Co 511, 54 Dauph Co 193—Lewistown-Reedsville Water Co v Hughes, Com Pl, 49 Dauph Co 18  
Right of public service commission to order relocation see infra § 261

73. N.Y.—New York Interurban Water Co v City of Mt Vernon, 173 N.Y.S 38, 185 App Div 305  
67 C.J p 1196 note 42

74. U.S.—Erie R Co v Board of Public Utility Com'rs, N.J., 41 S Ct 169, 254 U.S. 394, 65 L.Ed 322  
67 C.J p 1196 note 43.

75. Kan.—Wichita Water Co v City of Wichita, 158 P 49, 98 Kan 256

76. Fla.—Anderson v Fuller, 41 So 684, 51 Fla 380, 6 L.R.A., N.S., 1026, 120 Am SR 170

N.J.—Walker v North Bergen Tp in

Hudson County, 86 A 63, 84 N.J. Law 248

77. U.S.—Moore v New Orleans Water Works Co, C.C.La., 114 F 380  
67 C.J p 1196 note 46

Compensation for taking property already devoted to public use under power of eminent domain generally see Eminent Domain §§ 146-148

78. N.J.—Hackensack Water Co v Public Service Gas & Electric Co., 142 A. 563, 6 N.J. Misc 707.

In action by dissolved water corporation's trustees for damages for defendant's malicious destruction of water works utility property and appropriation of corporation's customers, defendant was not estopped to interpose defense of invalidity of transfer of the property to corporation because made without order of Public Service Commission, on theory that defendant could not claim greater rights than corporation's transferor, since it was trustees who were claiming through corporation's transferor—Webster v Joplin Water Works Co, 177 S.W 2d 447, 352 Mo 327

recovery by reason of the fact that a representative of the company was present when the charge was laid and set off<sup>79</sup> Although a water company lays its pipes over private property without compensation, the owner thereof has no right to injure the pipes willfully and intentionally,<sup>80</sup> but he owes no positive duty to support the pipes<sup>81</sup> Similarly, a city has no right to convert or injure the company's piping system, although the contract under which it was built is unenforceable<sup>82</sup>

§ 259. — Purchase, Lease, Sale, and Mortgage of Waterworks

- a Purchase
- b Lease
- c Sale or assignment
- d Mortgage

a. Purchase

A water company may purchase works or property necessary to the completion of its system.

A water company may purchase such works or property as is necessary to the completion of its system,<sup>83</sup> and, if authorized by statute, may issue stock for such a purpose<sup>84</sup> Under some statutes a water company may purchase the franchises and property of another water company which has been organized under the same act<sup>85</sup> Where one company takes over the property and franchise of an-

other, it is obligated to discharge the latter's public obligations,<sup>86</sup> and it takes the property subject to easements which exist on it<sup>87</sup> A water company's franchise, giving the city the right to purchase the works at the net cost, does not entitle the city to enjoin the company from purchasing the franchise and property of another water company,<sup>88</sup> and, in an action so to enjoin, the burden is on the city to show that the transaction would be a clear invasion of its right to acquire the original works<sup>89</sup>

b. Lease

A water company may lease the property and right of other water companies

If a statute so provides, a water company may lease the property and rights of other water companies and thereby acquire their rights<sup>90</sup> If a water company is operating under a charter from the state and no power to lease the waterworks is given, the company cannot do so,<sup>91</sup> even with the consent of the municipality which it serves<sup>92</sup>

c. Sale or Assignment

A water company may be authorized to sell its entire plant, property, and franchises

A water company may be authorized by statute,<sup>93</sup> or by its franchise, or charter,<sup>94</sup> to sell its entire plant, property, and franchises, provided it secures the consent of the proper public agency,<sup>95</sup> but even

79. N.J.—Hackensack Water Co v Public Service Gas & Electric Co, 142 A 563, 6 N.J. Misc 707  
67 C.J. p 1196 note 50

80. Pa.—Spring Brook Water Supply Co v Pennsylvania Coal Co, 54 Pa Super 380

81. Pa.—Spring Brook Water Supply Co v Pennsylvania Coal Co, supra  
67 C.J. p 1196 note 48

82. Tex.—Templeton v City of Wellington Civ App, 207 S.W. 186

83. N.Y.—Gamble v Queens County Water Co, 25 N.E. 201, 123 N.Y. 91, 9 L.R.A. 527, 25 Abb.N.Cas. 410  
67 C.J. p 1196 note 51  
Acquisition of water for public use generally see supra §§ 228-230

**Clarifying basin**

Where water company was required under certificate from state commerce commission to serve city and adjoining territory with water, and many people of city were employed in area outside of city, and city's welfare required that industries be served, not only for their profit but for welfare of citizens of the city, utility had power to obtain land in city adjacent to its plant and to erect thereon a clarifying basin so that it might better serve city and surrounding territory—Baird v. Board of Zoning Ap-

peals of City of Kankakee, 106 N.E. 2d 343, 347 Ill. App. 158

84. N.Y.—Gamble v Queens County Water Co, 25 N.E. 201, 123 N.Y. 91, 9 L.R.A. 527, 25 Abb.N.Cas. 410

85. Pa.—Greensburg Borough v Westmoreland Water Co, 87 A. 995, 240 Pa. 481  
67 C.J. p 1197 note 53

86. Pa.—Greensburg Borough v Westmoreland Water Co, supra

87. Cal.—Hudson v Ukiah Water & Improvement Co, 204 P. 862, 55 Cal. App. 709  
67 C.J. p 1197 note 55

88. Pa.—Greensburg Borough v Westmoreland Water Co, 87 A. 995, 240 Pa. 481

89. Pa.—Greensburg Borough v Westmoreland Water Co, supra

90. Pa.—Gring v Sinking Spring Water Co, 113 A. 435, 270 Pa. 232  
67 C.J. p 1197 note 62

**Company with right of eminent domain**, leasing company without that right, may serve district involved, even though such service requires exercise of such right—Reeves v Philadelphia Suburban Water Co, 135 A. 362, 287 Pa. 376, error denied 136 A. 526, 288 Pa. 418

91. U.S.—New Albany Waterworks

v Louisville Banking Co, Ind., 122 F. 776, 58 C.C.A. 576

92. U.S.—New Albany Waterworks v Louisville Banking Co, supra

93. Me.—Hodges v South Berwick Water Co, 26 A. 2d 645, 139 Me. 10  
67 C.J. p 1197 note 65

94. Cal.—San Luis Water Co v Estrada, 48 P. 1075, 117 Cal. 168

95. Me.—Hodges v South Berwick Water Co, 26 A. 2d 645, 139 Me. 40  
N.Y.—Spring Brook Water Co v Village of Hudson Falls, 56 N.Y.S. 2d 722, 269 App. Div. 515, appeal denied 57 N.Y.S. 2d 654, 269 App. Div. 913  
67 C.J. p 1197 note 64

**A sale of all property of water company except its franchise** to new corporation, which was organized to furnish water to the public, was authorized on securing of authority from the Public Utilities Commission, and plaintiff who furnished money to third person which was used in improving plant and facilities of new corporation could not recover therefor from the old company on theory that it remained the owner of the plant and facilities—Hodges v South Berwick Water Co, 26 A. 2d 645, 139 Me. 40

**Transfer to municipality**

(1) Private waterworks corpora-

then it may not sell before the authorized time<sup>96</sup> Where such a sale is made the purchaser or the succeeding utility company succeeds to, and has imposed on it, the obligation of continuing the service of furnishing water,<sup>97</sup> and it has been held that even though a water company has the power to transfer its plant and franchise, a transfer is invalid if the transferee has not the power to continue the public service<sup>98</sup>

The water company may have the right to sell such machinery and equipment as are no longer necessary in the operation of its plant,<sup>99</sup> and this right is not affected by the fact that the municipality has an option to purchase the plant at the expiration of the franchise<sup>1</sup> It cannot divest itself of water rights it has acquired in its capacity of a public utility unless such action is in good faith and the property is not necessary.<sup>2</sup> If the city has acquiesced in an assignment for a long period of time, it may not question the legality of the assignment to reap an advantage thereby<sup>3</sup> A contract attempting to grant an easement in the public use to the detriment of the public is subject to modification by the public authorities<sup>4</sup>

*Termination of corporation by sale* Under some

statutes a water company ceases to exist after it sells its franchises and property.<sup>5</sup>

#### d. Mortgage

A water company may mortgage its property under its express or implied powers.

If the power is expressly or impliedly given by the state or an agency thereof, a water company may mortgage its property<sup>6</sup> The after-acquired property of a water company may be subject to the mortgage,<sup>7</sup> and a municipality subsequently acquiring a water plant has been held estopped to claim that extensions and additions made by it were not covered by the mortgage<sup>8</sup> However, after-acquired property is not subject to the mortgage where it is not clearly within the terms of the agreement<sup>9</sup> and mortgages of the property of a corporation which constructed and operated both a water plant and an ice plant have been held not to include after-acquired property in the ice plant where the special description referred only to the water plant<sup>10</sup>

*Bondholders* Mortgage bondholders are bound at their peril to ascertain the terms of the ordinance

tion cannot transfer its property to a municipality without the written consent of the Public Service Commission, and, lacking such consent, was not entitled to specific performance of municipality's contract to purchase system, which contract was conditioned on consent of any regulatory agency which might have jurisdiction—Spring Brook Water Co v Village of Hudson Falls, 56 NYS 2d 722, 269 App Div 515, appeal denied 57 NYS 2d 654, 269 App Div 913

(2) On an application to transfer waterworks system from private corporation to municipality, Public Service Commission has jurisdiction to determine whether or not such transfer is in the public interest, since, once the transfer is made, commission would have no jurisdiction over service or rates—Spring Brook Water Co v Village of Hudson Falls, supra.

(3) Public Service Commission, on an application to transfer waterworks system from a private corporation to a municipality, has jurisdiction to inquire into price at which transfer is to be made, since municipality must establish rates in accordance with price paid and, if price is excessive, consumers would be forced to pay excessive rates—Spring Brook Water Co v Village of Hudson Falls, supra.

96. Me—Guilford & Sangerville Wa-

ter Dist v Sangerville Water Supply Co, 154 A 567, 130 Me 217  
67 C J p 1197 note 67

97 Ark—North Little Rock Water Co v Waterworks Commission of City of Little Rock, 136 SW 2d 194, 199 Ark 773

"The theory of the law is that a city may not be deprived of an essential utility, such as water, through the action of the utility furnishing that service by selling its plant, or an essential portion thereof, without which the service cannot be furnished"—North Little Rock Water Co v Waterworks Commission of City of Little Rock, supra

98 Cal—South Pasadena v Pasadena Land, etc., Co, 93 P 490, 152 Cal 579.

99 NY—Town of Mamaroneck v New York Interurban Water Co, 190 NYS 580, 198 App Div 396, motion denied 135 NE 933, 233 NY 598, and affirmed 135 NE 962, 233 NY 666  
67 C J p 1197 note 68

1. Pa.—Borough of Monessen v Monessen Water Co, 89 A 829, 243 Pa 53

2. RI—Public Utilities Commission v. East Providence Water Co, 136 A 447, 48 RI 376, reargument denied 137 A 387

3. US—Austin v Bartholomew, 107 F. 349, 46 CCA 327, certiorari de-

nied 22 S Ct 934, 183 US 698, 46 L Ed 395

67 C J p 1197 note 72

4. Cal—Southern Pac Co v Spring Valley Water Co, 159 P. 865, 173 Cal 291

5. Pa—Commonwealth v Lumber City Water Co, 74 A 238, 225 Pa 317

67 C J p 1198 note 74

6. Kan—State v Topeka, etc., Water Co, 60 P 337, 61 Kan 547

67 C J p 1198 note 75

7. US—Trust Co of America v City of Rhinelander, CC Wis, 182 F 64

Mortgage of after-acquired property generally see Mortgages § 185

8. US—Trust Co of America v Rhinelander, CC Wis, 182 F 64

9. Ky—United States Cast Iron Pipe & Foundry Co v Henry Vogt Mach Co, 206 SW 806, 182 Ky 473

#### Watershed acquired by borough

Lien of mortgages covering waterworks and containing after-acquired property clauses was held not to extend to watershed six miles from borough limits acquired by borough subsequent to its purchase of waterworks subject to mortgages—Madden v Borough of Mt Union, 185 A. 275, 322 Pa 109

10. Ky—United States Cast Iron Pipe & Foundry Co v Henry Vogt Mach Co, 206 S.W. 806, 182 Ky 473.

creating or licensing the company<sup>11</sup> Such bondholders are also charged with notice of all the provisions of the mortgage or deed of trust securing the bond,<sup>12</sup> where apt and sufficient reference is made in the bond to the mortgage or deed of trust,<sup>13</sup> and this rule has been applied with respect to provisions for payment and satisfaction.<sup>14</sup> The bonds cannot be paid off before maturity other than in accordance with the terms specified in the agreement.<sup>15</sup>

**§ 260. — Proceedings to Restrain Company from Exceeding Rights or Violating Duties**

A water company may be restrained from exceeding its rights.

A landowner may restrain the water company from exceeding its rights on his property,<sup>16</sup> but the court will not grant an injunction that will summarily cut off the water supply of a city but will provide a reasonable time for the company to condemn the rights involved or change its plans<sup>17</sup> If the landowner has established an unwarranted use by the water company, the latter must show a

prescriptive right or estoppel of the landowner.<sup>18</sup> If a water company without the right to do so attempts to use the streets for the laying of water pipes, the city may forcibly prevent the excavation<sup>19</sup> or may obtain equitable relief by injunction,<sup>20</sup> and so, when the necessary consent of the city is not obtained, an injunction lies to prevent the laying of the pipes in the streets without such consent,<sup>21</sup> and the court may compel the removal of such as are laid pending suit<sup>22</sup>

**§ 261. Authority of Public Service Commissions Relative to Construction and Operation of Waterworks**

The construction and operation of waterworks by water companies are subject to regulation and control by public service or public utility commissions.

In some jurisdictions, the construction and operation of waterworks by water companies are subject to regulation and control by public service or public utility commissions<sup>23</sup> Since such a commission derives its authority or jurisdiction wholly from constitutional or statutory provisions,<sup>24</sup> it has only such authority or jurisdiction as is derived there-

11. Ill.—Illinois Trust, etc, Bank v Pontiac, 112 Ill App 545, affirmed 72 NE 411, 212 Ill 326

12. Ark—Adler v City of Hot Springs, 190 SW 2d 528, 209 Ark 400

13. Ark—Adler v. City of Hot Springs, supra

14. Ark—Adler v. City of Hot Springs, supra

**Trustee agent of bondholder**

(1) Provisions of deed of trust securing bond of water company dealing with power and duties of trustee, restricting rights of bondholder to sue on bond and providing for ultimate payment made trustee agent of bondholder to receive satisfaction of bond and issue receipt and release—Adler v City of Hot Springs, supra

(2) Where trustee under deed of trust securing bond issue of water company was agent of bondholder to receive satisfaction and issue release, payment, and satisfaction made to trustee had the same effect as though made to bondholder—Adler v City of Hot Springs, supra

(3) Where trustee under deed of trust securing bond issue of water company, pursuant to authority given him by deed of trust, gave clerk of circuit court power of attorney to make a satisfaction on margin of record where deed of trust was recorded, the effect of such power of attorney and the marginal entry of clerk pursuant thereto, in the absence of fraud, was to establish that bond

sued on was paid—Adler v. City of Hot Springs, supra

15. Va—Manufacturers Trust Co v Roanoke Water Works Co, 1 S E 2d 318, 172 Va 242 67 C J p 1198 note 77

**Payment of specified premium**

Where bonds secured by trust deed on waterworks property did not mature until certain date, and were redeemable sooner only on payment of specified premium, bondholders were entitled to payment of interest until maturity in absence of redemption—Manufacturers Trust Co v Roanoke Water Works Co, supra

16. Or—Minto v Salem Water, Light & Power Co, 250 P 722, 120 Or 202

Actions by consumers against water companies see infra §§ 281, 307

17. Or—Minto v Salem Water, Light & Power Co, supra

18. Or—Minto v Salem Water, Light & Power Co, supra

19. N J—City of Bayonne v Borough of North Arlington, 79 A 357, 78 N J Eq 233

20. N J—Somerville Water Co v Borough of Somerville, 78 A 793, 78 N J Eq. 199

21. N J—Woodbridge Tp v Middlesex Water Co, 68 A 464 67 C J p 1198 note 84

22. N J—Woodbridge Tp v Middlesex Water Co, supra

23. Pa—Wright v Lancaster Suburban Water Co, 167 A 397, 109 Pa. Super. 372.

Regulation and control with respect to acquisition of water supply see supra § 229

Regulation of rates see infra § 296 Public service or public utility commissions generally see Public Utilities §§ 31-68

Water companies as subject to regulation and control generally see supra § 247

**Court without original jurisdiction**

Court was without original jurisdiction to direct water company to sever connection with another's pipe, or to adjudicate differences arising therefrom, since matter rested with Public Service Commission—Wright v Lancaster Suburban Water Co, supra

24. N Y—City of New York v New York Water Service Corp, 8 NE 2d 294, 274 N Y 100

Authority and power of public utility commissions generally see Public Utilities §§ 38-45

**Charter provision held not repudiated**

Rule of statutory construction contained in New York charter provision that no provision thereof was deemed to be repealed or amended unless repeal or amendment was expressly stated, or legislative intention to that effect was unmistakable, was not repudiated when provision of Public Service Law extending jurisdiction of Public Service Commission over water companies was enacted—City of New York v New York Water Service Corp, supra.

from,<sup>25</sup> and, accordingly, a public service commission whose jurisdiction is limited by statute to matters relating to the safety and sufficiency of the service has no power to order relocation of pipes in order to prevent damage to the streets from frequent repair of the pipe lines<sup>26</sup> When authorized by statute, a commission may order extensions of the distributing system of a water company,<sup>27</sup> but it does not have such power when it has been delegated to the city wherein the company is located and operated<sup>28</sup> The fact that a water company is authorized by its act of incorporation to adopt such bylaws, rules, and regulations as shall not contravene the constitution and laws of the United States, or of the commonwealth, does not authorize it to enforce rules and regulations contrary to the expressed policy and rules of the Public Service

Commission<sup>29</sup> Under a statute which leaves to each city the regulation and control of water companies operated within its boundaries and which supply water principally to it, a public service commission has no jurisdiction to entertain an application for authority to issue mortgage bonds from a water company so operated.<sup>30</sup>

The orders of the commission must be reasonable and in conformity with the law,<sup>31</sup> and an order of a commission requiring a water company to reconstruct its plant, when such is unnecessary and no adequate return would be made on the investment, is void<sup>32</sup>

*Review* While the decision or order of the commission is subject to review by the courts,<sup>33</sup> if based on substantial evidence it will not be disturbed,<sup>34</sup> unless it is so capricious, arbitrary, or

25 W Va.—City of Bluefield v Public Service Commission, 118 SE 542, 94 W Va. 334

#### Issuance of securities

Public Service Commission was without jurisdiction to require public service water company to secure approval of commission prior to entering into agreements with holders of mortgage bonds for reduction of interest rates, to be accomplished by delivery of bonds to company by owners, substitution of lower interest figure, and return of bonds to owners, since transaction was not an "issuing of securities" within statute conferring jurisdiction on commission—Blue Mountain Consol Water Co v Public Service Commission, 189 A 545, 125 Pa. Super 1

26. W Va.—City of Bluefield v Public Service Commission, 118 SE 542, 94 W Va. 334

67 C J p 1199 note 98

Duty of company to relocate pipes see supra § 257 d

27. Pa.—Ridley Tp v Pennsylvania Public Utility Commission, 94 A 2d 168, 172 Pa. Super. 472—Latrobe Water Co v Public Service Commission, 174 A 615, 115 Pa. Super 66

67 C J p 1199 note 99

Duty of company to extend mains see supra § 257 b

28 Wis.—State v Washburn Water Works Co, 196 NW 537, 182 Wis 287

67 C J p 1199 note 1

29. Pa.—Pottsville Water Co v Public Service Commission, 78 Pa. Super 56, 67

67 C J p 1199 note 3

30. Kan.—Wichita Water Co v Public Service Commission of Kansas, 268 P 89, 126 Kan 381.

31. Pa.—Latrobe Water Co v Public Service Commission, 186 A 294, 123 Pa. Super 21—Morris Water Co v Public Service Commission, 180 A 72, 118 Pa. Super 416

#### Certificate of public convenience

Stipulation by public service water company that any loss in proposed extension would be taken care of from proceeds and would not result in increased rates was held incompetent evidence on which to base certificate of public convenience permitting extension of service—Borough of Clarks Summit v Public Service Commission, 92 Pa. Super 591

#### Order directing uniform system of accounts

(1) Validity of an order of Public Utilities Commission directing water utilities to keep a uniform system of accounts does not depend on that part of order reserving to commission power to require utilities to write off any part of amounts in a designated account, since utility affected by any future write off order would have opportunity to question such order directly—Scranton-Spring Brook Water Service Co v Pennsylvania Public Utility Commission, 67 A 2d 735, 165 Pa. Super 286

(2) Order directing water utilities to keep a uniform system of accounts showing, among other things, original cost of property first devoted to public use, is not restricted to prospective application—Scranton-Spring Brook Water Service Co v Pennsylvania Public Utility Commission, supra

(3) The term "original cost" as used in order directing water utilities to keep an account showing original cost of utility plant is equivalent to the statutory phrases "original cost of such property when first

devoted to the public service" and "original cost of construction," and does not necessarily mean cost to the present owner, or book cost, or include increase in market value—Scranton-Spring Brook Water Service Co v Pennsylvania Public Utility Commission, supra.

32. Idaho—Osborn Utilities Corporation of Osborn v Public Utilities Commission of Idaho, 17 P 2d 333, 52 Idaho 571

33. Pa.—Cole v Pennsylvania Public Utility Commission, 22 A 2d 121, 146 Pa. Super 257—Latrobe Water Co v Public Service Commission, 186 A 294, 123 Pa. Super 21

34. Pa.—Cole v Pennsylvania Public Utility Commission, 22 A 2d 121, 146 Pa. Super 257—Latrobe Water Co v Public Service Commission, 174 A 615, 115 Pa. Super 66

#### Controlling question

On appeal from order of Public Utility Commission that it was unlawful for water company to continue to serve unfiltered water to the public and that it was unreasonable to require the company to serve filtered water to certain persons in view of cost of such service, the controlling question was whether there was substantial evidence with rational probative force in the record to sustain the findings of fact and the order of the commission, since the question before the commission was largely an administrative one which must be left to the sound judgment and discretion of the commission—Cole v. Pennsylvania Public Utility Commission, 22 A 2d 121, 146 Pa. Super 257

#### Matter not placed on record

Copies of letters which were printed as exhibits to Public Service Commission's brief on appeal by water company from orders entered in pro-

unreasonable as to amount to error of law<sup>35</sup> or a violation of constitutional rights<sup>36</sup>

## § 262. Licenses and Taxes

A water company may be liable for a license or privilege tax.

A license or privilege tax may be imposed on a water company,<sup>37</sup> and it may be liable for penalties where there is a failure to comply with the requirements of the statute imposing such a tax<sup>38</sup>. However, if unauthorized by its charter or statute, a city may not impose license taxes or fees on the franchise and plant of a water company for revenue purposes<sup>39</sup> or for the permission to carry on the business,<sup>40</sup> but it may impose a reasonable tax or fee as incident to the exercise of police supervision and inspection<sup>41</sup> and to defray the cost thereof<sup>42</sup>. Where a fee has been imposed by the city, the

presumption is that it is imposed for police inspection and surveillance purposes rather than for revenue or as a return for permission to carry on the business<sup>43</sup>. The burden of showing the unreasonableness of the fee is on the water company,<sup>44</sup> and payment cannot be avoided by showing that it is somewhat in excess of the actual expense of supervision,<sup>45</sup> since the city is ordinarily unable to tell in advance the exact cost and is at liberty to make the charge large enough to cover any reasonably anticipated expense<sup>46</sup>.

*Percentage of gross receipts* Under a constitutional provision that any individual or corporation may establish and operate waterworks to supply a city and its inhabitants with water under such conditions and regulations as the city may prescribe under its organic law, a municipality has no power

ceeding to require company to extend its facilities, but which were never placed on record, would not support orders of commission, since all parties must be fully apprized of evidence on which commission proposes to act, and must be afforded an opportunity to cross-examine opposing witnesses—*Latrobe Water Co v Public Service Commission*, 186 A 294, 123 Pa Super 21

### Orders held sustained by evidence

#### (1) Generally

NY—*Citizens Water Supply Co of Newtown v Maltbie*, 45 NYS 2d 796, 267 App Div 793, affirmed 59 NE 2d 440, 293 NY 849

Pa—*Cole v Pennsylvania Public Utility Commission*, 22 A 2d 121, 146 Pa Super 257

(2) Order directing extension of facilities—*Latrobe Water Co v Public Service Commission*, 174 A 615, 115 Pa Super 66

### Evidence held insufficient

Pa—*Ridley Tp v Pennsylvania Public Utility Commission*, 94 A 2d 168, 172 Pa Super 472

35. Pa.—*Scranton-Spring Brook Water Service Co v Pennsylvania Public Utility Commission*, 67 A 2d 735, 165 Pa Super 286—*Cole v Pennsylvania Public Utility Commission*, 22 A 2d 121, 146 Pa Super 257—*Morris Water Co v Public Service Commission*, 180 A 72, 118 Pa Super 416

### Orders extending facilities

(1) Public Service Commission's order, made without notice or hearing extending date for completing extension of its facilities, and refusing a hearing to water company on issues of fact as to whether condition of original order with respect to filing of applications and making of depos-

its had been complied with, as to alleged increase in costs, the necessity for a booster pump, and as to responsibility for long delay in case, was held unlawful as amounting to arbitrary exercise of power—*Latrobe Water Co v Public Service Commission*, 186 A 294, 123 Pa Super 21

(2) Public Service Commission's order directing water company to extend facilities, contingent on company's first receiving applications producing specified minimum revenue, was held not unreasonable in not requiring new applicants to make deposits as guaranty that they would take the service, where order left way open for company to require a deposit by general tariff provision—*Latrobe Water Co v Public Service Commission*, 174 A 615, 115 Pa Super 66

36. Pa.—*Cole v Pennsylvania Public Utility Commission*, 22 A 2d 121, 146 Pa Super 257

37. Ala.—*Henry v State ex rel Birmingham Water Works*, 161 So 494, 230 Ala 444

License fee for diversion of water see supra § 229

Taxation generally see Taxation §§ 185, 279

Taxation of franchises generally see Taxation § 134, Municipal Corporations § 2000 c

38. Ala.—*Henry v State ex rel Birmingham Water Works*, supra

### Notice of delinquency

(1) Written notice to county commissioner of licenses by license inspector that public utility license had not been taken out by waterworks company would have justified commissioner's refusal to issue license without payment of statutory penalty, even though no citation from inspector to appear before commissioner to take out license was served

on company until after it appeared for such purpose—*Henry v State ex rel Birmingham Water Works*, supra

(2) Notice to county commissioner of licenses by license inspector that waterworks company had not taken out public utility license must have been in writing and served after company became delinquent and before it applied for license in order to constitute valid defense to petition for writ of mandamus requiring commissioner to issue license without payment of penalty—*Henry v State ex rel Birmingham Water Works*, supra

39. Md.—*Cambridge v Cambridge Water Co*, 58 A 442, 99 Md 501, 2 Ann Cas 311

Pa.—*City of Wilkes-Barre v Crystal Spring Water Co*, 7 Kulp 31

40. Md.—*Cambridge v Cambridge Water Co*, 58 A 442, 99 Md 501, 2 Ann Cas 311

67 C J p 1199 note 10

41. Pa.—*Kittanning Borough v Armstrong Water Co*, 35 Pa Super 174

67 C J p 1199 note 11

42. Pa.—*Kittanning Borough v Armstrong Water Co*, supra—*Lansdowne Borough v Springfield Water Co*, 16 Pa Super 490, 8 Del Co 175

43. Pa.—*Lansdowne Borough v Springfield Water Co*, supra

44. Pa.—*Kittanning Borough v Armstrong Water Co*, 35 Pa Super 174

45. Pa.—*Kittanning Borough v Armstrong Water Co*, supra

46. Pa.—*Kittanning Borough v Armstrong Water Co*, supra

to impose, as a condition to the granting of a water franchise, a condition that the grantee and his assigns shall pay a percentage of gross receipts,<sup>47</sup> and the legislature has no power to authorize it to do so,<sup>48</sup> such tax cannot be supported under the general power of the municipality to contract<sup>49</sup> or by the fact that the grantee voluntarily consented thereto,<sup>50</sup> and, although the grantee received the franchise by consenting to conditions, neither he nor his assignee is estopped to deny the right of the municipality to recover.<sup>51</sup>

**Sales tax.** Exemption from a sales tax of sales of water have been held proper on the ground that they involve an element of service and that there exists a public interest that their prices be reasonable.<sup>52</sup>

47 Cal—Town of St Helena v Ewer, 146 P 191, 26 Cal App 191 67 C J p 1200 note 18

48 Cal—Town of St Helena v Ewer, supra

49 Cal—Town of St Helena v Ewer, supra

50 Cal—Town of St Helena v Ewer, supra 67 C J p 1200 note 21

51 Cal—Town of St Helena v Ewer, supra

52 NH—In re Opinion of the Justices, 190 A. 801, 88 NH 500

53 Okl—West Hills Water Co v American-First Trust Co in Oklahoma City, 158 P 2d 691, 195 Okl 428 67 C J p 1200 note 24

#### Foreclosure according to terms

A trust deed to the public trustee of a county to secure bonds of a land and water company was foreclosable according to its terms, and not to require a foreclosure proceeding—Walpole v Rogers, 185 P 346, 66 Colo 573

#### Persons entitled to prosecute action and necessary parties

(1) Where, by terms of trust deed covering waterworks system, trustee in case of default at his own option could, and on demand of majority of holders of bonds secured by deed must, declare entire indebtedness due and proceed with foreclosure, and where, after default and demand made, trustee in recognition thereof and on his own election declared indebtedness due and proceeded with foreclosure, alleged fact that such demand was made in violation of independent contract between bondholder

er making the demand and mortgage debtor did not impair right of trustee to prosecute foreclosure action—West Nichols Hills Water Co v American-First Trust Co in Oklahoma City, 158 P 2d 691, 195 Okl 428

(2) Where mortgagor answered to the merits without challenging trustee's right to maintain action to foreclose mortgage trust deed covering waterworks system, and filed a cross action alleging breach of contract between mortgagor and holder of majority of bonds secured by trust deed, mortgagor could not thereafter challenge trustee's right to maintain action on ground that holder of majority of bonds was a foreign corporation doing business in state without complying with domestication statutes and that action was for its benefit—West Nichols Hills Water Co v American-First Trust Co in Oklahoma City, supra.

(3) Where, by terms of trust deed covering a waterworks system, trustee was made representative of rights of beneficiaries, such beneficiaries were not necessary parties to action by trustee to foreclose trust deed, even though beneficiaries under terms of trust were authorized to and did demand that trustee prosecute foreclosure action—West Nichols Hills Water Co v American-First Trust Co in Oklahoma City, supra.

#### Cross action or counterclaim

Trustee, having duty under mortgage trust deed covering waterworks system to declare entire indebtedness due on any default in payment and proceed with foreclosure, would not be liable in damages for breach of bondholder's agreement to which trustee was not a party not to de-

## § 263. Remedies of Creditors and Enforcement of Liabilities

The mortgage creditors of a water company may be entitled to a foreclosure and the sale of its property

The mortgage creditors of a water company may be entitled to a foreclosure<sup>53</sup> and a judgment directing the sale of its property<sup>54</sup>. As a general rule, the property of a water or waterworks company, as a quasi public service company, is not subject to a mechanic's lien,<sup>55</sup> but there is also some authority to the contrary,<sup>56</sup> and under the provisions of some statutes such a lien may attach to the property of a waterworks company.<sup>57</sup> Where the property of a water company is subject to foreclosure and sale, the court will make such directions, as to selling the plant as an entirety and carrying on the business, as will protect the public.<sup>58</sup>

mand foreclosure, and hence claim for damages for such breach could not be interposed by mortgage debtor as cross action or counterclaim in foreclosure action by trustee—West Nichols Hills Water Co v American-First Trust Co in Oklahoma City, supra

54 Okl—West Nichols Hills Water Co v American-First Trust Co in Oklahoma City, 158 P 2d 698, 195 Okl 436

#### Advertisement of sale

Advertisement of sale of realty and personalty comprising waterworks plant and facilities, on special execution issued pursuant to judgment foreclosing mortgage deed of trust in newspaper published in city located in same township as the realty, was sufficient, although circulation of such newspaper was small—West Nichols Hills Water Co v American-First Trust Co in Oklahoma City, supra

55 US—Ackroyd v Winston Bros Co, CCA Mont, 113 F 2d 657—*Corpus Juris* quoted in Pittsburgh Equitable Meter Co v Cary, CCA Okl, 67 F 2d 65, 66

40 C J p 60 note 77

56 US—National Foundry & Pipe Works v Oconto Water Co, CC Wis, 52 F 43, affirmed 59 F. 19, 7 CCA 603

67 C J p 1200 note 24

57 NC—McNeal Pipe, etc, Co v Howland, 16 SE 857, 111 NC 615, 20 L R A 743

58 US—Oconto Water Co v National Foundry & Pipe Works, Wis, 59 F 19, 7 CCA 603

NC—McNeal Pipe, etc, Co v Woltman, 19 SE 109, 114 NC 178.



E. SUPPLY AND DISTRIBUTION OF WATER

§ 264. To Municipalities

Particular matters with respect to the supply and distribution of water to municipalities are discussed infra §§ 265-276, 283.

Examine Pocket Parts for later cases.

§ 265. — Power and Authority of Municipality to Contract

- a. In general
- b. Restrictions
- c. Particular contracts

a. In General

A municipal corporation generally has the authority to contract for a supply of water for municipal uses, but such authority must be conferred on it either expressly or by implication

Subject to the rules of law applicable to municipal contracts generally, particularly with reference to public improvements, as discussed in Municipal Corporations §§ 1035-1652, a municipal corporation ordinarily has the authority to contract for a supply of water for municipal uses,<sup>59</sup> but the power of a municipality to contract for the procurement of a water supply must be conferred on it either expressly or by implication<sup>60</sup> The power to enter into contracts for the supply of water to the municipality and its inhabitants may be expressly given<sup>61</sup> or may be implied<sup>62</sup> Such power may be implied from the power to provide for a water supply,<sup>63</sup> establish a water system of its own,<sup>64</sup> contract for and procure,<sup>65</sup> construct<sup>66</sup> or purchase<sup>67</sup> waterworks,<sup>68</sup> or make contracts for the welfare of the city or contract generally in connection with the

power to provide for the health and welfare of the inhabitants<sup>69</sup> However, the power to purchase water cannot be inferred from a grant of power to erect a waterworks in a statute in which there is found elsewhere express authority for the exercise of the power to purchase, although in a different manner<sup>70</sup> The right of contract conferred on municipalities by statute is not a right to contract for a water supply with any and every company, but only with such as have the power to make such a contract with a municipality.<sup>71</sup>

*Municipality as agent of individual citizen* Although it has been said that where municipal authorities are empowered to contract with a water company for a supply of water, they act as agents of all the people of the city, then and thereafter,<sup>72</sup> strictly speaking the contract is on behalf of the municipality as principal,<sup>73</sup> and the inhabitants will not be regarded as principals by reason of the fact that they are interested that the obligations of contractors toward the municipal corporation should be faithfully complied with, or the fact that they, as taxpayers, contribute the money with which the payments under the contracts of the municipality are to be made<sup>74</sup> Although, by statute, any contract for a municipal water supply must be confirmed by a two-thirds vote of the qualified electors of the city, a city, in entering on such a contract, is not the agent of a single elector or of the aggregate two thirds<sup>75</sup>

b. Restrictions

The authority of a municipality to contract for a supply of water may be subject to certain restrictions, such as limitations on the indebtedness which it may lawfully contract.

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| <p>59 Ala.—Water Works Board of City of Mobile v City of Mobile, 43 So 2d 409, 253 Ala 158</p> <p>Conn.—New Haven Water Co v City of New Haven, 40 A 2d 763, 131 Conn 456</p> <p>La.—City of Westwego v Marrero Land &amp; Imp Ass'n, 59 So 2d 885, 221 La. 564</p> <p>NY—People v City of Schenectady, 60 NYS 2d 911, 186 Misc 385</p> <p>ND—Harding v City of Dickinson, 33 NW 2d 626, 76 ND 71</p> <p>W Va.—Mountain State Water Co v Town of Kingwood, 9 SE 2d 532, 122 W Va 374</p> <p>67 C J p 1200 note 30</p> <p>60 US.—Wichita Water Co v City of Wichita, DCKan, 234 F 415</p> <p>61. ND—Harding v City of Dickinson, 33 NW 2d 626, 76 ND 71</p> <p>67 C.J p 1200 note 32.</p> | <p>62 Ark.—McGehee v Williams, 87 SW 2d 46, 191 Ark 643</p> <p>63. Ark.—McGehee v Williams, supra</p> <p>67 C J p 1201 note 34</p> <p>64. Idaho—Jack v Grangeville, 74 P 969, 9 Idaho 291</p> <p>65. Kan.—Columbus Water-Works Co v Columbus, 28 P. 1097, 48 Kan 99, 15 L R A 354</p> <p>67 C J p 1201 note 36</p> <p>66. Colo.—Colorado Springs v Pike's Peak Hydro-Electric Co, 140 P 921, 57 Colo 169</p> <p>67 C J p 1201 note 37</p> <p>67. NJ—Hackensack Water Co v Hoboken, 17 A 307, 51 N J Law 220</p> <p>68 Minn.—Reed v Anoka, 88 NW 981, 85 Minn 294</p> <p>67 C J p 1201 note 39.</p> | <p>69. Ky.—Dyer v Newport, 94 SW 25, 29 Ky L 656</p> <p>67 C J p 1201 note 40</p> <p>70 NY—Salmon v Rochester &amp; Lake Ontario Water Co, 197 NYS 769, 120 Misc. 131.</p> <p>71. NJ—Plainfield-Union Water Co v Inhabitants of City of Plainfield, 87 A 448, 84 N J Law 634</p> <p>72. Ala.—Birmingham Waterworks Co v Hernandez, 71 So 443, 196 Ala. 438, L R A.1916E 258</p> <p>73. La.—Allen, etc, Mfg Co v Shreveport Waterworks Co, 37 So 980, 113 La 1091, 104 AmSR 526, 68 L R A 650</p> <p>74. La.—Allen, etc, Mfg. Co v Shreveport Waterworks Co, supra.</p> <p>75. SC—Ancrum v Camden Water, etc, Co, 64 SE. 151, 82 S.C. 284, 21 L R A.,N.S., 1029.</p> |
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Although a municipal corporation generally has the authority to contract with an individual or corporation for a supply of water for municipal uses, such authority may be subject to certain restrictions.<sup>76</sup> Thus, the municipality may not exceed the amount authorized by statute to be paid or raised by taxation for such service,<sup>77</sup> and it may not exceed the indebtedness which it may lawfully contract,<sup>78</sup> including, for this purpose, the fixed payment for each current year, not the aggregate of such payments for the whole term of the contract,<sup>79</sup> although there is also authority for the view that the aggregate of payments for the whole term of the contract is to be included.<sup>80</sup> Mere power to enter into a contract with a water company<sup>81</sup> or to contract for a certain period<sup>82</sup> does not authorize a municipality to enter into a contract for such period or for a stated period at a fixed rate. Under a provision of the constitution that the supply of water is subject to the regulation of the state, a municipality has no power to bind itself to pay fixed rates for water for any period beyond the change of rates by statute.<sup>83</sup>

**Exhaustion of authority** Where a municipality is authorized to obtain a water supply either by contract with a private corporation, as discussed supra subdivision a of this section, or by constructing and operating its own works, as considered supra §§ 234-242, it has been held that the adoption of one method exhausts the power of the municipality to adopt the other as long as the first continues the supply according to law.<sup>84</sup>

**Monopoly.** Where its charter confers on a municipality the power to contract for a supply of water, a contract entered into therefor, although it

create a monopoly and is void to that extent, has been held valid to the extent of the powers delegated in the charter.<sup>85</sup> A municipality authorized to buy water for its own distributing system may agree to purchase water up to a given quantity exclusively from one company.<sup>86</sup> A statute prohibiting the grant of an exclusive right for the supply of water is not violated by a contract which contemplates the possibility of the municipality purchasing water from other sources in the future.<sup>87</sup>

**Pledge of municipal credit.** In the absence of express authority, a municipal corporation cannot enter into a contract for the purchase of water from a private corporation which amounts in effect to a pledge of the municipal credit for the support of a private enterprise.<sup>88</sup> A constitutional prohibition of the lending of the credit of a municipality is not violated by a contract with a water company under which the municipality obligates itself to pay for a certain minimum amount for a certain period, although to supply such water it is necessary for the water company to extend its system.<sup>89</sup>

**Source of supply** Although it may be unlawful for a municipality to go outside the state for its supply of water, where a contract for a water supply is silent as to the source from which the water is to be taken, an illegal execution of the contract will not be presumed.<sup>90</sup>

**Supply for portion of town** Under an act authorizing a town to establish a water-supply district and contract for a supply of water for such district, a town, all of which is included in a water district, is not authorized to contract for a supply of water for a portion only of the town.<sup>91</sup> On the other hand,

76 Ky—Beard v Hopkinsville, 24 S W 872, 95 Ky 239, 15 Ky L 756, 44 Am SR 222, 23 L R A 402

**Purchase from "public corporation"**

Under statute providing that city or village owning a distribution system and having an inadequate water supply may purchase water from any "public corporation," city was authorized to contract with the United States for a water supply—Harding v City of Dickinson, 33 NW 2d 626, 76 ND 71

77 W Va—Huntington Water Corporation v City of Huntington, 177 SE 290, 115 W Va. 531  
67 C J p 1201 note 49.

78. Ill—East St Louis & Interurban Water Co v City of Belleville, 196 NE 442, 360 Ill 490  
Ky—Beard v Hopkinsville, 24 S W 872, 95 Ky 239, 15 Ky L 756, 44 Am SR 222, 23 L R A. 402

79. W Va—Huntington Water Cor-

poration v City of Huntington, 177 SE 290, 115 W Va. 531—Allison v City of Chester, 72 SE 472, 69 W Va 533, 37 L R A, NS, 1042, Ann Cas 1913B 1174  
67 C J p 1201 note 51

80. Ill—East St Louis & Interurban Water Co v City of Belleville, 196 NE 442, 360 Ill 490

81. Ind—City of Washington, Ind., v Public Service Commission, 129 NE 401, 190 Ind. 105

82 Ill—Board of Education of Alton Community Consol School Dist No 151 v Alton Water Co., 145 NE 683, 314 Ill 466  
67 C J p 1201 note 53

83. Fla—City of Tampa v. Tampa Waterworks Co., 34 So 631, 45 Fla 600, affirmed 26 S Ct 23, 199 US 241, 50 L Ed 170  
Idaho—City of Pocatello v Murray, 120 P. 812, 21 Idaho 180, affirmed

33 S Ct 107, 226 US 318, 57 L Ed 239

84. Pa—Carlisle Gas & Water Co v Carlisle Water Co., 41 A 321, 188 Pa 51, followed in Dorrance v Bristol Borough, 73 A. 1015, 224 Pa 464

85. Mich—Lewick v Glazier, 74 N W. 717, 116 Mich 493

86. Cal—Marin Water & Power Co v Town of Sausalito, 143 P 767, 168 Cal 587

87. Cal—Marin Water & Power Co v Town of Sausalito supra

88. Ind—Scott v Laporte, 63 NE 278, 69 NE 675, 162 Ind 34

89. Cal—Marin Water, etc., Co v Sausalito, 143 P 767, 168 Cal 587

90. NJ—Brady v Bayonne, 30 A 968, 57 NJ Law 379

91. NY—People v Sisson, 77 NYS 376, 75 App Div 138, 140, affirmed 66 NE 1115, 173 NY 606.  
67 C J. p 1202 note 65.

under an act authorizing a municipal corporation to contract for a supply of water, it has been held that the fact that the water supply is not carried to every part does not invalidate the contract<sup>92</sup>

### c. Particular Contracts

- (1) Contract by municipality to supply other municipality
- (2) Furnishing water directly
- (3) Further or other supply
- (4) Use of streets

#### (1) Contract by Municipality to Supply Other Municipality

Where statutory authority therefor exists a municipality may contract with another municipality for the sale or purchase of water, but in the absence of statutory authority, a municipality which has purchased a supply of water for its own use is without power to contract to furnish water to another municipality.

Where statutory authority therefor exists a municipality may contract with another municipality for the sale<sup>93</sup> or purchase<sup>94</sup> of water. However, a municipality having no water supply of its own cannot, in the absence of any legislation vesting such power, contract with a water company for water to be supplied to another municipality,<sup>95</sup> nor, in the absence of statutory authority,<sup>96</sup> where a city has purchased a supply of water for its own use, has it the power to contract to furnish water to another municipality<sup>97</sup>. Where the authority to contract for a water supply is limited by statute to

adjoining municipalities, such authority does not extend to municipalities that are not contiguous<sup>98</sup>. Likewise, under a statute authorizing a municipality with waterworks of its own to enter into a contract with a contiguous municipality for the supply of the latter with water and also to dispose of surplus water for manufacturing and other purposes, a noncontiguous municipality cannot contract for a water supply from the municipality with its own waterworks<sup>99</sup>. The board of a town, which has established a water supply district including a village which is afterward incorporated, has been held to lack power, under the statutes applicable to the authority of the municipalities in question, to enter into a water contract to supply such village after its incorporation<sup>1</sup>.

*Water supply commission.* The power and authority of a water supply commission to contract with municipalities for the supply and distribution of water are statutory and depend on, and are measured by, the terms of the statutory grant of power and authority reasonably construed<sup>2</sup>.

*Restriction by contract.* The attempt of a water company, in selling its waterworks to a municipality, to restrict the sale of water to such municipality and other designated municipalities is beyond its powers and against the policy of the state<sup>3</sup>.

*Approval of district, state, or federal officers.* Where a municipality is authorized to contract with

92 N.J.—State v Summit Township, 19 A 966, 52 N.J. Law 483  
67 C.J. p 1202 note 66

93 Ark.—McGehee v Williams, 87 S.W.2d 46, 191 Ark 643  
Ill.—Baltis v Village of Westchester, 121 N.E.2d 495, 3 Ill 388

In contracting with board of county commissioners for sale of water, city is engaged in a "proprietary function" and binds itself as though it were a private concern—Wagner v City of Youngstown, Ohio App, 75 N.E.2d 724

94 Ark.—McGehee v Williams, 87 S.W.2d 46, 191 Ark 643

95 N.J.—East Newark v Jersey City, 57 A 1051, 67 N.J. Eq 265, affirmed 64 A 1132, 68 N.J. Eq 783

96 Ill.—Baltis v Village of Westchester, 121 N.E.2d 495, 3 Ill 2d 388

97 N.J.—Rehul v Jersey City, 58 A 175, 71 N.J. Law 109

98 N.J.—Bayliss v Borough of North Arlington, 76 A 1024, 80 N.J. Law 124

99 Ohio—Wright v Kennedy Heights, 1 Ohio Cir Ct, N.S., 195, 25 Ohio Cir Ct 409  
67 C.J. p 1202 note 71.

1. N.Y.—Villa Park Ass'n of Great Neck v Town of North Hempstead, 146 N.Y.S 1047, 162 App Div 45

2. N.J.—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A.2d 19, 30 N.J. Super 409

#### "May" as mandatory

"May," within statute providing that water supply commission, under certain circumstances, may contract to supply a municipality with water is mandatory, and commission is obliged to enter into such a contract, if applying municipality is willing to do so on the basis of the price to be fixed under the statutory formula, but this does not require that the words "may allow" appearing in later portion of the statute are to be construed to mean "shall allow"—City of Bayonne v North Jersey Dist Water Supply Commission, supra

#### Determination of adequacy of supply

Determination of whether water supply under control of water supply commission was adequate to justify contracting to supply nonparticipating city was within the commission's administrative responsibility and special competence, subject to limited statutory superintendency.—City of

Bayonne v North Jersey Dist Water Supply Commission, supra

#### Duty of village to contract

Where two villages pursuant to statutory authority passed identical ordinances providing for joint acquisition and operation of common source of water supply, and each village appointed a commissioner to serve on water commission which had been created pursuant to statute, and circuit court of county appointed third commissioner as provided by statute, thus constituting a commission vested with statutory power, and one village entered into contract with commission for water pursuant to statute, officers of the other village had duty under statute to contract with commission for water, as against contention that such village could disclaim any right, obligation or duty in connection with further functioning of commission—People ex rel Morgan v Village of Berkeley, 94 N.E.2d 550, 342 Ill App 117, affirmed 98 N.E.2d 743, 409 Ill. 160.

3. N.J.—East Jersey Water Co v City of Newark, 130 A. 557, 558, 98 N.J. Eq 672  
67 C.J. p 1202 note 73.

another municipality for a water supply, but is required to have the consent of the district water supply commission and the board of conservation and development, it is immaterial that such consent was obtained subsequent, rather than prior, to the making of such contract<sup>4</sup> In the absence of any statutory requirement, a municipality contracting to purchase water from another is not required to have the consent of the conservation commission<sup>5</sup> or the approval of the state board of health<sup>6</sup> A contract of a municipality purchasing water from another is not invalidated by the fact that the consent of the war department of the United States and that of the state board of commerce and navigation has not been obtained, although one or both would be necessary if delivery is to be made by a main laid according to the plan presented by the contract, where this is not the sole means by which the contract may be performed<sup>7</sup>

### (2) Furnishing Water Directly

A statute authorizing water commissioners to contract for the furnishing of water to the city for public purposes does not authorize a contract for the furnishing of water directly to the inhabitants through the private pipes of the company

A statute authorizing water commissioners to contract for the furnishing of water to the city for public purposes does not authorize a contract for the furnishing of water directly to the inhabitants through the private pipes of the company.<sup>8</sup>

### (3) Further or Other Supply

The fact that a municipality has a contract for a supply of water will not prevent it from contracting for a further or other supply.

The fact that a municipality has a contract for a supply of water will not prevent it from contracting for a further or other supply.<sup>9</sup> A city may be authorized to procure by purchase or otherwise ad-

ditional water supply for temporary and emergency use<sup>10</sup>

*Board of water commissioners* expressly granted power to make contracts for supplying a village with water may contract with an individual for supplying the balance of water needed after it has acquired a municipal plant and has found it inadequate<sup>11</sup>

### (4) Use of Streets

The power of a municipality to contract for a water supply includes the power to contract for the use of the streets for that purpose by private persons.

The power of a municipality to contract for a water supply includes the power to contract for the use of the streets for that purpose by a private corporation or individuals.<sup>12</sup>

## § 266. — Form and Requisites of Contract

- a In general
- b Bids and deposits

### a. In General

A contract for a water supply must be made as the law directs, and a municipal ordinance may constitute the contract

A contract for a water supply must be made by means of an ordinance, resolution of the municipal authorities, or otherwise as the law directs<sup>13</sup> An ordinance prescribing the conditions on which a water supply company may lay its mains and pipes in the streets of a city, and furnish water to it and its inhabitants, when accepted by the water company, constitutes the contract between it and the city<sup>14</sup>

*Invalid ordinance; ordinance procured by fraud*  
Where an ordinance embracing a contract between a municipality and a water company was void because a member of the common council of the municipality was interested in the water company, the former is not estopped to assert the invalidity of

<sup>4</sup> NJ—Mundy v Raritan Tp, 144 A 162, 7 NJ Misc 78

<sup>5</sup> NY—Town of Mamaroneck v New York Interurban Water Co, 190 NY 580, 198 App Div 396, motion denied 135 NE 933, 233 NY 598, and affirmed 135 NE 962, 233 NY 666

<sup>6</sup> NJ—Mundy v Raritan Tp, 144 A 162, 7 NJ Misc 78

<sup>7</sup> NJ—Mundy v Raritan Tp, supra

<sup>8</sup> NY—Woodside Water Co v Long Island City, 48 NYS 686, 23 App Div 78, affirmed 54 NE 1095 mem, 159 NY 558 mem

<sup>9</sup> NJ—Jersey City v Kearny, 59 A 1056, 72 NJ Law 109.

<sup>10</sup> NY—People ex rel Urban Water Supply Co v Connolly, 149 NYS 563, 86 Misc 670, affirmed 149 NYS 693, 164 App Div 163, affirmed 108 NE 1105, 213 NY 706

<sup>11</sup> NY—Drew v White Plains, 142 NYS 577, 157 App Div 394

<sup>12</sup> US—Illinois Trust, etc, Bank v Arkansas City, Kan, 76 F 271, 22 CCA 171, 34 LRA 518  
67 CJ p 1203 note 83

<sup>13</sup> NY—Jamaica Water Supply Co v City of New York, 4 NYS 2d 864, 254 App Div 323, reargument denied 6 NYS 2d 347, 254 App Div 884, certified question answered 18 NE 2d 523, 279 NY 342, reversed on other grounds 18 NE 2d 523, 279 NY 342—People v City of Sche-

nectady, 60 NYS 2d 911, 186 Misc 385

67 CJ p 1203 note 85

#### Formal requirement inapplicable

Failure to obtain formal approval by common council of arrangement made by city manager concerning water supply did not prevent city from being obligated under implied contract, in view of emergency confronting city when arrangement was made and council's full knowledge of situation requirement of formal action by council being inapplicable under such circumstances—People v City of Schenectady, supra.

<sup>14</sup> Va.—Portsmouth, Berkley & Suffolk Water Co v City of Portsmouth, 70 SE 529, 112 Va. 158.

the ordinance where most of the acts relied on to work an estoppel were required of the municipality under a previous valid ordinance and the presumption is that, relative to the invalid ordinance, the water company knew the law<sup>15</sup> It has been held, however, that the fact that an ordinance granting to a person the right to supply water was procured by bribing members of the council will not affect the right of a water company which purchased the franchise of such person, without notice of the fraud, and expended money in the construction of waterworks, to collect the agreed rent for hydrants actually furnished to, and used by, the city.<sup>16</sup>

### b. Bids and Deposits

Generally, a contract to supply water is not required to be awarded to the lowest of competitive bidders, but where competitive bids are called for, bidders may be required to deposit a reasonable sum as a guaranty of good faith

Generally, a contract to supply water is not required to be awarded to the lowest of competitive bidders,<sup>17</sup> but where competitive bids are called for, bidders may be required to deposit a reasonable sum as a guaranty of good faith<sup>18</sup>

## § 267. — Ratification of Defective Contract

A defective contract may be ratified by appropriate action.

Where a municipality possessing the power to contract for supplying itself and its inhabitants with water, in entering into a contract for this purpose, exercises its power in an improper or defective manner, it may by appropriate action subsequently ratify the contract<sup>19</sup> Thus, where a municipality possesses the requisite power to contract, the making of a subsequent contract modifying the original may operate to ratify the original<sup>20</sup> However, where a municipality is without authority to contract for supplying itself and its inhabitants with

water, the subsequent execution of an agreement modifying the original one, unless expressly authorized by statute as such ratification, does not validate the original contract<sup>21</sup>

*Legislative action* A contract originally ultra vires may be rendered valid by subsequent legislative action<sup>22</sup>

## § 268. — Terms and Conditions of Contract in General

- a. In general
- b. Duration, extension, and renewal
- c. Quantity of water; force or pressure
- d. Compensation

### a. In General

In the absence of a controlling statute, the terms and conditions on which a city will exercise its authority to contract for a water supply are largely within the discretion of its authorities

In the absence of a controlling statute, the terms and conditions on which a city will exercise a statutory authority to contract for a supply of water are largely within the discretion of its authorities,<sup>23</sup> which will not be reviewed in the absence of fraud or abuse<sup>24</sup>

*Regulation by commission.* Where, under a public utilities act, the terms of the contract between a water company and a municipality are determined by the public utility commission, it has power to prescribe not only the rates to be paid, as discussed infra § 275, but the character of the service to be furnished<sup>25</sup>

### b. Duration, Extension, and Renewal

In the absence of a constitutional or statutory restriction, the duration of the contract may be fixed in the discretion of the municipal authorities, and provision may be made for its extension and renewal, but, under the circumstances of particular cases, a contract for a term of twenty or thirty years has been held to be unreasonable.

15 Wis—Antigo Water Co v Antigo, 128 NW 888, 144 Wis 156

16 Kan—Burlington Water-Works Co v Burlington, 23 P 1068, 43 Kan 725

17. N Y—People v City of Schenectady, 60 N Y S 2d 911, 186 Misc 385 67 C J p 1203 note 89

18. N J—Flemming v Jersey City, 42 A 845 67 C J p 1203 note 90

19. US—Wichita Water Co v City of Wichita, D C Kan., 234 F. 415

20. US—Wichita Water Co. v City of Wichita, supra.

21. US—Wichita Water Co v City of Wichita, supra.

22 Conn—New Haven Water Co v City of New Haven, 40 A 2d 763, 131 Conn 456

23. Ala—Hillard v City of Mobile, 47 So 2d 162, 253 Ala 676

Cal—City of Coronado v City of San Diego, 119 P 2d 359, 48 Cal App 2d 160

ND—Harding v City of Dickinson, 33 NW 2d 626, 76 ND 71

Ohio—Wagner v City of Youngstown, 75 NE 2d 724

Utah—Barlow v Clearfield City Corp, 268 P 2d 682, 1 Utah 2d 419 67 C J p 1204 note 94

**Designation of connecting point by mayor**

A municipal contract for a new water supply is not invalid because, instead of fixing the point at which the new water supply is to be connected, it leaves the designation of such point to the mayor of the municipality—Brady v Bayonne, 30 A. 968, 57 N J Law 379

24. Cal—Wehrle v Board of Water and Power Com'rs of Los Angeles, 293 P 67, 211 Cal 70. 67 C J p 1204 note 95.

25. N J—Hackensack Water Co v Borough of Tenafly, 111 A. 261, 95 N J Law 25.

In the absence of constitutional<sup>26</sup> or statutory<sup>27</sup> restriction, the duration of the contract may be fixed in the discretion of the municipal authorities,<sup>28</sup> although for a longer period than their term of office<sup>29</sup> Accordingly, a contract for a municipal water supply for a term of ten,<sup>30</sup> twenty, or thirty,<sup>31</sup> and even of forty years,<sup>32</sup> is not so unreasonable per se as to be illegal. However, under the circumstances of particular cases, a contract for a term of twenty or thirty years has been held to be unreasonable and void.<sup>33</sup> A statute limiting the contracts of a municipality with a corporation for a water supply to a term of twenty years does not apply to a contract with individuals, although such individuals intend to, and subsequently do, transfer their rights to a corporation.<sup>34</sup>

**Contract for year.** By adopting a contract that provided for an annual rental and paying on that basis, a municipality and a water company became mutually bound at least for the current year.<sup>35</sup> In the absence of proof to the contrary, a contract for a year is a contract for the calendar year.<sup>36</sup> Authority to contract for a water supply is not limited to the making of annual contracts by the use of the phrase "for supplying the said city . . . with water . . . from year to year."<sup>37</sup>

**Indefinite term.** In the absence of constitutional or statutory provision to the contrary, a city and a company may contract for a supply of water for an unlimited period.<sup>38</sup> Where the contract is for an unspecified term, the city may terminate the contract on giving due and reasonable notice of its election so to do.<sup>39</sup>

**Renewal or extension.** Where a city is authoriz-

ed to enter into a contract for a water supply, provisions for a renewal or extension at the expiration of the first term have been held valid.<sup>40</sup> The provision of a contract to furnish water for a municipality extending its term in case a sale has not been made until new terms could be reached is not abrogated by the powers vested in a public utilities commission created since the contract was made,<sup>41</sup> but, where the act establishing a public utilities commission provided that any agreement of the parties for an extension of the contract was subject to the approval of the commission, the authority of such commission supersedes a contractual provision for arbitration in case of failure of a municipality and water company to agree on terms of renewal.<sup>42</sup> Where the terms of a contract between a city and a water company comprehend beside rates the elements that go to make up service, and the contract contains no provision permitting the settlement of the terms of renewal to be determined by any agency other than the parties themselves, a provision of the contract that on the expiration of the stated term, if the city does not elect to purchase the waterworks, it shall renew the contract on such terms as are to be mutually agreed on at that time, provided that the rates shall in no case exceed those fixed by the contract, imposes no obligation on the city to renew on failing to purchase.<sup>43</sup> Where, according to its contract, a city was to be furnished water without charge for certain purposes, and had the right to purchase the water plant at a date beyond the term of the franchise, and both franchise and contract were treated by both parties as extended, the contract period, including the obligation to furnish water free for certain purposes, continued

26. Cal—Marin Water & Power Co v Town of Sausalito, 143 P 767, 168 Cal 587

67 C J p 1204 note 99

27. Ohio—Wagner v City of Youngstown, App, 75 NE 2d 724

67 C J p 1204 note 1

28. Ohio—Wagner v City of Youngstown, supra

67 C J p 1204 note 2

29. US—Salina Waterworks Co v City of Salina, D C Kan, 195 F 142

30. Cal—Marin Water & Power Co v Town of Sausalito, 143 P 767, 168 Cal 587

67 C J p 1204 note 4

31. Me—Inhabitants of North Berwick v. North Berwick Water Co, 134 A 569, 125 Me 446

67 C J p 1204 note 5

32. US—Wichita Water Co v City of Wichita, D C Kan, 234 F 415

33. Minn—Flynn v. Little Falls

Electric, etc, Co, 77 NW 38, 78 NW 106, 74 Minn 180

67 C J p 1204 note 7

34. US—City Water Co of Chillicothe v City of Chillicothe, Mo, 196 F 234

35. NJ—Belvidere Water Co v Town of Belvidere, 83 A 241, 82 NJ Law 601

36. NJ—Belvidere Water Co v Town of Belvidere, supra

37. Miss—Light, Heat & Water Co of Jackson v City of Jackson, 19 So 771, 73 Miss 598

38. Me—City of Belfast v Belfast Water Co, 98 A 738, 115 Me 234, L R A 1917B 908

NJ—Atlantic City Water Works Company v Atlantic City, 6 A 24, 48 NJ Law 378

39. US—Risley v. Utica, CCNY, 179 F 875

Notice held reasonable

Under contract by which city was to furnish water to adjoining city

at specified rates, and which contained no provision that contract was for any specified term, notice by city furnishing water that contract would terminate approximately three years thereafter was held reasonable and to terminate contract as of such date—City of Milwaukee v City of West Allis, 258 NW 851, 217 Wis 614, rehearing denied 259 NW 724, 217 Wis 614

40. US—Salina Waterworks Co v City of Salina, D C Kan, 195 F 142

67 C J p 1205 note 14

41. Me—Inhabitants of North Berwick v North Berwick Water Co, 134 A 569, 125 Me. 446

42. Me—Inhabitants of North Berwick v North Berwick Water Co, supra

43. Mont—Livingston Waterworks v City of Livingston, 162 P 381, 53 Mont 1, L R A 1917D 1074.

67 C J p 1205 note 17.

until the time necessary to complete the purchase, which the city had elected to make<sup>44</sup> A contract by a city to pay hydrant rentals to a water company for the term of twenty years, containing no express limitations as to the time during which the company is to furnish water, is not extended by the fact that the city permits the company to continue to occupy the streets with its mains and hydrants<sup>45</sup>

### c. Quantity of Water; Force or Pressure

Contractual requirements as to the quantity of water and pressure will be enforced unless waived

A requirement in the contract of a municipality with a water company that the latter should furnish an "ample supply" of water, or "first class fire protection," or a specified quantity and pressure, obligates the water company to maintain a plant and equipment capable of filling the requirement,<sup>46</sup> provided the requirement of the contract has not been waived by the municipality, as by its acceptance of an inadequate plant<sup>47</sup> However, where the city has contracted for results and not for the means or appliances by which such results may be reached, the acceptance of mains smaller than the maximum size specified does not relieve a company from its obligation to supply the stipulated quantity and force of water,<sup>48</sup> unless the acceptance of smaller pipes in consideration of a reduced rental modifies the original obligation<sup>49</sup> An agreement to supply water to the extent it may be needed only is not void for lack of mutuality merely because the amount needed may be a variable quantity<sup>50</sup>

*Notice* Where the contract between municipality and water company provides for notice of in-

sufficient supply or pressure, proper notice must be given to relieve the municipality of its obligation to make payments under the contract<sup>51</sup> However, formal notice and demand of requisite pressure in emergencies have been said to be unnecessary<sup>52</sup>

### d. Compensation

- (1) In general
- (2) Remission or payment of taxes

#### (1) In General

Authority to purchase water implies authority to pay for it, and provisions for reasonable compensation will be sustained.

Authority to purchase water necessarily implies authority to pay for it,<sup>53</sup> and provisions for reasonable compensation will be sustained<sup>54</sup> Where statutory authority therefor exists a municipality may bind itself to raise the money to pay for the water purchased in such a manner as would secure for it the most efficient and economical contract<sup>55</sup>

*Rate of contract with other parties* Where a company, which had been furnishing a city with water, joined with others, who had contracted to furnish the city a new water supply, in an agreement with the city to continue to furnish it water until the city should obtain its new supply, and the rate at which water was to be furnished in the interim was different from that at which it was to be furnished from the new supply, those who had contracted for the new supply were not obliged to furnish the water at the temporary rate<sup>56</sup> However, by express contract between a municipality and a water company, the rate to be paid by the former may, under

44. US—Municipal Waterworks Co v City of Ft Smith, D C Ark., 216 F 431

Free supply generally see *infra* § 283

45. US—City Water Co of Chillicothe v City of Chillicothe, Mo., 207 F 503, 125 CCA 165

Hydrant rentals generally see *infra* § 270

46. Iowa—Cedar Rapids Water Co v Cedar Rapids, 90 NW 746, 117 Iowa 250  
67 C J p 1205 note 22

47. Ky—Owensboro Water Co v Duncan's Adm'x, 32 SW 478, 17 Ky Law 755

48. Miss—Light, etc, Co v Jackson, 19 So 771, 73 Miss 598

49. Me—Milford v Bangor R, etc, Co, 76 A 696, 106 Me 316, 30 L R A, NS, 526, 20 Ann Cas 622  
67 C J p 1205 note 25

50. Cal—City of Coronado v City of San Diego, 119 P.2d 359, 48 Cal App 2d 160.

51. NC—Wilson v Charlotte, 14 SE 961, 110 NC 449  
67 C J p 1206 note 26

52. Miss—Light, etc, Co v Jackson, 19 So 771, 73 Miss 598  
67 C J p 1206 note 27

53. ND—Harding v City of Dickinson, 33 NW 2d 626, 76 ND 71.

54. Ky—Dolan v Louisville Water Co, 174 SW 2d 425, 295 Ky 291  
Utah—Barlow v Clearfield City Corp, 268 P 2d 682, 1 Utah2d 419  
67 C J p 1208 note 65  
Regulation by city or state see *infra* § 275

**Rates "reasonable" in relation to costs**

Under a contract for the sale of water by a city to a township providing that the rates should always be "reasonable" in relation to the costs incurred by the city for the supply of water, method employed by city of dividing in proportion to the total income, the customary account-

ing and collection costs and the administrative and general expenses was not unreasonable, and where township's demands for water were partially met by supplying water through pipes financed by bond issues, it was not unreasonable that the township should pay a share of the bond service charges regardless of the fact that the construction of facilities was not directly occasioned by the township's demands, and prudent business administration required that the item of costs incurred include, among others, operating expenses, upkeep of property, and a fair return on the value thereof—Meridian Tp v City of East Lansing, Mich., 71 NW 2d 234, 342 Mich 734

55. ND—Harding v City of Dickinson, 33 NW 2d 626, 76 ND 71

56. NJ—Jersey City v Flynn, 70 A 497, 74 N J Eq 104, modified on other grounds 76 A. 3, 76 N J Eq 607.

certain circumstances, depend on the rate paid by other municipalities<sup>57</sup>

## (2) Remission or Payment of Taxes

When not in contravention of applicable constitutional provisions, a city generally may agree, as part of the consideration for a municipal water supply, to remit municipal taxes on the property of the water company, and it may also generally agree to pay, or to exempt the company from the payment of, such taxes.

When not in contravention of applicable constitutional provisions,<sup>58</sup> a city generally may agree, as part of the consideration for a municipal water supply, to remit municipal taxes on the property of the water company<sup>59</sup> It may also generally agree to pay,<sup>60</sup> or to exempt the company from the payment of,<sup>61</sup> such taxes in excess of a certain amount, provided the consideration for such agreement, on the part of the municipality, is reasonably adequate, and the contract is for a reasonable length of time and in other respects reasonable and fair<sup>62</sup>

**Federal taxes** Where a municipality has contracted, in case "any franchise or other tax, except upon its tangible property" is assessed against the water company, to save it harmless from a defined part thereof, or, on failure to do so, pay a specified sum for certain services by such company, the phrase does not include federal income and capital stock taxes.<sup>63</sup>

**State tax.** Where a city agrees, as part of the consideration for a water supply, to pay a sum equal to all taxes which may be assessed on the franchise and real and personal property of the company, this includes a tax assessed by the state.<sup>64</sup>

## § 269. — Purity and Quality of Water

### a. In general

### b. Waiver or estoppel

### a. In General

A requirement that a water company furnish "pure and wholesome water" obligates the company to furnish water which is ordinarily and reasonably pure and wholesome and fit for domestic use

A requirement that a water company furnish "pure and wholesome water" obligates the company to furnish water which is ordinarily and reasonably pure and wholesome and fit for domestic use, but not necessarily chemically pure<sup>65</sup> The municipality is under no obligation to pay for water which is not up to such standard<sup>66</sup>

**Notice** Where a contract provides that in case the water company neglects or refuses to maintain a filtering process to keep the water pure, after reasonable notice by the municipality, the latter is under no obligation to pay a stipulated hydrant rental until such filtering process is provided, proper notice must be given and a reasonable time allowed thereafter to perfect the filtering process required in order to discharge the municipality from its obligation<sup>67</sup>

**Hydrant rental.** The obligation of the city to pay for water supplied at hydrants for fire protection or sanitary purposes is unaffected by the failure to supply water which is "good and wholesome" and suitable for domestic uses<sup>68</sup>

### b. Waiver or Estoppel

A municipality may waive its rights as to quality of water, but the waiver of a former breach of the obligation to supply pure water, which is a continuous obligation, does not estop a municipality to set up a present breach

A municipality may waive its rights as to the quality of water to be supplied under a contract<sup>69</sup> Thus, where the water is not "wholesome," as contemplated by the contract, but the municipality receives such water without objection within a reasonable time, it will be held to have waived its rights as to quality,<sup>70</sup> likewise, if the water is accepted

57. N.J.—New Jersey Suburban Water Co v Kearny, 77 A 50, 80 N.J. Law 319

67 C.J. p 1208 note 67

58. Minn.—Little Falls Electric, etc., Co v. Little Falls, 77 N.W. 40, 7 Minn 197

67 C.J. p 1208 note 70

59. Mich.—Alpena City Water Co v Alpena, 90 N.W. 323, 130 Mich 518

67 C.J. p 1208 note 71

60. Mich.—Ludington Water-Supply Co v Ludington, 78 N.W. 558, 119 Mich 480

61. Conn.—Portland Water Co v Town of Portland, 118 A. 84, 97 Conn. 628.

62. Me.—Maine Water Co v Waterville, 45 A 830, 93 Me 586, 49 L. R. A. 294

67 C.J. p 1209 note 74

63. Conn.—New Haven Water Co v City of New Haven, 139 A. 99, 106 Conn 562

67 C.J. p 1209 note 75

64. Me.—Inhabitants of North Berwick v North Berwick Water Co, 134 A 569, 125 Me 446

N.J.—Montclair Water Co v Town of Montclair, 79 A. 258, 81 N.J. Law 573

65. Ala.—State v Birmingham Waterworks Co, 64 So. 23, 185 Ala 388, Ann Cas 1916B 166

67 C.J. p 1206 note 29

66. Ky.—Harrodsburg Water Co v Harrodsburg, 73 S.W. 1032, 24 Ky L. 2193

67. Ill.—Kankakee v Kankakee Water Co, 38 Ill. App. 620

67 C.J. p 1206 note 31

68. Minn.—Industrial Trust Co v St. Cloud, 93 N.W. 114, 88 Minn 437 —State Trust Co v Duluth, 73 N.W. 249, 70 Minn 257

Hydrants and hydrant rentals generally see *infra* § 270

69. Mo.—Lamar Water & Electric Light Co v City of Lamar, 39 S.W. 768, 140 Mo 145

70. Mo.—Lamar Water & Electric Light Co v City of Lamar, *supra*



as good and used by the city and its people generally for some length of time, the fact that it was actually impure will not relieve the city of its obligation to pay for such water<sup>71</sup> However, this does not apply where there was a mere occasional use of the water without fair examination,<sup>72</sup> or an examination merely of samples submitted<sup>73</sup> The right to insist on a filtering process to provide good and wholesome water, suitable for drinking or other domestic purposes, is not waived by the acceptance of the waterworks, where no filtering processes had been installed but it is not shown that the city authorities then knew that the water was unfit for domestic use<sup>74</sup> The waiver of a former breach of the obligation to supply pure water, which is a continuous obligation, does not estop a municipality to set up a present breach<sup>75</sup> Where a water company, supplying impure water in breach of its contractual obligation, has the only supply and the municipality is compelled to take its service or none at all, acceptance of such service is not a waiver of the breach<sup>76</sup> Where a municipality treated a contract as terminated by refusing to recognize it as of binding force and by resisting an action for specific performance, continued receipt of water service, which the company was under a franchise, as well as contractual, obligation to furnish, was not a waiver of the company's failure to perform its contract<sup>77</sup>

*Authority of city council* A city council has power, acting in good faith, to waive strict compliance with a contract as to the quality of the water furnished<sup>78</sup>

*Exercise of police power despite waiver.* Although a municipality may waive its contract right

to pure and wholesome water by continuing to accept performance, this does not involve waiver of its police power to secure the inhabitants such water<sup>79</sup>

## § 270. — Hydrants and Hydrant Rentals

- a In general
- b Conditional payments

### a. In General

Subject to constitutional and statutory conditions and limitations, a municipality authorized to contract for a water supply may agree to pay hydrant rentals, and the rights and obligations of the parties under such contract depend on its terms, reasonably construed

Subject to constitutional and statutory conditions and limitations,<sup>80</sup> where a municipality is authorized to contract for a water supply, it may agree to pay a stipulated rental for a certain number of fire hydrants,<sup>81</sup> likewise, where a statute authorizes a municipality to provide the necessary means for extinguishing fires, it may lawfully contract with a water company, under agreement to furnish water for extinguishing fires, to furnish the necessary hydrants in an extension of the waterworks<sup>82</sup> The rights and obligations of the parties under such contract depend on its terms, reasonably construed<sup>83</sup> The municipality is under no obligation to pay for any hydrants which do not come up to the standard fixed by the contract or ordinance<sup>84</sup>

*Attempted modification of contract* Notice of the adoption of a resolution, contemplating the continued performance of an existing contract, which provides for payment of the reasonable rental of additional hydrants, by which resolution the city assumed to declare what should be such rental, to

71. Kan—Burlington Water-Works Co v Burlington, 23 P 1068, 43 Kan 725  
 Mich—Alpena City Water Co v Alpena, 90 NW 323, 130 Mich 518  
 72 Kan—Winfield Water Co v Winfield, 33 P 714, 51 Kan 104  
 73 Miss—Meridian Waterworks Co v Meridian, 37 So 927, 85 Miss 515  
 74 Ill—Illinois Trust, etc, Co v Pontiac, 112 Ill App 545  
 75 U S—Montana Water Company v City of Billings, D C Mont, 214 F 121, appeal dismissed 224 F 1021, 139 CCA 665  
 76. U S—Montana Water Company v City of Billings, supra  
 77. U S—Montana Water Co v City of Billings, supra  
 78. Iowa—Creston Waterworks Co v Creston, 70 NW 739, 101 Iowa 687  
 67 C J p 1207 note 42.

79. U S—Montana Water Co v City of Billings, D C Mont, 214 F 121, appeal dismissed 224 F 1021, 139 CCA 665  
 80. Ill—East St Louis & Interurban Water Co v City of Belleville, 196 NE 442, 360 Ill 490  
 Regulation of rates by municipality or state see infra § 275  
 Violation of debt limitation  
 Ill—East St Louis & Interurban Water Co v City of Belleville, supra  
 81. Ill—East St Louis & Interurban Water Co v City of Belleville, supra  
 Ind—Seymour Water Co v City of Seymour, 197 NE 701, 102 Ind App 56  
 Ky—City of Whitesburg v Whitesburg Water Co, 78 SW 2d 330, 257 Ky 444  
 67 C J p 1207 note 47.  
 Power and authority of municipality

to contract for a water supply generally see supra § 265  
 Curing previous franchise  
 City had right to enter into contract with water company confirming previous franchise and reducing hydrant rentals, and to make contract curative of previous franchise—City of Whitesburg v Whitesburg Water Co, supra  
 82. N Y—Utica Water Works Co v. Utica, 31 Hun 426  
 83 Wash—Ellensburg Water Supply Co v Ellensburg, 43 P 531, 13 Wash 554  
 67 C J p 1207 note 50  
 84. U S—Illinois Trust, etc, Bank v Arkansas City Water Co, C C Kan, 67 F 196  
 Me—Belfast Water Co v Belfast, 42 A 235, 92 Me 52  
 Evidence held to show compliance  
 Ky—Combs v Prestonsburg Water Co, 84 SW 2d 15, 260 Ky. 169.

which the company made no response, does not change the contract or affect the company's rights<sup>85</sup>

*Delegation of right to use.* Where a city has an unlimited right to use hydrants for sprinkling the streets, it may exercise such right by employing others to perform the service<sup>86</sup>

### b. Conditional Payments

The obligation of a municipality to pay hydrant rentals may be subject to certain conditions

Where, according to the agreement between a city and a water company, on failure of the water system to meet a certain test, the city should be free from the obligation to pay hydrant rental until such test can be met, the obligation of the city is subject to the condition that the water system meet such test.<sup>87</sup> The provision of a contract suspending the liability of the city for the payment of hydrant rentals for the period during which the company's service is shown by test to be inefficient exempts the city from payment for such period and does not merely postpone the time of payment<sup>88</sup> A provision that, if the water company fail to furnish pure and wholesome water for drinking and other domestic purposes, the city should be relieved from paying hydrant rentals while still using the water from such hydrants for fire and other prescribed purposes, has been held to be not a forfeiture but a valid stipulation for liquidated damages<sup>89</sup>

*Improvement of water system.* Where the obligation of a municipality to pay hydrant rentals is dependent on the obligation of the water company to extend and improve its system, there is no obligation to make such payments where the company has failed to perform its obligation<sup>90</sup> The municipality does not waive performance of such condition by continuing to accept and use the water

furnished,<sup>91</sup> nor, under such circumstances, does an obligation of payment arise because of the use of the water, where refusal of payment is not based on the repudiation of the debt but is merely a suspension of payment until performance by the water company, according to the terms of the contract,<sup>92</sup> and a waiver by the municipality of its right to annul the franchise for failure to make the specified improvements is not a waiver of its right under the contract to suspend the payment of hydrant rentals<sup>93</sup>

## § 271. — Construction, Operation, and Assignment of Contracts

a Construction and operation of contracts

b Assignment of contract

### a. Construction and Operation of Contracts

The contract between a municipality and a water supplier is not subject to interpretation concerning any matter on which it is clear, but, if a question of construction arises, the rules governing the construction of contracts generally are applicable.

The contract between a municipality and a water company or other water supplier is not subject to interpretation concerning any matter on which it is clear,<sup>94</sup> however, should a question of construction arise, the general rules governing the construction of contracts apply<sup>95</sup> In accordance with the primary rule of construction, the intention of the parties should, if possible, be ascertained and given effect<sup>96</sup> Where there is ambiguity in the terms of the contract, courts will generally give it the construction placed on it by the parties,<sup>97</sup> especially where they have acted under it for a great length of time<sup>98</sup> General terms are to be restricted and limited by particular recitals, used in connection

85. Ind—Valparaiso v Valparaiso City Water Co, 65 NE 1063, 30 Ind App 316

Modification of contract to supply water to municipality generally see infra § 272

86. Pa—City of New Castle Water Co v Mahoning & S Ry & Light Co, 89 A 811, 243 Pa. 100

87. Wis—Antigo Water Co v Antigo, 128 NW 888, 144 Wis 156 67 C.J. p 1207 note 57

88. Kan—Great Bend Water & Electric Co v. City of Great Bend, 205 P 359, 111 Kan 229

89. Ill—Illinois Trust, etc, Bank v Pontiac, 112 Ill App 545, affirmed 72 NE 411, 212 Ill 326

Failure to supply good water suitable for domestic uses as not excusing liability of municipality to pay for

water supplied at hydrants for fire protection and sanitary purposes see supra § 269 a

90. Mo—Daly v City of Carthage, 128 SW 265, 143 Mo App 564

91. Mo—Daly v City of Carthage, supra

92. Mo—Daly v City of Carthage, supra

93. Mo—Daly v. City of Carthage, supra

94. Mont—Butte Water Co v City of Butte, 138 P 195, 48 Mont 386

95. US—Louisiana Power & Light Co v Town of Arcadia, DCLa, 119 F Supp 818

Ala—Hillard v City of Mobile, 47 So 2d 162, 253 Ala 676

Cal—City of Coronado v City of San Diego, 140 P 2d 881, 60 Cal App 2d 395—City of Coronado v. City of

San Diego, 119 P 2d 359, 48 Cal App 2d 160

Conn—New Haven Water Co v City of New Haven, 40 A 2d 763, 131 Conn 456

Minn—Village of Hibbing v Stuntz Tp, 29 NW 2d 808, 225 Minn 31.

Ohio—Wagner v City of Youngstown, Ohio App, 75 NE 2d 724

96. La—Louisiana Power & Light Co v Town of Arcadia, DCLa, 119 F Supp. 818

Ohio—Wagner v City of Youngstown, App, 75 NE 2d 724 67 C.J. p 1209 note 86

97. RI—Newport Waterworks v. Taylor, 83 A 833, 34 RI 478 67 C.J. p 1209 note 79

98. Wash—State v Mountain Spring Co, 105 P 243, 56 Wash 176, 34 L R.A.N.S. 196

67 C.J. p 1209 note 80.

with them<sup>99</sup> Since the public interest is affected by a contract between a municipality and a water company, the language of such contract should be construed so as to protect that interest<sup>1</sup> The language of a provision of a contract inserted for the benefit of the water company must be construed most strongly against the company<sup>2</sup> However, a waterworks ordinance accepted by a water company is not to be strictly construed against the city on the theory that it was prepared with care and at leisure by the city and accepted by the company without opportunity to consider its provisions<sup>3</sup> Where, under the constitution of the state, a municipality could not enter into a contract that would constitute a monopoly, its contract with a water company must be construed in the light of the presumption that all parties knew of such limitation<sup>4</sup>

*Obligations as independent or dependent.* As to whether or not the covenants of a contract between a municipality and a water company are dependent or independent, the intention of the parties, to be gathered from the contract according to the ordinary rules of construction, must govern<sup>5</sup>

#### b. Assignment of Contract

A water company deriving its supply under contracts from another company may effectively assign its rights under such contracts to a municipality, and a municipality may waive its right to object to the assignment by a water company of its rights and privileges under a contract with the municipality

Where a water company, acting as an intermediary and deriving its supply under certain contracts from another company, assigns all its rights to a municipality, which, among others, it had supplied, such municipality is entitled to the continued supply of water to itself from the supplying company for the period for which compensation by both municipality and the assigning water company had been agreed on and is ascertainable,<sup>6</sup> and, likewise, for the periods for which other municipalities, to be

supplied by such municipality under the assignment, were to be supplied by the assigning water company at an agreed percentage to the supplying water company of the compensation to be received,<sup>7</sup> but such municipality has no right, under the assignment, to the continued supply of water to itself for a further period for which the compensation of the supplying water company is to be an agreed percentage of the to-be-agreed-upon compensation which was to be obtained from the municipality by the assigning water company<sup>8</sup>

*Waiver of right to question* Where for a number of years a city has acquiesced in the assignment by a water company of its rights and privileges under a contract with the city, and allowed the new company during such time to perform the contract of its assignor, the city cannot question the legality of the assignment for the purpose of avoiding performance of the contract on its part<sup>9</sup>

### § 272. — Modification, Rescission, or Abandonment of Contract

- a. Modification of contract
- b. Termination, abandonment, or rescission of contract

#### a. Modification of Contract

The contract between a city and a water company may be modified and changed by the parties, and under a statute in effect so providing, where a designated state regulatory agency determines that the terms of the contract are unjust or unreasonable, the agency must modify the unreasonable terms

The contract between a city and a water company may be modified and changed by the parties,<sup>10</sup> but neither party may vary the contract by unlawful means<sup>11</sup> Where a statute authorizes a municipality to make contracts for a period not to exceed ten years, the municipality has power to revise its contracts with the water company as to the rates for public consumption at the end of every decade<sup>12</sup>

99. RI—Newport Waterworks v Taylor, 83 A 833, 34 RI 478  
67 C J p 1209 note 81

1. Conn—New Haven Water Co v City of New Haven, 139 A 99, 106 Conn 562

2. Conn—New Haven Water Co v City of New Haven, supra

3. Ind—Valparaiso City Water Co v Valparaiso, 69 NE 1018, 33 Ind App 193

4. Tex—City of Memphis v Bowder, Com App, 12 SW 2d 160

5. Mo—Daly v City of Carthage, 128 SW 265, 143 Mo App 564  
67 C J p 1210 note 87

6. N.J.—City of Bayonne v. East

Jersey Water Co, Ch, 108 A 121, 126

7. N.J.—City of Bayonne v. East Jersey Water Co, supra

8. N.J.—City of Bayonne v East Jersey Water Co, supra

9. US—Austin v Bartholomew, 107 F 349, 46 CCA 327, certiorari denied 22 S Ct. 934, 183 US 698, 46 L Ed 395

10. Cal—City of Coronado v City of San Diego, 119 P 2d 359, 48 Cal App 2d 160  
67 C J p 1210 note 93

11. Mich—City of Iron Mountain v Iron Mountain Waterworks, 173 N W 612, 206 Mich 537.

#### Personnel transfers

Neither the city nor the waterworks company can vary the contract between them by having an officer of the city become a stockholder of the waterworks company or by having an officer or stockholder of the waterworks company become a city official and then, in violation of a statute, attempt to change the contractual obligations of the parties—City of Iron Mountain v Iron Mountain Waterworks, supra

12. N.J.—Long Branch Commission v Tintern Manor Water Co, 62 A 474, 70 N J Eq 71, affirmed 71 A 1134, 71 N J Eq 790.

*By state regulatory agency* Under a statute in effect so providing, where a designated state regulatory agency, such as a Public Utilities Commission, determines that the terms of the contract between a water company and a municipality are unjust or unreasonable, the agency must modify the unreasonable terms,<sup>13</sup> or, if necessary, as discussed infra subsection b of this section, abrogate the contract altogether

#### b. Termination, Abandonment, or Rescission of Contract

A contract for water supply may be terminated or rescinded at any time by mutual consent of the parties, or by one of the parties if the other fails to perform its obligations, and under a statute in effect so providing, subject to the conditions contained therein, a designated state regulatory agency may abrogate the contract

A contract for water supply may be terminated at any time by mutual consent of the parties<sup>14</sup> The municipality<sup>15</sup> or the water company<sup>16</sup> may terminate or rescind the contract between them, if the other party fails to perform its obligations. If a water company under obligation to supply pure and wholesome water fails therein for other than unforeseen causes, or fails to remedy promptly defaults due to the latter, it is the duty of the municipality to avoid the contract, absolutely or in the alternative of compelling full performance.<sup>17</sup> However, it has been held that a water company which contracts with a city to supply water for fire protection through hydrants supplied by the city becomes a municipal agency and, even though it may have a contractual right to terminate the contract, cannot summarily shut off the water from such hydrants without other provisions being made for protection from fire.<sup>18</sup> Likewise, inasmuch as the

supply of water to the public schools is a public necessity, a municipality or its water board has no right to cut off the schools' water supply because of rates unpaid by the board of education.<sup>19</sup> Where there has been no breach of duty on the part of the company the city cannot arbitrarily abandon or withdraw from the contract.<sup>20</sup> A contract by which a company agrees to construct waterworks and furnish a borough and its inhabitants with an adequate supply of water, to be taken from certain springs, will not be canceled merely because the springs prove inadequate, where the mistake as to the capacity of the springs is no more the fault of the company than the borough.<sup>21</sup>

*Abrogation by state regulatory agency* Under a statute in effect so providing where a designated state regulatory agency, such as a Public Utilities Commission, determines that the terms of the contract between a water company and a municipality are unjust or unreasonable, the agency must modify the unreasonable terms, as discussed supra subsection a of this section, or, if necessary, abrogate the contract altogether.<sup>22</sup>

#### § 273. — Performance or Breach

The contract of a company to furnish an adequate supply of wholesome water is not met by intermittent performance, and is not excused by climatic conditions which are likely to happen, and it has been held that a contract to supply water from artesian wells is not complied with by supplying water from other sources, although it is equally good

As in any contract of continuing obligation, the contract of a company to furnish an adequate supply of wholesome water is not met by full performance intermittently or in the beginning.<sup>23</sup> Nonperformance of such obligation is not excused by the

13. Me—Milo Water Co v Inhabitants of Town of Milo, 173 A 152, 133 Me 4—In re Searsport Water Co, 108 A 452, 118 Me 382

State regulation of:

Character of service see supra § 268 a

Rates see infra § 275

Act creating Public Utilities Commission did not alter terms of contract between water company and town, and contractual provisions remained binding until commission found them unjust or unreasonable—Milo Water Co v Inhabitants of Town of Milo, 173 A 152, 133 Me 4

14. Ohio—Wagner v City of Youngstown, App, 75 NE 2d 724

Duration of contract and termination of contract for unspecified term by action of one party see supra § 268 b

15. U.S.—Columbus v. Mercantile

Trust, etc, Co, Ga, 31 S Ct 105, 218 US 645, 45 L Ed 1193

67 CJ p 1210 note 96

16. NM—Albuquerque Water Supply Co v Albuquerque, 54 P 969, 9 NM 441

67 CJ p 1211 note 97

17. US—Montana Water Co v City of Billings, D C Mont, 214 F. 121, appeal dismissed 224 F 1021, 139 CCA 665

67 CJ p 1211 note 99

18. Ala.—Bienville Water Supply Co v Mobile, 20 So 742, 112 Ala. 260, 57 Am SR 28, 33 LRA 59.

67 CJ p 1211 note 1

Injunction to restrain company see infra § 276

19. NJ—Board of Education of Borough of Glassboro v Borough of Glassboro, 149 A 820, 106 NJ Eq 38

NY.—Board of Education of City of

Lockport v Richmond, 137 NYS 62

20. US—Anoka Waterworks, etc. Co v Anoka, C C Minn, 109 F 580—Los Angeles City Water Co v Los Angeles, C C Cal, 88 F 720, affirmed 20 S Ct 736, 177 US 558, 44 L Ed 886

21. Pa—Du Bois Borough v Du Bois City Water Works Co, 35 A 248, 176 Pa 430, 53 Am SR 678, 31 LRA 92

22. Me—Milo Water Co v Inhabitants of Town of Milo, 173 A 152, 133 Me 4

23. US—City of Columbus v Mercantile Trust & Deposit Company of Baltimore, Ga, 31 S Ct 105, 218 US 645, 54 L Ed 1193—Montana Water Company v City of Billings, D C Mont, 214 F 121, appeal dismissed 224 F. 1021, 139 CCA 665.

occurrence of conditions which are likely to happen in a climate of long, dry summers <sup>24</sup>

*Greater supply at less pressure* The requirement of a certain pressure, it has been held, is sufficiently complied with, although not actually so, where by a change from a pumping system to a gravity system the supply of water is greatly increased <sup>25</sup>

*Other source* A contract to supply water drawn from artesian wells is not complied with by supplying water from other sources, although it is equally good or better <sup>26</sup>

*Performance conditional on reciprocal performance or request.* Where the contract between a municipality and a water company imposes reciprocal duties on the parties and the ability of the water company to perform depends on performance by the municipality, the latter's failure to perform within the time fixed for performance by the water company is a waiver of the time limitation <sup>27</sup> Likewise, where the obligation to extend water pipes is conditional on a request by the municipality, where there has been no request there can be no failure of performance <sup>28</sup>

## § 274. — Implied and Noncontractual Obligations

- a Of municipality
- b Of water company

### a. Of Municipality

- (1) In general
- (2) Amount and rate of compensation

<sup>24</sup> US—Columbus v Mercantile Trust, etc, Co, Ga, 31 S Ct 105, 218 US 645, 54 L Ed 1193

<sup>25</sup> Colo—Denver v Denver Union Water Co, 91 P 918, 41 Colo 77 67 C J p 1211 note 9

<sup>26</sup> US—Foster v Joliet, C C Ill, 27 F 899

<sup>27</sup> Pa—Ephrata Water Co v. Ephrata, 20 Pa Super 149 67 C J p 1211 note 11

<sup>28</sup> Pa—Bennett Water Co v Millvale, 51 A 1098, 202 Pa. 616

<sup>29</sup> Idaho—Village of Lapwai v Alligier, 207 P 2d 1025, 69 Idaho 397 W Va—Mountain State Water Co v Town of Kingwood, 9 SE 2d 532, 122 W Va 374 67 C J p 1212 note 13

#### Duty to reimburse for loss

Failure of city to make appropriation to reimburse state for revenues lost by reason of decreased power production at state-owned and operated hydro-electric plant as a result of placing flash boards on dam at request of city manager to raise water level in city's wells did not prevent

city from becoming obligated under implied contract to reimburse state for such loss, in view of emergency confronting city when arrangement was made—People v City of Schenectady, 60 NYS 2d 911, 186 Misc 385

#### Ownership of water system

One cannot claim compensation on an implied contract on the basis of being the full and exclusive owner of a water system when the ownership is shared with others—Country Club Dist Service Co v Village of Edina, St Paul Fire & Marine Ins Co, Intervener, 8 NW 2d 321, 214 Minn 26

<sup>30</sup> Cal—Ukiah City v Ukiah Water, etc, Co, 75 P 773, 142 Cal 173, 100 Am SR 107, 64 L R A 231

<sup>31</sup> Idaho—Village of Lapwai v Alligier, 207 P 2d 1025, 69 Idaho 397 67 C J p 1212 note 15.

#### No voluntary acceptance

Where association constituting a limited municipality functioning within territorial limits of city did not request furnishing of water for

### (1) In General

A city may be required to pay for water used under an implied contract, and when a water company performs a statutory duty to furnish water, there may be a corresponding legal duty on the part of the city to pay for it, but there is no obligation to pay for water furnished with the understanding that it is free.

In the absence of a statutory requirement of a formal written contract, a city, although there is no express agreement to that effect, may be required to pay for water which it uses <sup>29</sup> Thus, the city is liable where it attaches fire hydrants to the mains of the water company and passes an ordinance regulating the charges to be made therefor, <sup>30</sup> where it continues to accept <sup>31</sup> or insist on <sup>32</sup> service after the termination of the formal contract, or where it permits a purchaser of the water company's rights to perform the contract which the city had entered into <sup>33</sup> Likewise, where for a number of years a water company has furnished and a town has paid for water in accordance with the terms of a contract, the company having only a de facto existence, on such company acquiring a de jure status while continuing to furnish, and the town to accept, water, the necessary inference is that the parties adopted the contract between them as far as they legally might <sup>34</sup> Where, however, a statute provides that no city shall make a contract otherwise than in writing and in compliance with certain other requirements, a city, in the absence of such contract, is not liable for the reasonable value of water used, <sup>35</sup> or, on expiration of its written contract with the water company, on the ground of holding over as lessee <sup>36</sup> On the other hand, it has been held

fire protection, but merely accepted water while city was paying for it under contract with water company, and refused to acknowledge responsibility when city denied liability for water charges, there was no voluntary acceptance of the water which would render the association liable for the charges—New Haven Water Co v City of New Haven, 40 A 2d 763, 131 Conn 456

<sup>32</sup> US—Quarles v City of Appleton, CCA Wis, 299 F 508 67 C J p 1212 note 16

<sup>33</sup> US—Austin v Bartholomew, Tex, 107 F 349, 46 CCA 327, certiorari denied 22 S Ct 934, 183 US 698, 46 L Ed 395.

<sup>34</sup> NJ—Belvidere Water Co v Town of Belvidere, 83 A. 241, 82 N J Law 601 67 C J p 1212 note 18

<sup>35</sup> US—City Water Co of Chillicothe v City of Chillicothe, D C Mo, 196 F 234, affirmed 207 F 503, 125 CCA 165

<sup>36</sup> US—City Water Co. of Chillicothe v. City of Chillicothe, supra.

that, although the formal contract between a city and a water company is void because of failure to comply with certain constitutional requirements, the former must pay for water actually used.<sup>37</sup> A statute requiring certain formalities relative to contracts for the public water supply will not prevent an implied obligation to pay for water supplied to the city as to any other householder.<sup>38</sup> Where a city, on the expiration of its contract with a water company, refused to renew the contract and did not thereafter use water from the company's hydrants, the company could not recover hydrant rentals on a quantum meruit for the period following such expiration on the theory that the city was given fire protection and could have used the water, if necessary.<sup>39</sup> An obligation on the part of the city to take water or use fire plugs will not be implied, unless compelled by the plain language of the contract, where to do so would render the contract void.<sup>40</sup> A municipality cannot be held liable on an implied contract for water or service furnished by a person in his own interest and without expectation of compensation.<sup>41</sup>

*Statutory obligation to furnish water.* When a waterworks company performs a statutory duty to furnish water for domestic purposes or fire protection, there is, in the absence of a contract, a corresponding legal duty on the part of the city to pay for such services.<sup>42</sup> Thus, where a water company is under a statutory obligation to furnish water at reasonable rates for extinguishing fires, such rates to be determined by commissioners appointed by the company and city, and the rates were lawfully so determined, the city is liable under an implied contract to pay for water so furnished and used, although the schedule of rates was never adopted by the city council and the city had notified the water company of its refusal to pay.<sup>43</sup>

*Water furnished free.* There is no obligation to pay for water furnished with the understanding that it is free,<sup>44</sup> before notice that the promise is withdrawn.<sup>45</sup> Where, according to its original contract, the term of which had expired, a city was to be furnished water without charge for certain purposes, a promise to pay for the continued use of such water is not implied where the city refused to pay for it and the water company voluntarily continued to furnish it.<sup>46</sup> Where a city furnishes water to the county as a mere volunteer, or under the mistaken impression that it is required to furnish a free supply, not expecting payment, payment cannot be enforced.<sup>47</sup>

*Water furnished county by city.* In the absence of anything to show that the service was gratuitous, where a city furnished water to the county, the latter by accepting the water impliedly promised to render an equivalent.<sup>48</sup>

*Where a municipality purchases the plant of a water company supplying another municipality,* the former must, if it is authorized to do so, continue to furnish such service, as long as it retains possession and control of the property so charged.<sup>49</sup>

## (2) Amount and Rate of Compensation

A city under a noncontractual or implied contractual duty to pay for water furnished must, in the absence of any agreement as to amount, pay a reasonable compensation for the service rendered.

A city, under obligation to pay for the performance of a statutory obligation to furnish water<sup>50</sup> or because of continued use after expiration of its contract,<sup>51</sup> must, in the absence of any agreement as to the amount, pay a reasonable compensation for the service rendered, but a municipality has been held liable for hydrant rental at the rate previously paid where, after a demand of the water company for a higher rate had been rejected, the hydrants

37. Ky.—Nicholasville Water Co v Nicholasville, 36 SW 549, 38 SW 430, 18 Ky L 592

38. NY—Staten Island Water Supply Co v City of New York, 128 NYS 1028, 144 App Div. 318. 67 C.J. p 1212 note 22

39. NY—Commonwealth Water Co v Village of Castleton, 183 N.Y.S. 753, 192 App Div. 697

40. Tex.—City of Memphis v Browder, Com App, 12 SW 2d 160

41. Minn.—Country Club Dist Service Co v Village of Edina, St Paul Fire & Marine Ins Co, Intervener, 8 NW 2d 321, 214 Minn. 26

42. NY—People ex rel City of New York v Queens County Water Co, 133 NE 889, 232 NY 277. 67 C.J. p 1212 note 25

43. US—Boise Artesian Hot & Cold Water Co v Boise City, Idaho, 33 S Ct 997, 230 US 84, 57 L Ed 1400

44. NC—Henderson Water Co v Henderson Graded Schools, 65 SE 927, 151 NC 171. 67 C.J. p 1212 note 28

45. NY—Walton Water Co v Village of Walton, 143 NE 786, 238 NY 46, 144 NE 889, 238 NY 555

46. US—Municipal Waterworks Co v City of Ft Smith, DC Ark, 216 F 431

47. Ala.—Mobile v Mobile County, 53 So 793, 169 Ala 539.

48. Ala.—Mobile v. Mobile County, supra. Free supply see preceding italic paragraph

49. Cal.—South Pasadena v Pasadena Land, etc, Co, 93 P 490, 152 Cal 579

Obligations of municipality on purchase of plant generally see supra § 239

50. NY—People ex rel City of New York v Queens County Water Co, 133 NE 889, 232 NY 277—Staten Island Water Supply Co v City of New York, 128 NYS 1028, 144 App Div 318.

51. NY—People ex rel Arthur v Huntington Water Works Co, 203 NYS 808, 208 App Div. 807. 67 C.J. p 1213 note 35.

were used by the local fire company,<sup>52</sup> and where a water company is under a statutory obligation to furnish water at reasonable rates for extinguishing fires, such rates to be determined in a specified manner, and they are so determined, but never adopted by the city council, the liability of the city under an implied contract to pay for water so furnished and used is in accordance with the schedule rates<sup>53</sup> Where a water company continued to furnish water to a city after the expiration of a contract, and a state commission was in existence with authority to fix reasonable compensation for water service furnished cities, pending action by such commission on application by both the city and the water company, the city is liable for the reasonable value of the service rendered,<sup>54</sup> and such, likewise, is the liability of the city for the service rendered after the state commission had fixed the price at which the city might acquire the plant of the water company for the period during which the city, continuing to use the water, failed to raise the money to pay for the property<sup>55</sup>

#### b. Of Water Company

If an obligation to furnish water may be fairly implied from the language actually used in a contract, it is just as binding on the company as if it were specifically mentioned, and a water company may be under a statutory duty to furnish water.

If an obligation to furnish water may be fairly implied from the language actually used in a contract, it is just as binding on the company as if it were, in so many words, specifically mentioned.<sup>56</sup> Where a school board, under no obligation to do so, paid accrued water bills to have the service continued, which the water company was under no obligation to continue, the school board cannot recover the amount of such payments<sup>57</sup>

*Obligation to install hydrants* Although the contract between a water company and a municipality has expired, where the former is under the statutory duty to furnish water for fire protection, the fire commissioners, under their statutory powers,

may direct the company to install an additional hydrant<sup>58</sup>

### § 275. — Rates

- a Prescription by company
- b Regulation by municipality
- c. Regulation by state

#### a. Prescription by Company

Under a statute so providing where a water company has complied with the prescribed statutory steps, a rate fixed by such company is binding on a municipality until declared unreasonable by the public service commission, but a rate fixed for fire protection should bear a reasonable proportion to the rates established for other service.

Under a statute so providing, where a water company has complied with the prescribed statutory steps, a rate fixed by such company is binding on a municipality, until declared unreasonable by the public service commission<sup>59</sup> A rate fixed by a water company for fire protection should bear a reasonable proportion to the rates established for other service<sup>60</sup>

#### b. Regulation by Municipality

Where authority therefor exists, a municipality may regulate the rates for water furnished to another municipality or county, or the rates at which water may be delivered to it by a public service corporation.

Under the authority to regulate rates for the use of water conferred on the governing body of a municipality by the constitution of the state, water supplied to a city or county is as fully covered by the provision as is water supplied to individual consumers,<sup>61</sup> accordingly, the municipality may, in its governmental capacity, regulate the rates at which water may be delivered to it by a public service corporation and received by the municipality in its role as consumer,<sup>62</sup> but the power of a municipality to regulate rates, conferred by the constitution, does not apply to a sale of water to a municipality purchasing water in bulk for sale to its inhabitants<sup>63</sup> Where a municipality is authorized to enter into a contract with a water company for a certain

52. NY—Marlborough Waterworks Co v Village of Marlborough, 148 NYS 374, 163 App Div 159

53. US—Boise Artesian Hot & Cold Water Co v Boise City, Idaho, 33 S Ct 997, 230 US 84, 57 L Ed 1400

54. US—Quarles v City of Appleton, CCA Wis, 299 F 508

55. US—Quarles v City of Appleton, supra

56. NY—Nicoll v Sands, 29 NE 818, 131 NY 19

67 C J p 1213 note 40.

57. Ky—Board of Education of City of Somerset v Kentucky Utilities Co, 21 SW 2d 817, 231 Ky 484

58. NY—People ex rel Arthur v Huntington Water Works Co, 203 NYS 808, 208 App Div 807

59. Pa—Suburban Water Co v Borough of Oakmont, 110 A 778, 268 Pa 243

Rates under contract see supra § 268

60. Pa—Borough of Mechanicsburg v Mechanicsburg Gas & Water Co, 92 A 142, 246 Pa 232.

67 C J p 1213 note 48

61. Cal—Spring Valley Water Works v San Francisco, 61 Cal 18

Water rents or rates and other charges to consumers generally and regulation thereof see infra §§ 284-308

62. US—Spring Valley Waterworks v Schottler, Cal, 4 S Ct 48, 110 US 348, 28 L Ed 173

63. Cal—Marin Water & Power Co v Town of Sausalito, 143 P. 767, 168 Cal 587

67 C J p 1214 note 51.

period and is likewise authorized to regulate the rates of such water company, the legislative powers of succeeding municipal officers cannot be curtailed by a contract purporting to fix the rate to be paid by the municipality for an extended future period <sup>64</sup>

A water supply commission has power, under a statutory grant of authority, to determine the rate of charge for water supplied to municipal corporations <sup>65</sup>

*Regulation subject to referendum* Where certain officers of a municipality are authorized to regulate the price of water for municipal purposes, subject to the approval of, or rejection by, the qualified electors, and no referendum is invoked, the rates fixed by such officers are binding on the municipality, although there has been no ratification by the electors <sup>66</sup>

### c. Regulation by State

- (1) Power to regulate
- (2) Manner of regulation
- (3) Effect of regulation
- (4) Effect of failure to regulate

#### (1) Power to Regulate

The rates charged by water companies for water supplied to municipalities are subject to regulation by the state.

The rates charged by water companies for water supplied to municipalities are subject to regulation by the state <sup>67</sup> The power of a municipality to enter into a contract with a water company <sup>68</sup> for a certain period <sup>69</sup> cannot restrict the power, reserved by the state, to regulate the rates to be paid by the municipality, although a contract between a municipality and a water company fixing the rates to be paid by the former for water furnished by the latter cannot be altered by either party without the consent of the other, the contract is subject to the sovereign power of the state to fix just and reasonable rates such as subsequent conditions might make desirable <sup>70</sup> Where statutory authority therefor exists, a state board or agency, such as a public service commission, may fix the rates to be paid by a municipality for water service, <sup>71</sup> and unless it is expressly denied power to approve or reject rates fixed by contract, <sup>72</sup> it may determine the fair and reasonable rates which the company is entitled to receive, notwithstanding a prior contractual provision fixing the rates, <sup>73</sup> and may fix higher rates than those provided by contract <sup>74</sup> Even if, as to the water company itself, the contract might be unalterable except with its consent, inasmuch as the municipal corporation is but a political subdivision of the state, a city has no absolute property right to demand continued service at a given rate, which

64 Ill—East St Louis & Interurban Water Co v City of Belleville, 196 NE 442, 360 Ill 490—Board of Education of Alton Community Consol. School Dist No 151 v Alton Water Co, 145 NE 683, 314 Ill 466 Contractual provisions for reasonable rates sustained see supra § 268

65 NJ—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 NJ Super 409

66 Ohio—State v Burris, 109 NE 591, 91 Ohio St 70

67 Conn—City of New Haven v New Haven Water Co, 45 A 2d 811, 132 Conn 496

Ky—Daugherty v City of Lexington, 249 SW 2d 755—Nerren v Kentucky Water Service Co, 230 SW 2d 615, 313 Ky 151

NY—Jamaica Water Supply Co v City of New York, 18 NE 2d 523, 279 NY 342

Water rents or rates and other charges to consumers generally and regulation thereof see infra §§ 281–308

68 Ind—City of Washington, Ind, v Public Service Commission, 129 NE 401, 190 Ind 105

69 Ill—Board of Education of Alton Community Consol. School Dist No 151 v Alton Water Co, 145 NE 683, 314 Ill 466

67 C J p 1214 note 56.

70. NJ—Hackensack Water Co v Board of Public Utility Com'rs, 115 A 528, 96 NJ Law 184

#### Contract provision void

Where provision in contract between water company and city for indefinite duration was void, it was incumbent upon the public service commission to establish just and fair rates, and it derived its power, not from the agreement of the parties, but from the state Legislature—City of New Haven v New Haven Water Co, 45 A 2d 831, 132 Conn 496

**Borough held bound to pay rate prescribed by schedule filed with Public Service Commission by water company, though higher than rate fixed by latter's contract with borough, in absence of exception by borough to such schedule—Borough of Dormont v South Pittsburgh Water Co, 185 A 263, 322 Pa 60**

71. Me—Milo Water Co v Inhabitants of Town of Milo, 7 A 2d 895, 136 Me 228

NY—Jamaica Water Supply Co v City of New York, 18 NE 2d 523, 279 NY 342

Pa—Borough of Dormont v. South Pittsburgh Water Co, 185 A 263, 322 Pa 60—Anthracite Water Co v Gilberton Borough, Com Pl, 5 Sch Reg 119

W Va—Mountain State Water Co v

Town of Kingwood, 9 SE 2d 532, 122 W Va 374

#### Construction and operation of order

Where order of Public Utilities Commission fixed rates water company could charge town for fire protection, on basis of one hundred fifty dollars hydrant rental for each of first forty-eight hydrants, and sixty dollars for each additional hydrant, and it was clear, from consideration of order together with previous orders of commission relating to same matter, that commission was endeavoring to provide adequate revenue for water company and for a proper apportionment of charges between town and private consumers, town did not have right to discontinue use of some of forty-eight hydrants, and pay only for balance at scheduled rates, notwithstanding order of commission did not call for a fixed minimum amount—Milo Water Co v Inhabitants of Town of Milo, 7 A 2d 895, 136 Me 228

72. NY—Jamaica Water Supply Co v City of New York, 18 NE 2d 523, 279 NY 342

73. Pa—Springfield Tp v Public Service Commission, 74 Pa Super 217

74. NJ—Hackensack Water Co v Board of Public Utility Com'rs, 115 A 528, 96 NJ Law 184.



was named in the franchise granted by the city, as against the right of the state to modify such rates of service with the consent of the water company.<sup>75</sup> It has been held that the jurisdiction of a state commission to impose charges on municipalities for the service of a water company is dependent on whether, with respect to the services for which the charges are sought to be imposed, the company has actually devoted its property to a public use.<sup>76</sup> Where a water company is rendering a material municipal service, dedicated to all municipalities requiring such service, there is a dedication to a public use,<sup>77</sup> and in such case the fixing of charges by the commission for water supplied to various municipalities by a water company is within the rate-fixing power of the commission,<sup>78</sup> it is neither the imposition of a tax<sup>79</sup> nor an interference with a municipal affair within the control of the municipalities<sup>80</sup> within the meaning of a constitutional prohibition or limitation. Where a municipality has no contract with a water company and no hydrants in use for fire protection, a state commission has no authority to impose on the municipality the burden of a fire protection service which it cannot contract for generally, and to pay for which its officers can neither levy taxes on the inhabitants nor incur indebtedness.<sup>81</sup>

*City as consumer.* A city, purchasing water from a water company for the use of its citizens in the exercise of its corporate powers, is a consumer within the meaning of a statute relative to the regulation of public service companies.<sup>82</sup>

*Charges by receiver.* Under a statute providing therefor, a receiver duly appointed to take charge of a self-liquidating municipal water system may charge the municipality involved the reasonable rental value of hydrants within the municipality.<sup>83</sup>

## (2) Manner of Regulation

A water company must be compensated for the cost

of operating and maintaining the portions of its system devoted to the requirements of the municipalities it serves, and generally where the determination of rates is committed to a state regulatory agency, unless there is some palpable mistake of fact or law, the courts are not inclined to disturb its decision.

A water company must be compensated for the cost of operating and maintaining the portions of its system devoted to the requirements of the municipalities it serves.<sup>84</sup> The reasonable rental value of the hydrants is not required to be measured by the supply of water that may in the past have passed through, or is likely in the future to pass through, the hydrants.<sup>85</sup> Where the rates for hydrant service to a municipality represent the maximum reasonable value of the service, they are not confiscatory as to the company, whatever may be the returns.<sup>86</sup> Rates which should be paid a water company for municipal service cannot be measured by the amount of taxes received by the municipality from the water company.<sup>87</sup> It is immaterial that a municipality has not provided for the payment of the amounts required, under the order of the state authority, in the budget for the year.<sup>88</sup> The amount to be charged for furnishing water for municipal purposes, such as fire protection is an administrative question, which the state regulatory authority is best fitted to decide,<sup>89</sup> and, unless there is some palpable mistake of fact or law, the courts are not inclined to disturb such decision.<sup>90</sup> Thus, a finding of fact by the state authority that the rates paid by a municipality were all that the service of the water company was reasonably worth, if supported by substantial evidence, is final.<sup>91</sup> However, inasmuch as an allocation based on estimate presents the possibility of an abuse of the rate-fixing power, the court will closely scrutinize rates so fixed, lest the exercise of the rate-fixing power merge into a system of confiscation.<sup>92</sup> Enforcement of an order fixing the rates to be charged for water furnished a municipality which is invalid for lack of jurisdic-

75. U.S.—Salem v Salem, etc., Co., Or., 255 F 295, 168 CCA 465  
67 C J p 1214 note 61

76. Cal—City of San Leandro v Railroad Commission, 191 P. 1, 183 Cal 229

77. Cal—City of San Leandro v Railroad Commission, supra.

78. Cal—City of San Leandro v Railroad Commission, supra

79. Cal—City of San Leandro v Railroad Commission, supra  
67 C J p 1214 note 65

80. Cal—City of San Leandro v Railroad Commission, supra  
67 C J p 1214 note 66

81. Pa—Springfield Tp. v. Public

Service Commission, 74 Pa Super 220

82. Pa—Springfield Consol Water Co v City of Philadelphia, 131 A 716, 285 Pa 172

83. U.S.—Farmington Tp v Warrenville State Bank, CA Mich, 185 F 2d 260

84. Cal—City of San Leandro v Railroad Commission, 191 P 1, 183 Cal 229

67 C J p 1215 note 70.

85. U.S.—Farmington Tp. v Warrenville State Bank, CA Mich, 185 F 2d 260

86. Me—Gay v Damariscotta-Newcastle Water Co, 162 A. 264, 131 Me 304

87. Me—Gay v Damariscotta-Newcastle Water Co, supra

88. Pa—Borough of Lansdowne v Public Service Commission, 74 Pa Super 203  
67 C J p 1215 note 73

89. Pa—City of York v Public Service Commission, 85 Pa Super. 134  
67 C J p 1215 note 74.

90. Pa—City of York v Public Service Commission, supra

91. Me—Gay v Damariscotta-Newcastle Water Co, 162 A. 264, 131 Me 304

92. Cal—City of San Leandro v. Railroad Commission, 191 P. 1, 183 Cal 229.

tion of the agency or board making the order may be enjoined<sup>93</sup>

### (3) Effect of Regulation

A change in rates, on order of a state regulatory authority, does not abrogate the contract between a city and a public utility, but the contract, as modified, remains binding.

A change in rates, on order of a state regulatory authority, does not abrogate the contract between a city and a public utility, but the contract, as modified, continues to be binding on the parties<sup>94</sup>. Where a city agrees that the state, through its regulatory agency, may modify a contract between itself and a water company with respect to the rates to be charged by the company, the city is bound by any modification so made with the consent of the company<sup>95</sup>.

### (4) Effect of Failure to Regulate

The rates for public service, fixed by its contract with a municipality and filed by a water company with a state regulatory body in accordance with statutory requirement, continue to be lawful rates until changed.

The rates for public service, fixed by its contract with a municipality and filed by a water company with a state regulatory body in accordance with statutory requirement, continue to be lawful rates until changed<sup>96</sup>.

## § 276. — Actions and Proceedings

- a Right of action
- b Form of action
- c. Defenses
- d Set-off
- e Equity jurisdiction
- f Parties
- g Pleading
- h Evidence
- i Trial
- j. Judgment or decree
- k Damages
- l. Proceedings before public service commission

### a. Right of Action

#### (1) Against municipality or officers

- (2) Against water company
- (3) Of particular officers and others

#### (1) Against Municipality or Officers

A water company or other entity may maintain an action against a municipality to recover water rents based on an express or implied contract.

A water company may maintain an action against a municipality to recover the rents or rentals stipulated in the contract between them<sup>97</sup>. Where there is an implied obligation on the part of the city to pay a reasonable compensation to a water company for service rendered, as discussed supra § 274, failure to do so gives the company a right of action on implied assumpsit<sup>98</sup>. Although a contract prescribes the manner in which water shall be used for a particular municipal purpose, there is no liability on the part of the municipality for water used in another manner unless more water is used by the latter method<sup>99</sup>.

*Certiorari* Certiorari will not lie to review a contract for a municipal water supply into which provisions are inserted which are not authorized by the resolution of the water commissioners under which the contract is entered into but which are for the benefit of the city and impose additional burdens on the contractor.<sup>1</sup>

*Conversion* A city cannot be held liable in tort for the conversion of water, used from fire hydrants of water company without any contract therefor, where such use was with the company's consent<sup>2</sup>.

*Injunction* The right to an injunction to prevent a municipality or its officers from shutting off a water supply is discussed in Injunctions § 124.

*Mandamus* will lie against the water commissioners to compel them to supply water to the municipal parks, although the park commissioners refuse to pay a balance alleged to be due for water and the city has failed to raise by general tax sufficient funds to pay a deficit in the accounts of the former.<sup>3</sup>

*A water supply commission* has been held to have

<sup>93</sup> N.Y.—City of New York v. Maltbie, 289 N.Y.S. 558, 248 App. Div. 36, affirmed 8 N.E.2d 605, 274 N.Y. 464.

<sup>94</sup> Mo.—City Water Co. v. City of Sedalia, 231 S.W. 942, 288 Mo. 411.

<sup>95</sup> U.S.—Salem v. Salem, Or., 255 F. 295, 166 C.C.A. 465.

<sup>96</sup> Me.—Inhabitants of North Berwick v. North Berwick Water Co., 134 A. 569, 125 Me. 446.

<sup>97</sup> Iowa.—Marion Water Co. v. Marion, 96 N.W. 883, 121 Iowa 306.

67 C.J. p. 1216 note 81.

<sup>98</sup> N.Y.—People ex rel. City of New York v. Queens County Water Co., 133 N.E. 889, 232 N.Y. 277—People ex rel. Arthur v. Huntington Water Works Co., 203 N.Y.S. 808, 208 App. Div. 807.

<sup>99</sup> Kan.—Wichita Water Co. v. City of Wichita, 158 P. 49, 98 Kan. 256.

1. N.J.—Flemming v. Jersey City, 42 A. 845.

2. U.S.—City Water Co. of Chillicothe v. City of Chillicothe, Mo., 207 F. 503, 125 C.C.A. 165.

3. N.Y.—People v. Barrows, 119 N.Y.S. 32, 65 Misc. 158, affirmed 124 N.Y.S. 270, 140 App. Div. 24, affirmed 97 N.E. 1113, 204 N.Y. 664.

authority to bring an action to recover for water lawfully sold to a municipality <sup>4</sup>

### (2) Against Water Company

In a proper case a municipality may maintain a suit for specific performance of its contract with a water company, but before resorting to the courts for equitable remedies against a water company, the municipality should invoke the relief provided by statute

Where a water company has an exclusive franchise and a provision of its contract with the municipality makes it the duty of the company to filter the water intended for domestic use, it will be compelled to do so in an action for specific performance at the suit of the municipality <sup>5</sup>

*Exhaustion of statutory remedy* Before resorting to the courts for equitable remedies, a city, complaining of the service of a water company under the contract between them, should invoke the relief provided by statute <sup>6</sup>

*Injunction* The right to an injunction to prevent a water company from shutting off a water supply required for public or municipal purposes is discussed in Injunctions § 124

### (3) Of Particular Officers and Others

Suit to enforce a municipal water supply contract or obligation to pay for water furnished may be brought, in a proper case, by the mayor and council of the municipality involved, a board of water commissioners, or the trustee of the bonds of a water company

Where the mayor and council of a city, representing the citizens, made a contract for a water supply, the mayor and council are authorized, in their representative capacity, to bring suit to enforce the contract <sup>7</sup> A statute, creating a board of water commissioners of a municipality as a body corporate and authorizing such board to fix a rate to be paid by the municipality for water for municipal use, has been held not to authorize the board to bring suit against the municipality to collect the rate <sup>8</sup> Where a municipality has obligated itself to pay rentals directly to the trustee of the bonds of a water company, such liability may be enforced by the trustee <sup>9</sup>

### b Form of Action

The remedy of a water company, alleging that a resolution of a municipality is a breach of the contract between them, is not certiorari to review the resolution

The remedy of a water company, alleging that a resolution of a municipality is a breach of the contract between them, is not certiorari to review the resolution <sup>10</sup> The form of action that will lie against a water company or a municipality has been considered in dealing with the right to bring such action, as discussed supra subsection a of this section

### c. Defenses

- (1) In general
- (2) Under control of state commission

#### (1) In General

Against an action on a contract for the supply of water, a municipality may set up as a defense failure on the part of the water company to perform a condition of the contract, but where a city receives the benefit of a part performance of the contract, with knowledge that the contract is not being fully performed and without attempting to terminate it for that reason, it cannot insist on full performance as a condition precedent to liability to pay for what it has received. Various other matters have been held sufficient or insufficient as defenses

Against an action on a contract for the supply of water, a municipality may set up as a defense failure on the part of the water company to perform a condition of the contract <sup>11</sup> When the sole consideration for the payment of rentals for hydrants not used, in a contract between a waterworks company and a municipality, is a full and reliable supply of water for fire protection and other purposes, failure to furnish such supply is a complete defense, <sup>12</sup> but where a city receives the benefit of a part performance of the contract, with knowledge that the contract is not being fully performed and without attempting to terminate it for that reason, it cannot insist on full performance as a condition precedent to liability to pay for what it has received <sup>13</sup> Accordingly, in a suit against a city for hydrant rentals under an ordinance, where the city fails to

4. N.J.—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 N.J. Super 409

5. Iowa—Burlington v Burlington Water Co., 53 N.W. 246, 86 Iowa 266  
67 C.J. p 1216 note 96

6. Kan.—City of Parsons v Parsons Water Supply & Power Co., 178 P. 438, 104 Kan. 294

7. Md.—Washington County Water Co. v. City of Hagerstown, 82 A.

826, 116 Md. 497, Ann. Cas. 1913C 1022

8. N.Y.—Corning Water Com'rs v Corning, 124 N.Y.S. 268, 140 App. Div. 11, 13, affirmed 95 N.E. 1123, 201 N.Y. 570  
67 C.J. p 1216 note 2

9. U.S.—Columbia Ave Sav Fund, etc., Co v Dawson, C.C.Ga., 130 F. 152, reversed on other grounds 25 S.Ct. 420, 197 U.S. 178, 49 L.Ed. 713—Centerville v Fidelity Trust, etc., Co, Iowa, 118 F. 332, 55 C.C. A. 348

10. N.J.—Belvidere Water Co v Town of Belvidere, 92 A. 365, 88 N.J. Law 696

11. Minn.—State Trust Co v Duluth, 73 N.W. 249, 70 Minn. 257  
67 C.J. p 1217 note 6

12. Fla.—City of Palatka v Palatka Waterworks, 67 So. 71, 68 Fla. 525

13. U.S.—Columbia Ave Sav Fund, etc., Co v Dawson, C.C.Ga., 130 F. 152, reversed on other grounds 25 S.Ct. 420, 197 U.S. 178, 49 L.Ed. 713  
67 C.J. p 1217 note 8.

deny the use of the hydrants, but pleads plaintiff's failure to comply with certain specifications in the ordinance relating to water pressure, such plea is insufficient as a complete defense<sup>14</sup>

*Ultra vires* Where waterworks have been constructed according to a contract and accepted by the municipality, fact that the grant of an exclusive right to use the streets to conduct water to the inhabitants is *ultra vires* and invalid is no defense to an action for hydrant rentals<sup>15</sup> On the other hand, in a suit to restrain a water company from discontinuing its service, where a water district made an unauthorized contract for the purchase of water from a water company, but the water company, with knowledge of the facts, acquiesced in the transaction and induced the district to act on such acquiescence, the company will be estopped to set up *ultra vires*<sup>16</sup> Although a condition in a contract between a water company and a municipality may be *ultra vires* on the part of the former, where such condition has been performed and the contract thereafter recognized as binding and acted on by both parties, it is as if the condition had never been inserted, and it is no defense to an action to recover payments alleged to be due under the contract<sup>17</sup>

*Test as conclusive.* Where a city contracted for a water supply, all tests to be made by the city engineer, whose report should be conclusive on both parties, a report by the engineer after a test showing that there was neither complete nor substantial performance of the contract is a bar to a recovery of the contract price<sup>18</sup>

## (2) Under Control of State Commission

Violation of orders of a state commission vested with regulatory authority may constitute a defense to an action by a water company to recover for water furnished a municipality.

Where a public utility commission is authorized to determine the character of the service to be furnished as well as the rates to be paid, and has so determined, in an action by a water company to recover the rates, a denial that the order of the commission relative to service has been complied

with is a good defense,<sup>19</sup> but a defense that the service furnished was inadequate is insufficient<sup>20</sup> In a suit against a municipality for fire protection service at rates prescribed by the state commission, the fact that a part of the municipality was not furnished with water at the required pressure and quantity is a defense to that extent<sup>21</sup> In an action against a city by a water company for charges made at the rate fixed by the state public utilities commission, no defense, or partial defense, is established by evidence that a lower rate has been agreed on between the parties,<sup>22</sup> that plaintiff has served other persons at a lower rate,<sup>23</sup> or that plaintiff has in various ways violated city ordinances and rules of the commission<sup>24</sup> The failure of a water company to comply with a statutory requirement that it file with a state commission the rate charged the city is not a bar to an action for the reasonable value of the service rendered where there was sufficient compliance by the company in informing the commission that the rate was in dispute and requesting the commission to fix the rate<sup>25</sup>

## d. Set-Off

In an action for recovery of hydrant rentals under a contract with a municipality, the latter may plead by way of set-off rentals previously paid but which plaintiff water company, it is alleged, has no right to retain, but a municipality cannot set off damages sustained by private citizens, whose property has been destroyed by fire because of insufficient water pressure.

In an action for the recovery of hydrant rentals under a contract with a municipality, the latter may plead by way of set-off rentals previously paid but which plaintiff water company, it is alleged, has no right to retain,<sup>26</sup> but a municipality cannot set off damages sustained by private citizens, whose property has been destroyed by fire because of insufficient water pressure, in a suit to recover for water supplied for extinguishing fires and for sanitary purposes<sup>27</sup>

## e. Equity Jurisdiction

The fact that a city has failed to levy and collect a specific tax to create a special fund for the payment of water rentals, as required by contract, does not give

14. Ala.—Greenville v Greenville Water Works Co, 27 So 764, 125 Ala 625

15. US—Illinois Trust, etc, Bank v Arkansas City, Kan, 76 F 271, 22 CCA 171, 34 LRA 518

16. NY—Salmon v Rochester & Lake Ontario Water Co, 197 NYS 769, 120 Misc 131.

17. NY—Utica Water-Works Co v Utica, 31 Hun 426

18. Pa.—Hallock v Lebanon City, 73 A 333, 224 Pa 359.

19. NJ—Hackensack Water Co v Borough of Tenafly, 111 A 261, 262, 95 NJ Law 25

20. NJ—Hackensack Water Co v Borough of Tenafly, supra 67 C J p 1217 note 16

21. NJ—Hackensack Water Co v Borough of Ridgely, 115 A 399, 96 NJ Law 526

22. Kan—Leavenworth City & Ft Leavenworth Water Co v City of Leavenworth, 166 P 234, 101 Kan 346

23. Kan—Leavenworth City & Ft Leavenworth Water Co v City of Leavenworth, supra

24. Kan—Leavenworth City & Ft Leavenworth Water Co v City of Leavenworth, supra

25. US—Quarles v City of Appleton, CCA Wis, 299 F 508

26. Pa—Middletown, etc, Cons Water Co v Middletown Borough, 3 Pa Dist & Co 587

27. Ala—Montgomery v Montgomery Waterworks, 79 Ala 233

equity jurisdiction of a suit to collect rentals previously accrued, and a court of equity is without jurisdiction to enforce the payment of water rentals, although it has acquired jurisdiction to determine other matters in controversy between the parties; but the obligation of a city to pay hydrant rentals to the trustee on behalf of the bondholders may be enforced in a suit, to which the city is a party, to foreclose the mortgage on the waterworks, which the city has purchased subject to such mortgage.

The fact that a city has failed to levy and collect a specific tax to create a special fund for the payment of water rentals, as required by its contract, does not give equity jurisdiction of a suit to collect rentals previously accrued,<sup>28</sup> and, although a suit will lie in equity to restrain a threatened diversion of the fund so collected, the water company must seek its remedy at law to have the contract declared valid and to compel the city to levy such tax.<sup>29</sup> A federal court of equity is without jurisdiction to enforce the payment of water rentals claimed to be due under a contract, although it has acquired jurisdiction to determine other matters in controversy between the parties.<sup>30</sup> However, the obligation of a city to pay hydrant rentals to the trustee on behalf of the bondholders may be enforced in a suit, to which the city is a party, to foreclose the mortgage on the waterworks, which the city has purchased subject to such mortgage.<sup>31</sup> Independently, however, suit will not lie in a federal court of equity to enforce payments, under a contract for the supply of water, to the trustee.<sup>32</sup>

#### f. Parties

The mortgagees of a water company's plant are necessary parties in a suit by a municipality to cancel its contract with the company, and in an action between two water companies each claiming exclusive rights in supplying water to a town, consumers who had spent substantial sums in connecting their properties with the mains of one of the companies may intervene for the purpose of contesting the exclusive rights.

The mortgagees of a water company's plant are

necessary parties in a suit by a municipality to cancel its contract with the company.<sup>33</sup> In an action between two water companies each claiming exclusive rights in supplying water to a town, consumers who had spent substantial sums in connecting their properties with the mains of one of the companies may intervene for the purpose of contesting the exclusive rights.<sup>34</sup>

#### g. Pleading

General rules of pleading have been applied in actions of the type under consideration.

General rules of pleading have been applied in actions of the type under consideration.<sup>35</sup> In an action to recover hydrant rentals it has been held that a municipality is not required to file an affidavit of defense.<sup>36</sup>

#### h. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility
- (3) Weight and sufficiency

##### (1) Presumptions and Burden of Proof

Where municipal authorities, authorized to contract with a company for a supply of water, acted within the scope of their authority, it is presumed that they knew the state of the matter in which they undertook to act, and where payment by the municipality is subject to a certain condition precedent, the water company must show that such condition was fulfilled or performed.

Where municipal authorities, authorized to contract with a company for a supply of water, acted within the scope of their authority, it is presumed that they knew the state of the matter in which they undertook to act.<sup>37</sup> Where payment by the municipality is subject to a certain condition precedent, the water company must show that such condition was fulfilled or performed,<sup>38</sup> it must show such fulfillment or performance by a preponderance of evidence.<sup>39</sup>

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|---|--|---|
| <p>28. US—Eau Claire v Payson, Wis, 107 F 552, 46 CCA 466, 109 F. 676, 48 CCA 608</p> <p>29. Wis—Oconto City Water Supply Co v Oconto, 80 NW 1113, 105 Wis 76.</p> <p>30. US—American Water Works, etc., Co v Home Water Co, CC Ark, 115 F 171, appeal dismissed American Water Works and Guaranty Co. v. City of Little Rock, 24 S Ct 855, 194 US 639, 48 L Ed 1162</p> <p>31. US—Centerville v Fidelity Trust, etc., Co, Iowa, 118 F 332, 56 CCA 348—Fidelity Trust, etc., Co v Fowler Water Co, CC Ind, 113 F 560.</p> | <p>32. US—New York Guaranty, etc., Co v Memphis Water Co, Tenn, 2 S Ct 279, 107 US 205, 27 L Ed 484—Eau Claire v. Payson, Wis, 109 F. 676, 48 CCA 608</p> <p>33. Okl—El Reno v El Reno Water Co, 76 P 126, 14 Okl 53.</p> <p>34. Colo—Wood v Denver City Waterworks Co, 38 P 239, 20 Colo 253, 46 Am SR 288</p> <p>35. Fla—City of Palatka v Palatka Waterworks, 67 So 71, 68 Fla 525</p> <p><b>Obligation in language of contract</b><br/>In an action for hydrant rentals, based on a contract, although the language of a plea in defense, alleging a breach of plaintiff's obligation, in general, it is sufficient where it</p> | <p>uses the language of the contract in setting out such obligation—City of Palatka v. Palatka Waterworks, supra.</p> <p>36. Pa—Middletown &amp; Swatara Consol Water Co v Middletown Borough, 3 Pa Dist &amp; Co. 587, 126 Dauph Co 347.</p> <p>37. Ala—Birmingham Waterworks Co v Hernandez, 71 So 443, 196 Ala 438, L R.A 1916E 258</p> <p>38. Mo—Daly v City of Carthage, 128 S W 265, 143 Mo App 564.</p> <p>Wis—Antigo Water Co v City of Antigo, 128 N.W 888, 144 Wis 156.</p> <p>39. Wis—Antigo Water Co. v. City of Antigo, supra.</p> |
|---|--|---|

## (2) Admissibility

In actions of the type under consideration certain evidence has been held admissible or inadmissible

In actions of the type under consideration certain evidence has been held admissible<sup>40</sup> or inadmissible<sup>41</sup> in accordance with general rules.

## (3) Weight and Sufficiency

In actions of this type certain evidence has been held sufficient or insufficient to establish certain issues.

In actions of this type certain evidence has been held sufficient<sup>42</sup> or insufficient<sup>43</sup> to establish certain issues

## 1. Trial

Questions arising under evidence susceptible of different inferences and conclusions are for the jury to determine.

Questions arising under evidence susceptible of different inferences and conclusions are for the jury to determine<sup>44</sup>

*Directed verdict* In a suit against a city for fire protection at rates prescribed by the state commission, where part of the city was not furnished with water at the required pressure but part was, it is proper to direct a verdict at such rates for water furnished the latter part<sup>45</sup>

## j. Judgment or Decree

Where it is for the interest of a city, seeking a decree for conveyance of a water plant under an option to purchase but failing to tender any amount in payment, that it be charged with water rents, instead of interest on the purchase price of the plant up to the time of the decree, it will be so charged, especially where the water company concurs in demanding it

Where it is for the interest of a city, seeking a decree for conveyance of a water plant under an op-

tion to purchase but failing to tender any amount in payment, that it be charged with water rents, instead of interest on the purchase price of the plant up to the time of the decree, it will be so charged, especially where the water company concurs in demanding it<sup>46</sup>

## k. Damages

In the event of a breach of the contract between a city and a water company, the city, or any of its inhabitants, or the water company is entitled to such damages as are fairly contemplated by the parties, and if the city, breaking its contract unjustifiably, erects waterworks of its own, the measure of damages is the sum which would make the water company whole for the breach. Various other measures of damages have been adopted in particular cases.

In the event of a breach of the contract between a city and a water company, the city, or any of its inhabitants, or the water company is entitled to such damages as are fairly contemplated by the parties, whether expressly provided in the contract or fairly implied<sup>47</sup>. If the city, breaking its contract unjustifiably, erects waterworks of its own, the measure of damages is the sum which would make the water company whole for the breach<sup>48</sup>. Under particular contracts,<sup>49</sup> or the obligation to pay without contract,<sup>50</sup> the measure of damages which a municipality has to pay has been variously determined. Although, where water is furnished without contract as to price, it has been held that the water company is entitled to recover a reasonable return on the fair value of the property devoted to such service,<sup>51</sup> compensation for inadequate service rendered a municipality by a water company is not to be based on a reasonable return on the fair value of the property devoted to such service, but rather on the worth of such service to the municipality<sup>52</sup>

40. Tex.—City of Comanche v Hoff & Harris, Civ App, 170 SW 135 67 C J p 1218 note 39

41. N Y.—Brockport-Holley Water Co v. Village of Brockport, 96 N E 745, 203 N Y 399 67 C J p 1218 note 40

42. Cal.—City of Coronado v City of San Diego, 140 P 2d 881, 60 Cal App 2d 395.

**Particular matters sustained by evidence**

(1) Finding that contract was neither improvident nor procured by fraud—Chisholm Water Supply Co v City of Chisholm, 285 N.W. 895, 205 Minn 245.

(2) Other matters—City of Coronado v City of San Diego, 140 P 2d 881, 60 Cal.App 2d 395—67 C.J. p 1218 note 41.

43. US.—City of Omaha v Omaha Water Co, Neb, 171 F 647, 96 CC A 419 67 C J p 1218 note 42

**44. Additional charges**

In an action by a water company against a municipality to recover the reasonable value of water supplied, the question whether there was an agreement that the water in question should be furnished under an annual hydrant charge and that there should be no additional charge of any kind was for the jury where some of the testimony was susceptible of two constructions—Queens County Water Co v City of New York, 174 N Y S 569, 186 App Div 512.

45. N J.—Hackensack Water Co v Borough of Ridgefield, 115 A 399, 96 N J Law 526

46. N J.—Jersey City v. Flynn, 70 A

497, 74 N J Eq 104, modified on other grounds 76 A 3, 76 N J Eq 607

47. SC.—Ancrum v Camden Water, etc., Co, 64 S E 151, 82 S C. 284, 21 L R A, N S, 1029

48. Pa.—Bennett Water Co v Millvale, 51 A 1098, 202 Pa 616

49. Cal.—Marin Water & Power Co v Town of Sausalito, 143 P 767, 168 Cal 587 67 C J p 1219 note 51

50. N.C.—Board of Trustees of Henderson Graded Schools v City of Henderson, 146 S E 808, 196 N C. 687 67 C J p 1219 note 52

51. US.—C H Venner Co v Urbana Waterworks, C C Ohio, 174 F 348 67 C J p 1219 note 53

52. US.—Quarles v City of Appleton, C.C.A Wis, 45 F 2d 675.

# 1. Proceedings before Public Service Commission

A public service commission has authority to require a water company to furnish an adequate supply of reasonably pure water, and the procedure and proceedings before such commission have been the subject matter of judicial decision

Although a public service commission may not be empowered to require the performance of a private contract, according to its terms between a water company and a municipality, it has authority to require a water company to furnish an adequate supply of reasonably pure water as long as it exercises its charter powers<sup>53</sup> The dismissal of a complaint is improper until it is made to appear by the water company that the method of treatment of the water supplied has rendered it reasonably free from odors, taste, and color which have made it unfit for domestic use<sup>54</sup> On complaint by a borough that a water company's supply is inadequate and not of the quality required by their contract, the public service commission, dismissing the complaint as to rates, may retain the petition pending the completion of tests to determine the adequacy of the supply and pending compliance with an order to the company to take certain steps to prevent the pollution of the water<sup>55</sup> Relative to rates, the courts in reviewing proceedings before public service commissions have ruled as to various matters of procedure as indicated in the appended note<sup>56</sup>

## § 277. To Private Consumers

The right of a municipality to distribute water and to make charges therefor is not a "franchise" subject to execution, and the terms "consumer" and "domestic purposes" have been defined

As discussed supra § 241, it is usually recognized that in supplying water to consumers for general or domestic purposes a municipal corporation acts in the capacity of a private corporation and not in the exercise of the power of local sovereignty, that is, the municipal corporation acts in a proprietary

and not in a governmental capacity. The right of a municipality to distribute water derived from its waterworks to its customers, and to make charges therefor, is not a "franchise" within the meaning of a statute providing for the sale of franchises under execution<sup>57</sup>

*"Consumer" defined* A consumer of water within the meaning of a regulation governing the supply and distribution of water has been held to be each householder using water and occupying a separate house, either as tenant or owner<sup>58</sup>

*The use of water for "domestic purposes"* has been defined as all uses of water which contribute to the health, comfort, and convenience of a family in the enjoyment of their dwelling as a home<sup>59</sup>

## § 278 — Right and Duty to Supply

- a Right and duty of municipalities to supply
- b Right and duty of water companies to supply

### a. Right and Duty of Municipalities to Supply

- (1) In general
- (2) Nonresidents

#### (1) In General

While it has been declared that a municipality owes no absolute duty to supply water to its inhabitants, it may be bound to do so by contract or statute, and when it does offer to furnish water it is under a duty to furnish all persons similarly situated applying therefor without discrimination, where the service requested is within reasonable range of its plant, equipment, or mains

The general power of a municipality to supply its inhabitants with water is treated in Municipal Corporations § 1051, and the construction, acquisition, and operation of municipal waterworks has already been discussed supra §§ 234-239, 241, 242 While it has been declared that a municipality owes no absolute duty to supply water to its inhabitants,<sup>60</sup> it may be bound to do so by contract<sup>61</sup> or statute,<sup>62</sup>

53 Pa—Borough of Warren v Public Service Commission, 80 Pa Super 10

54 Pa—Borough of Warren v Public Service Commission, supra

55. Pa—Borough of Mt Union v Mt Union Water Co, 100 A 968, 256 Pa 516

56 Me—Gay v Damariscotta-Newcastle Water Co, 162 A 264, 131 Me 304

67 C J p 1219 note 59

57. Cal—Marin Water & Power Co v Town of Sausalito, 193 P 291, 49 Cal App 78

58 NC—Thompson v Goldsboro, 65 SE 901, 151 NC 189, 190

59 Ala—Crosby v Montgomery, 18 So 723, 108 Ala 498

Okl—Mitchell v Tulsa Water, etc, Co, 95 P 961, 21 Okl 243  
Duty of water company to supply water for "domestic purposes" see infra § 278 b (3)

#### Other definitions

(1) The term has reference to the use of water for domestic purposes as known and recognized at common law by riparian proprietors—Crawford Co v Hathaway, 93 NW 781,

67 Neb 325, 108 Am SR 647, 60 L R A 889

(2) Other definitions see 19 C J p 388 note 42 [b] 3, 4

60 Ohio—Kraus v City of Cleveland, Com Pl, 116 NE 2d 779, affirmed, App, 121 NE 2d 311, affirmed 127 NE 2d 609, 163 Ohio St 559

61 Ohio—Kraus v. City of Cleveland, supra  
Contracts with, or for benefit of, consumers see infra § 279

62. NY—Dexter Sulphite Pulp & Paper Co v Shaver, Sup, 51 NY S 2d 37, 183 Misc 275.

and when it does offer to furnish water it is under a duty to furnish all persons similarly situated applying therefor without discrimination,<sup>63</sup> where the service requested is within the reasonable range of its plant, equipment, or mains.<sup>64</sup> While the municipality has a governmental discretion as to the extension of service, governed largely by the extent of the need and economic considerations,<sup>65</sup> this discretionary authority must be fairly and reasonably exercised,<sup>66</sup> and the remedial processes of the courts may be invoked for an abuse of discretion if an extension of service is arbitrarily refused.<sup>67</sup> The ordinance of a municipality, operating its own waterworks, denying a tenant the right to water unless in possession of the entire building,<sup>68</sup> and a regulation, providing that water would be furnished only on application of the owner of the building,<sup>69</sup> are

unreasonable and void. However, a municipality, under duty to supply the occupiers of premises with water, owes no duty to the owner of property to supply his tenants,<sup>70</sup> or, apart from any contractual obligation, to a land company.<sup>71</sup>

*License to tap private line* of a municipality may be revoked at any time.<sup>72</sup>

*Quality* A municipality under an obligation to furnish water is bound to furnish water that is wholesome, pure, or free from contamination,<sup>73</sup> and is potable and palatable.<sup>74</sup> Fluoridation may constitute a breach of the municipality's duty if shown to be harmful,<sup>75</sup> but not otherwise.<sup>76</sup>

*Resale* A town engaged in supplying water to its inhabitants is under no obligation to supply water

#### "Reasonable distance" from line

Water commissioners of a city, required by statute to furnish water to inhabitants of a town "within a reasonable distance from the line of main pipes" by furnishing water for over eight years to all inhabitants of the town who complied with certain conditions have put a construction on the term "reasonable distance" and cannot thereafter limit its meaning to a narrower construction.—*West Hartford v Hartford Water Com's*, 36 A 786, 68 Conn 323

63. Ariz.—*Town of Wickenburg v Sabin*, 200 P 2d 342, 68 Ariz 75

Md.—*Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore*, 3 A 2d 747, 175 Md 676

Neb.—*Village of Hay Springs v Hay Springs Commercial Co*, 267 NW 398, 131 Neb 170

NJ.—*Reid Development Corp v Parsippany-Troy Hills Tp*, 89 A 2d 667, 10 NJ 229

NY.—*Toan v Village of Perry*, 56 N YS 2d 572, 269 App Div 894.—*Dexter Sulphite Pulp & Paper Co v Shaver*, 51 NYS 2d 37, 183 Misc 275

NC.—*Fulghum v Town of Selma*, 76 SE 2d 368, 238 NC 100.—*Halifax Paper Co v Roanoke Rapids Sanitary Dist*, 61 SE 2d 378, 232 NC 421

Tex.—*State ex rel Richmond Plaza Civic Ass'n v City of Houston*, Civ App, 270 SW 2d 235, error refused no reversible error  
67 C J p 1220 note 63

#### Building partly in city

Where city, through its water system, held itself out to serve water to public in an area without city limits, public service commission had jurisdiction to order service to an applicant whose building was located partly within city and partly within area in which city held out its service—

*City of Milwaukee v Public Service Commission*, 66 NW 2d 716, 268 Wis 116

#### Deposit or bond

A municipal corporation which had exclusive monopoly of water and electric distribution systems was required to furnish service to resident whose tent house was located within established service zone without a fifty dollar deposit or bond which was not required of another receiving utility services in same neighborhood, where granting of such service involved making only ordinary service connections with existing lines and such action did not require formal authorization of town council.—*Town of Wickenburg v Sabin*, 200 P 2d 342, 68 Ariz 75

64. Md.—*Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore*, 3 A 2d 747, 175 Md 676

65. Neb.—*Brasier v City of Lincoln*, 65 NW 2d 213, 159 Neb 12, certiorari denied 75 S Ct 338, 348 US 926, 99 L Ed —, rehearing denied 75 S Ct 437, 318 US 956, 99 L Ed —

NJ.—*Reid Development Corp v Parsippany-Troy Hills Tp*, 89 A 2d 667, 10 NJ 229

Utah.—*Rose v Plymouth Town*, 173 P 2d 285, 110 Utah 358

Extension of mains see supra § 242

Where the expense involved would be too great with respect to the returns which would result, an extension of service may be refused.—*Brasier v City of Lincoln*, 65 NW 2d 213, 159 Neb 12, certiorari denied 75 S Ct 338, 348 US 926, 99 L Ed —, rehearing denied 75 S Ct 437, 348 US 956, 99 L Ed —

66. NJ.—*Reid Development Corp v Parsippany-Troy Hills Tp*, 89 A 2d 667, 10 NJ 229

#### Refusal held unreasonable

NY.—*Dexter Sulphite Pulp & Paper Co v Shaver*, 51 NYS 2d 37, 183 Misc 275

67. NJ.—*Reid Development Corp v Parsippany-Troy Hills Tp*, 89 A 2d 667, 10 NJ 229

68. Tex.—*City of Galveston v Kenner*, 240 SW 894, 111 Tex 484

69. Tex.—*City of Galveston v Kenner*, supra

70. Mass.—*Brand v Board of Water Com's of Town of Billerica*, 136 NE 389, 242 Mass 223

Landlord may not complain of refusal to supply his tenants with water.—*Page v City of Santa Rosa*, 65 P 2d 775, 8 Cal 2d 311

71. Mass.—*Brand v Board of Water Com's of Town of Billerica*, 136 NE 389, 242 Mass 223

72. Minn.—*State v Village of Killenny*, 212 NW 899, 170 Minn 424

#### Tap right where contract void

Where a contract granting to town right of way for piping water in exchange for tap rights, was void, landowners' tap rights were merely permissive.—*Hyde Park Town v Chambers*, 104 P 2d 220, 99 Utah 118

73. Ohio.—*Kraus v City of Cleveland, Com Pl*, 116 NE 2d 779, affirmed, App, 121 NE 2d 311, affirmed 127 NE 2d 609, 163 Ohio St 559

Wash.—*Kaul v City of Chehalis*, 277 P 2d 352

74. Ohio.—*Kraus v City of Cleveland, Com Pl*, 116 NE 2d 779, affirmed, App, 121 NE 2d 311, affirmed 127 NE 2d 609, 163 Ohio St 559

75. ND.—*Gurren v. City of Fargo*, 66 NW 2d 207

76. Ohio.—*Kraus v City of Cleveland*, 127 NE 2d 609, 163 Ohio St 559



to a resident for resale to others, either within or without the municipal limits.<sup>77</sup>

(2) Nonresidents

- (a) Right to supply
- (b) Duty to supply

(a) Right to Supply

A municipality, supplying water as a public utility beyond its boundaries, must be authorized to do so, but a municipality, owning and supplying water to its inhabitants, as an incident of its right to supply its inhabitants, has the power to dispose of surplus water outside the municipal limits for the benefit of the municipality without express legislative authority

A municipality, supplying water as a public utility beyond its boundaries, must be authorized to do so<sup>78</sup> The general power of a municipality to provide a water supply for its inhabitants does not include the right to furnish water to persons outside

its limits or the inhabitants of other municipalities<sup>79</sup> However, provisions authorizing a municipality to furnish water to its inhabitants do not imply a prohibition against furnishing water to those outside its limits,<sup>80</sup> nor does a constitutional provision, authorizing a municipality to furnish water to individuals, firms, and private corporations, limit the service to those within the municipal limits<sup>81</sup> A municipality, owning and supplying water to its inhabitants, has the power, as an incident of its right to supply its inhabitants, to dispose of surplus water outside the municipal limits for the benefit of the municipality without express legislative authority<sup>82</sup> Likewise, where a city is authorized to operate the waterworks of an improvement district, the city, in the absence of any statutory limitation, may supply surplus water to consumers beyond the limits of the district.<sup>83</sup> Where a municipality purchases a water

77. N.C.—Fulghum v Town of Selma, 76 S E 2d 368, 238 NC 100

78. Ala.—Atkinson v City of Gadsden, 192 So 510, 238 Ala 556

Ga.—City of Cornelia v Wells, 183 S E 66, 181 Ga 554—Collier v City of Atlanta, 173 S E 853, 178 Ga 575

Ky.—Smith v City of Raceland, 80 S W 2d 827, 258 Ky 671

Md.—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

Or.—Richards v Portland, 255 P 326, 121 Or 340

Tex.—Stevenson v City of Abilene, Civ App, 67 S W 2d 645, error refused

Utah.—County Water System v Salt Lake City, 278 P 2d 285, 3 Utah 2d 46

44 C J p 176 note 53

**Municipal distribution plant**

Under certain statutes, a municipality, not owning or operating a plant for pumping water from the original sources of supply, but merely having a plant for distribution, has no authority to distribute water to persons outside its limits—Gage v Village of Wilmette, 233 Ill App 123, affirmed 146 N E 325, 315 Ill 328.

79. Tex.—Stevenson v City of Abilene, Civ App, 67 S W 2d 645, error refused

Utah.—County Water System v Salt Lake City, 278 P 2d 285, 3 Utah 2d 46

67 C J, p 1220 note 72—44 C J p 176 note 54

**Power to construct for inhabitants**

Grant of power to municipality to construct waterworks for inhabitants generally gives no implied power to furnish water to outsiders—Corporation of Mt Jackson v Nelson, 145 S E 355, 151 Va 396.

**Condemnation for works outside city**

Charter amendment empowering city to condemn lands for purpose of constructing or enlarging waterworks system, within or without corporate limits, held not to confer on city power to furnish water to others than its inhabitants—City of Cornelia v Wells, 183 S E 66, 181 Ga 554

**When city annexed area to which adjoining city had been furnishing water and sewer, right of adjoining city to furnish water was terminated**—State ex rel Richmond Plaza Civic Ass'n v City of Houston, Tex Civ App, 270 S W 2d 235, error refused no reversible error

80. Ariz.—City of Tucson v Sims, 4 P 2d 673, 93 Ariz 168

81. S C.—Paris Mountain Water Co v Greenville, 96 S E 545, 110 S C 36

82. Ariz.—City of Phoenix v Kasun, 97 P 2d 210, 54 Ariz 470, 127 A L R 84—City of Phoenix v Wright, 80 P 2d 390, 52 Ariz 227

Ark.—McGehee v Williams, 87 S W 2d 46, 191 Ark 643

Cal.—South Pasadena v Pasadena Land, etc, Co, 93 P 490, 152 Cal 579—Durant v City of Beverly Hills, 102 P 2d 759, 39 Cal App 2d 133

Ky.—Board of Com'rs of Louisville Extension Water Dist v Yunker, 239 S W 2d 984

N J.—Mongello v. Borough of Hightstown, 112 A 2d 241, 17 N J. 611

Va.—Light v. City of Danville, 190 S E 276, 168 Va 181—Corporation of Mt Jackson v Nelson, 145 S E 355, 151 Va 396. 67 C J p 1221 note 75

**Places closely adjacent**

Municipality having prior appropriation of waters of stream for municipal use held entitled to dispose of

surplus of water to places closely adjacent to city which, as far as municipal use of water is concerned, may be considered as parts of city—Van Tassel Real Estate & Live Stock Co v City of Cheyenne, 54 P 2d 906, 49 Wyo 333, certiorari denied 57 S Ct 38, 299 US 574, 81 L Ed 423

**Contract not ultra vires**

The contract of a municipality to furnish surplus water to consumers outside of the corporate limits of the city is not ultra vires—Larimer County v Ft Collins, 189 P 929, 68 Colo 364—44 C J p 176 note 53

**Municipally owned company**

Where all of capital stock in incorporated water company was owned by sinking fund of city and corporation was directed by board of waterworks composed of mayor of city and four other members appointed by him with approval of Board of Aldermen water company was "municipally owned" within rule allowing municipally owned water company to sell water outside city limits, and company was not, by organization of water district, deprived of its right to furnish water to those consumers being served at time of district's incorporation and as to consumers which it was in position to serve and which district could not serve within immediate future—Board of Com'rs of Louisville Extension Water Dist v Yunker, Ky, 239 S W 2d 984

**Limiting the beneficial use of water appropriated by city to area of the municipal water system does not prohibit city from leasing water not needed for immediate use**—City and County of Denver v Sheriff, 96 P 2d 836, 105 Colo 193.

83. Ark.—Armour v. City of Ft. Smith, 174 S W 234, 117 Ark 214. 67 C J, p 1221 note 76.

system supplying water to persons outside the municipal limits it has been held that continued supplying of water to the outside territory is within the power of the municipality.<sup>84</sup> The rights of municipalities to supply water beyond their limits may be by express provision of statute or charter.<sup>85</sup> However, authority to sell water outside municipal limits may be subject to limitations,<sup>86</sup> such as a limitation that the facilities for conveying the water beyond the municipal limits be constructed by the consumers without expense to the municipality.<sup>87</sup>

**Compelling acceptance of service** A municipality may not compel persons outside its territorial limits to accept water service.<sup>88</sup>

**Consumption within municipality** Although it has been said that where the charter of a municipality limits its power to the supply of its inhabitants, the city is not only limited to the sale of water within the city but to the sale for consumption within the city,<sup>89</sup> it has been held that the municipality has the power to deliver within the city water from its waterworks system to a railroad company, an inhabitant of the city, which stores the water outside the city limits for use partly within and partly without the city.<sup>90</sup> Likewise, a town which has acquired the rights of a water company, authorizing the company to distribute water throughout the town, may deliver water to a mill corporation therein, although the mill property lies partly within and partly without the town, and the water is distributed by the corporation throughout its premises.<sup>91</sup>

**Consent of state board or of officials of municipality supplied.** A municipality, operating its own waterworks, authorized by statute to supply water beyond its limits, is not within the provisions of a statute requiring a water corporation to secure a certificate of convenience and necessity from the public service commission.<sup>92</sup> A statute forbidding any person, firm, or corporation to supply water within a municipality without the consent of the board in charge of the water supply does not apply to a municipal corporation.<sup>93</sup> A statute prohibiting the obtaining of water from without a municipality without the consent of the board in charge of the water supply applies only to municipalities maintaining an adequate water supply with respect to the consumer in question.<sup>94</sup>

**Supply as consideration for right of way.** A municipality with power to enlarge its plant, relocate its pipes, acquire locations for such purposes, and enter into contracts necessary to carry out the purpose of supplying its inhabitants with water, may contract, as part consideration for the grant of rights of way for its mains, to furnish water from such mains to the owners or occupants of the tracts through which the rights of way run.<sup>95</sup>

**Supply as bonus or donation** Although a city has authority to furnish water to nonresidents, a contract obligating it to do so where the consideration is the establishment of a public road, to be deeded to the county, is a mere bonus or donation for such purpose and void.<sup>96</sup>

84. Cal—Durant v City of Beverly Hills, 102 P 2d 759, 39 Cal App 2d 133

85. Ala—Atkinson v City of Gadsden, 192 So 510, 238 Ala 556

Ariz—City of Phoenix v Kasun, 97 P 2d 210, 54 Ariz 470, 127 A L R. 84  
—City of Phoenix v Wright, 80 P 2d 390, 52 Ariz 227

Ga—Collier v City of Atlanta, 173 SE 853, 178 Ga 575

Idaho—Beus v. City of Soda Springs, 107 P 2d 151, 62 Idaho 1

Ky—Austin v City of Louisa, 264 S. W 2d 662

NC—Fulghum v Town of Selma, 76 SE 2d 368, 238 NC 100

Pa—City of Altoona v Pennsylvania Public Utility Commission, 77 A 2d 740, 168 Pa Super 246

SC—Looper v City of Easley, 172 SE 705, 172 SC 11.

Utah—County Water System v Salt Lake City, 278 P 2d 285, 3 Utah 2d 46

67 C J p 1221 note 77.

**Statute ratifying contract of city to supply water to military reservation located outside city limits held to provide that use of water furnish-**

ed to reservation was "municipal use" within decree establishing municipality's priority for that purpose—Van Tassel Real Estate & Live Stock Co v City of Cheyenne, 54 P 2d 906, 49 Wyo 333, certiorari denied 57 S Ct 38, 299 US 574, 81 L Ed 423

86. Utah—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P 2d 790, 98 Utah 104

#### Parting with water rights

Even though a city may sell its excess water to outsiders, city's agreement to deliver a definite amount of water in perpetuity is in effect a parting with water rights, forbidden by state constitution—Genola Town v. Santaquin City, supra

87. Ky—Board of Com'rs of Louisville Extension Water Dist v Yunker, 239 S W 2d 984—Smith v City of Raceland, 80 S W 2d 827, 258 Ky 671  
Extension of mains see supra § 242

88. Ga—Barr v City Council of Augusta, 58 SE 2d 823, 206 Ga. 753

89. NY—Western New Work Wa-

ter Co v City of Buffalo, 208 N YS 387, 124 Misc 257, affirmed 210 NYS 611, 213 App Div 458, reversed on other grounds 151 N E 207, 242 N Y 202.

67 C J p 1221 note 79

90. NY—Delaware, L & W R Co v City of Buffalo, 115 NYS 657, affirmed 117 NYS 1132, 132 App Div 946

91. Mass—Lawrence v Methuen, 44 NE 247, 166 Mass 206

92. Mo—Public Service Commission of Missouri v City of Kirkwood, 4 S W 2d 773, 319 Mo 562  
67 C J p 1221 note 82

93. NJ—Town of Kearny v Jersey City, 73 A 110, affirmed 76 A 1118, 79 NJ Law 599

94. NJ—Town of Kearny v Jersey City, supra

95. NJ—Kearny v Bayonne, 107 A. 169, 90 N J Eq 499  
67 C J p 1221 note 85

96. Tex—City of Teague v. Sheffield, Civ App, 26 S W 2d 417

Free supply of water generally see infra § 283.

(b) Duty to Supply

- aa Distinction between residents and nonresidents
- bb Distinctions among nonresidents

- aa Distinction between residents and non-residents

Assuming it possesses power to sell water outside the municipal limits, there is no duty on the part of a municipality to do so in the first instance, at least in the absence of a statute or contract imposing such duty.

In the absence of authority to furnish water to persons outside its limits, there is no duty to do so on the part of a municipality<sup>97</sup> Even where authority is not lacking, there is no duty on the part of the municipality in the first instance to furnish water to persons outside its limits,<sup>98</sup> in the absence of a statute imposing such duty<sup>99</sup> However, it has been held that where a municipality, authorized to supply water to nonresidents, purchases the plant of a water company, and undertakes to distribute water for domestic purposes, it becomes the duty of the municipality to furnish water in the areas through which the water mains of the water company are laid, although outside the municipal limits<sup>1</sup>

*Contractual obligation* Where a municipality acquired the property of a private water company, including a pipe extending beyond the municipal limits used to supply a number of families, and contracted to continue such supply, it was under obligation to do so<sup>2</sup>

97 Ill—Gage v Village of Wilmette, 233 Ill App 123, affirmed 146 NE 325, 315 Ill 328  
67 C J p 1221 note 87

98. Ariz—City of Phoenix v Kasun, 97 P 2d 210, 54 Ariz 470, 127 A L R 84

Ga—Barr v City Council of Augusta, 58 S E 2d 823, 206 Ga 753—Collier v City of Atlanta, 173 S E 853, 178 Ga 575

Ill—Rehm v City of Batavia, 125 NE 2d 831, 5 Ill App 2d 442

Ky—Austin v City of Louisa, 264 S W 2d 662

N C—Fulghum v Town of Selma, 76 S E 2d 368, 238 N C 100

S C—Looper v City of Easley, 172 S E 705, 172 S C 11

99. Va—City of South Norfolk v City of Norfolk, 58 S E 2d 32, 190 Va 591

**Statute amended by charter**

Where general statute required all cities on acquiring a water plant operating in contiguous territory, to furnish water to the customers of that plant, and charter of the city involved, which became effective at a later date, authorized the city to op-

erate a water system and to sell surplus water to consumers located outside the city limits, there was no irreconcilable inconsistency and repugnancy between the statute and charter which would result in an implied repeal of the former by the latter, but charter would be construed as a qualified amendment of the general law to the extent that the city was permitted to sell only surplus water—City of South Norfolk v City of Norfolk, supra

1. Cal—City of South Pasadena v Pasadena Land and Water Co, 93 P 490, 152 Cal 579  
Md—Meiryman v Baltimore City, 138 A 324, 153 Md 419

**Purchase impressed with trust**

City purchasing water plant, supplying water to persons residing outside city limits, by continuing to furnish water to such persons, is not selling the surplus or excess waters to the prior users, but rather purchase of system is impressed with a trust and the city holds title as a mere "trustee," bound to apply it to use of those beneficially interested—Durant v City of Beverly Hills, 103 P 2d 759, 39 Cal App 2d 133.

*Nonresident using water for residents* A water company, under duty to supply the residents of a city, is under duty to supply a nonresident who uses the water solely for the inhabitants<sup>3</sup> Where a city furnished water to a village through village mains, and also to private users by extension beyond the village limits, the supply to such users, it was held, could not be cut off when the village installed its own system, but the court could decree that, pending construction of main by the city to supply such users, the village should supply them<sup>4</sup>

bb Distinctions among Nonresidents

Although there is authority to the contrary, it is generally held that in the absence of contract, a municipality, in selling and delivering any surplus water to other than inhabitants, does not become such a public utility as to be bound to serve indiscriminately all who may demand such service, but that the municipality may sell and dispose of its surplus water in such quantities and in such manner as the municipal authorities determine to be in the best interest of the municipality and its inhabitants, restricted only by pertinent constitutional and statutory limitations

Although a municipality may refuse to supply any consumers beyond its limits, if, as authorized, it supplies certain consumers, it has been broadly stated that it cannot refuse to supply others applying for service under like conditions,<sup>5</sup> and that where a municipality, authorized to do so, extends its water system beyond its corporate limits, it must supply water to all along its mains without discrimination<sup>6</sup> It has been held that when a municipality contracts to supply water to the public of another municipal-

2 NY—Bradley v Village of Union, 150 N Y S 107, 164 App Div 565, appeal denied 151 N Y S 1106, 166 App Div 953, affirmed 117 NE 1062, 221 NY 591

Contracts with, or for benefit of, consumers generally see infra § 279

3. US—Wiemer v Louisville Water Co, C C Ky, 130 F 251

4. Mich—Board of Water Com'rs of City of Detroit v Village of Highland Park, 159 NW 160, 192 Mich 607

5. Pa—Reagle v Smith, 134 A 380, 287 Pa 30

**Refusal subject to review**

Where city extended service of its city waterworks to some customers beyond city limits, refusal of city to serve other customers similarly situated was subject to review by Public Utility Commission—City of Altoona v Pennsylvania Public Utility Commission, 77 A 2d 740, 168 Pa Super 246

6 Ala—City of Montgomery v Greene, 60 So 900, 180 Ala 322  
67 C J p 1222 note 89.

ity, it dedicates itself in that respect to the service of the public of such other municipality,<sup>7</sup> and while it may limit, by contract, the scope and extent of its duty to the municipality as such, it cannot, while enjoying the privileges and immunities of a public utility, by contract absolve itself from the duties toward the public that are cast on it by law by reason of such dedication.<sup>8</sup> However, there is also authority to the effect that the fact that a municipality allows sale of its water to some residents of an adjoining municipality under a contract with the adjoining municipality on agreed limitations does not give rise to a presumption of dedication to public use so as to impose on the municipality the duties of a public utility with respect to supplying water to all residents of the adjoining municipality,<sup>9</sup> and it has also been held that in the absence of contract, a municipality, in selling and delivering any surplus water to others than inhabitants, does not become such a public utility as to be bound to serve indiscriminately all who may demand service,<sup>10</sup> but that the municipality may sell and dispose of its surplus water in such quantities and in such manner as the municipal authorities determine to be in the best interest of the municipality and its inhabitants,<sup>11</sup> restricted only by pertinent constitutional and statutory limitations.<sup>12</sup> Further, the fact that a municipality by contract with an adjoining town has assumed to serve small, isolated, and precisely limited portions of the town with water has been deemed not to impose an obligation to

serve the entire town.<sup>13</sup> Where a municipality undertakes to serve county institutions outside the municipal limits through mains and equipment furnished by the county under a contract giving the county control of the tapping of its mains, it has been held that the municipality may not be charged with illegally discriminating against persons outside the municipality desiring to obtain water from the county mains by refusing to serve them without county approval.<sup>14</sup>

#### b. Right and Duty of Water Companies to Supply

- (1) In general
- (2) To tenants
- (3) Particular purposes

##### (1) In General

The power of private corporations to sell water to consumers in any given community depends on legislative grant, and while the mere fact that a water company is authorized to supply water to the public in a certain community does not impose on it the duty to supply water to all the public in the community, generally speaking, a water company engaged in supplying water to the public is bound to supply water without discrimination to all persons within its zone of service who comply with its proper rules and regulations.

The power of private corporations to sell water to consumers in any given community depends on legislative grant.<sup>15</sup> The paramount rights of the public must be controlled by the legislature, or the

7 Ohio—Western Reserve Steel Co v Village of Cuyahoga Heights, 161 NE 920, 118 Ohio St 544

#### City authorized to bind itself by contract

In sale and delivery of surplus water of a municipal utility to others than the municipality and its inhabitants, municipality is authorized to bind itself by a contract whereby it dedicates itself to the public served and assumes the duty to supply such product without discrimination—State ex rel Indian Hill Acres v Kellogg, 79 NE 2d 319, 149 Ohio St 461

8. Ohio—Western Reserve Steel Co v Village of Cuyahoga Heights, 161 NE 920, 118 Ohio St 544  
67 C J p 1222 note 97

9. Colo—City of Englewood v City & County of Denver, 229 P 2d 667, 123 Colo 290

10. Colo—City of Englewood v City & County of Denver, supra  
N J—Mongiello v Borough of Hightstown, 105 A 2d 692, 31 N J Super 1, affirmed 112 A 2d 241, 17 N J 611  
N C—Corpus Juris cited in Fulghum

v Town of Selma, 76 SE 2d 368, 371, 238 NC 100

Ohio—State ex rel Indian Hill Acres v Kellogg, 79 NE 2d 319, 149 Ohio St 461

Pa—City of Altoona v Pennsylvania Public Utility Commission, 77 A 2d 740, 168 Pa Super 246

SC—Childs v City of Columbia, 70 SE 296, 87 SC 566, 34 L R A, N S, 542

#### Incidental service as accommodation

If nonresidents can incidentally be served by municipal water system as an accommodation and without endangering local service, they may be served, but such incidental service may not fairly be converted into obligation to render additional nonresident service tending to jeopardize service within municipality—Mongiello v Borough of Hightstown, 112 A 2d 241, 17 N J 611

11. Colo—City of Englewood v City & County of Denver, 229 P 2d 667, 123 Colo 290

N C—Fulghum v Town of Selma, 76 SE 2d 368, 238 NC 100  
Ohio—State ex rel Indian Hill Acres v Kellogg, 79 NE 2d 319, 149 Ohio St 461

Regulation of supply and use see infra § 280

#### Ordinance held valid

City ordinance effective at expiration of date of contract between city and county for sale of surplus water by city to residents in sanitary sewer districts outside city, and providing that city manager might furnish water in accordance with terms of old contracts, but could not furnish water to any extension of existing mains outside city, except in cases of great hardship or where those seeking water sought annexation of their lands to city, is valid—State ex rel Indian Hill Acres v Kellogg, supra

12. Ohio—State ex rel Indian Hill Acres v Kellogg, supra

13. Wis—City of Milwaukee v Public Service Commission, 5 N W 2d 800, 241 Wis 249

14. Mich—Nelson v Wayne County, 286 NW 617, 289 Mich 284.

15. Mont—Noid v Butte Water Co, 30 P 2d 809, 96 Mont 311  
N Y—Western New York Water Co v Buffalo, 210 N Y S 611, 218 App Div 458

municipality, acting under delegated authority,<sup>16</sup> and in granting the privilege to sell water the granting power has authority to attach conditions to its exercise.<sup>17</sup> While the mere fact that a water company is authorized to supply water to the public in a certain community does not impose on it the duty to supply water to all the public in the community,<sup>18</sup> especially where the water company is not given a monopoly,<sup>19</sup> and the community to be served is sparsely settled,<sup>20</sup> generally speaking, a water company engaged in supplying water to the public is bound to supply water without discrimination to all persons within its zone of service who comply with its proper rules and regulations.<sup>21</sup> That is to say, a water company operating as a public utility is bound to supply water without discrimination to all persons within its zone of service.<sup>22</sup> The test to be applied in determining whether or not a water company can be considered a public utility, at least under some statutory provisions, is whether the company holds itself out, expressly or impliedly, as engaged in supplying water to the public as a class, not necessarily all the public, but to any limited portion of it, as contradistinguished from holding itself out as serving, or ready to serve, only particular individuals, either as a matter of accom-

modation or for other reasons peculiar and particular to them.<sup>23</sup> A water company is not bound to supply water beyond the zone of its service,<sup>24</sup> or, in the absence of a contract or statutory provision to that effect, for any particular purpose.<sup>25</sup> A water company operating as a public utility, in making a contract with applicants for the extension of service into an area not previously served and with reference to which it has no existing contracts of service, and which it owes no obligation to serve, has a right within limits to make the contract on such terms as may be agreed on between itself and the applicant, as long as the contract thus made does not interfere with the public interest, or impair, or restrict the service of the utility or the power of the utility to render service to the public which it is already under obligation to serve.<sup>26</sup> If there is no duty on the part of a water utility to serve claimants, no just claim of discrimination is available as a basis for equitable relief.<sup>27</sup> There is no obligation on the owner of a private main<sup>28</sup> or of a private water supply,<sup>29</sup> or on a private corporation, organized to supply water to stockholders only,<sup>30</sup> to furnish water to others. A waterworks corporation, operating as a public utility, cannot discontinue its service without giving its patrons a

16. Mont—Nord v Butte Water Co, 30 P 2d 809, 96 Mont 311

17. Mont—Nord v Butte Water Co, supra

18. Pa—Morris Water Co v Public Service Commission, 180 A. 72, 118 Pa Super 416

Prior users have a right to be protected and those seeking subsequent connections are limited by amount of water available for use—North Salt Lake v St Joseph Water & Irr. Co, Utah, 223 P 2d 577

19. Pa—Morris Water Co v Public Service Commission, 180 A. 72, 118 Pa Super 416

#### 20. Supply to public of township

(1) Where a township is the only recognized governmental division in the state for more sparsely settled communities, a water company applying for a charter and stating that its purpose is to supply water to the public in a certain township does not, ordinarily, hold itself out as ready to perform its corporate functions everywhere throughout the township, unlike a water company chartered to serve a borough or city—Wyoming Valley Water Supply Co v Public Service Commission, 159 A. 340, 104 Pa Super. 432

(2) So, the assumption by merger of a water company's power to supply water in a certain township does not impose on the company the obligation of supplying service through-

out that township—Cole v Pennsylvania Public Utility Commission, 22 A 2d 121, 146 Pa Super 257

21. Ala—Birmingham Slag Co. v Birmingham Water Works Co, 48 So 2d 193, 254 Ala 211

Md—Home Owners' Loan Corp. of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

N J—Reid Development Corp v Parsippany-Troy Hills Tp, 89 A 2d 667, 10 N J. 229

Pa—Ridley Tp v Pennsylvania Public Utility Commission, 94 A 2d 168, 172 Pa Super 472

67 C J p 1222 note 98.

#### Rules and regulations

Generally see infra § 280

#### Payment

As condition of continued supply see infra § 305

In advance see infra § 302

22. Md—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

Wash—Clark v Olson, 31 P 2d 534, 177 Wash 237, 93 A L R. 240

23. Cal—Richardson v Railroad Commission, 218 P 418, 191 Cal 716—Van Hoosear v Railroad Commission, 194 P 1003, 184 Cal 553

Wash—Clark v Olson, 31 P 2d 534, 177 Wash 237, 93 A L R. 240

24. Ala—Birmingham Slag Co v Birmingham Water Works Co, 48 So 2d 193, 254 Ala 211.

Md—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

67 C J p 1223 note 99

#### Contractual obligations

General principles of utility obligations must give way to contracts executed by parties dealing at arm's length, designed to benefit one who desires his property developed by services of waterworks utility, which is under no obligation to serve area—Birmingham Slag Co v Birmingham Water Works Co, 48 So 2d 193, 254 Ala 211

25. Cal—Niehaus Bros Co v Contra Costa Water Co, 113 P 375, 159 Cal 305, 36 L R A. N S., 1045

26. Ala—Birmingham Slag Co v Birmingham Water Works Co, 48 So 2d 193, 254 Ala 211

27. Ala—Birmingham Slag Co v Birmingham Water Works Co, supra

28. Wash—State v Hillyard Water Co, 94 P. 1080, 49 Wash 232  
67 C J p 1223 note 2.

29. Cal—Del Mar Water, Light & Power Co v Eshleman, 140 P 591, 948, 167 Cal 666  
67 C J p 1223 note 3

30. Cal—Garrison v North Pasadena Land & Water Co, 124 P. 1009, 163 Cal 235  
67 C J p 1223 note 4.

reasonable time in which to provide themselves with similar service<sup>31</sup>

*Adequate supply* A private company engaged in furnishing a water supply to a community owes it the duty of providing an adequate supply of water<sup>32</sup> A water company, in accepting a contract with a municipality to supply its inhabitants with water for domestic use and fire protection, is impressed with a public duty to furnish a supply which shall be equal to all emergencies which may be reasonably anticipated<sup>33</sup> and to bear constantly in mind the prospective increase in population and a consequent increased demand for water<sup>34</sup> A water company is under no duty, in the absence of a contract or statutory provision to that effect, to furnish water in any specified quantity<sup>35</sup>

*"Pure and wholesome" water* Under certain acts, with respect to chartered water companies, a water company is bound to supply water that is ordinarily and reasonably pure and wholesome, but not water that is chemically pure<sup>36</sup>

*Defective plumbing* Where the consumer owns, or holds under one who owns, the service line, if the line is not in a fit condition to receive the water, in the absence of stipulations to the contrary, the water company is under no obligation to continue to furnish water<sup>37</sup> Likewise, where a consumer has the duty of maintaining a private pipe line in good repair so as to save water from waste, the water company may refuse to continue to furnish water until the line is repaired.<sup>38</sup>

*Size of connection* Where, at the time a water company by its agreement with a municipality undertook to furnish water, the majority of the service connections were of a certain size and it was the

intention of the parties that the size of such connections should remain as they were, a consumer, during a continuance of the contract, is not entitled to a supply through a connection of greater diameter.<sup>39</sup>

*Limited dedication for public use* The owner of a water supply is not compelled to dedicate all of it to public use, he may dedicate a part of it to public use, reserving the remainder for private purposes or private sale.<sup>40</sup>

*Right to supply under special charter* depends on its terms<sup>41</sup>

## (2) To Tenants

In the absence of legislation to the contrary, the occupant of premises dependent on a public service corporation for a supply of water, if otherwise entitled to service, cannot be denied because he is a tenant.

In the absence of legislation to the contrary, the occupant of premises dependent on a public service corporation for a supply of water, if otherwise entitled to the service, cannot be denied because he is a tenant<sup>42</sup> However, the right of a tenant to exact service of water necessarily presupposes premises suitably equipped for that purpose<sup>43</sup> Although a tenant may make an application for water service, a regulation of the water company that such application must be for service through connections made, or applied for by the owner, is not unreasonable<sup>44</sup> The owner of the premises has no standing to complain of the refusal of the water company to supply his tenant with water<sup>45</sup>

## (3) Particular Purposes

Public service water companies may be required by statute to furnish water adequate for proper fire protection, and a water company bound by its charter to supply

31. Tex.—West v Probst, Com App, 6 S W 2d 96

32. Conn.—In re New Haven Water Co, 85 A 386, 86 Conn 361

NJ.—Reid Development Corp v Parsippany-Troy Hills Tp, 89 A 2d 667, 10 NJ 229

Pa.—Public Service Commission of Commonwealth of Pennsylvania v Sinking Spring Water Co, Com Pl, 46 Dauph Co 9

33. NJ.—Long Branch Commission v Tintern Manor Water Co, 62 A 474, 476, 70 NJ Eq 71

67 C J p 1223 note 7.

34. NJ.—Long Branch Commission v Tintern Manor Water Co, supra

67 C J p 1223 note 8

35. Cal.—Niehaus Bros Co v Contra Costa Water Co, 113 P 375, 159 Cal 305, 36 L R A, N S., 1045

36. Pa.—Peffer v. Pennsylvania Water Co, 70 A. 870, 221 Pa 578—Public Service Commission of Commonwealth of Pennsylvania v Sinking Spring Water Co, Com Pl, 46 Dauph Co 9

67 C J p 1223 note 11

37. Ala.—Harrison v Birmingham Water Works Co, 64 So 164, 9 Ala App 605

67 C J p 1223 note 13

Duty to supply tenant as presupposing premises suitably equipped see infra subsection b (2) of this section

38. Ariz.—Warren Co v Hanson, 150 P 238, 17 Ariz 252

39. NY.—Condon v New Rochelle Water Co, 116 N Y S 142, affirmed 120 N Y S 1119, 136 App Div 897, affirmed 95 N E 1126, 202 N Y 535

40. Cal.—Del Mar Water, Light & Power Co v Eshleman, 140 P. 591, 948, 167 Cal 666

41. Conn.—New Hartford Water Co v Village Water Co, 87 A 358, 87 Conn 183

67 C J p 1224 note 17

42. Vt.—Waldron v International Water Co, 112 A 219, 95 Vt 135, 13 A L R 340

67 C J p 1224 note 19

43. NJ.—Millville Improvement Co v Millville Water Co, 113 A 516, 92 NJ Eq 480

67 C J p 1224 note 20

44. Ala.—Alabama Water Co v Knowles, 124 So 96, 220 Ala 61

Defective plumbing as ground for refusing service generally see supra subsection b (1) of this section

Regulations generally see infra § 280.

45. Cal.—Page v City of Santa Rosa, 65 P 2d 775, 8 Cal 2d 311

Vt.—Waldron v International Water Co, 112 A 219, 95 Vt 219.

water for "domestic purposes" is required to supply water for any domestic use, although incidentally it might be converted into power and used in that form.

Public service water companies may be required by statute to furnish water adequate for proper fire protection<sup>46</sup> The obligation to supply the municipality with water for fire protection, as provided for by a contract between a municipality and a water company, does not, however, include the obligation to furnish water for a private system of fire protection<sup>47</sup> or to maintain pressure sufficient to make a private sprinkler system serviceable in case of fire,<sup>48</sup> but where supplying water for a private sprinkler system is contemplated by the contract between water company and municipality, the mere fact that water pressure is also furnished cannot be offered as an excuse for refusing to supply such water as for other uses<sup>49</sup>

*"Domestic purposes"* A water company bound under its charter to supply water for "domestic purposes" is required to supply water for any domestic use, although incidentally it might be converted into power and used in that form<sup>50</sup>

# § 279. — Contracts with, or for Benefit of, Consumers

- a. Contracts of municipalities
- b. Contracts of water companies
- c. Contracts of others

## a. Contracts of Municipalities

- (1) In general
- (2) Particular terms

### (1) In General

Contracts of municipalities with, or for the benefit of, private consumers of water are subject to the rules governing contracts generally with respect to their validity, construction, and operation, and, generally speaking,

a municipality may enter into such contract on such terms and conditions as the municipal authorities consider proper and necessary

Contracts of municipalities with, or for the benefit of, private consumers of water are subject to the rules governing contracts generally with respect to their validity,<sup>51</sup> construction, and operation<sup>52</sup> Generally, speaking, a municipality may enter into a contract for a water supply to a private consumer on such terms and conditions as the municipal authorities deem proper and necessary as long as they are not unconscionable or oppressive, and do not impair the obligation of the municipality to discharge its public duties<sup>53</sup> A municipality, purchasing the plant of a private water company and undertaking to distribute water for domestic purposes, occupies the same position as the corporation to whose rights and duties it succeeds in its relations with those with whom it contracts<sup>54</sup> Where a municipality furnishes water and the consumer pays for it, without written agreement,<sup>55</sup> for a period of years,<sup>56</sup> a contract is implied which, on the part of the municipality, imposes the obligation of continuing the service The acceptance by a municipality of an application for the service of water creates an implied contract to supply the water asked for, subject to its reasonable rules and regulations<sup>57</sup> Where consumers, accepting the offer of a municipality, make connections with its water mains, there is a contract between the municipality and the consumers for the supply of water<sup>58</sup> However, under a contract between a municipality and a consumer for the supply of water, based merely on a supply for a time and compliance with the municipality's requirements by the consumer, where the municipality is unauthorized to furnish the water, there is no obligation to continue the supply<sup>59</sup>

*Sale of "goods"* Within the meaning of a statute defining "goods," the furnishing of water by a mu-

46. Va—Alexandria Water Co v City Council of Alexandria, 177 S E 454, 163 Va 512

47. Fla—Miami Water Co v City of Miami, 134 So 592, 101 Fla 506  
Ga—Washington Water & Electric Co v Pope Mfg Co, 167 SE 286, 176 Ga 155

48. Tenn—D B Loveman Co v City Water Co, 1 Tenn Ch A 596

49. Ind—Terre Haute Paper Co v Terre Haute Waterworks Co, 110 NE 85, 62 Ind App 263  
67 C J p 1224 note 26

50. Me—Kimball v Northeast Harbor Water Co, 78 A 865, 107 Me 467, 32 L R A, N S, 805  
67 C J p 1224 note 27  
'Domestic purposes' defined see supra § 277.

51. Agreement not indefinite and uncertain

Utah—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P 2d 790, 96 Utah 104

52. Utah—Genola Town v Santaquin City, supra

53. NC—Halifax Paper Co v Roanoke Rapids Sanitary Dist, 61 SE 2d 378, 232 NC 421

Contracts as to rates see infra § 287

54. NY—Bradley v Village of Union, 150 NYS 107, 164 App Div 565, appeal denied 151 NYS 1106, 166 App Div 953, and affirmed 117 NE 1062, 221 NY 591

55. Me—Woodward v Livermore Falls Water Dist, 100 A 317, 116 Me 86, L R A 1917D 678.

Tex—Corpus Juris quoted in City of Dallas v Brown, Civ App, 150 S W 2d 129, 131, error dismissed

56. NY—Delaware, etc, R Co v Buffalo, 115 NYS 657, affirmed 117 NYS 1132, 132 App Div 946

Tex—Corpus Juris quoted in City of Dallas v Brown, Civ App, 150 S W 2d 129, 131, error dismissed

57. Md—Merryman v Baltimore City, 138 A 324, 153 Md 419

58. NY—Tonawanda Board & Paper Co v City of Tonawanda, 190 NYS 874, 198 App Div 760

59. Ill—Gage v Village of Wilmette, 233 Ill App 123, affirmed 146 NE 325, 315 Ill 328.

municipal corporation to private consumers, at a fixed compensation, is a sale of goods <sup>60</sup>

**Assumption of obligations** The exercise by a municipality of the power to purchase a water system, by which it assumed the obligations of contracts between the water company and consumers as part of the consideration, binds the water board of the municipality, although a separate corporation, <sup>61</sup> but the mere purchase of part of a water company's plant, essential to the carrying out of a contract between the water company and a consumer, although imposing on the municipality the duty to supply water, imposes no obligation to supply the water at the price of the contract <sup>62</sup>

**Covenant running with land** A contract to furnish water on certain premises on the part of a municipality in consideration of certain property rights is a covenant running with the land, subject to reasonable regulations to be made by the city <sup>63</sup>

**Authority of officers to contract** Under a statute by which the street and water commissioners of a first class city is the governing body of the city with respect to water, a contract made under a statute authorizing the governing body of a municipality owning or controlling waterworks to supply water to a private corporation in an adjoining municipality does not require the consent of any other board <sup>64</sup>

**Consideration** Contracts between municipalities and private consumers with respect to water supply must be supported by consideration <sup>65</sup>

**Contract with county** A contract entered into between a municipality and a county for a supply of water to the latter is not void as against public

policy by reason of the county authorities being permitted to control the municipality in its operation to the extent that the municipality must have the consent of the county authorities to serve other applicants from a main constructed and maintained by the county <sup>66</sup>

## (2) Particular Terms

- (a) Commencement of service
- (b) Duration of service
- (c) Sufficiency of supply
- (d) Purposes for which water may be used

### (a) Commencement of Service

The acceptance by a municipality of an application for water service creates an implied contract to supply water within a reasonable time

The acceptance by a municipality of an application for the service of water creates an implied contract under which the municipality agrees to supply the water within a reasonable time <sup>67</sup>

### (b) Duration of Service

A contract for water service, not specifying or implying the time it is to continue, is a contract terminable by either party on reasonable notice to the other, and a municipality may be authorized to enter into a long term contract

A contract between a municipality and a consumer for the supply of water, without specifying or implying the time for which the contract should continue, is a contract terminable by either party on reasonable notice to the other <sup>68</sup> Where connection with municipal water mains by nonresidents was made on the understanding that the city ordinances were to be complied with, one of which provided

<sup>60</sup> NY—*Canavan v City of Mechanville*, 128 NE 882, 229 NY 473, 13 ALR 1123  
<sup>67</sup> C J p 1225 note 38

<sup>61</sup> US—*Cudahy Packing Co v City of Omaha*, CCA Neb, 277 F 49

<sup>62</sup> NJ—*Inhabitants of City of Bordentown v Anderson*, 79 A 281, 81 NJ Law 434, error dismissed 32 S Ct 521, 223 US 714, 56 L Ed 626  
Water rents generally see *infra* § 284-308

<sup>63</sup> Kan—*Corpus Juris cited in City of Iola, Allen County v Lytle*, 187 P 2d 378, 381, 164 Kan 33  
<sup>67</sup> C J p 1225 note 42

<sup>64</sup> NJ—*Town of Kearny v Jersey City*, 73 A 110, 78 NJ Law 77, affirmed 76 A 1118, 79 NJ Law 599

<sup>65</sup> Ky—*Wood v Williams*, 184 S W 2d 799, 299 Ky 167

NY—*Berwin Paper Corp v Village of Danville*, 50 NY S 2d 636, appeal dismissed 70 NY S 2d 581.

### Insufficient consideration

(1) Fact that company had taken and paid for water at rate specified in contract was not sufficient consideration to support contract which required village to furnish water, but did not require company to take any, and the fact that a market for water, which otherwise would not have been used, had been provided by consumer, did not constitute consideration for such contract—*Berwin Paper Corp v Village of Danville*, *supra*

(2) Various other alleged consideration has been held insufficient—*Berwin Paper Corp v Village of Danville*, *supra*

### Agreement supported

Where, after owner had constructed private water system line to her residence, tract was divided, defendant became owner of tract traversed by the line and connected his residence with the line, and plaintiffs be-

came owners of the residence originally serviced, and town refused to enter into agreement to furnish water to both residences unless defendant agreed to be responsible for payment of all water passing through the line, the agreement executed by plaintiffs, defendant, and the town was supported by consideration—*Wood v Williams*, 184 S W 2d 799, 299 Ky 167

<sup>66</sup> Mich—*Nelson v Wayne County*, 286 NW 617, 289 Mich 284

<sup>67</sup> Md—*Meiryman v Baltimore City*, 138 A 321, 153 Md 419

<sup>68</sup> US—*Seldovia Public Utilities Dist v Cook Inlet Packing Co*, D C Alaska, 95 F Supp 528

NC—*Corpus Juris cited in Fulghum v Town of Selma*, 76 SE 2d 368, 370, 238 NC 100

<sup>67</sup> C J p 1225 note 46.



that any contract made by the city with nonresidents should be terminable by the city on a certain notice, the city is not estopped to terminate the agreement on such notice.<sup>69</sup> A municipality, operating its own waterworks, may, under a general grant of power in the absence of statutory limitation, enter into a contract to furnish a certain consumer with a large amount of water for a period of twenty years at a rate lower than that charged consumers of ordinary amounts,<sup>70</sup> but the express legislative prohibition of a sale of water by a certain municipality to a corporation located outside the city, if the supply of water for the city or its inhabitants shall thereby be insufficient, renders invalid a contract to furnish such outside corporation with a fixed quantity of water for a fixed term without limiting the supply to the surplus water remaining after the needs of the city and its inhabitants have been supplied.<sup>71</sup>

### (c) Sufficiency of Supply

A municipality under an implied contract to furnish water is under obligation to furnish a sufficient supply.

Under the implied contract arising where a municipality furnishes water and the consumer pays for it, the municipality is under obligation to furnish a sufficient supply.<sup>72</sup>

### (d) Purposes for Which Water May Be Used

The obligation to supply water for certain purposes does not include a supply for other purposes.

A municipality may enter into a contract to supply water for certain specific purposes.<sup>73</sup> The obligation to supply water for certain purposes does not include a supply for other uses.<sup>74</sup>

## b. Contracts of Water Companies

- (1) In general
- (2) Particular terms

### (1) In General

Express contracts between a water company and

consumer are governed by the general rules applicable to all contracts, and a water company may be under an implied contractual obligation to serve a consumer.

Express contracts between a water company and consumer are governed by the general rules applicable to all contracts.<sup>75</sup> The public duty imposed on a water company, as discussed supra § 278, raises an implied promise of performance.<sup>76</sup> Where a water company, duly paid, has been furnishing water for a number of years to a consumer, an implied contract exists between them for the supply of water.<sup>77</sup>

*Rules and regulations of water company*, to be applicable to a contract with a consumer, must enter into it by express or implied adoption at its inception.<sup>78</sup> They are not part of a contract made in terms and on conditions radically different.<sup>79</sup>

*Sale of "goods"* Within the meaning of a statute defining "goods," the furnishing of water by a water corporation to private consumers, at a fixed compensation, is a sale of goods.<sup>80</sup>

*Contract by agent* Contracts within the real or apparent scope of an agent's authority are binding on the company.<sup>81</sup>

### (2) Particular Terms

- (a) Duration of service
- (b) Sufficiency of supply
- (c) Purposes for which water may be used
- (d) Repair of water pipes

#### (a) Duration of Service

Generally speaking, the duration of a contract for water supply between a water company and a private consumer is measured by the terms of the contract as reasonably construed.

Generally speaking, the duration of a contract for water supply between a water company and a private consumer is measured by the terms of the contract as reasonably construed.<sup>82</sup> A contract with

69 SC—Childs v City of Columbia, 70 SE 299, 87 SC 573

70. NY—Tonawanda Board & Paper Co v City of Tonawanda, 190 NYS 874, 193 AppDiv. 760

71. NY—Simson v Parker, 82 NE 732, 190 NY 19

72. Me—Woodward v Livermore Falls Water Dist, 100 A 317, 116 Me 86, LRA 1917D 678

73. Mass—Watson v Needham, 37 NE 204, 161 Mass 404, 24 LRA 287.

67 CJ p 1225 note 54

74. Vt—Rutland v. Edgerton, 47 Vt 155.

67 CJ p 1225 notes 55–56

75. Miss—Vicksburg Waterworks Co v Yazoo, etc, R Co, 51 So 915, 96 Miss 807

67 CJ p 1226 note 63

Contracts as to rates see infra § 287

76. NY—McEntee v Kingston Water Co, 58 NE 785, 165 NY 27

67 CJ p 1226 note 61

77. NY—McEntee v Kingston Water Co, supra—Whitehouse v Staten Island Water Supply Co, 91 NY S 544, 101 AppDiv. 112

78. W Va—Jopling v Bluefield Waterworks & Improvement Co, 74 SE 943, 70 W Va. 670, 39 LRA, NS, 814

Regulation of supply and use with respect to private consumers generally see infra § 280

79. W Va—Jopling v Bluefield Waterworks & Improvement Co, supra.

80. NY—Canavan v. City of Mechanicville, 128 NE 882, 229 NY 473, 13 ALR 1123

81. Miss—Meridian Waterworks Co v Marks, 17 So. 777—Meridian Waterworks Co. v. Schulherr, 17 So. 167

82. Ky—Beutel v Camp Taylor Development Co., 105 SW.2d 632, 268 Ky. 544.

a water company for a supply of water for one year and thereafter to be discontinued on thirty days' notice cannot be construed as a contract running from year to year after the first year, binding the water company to supply water during all of a subsequent year on delaying to act on the consumer's alleged default at the commencement of such year <sup>83</sup> A contract by a water company to furnish a consumer water, at a specified price, as long as such consumer uses the premises as a dwelling, is not defective for indefiniteness as to the length of time it is to run <sup>84</sup>

### (b) Sufficiency of Supply

Under the implied obligation of a water company to furnish water the supply should be sufficient for the ordinary uses to which the consumer has put it

Under the implied obligation of a water company to furnish water, as discussed supra subsection b (1) of this section, the supply should be sufficient for the ordinary uses to which the consumer has put it <sup>85</sup>

### (c) Purposes for Which Water May Be Used

Where different rates are charged for different uses, the company is entitled to hold the consumer strictly to the use for which he pays, and where the contract limits the purposes for which a consumer may use water, the consumer has no right to use water for other purposes.

Where different rates are charged for different uses, the company is entitled to hold the consumer strictly to the use for which he pays. <sup>86</sup> Where by contract with a water company a consumer has the right to use pure water for certain purposes only, there is no right to use water taken from the pure water supply for other purposes <sup>87</sup>

### (d) Repair of Water Pipes

The consumer must repair his service pipe where

the rule to that effect has been assented to by him and made a part of his contract

The consumer is under obligation to repair the service pipe leading to his property from the main pipe in the street where the rule to that effect by the water company has been assented to by him and made part of his contract <sup>88</sup>

### c. Contracts of Others

An agreement between private parties for the supply and distribution of water is governed by the rules applicable to contracts generally with respect to the requisites of a valid contract, and relating to construction and operation

An agreement between private parties for the supply and distribution of water is governed by the rules applicable to contracts generally with respect to the requisites of a valid contract, <sup>89</sup> and relating to construction and operation, <sup>90</sup> and enforcement <sup>91</sup> When the language of the agreement is ambiguous and uncertain resort may be had to the construction of the parties to resolve the ambiguity or uncertainty <sup>92</sup>

## § 280. — Regulation of Supply and Use

- a By water company or municipality as proprietor
- b By state or municipality as government agency

### a. By Water Company or Municipality as Proprietor

- (1) In general
- (2) Water meters
- (3) Shutting off supply for violation of regulations

### (1) In General

A water company, or a municipality operating its

<sup>83</sup> Ala.—Hieronymus Bros v Bienville Water Supply Co, 36 So 453, 138 Ala. 577

<sup>84</sup> Ala.—Brown v Birmingham Water Works Co, 52 So 915, 169 Ala. 230

<sup>85</sup> N.Y.—Whitehouse v Staten Island Water Co, 91 N.Y.S. 544, 101 App Div 114  
67 C.J. p 1226 note 72

<sup>86</sup> Ala.—Montgomery v Capital City Water Co, 9 So 337, 92 Ala. 376

<sup>87</sup> Pa.—Scranton Gas, etc, Co v Lackawanna Iron, etc, Co, 31 A 484, 167 Pa 136

<sup>88</sup> W.Va.—McClagherty v Bluefield Waterworks, etc, Co, 68 S.E. 28, 67 W.Va. 285, 32 L.R.A., N.S., 229.

<sup>89</sup> Cal.—John v Marshall, 229 P 2d 367, 103 Cal App 2d 172

<sup>90</sup> Ark.—Clark v Tilton, 178 S.W. 2d 649, 206 Ark 956  
Cal.—John v Marshall, 229 P 2d 367, 103 Cal App 2d 172  
Fla.—Wilson v Wakulla Edgewater Co, 36 So 2d 440, 160 Fla 702

### Agreement held to run with land

Where agreement between country club and purchasers of lots from the club for maintenance of water system by it to provide water to it and to each lot owner who desired water, expressly provided that agreement was to run with the land and was to be binding on all assigns and successors of the parties, such agreement did run with the land and was binding on defendant, as successor to the club—John v Marshall, 229 P 2d 367, 103 Cal App 2d 172

### Validation of contract by association

If association incorporated by residents of community to establish community water system ratified or adopted contract between residents or accepted benefits thereof, association would be bound by contract—Porterfield v Black Bill & Doney Parks Water Users' Ass'n, 210 P 2d 335, 69 Ariz 110

<sup>91</sup> Cal.—John v Marshall, 229 P 2d 367, 103 Cal App 2d 172.

**Purchaser of subdivision, having notice of contract to supply water therefor, took title burdened with such contract—Wilson v Wakulla Edgewater Co, 36 So 2d 440, 160 Fla 702.**

<sup>92</sup> Cal.—John v Marshall, 229 P 2d 367, 103 Cal App 2d 172.

own waterworks, has the right to adopt reasonable rules governing the supply of water to its customers

A water company,<sup>93</sup> or a municipality operating its own waterworks,<sup>94</sup> has the right to adopt reasonable rules governing the supply of water to its customers. Where a water company's franchise imposes a burden on the company, any regulation by which it attempts to shift the burden on the consumer is unenforceable.<sup>95</sup>

**Waiver by company** The regulations of a water company, approved by the public service commission, which are for the convenience of the company, may be waived by it.<sup>96</sup>

**93 Ky—City of Hazard v Minge, 92 S W 2d 768, 263 Ky 535**

**Mo—Williams v Independence Waterworks Co, 171 S W 2d 759, 237 Mo App 1231**

**N J—Vanderbilt v Hackensack Water Co, 166 A 298, 113 N J Eq 166**

**Pa—Usiak v Milnesville Water Co-op Ass'n, Com Pl, 42 Luz Leg Reg 171**

**67 C J p 1226 note 78**

**94 Cal—Page v City of Santa Rosa, 65 P 2d 775, 8 Cal 2d 311**

**Ky—City of Hazard v Minge, 92 S W 2d 768, 263 Ky 535**

**N Y—Parsons Const Corp v City of New York, 298 N Y S 276, 163 Misc 932**

**Tex—Port Arthur Housing Co v City of Port Arthur, Civ App, 181 S W 2d 1017, error refused—City of Dallas v Brown, Civ App, 150 S W 2d 129, error dismissed**

**67 C J p 1227 note 79**

#### **Regulations held reasonable**

(1) Requiring inspection fee and inspection of plumbing—**Port Arthur Housing Co v City of Port Arthur, Tex Civ App, 181 S W 2d 1017, error refused**

(2) Requiring installation of drum traps—**Port Arthur Housing Co v City of Port Arthur, supra**

(3) Other regulations see **67 C J p 1227 note 79 [b]**

**95 N M—State v Water Supply Co of Albuquerque, 140 P 1059, 19 N M 36, L R A 1915A 246, Ann Cas 1916E 1290**

**96 Ala—Alabama Water Co v Wilson, 107 So 821, 214 Ala 361**  
**67 C J p 1227 notes 81–82**

**97 U S—Sierra Pac Power Co v City of Reno, D C Nev, 33 F Supp 878**

#### **Statute not invalid**

The Nevada statute making it unlawful for any public utility to install, operate, or use within any city or town containing more than four thousand five hundred inhabitants any mechanical water meter is not

invalid as applied to the city of Reno on ground that the meter is the most efficient method for accurately measuring quantity of water service and prevents extravagant use or needless waste of service, where nearly all water used by Reno inhabitants except for irrigation is, shortly after use, by means of sewerage, returned to the river which is the source of supply and becomes available in supplying irrigation needs at various points down the course of the river—**Sierra Pac Power Co v City of Reno, supra**

**98 Ark—Arkansas Water Co v Furnish, 193 S W 80, 127 Ark 585**  
**67 C J p 1227 note 83**

#### **Duty to construct meter box**

Under ordinance authorizing operation of waterworks by water company but not expressly providing who should construct services connecting company's mains in the street with customers' houses, company had no duty to construct meter box which was part of services, but duty of construction rested on customer, especially where company's regulations provided for customer installation of services, and such regulation was reasonable in the absence of a contract to the contrary—**Williams v Independence Waterworks Co, 171 S W 2d 759, 237 Mo App 1231**

**99 Ky—City of Raceland v Colvin, 95 S W 2d 1113, 265 Ky 12**  
**67 C J p 1227 note 84**

#### **Meter for each building**

Ordinance providing that no water meter should be used to supply more than one building held reasonable, so that city which operated water system was not required to furnish water to owner of premises where water was piped to and supplied not only owner's house, but also garage on owner's premises, in which there was an apartment which was occupied—**City of Raceland v Colvin, supra**

#### **Ownership and control**

Fact that water consumer was re-

## **(2) Water Meters**

In the absence of a statute otherwise providing, a water company or a municipality operating its own waterworks, may require the installation of water meters, and under certain ordinances a consumer may require the installation of a meter

In the absence of a statute otherwise providing,<sup>97</sup> a water company<sup>98</sup> or municipality operating its own waterworks,<sup>99</sup> may require the installation of water meters.<sup>1</sup> On the other hand, under certain ordinances, a consumer supplied by a water company<sup>2</sup> or municipality<sup>3</sup> may require the installation of a meter. Where an ordinance provides for the installation of meters at the wish of consumers, a rule that after a meter has been installed a con-

quired under city water rent regulation to bear cost of water meter did not necessarily constitute him owner of meter in sense of personal property, and meter, although personal property of owner when unconnected, becomes part of city water supply system when it is annexed thereto, and consumer impliedly surrenders dominion, possession and control of the meter to water department—**Vitacolonna v City of Philadelphia, 115 A 2d 178, 382 Pa 399**

#### **Installation by city**

Fact that, prior to city's uniform water metering plan, business of buying, selling, and installing water meters was handled by private enterprise did not bar city from exercising power to install meters itself, and, where city water rent regulation provided that water department would contract for installation of water meters by competitive bidding, regulation did not result in discrimination—**Vitacolonna v City of Philadelphia, 115 A 2d 178, 382 Pa 399**

**1. Charges for installation, meters, meter rent, reading meters, and other service charges see infra § 301**

#### **Definition and nature of water meter**

(1) A water meter is "a contrivance to regulate the distribution of water by adjusting the quantity and price"—**Red Star Line SS Co v Jersey City, 45 N J Law 246, 249**

(2) A water meter, however actuated, is not designed for exerting or transmitting power, but simply for measuring and registering fluid volume, and, as a matter of applied art, a water meter and a water motor are essentially different—**National Meter Co v Neptune Meter Co, C C N J, 122 F 75, 78, reversed on other grounds 127 F 563, 62 CCA 345**

**2. Ariz—Nogales Water Co v Neuman, 100 P 794, 12 Ariz 306**  
**67 C J p 1228 note 85.**

**3. Minn—Powell v Duluth, 97 N W 450, 91 Minn 53**  
**67 C J p 1228 note 86.**

sumer cannot return to a flat rate without the consent of the board of water commissioners is reasonable.<sup>4</sup> However, certain regulations by a water company<sup>5</sup> or municipality operating its own water system,<sup>6</sup> with respect to the installation of meters, have been held unreasonable.

**Kind of meter** A municipality, operating its own waterworks, may designate the kind of water meter to be used by consumers.<sup>7</sup> Where the method of payment refers to one building or residence, a consumer, although supplied by meter, may not furnish water to his tenants in adjoining residences.<sup>8</sup>

**Meter as security** An ordinance of a city, operating its own waterworks, requiring a consumer, as an alternative to a deposit, to assign his meter as security is not unreasonable.<sup>9</sup>

**Test of meter** Where a statute entitles the user of water supplied by a municipality or company and measured by a meter to have a test of the accuracy of the meter made in any quarter or period before the expiration of the time when the rate is required to be paid, by implication the right to object for inaccuracy is lost if application for the test is not made before such date.<sup>10</sup>

### (3) Shutting Off Supply for Violation of Regulations

A water company or a municipality operating its own waterworks, may enforce a reasonable regulation by shutting off the supply of a consumer violating it.

A water company<sup>11</sup> or municipality operating its own waterworks<sup>12</sup> may enforce a reasonable regulation by shutting off the supply of a consumer violating it.<sup>13</sup> Under certain ordinances,<sup>14</sup> in the absence

of a regulation authorizing the water to be shut off,<sup>15</sup> there is no such right. Water service may not be shut off because of a collateral matter.<sup>16</sup> Under certain circumstances, notice and opportunity to comply are necessary.<sup>17</sup>

### b. By State or Municipality as Government Agency

- (1) By state
- (2) By municipality

#### (1) By State

- (a) In general
- (b) Persons subject to regulation
- (c) Exercise of power

#### (a) In General

The police power of the state extends to the regulation of matters connected with water service.

The police power of the state extends not merely to regulating rates at which water is to be supplied to the public, as discussed *infra* §§ 288-296, but to the regulation of other matters connected with the service.<sup>18</sup> Such power may be exercised by the legislature directly, or its exercise may be committed to a board, commission, or court, as discussed *infra* subdivision b (1) (c) of this section. In the absence of such delegation of authority state boards or commissions have no jurisdiction to regulate matters connected with water service.<sup>19</sup>

#### (b) Persons Subject to Regulation

Generally speaking, dedication of a water system to public use invests it with the character of a public utility and subjects it to regulation as such, and under certain provisions and circumstances a municipality in fur-

4 Minn—Powell v. Duluth, *supra*.

5 Ind—Terre Haute Paper Co v Terre Haute Waterworks Co., 110 NE 85, 62 Ind App 263, 67 C J p 1228 note 88.

6 Tex—City of Galveston v Kenner, Civ App, 193 SW 208, affirmed 240 SW 894, 111 Tex 484, 67 C J p 1228 note 89.

7 Mo—Mallon v Kansas City Water Com'rs, 128 SW 764, 144 Mo App 104.

8 Pa—Vitacolonna v City of Philadelphia, 115 A 2d 178, 382 Pa 399, 67 C J p 1228 note 90.

9 Ky—Specht v Louisville Water Co., 78 SW 142, 117 Ky 414, 25 Ky L 1506.

10 Ga—Young v City of Moultrie, 137 SE 257, 163 Ga 829.

11 Mass—Fire Dist No 2 Waterworks v Canney, 168 NE 159, 269 Mass 12.

12 Ill—Salaban v East St Louis & Interurban Water Co., 1 NE 2d 731, 284 Ill App 358.

N J—Vanderbilt v Hackensack Water Co., 166 A 298, 113 NJ Eq 166, 67 C J p 1228 note 96.

#### Prevention of leaks

Water company had right, under its rules and regulations, to shut off customer's water until he complied with company's reasonable request to make such improvements in plumbing to prevent leaks as company's investigation showed to be necessary—Salaban v East St Louis & Interurban Water Co., 1 NE 2d 731, 284 Ill App 358.

12. Cal—Page v City of Santa Rosa, 65 P 2d 775, 8 Cal 2d 311, 67 C J p 1228 note 97.

13. Cutting off supply for nonpayment generally see *infra* § 305.

14. Ark—Arkansas Water Co v Furnish, 193 SW 80, 127 Ark 585, 67 C J p 1228 note 98.

15. N J—Johnson v Belmar, 44 A 166, 58 NJ Eq 354, 67 C J p 1228 note 99.

16. Mich—Ten Broek v Miller, 216 NW 385, 240 Mich 667, 55 ALR 768, 67 C J p 1228 note 1.

17. Tex—Van Alstyne v Morrison, 77 SW 655, 33 Tex Civ App 670, 67 C J p 1229 note 2.

18. Md—Yeatman v. Towers, 95 A 158, 126 Md 513.

19. Pa—Public Service Commission of Commonwealth of Pennsylvania v Sinking Spring Water Co., Com Pl., 46 Dauph Co 9.

20. Ariz—City of Phoenix v Kasun, 97 P 2d 210, 54 Ariz 470, 127 ALR 84.

State Corporation Commission held without jurisdiction to regulate actions of municipal corporations in service and delivery of water for public purpose to consumers—City of Phoenix v Kasun, *supra*—City of Phoenix v Wright, 80 P 2d 390, 52 Ariz 227.

furnishing water service may be subject to the jurisdiction of a designated regulatory agency.

Whether or not a water system is a public utility subject to regulation depends on the character of its business and operations<sup>20</sup> Generally speaking, dedication of a water system to public use invests it with the character of a public utility and subjects it to regulation as such<sup>21</sup> However, the mere fact that a person furnishes within a limited area a portion of his water supply to a certain number of consumers, each individually receiving the use and benefit of the same and paying an agreed sum, does not of itself show a dedication of property to public use and invest it with the character of a public utility<sup>22</sup> So, a private manufacturing corporation, which does not hold itself out as ready to supply the public but merely furnishes water to a single consumer, does not thereby subject itself to public regulation as a public utility<sup>23</sup> The fact that a private corporation furnishes water to individuals without authority under its charter does not bring it within the jurisdiction of the commerce commission<sup>24</sup>

*Municipal waterworks*, under certain provisions and circumstances is not subject to the jurisdiction of the public service or utilities commission<sup>25</sup> Under other provisions and circumstances, a municipality in furnishing water service within the municipality may be subject to the jurisdiction of a designated court,<sup>26</sup> and in furnishing service outside the cor-

porate limits may be subject to the jurisdiction of a state public service or utility commission.<sup>27</sup>

### (c) Exercise of Power

The power to regulate the water supply to the public is one which may be exercised by the legislature directly, or its exercise may be committed to a board or commission, or a court, the nature and extent of whose power depend on the statutory delegation of authority construed in accordance with general rules of statutory construction, and an order of such regulatory agency must be reasonable.

The power to regulate the water supply to the public is one which may be exercised by the legislature directly, or its exercise may be committed to a board or commission,<sup>28</sup> or a court.<sup>29</sup> The nature and extent of the power of the board or commission over the regulation of water supply depend on the statutory delegation of authority construed in accordance with the general rules of statutory construction<sup>30</sup> Where authority is duly conferred a state public service commission may pass on the reasonableness of the rules of a water company regulating the conditions on which service will be supplied to a customer<sup>31</sup> Where, by statute, a department of public utilities in determining an applicant's right to water, has jurisdiction of all rights involved, those of others as well as those of applicant, where the contract rights involved are those of a municipality, although not an applicant, the department may disregard such contractual rights, if inconsistent with public necessity or appropriate ac-

20. Cal—Trask v Moore, 149 P 2d 854, 24 Cal 2d 365

21. Pa—Pennsylvania Chautauqua v Public Service Commission of Pennsylvania, 160 A 225, 105 Pa Super 160  
67 C J p 1229 note 10

22. Cal—Trask v Moore, 149 P 2d 854, 24 Cal 2d 365

23. Pa—Borough of Ambridge v Public Service Commission of Pennsylvania, 165 A. 47, 108 Pa Super 298

67 C J p 1229 note 11

24. Ill—Highland Dairy Farms Co v Helvetia Milk Condensing Co, 139 N E 418, 308 Ill 294  
67 C J p 1229 note 12

25. Colo—City of Colorado Springs v Public Utilities Commission, 248 P 2d 311, 126 Colo 265

Pa—Youngman v Commissioners of Waterworks in City of Erie, 110 A 174, 267 Pa 490

#### Extraterritorial supply

Where city as successor to properties of water company acquired properties for sole purpose of supplying water for inhabitants, city held such water as was not needed by it

for immediate use in its proprietary capacity in which it had a property right, and therefore fact that city permitted adjoining city an extraterritorial supply of water on the non-utility basis did not subject city's activity to jurisdiction of Public Utilities Commission—City of Englewood v City & County of Denver, 229 P 2d 667, 123 Colo 290

26. Pa.—City of Altoona v Pennsylvania Public Utility Commission, 77 A 2d 740, 168 Pa Super 246—Pyle v Oakmont Municipal Authority, 70 Pa Dist & Co, 97 Pittsb Leg J 193

27. Pa—White Oak Borough Authority v Pennsylvania Public Utility Commission, 103 A 2d 502, 175 Pa Super 114—City of Allentown v Pennsylvania Public Utility Commission, Com Pl, 63 Dauph Co 61, exceptions overruled 64 Dauph Co 126, appeal quashed 96 A 2d 157, 173 Pa Super 219

28. Md—Yeatman v. Towers, 95 A 158, 126 Md 513

Pa—City of Allentown v Pennsylvania Public Utility Commission, Com Pl, 63 Dauph Co 61, exceptions overruled 64 Dauph Co. 126, appeal

quashed 96 A 2d 157, 173 Pa Super 219

Utah—North Salt Lake v St Joseph Water & Irr Co, 223 P 2d 577, 118 Utah 600

Vt—McFeeters v Parker, 30 A 2d 300, 113 Vt 139

Wis—City of Milwaukee v Public Service Commission, 5 NW 2d 800, 241 Wis 249

Authority of public service commissions with respect to construction and operation of waterworks by public service water companies generally see supra § 261

Municipal waterworks as subject to regulation by board or commission see supra subsection b (1) (b) of this section

29. Pa.—City of Altoona v. Pennsylvania Public Utility Commission, 77 A 2d 740, 168 Pa Super 246

Municipal waterworks as subject to regulation by court see supra subsection b (1) (b) of this section

30. Mo—State ex rel. City of St Joseph v Public Service Commission, 30 S W 2d 8, 325 Mo. 209

31. Pa—Panther Valley Water Co v Public Service Commission, 70 Pa Super. 8.

tion,<sup>32</sup> but, under a statute requiring grievances to be set forth, the state department is without jurisdiction to hear and determine matters involving a water company which are not set out in the complaint<sup>33</sup> Where the public is affected indirectly, if at all, the authority of a commission to regulate the service of a water company does not include the right to dictate the manner in which the company shall do business<sup>34</sup> To be valid, an order of a public service or utility commission must be reasonable<sup>35</sup> It is unreasonable for the commission to make an order that cannot be complied with<sup>36</sup> The state regulatory body is powerless to compel a company, after the complete abandonment to the public of all its property devoted to the supply of water, to resume operations at a loss<sup>37</sup>

*Quality of water* A statute providing that persons, companies, or municipalities furnishing water beyond a certain extent for human consumption shall be guilty of maintaining a nuisance, unless the water supplied is the purest and most healthful procurable, no matter how pure and healthful the water actually supplied is, is an unreasonable exercise of the police power<sup>38</sup>

*Effect of order of board or commission.* An order made by a board or commission with respect

to water services within the jurisdiction of the board or commission has the effect of a judgment,<sup>39</sup> and in the absence of a timely application for administrative or judicial review such order is final,<sup>40</sup> and not subject to collateral attack<sup>41</sup>

*Review of action of board or commission.* As a general rule, resort should be had to administrative remedies before recourse is made to the courts for review, and the remedies provided by statute should be pursued before other remedies are sought<sup>42</sup> Findings<sup>43</sup> and orders<sup>44</sup> of the board or commission made within the scope of its powers will be upheld on appeal if supported by substantial evidence.

## (2) By Municipality

A city, granting a franchise to a water company supplying the city and its inhabitants with water, may enforce reasonable regulations

A city, granting a franchise to a water company supplying the city and its inhabitants with water, may enforce reasonable ordinances regulating the performance by the company of its duty to the inhabitants,<sup>45</sup> but such ordinance, to be valid, cannot create new duties<sup>46</sup>

*Permit to open paved street* The rule of a municipality that when an application is made for water for premises on a paved street the water depart-

32. Mass—Inhabitants of Town of Salisbury v Salisbury Water Supply Co, 181 NE 194, 279 Mass 204.

33. Wash—North Pacific Public Service Co v Kuykendall, 219 P 834, 127 Wash 73  
67 C J p 1229 note 9

34. Mo—State ex rel City of St Joseph v Public Service Commission, 30 SW 2d 8, 325 Mo 209  
67 C J p 1229 note 7

35. Pa—City of Altoona v Pennsylvania Public Utility Commission, 77 A 2d 740, 168 Pa Super. 246  
67 C J p 1229 note 15

**Order for extension held unreasonable**

Order of Public Utility Commission requiring city which was supplying water to some properties outside of city limits in adjacent township, to extend specified number of feet of two inch pipe for specified residential properties outside of city limits and in adjacent township, was unreasonable where two inch extensions might not be adequate for water supply of area involved when improved in future, and extension of water service further into township which might become necessary by additional annexation of township lands by city, or otherwise, would require re-

placement of the pipe by mains of adequate size—City of Altoona v Pennsylvania Public Utility Commission, supra

**Order for reconnection not unreasonable**

Where cost of replacing water mains to serve a residence previously served was chargeable to depreciation reserve rather than to addition of applicant as a customer, order directing utility to resume service was not unreasonable as calling for a large expenditure on which no return could be expected, nor was it unreasonable or unlawful on any other ground—Northern States Power Co v Public Service Commission, 16 NW 2d 790, 246 Wis 215.

36. NJ—Elizabethtown Water Co v Board of Public Utility Com'rs, Sup, 119 A 284  
67 C J p 1229 note 16

37. Cal—Lyon & Hoag v Railroad Commission, 190 P 795, 183 Cal 145, 11 A L R 249

38. Cal—Frost v City of Los Angeles, 183 P. 342, 181 Cal. 22, 6 A L R 468

39. Utah—North Salt Lake v. St Joseph Water & Irr Co, 223 P 2d 577, 118 Utah 600

40. Cal—Miller v Railroad Commission, 70 P 2d 164, 9 Cal 2d 190, 112 A L R 221.

Utah—North Salt Lake v St Joseph Water & Irr Co, 223 P 2d 577, 118 Utah 600

41. Utah—North Salt Lake v St Joseph Water & Irr Co, supra

42. Wis—City of Milwaukee v Public Service Commission, 47 NW 2d 298, 259 Wis 30

**Court without jurisdiction**

Where motion for rehearing was not made until more than thirty days after order of Public Service Commission directing city to render water service, jurisdictional defect on judicial appeal from commission's order denying rehearing could not be waived or affected by general appearance of interested parties, and city's motion to reopen proceedings for additional evidence could not be treated as motion for rehearing so as to give court jurisdiction on appeal taken by city—City of Milwaukee v Public Service Commission, supra.

43. **Evidence held to support finding**  
Wis—City of Milwaukee v Public Service Commission, 66 NW 2d 716, 268 Wis 116

44. Wis—City of Milwaukee v Public Service Commission, supra

45. Mo—City of Joplin v Wheeler, 158 S W. 924, 173 Mo App 590

46. Mo—City of Joplin v Wheeler, supra.

ment will not furnish such water until applicant has obtained a permit from other officers in charge of the pavement of the streets is not unreasonable <sup>47</sup>

*Quality of water* An ordinance prohibiting the sale for human consumption of water containing certain elements or compounds as unwholesome must set up an accurate standard to be valid <sup>48</sup>

## § 281. — Actions

- a Right of action
- b. Defenses
- c. Jurisdiction
- d Pleading
- e. Evidence
- f. Trial
- g Judgment or decree
- h Damages

### a. Right of Action

- (1) Against municipality
- (2) Against water company
- (3) Against third persons

#### (1) Against Municipality

An action may be maintained against a municipality for failure to perform its duties in connection with the supply and distribution of water.

Although the water service of a municipality is contingent on compliance with such reasonable rules and regulations as the proper officers may adopt, as discussed supra § 280, their action is subject to the control of the courts where they discriminate or act unreasonably <sup>49</sup> Where a city owning waterworks wrongfully refuses to furnish water to a citizen, he has no adequate remedy at law, and may bring a suit in equity <sup>50</sup> A city water consumer may maintain an action against the city for an injunction restraining the furnishing of impure water <sup>51</sup> However, an omission to provide a

pure and wholesome water supply, imposed on a city for the convenience of the public, gives a citizen no cause of action to compel its performance, unless such action is given by statute <sup>52</sup> Where an implied contract exists on the part of the city to continue the supply of water, as discussed supra § 279, the consumer is entitled to injunctive relief restraining the city from cutting off his supply as long as he pays its rates <sup>53</sup> Where a municipality operates its own waterworks, one is entitled to damages from the city for the wrongful refusal of water <sup>54</sup> The owner of property who, in violation of municipal ordinances, lays water lines across a street which does not abut his property and the fee-simple title to which is in the municipality, has no cause of action against the municipality, its officers, or employees for disconnecting the lines <sup>55</sup>

*Owner of building who has leased it for a term of years, and has paid the water rent, cannot complain of the action of the water commissioners in cutting off the water supply from the building because the tenant did not comply with their regulations* <sup>56</sup>

#### (2) Against Water Company

A private consumer may maintain a suit for injunction against a water company to enjoin the cutting off or diminishing of his supply, and may maintain an action to compel a water company to comply with the terms of its contract with the municipality for the benefit of the inhabitants.

A person who has the right to be supplied with water by a water company may enforce this right by mandamus, as discussed in Mandamus § 231 g, and he may prevent by injunction the cutting off or diminishing of his supply <sup>57</sup> A user of water in a municipality has a right to maintain an action to compel a water company to comply with the terms of its contract with the municipality for the benefit of the inhabitants <sup>58</sup> So, a consumer may enforce a

47. Md—Lee v Leitch, 101 A. 716, 131 Md 30

48. Fla—Hyman v Dillon, 84 So 666, 79 Fla 673

67 C J p 1230 note 26

49. Pa—Reigle v Smith, 134 A 380, 287 Pa 30

Mandamus to compel municipal authorities to perform duties with respect to furnishing water see Mandamus § 180 g

Actions for injuries incident to supply and use see infra § 312

Remedies of private consumer with respect to rates and charges see infra § 307

50. Tex—Dittmar v New Braunfels, 48 S W 1114, 20 Tex Civ App 293 21 C J p 134 note 95

51. ND—McGurren v City of Fargo, 66 NW 2d 207

52. NY—Oakes Mfg Co v New York, 120 NYS 796, 65 Misc 97, affirmed 125 NYS 1030, 141 App Div 130, affirmed 99 NE 540, 206 NY 221, 42 L.R.A.,NS, 286, reargument denied 100 NE 414, 206 NY 749, 42 L.R.A.,NS, 291

53. NY—Delaware, L & W R Co v City of Buffalo, 115 NYS 657, affirmed 117 NYS 1132, 132 App Div 946

54. Miss—Ginnings v Meridian Waterworks Co, 56 So 450, 100 Miss 507, Ann Cas 1914A 540

55. Ky—Goodloe v City of Richmond, 113 S W 2d 834, 272 Ky 100

56. NY—Brass v Rathbone, 40 NYS 466, 469, 8 App Div 78, affirmed 47 NE 905, 153 NY. 435

67 C J p 1230 note 35.

57. US—Lanning v Osborne, C.C. Cal, 76 F 319, affirmed 20 S Ct 860, 178 US 22, 44 L Ed 961

Remedies of private consumer for cutting off water supply for failure to pay water rents or other charges see infra § 307

58. Ky—Nerren v Kentucky Water Service Co, 230 S W 2d 615, 313 Ky 151

67 C J p 1230 note 38

Restraining enforcement of improper charges see infra § 307.

contract to lay new mains made for his benefit,<sup>59</sup> and he is not precluded from suit because of a refusal to pay excessive water rates.<sup>60</sup> However, unless there is a contract authorizing the inference of an intention to compensate the individual members of the public in the event of default, either expressed or implied, it has been held that a private individual may not bring an action against the company for its failure to construct a main.<sup>61</sup> If one entitled to service is refused, he need not go to the expense of installing a service line in order to perfect his right of action.<sup>62</sup>

*Railroad company* that is a party to an instrument whereby a water company in consideration of the grant of an easement for its pipe line is to furnish a supply of water for railroad purposes, although, under provisions of the constitution and a public utilities act vesting the regulation of railroads in a railroad commission, the former may apply to the commission for relief, it may also resort to an ordinary action for the enforcement of its rights under such instrument.<sup>63</sup>

### (3) Against Third Persons

The owner of a private service line, through which he receives water from a public service company, may, by suit in equity, prevent the unauthorized tapping of the line by others.

The owner of a private service line, through which he receives water from a public service company or municipality, may, by a suit in equity, prevent the unauthorized tapping of the line by others.<sup>64</sup>

### b. Defenses

Various matters relied on as defenses have been held

insufficient in an action against a municipality or a water company based on contracts to furnish water.

Various matters relied on as defenses have been held insufficient in an action against a municipality<sup>65</sup> or a water company<sup>66</sup> based on contracts to furnish water. To a petition attempting to enjoin a city from carrying out a regulation establishing a method of charging for water and setting out unlawful discrimination in that two methods were used, an answer setting up later regulations providing for a single method is good against demurrer.<sup>67</sup>

### c. Jurisdiction

A court of equity has jurisdiction in the case of an infringement of a consumer's legal right by a municipal waterworks, but jurisdiction of the courts is subject to statutory limitation.

A court of equity has jurisdiction in the case of the infringement of a consumer's legal right by a municipal waterworks.<sup>68</sup> Where, by statute, certain courts have jurisdiction of a suit against a water company, on complaint of a citizen, to enforce its duty to furnish pure water, the court is not deprived of such jurisdiction by the correction of the defect complained of before the final hearing.<sup>69</sup> Where, by statute, a department of public utilities in determining an applicant's right to water has jurisdiction of all rights involved, including the rights of the municipality of which applicant is a resident, on such application, although not the application of the municipality, the jurisdiction of the department attaches, preventing the municipality from bringing suit thereafter in another forum, except to review the decision of the department pursuant to the statute providing for such appeal.<sup>70</sup>

59. N.Y.—*Baker v. New York Inter-urban Water Co.*, 184 N.Y.S. 833, 113 Misc. 459.

#### Main of required size

A private consumer may compel the installation of a main of the size required by contract between the city and the water company, and the fact that the city might enjoin the water company from violating its duty does not preclude his suit.—*Alabama Water Co. v. City of Jasper*, 100 So. 486, 211 Ala. 280.

60. N.Y.—*Baker v. New York Inter-urban Water Co.*, 184 N.Y.S. 833, 113 Misc. 459.

61. N.Y.—*Morenken Bldg. Corporation v. Long Island Water Co.*, 244 N.Y.S. 605, 138 Misc. 303.

62. Ala.—*Alabama Water Co. v. Knowles*, 124 So. 96, 220 Ala. 61.

63. Cal.—*Southern Pac. Co. v. Spring Valley Water Co.*, 159 P. 865, 173 Cal. 291.

64. W. Va.—*Stifel v. Hannan*, 123 S.E. 673, 95 W. Va. 617.

#### Temporary injunction unnecessary

In action by water district as assignee of private pipeline owner to enjoin landowner from taking water from water pipeline passing over his land where easement granted by landowner to pipeline owner provided that landowner could remove water from pipelines when water was sold to water district for residential uses, and there was no evidence that landowner was wasting water, or interfering with pipeline owner's or water district's use of easement, or doing irreparable injury to pipeline, temporary injunction was not necessary to preserve the status quo.—*McDaniel v. San Patricio Municipal Water Dist.*, Tex. Civ. App., 279 S.W.2d 697, error refused, no reversible error.

65. Tex.—*Van Alstyne v. Morrison*, 77 S.W. 655, 33 Tex. Civ. App. 670.  
67 C.J. p. 1231 note 42.

66. N.Y.—*Whitehouse v. Staten Island Water Co.*, 91 N.Y.S. 544, 101 App. Div. 114.

67 C.J. p. 1231 note 43.

67. Ohio.—*Rogers v. Cincinnati*, 32 O.C.A. 394.

68. Pa.—*Youngman v. Commissioners of Waterworks in City of Erie*, 110 A. 174, 267 Pa. 490.

Right of consumer to maintain suit in equity where municipality wrongfully refuses to furnish water see supra subsection a. (1) of this section.

Right of owner of private line to maintain suit in equity to prevent unauthorized tapping of line by others see supra subsection a. (3) of this section.

#### Furnishing impure water

Court of equity has jurisdiction over suit by city water consumer to restrain city from furnishing impure water.—*McGurren v. City of Fargo*, N.D., 66 N.W.2d 207.

69. Pa.—*City of New Castle v. City of New Castle Water Co.*, 95 A. 534, 250 Pa. 341.

70. Mass.—*Inhabitants of Town of Salisbury v. Salisbury Water Supply Co.*, 181 N.E. 194, 279 Mass. 204.



**d. Pleading**

In a suit for an injunction, involving a supply of water, the rules of pleading applicable to suits for injunction generally apply, and as to what must be proved in an action against a water company for breach of its contract to supply a private consumer, the rules applicable to actions on contracts generally apply.

In a suit for an injunction, involving a supply of water, the rules of pleading applicable to suits for injunction generally apply.<sup>71</sup> Likewise, as to what must be proved in an action against a water company for breach of its contract to supply a private consumer, the rules applicable to actions on contracts generally apply.<sup>72</sup>

**e. Evidence**

- (1) In general
- (2) Admissibility
- (3) Weight and sufficiency

**(1) In General**

The rules governing the burden of proof in civil actions generally apply in suits or actions involving the supply of water to private consumers.

The rules governing the burden of proof in civil actions generally apply in suits or actions involving the supply of water to private consumers.<sup>73</sup>

**(2) Admissibility**

The general rules with respect to the admissibility of evidence apply to actions against a municipality or water company for failure to furnish water to a consumer.

The general rules with respect to the admissibility of evidence apply to an action against a municipality<sup>74</sup> or water company<sup>75</sup> for failure to furnish water to a consumer.

**(3) Weight and Sufficiency**

The general rules as to the weight and sufficiency of evidence apply to suits or actions involving the supply of water to a private consumer.

The general rules as to the weight and sufficiency of evidence apply to suits or actions involving the supply of water to a private consumer.<sup>76</sup>

**f. Trial**

- (1) Questions of law and fact
- (2) Instructions

**(1) Questions of Law and Fact**

General rules with respect to questions of law and fact have been applied in actions involving the supply of water to private consumers.

In accordance with the general rule, in an action against a water company for breach of an alleged oral contract to supply water, whether or not the contract existed was a proper question for the jury.<sup>77</sup> It cannot be said as a matter of law that it was not a willful and wanton act to cut off a consumer's water supply without notice and with knowledge of the probability of damage.<sup>78</sup> Where the tenant of premises has been refused a further supply of water because of nonpayment of rates and his cotenant applies for such service, it is a question for the jury whether such application is made in good faith.<sup>79</sup>

**(2) Instructions**

The general rules with respect to instructions apply in actions for breach of the duty to furnish water.

The general rules with respect to instructions apply to actions involving the supply of water to private consumers.<sup>80</sup>

<sup>71</sup> Tex.—Paris v. Sturgeon, 110 S W 459, 50 Tex Civ App 519 67 C J p 1231 note 50

**Allegations held sufficient**

Complaint by consumer seeking to enjoin city from mixing fluorides with water which alleged an implied contract between city and consumer to furnish pure water, that city had breached the contract by mixing fluorides, alleged to be poisonous, with the water, that consumer and others similarly situated suffered irreparable damage therefrom, and that there was no adequate remedy at law held sufficient to state a cause of action—McGurren v City of Fargo, ND, 66 NW 2d 207

<sup>72</sup> Ala.—Birmingham Water Works Co v Ferguson, 51 So 150, 164 Ala 494 67 C J p 1231 note 51

<sup>73</sup> Tex.—Sturgeon v City of Paris, 122 S W 967, 58 Tex Civ App 103 67 C J p 1231 note 54.

**Issues presented by answer**

Water company, sued by customer for damages for alleged breach of contract to supply water, had burden of proving issues properly presented by answer and not replied to, but controverted, by customer—Beutel v Camp Taylor Development Co, 105 S W 2d 632, 268 Ky 544

<sup>74</sup> Md.—Merryman v Baltimore City, 138 A 424, 153 Md 419 67 C J p 1232 note 56

<sup>75</sup> Ala.—Alabama Water Co v Knowles, 124 So 96, 220 Ala 61 67 C J p 1232 note 57

<sup>76</sup> Ky.—City of Hazard v. Minge, 92 S W 2d 768, 263 Ky 535. 67 C J p 1232 note 59

<sup>77</sup> Ala.—Birmingham Water Works Co v Ferguson, 51 So 150, 164 Ala 494

<sup>78</sup> Ala.—Alabama Water Service Co v Johnson, 137 So 439, 223 Ala 529.

<sup>79</sup> Miss.—Ginnings v Meridian Waterworks Co, 56 So 450, 100 Miss 507, Ann Cas 1914A 540

<sup>80</sup> Ala.—Alabama Water Co. v Knowles, 124 So 96, 220 Ala 61

**Instructions held erroneous**

(1) Instruction that if city, and water and light company, by bringing suit against plaintiff to enjoin him from laying water lines during drouth when company could not furnish adequate water supply, made it necessary for him to equip truck with tank to haul water to his garage, then plaintiff was entitled to recover cost of obtaining water supply, was erroneous, since proper measure of damages was difference in cost of conducting water through garage owner's water lines and cost of hauling it in truck—Goodloe v. City of Richmond, 113 S W 2d 834, 272 Ky 100

(2) Other instructions, see 67 C J p 1232 note 67 [a].

### g. Judgment or Decree

The rules with respect to decrees in suits for an injunction, or specific performance, apply to such suits or proceedings involving the supply of water.

The rules with respect to decrees in suits for an injunction<sup>81</sup> or specific performance,<sup>82</sup> apply to such suits or proceedings involving the supply of water.

### h. Damages

A water company is liable in damages for whatever injury a consumer sustains as a proximate result of its breach of duty to the consumer, and various amounts of damages have been held excessive or not excessive.

In refusing to let an inhabitant of a municipality to whom it owed the duty of supplying water have such water, a water company is liable in damages for whatever injury he may have sustained as a proximate result of the breach<sup>83</sup> The liability of a water company for failure to furnish water fit for drinking and bathing is not measured by whatever consumer has elected to pay in order to secure wholesome water from other sources, but only by the reasonable cost of accomplishing the desired result<sup>84</sup> With respect to the amount awarded for improperly shutting off the supply of water, certain sums, under the circumstances, have been held excessive<sup>85</sup> or not excessive<sup>86</sup>

*Inconvenience and annoyance* in obtaining water, resulting from the shutting off of the supply<sup>87</sup> or the refusal to supply water on application,<sup>88</sup> in connection with proof of pecuniary loss or the loss of time and labor in securing water elsewhere form an item of recoverable damages

## § 282. To Water Companies

A municipality with authority to furnish water outside its corporate limits may contract to supply it to a

private utility operating a water plant outside the corporate limits, and the rights under such contract depend on its terms.

A municipality owning and operating a water plant and having authority, subject to statutory limitations, to furnish service outside its corporate limits may contract with a private utility operating a water plant outside the corporate limits to supply it with water<sup>89</sup> In entering into such contract the municipality and the utility act in the same capacity as though the business in which they are engaged was not affected by a public interest<sup>90</sup> The right to service under such contract depends entirely on the terms of the contract<sup>91</sup> Where a municipality in supplying a water company beyond its limits is not acting as a public utility but merely disposing of surplus water, in the absence of any contractual obligation to the contrary, the municipality may impose the requirement of storage reservoirs on the water company as a condition of such supply<sup>92</sup> Where a contract by a municipality to furnish water to a water company does not specify or imply the time for which it is to continue, but is for an indefinite period, either party has the right to terminate it on reasonable notice to the other<sup>93</sup> What is a reasonable time has been held to constitute a matter within the authority of a state public service commission to determine<sup>94</sup> The authority vested in a state commission to regulate utilities does not authorize it to require a municipality to furnish water to a private utility beyond the zone undertaken to be served in the municipality's charter<sup>95</sup>

*Contract between water companies.* The right to service under a contract by which a water company undertakes to supply another water company with water depends on the terms of the contract reasonably construed<sup>96</sup>

81. Ky—City of Hazard v Minge, 92 S W 2d 768, 263 Ky 535.  
67 C J p 1232 note 69

82. Pa—Peffer v Pennsylvania Water Co, 70 A 870, 221 Pa 578  
67 C J p 1232 note 70.

83. Tenn—Crumley v Wautauga Water Co, 41 S W. 1058, 99 Tenn 420.

84. Ky—Vansant v Ashland Waterworks Co, 255 S W. 132, 200 Ky 586  
67 C J p 1232 note 74

85. Miss—Vicksburg Waterworks Co v Dutton, 53 So 537, 98 Miss 209  
67 C J p 1233 note 75

86. Mich—Ten Broek v. Miller, 216 N W 385, 240 Mich 667, 55 A L R 768  
67 C J p 1233 note 76.

87. Ala—Birmingham Water Works Co v Ferguson, 51 So 150, 164 Ala 494

67 C J p 1233 note 77

88. Ala—Alabama Water Co v Knowles, 124 So 96, 220 Ala. 61

89. W Va—Benwood-McMechen Water Co v City of Wheeling, 4 SE 2d 300, 121 W Va 373

**Contract does not extend to public**  
A contract by which city owning and operating water plant agreed to supply water to private utility operating plant in adjoining municipality was confined to the two utilities and did not extend to the public served by each—Benwood-McMechen Water Co v City of Wheeling, supra

90. W Va—Benwood-McMechen Water Co v. City of Wheeling, supra

91. W Va—Benwood-McMechen Water Co v. City of Wheeling, supra

92. Or—Richards v City of Portland, 255 P 326, 121 Or 340

93. W Va—Benwood-McMechen Water Co v City of Wheeling, 4 SE 2d 300, 121 W Va 373

**City cannot abruptly terminate**

Where city and private utility entered into contract by which city agreed to sell water to private utility for an indefinite period, city could not abruptly terminate contract and discontinue services thereunder, but private utility was entitled to reasonable time to adjust its affairs to give public the services to which they were entitled—Benwood-McMechen Water Co v City of Wheeling, supra

94. W Va—Benwood-McMechen Water Co v City of Wheeling, supra.

95. W Va—Benwood-McMechen Water Co v City of Wheeling, supra

96. Cal—San Diego Water Co. v. San

§ 283. Free Supply or Nominal Charge

- a By municipality
- b By water company

a. By Municipality

- (1) In general
- (2) Statutory and charter limitations on right to charge

(1) In General

A municipality owning its own waterworks may furnish water for municipal, public, religious, educational, or charitable purposes free, but generally speaking, an agreement to supply particular private consumers with water free of charge constitutes discrimination against consumers required to pay, and is void

A municipality owning its own waterworks may furnish water for municipal, public, religious, educational, or charitable purposes free<sup>97</sup> In doing so, a municipality cannot be said to be unjustly discriminating against persons required to pay for water service<sup>98</sup> So, a municipality may furnish free water to a state institution within the municipality where such institution is of great public benefit, both to the municipality and its inhabitants<sup>99</sup> However, under a statute authorizing a municipality with a waterworks system of its own to assess such rates

for the use of the water supplied by the waterworks as the common council or board of trustees shall deem just and expedient, it has been held that a city cannot agree to furnish water for a nominal sum to a state institution in consideration of its location within the city<sup>1</sup> Where a hospital is entitled to free water under a will establishing a water system, a water district succeeding to the rights of such system is bound by the legacy<sup>2</sup> Public institutions which do not belong to the city are not entitled as a matter of right to be supplied with water free of charge<sup>3</sup>

*Supply to private consumers* Generally speaking, an agreement of a municipality to supply particular private consumers with water free of charge constitutes discrimination against consumers required to pay,<sup>4</sup> and is void as against public policy<sup>5</sup> Authority vested in a municipality to fix rates or to agree on prices does not allow it to give water free of charge<sup>6</sup> However, a municipality may be required by statute, or the terms of its charter, to furnish free water to all its inhabitants<sup>7</sup> A municipality may, in consideration of a transfer of property to it, agree to furnish free water to the transferor<sup>8</sup> So, a municipality having power to enlarge its plants, to relocate its pipes, to acquire

Diego Flume Co, 34 P 656, 100 Cal 13  
67 C J p 1233 note 80

97. Fla—City of Gainesville v Board of Control, 81 So 2d 514

Ohio—*Corpus Juris* cited in State ex rel Mt Sinai Hospital of Cleveland v Hickey, 30 NE 2d 802, 801, 137 Ohio St 474

67 C J p 1233 note 82

**Consideration for promise to county**

Where law relating to status of tax liens on property after it was acquired by a municipal corporation was unsettled at time county promised to mark off tax roll all county and municipal taxes then due and unpaid on property acquired by municipality in consideration of promise of city to furnish water to county courthouse free of charge as long as such property remained off tax roll, promise of county and release of tax lien constituted sufficient consideration for city's promise to furnish water free of charge—City of Bellingham v Whatcom County, 245 P 2d 1016, 40 Wash 2d 669

**High school not charitable institution**

A public high school supported by revenue derived from a levy of school taxes in a school district on property located therein was not a 'charitable institution' within meaning of a municipal ordinance exempting charitable institutions from pay-

ment of water charges—Town of Cicero v Township High School Dist No 201, 20 NE 2d 114, 299 Ill App 237

98. Okl—Fretz v City of Edmond, 168 P 800, 66 Okl 262, L R A 1918C 405

Uniformity and discrimination in rates generally see *infra* § 297

99. Okl—Fretz v City of Edmond, 168 P 800, 66 Okl 262, L R A 1918C 405

**Obligation to supply university**

Where city agreed to furnish water to university without charge as an inducement to establishing university in that city, city was obligated to furnish water to university without charge for as long as university remained located in city—City of Gainesville v Board of Control, Fla., 81 So 2d 514

1. Ill—Eastern Illinois State Normal School v City of Charleston, 111 NE 573, 271 Ill 602, L R A 1916D 991—City of Chicago v University of Chicago, 81 NE 1138, 228 Ill 605, 10 Ann Cas 669

2. Philippine—San Juan de Dios Hospital v Metropolitan Water District, 54 Philippine 174  
67 C J p 1233 note 86.

3. Mich—Detroit Water Com'rs v Detroit Board of Education, 100 N W 455, 137 Mich 245.

67 C J p 1233 note 87

4. Pa—American Aniline Products v City of Lock Haven, 135 A 726, 288 Pa 420, 50 A L R 121

5. Mo—Kirkville Light, Power & Ice Co v City of Kirkville, 141 SW 484, 159 Mo App 460

Pa—American Aniline Products v City of Lock Haven, 135 A 726, 288 Pa 420, 50 A L R 121

67 C J p 1226 note 59, p 1233 note 88

6. Pa—American Aniline Products v City of Lock Haven, *supra*

7. Cal—Page v City of Santa Rosa, 65 P 2d 775, 8 Cal 2d 311

Statutory and charter limitations on right to charge see *infra* subsection a (2) of this section

**Landlord cannot assert tenant's right**

Landlord held not entitled to require municipality to furnish water free to his tenants under charter provision of municipality requiring that a reasonable quantity of water be supplied free for domestic quantity use to its "inhabitants," since tenants were "inhabitants" within charter provision, water was supplied to them in that capacity, and they would be responsible for any excess use while landlord would not—Page v City of Santa Rosa, *supra*

8 Kan—City of Iola, Allen County v Lytle, 187 P 2d 378, 164 Kan 33  
Utah—East Mill Creek Water Co v Salt Lake City, 159 P 2d 863, 108 Utah 315.

locations for such purposes, and to enter into contract which may be necessary to carry out the purpose of supplying its inhabitants with water, may, as part consideration for the grant to it of rights of way for its mains in another municipality, contract to furnish water from such mains to the owners or occupants of the tracts through which the rights of way run,<sup>9</sup> and the consent of the other municipality need not be obtained<sup>10</sup> The extent of the right to free water under a contract between a municipality and a private consumer depends on the terms of the agreement reasonably construed<sup>11</sup> A municipality may also be authorized to furnish free water to private consumers whose own supply of water has been destroyed or rendered useless by the municipality<sup>12</sup> A municipality acquiring a water system from one who purchased it from the owners under a contract and conveyance reserving and excepting a portion thereof and the water flowing therein for certain purposes has been held not entitled to collect rent for the use of water for the purposes specified,<sup>13</sup> and failure to collect such rent has been held not to constitute a preference which is prohibited by statute<sup>14</sup> Where there has been a concession of free water in acknowledgment of the gift of certain lands, and where, by statute, a water district is directed to assume all the obligations of its predecessor, such district must continue the gratuitous supply<sup>15</sup> In the absence of statutory authority a municipality may not bind itself by contract to furnish water free of charge to private persons for an indefinite period,<sup>16</sup> or for a definite period extending far into the future<sup>17</sup>

*Prescriptive right to free supply.* Where a school district claimed a right to receive free water from a municipality by virtue of exemption from taxation, not by the assertion of rights hostile to the municipality, it acquired no prescriptive right to the gratuitous use of water<sup>18</sup>

*Purchase of plant of water company* A city, purchasing the plant but not the franchise of a water company, does not assume the duty of furnishing a free supply of water imposed on the company by its franchise from the legislature,<sup>19</sup> nor does the purchase of the plant of a water company, under contract with the city to furnish water without charge to public schools, impose on the city itself the obligation to continue to supply such water without charge<sup>20</sup>

## (2) Statutory and Charter Limitations on Right to Charge

The legislature in the absence of any constitutional limitation may prohibit a municipality from making any charge for water supplied to certain institutions, but statutes so providing will be strictly construed.

The legislature, in the absence of any constitutional limitation, may prohibit a municipality or the trustees of a municipal waterworks from making any charge for water supplied to certain institutions,<sup>21</sup> such as churches,<sup>22</sup> or a state hospital<sup>23</sup> However, such statutes,<sup>21</sup> or more specifically, statutes prohibiting a municipality or its waterworks from making a charge for supplying water to charitable institutions,<sup>25</sup> or collecting compensation

9. N.J.—Kearny v Bayonne, 107 A 169, 90 N.J. Eq 499

10. N.J.—Kearny v Bayonne, supra

11. Kan.—City of Iola, Allen County v Lytle, 187 P.2d 378, 164 Kan 33

Utah—East Mill Creek Water Co v Salt Lake City, 159 P.2d 863, 108 Utah 315

Contracts with, or for benefit of, private consumers generally see supra § 279

12. Ala.—City of Roanoke v Johnson, 158 So 182, 229 Ala 496

**Not discrimination among arbitrary class**

City's ordinance contract to furnish free water to persons whose wells were rendered useless by seepage from city's water basin held not to constitute discrimination as to rates among arbitrary class—City of Roanoke v Johnson, supra

13. Wash.—Duus v Town of Ephrata, 128 P.2d 510 14 Wash 2d 426, reheard 134 P.2d 722, 14 Wash 2d 426

14. Wash.—Duus v Town of Ephrata, supra

15. Philippine—La Sagrada Orden, etc v Metropolitan Water Dist, 44 Philippine 292

16. Ga.—Screws v City of Atlanta, 8 S.E.2d 16, 189 Ga 839—Horkan v Moultrie, 71 S.E. 785, 136 Ga 561

**17. Twenty-five year lease**

Where a municipality leases certain property for a term of twenty-five years, a provision of such contract obligating the city to supply the leased premises with free water during the term of the lease is not authorized by statutory authority to lease the premises and is void in the absence of statutory authority—Screws v City of Atlanta, 8 S.E.2d 16, 189 Ga 839

18. Pa.—School Dist of Bedford Borough v Schnably, 89 Pa Super 486

19. Ala.—Mobile v Mobile County, 53 So 793, 169 Ala 539

20. N.C.—Board of Trustees of Henderson Graded Schools v City of

Henderson, 146 S.E. 808, 196 N.C. 687

21. N.Y.—Bay Ridge Reformed (Dutch) Church v City of New York, 146 N.Y.S. 1014, 162 App Div 49

Right to charge for water service generally see infra § 285

Uniformity and discrimination as to rates generally see infra § 297

22. N.Y.—Bay Ridge Reformed (Dutch) Church v City of New York, supra  
67 C.J. p 1234 note 94

23. Ohio—Gallipolis v Gallipolis Water Works, 4 Ohio S. & C.P. 101, 2 Ohio N.P. 161

24. Ohio—Board of Education of City School Dist of Columbus v City of Columbus, 160 N.E. 902, 118 Ohio St 295

25. Ohio—Village of Euclid v Camp Wise Ass'n, 131 N.E. 349, 102 Ohio St 207

**Statute invalid as discriminatory**

A statute, in so far as it imposes the obligation of furnishing free water service to charitable institutions

for furnishing water to public school buildings,<sup>26</sup> hospitals,<sup>27</sup> owners of private fire lines,<sup>28</sup> or against the fire department for supplying or installing fire hydrants,<sup>29</sup> have been held to violate a constitutional provision authorizing municipal corporations to acquire and operate waterworks. While water rates may not be, strictly speaking, taxes, as discussed infra § 284, for the purpose of construing an exemption statute, regular water rates must be deemed to be in the nature of a general tax and, inasmuch as exemptions from taxation of a general nature are not favored, a statute authorizing such exemption will be strictly construed.<sup>30</sup> A provision in the charter of a city that water is to be supplied without charge to "the several hospitals, orphan asylums, and all other charitable and benevolent corporations, societies, and institutions" has been held to be limited to the class specifically named.<sup>31</sup> A city water board, in the absence of an express provision in the charter requiring the city or its departments to pay water rents, may not charge the city or any department for water.<sup>32</sup>

#### b. By Water Company

##### (1) Under statute

##### (2) Under contract

##### (1) Under Statute

The legislature may require water companies to furnish the municipalities in which they exercise their franchises water for public purposes without charge.

on municipalities owning or operating waterworks, discriminates against them and is to that extent invalid, where a subsequent constitutional provision authorizes municipal corporations to acquire and operate waterworks free from any such restriction—*Village of Euclid v. Ambler & Co.*, 131 N.E. 349, 102 Ohio St. 207.

**26. Ohio**—Board of Education of City School Dist. of Columbus v. City of Columbus, 160 N.E. 902, 118 Ohio St. 295, overruling *City of East Cleveland v. Board of Education of City School Dist. of East Cleveland*, 148 N.E. 350, 112 Ohio St. 607.

**27. Ohio**—*Kasch v. Peoples Hospital Co.*, 5 N.E.2d 1020, 54 Ohio App. 80, appeal dismissed *Kasch on Behalf of City of Akron v. Peoples Hospital Co.*, 2 N.E.2d 778, 131 Ohio St. 286.

**28. Ohio**—*Wayne Furniture Co. v. City of Dayton*, 14 Ohio Supp. 131, appeal dismissed 55 N.E.2d 808, 143 Ohio St. 517, affirmed, App., 57 N.E.2d 667.

**29. Ohio**—*Alcorn v. Deckebach*, 166 N.E. 597, 31 Ohio App. 142.

**30. NY**—*In re Young Women's Christian Assoc. of Brooklyn*, 141

N.Y.S. 138, 156 App. Div. 295, affirmed 102 N.E. 1118, 209 N.Y. 534, 67 C.J. p. 1234 note 2.

**31. NY**—*People v. Willis*, 52 N.Y.S. 739, 23 Misc. 545, affirmed 53 N.Y.S. 1111, 32 App. Div. 626, 67 C.J. p. 1234 note 3.

**32. NY**—*People v. Barrows*, 124 N.Y.S. 270, 140 App. Div. 24, affirmed 97 N.E. 1113, 204 N.Y. 664.

**33. Idaho**—*Boise City v. Artesian Hot, etc., Water Co.*, 39 P. 562, 4 Idaho 351, modified on other grounds 39 P. 566, 4 Idaho 392, 67 C.J. p. 1234 note 5.

Statute held inapplicable to city not within statutory classification—*Electric Plant Board of City of Mayfield v. City of Mayfield*, 185 S.W.2d 411, 299 Ky. 375.

**34. US**—*Boise Artesian Hot & Cold Water Co. v. Boise City, Idaho*, 33 S.Ct. 997, 230 U.S. 84, 57 L.Ed. 1400, 67 C.J. p. 1234 note 6.

**35. NM**—*Water Supply Co. of Albuquerque v. City of Albuquerque*, 128 P. 77, 17 N.M. 326, 43 L.R.A., N.S., 439.

**36. Iowa**—*Le Mars Independent School Dist. v. Le Mars City Water, etc., Co.*, 107 N.W. 944, 131 Iowa 14, 10 L.R.A., N.S., 859.

The legislature may require water companies to furnish the municipalities in which they exercise their franchises water for public purposes without charge.<sup>33</sup> A city cannot object to a change in the statutory obligations of water companies which relieves them of a duty to furnish water without charge for extinguishing fires and imposes on them the duty to furnish such water at reasonable rates.<sup>34</sup>

##### (2) Under Contract

A water company may contract for free water service to a municipality, public institutions, and private consumers.

Where a city is authorized to contract for a water supply, as discussed supra § 265, it may stipulate that no charge shall be made for city purposes,<sup>35</sup> or it may require the water company to furnish a free supply to public institutions.<sup>36</sup> Thus, a municipality, leasing its waterworks, may stipulate with the lessee for a free supply to certain public institutions.<sup>37</sup> A municipality, under its contract with the water company, may provide that no charge shall be made for water furnished for the purpose of extinguishing fires,<sup>38</sup> for sprinkling streets, watering parks, flushing sewers, and other municipal uses,<sup>39</sup> and for a public fountain for watering animals,<sup>40</sup> and it may stipulate for a free supply to schools,<sup>41</sup> including parochial schools,<sup>42</sup> and churches.<sup>43</sup> At common law, a contract for free supply of

N.C.—*Henderson Water Co. v. Henderson Graded Schools*, 65 S.E. 927, 151 N.C. 171.

67 C.J. p. 1234 note 11.

**37. NY**—*St. Patrick's Church Soc. v. Heermans*, 124 N.Y.S. 705, 68 Misc. 487.

**38. NY**—*Walton Water Co. v. Village of Walton*, 143 N.E. 786, 238 N.Y. 46, reargument denied 144 N.E. 889, 238 N.Y. 555, 67 C.J. p. 1234 note 13.

**39. Mich**—*Detroit Water Com'rs v. Detroit Citizens' St. R. Co.*, 90 N.W. 657, 91 N.W. 171, 131 Mich. 1, 67 C.J. p. 1235 note 14.

**40. NM**—*Water Supply Co. of Albuquerque v. City of Albuquerque*, 128 P. 77, 17 N.M. 326, 43 L.R.A., N.S., 439, 67 C.J. p. 1235 note 15.

**41. Iowa**—*Le Mars Independent School Dist. v. Le Mars City Water, etc., Co.*, 107 N.W. 944, 131 Iowa 14, 10 L.R.A., N.S., 859, 67 C.J. p. 1235 note 16.

**42. NY**—*St. Patrick's Church Soc. v. Heermans*, 124 N.Y.S. 705, 68 Misc. 487, 67 C.J. p. 1235 note 17.

**43. Ohio**—*M. E. Church v. Ashtabula Water Co.*, 20 Ohio Cir. Ct. 578, 10 Ohio Cir. Dec. 648.

water to a municipality is not illegal as discriminating against other users,<sup>44</sup> nor is a contract to supply a city with water for a certain rental for a period of twenty years, and thereafter the supply to be free, illegal as a discrimination by a public utility, where the permanent supply is paid for in twenty installments instead of annually.<sup>45</sup> A statute forbidding unreasonable preferences and making it unlawful for any corporation to receive any discrimination in respect to the service of a public utility has been held to be a prospective, and not a retroactive, statute, which does not invalidate a contract previously made for the free supply of water to a municipality.<sup>46</sup> Whether or not the contract in question imposes an obligation to furnish water without charge,<sup>47</sup> and if it does, the scope and extent of the obligation imposed,<sup>48</sup> depend on the terms of the contract construed in accordance with the rules governing the construction of contracts generally. After a contract between a municipality and a water company has been entered into, another municipality, to which the former is annexed, cannot arbitrarily provide by ordinance for the free supply of water to charitable, religious, and educational institutions.<sup>49</sup>

*Private consumers* A water company may contract to furnish free water to a private consumer.<sup>50</sup> The rules governing the construction and operation of contracts generally are applicable in determining the construction and operation of such contracts.<sup>51</sup>

*Regulation by state* Although a municipality, as authorized by a general provision of its charter, may contract with a water company for free water for certain municipal purposes in consideration of the damage caused the city by the disturbance and excavation of street improvements by the installation of the water mains, such provision is subject to the action of the state, which, through its public service commission, may invalidate such provision as a discrimination against the paying patrons of the company.<sup>52</sup> A contract between a municipality and a company, under which, after a certain period, the company is to install and maintain fire hydrants without charge to the city, is not exclusively a proprietary matter on the part of the city but one in which the general public has an interest, and the city, as much a customer of the company as any private consumer, is subject to the jurisdiction of a public service commission, which may order the company to discontinue its free service and make a certain charge.<sup>53</sup> However, a statute with respect to the regulation of rates of a water company by the department of public works gives the department no authority to abrogate the provision in the franchise of a company from a municipality providing for the free supply of water for certain municipal purposes, where "contract," as used in such section, refers to contracts with "person" or "corporation," which words, as defined by statute, do not include a municipal corporation.<sup>54</sup>

## F WATER RENTS OR RATES AND OTHER CHARGES TO CONSUMERS

### § 284. In General

Municipal charges for water are generally not taxes, unless made so by the legislature.

"Water rents" and "water rates" have been held to be synonymous terms,<sup>55</sup> which may designate either a tax or compensation for water service.<sup>56</sup>

44. Me—City of Belfast v Belfast Water Co, 98 A 738, 115 Me 234, L R A 1917B 908

67 C J p 1235 note 19

45. Me—City of Belfast v Belfast Water Co, supra

46. Me—City of Belfast v Belfast Water Co, supra

47. Clear language of contract held to negative claim that contract provided for free water—New Haven Water Co v City of New Haven, 40 A 2d 763, 131 Conn 456

48. Nev—Ely Water Co v White Pine County, 151 P 335, 38 Nev 472, L R A 1916D 431

67 C J p 1235 note 22

49. Ill—Chicago v Rogers Park Water Co, 73 NE 375, 214 Ill 212

50. NH—Colebrook Water Co v Parsons, 186 A 14, 88 NH 217

94 C J S —11

NY—Kemp v Owego Water Works, 45 NYS 2d 794, 267 App Div 849

51. NH—Colebrook Water Co v Parsons, 186 A 14, 88 NH 217

**Successors entitled to free water**

Where deed of sale conveying part of grantor's land to water company provided that, if water company should destroy a spring situated on grantor's premises by constructing water reservoir, it should furnish grantor and her heirs forever, from its waterworks, an amount equal to that supplied by spring, all successors in title of grantor were entitled to free water in perpetuity where water company had destroyed spring by construction of water reservoir—Kemp v Owego Water Works, 45 NYS 2d 794, 267 App Div 849

52. W Va—City of Charleston v Public Service Commission, 103 S E 673, 86 W Va 536

Propriety and regulation of rates of water companies generally see infra §§ 291-296

Uniformity and discrimination as to rates generally see infra § 297

53. Or—City of Hillsboro v Public Service Commission of Oregon, 187 P 617, 192 P 390, 97 Or 320, error dismissed 41 S Ct 323, 255 US 562, 65 L Ed 787

54. Wash—Monroe Water Co v Town of Monroe, 237 P 996, 135 Wash 355

55. Me—Pejepscot Paper Co v Town of Lisbon, 142 A 194, 197, 127 Me 161

67 C J p 1236 note 28

56. NC—McNeal Pipe, etc., Co v Howland, 16 SE 857, 111 NC 615, 624, 20 L R A 743

Where there is ambiguity, a water company's rule affecting charges should be construed against the company which framed it and in favor of the consumer.<sup>57</sup>

*As applied to charges of municipality operating water system* Water rents or water rates fixed by municipal ordinance for service from a water system owned and operated by a municipal corporation, while they have been referred to as taxes,<sup>58</sup>

are ordinarily not taxes, but simply the price charged for the service or for the water as a commodity,<sup>59</sup> nor are they assessments<sup>60</sup> or substitutes for taxes.<sup>61</sup> The transaction is merely a voluntary sale and purchase of such quantity of water or such service as the consumer chooses to buy,<sup>62</sup> and his duty or obligation to pay the charges therefore rest not on the taxing power but rather on contract,<sup>63</sup> such contractual relation does not

57 Pa.—Lewistown-Reedsville Water Co v Public Service Commission, 169 A 406, 111 Pa Super 21

58. N.Y.—Weiskopf v City of Saratoga Springs, 279 N.Y.S. 878, 244 App Div 417, reversed on other grounds 200 N.E. 37, 269 N.Y. 634

59 U.S.—Warrenville State Bank v Farmington Tp., D.C. Mich., 81 F Supp 101, affirmed, C.A., 185 F.2d 260

Idaho—Schmidt v Village of Kimberly, 256 P.2d 515, 74 Idaho 48

Ill.—People ex rel Brockamp v Schlitz Brewing Co., 103 N.E. 555, 261 Ill. 22—Chicago v Northwestern Mut. L. Ins. Co., 75 N.E. 803, 218 Ill. 40, 1 L.R.A.N.S., 770—Town of Cicero v Township High School Dist No 201, 20 N.E.2d 114, 299 Ill. App. 237

Md.—Home Owners' Loan Corp of Washington, D.C., v Mayor and City Council of Baltimore, 3 A.2d 747, 175 Md. 676

N.H.—Chicopee Mfg. Corp v Manchester Board of Water Com'rs, 81 A.2d 837, 97 N.H. 109—Whitefield Village Fire District v Bobst, 39 A.2d 566, 93 N.H. 329

N.Y.—Rupersam Realty Corp v Larpeg Realty Corp., 3 N.Y.S.2d 840, 253 App Div 695—Dunbar v City of New York, 164 N.Y.S. 519, 177 App Div 647, affirmed 119 N.E. 1039, 223 N.Y. 597, affirmed 40 S.Ct. 250, 251 U.S. 516, 64 L.Ed. 384—City of New York v Idlewild Beach Co., 43 N.Y.S.2d 567, 182 Misc. 205, affirmed 50 N.Y.S.2d 341, 182 Misc. 213

Ohio—Corpus Juris cited in City of Niles v Union Ice Corporation, 12 N.E.2d 483, 489, 133 Ohio St. 169

Pa.—Shirk v City of Lancaster, 169 A. 557, 313 Pa. 158, 90 A.L.R. 688—Jolly v Monaca Borough, 65 A. 809, 216 Pa. 345—Roma E. Provincia Building & Loan Ass'n v Penza, 175 A. 430, 115 Pa. Super 201—Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n, 171 A. 287, 112 Pa. Super 352—City of Philadelphia v Philadelphia & Reading R. Co., 62 Pa. Dist. & Co. 434—Rankin v Chester Municipal Authority, Com. Pl., 36 Del. Co. 144 affirmed 68 A.2d 458, 165 Pa. Super 438

S.C.—Simons v City Council of

Charleston, 187 S.E. 543, 181 S.C. 353

67 C.J. p 1236 note 32

Municipal water systems in general see supra §§ 234-242

**Charge for connection to main; tapping charge**

Wis.—City of De Pere v Public Service Commission, 63 N.W.2d 764, 266 Wis. 319

**Service to nonresidents**

Charge for water service furnished by city to residents of territory outside city was held not a tax subject to rules governing taxation—Collier v City of Atlanta, 173 S.E. 853, 178 Ga. 575

**Municipal waterworks as commercial enterprise**

The conduct of a municipal waterworks is a commercial enterprise, and its charges are for a commodity sold and are not taxes which are levied for the support of the government—Whitefield Village Fire Dist v Bobst, 39 A.2d 566, 93 N.H. 229

**Where city owned all shares of capital stock of water company, water rent was not objectionable on ground that it constituted a special tax collected by nontaxing agent of city**—Dolan v Louisville Water Co., 174 S.W.2d 425, 295 Ky. 291

**Purchase at mortgage foreclosure sale**

Water service charges by municipality against mortgagors were not, in ordinary sense of the word, taxes for which the Home Owners' Loan Corporation would be liable after buying realty at mortgage foreclosure sale—Home Owners' Loan Corp of Washington, D.C., v Mayor and City Council of Baltimore, 3 A.2d 747, 175 Md. 676

60. Md.—Home Owners' Loan Corp of Washington, D.C., v Mayor and City Council of Baltimore, supra

N.Y.—Rupersam Realty Corp v

Larpeg Realty Corp., 3 N.Y.S.2d

840, 253 App Div 695

Wis.—City of De Pere v Public Service Commission, 63 N.W.2d 764, 266

Wis. 319

**"Assess" as meaning "establish"**

(1) The word "assess," as used in

statute authorizing village board of

trustees of public affairs to "assess"

water rents for purpose of paying

expenses of waterworks owned by

village means no more than "estab-

lish"—Home Owners' Loan Corp v

Tyson, 12 N.E.2d 478, 133 Ohio St

181

(2) Establishment of rates generally see infra § 286

61. Pa.—Shuk v City of Lancaster,

169 A. 557, 313 Pa. 158, 90 A.L.R.

688—Provident Trust Co of Phila-

delphia v Judicial Building &

Loan Ass'n, 171 A. 287, 112 Pa. Su-

per 352

62. N.Y.—New York University v

American Book Co., 90 N.E. 819

197 N.Y. 294—Pines v Traktman,

178 N.Y.S. 90, 189 App Div 904

"The obligation to pay for the use

of water supplied by the city, meas-

ured by meter, is that of one who

makes a voluntary purchase"—City

of New York v Idlewild Beach Co.,

43 N.Y.S.2d 567, 182 Misc. 205,

affirmed 50 N.Y.S.2d 341, 182 Misc.

213

**Charge for connection to main**

Wis.—City of De Pere v Public Service Commission, 63 N.W.2d 764, 266

Wis. 319

63. Ill.—People ex rel Brockamp v

Schlitz Brewing Co., 103 N.E. 555,

261 Ill. 22—Town of Cicero v

Township High School Dist No

201, 20 N.E.2d 114, 299 Ill. App. 237

N.J.—Bea v Turner & Co., 169 A. 832,

115 N.J. Eq. 189

N.Y.—Security Bldg & Loan Ass'n v

City of Oswego, 18 N.Y.S.2d 511,

259 App Div 42, affirmed Security

Bldg & Loan Ass'n v Carey, 36

N.E.2d 690, 286 N.Y. 646—City of

New York v Idlewild Beach Co.,

43 N.Y.S.2d 567, 182 Misc. 205,

affirmed 50 N.Y.S.2d 341, 182 Misc.

213

Pa.—City of Philadelphia v Phila-

delphia & Reading R. Co., 62 Pa.

Dist. & Co. 434

67 C.J. p 1236 note 34

**Notice as to nonuse of meter**

Where water commissioner charg-

ed contractor for water used on ba-

sis of amount of masonry and plas-

tering being used, as authorized by

ordinance, because meter had been

tampered with, charges did not con-

stitute taxes but were based on con-

tract, especially where contractor ex-

pressly applied to be supplied with

water "subject to city ordinance,"

hence contractor was not entitled to

give the municipality the authority or power to collect water charges as delinquent taxes <sup>64</sup>

However, it has been held that water rents and charges may be collected either as taxes or as compensation for water consumed <sup>65</sup> The legislature may, unless hampered by constitutional restrictions, bring compensation for water furnished by a municipality within the category of a tax, <sup>66</sup> and, where the rate is established with respect to the dimensions, value, use, and exposure of buildings, and the like, and is required to be paid regardless of the quantity of water used, or whether any water is used, such rate is a tax <sup>67</sup> Water rates or charges by a municipality are not classed as taxes so long as their use is limited to waterworks purposes enumerated in the statute, <sup>68</sup> but if they are employed as a mere device to lessen the burden of taxation for general governmental purposes, then such funds should be considered in the category of taxes <sup>69</sup> Charges for the use of water, as a general rule, are governed by principles somewhat different from those regulating and controlling the imposition of taxes <sup>70</sup>

Water rents have been held not municipal claims within a statute relating thereto, <sup>71</sup> nor are they improvements <sup>72</sup> or municipal improvements. <sup>73</sup> Likewise, water rent, unless made so by statute or contract, is not a ground rent, <sup>74</sup> a levy, <sup>75</sup> a public debt, <sup>76</sup> or a charge <sup>77</sup>

*Permitting customers to read meters* A water company should, at the reasonable request of its customers, permit them to read the meters, <sup>78</sup> and on proper showing may be compelled to do so, <sup>79</sup> but the company is not required to furnish them with keys required for access to the meters <sup>80</sup>

### § 285. Right to Charge for Water Service

A municipality has a right to charge for water supplied by it

A municipal corporation operating a water system has a right, the same as a private water corporation, to charge consumers for water supplied to them, <sup>81</sup> and it may properly, in its proprietary capacity as operator of the water system, make a

notice that meter readings would no longer be used as basis for charges — *Parsons Const Corp v City of New York*, 298 N Y S 276, 163 Misc 932

64. Ill—*People ex rel Brockamp v Schlitz Brewing Co*, 103 NE 555, 261 Ill 22—*Town of Cicero v Township High School Dist No 201*, 20 NE 2d 114, 299 Ill App 237

65. NY—*Sayer v City of New York*, 101 NE 764, 208 NY 159—*Security Bldg & Loan Ass'n v City of Oswego*, 18 N Y S 2d 511, 259 App Div 42, affirmed *Security Bldg & Loan Ass'n v Carey*, 36 N E 2d 690, 286 N Y 646

66. US—*McDowell v City of Barten*, CCA Ohio, 38 F 2d 786

67. NY—*Parsons Const Corp v City of New York*, 298 N Y S 276, 163 Misc 932

67 C J p 1236 note 36

#### Charge for "baths"

An extra or miscellaneous water rate or charge, imposed by city ordinance for "baths" where water supply is not metered, and not based on the quantity of water consumed, is a tax, which is without statutory authority, and hence void as applied to washtubs in private apartments — *Effel Realty Corp v City of New York*, 299 N Y S 373, 165 Misc 176, affirmed 11 N Y S 2d 250, 256 App Div 972, affirmed 24 NE 2d 978, 282 NY 541

68. US—*Warrenville State Bank v Farmington Tp*, DCMich, 81 F Supp 101, affirmed, CA, 185 F 2d 260

Ohio—*Himebaugh v City of Canton*, 61 NE 2d 483, 145 Ohio St 237

69. US—*Warrenville State Bank v Farmington Tp*, DCMich, 81 F Supp 101, affirmed, CA, 185 F 2d 260

Ohio—*Himebaugh v City of Canton*, 61 NE 2d 483, 145 Ohio St 237

70. NY—*Weiskopf v City of Saratoga Springs*, 279 N Y S 878, 244 App Div 417 reversed on other grounds, 200 NE 33, 269 NY 634

71. Pa—*Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n*, 171 A 287, 112 Pa Super 352

72. Pa—*Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n*, supra

#### Time of use as not completion of improvement

Time of using or consuming water is not "completion of improvement," within statute authorizing city to sue in assumption on municipal claims — *Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n*, supra

73. Pa—*Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n*, supra

74. Md—*Home Owners' Loan Corp of Washington, D C*, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

75. Md—*Home Owners' Loan Corp of Washington, D C*, v Mayor and City Council of Baltimore, supra

76. Md—*Home Owners' Loan Corp*

of Washington, D C, v Mayor and City Council of Baltimore, supra

77. Md—*Home Owners' Loan Corp of Washington, D C*, v Mayor and City Council of Baltimore, supra

78. Ky—*Combs v Prestonsburg Water Co*, 84 SW 2d 15, 260 Ky 169

79. Ky—*Combs v Prestonsburg Water Co*, supra

80. Ky—*Combs v Prestonsburg Water Co*, supra

81. Ill—*People ex rel Brockamp v Schlitz Brewing Co*, 103 NE 555, 261 Ill 22—*Town of Cicero v Township High School Dist No 201*, 20 NE 2d 114, 299 Ill App 237 NY—*Parsons Const Corp v City of New York*, 298 N Y S 276, 163 Misc 932

Pa—*City of Philadelphia v Philadelphia & Reading R Co*, 62 Pa Dist & Co 434

Utah—*East Mill Creek Water Co v Salt Lake City*, 159 P 2d 863, 108 Utah 315

67 C J p 1237 note 38

Right and duty to furnish free service or service at nominal charge see supra § 283

"The city is entitled to be paid for water that it supplies to any one" — *City of New York v Psaty & Fuhrman*, 3 N Y S 2d 230, 232, 166 Misc 938

#### Reasonable rules for payment

Water company, whether privately or publicly owned, has right to require compliance with reasonable rules for payment of sums due for



charge for water furnished itself in its governmental or public capacity <sup>82</sup>

Inasmuch as rates for water service from a municipal water system are not, ordinarily, a tax, as discussed supra § 284, a municipality may charge for water furnished to a school district,<sup>83</sup> or to a charitable or eleemosynary institution, even though such institution is exempt from taxation,<sup>84</sup> but, for the same reason, it can make no charge for water supply where there is no contract for service, and no service has been supplied.<sup>85</sup> Likewise, a municipality cannot collect a water charge where no water is furnished and none is available.<sup>86</sup>

The question whether a water company has a right to make a charge for a particular type of service has been held to be within the jurisdiction

of a superior court <sup>87</sup>

*Right to charge as franchise* The right to collect compensation for the use of water has been held a franchise <sup>88</sup>

*Charge for fire protection service* Where it is established that there is some reasonable basis for charging for fire protection service because it is an additional service, a municipal waterworks cannot be required to perform such service without compensation,<sup>89</sup> so, water service for private fire protection has been held to confer a special benefit for which persons protected can be charged, where the charge is not unreasonable.<sup>90</sup> Even though a water company is bound by contract or otherwise to furnish a municipal corporation with water for fire protection, it is entitled to charge a private con-

service to customers—*Schultz v Town of Lakeport*, 54 P 2d 1110, 55 P 2d 485, 5 Cal 2d 377, 108 A L R 1168

**Service to nonresidents**

Ga—*Collier v City of Atlanta*, 173 S E 853, 178 Ga 575

**Effect of void ordinance fixing rates**

A consumer of water is under duty to pay a reasonable rate for such use, even though the ordinance undertaking to fix rates is void—*Almaras v City of Hattiesburg*, 180 So 392, 181 Miss 752

**Effect of reservation and exception in sale**

Where contract for sale of water system, supplied from springs on sellers' farm, "reserved" and "excepted" pipe lines to sellers' "buildings" and water flowing therein for domestic, stock watering, garden, and lawn purposes only without charge to sellers, a town, acquiring system from buyer, had no right to collect rent for use of water for such purposes from owner of land excepted from conveyance of farm to another—*Duus v Town of Ephrata*, 128 P 2d 510, 14 Wash 2d 426, reheard 134 P 2d 722, 14 Wash 2d 426

82 Wash—*Uhler v City of Olympia*, 151 P 117, 152 P 998, 87 Wash 1

"The supply of city owned water to the inhabitants thereof is a 'governmental function' of a public service character for which [the city] is entitled to compensation fixed by law"—*Parsons Const Corp v City of New York*, 298 N Y S 276, 285, 163 Misc 932

**Charging electric board with tax equivalents**

A fourth-class city has right to require its electric board, in operation of municipal waterworks, acquired from a private utility corporation, to pay to city reasonable tax equivalents, and may charge such amounts

as operating expenses in computation of net earnings of waterworks, and use earnings so computed as a basis for possible reduction of rates—*Electric Plant Board of City of Mayfield v City of Mayfield*, 185 SW 2d 411, 299 Ky 375

83. La—*Amite City v Tangipahoa Parish School Board*, 123 So 419, 11 La App 309

Pa—*School Dist of Bedford Borough v Schnably*, 89 Pa Super 486

84 Pa—*City of Pittsburgh v Phelan*, 85 Pa Super 548

85. N J—*Austin v Mayor and Common Council of Borough of Union Beach*, 160 A 318, 10 N J Misc 670

86 Pa—*City of Philadelphia v Philadelphia & Reading R Co*, 62 Pa Dist & Co 434

**Private garages without water**

An ordinance establishing a water charge for automobiles in private garages without water cannot be construed to permit the collection of a charge against automobiles in garages which not only had no water, but for which no water was available, the intention was to impose a water rate only where there was some appliance or ferrule on the property, adjacent to the garages, from which water could be obtained—*City of Philadelphia v Philadelphia & Reading R Co*, supra

87. Wash—*State v Hoquiam Water Co*, 127 P 304, 70 Wash 682

88 US—*City and County of San Francisco v U S*, C C A Cal, 106 F 2d 569, reversed on other grounds 60 S Ct 749, 310 US 16, 84 L Ed 1050, rehearing denied 60 S Ct 1071, 310 US 657, 84 L Ed 1420

"The doctrine that the right to collect rates for water distributed or furnished is a franchise independent of the creative or corporate franchise is by no means new or strange. This rule and other analogous rules find

support in many well-considered cases"—*San Joaquin, etc., Canal, etc., Co v Merced County*, 84 P 285, 2 Cal App 593, 599

89 N H—*Chicopee Mfg Corp v Manchester Board of Water Com'rs*, 81 A 2d 837, 97 N H 109

**Use or nonuse of water**

Charge imposed by commissioners of municipal waterworks for standby service for private fire protection was a charge for service whether water was used or not—*Chicopee Mfg Corp v Manchester Board of Water Com'rs*, supra

**Sprinkler system**

A city was authorized to assess a furniture warehouse for a water fire line service for a sprinkler system, statute prohibiting charge by city or village for supplying water for extinguishing fire, etc., applied only to water taken from mains under direct control and through equipment of city or village fire department, and did not prohibit charge for special service to water sprinkler system through private fire line—*Wayne Furniture Co v City of Dayton*, Ohio App, 57 N E 2d 687

90 N H—*Chicopee Mfg Corp v Manchester Board of Water Com'rs*, 81 A 2d 837, 97 N H 109

Reasonableness of rates see infra § 289

**Service to suburbs**

A municipally owned water utility was authorized to collect its expense of fire protection service furnished to suburban retailer by including a charge therefor in the suburb's general water rate—*Village of Fox Point v Public Service Commission*, 7 N W 2d 571, 242 Wis 97, followed in *Village of Shorewood v Public Service Commission*, 7 N W 2d 574, 242 Wis. 105 and *Village of Whitefish Bay v Public Service Commission*, 7 N.W 2d 575, 242 Wis 106.

sumer for supplying water to a sprinkler or fire extinguishing system on his premises, that being a peculiar and personal service furnished him beyond, and in addition to, the service furnished the public generally,<sup>91</sup> and, for a similar reason, a municipality operating a water system may rightfully make a charge for such service, notwithstanding the sprinkler system and the use of water in connection therewith reduce the burden on the municipality in supplying fire protection, and even though the consumer has no right to take or use water through the system except in case of fire<sup>92</sup>

## § 286. Establishment of Rates

- a By water company
- b By municipality for service from municipally operated system

### a. By Water Company

Except as restricted by statute, contract, or its charter, a water company may fix its rates, subject to public regulation and the requirements as to reasonableness and the absence of unjust discrimination.

Unless withdrawn or superseded by statute,<sup>93</sup> or restricted by contract, as discussed infra § 287, or

by its charter,<sup>94</sup> the right to fix the rates to be charged by a public service water company for its services belongs to the company itself,<sup>95</sup> subject to the power of the state or its duly authorized agency to modify or supersede such rates, as discussed infra §§ 291-296, and subject also to the requirement that they be reasonable, infra § 293, and not unduly discriminatory, infra § 297.

*Rates lower than lawful maximum* Where the maximum rates to be charged are prescribed by public authority, with no indication that they are also to be the minimum rates, a water company may establish a rate less than such maximum<sup>96</sup>

### b. By Municipality for Service from Municipally Operated System

Except as restricted by statute or contract, a municipality may fix rates for its water service, subject to requirements as to reasonableness and, in some jurisdictions, to regulation by public service commissions.

In the absence of statute providing otherwise,<sup>97</sup> and except as it may be restricted by contracts previously made,<sup>98</sup> a municipal corporation owning or operating a water system has power to fix the rates to be charged for service to consumers,<sup>99</sup> sub-

91. Ga—Washington Water & Electric Co v Pope Mfg Co, 167 SE 286, 176 Ga 155  
67 C J p 1237 note 44

92. Mass—Shaw Stocking Co v City of Lowell, 85 NE 90, 199 Mass 118, 18 L R A, N S, 746, 15 Ann Cas 377  
67 C J p 1237 note 45

93. City waterworks leased by company

Statute authorizing city to fix rates for water served to city and inhabitants under contract, limited in its term and ratified by city electorate, vested city with power to fix rates for water served by company leasing city waterworks—Gulf Public Service Co v Louisiana Public Service Commission, 149 So 517, 177 La 911

94. La—Levy v New Orleans Waterworks Co, 38 La Ann 25.  
67 C J p 1237 note 48

95. NC—Griffin v Goldsboro Water Co, 30 SE 319, 122 NC 206, 41 L R A 240  
67 C J p 1237 note 49

96. Ala—State v Birmingham Waterworks Co, 51 So 354, 164 Ala 586, 27 L R A, N S, 674, 137 Am SR 69, 20 Ann Cas 951

Contract with municipality fixing maximum rates see infra § 287 a (1)

97. Mass—Merrill v Inhabitants of Town of Revere, 98 NE 99, 211 Mass 468  
67 C J p 1237 note 55.

### Act as not limiting lawful rates

The act authorizing city authorities to fix water rates and to provide funds necessary for servicing the bonded indebtedness, is not a limitation on lawful rates, but looks to rendering the enterprises self-liquidating insofar as reasonable rates would provide such funds, and thus relieve taxpayers of the burden of such indebtedness—Mitchell v City of Mobile, 13 So 2d 664, 244 Ala 442

### Provision not exempting municipalities

Provision in Public Service Law that subdivision relating to filing of schedules and contracts by water companies should not apply to state, municipal, or federal contracts did not exempt municipalities from operation of provisions of law governing fixing of rates—City of New York v Maltbie, 8 NE 2d 289, 274 N Y. 90

### Charter provision not conferring power

Section of charter, providing that, in case of controversy over just and reasonable water rates, question should be determined by court, provides no notice or proceeding to fix rate, so that no rate-making power is conferred, there is not such conflict between the Public Service Law and such charter, with respect to power to fix water rate, that both cannot stand, since the law provides for rate-making power and charter fails in attempt to do so—City of New York v Maltbie, 289 NYS 562,

248 App Div 39, affirmed 8 NE 2d 289, 274 NY 90

98. Ark—Arkansas Light & Power Co v City of Paragould, 225 S W. 435, 146 Ark 1  
67 C J p 1237 note 56

Contracts as to rates between municipality and

Patrons see infra § 287 b (2)  
Security holders see infra § 287 c

99. Iowa—Sloan v City of Cedar Rapids, 142 N W 970, 161 Iowa 307  
67 C J p 1237 note 57

"The municipality has all the powers of an owner to initiate rates and classifications of rates"—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 323, 189 Md 58

### Power under charter

(1) In general—State v City of St Petersburg, 198 So 837, 145 Fla 206

(2) Power given city by charter to police certain sections in other municipality was held not to affect rights of city in charging for water service rendered residents of latter municipality—Collier v City of Atlanta, 173 SE 853, 178 Ga 575

Power of public utility district to fix rates for water furnished exists by necessary implication—Seldovia Public Utilities Dist v Cook Inlet Packing Co, D C Alaska, 95 F Supp 528

### Power in board of commissioners of city

Utah—Fjeldsted v Ogden City, 28 P 2d 144, 83 Utah 278

ject to any constitutional or statutory requirements as to the time or frequency of so doing,<sup>1</sup> and to the rules as to reasonableness, as discussed *infra* § 289, and, in some jurisdictions, to the authority of the state public utility commission to modify or regulate such rates, *infra* § 290. So, the power of a municipality to fix rates to be charged the customers residing within its boundaries has been held incidental to the power to "establish and operate" public utility systems conferred by the constitution,<sup>2</sup> and where the operation of the water system is but incidental to the main purpose of service to the inhabitants of the city, the municipal authorities have the same right to fix the charges to be paid by those served in the outside territory as they have to fix those charged by the city's own inhabitants.<sup>3</sup>

It has been held that the power of a municipality to fix and regulate water rates is a legislative or governmental power,<sup>4</sup> and that fixing, or making,

rates is a legislative act,<sup>5</sup> but may be delegated by law to an administrative agency,<sup>6</sup> free from interference by the court except to preserve constitutional rights.<sup>7</sup> Under other authority, in fixing rates a municipality acts in its private or proprietary, and not its governmental, capacity,<sup>8</sup> so, where a municipal corporation purchases a water system which extends into another municipality, it has the right to fix rates for the whole system, notwithstanding the authorities of such other municipality are vested by statute with irrevocable authority to fix rates therein.<sup>9</sup>

A statute authorizing a municipality operating a water system to fix the rates to be charged contemplates the establishment of general rates, and not the making of special contracts with individual consumers,<sup>10</sup> and it does not give the municipality power to fix or change rates retroactively.<sup>11</sup> A municipality acquiring a water system from its former owners may fix rates superseding lower rates

#### Hearing not required

Board of aldermen was not required to hold public hearing before fixing New York City water rates—*Franc v Davidson*, 278 NYS 559, 155 Misc 382

#### Power to increase rates

(1) The fact that a city construed the statute under which it gave a deed of trust on its waterworks as authorizing it to increase rates to private consumers by inserting a clause in the deed providing for increase of rates and raised no objection for thirteen years is not to be lightly considered in determining its authority to increase rates, the fact that the public knew the language of the statute, knew the city's interpretation of it, as expressed in the recorded deed, as authorizing it to increase rates, knew that rates to private consumers had been increased, and yet raised no objection to the interpretation for thirteen years, does not appeal to a court of equity in support of the contention that the city cannot raise rates, the result of which would prevent the enforcement of a valid foreclosure judgment and preserve to the city its water plant practically without cost, and the fact that a city ordinance approving the form of the deed was not recorded did not affect the power of the city to increase rates if necessary to pay the secured certificates—*Connett v City of Jerseyville*, CCA Ill., 96 F2d 392

(2) The provision of the original statute authorizing cities to issue certificates of indebtedness payable solely from the water fund for the purpose of acquiring waterworks, for a sale, on foreclosure of the deed of trust securing the certificates, to the

person offering to satisfy the decree for the income of the system for the least number of years, during which period the purchaser shall be entitled to rates prescribed in the ordinance therein provided for, has no application to a creditor whose decree is unsatisfied where there has been no sale, so as to preclude him from having rates raised, but the remedial and procedural provisions of the amendatory statute, including the provisions for rates sufficient to pay cost of operation, the principal and interest on the bonds, etc., and for the enforcement of the duties of the city by mandamus, apply in favor of holders of water fund certificates issued under the original statute—*Connett v City of Jerseyville*, *supra*

1. Pa—*Central Iron & Steel Co v City of Harrisburg*, 114 A 258, 271 Pa 340

67 C J p 1238 note 58

2. Cal—*Durant v City of Beverly Hills*, 102 P2d 759, 39 Cal App 2d 138

3. Cal—*Durant v City of Beverly Hills*, *supra*

Rates outside municipal boundaries as or as not discriminatory see *infra* § 297 b

4. Ga—*Jarrett v City of Boston*, 74 SE2d 549, 209 Ga 530—*Barr v City Council of Augusta*, 58 SE2d 823, 206 Ga 753—*Screws v City of Atlanta*, 8 SE2d 16, 189 Ga 839

Tex—*Boiles v City of Abilene*, Civ App, 276 SW2d 922, error refused

5. Ala—*Taxpayers and Citizens of City of Mobile v Board of Water and Sewer Com'rs of City of Mobile*, 73 So 2d 97, 261 Ala 110.

#### Resolution superseding ordinance

A resolution of city board of estimate, approving water tariffs fixed by commissioner of water supply, superseded previous ordinance of board of aldermen reducing water rates, where power to institute changes in rates was with such commissioner, subject to approval of board of estimate—*Garber v City of New York*, 5 NYS 2d 110, 166 Misc 580

6. Ala—*Taxpayers and Citizens of City of Mobile v Board of Water and Sewer Com'rs of Mobile*, 73 So 2d 97, 261 Ala 110

7. Ala—*Taxpayers and Citizens of City of Mobile v Board of Water and Sewer Com'rs of Mobile*, *supra*

8. Wis—*City of De Pere v Public Service Commission*, 63 NW2d 764, 266 Wis 319—*Pabst Corporation v City of Milwaukee*, 208 NW 493, 190 Wis 349, 45 ALR 1164

#### Change of rate as ministerial, not governmental, act

Pa—*First Nat Bank of Strasburg v Borough of Strasburg*, Comp Pl., 54 Lanc Rev 45

9. US—*Cudahy Packing Co v City of Omaha*, CCA Neb., 24 F2d 3, certiorari denied 49 S Ct 9, 278 US 601, 73 L Ed 530

10. Ohio—*Lake Shore & M S Ry v City of Elyria*, 32 Ohio Cir Ct 449

Contracts between municipality and consumers as to rates see *infra* § 287 b (2)

11. NJ—*Federal Shipbuilding & Dry Dock Co v City of Bayonne*, 141 A 455, 102 NJ Eq 475, affirmed 144 A 918, 104 NJ Eq 196.

agreed on in contracts previously made by such owners, in the absence of agreement to be bound by any such contracts<sup>12</sup>

A patron of a municipal water system who, without objection, makes numerous payments of charges imposed by the municipality for water, under the mistaken belief of both parties that the municipality had power to establish rates without the intervention of the state public utility commission, is estopped to deny the power of the municipality to establish such rates<sup>13</sup>

The courts are not managers of municipal water utilities and have no rate-making powers<sup>14</sup>

*Repeal of rate ordinance.* An ordinance prescribing the rates for water furnished the city and its inhabitants by a water company is repealed by ordinances fixing the rates for water sold by the city to the company for supply of its consumers outside the city after the city purchases the company's distribution system and other properties in the city<sup>15</sup> Such repeal constitutes a legislative recognition of the interim validity of the repealed ordinance<sup>16</sup>

## § 287. Contracts as to Rates

- a Contracts between municipality and water company
- b Contracts with patrons
- c Contracts between municipality and security holders

### a. Contracts between Municipality and Water Company

- (1) In general
- (2) As binding on parties
- (3) Modification of contract rates under regulatory power

### (1) In General

Except as prohibited by law or public policy, a municipality may contract with a water company as to the rates to be charged consumers, but cannot so contract for an indefinite or unreasonably long term

Authority conferred by its charter or general statute on a municipal corporation to provide for supplying the municipality or its inhabitants with water authorizes it to contract with a water company as to the rates to be charged by the latter to consumers,<sup>17</sup> and, independently of statute, a municipality, in granting a franchise to a water company or consenting to the use of its streets by such a company, may lawfully stipulate as to such rates, for a definite and reasonable period of time,<sup>18</sup> unless such a contract is contrary to the declared public policy of the state,<sup>19</sup> or is prohibited by law,<sup>20</sup> and except where the company has, by statute, the right to maintain its system in the streets, in which case a grant or consent by the municipality is, as to a provision fixing the rates to be charged consumers, void for want of consideration<sup>21</sup>

A contract as to rates to be charged, for an indefinite term, or unreasonably long term, is void as infringing the police power of the state,<sup>22</sup> and the legislature cannot authorize a municipality to enter into a contract as to rates for an unlimited or unreasonable term<sup>23</sup>

The passage of a franchise ordinance, specifying the rates to be charged by a company for water service, and its acceptance by the company, constitute a contract as to such rates<sup>24</sup> A contract between a municipality and a water company fixing the rates to be charged to private consumers and also the rates for water for municipal purposes is not supplanted or abrogated, as to rates to private consumers, by a later contract referring only to

12 U.S.—Cudahy Packing Co v City of Omaha, CCA Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530

13 Wis.—Pabst Corporation v City of Milwaukee, 213 N.W. 888, 215 N.W. 670, 193 Wis. 522

Rates of municipal water system as subject to regulation by commission see *infra* § 290

14 Md.—Lewis v Mayor and City Council of Cumberland, 54 A.2d 319, 189 Md. 58

15 Ark.—Water Works Commission of City of Little Rock v North Little Rock Water Co., 180 S.W.2d 526, 207 Ark. 349

16 Ark.—Water Works Commission of City of Little Rock v North Little Rock Water Co., *supra*

17 U.S.—Birmingham Waterworks Co v City of Birmingham, D.C. Ala., 211 F. 497, affirmed 213 F. 450, 130 CCA 96

67 C.J. p. 1238 note 69

Contracts between municipalities and public utilities as to rates in general see Municipal Corporations § 292 b

Contracts fixing discriminatory rates see *infra* § 297

18 N.J.—Long Branch Commission v Tintern Manor Water Co., 62 A. 474, 70 N.J.Eq. 71, affirmed 71 A. 1134, 71 N.J.Eq. 790

67 C.J. p. 1238 note 70

19 U.S.—Freeport Water Co v Freeport, Ill., 21 S.Ct. 493, 180 U.S. 587, 45 L.Ed. 679

20 Iowa—Creston Waterworks Co

v City of Creston, 70 N.W. 739, 101 Iowa 687

21 N.Y.—Waterloo Water Co v Village of Waterloo, 193 N.Y.S. 360, 200 App.Div. 718

22 Conn.—New Haven Water Co v City of New Haven, 139 A. 99, 106 Conn. 562

23 Conn.—New Haven Water Co v City of New Haven, *supra*  
Fla.—City of Tampa v Tampa Waterworks Co., 34 So. 631, 45 Fla. 600, affirmed 26 S.Ct. 23, 199 U.S. 241, 50 L.Ed. 170

24 U.S.—Armour Packing Co v Metropolitan Water Co., N.J., 130 F. 851, 65 CCA 335, certiorari denied 25 S.Ct. 791, 195 U.S. 631, 49 L.Ed. 354

67 C.J. p. 1239 note 76

rates for water used for municipal purposes<sup>25</sup> Where a contract between a municipality and a water company provides that the rates charged by the latter shall be the same as those charged in a designated city, and there is no established rate in such city for service of a particular class, no rate for such service can be said to be fixed by such contract<sup>26</sup>

*Contract fixing maximum rates only* A contract between a municipal corporation and a water company which merely fixes maximum rates for water service, so placing a limitation on the amounts which may be charged by the company, but does not fix absolute or minimum rates which it may or must charge, does not prevent either the municipality, under its regulatory power,<sup>27</sup> or the company, under its inherent power to fix the rates for its service,<sup>28</sup> from establishing rates lower than the maximum prescribed by such contract.

*Extension of corporate limits of municipality* Persons who resided beyond the corporate limits of a municipality when a contract was made between the municipal corporation and a water company as to the rates to be charged for water service, but who are subsequently brought within the municipality by an extension of its corporate limits, thereupon become entitled to water at the contract rates<sup>29</sup>

## (2) As Binding on Parties

A contract between a municipality and a water company as to rates to be charged to consumers, for a definite and reasonable time, binds both parties and, except as the contract provides, neither may depart from the prescribed rates without the other's consent

A contract between a municipal corporation and a water company as to the rates to be charged to consumers for water service for a definite and rea-

sonable time in the future is binding on both parties thereto,<sup>30</sup> and neither can alter or depart from the rates thereby prescribed without the consent of the other,<sup>31</sup> except as the contract may provide otherwise, expressly or by implication<sup>32</sup> Accordingly, where the municipality consents to an increase of rates on specified conditions, the company cannot put such an increase into effect without complying with the conditions<sup>33</sup> Such a contract as to rates should, however, be strictly construed so far as it limits or restricts the power of the municipality over rates,<sup>34</sup> and doubtful or ambiguous provisions must be construed against any restriction or surrender of such power<sup>35</sup>

*Where contract fixing rates is indeterminate or indefinite as to time or duration*, the rates thereby fixed may be changed or departed from, on notice, where conditions have so changed as to render them no longer fair and reasonable,<sup>36</sup> in accordance with the general rule as to termination of contracts fixing no limit of duration, as discussed in Contracts § 398

## (3) Modification of Contract Rates under Regulatory Power

Except where authority has been clearly conferred on a municipality to contract inviolably as to rates, a contract between a municipality and a water company as to rates to consumers is subject to the state's paramount authority to regulate rates

While a contract between a municipal corporation and a water company, fixing the rates to be charged for water service to consumers, is binding on the parties, as discussed supra subdivision a (2) of this section, it must be deemed to have been made subject to the paramount authority of the state to regulate rates,<sup>37</sup> and the rates fixed by the contract may, accordingly, be modified or superseded by the legislature or its duly authorized agency, if they are or

25 NJ—Borough of North Wildwood v Board of Public Utility Com'rs, 95 A 749, 88 NJ Law 81

26 Pa—Turtle Creek Borough v Pennsylvania Water Co, 90 A 199, 243 Pa 415

27 US—Birmingham Waterworks Co v City of Birmingham, DC Ala, 211 F 497, affirmed 213 F 450, 130 CCA 96

Regulation of rates by municipality in general see infra § 292 b

28 Ala—State v Birmingham Waterworks Co, 51 So 354, 164 Ala 586, 137 Am SR 69, 27 L R A, NS, 674, 20 Ann Cas 951

Right of company to establish rates see supra § 286 a

29 Ala—Birmingham v Birmingham Waterworks Co, 42 So 10

Operation and effect of extension in general see Municipal Corporations §§ 69–80

30 US—Tampa Water Works Co v City of Tampa, Fla, 26 S Ct 23, 199 US 241, 50 L Ed 170  
67 C J p 1239 notes 79, 80

31. US—Freeport Water Co v Freeport, Ill, 21 S Ct 493, 180 US 587, 45 L Ed 679  
67 C J p 1239 note 80

32. Mass—Town of Oak Bluffs v Cottage City Water Co, 126 NE 384, 235 Mass 18  
67 C J p 1239 note 81

33. Mo—City of Independence v Independence Water Works Co, 135 S W 956, 153 Mo App 693

34. US—Rogers Park Water Co v

Fergus, Ill, 21 S Ct 490, 180 US 624, 45 L Ed 702

35 US—Rogers Park Water Co v Fergus, supra

36 Pa—Borough of Mt Union v Mt Union Water Co, 100 A 968, 256 Pa 516  
67 C J p 1239 note 85

37. NJ—New Jersey Suburban Water Co v Town of Harrison, 1 A 2d 61, 120 NJ Law 546, reversed on other grounds 3 A 2d 623, 122 NJ Law 189—Hackensack Water Co v Board of Public Utility Com'rs, 115 A 531, 96 NJ Law 184  
67 C J p 1240 note 94

Power to regulate rates in general see infra § 292

Regulation of rates in general see infra §§ 291–296.

become unreasonable,<sup>38</sup> except where authority has been conferred by the state on the municipality to contract inviolably as to rates for a fixed period,<sup>39</sup> which authority will not be implied, but must be clearly and unmistakably bestowed<sup>40</sup> Unless and until the contracts are so modified or superseded, however, the contract is valid as between the parties, and continues in effect<sup>41</sup>

#### b. Contracts with Patrons

- (1) Of water company
- (2) Of municipal water system

##### (1) Of Water Company

Where rates have not been established by public authority, a water company may contract with consumers as to rates, which are then subject to modification by such authority

Where the rates to be charged for its service by a water company have not been established by public authority, or where special services not covered by established rates are involved, the company may make its own contracts with consumers as to the rates to be charged,<sup>42</sup> provided that in so doing it does not discriminate unjustly among them<sup>43</sup> Such contracts are not without consideration,<sup>44</sup> but are

valid and binding on both parties unless and until public authority intervenes and modifies the rates thereby fixed,<sup>45</sup> and cannot be changed by either party, without the consent of the other, before the expiration of the contract term<sup>46</sup> Rates so fixed by private contract are, however, subject to modification by public authority where they are or become unreasonable,<sup>47</sup> they remain in force only as long as the legislative body having authority to establish rates refrains from the exercise of its powers,<sup>48</sup> and must yield when rates are established by or under the authority of law<sup>49</sup> So, every such contract must be deemed to have been made with the knowledge or understanding that the rates fixed by the parties are subject to change by the rate-making power of the state,<sup>50</sup> and a change of rates so made, even though on the company's application, does not constitute a breach of such contract or authorize the consumer to rescind it<sup>51</sup>

A water company cannot, by a simple written agreement with a town which purchased a distribution system from the company, bind itself and its successors in perpetuity to a rate not charged by the company to the remainder of the public served by

<sup>38</sup> Me—Milo Water Co v Inhabitants of Town of Milo, 173 A 152, 133 Me 4

<sup>67</sup> C J p 1240 note 94

Reasonableness of rates in general see *infra* § 293

#### Revision by city council

Where city bought portion of water plant lying within its own limits, which plant served both it and another city, and agreed to sell water to company for distribution in other city, rates fixed in contract were subject to revision by city council of first city, since contract called for public utility service, and not merely for sale of surplus water—North Little Rock Water Co v Waterworks Commission of City of Little Rock, 136 SW 2d 194, 199 Ark 773

<sup>39</sup> Me—In re Guilford Water Co's Service Rates, 108 A 446, 118 Me 367

<sup>67</sup> C J p 1240 note 95

<sup>40</sup> US—Freeport Water Co v City of Freeport, Ill., 21 S Ct 493, 180 US 587, 45 L Ed 679

<sup>67</sup> C J p 1240 note 96

<sup>41</sup> Conn—New Haven Water Co v City of New Haven, 139 A 99, 106 Conn 562

<sup>67</sup> C J p 1241 note 97

#### Referendum required for modification

Where a city had contracted with a water company to furnish water to the city and its citizens at specified rates for thirty years, a subsequent

ordinance, modifying the original contract and establishing rates different from those specified, constituted a municipal grant of a franchise which must be submitted to referendum, and, the people having voted adversely thereon, it never became effective—Birmingham Waterworks Co v Birmingham, D Cal, 211 F 497, affirmed 213 F 450, 130 CCA 96

#### Right to intracity rates not affected

(1) Order of Public Service Commission authorizing city to raise rates both inside and outside city limits did not authorize city to change rate of purchaser of water delivered and metered within city, but used outside city, from intracity to extracity rates, where, under contract, purchaser was entitled to intracity rates—City of Wheeling v Benwood-McMechen Water Co, 176 SE 234, 115 W Va 353

(2) Regulation of rates by public utility commission generally see *infra* § 290

<sup>42</sup> Idaho—Jack v Grangeville, 74 P 969, 9 Idaho 291

<sup>67</sup> C J p 1241 note 98

Right of company to establish rates see *supra* § 286 a

<sup>43</sup> Pa—Lackawanna Mills v Scranton Gas & Water Co, 150 A 633, 300 Pa 303

<sup>67</sup> C J p 1241 note 99

Uniformity and discrimination in general see *infra* § 297

<sup>44</sup> Ala—Brown v Birmingham Waterworks Co, 52 So 915, 169 Ala 230

<sup>45</sup> Cal—Coulter v Sausalito Bay Water Co, 10 P 2d 780, 122 Cal App 480

<sup>67</sup> C J p 1241 note 2

<sup>46</sup> Wis—Appleton Waterworks Co v Appleton, 113 NW 44, 132 Wis 563

<sup>67</sup> C J p 1241 note 3

<sup>47</sup> Cal—Coulter v Sausalito Bay Water Co, 10 P 2d 780, 122 Cal App 480

Me—In re Searsport Water Co, 108 A 452, 118 Me 382

Regulation of rates in general see *infra* §§ 291–296

<sup>48</sup> Mo—State ex rel St Joseph Water Co v Geiger, 154 SW 486, 246 Mo 74, L R A 1916A 1060, certiorari dismissed 35 S Ct 208, 235 US 695, 59 L Ed 430

<sup>49</sup> US—Lanning v Osborne, CC Cal, 76 F 319, affirmed 20 S Ct 860, 178 US 22, 44 L Ed. 961

Mo—State ex rel St Joseph Water Co v Geiger, 154 SW 486, 246 Mo 74, L R A 1916A 1060, certiorari dismissed 35 S Ct 208, 235 US 695, 59 L Ed 430

<sup>50</sup> Me—American Thread Co v Milo Water Co, 146 A 695, 128 Me 218

Power of state to regulate rates see *infra* § 292 a

<sup>51</sup> Me—American Thread Co v Milo Water Co, *supra*.

it,<sup>52</sup> and cannot enforce that agreement by a covenant made to run with its property, already subject to a larger public use<sup>53</sup>

*Rates in territory annexed to municipality as subject to existing ordinance* Where a water company extends its mains outside the corporate limits of the municipality in which it operates, and contracts with a large consumer outside such limits for water service to him at higher rates than those established by municipal ordinance within the city, the subsequent extension of the territorial limits of the municipality so as to bring such consumer within its boundaries does not abrogate or affect such private contract<sup>54</sup>

## (2) Of Municipal Water System

A municipality has been held bound by a contract with a consumer as to water rates, if it is not ultra vires and the contract period is not unreasonably long, under other authority, the contract rates are subject to change under a statute authorizing the municipality to fix rates

A special contract, express or implied, by a municipal corporation operating a water system to supply water to a consumer at a specified rate or price is, it has been held, binding on the municipality,<sup>55</sup> provided the contract period is not unreasonably long,<sup>56</sup> and provided the contract is not ultra vires<sup>57</sup> Under other authority, while a municipality authorized to regulate its rates for water cannot use its power to abrogate entirely a valid contract under which it furnishes water to a consumer,<sup>58</sup> a statute authorizing the municipality to fix its rates necessarily becomes a part of any such contract, so that the contract rates are subject to change<sup>59</sup> to meet changed conditions,<sup>60</sup> although no such change may be made capriciously or arbitrarily, or unless the contract rate is unjust, unreasonable, or discriminatory,<sup>61</sup> and the municipality has the burden of showing the impropriety of the rate sought to be changed or superseded<sup>62</sup>

52 Va—Town of Vinton v City of Roanoke, 80 SE2d 608, 195 Va 881

53 Va—Town of Vinton v City of Roanoke, supra

54 Mo—State ex rel St Joseph Water Co v Easton, 142 SW 1006, 270 Mo 193, LRA 1917D 802, overruling State ex rel St Joseph Waterworks Co v Geiger, 154 SW 486, 246 Mo 74, LRA 1916A 1060, certiorari dismissed 35 S Ct 208, 253 US 695, 59 L Ed 430

Annexed territory as becoming subject to laws and ordinances of municipality in general see Municipal Corporations § 73

55 Pa—Central Iron & Steel Co v City of Harrisburg, 114 A 258, 271 Pa 340

### Publication of rates as contract

(1) The promulgation and publication by municipality of rates for water service constituted offers to furnish such services to all eligible persons who might apply therefor, so that on acceptance by consumer a continuing contract with municipality resulted, by which municipality was bound to furnish services to consumer at stipulated rates so long as he complied with conditions of contract and until rates were changed in manner authorized by law—Hall v Village of Swanton, 35 A2d 381, 113 Vt 424

(2) Contracts with consumers for water generally see supra § 279

### Change from annual to meter rate

Where a consumer for a considerable time has paid for water used at a certain price per annum, the municipality cannot, in violation of its contract, change the price in the mid-

dle of the term to a meter rate—Penn Iron Co v Lancaster, 25 Pa Super 478

### Contract held not improvident

Pa—Griffith v McCandless Tp, 77 A 2d 430, 366 Pa 309

56 Ill—Eastern Illinois State Normal School v City of Charleston, 111 NE 573, 271 Ill 602 67 C J p 1241 note 11

57 Ga—Barr v City Council of Augusta, 58 SE2d 823, 206 Ga 756

### Lack of express approval by city council

Where city council acquiesced in arrangement whereby water board agreed to sell water to the United States at the city reservoir at within-city rates, rather than at outside-city rates, fact that city council did not expressly approve contract did not render it ultra vires—Department of Water and Power of City of Los Angeles v U S, 62 F Supp 938, 105 Ct Cl 72

### Limiting powers of future city bodies

(1) Board of commissioners of city may not by contract restrict or curtail the powers of future boards to fix and determine rates—Fjelsted v Ogden City, 28 P2d 144, 83 Utah 278

(2) The power of a municipality to fix and regulate water rates falls within the limitation placed on councils of municipalities by statute providing that one council may not, by contract or ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government—Barr v City Council of Augusta, 58 SE2d 823, 206 Ga 753—Screws v City of Atlanta, 8 SE2d 16, 189 Ga 839

(3) Alleged contract entered into

between city and corporation predecessor in title to plaintiffs' lands, located outside the city limits, whereby city agreed to charge for water to consumers within that area same price charged for similar services within corporate limits of city, was ultra vires and void in that it restricted legislative and governmental powers of future councils of the city, and plaintiffs did not acquire any rights to water service under the contract—Barr v City Council of Augusta, 58 SE2d 825, 206 Ga 756

### Water line easements

Portion of water line easement contracts providing that landowners could purchase water at specified rate was ultra vires and not binding on future administrations of city, but city could not continue to use easements by virtue of contracts and at same time refuse to pay consideration agreed to be paid by selling water to landowners at agreed rate—Boiles v City of Abilene, Tex Civ App, 276 SW2d 922, error refused

58 NY—Tonawanda Board & Paper Co v City of Tonawanda, 190 NY S 874, 880, 198 App Div 760

59 NY—Tonawanda Board & Paper Co v City of Tonawanda, supra

60 NY—Tonawanda Board & Paper Co v City of Tonawanda, supra

67 C J p 1230 note 23

61 NY—Tonawanda Board & Paper Co v City of Tonawanda, supra

62 NY—Tonawanda Board & Paper Co v City of Tonawanda, supra

A contract fixing no time limit is terminable at will,<sup>63</sup> even if it is made orally and is subsequently ratified by the public utility district.<sup>64</sup>

A court has no jurisdiction to coerce a municipality to furnish water at rates other than those required by its contract.<sup>65</sup> Where a contract by a municipality to furnish water to another municipality at specified rates has terminated, the rates fixed by the contract do not fix the rates thereafter.<sup>66</sup>

A statute authorizing a municipality to contract with patrons as to rates for water does not authorize it to increase, retroactively, a rate fixed by a contract made pursuant to the statute.<sup>67</sup> A municipal ordinance fixing rates, and providing that the water year shall commence on the first day of January of each calendar year, does not amount to, or effectuate, a contract between the municipality and one who accepts water from the municipal system, so as to prevent an increase of such rates within the year.<sup>68</sup>

A contract by which a city agrees to sell water to the United States at the city reservoir at the within-city rates, rather than at the rates applicable where water is furnished for use outside the city by means of facilities constructed and maintained by the city, is not rendered illegal merely by the fact that the water delivered to the United States within the city is used in a government institution outside the city.<sup>69</sup>

*Burden of proof as to contract* A patron seeking to establish a contract between himself and the municipality as to rates has the burden of proof.<sup>70</sup>

*Approval by public service commission* Under statute, it has been held that a municipal water works board may enter into contracts with the users of water without obtaining the approval of the state

public service commission.<sup>71</sup>

*Municipality acquiring water system as bound by existing contracts with patrons* Where a municipality acquires a water system from a water company, contracts theretofore made between the company and consumers of its water as to the rates to be charged therefor are not binding on the municipality,<sup>72</sup> except where it assumes them or agrees to be bound by them, in which case it cannot, under general authority given it by statute to regulate rates, increase the rates charged to such consumers during the term of the contracts,<sup>73</sup> and, even where existing contracts are in terms assumed by the municipality, a contract providing that the water company shall be held harmless and released from further obligation if the municipality shall acquire the water system and increase the rates above the contract price does not prevent the municipality from increasing the rate, since the obligation of the water company ceases with such increase and the municipality therefore assumes nothing.<sup>74</sup>

#### c Contracts between Municipality and Security Holders

Under a statute authorizing a municipality issuing securities for the purchase price of a water system to enact an ordinance fixing rates, which shall not be reduced until the securities are paid, the rates fixed by such ordinance cannot be reduced during its effective period.

Under a statute authorizing a municipal corporation, on acquiring a water system and issuing certificates of indebtedness or other securities for the purchase price, to enact an ordinance fixing the rates to be charged, which shall not be reduced until such securities are fully paid, the enactment of such an ordinance creates a valid and binding contract between the municipality and the holders of such securities, and the rates fixed by it cannot be reduced by the municipality during its effective period.

63 U.S.—Seldovia. Public Utilities Dist v Cook Inlet Packing Co., D C Alaska, 95 F Supp 528

64. U.S.—Seldovia. Public Utilities Dist v Cook Inlet Packing Co., supra

65. Tex.—State ex rel Richmond Plaza Civic Ass'n v City of Houston, Civ App, 270 SW 2d 235, error refused no reversible error

**Contract with other municipality; annexed area**

Tex.—State ex rel Richmond Plaza Civic Ass'n v City of Houston, supra

66 Wis.—City of Milwaukee v City of West Allis, 258 NW 851, 217 Wis 614, rehearing denied 259 NW 724, 217 Wis 614

**No recovery in excess of contract rate**

However, a city cannot recover anything in excess of contract rates, paid by another city, for furnishing water to such city between date of termination of contract and date on which city furnishing water filed higher rate with Public Service Commission.—City of Milwaukee v City of West Allis, 294 NW 625, 236 Wis 371 certiorari denied 61 S Ct 941, 313 US 567, 85 L Ed 1525

67 N.J.—Federal Shipbuilding & Dry Dock Co v City of Bayonne, 141 A 455, 102 N J Eq 475 affirmed 144 A 918, 104 N J Eq 196

68 Pa.—Central Iron & Steel Co v City of Harrisburg, 114 A 258, 271 Pa 340

69 U.S.—Department of Water and

Power of City of Los Angeles v U S, 62 F Supp 938, 105 Ct Cl 72

Higher rates outside municipal boundaries see infra § 297 b

70 Pa.—Central Iron & Steel Co v City of Harrisburg, 114 A 258, 271 Pa 340

71 Ala.—Water Works Board of City of Mobile v City of Mobile, 43 So 2d 409, 253 Ala 158

Regulation by public utility commission generally see infra § 290

72. U.S.—Cudahy Packing Co v City of Omaha, CCA Neb, 277 F 49

73. U.S.—Cudahy Packing Co v City of Omaha, supra

74. U.S.—Cudahy Packing Co v City of Omaha, CCA Neb, 21 F 2d 3, certiorari denied 49 S Ct 9, 278 US 601, 73 L Ed 530.



tive period,<sup>75</sup> nor, on the other hand, can the security holders complain that the rates thereby fixed are inadequate or confiscatory.<sup>76</sup> The fact that, in such a contract, the municipality expressly or impliedly reserves the right to increase the rates does not make the contract lacking in mutuality, since such an increase could not harm the security holders,<sup>77</sup> nor does such reservation of power to increase the rates imply any obligation on the part of the municipality to do so where necessary to obtain sufficient revenues to pay such securities and interest thereon.<sup>78</sup>

The covenant of a municipality, issuing water revenue certificates for improvements to its water system, to maintain rates which will maintain both the system and the pledged fund set up as security for the payment of the certificates is a valid covenant enforceable by the certificate holders.<sup>79</sup>

In the absence of special authorization by law, however, a municipality is without power to make such a contract as to rates, which would deprive it of power to fix or alter rates for the period of the contract,<sup>80</sup> in violation of the rule prohibiting contracts by municipal corporations which will embarrass or control their legislative powers and duties, as discussed in *Municipal Corporations* § 979 c.

## § 288. Propriety and Regulation of Rates of Municipal Water System

Courts should not hesitate to strike down a municipality's illegal system of water charges because it has

gone unchallenged, or has been successfully resorted to, for years

The courts should not hesitate to strike down an illegal system of water charges by a municipality simply because the system has gone unchallenged for years,<sup>81</sup> or because it has been successfully resorted to for years and has been productive of revenue for the municipality.<sup>82</sup>

A statutory grant to a city of the right to regulate private utilities has been held to contain no restriction on the city's right to regulate the rates of a water utility operated by itself.<sup>83</sup>

## § 289. — Amount and Reasonableness of Rates

- a In general
- b Rate producing profit or surplus revenue
- c Matters considered
- d Judicial review

### a. In General

A municipality must generally fix reasonable rates for water furnished by it, or rates reasonably proportionate to the value of the service rendered

As a general rule, a municipal corporation authorized by law to fix the rates to be charged for service from a water system operated by it is not free to exact whatever rates it may see fit,<sup>84</sup> but must fix reasonable rates, or rates reasonably proportionate to the value of the service rendered.<sup>85</sup>

75. US—Karel v City of Eldorado, DC Ill, 32 F 2d 795

76. US—Karel v City of Eldorado, supra

77. DC Ill—Karel v City of Eldorado, supra

78. US—Karel v City of Eldorado, supra

79. Fla—State ex rel City of Vero Beach v MacConnell, 169 So 628, 125 Fla 130, followed in 169 So 657, 125 Fla 251

### Present earnings as basis of pledge

Municipality issuing such certificates payable solely from revenues of system as special fund pledged specifically for that sole purpose and not approved by majority vote of freeholders, cannot validly pledge its rate-making powers as means of raising funds to repay certificates out of future earnings, except on basis of present earnings calculated on basis of existing rate structure—State ex rel City of Vero Beach v MacConnell, 169 So 628, 125 Fla 130, followed in 169 So 657, 125 Fla 251

80. Or—Batchelder v Hartwig, 128 P. 439, 63 Or. 472.

81. NY—Weiskopf v City of Saratoga Springs, 279 NYS 878, 244 App Div 417, reversed on other grounds 200 NE 33, 269 NY 634

82. NY—Weiskopf v City of Saratoga Springs, supra

83. Ark—North Little Rock Water Co v Waterworks Commission of City of Little Rock, 136 SW 2d 194, 199 Ark 773

84. Kan—Holton Creamery Co v Brown, 20 P 2d 503, 137 Kan 418 67 CJ p 1242 note 29

Power of city water commissioner to fix water rates see *Municipal Corporations* § 635 a

Regulation of rates of municipally owned utilities in general see *Municipal Corporations* § 1050 c

85. Ala—Bankhead v Town of Suligent, 155 So 869, 229 Ala 45, 96 ALR 1381

Ill—Chicago v Northwestern Mut Life Ins Co, 75 NE 803, 218 Ill 40, 1 LRA, NS, 770

Miss—Almaras v City of Hattiesburg, 180 So 392, 181 Miss 752

Ohio—State ex rel Mt Sinai Hospi-

tal of Cleveland v Hickey, 30 NE 2d 802, 137 Ohio St 474 67 CJ p 1242 note 29

"Municipally owned water works stand in no better position in regard to water rates than privately owned systems"—Simons v City Council of Charleston, 187 SE 545, 547, 181 SC 353

The service received is the test of reasonableness—Simons v City Council of Charleston, supra

In exercise of police power, municipality, by ordinances not arbitrary or discriminatory, can fix reasonable service water rate and charge—Macmahon v Baumhauer, 175 So 299, 234 Ala 482

In absence of fixed rate, inhabitants of city have no greater rights than to receive water at reasonable rates without discrimination—Parsons Const Corp v City of New York, 298 NYS 276, 163 Misc. 932

### Evidence

(1) Held to establish that rates to be charged by municipal water plant as fixed by resolution and ordinance of city council were reasonable—P J Ritter Co v Mayor of City of

and a water rate ordinance must have reasonable standards<sup>86</sup> This rule is subject, however, to the qualification that a municipality is under no obligation to furnish service at less than cost,<sup>87</sup> and it does not apply where the municipality is authorized by statute to furnish water at such rates as may be fixed by agreement,<sup>88</sup> or where rates are required by statute to be sufficient to cover specified items of expense, such as the cost of constructing or acquiring the system, or of maintaining, repairing, or extending it,<sup>89</sup> although even under such a statute the powers of the municipality must not be abused or grossly misused<sup>90</sup> Likewise, a constitutional requirement of reasonable rates must be obeyed regardless of a bond ordinance requiring the city to charge and collect sufficient rates for water furnished to provide for all payments and reserve specified therein<sup>91</sup>

The rates should be made as low as is consistent with good business judgment,<sup>92</sup> but the rule as to reasonable rates does not contemplate rates sufficient only to maintain and operate the water system, so that the cost of erection of the original system and of any necessary additions must come from the general tax fund<sup>93</sup> The fact that a rate schedule promulgated by a water company has been judicially

held not unreasonable or confiscatory does not prevent a municipality, on taking over the water system, from increasing such rates<sup>94</sup> Where it is provided by statute that municipal water systems shall "as far as possible" be self-supporting, but that rates need not be charged which are unreasonably high, consideration is to be given to the justness and propriety, and the probable results, of fixing rates high enough to make the system self-supporting<sup>95</sup>

Fair return to a municipality should not exceed that allowed private concerns,<sup>96</sup> and may be less, as the municipal authorities decide<sup>97</sup>

The question of reasonableness of rates is ordinarily a question of fact<sup>98</sup> to be decided by the rate-making authority<sup>99</sup>

*Presumptions and burden of proof.* A municipal water rate ordinance is presumed to be reasonable and valid,<sup>1</sup> until the contrary is shown<sup>2</sup> Likewise, the rate charged to persons residing outside the city limits, as fixed by the lawful rate-fixing body, must be presumed to be reasonable, fair, and lawful,<sup>3</sup> and the city is entitled to rest on that presumption until some showing is made to the contrary<sup>4</sup>

A taxpayer asserting that the rates charged by a municipally owned utility are unreasonable has the

Bridgeton, 50 A 2d 1, 135 N J Law 22, affirmed 59 A 2d 422, 137 N J Law 279

(2) Held insufficient to support commission's finding that rates were unreasonable or discriminatory—State College Borough Authority v Pennsylvania Public Utility Commission, 31 A 2d 557, 152 Pa Super 363

**Surplus in debt service fund, excess of income**

Pa—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 144, affirmed 68 A 2d 458, 165 Pa Super 438

**Increase in rates to pay bond charges**  
Del—Rankin v Chester Municipal Authority, supra

**86. Miss—Almaras v City of Hattiesburg**, 180 So 392, 181 Miss 752

**Expense of changing plumbing**

Ordinance, which gave owner of apartment building containing thirteen apartments the option to install a meter for each apartment or to install a single meter and pay thirteen times the minimum charge for one apartment, was not invalid because it might be expensive for owner to change his plumbing so as to install multiple meters—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

**87. Pa—Consolidated Ice Co v City of Pittsburgh**, 118 A. 544, 274 Pa 558.

Free supply or nominal charge see supra § 283

**88. S C—Childs v City of Columbia**, 70 SE 296, 87 SC 566, 34 L R A, NS, 542

67 C J p 1242 note 31

Contracts between municipality and patrons as to rates in general see supra § 287 b (2)

**Increase pursuant to provision in trust deed**

Under statute authorizing cities to acquire waterworks and pay therefor by the issuance of certificates of indebtedness payable solely from the water fund, and to secure the payment of the certificates by mortgage or deed of trust containing provisions and conditions reasonably necessary fully to secure payment, the city had authority to insert in its trust deed a provision obligating it to increase rates to private consumers when necessary to pay the certificates, and had authority to increase the rates pursuant to such agreement—Connett v City of Jerseyville, CC A Ill, 96 F 2d 392

**89. Iowa—J W Edgerly & Co v City of Ottumwa**, 156 NW 388, 174 Iowa 205

**90. Iowa—Sloan v City of Cedar Rapids**, 142 NW 970, 161 Iowa 307

**91. Utah—Fjeldsted v Ogden City**, 28 P 2d 144, 83 Utah 278

**92. Iowa—Saltzman v City of Coun-**

cil Bluffs, 243 NW 161, 214 Iowa 1033

**93. S C—Simons v City Council of Charleston**, 187 SE 545, 181 SC 353

**94. Iowa—Sloan v City of Cedar Rapids**, 142 NW 970, 161 Iowa 307

**95. Cal—General Engineering & Dry Dock Co v East Bay Municipal Utility Dist**, 14 P 2d 828, 126 Cal App 349

**96. Pa—Shirk v City of Lancaster**, 169 A. 557, 313 Pa 158, 90 A L R 688

**97. Pa—Shirk v City of Lancaster**, supra.

**98. Md—Lewis v Mayor and City Council of Cumberland**, 54 A 2d 319, 189 Md 58

**99. Md—Lewis v Mayor and City Council of Cumberland**, supra

**1. Md—Lewis v Mayor and City Council of Cumberland**, supra

**2. Md—Lewis v Mayor and City Council of Cumberland**, supra

**3. Cal—Durant v City of Beverly Hills**, 102 P 2d 759, 39 Cal App 2d 133

Higher rates outside municipal boundaries as affecting uniformity see infra § 297 b

**4. Cal—Durant v City of Beverly Hills**, supra

buiden of proof as to the value of the water system<sup>5</sup>

*Water for resale* A resident of a municipality cannot complain of its refusal to furnish him, at the rate charged resident consumers, with water for resale to nonresidents<sup>6</sup>

### b. Rate Producing Profit or Surplus Revenue

Under most authorities, the fact that a municipal water system produces a profit does not show that the rates are unreasonable

Subject to any statutory restrictions as to the items which may be included or covered in water rates,<sup>7</sup> a municipal corporation operating a water system has authority to charge such rate for its service as to yield a fair profit, or revenue in excess of the cost of furnishing the service, if such rate is reasonably proportionate to the value of the service rendered,<sup>8</sup> and it is not precluded from charging a rate representing the reasonable value of the service by the fact that such rate produces a profit,<sup>9</sup> the mere fact that a profit is made not showing that the rate is unreasonable or excessive<sup>10</sup> Moreover, a municipality does not, by operating its water system for a time at cost, become bound to persist in such policy, but may at any time abandon it for a policy of charging rates which will produce

a profit or surplus revenue, subject always to the rule as to reasonableness<sup>11</sup>

In determining the amount of profit a municipality may receive, a rate base must be found,<sup>12</sup> which is the fair value of all the property used and useful in the business<sup>13</sup> Ordinarily, the purpose for which any profits are used is within the sound discretion of the municipal authorities,<sup>14</sup> and this discretion will not be interfered with unless it is abused<sup>15</sup>

On the other hand, it has been held that, since the primary purpose of a municipal waterworks is to provide adequate water and water service at reasonable charges,<sup>16</sup> revenue not needed to maintain the system will spell out a case of unreasonable water charges<sup>17</sup>

### c. Matters Considered

Numerous factors enter into the determination of the reasonableness of a municipality's water rates, including reproduction costs, operating expenses, depreciation, and the nature of the use by the consumer

It is only on a fair value of all the property used and useful in the business that the question of reasonable or oppressive rates charged by a municipality for water can be determined<sup>18</sup> The determination of the fair value of a municipality's water system must be made in the same manner as that

5 Pa.—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

6 NC—Fulghum v Town of Selma, 76 SE 2d 368, 238 NC 100  
Classification of rates as affecting nonresidents see *infra* § 297

7 Iowa—J W Edgerly & Co v City of Ottumwa, 156 NW 388, 171 Iowa 205  
67 C J p 1243 note 41

8 NJ—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 NJ Super 409

Pa.—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688  
SC—Simons v City Council of Charleston, 187 SE 545, 181 SC 353

Tenn.—Killion v City of Paris, 241 SW 2d 524, 192 Tenn 446  
67 C J p 1243 note 45

**Rates not limited by reasonable profit**

Pa.—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 144, affirmed 68 A 2d 458, 165 Pa Super 438

9 Ill.—Wagner v City of Rock Island, 34 NE 545, 146 Ill 139, 21 L R A 519

Tenn.—Killion v City of Paris, 241 SW 2d 524, 192 Tenn 446

"Water from a municipally owned plant, in theory at least, should come to the consumer without profit to the seller as such term is understood in the utility field, but such theory does not exclude the idea of profit"—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

**Court does not have power**, in fixing rates, to deprive municipality from making profit, though city should not make profits basis for manifestly unreasonable discrimination or preference in tax burdens—Shirk v City of Lancaster, *supra*

10. Pa.—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 144, affirmed 68 A 2d 458, 165 Pa Super 438

SC—**Corpus Juris cited in** Simons v City Council of Charleston, 187 SE 545, 547, 181 SC 353

Wash.—Twitchell v City of Spokane, 104 P 150, 55 Wash 86, 133 Am SR 1021, 24 L R A, NS, 290

11. Ill.—Wagner v City of Rock Island, 34 NE 545, 146 Ill 139, 21 L R A 519

12 Pa.—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

13 Pa.—Shirk v City of Lancaster, *supra*

14 Pa.—Shirk v City of Lancaster, *supra*

15 Pa.—Shirk v City of Lancaster, *supra*

16 NH—Chicopee Mfg Corp v Manchester Board of Water Com'rs, 81 A 2d 837, 97 NH 109

17 NH—Chicopee Mfg Corp v Manchester Board of Water Com'rs, *supra*

18 Pa.—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

### **Construction fund not expended**

No portion of a construction fund not expended because of material priorities imposed by the government, can be added to the rate base as representing the value of property used and useful in rendering the service—State College Borough Authority v Pennsylvania Public Utility Commission, 31 A 2d 557, 152 Pa Super 363

### **Segregation of property on basis of usage**

A borough authority should segregate property, for purposes of water rates, between various types of users and service within and outside borough limits on basis of "usage," which means consumption or quantity of service, not number of customers—State College Borough Authority v Pennsylvania Public Utility Commission, *supra*.

of a private corporation<sup>19</sup> In determining the reasonableness of rates, reproduction costs,<sup>20</sup> like historic costs<sup>21</sup> and actual costs,<sup>22</sup> are a relevant fact requiring consideration, but are not an exclusive test,<sup>23</sup> and the weight to be given to each of these factors is to be determined in the light of the facts of the particular case under consideration<sup>24</sup>

Coincidentally with the determination of the fair value of the property, the cost of operating the plant must be ascertained,<sup>25</sup> it includes all charges or expenses involved in the production, supply, and distribution of the water<sup>26</sup>

The depreciation of the system<sup>27</sup> and the cost of extending water mains<sup>28</sup> may be considered in de-

termining whether a particular rate is reasonably proportionate to the service rendered; and under a particular statutory provision as to price, cost has been held but one factor in fixing reasonable value<sup>29</sup>

The quantity of water used by each consumer is not the sole criterion of the reasonableness of the rate,<sup>30</sup> there must also be considered the nature of the use,<sup>31</sup> the benefit obtained therefrom,<sup>32</sup> the number of persons who want the water for such use,<sup>33</sup> and the effect of a certain method of determining prices on the revenues to be obtained by the municipality<sup>34</sup> and on the interests of property holders<sup>35</sup> Taxes paid to a municipality are not an

19 Pa—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

20 NJ—P J Ritter Co v Mayor of City of Bridgeton, 50 A 2d 1, 135 NJ Law 22, affirmed 59 A 2d 422, 137 NJ Law 279

21 NJ—P J Ritter Co v Mayor of City of Bridgeton, supra

22 NJ—P J Ritter Co v Mayor of City of Bridgeton, supra

#### Interest, amortization

The interest paid by participating municipalities during course of construction of a water project is a proper element to be considered in determining cost of the project, as a step in determining price to be charged a nonparticipating municipality for water, but latter should not be charged for the amount paid out to participating municipalities by way of amortization on their bonds—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 10 NJ Super 409

#### Reduction of bonded indebtedness

The cost of a water supply project, on which price of water sold to a nonparticipating municipality should be based, should not be reduced by amount by which participating municipalities have reduced the bonded indebtedness of the project—City of Bayonne v North Jersey Dist Water Supply Commission, supra

23 NJ—P J Ritter Co v Mayor of City of Bridgeton, 50 A 2d 1, 135 NJ Law 22, affirmed 59 A 2d 422, 137 NJ Law 279

24 NJ—P J Ritter Co v Mayor of City of Bridgeton, supra

25 Pa—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

26 Pa—Shirk v City of Lancaster, supra

This embraces, among other items, not only the salaries or wages of all persons employed directly by the city, but also a just portion of the salaries of elective officers whose time is en-

gaged in that business, such expenses as telephone, insurance, printing, stationery, etc., connected with supply and distribution must be given a place, and all taxes, whether on the plant as such or on any bonds that may be properly allocated as an indebtedness against the plant should be taken into consideration and allowed for—Shirk v City of Lancaster, supra

Interest paid on bonds, issued by borough authority for purchase of water supply properties from borough and construction of improvements, is not properly operating cost to be considered in fixing rates—State College Borough Authority v Pennsylvania Public Utility Commission, 31 A 2d 557, 152 Pa Super 363

#### Tax equivalent

The legislature is authorized to include a tax equivalent as an operating expense of a municipally owned water utility for rate-making purposes, under statute, a five hundred fifty thousand dollar tax equivalent was properly included in computing the operating expenses—Village of Fox Point v Public Service Commission, 7 NW 2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 NW 2d 574, 242 Wis 105 and Village of Whitefish Bay v Public Service Commission, 7 NW 2d 575, 242 Wis 106

#### Water for fire-fighting, hydrants

The statute relating to township water supplies authorizes township, in arriving at a reasonable price for water used for fire-fighting, to consider cost of hydrants, labor of attaching hydrants to main, interest over bond period on such items, replacements costs, and cost of effectively installing hydrants, including cost of larger mains, reservoirs, stand towers, special requirements, and other items—Fleming v Ferguson, 171 P 2d 274, 161 Kan 562

27 NJ—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 NJ Super 409

Pa—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

#### Depreciation charge held too small

A depreciation charge based on four per cent sinking fund method was too small, and two per cent rate would be nearer reality, with respect to annual depreciation which small borough could charge for rate purposes—Borough of Ambridge v Pennsylvania Public Utility Commission, 8 A 2d 429, 137 Pa Super 50

28 Wash—Twitchell v City of Spokane, 104 P 150, 55 Wash 86, 133 Am SR 1021, 24 L R A, NS, 290

29 NJ—City of Bayonne v North Jersey Dist Water Supply Commission, 105 A 2d 19, 30 NJ Super 409

30 Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

Mass—Ladd v City of Boston, 49 NE 627, 170 Mass 332, 40 L R A 171

31 Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

Mass—Ladd v City of Boston, 49 NE 627, 170 Mass 332, 40 L R A 171

32 Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

Mass—Ladd v City of Boston, 49 NE 627, 170 Mass 332, 40 L R A 171

33 Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

Mass—Ladd v City of Boston, 49 NE 627, 170 Mass 332, 40 L R A 171

34 Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

Mass—Ladd v City of Boston, 49 NE 627, 170 Mass 332, 40 L R A 171

35 Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

accurate measure of the reasonable charge that should be made for municipal water service,<sup>36</sup> and water service to a property is not to be measured solely by the value of the property served<sup>37</sup>

Rates which are sufficient to cover all operating expenses, repairs, and improvements, and interest on the cost of the water system, and to repay the purchase price in a period of twenty years, have been held so high as to be unreasonable,<sup>38</sup> but the imposition of rates sufficiently high to produce the necessary income to pay bonds issued to provide for a necessary extension of the municipal water system has been held not unreasonable,<sup>39</sup> and a municipality may be empowered by its charter to impose a rate sufficient to pay, as they mature, the certificates issued to pay the cost of the waterworks property purchased<sup>40</sup> So, if the municipal authorities decide not to make a profit, or to make a profit less than ordinary, fair return may properly include consideration of such items as debt service charge to the extent that the value of the property warrants,<sup>41</sup> a return may be allowed which will compensate the municipality for any debt service

charge on any funded debt the money from which was used directly or indirectly in building or improving the water system<sup>42</sup>

*The amounts voluntarily paid by other communities to a municipality for water is immaterial in determining whether the charge fixed by a commission for water taken by a particular community is arbitrary or capricious.*<sup>43</sup>

#### d. Judicial Review

Apart from statutory regulation, courts may pass on the reasonableness of a municipality's water rates, but will not interfere if discretion appears to have been reasonably exercised

The reasonableness of water rates fixed by a municipality is subject to judicial review at the suit, or on the complaint, of consumers,<sup>44</sup> the power of a court to pass on the reasonableness of charges made by a municipal waterworks, when not otherwise regulated by statute, is generally recognized<sup>45</sup> Reasonable discretion must be allowed the municipal officers charged with the duty of fixing rates, and unless the court can say from all the circumstances that the rate fixed is excessive and dispro-

Mass—Ladd v City of Boston, 49 N E 627, 170 Mass 332, 40 L R A 171

36 NH—Chicopee Mfg Corp v Manchester Board of Water Com'rs, 81 A 2d 837, 97 NH 109

37. NH—Chicopee Mfg Corp v Manchester Board of Water Com'rs, supra

#### Percentages of water charges and assessed valuation

Where water charges paid by plaintiffs for water service for private fire protection totaled twenty-five per cent of city's metered water charges, fact that property at which water was used was only twenty per cent of assessed valuation of city did not make the water charges unreasonable—Chicopee Mfg Corp v Manchester Board of Water Com'rs, supra

38. Idaho—Feil v City of Coeur d'Alene, 129 P 643, 23 Idaho 32, 43 L R A, N S, 1095

39. SC—Simons v City Council of Charleston, 187 SE 545, 181 SC 353

40. Fla—State v City of St Petersburg, 198 So 837, 145 Fla 206

41. Pa—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A L R 688

42. Pa—Shirk v. City of Lancaster, supra.

#### Allied indebtedness

This charge would include a portion of an allied indebtedness with which the water system is inseparably connected and which is necessary to the system's successful operation,

though such indebtedness, in addition, has in fact been devoted to other uses, such as a sewerage system—Shirk v City of Lancaster, supra

43 NY—City of Syracuse v Gibbs, 28 NE 2d 835, 283 NY 275

44. Ala—Bankhead v Town of Sul-  
ligent, 155 So 869, 229 Ala 45, 96  
A L R 1381

67 C J p 1243 note 39

Proceedings by consumers for relief against unreasonable rates of water companies see infra § 295 b  
Review of rates of water company, and relief against unreasonable rates see infra § 295 a

#### Absence of rate-making bodies

The courts have, at most, in the absence of administrative rate-making bodies, the power they had at common law with respect to unreasonable or unjustly discriminatory rates and the power to declare municipal ordinances unreasonable or arbitrary and therefore invalid exercises of delegated authority, which power resembles, in scope, statutory power of courts to review rate orders of Public Service Commission—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

#### Petition to determine reasonableness of rates dismissed

Pa—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 52

Petition for certiorari held defective Mass—Lucia v Water and Sewer Com'rs of Medford, 125 NE 2d 776

#### Bill challenging reasonableness of rates dismissed

Pa—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 73, exceptions dismissed 36 Del Co 144, affirmed 68 A 2d 458, 165 Pa Super 438.

#### Allegation raising question of fact

Pa—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 53

#### Joinder of individual members of authority as defendants

Pa—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 53

#### Supply to nonresidents

However, the relationship between city and consumers of city water outside of city limits was purely contractual, in absence of any obligation on part of city to furnish water, and therefore reasonableness or unreasonableness of rates was not subject to review by court in suit by parties affected to restrain enforcement of ordinance increasing rates, court could only determine whether city was complying with terms of contract—City of Phoenix v Kasun, 97 P 2d 210, 54 Ariz 470, 127 A L R 84

45. NH—Chicopee Mfg Corp. v Manchester Board of Water Com'rs, 81 A 2d 837, 97 NH 109

#### Jurisdiction of court of common pleas

Pa—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 53  
—Rankin v Chester Municipal Authority, Com Pl, 36 Del Co 52

portionate to the service rendered, their determination must stand,<sup>46</sup> the court will not interfere with the discretionary rights of the municipality as long as they appear to have been reasonably exercised<sup>47</sup> and no fraud or discretion is charged.<sup>48</sup> Accordingly, the action of a municipality in fixing or increasing rates is not reviewable in the absence of a showing that the new rates are unreasonable,<sup>49</sup> and changes should be proposed to the municipality, as the rate-making authority, and not to the court.<sup>50</sup>

The well-recognized procedure for review is by bill of injunction or by declaratory judgment proceedings wherein complainant offers to do equity.<sup>51</sup>

In a suit by a consumer for relief against rates charged by a municipal water system under an order of a public utility commission, the validity of a prior order of the commission fixing the wholesale rates to be paid by the municipality for water supplied to it, to be by it distributed through its system, is not open to consideration.<sup>52</sup>

*Laches* such as to bar the prosecution of a writ

of certiorari to review a resolution and ordinance fixing municipal water rates has been held not shown by particular proof adduced.<sup>53</sup>

## § 290. — Regulation by Public Utility Commission

Authorities differ as to whether, under the variously worded statutes, public utility commissions have power to regulate municipal water rates.

According to some authorities, the power to regulate rates for water supplied by municipally owned water systems is not conferred on a state public utility commission by constitutional or statutory provisions authorizing such commission to regulate the rates of public utilities,<sup>54</sup> except where it is provided otherwise.<sup>55</sup> There is, however, also authority, to the contrary, that a municipal corporation engaging in the business of supplying water to its inhabitants or the public is subject to the same constitutional and statutory provisions as to the manner of fixing reasonable rates as individuals and private corporations,<sup>56</sup> particularly where the

**46.** Wash—*Twitchell v City of Spokane*, 104 P 150, 55 Wash 86, 133 Am SR 1021, 24 L R A, NS, 290

### Reduction held not warranted

Evidence failed to establish past or probable future operation of municipal system at a substantial profit which would warrant an order reducing rates—*Lewis v Mayor and City Council of Cumberland*, 54 A 2d 319, 189 Md 58

**47.** Mo—*City of Maryville v Cushman*, 249 SW 2d 347, 363 Mo 87

### Arbitrary or illegal order or ordinance

If administrative order or municipal ordinance is unsupported by substantial evidence or in other respects arbitrary or contrary to law, it may be set aside, otherwise it will be sustained—*Lewis v Mayor and City Council of Cumberland*, 54 A 2d 319, 189 Md 58

**48.** Mo—*City of Maryville v Cushman*, 249 SW 2d 347, 363 Mo 87

**49.** US—*Cudahy Packing Co v City of Omaha*, CCA Neb, 24 F 2d 3, certiorari denied 49 S Ct 9, 278 US 601, 73 L Ed 530

**50.** Md—*Lewis v Mayor and City Council of Cumberland*, 54 A 2d 319, 189 Md 58

**51.** Ala—*Mitchell v City of Mobile*, 13 So 2d 664, 244 Ala 442

**52.** Wis—*J Greenebaum Tanning Co v Railroad Commission of Wisconsin*, 217 NW 282, 194 Wis 634

**53.** NJ—*P J Ritter Co v Mayor of City of Bridgeton*, 50 A 2d 1, 135 NJ Law 22, affirmed 59 A 2d 422, 137 NJ Law 279

**54.** Cal—*Durant v City of Beverly Hills*, 102 P 2d 759, 39 Cal App 2d 133.

Ga—*Georgia Public Service Commission v City of Albany*, 179 SE 369, 180 Ga 355

67 C J p 1243 note 50

Regulation by commission of rates of water companies see *infra* § 296

"With an exception not applicable the Public Service Commission has no power over municipal water rates"—*Lewis v Mayor and City Council of Cumberland*, 54 A 2d 319, 323, 189 Md 58

**Municipalities held not within commission's supervision under statute**—*Hall v Village of Swanton*, 35 A 2d 381, 113 Vt 424

**City of New York** held not subject, as a water company, to Public Service Commission, with respect to power to fix water rates—*Franc v Davidson*, 278 N Y S 559, 155 Misc 382

### Publication of rates without commission's approval

Under statute, municipal water works board may legally publish rates for sale of water without obtaining the approval of state public service commission of such rates—*Water Works Board of City of Mobile v City of Mobile*, 43 So 2d 409, 253 Ala 158

**55.** Wis—*Pabst Corporation v City of Milwaukee*, 208 NW 493, 190 Wis 349, 45 ALR 1164  
67 C J p 1243 note 51

**Rates for service beyond city limits**  
Ky—*City of Covington v Sohio Petroleum Co*, 279 SW 2d 746  
Pa—*White Oak Borough Authority*

*v Pennsylvania Public Utility Commission*, 103 A 2d 502, 175 Pa Super 114—*City of Allentown v Public Utility Commission*, Com Pl, 64 Dauph Co 126

### Duty to file rate schedule

Wis—*City of Milwaukee v City of West Allis*, 294 NW 625, 236 Wis 371, certiorari denied 61 S Ct 941, 313 US 567, 85 L Ed 1525—*City of Milwaukee v City of West Allis*, 258 NW 851, 217 Wis 614

**Charge for connection to mains** held subject to review by commission for determination whether the charge was reasonable and just—*City of De Pere v Public Service Commission*, 63 NW 2d 764, 266 Wis 319

**56.** Idaho—*Feil v City of Coeur d'Alene*, 129 P 643, 23 Idaho 32, 43 L R A, NS, 1095

### Statute held valid

Provision of Revenue Bond Act with respect to appointment of receiver for municipally-owned utility was held not invalid as interfering with constitutional rate-making power of commission, as applied to part of projected water system which town proposed to operate outside its corporate limits—*Crandall v Town of Safford*, 56 P 2d 660, 47 Ariz 402

### Effect of contract; repeal of charter provision

(1) Under Public Service Law, commission cannot fix rates for public use where municipality has contract with waterworks company, but if municipality has no such contract, commission can conduct investigation and fix rate on written complaint, provisions of law vesting in commis-

municipality is selling water for profit,<sup>57</sup> and except where municipalities or water systems owned by them are in terms excepted from the operation of such provisions<sup>58</sup>

The determination, by a commission, as to the rates which a municipality is entitled to charge is conclusive on the courts, where such determination is fully sustained by the evidence<sup>59</sup> In its order fixing rates, a commission cannot require a municipality to carry out a provision of its contract with a water company to reimburse the company for taxes assessed by the municipality<sup>60</sup>

In a proceeding before a commission for the reduction of the rates charged to consumers outside the municipality, it is the duty of the commission, as the agency of the legislature, to carry out the legislative policy, expressed in a statute, of protecting the bondholders of municipal authorities<sup>61</sup> Where such proceeding is on the ground that the

rates are unjust, unreasonable, and discriminatory, the burden of proving the reasonableness of the rates is on the municipality, in the absence of compliance by it with the statutory requirements as to filing, and subscribing to, tariffs<sup>62</sup> The provisions of an ordinance authorizing the issuance of water revenue bonds for the extension of a city water-works system are subject to any authority vested in the public service commission as to rates<sup>63</sup>

*Quasi-municipal corporations*, such as a fire district,<sup>64</sup> a water district,<sup>65</sup> and a water authority<sup>66</sup> are subject to regulation by a public utility commission or officer, as to their rates, under general statutes authorizing such commission or officer to regulate the rates of public utilities, where not specifically excepted therefrom

*Notice of change of rate or classification.* A city subject to the power of a public service commission to regulate rates cannot change an established

sion jurisdiction over rates of water companies were held to repeal prior charter provision authorizing city commissioner of water supply to exercise superintendence, regulation, and control in respect of rates of water companies, to extent of vesting in commission the fixing of rates between city and water companies, in absence of contract—City of New York v Maltbie, 8 NE2d 289, 274 NY 90

(2) Contracts between municipalities and water companies as to rates generally see supra § 287 a

#### Effect of statute as to filing rates

Section of law providing that municipality had power to require companies to file and keep open to public inspection schedules of all rates to be charged and contracts relating thereto, does not indicate that rights of municipality to fix rates were not affected by commission's power—City of New York v Maltbie, 289 NY 562, 248 App Div 39, affirmed City of New York v Maltbie, 8 NE 2d 289, 274 NY 90

#### Ordinance as to rates for nonresidents held invalid

Ky—City of Covington v Sohio Petroleum Co., 279 SW 2d 746

57. W Va.—City of Wheeling v Benwood-McMehen Water Co., 176 SE 231, 115 W Va 353

58. Or.—Gates v Public Service Commission of Oregon, 167 P 791, 168 P 939, 86 Or 442

67 C J p 1243 note 53

**Statute held not to deprive commission of jurisdiction** to revise rates to be charged by municipality for water under contract executed prior to April 1, 1907, where rate prescribed by contract was claimed to be un-

reasonable—City of Milwaukee v Railroad Commission of Wisconsin, 258 NW 854, 217 Wis 606

#### Statute repealed by implication

Statute authorizing municipality to fix rates for water furnished to any purchaser outside municipality was held to repeal, by implication, prior statute authorizing Public Service Commission to fix prices for water so sold by municipality and to give city exclusive jurisdiction over such rates—State ex rel West Side Imp Club v Department of Public Service of Washington, 58 P 2d 350, 186 Wash 378

#### Supplying water outside corporate limits

City's statutory exemption from regulation of commission as to rates charged and service rendered by it in furnishing water to its citizens ceased when it supplied water to patrons outside its corporate limits—Louisville Water Co v Preston St Road Water Dist No 1, Ky, 256 SW 2d 26

59. NY—City of Syracuse v Gibbs, 28 NE 2d 835, 283 NY 275

60. Me—Milo Water Co v Inhabitants of Town of Milo, 173 A 152, 133 Me 4

#### Order contingent on remission of taxes

Where commission implied, in ordering increase in rates, that continuance of order was contingent on town's remission of taxes to company as provided in contract, and subsequently made order increasing rates to compensate company for tax assessment, company could not recover increased rates for period preceding time when subsequent order became operative, where company did not ex-

cept to subsequent order, since contract was abrogated by parties' conduct and commission's orders—Milo Water Co v Inhabitants of Town of Milo, supra

61. Pa—State College Borough Authority v Pennsylvania Public Utility Commission, 31 A 2d 557, 152 Pa Super 363

#### Additional allowance to meet obligations

Where reasonable return, based on proper water rates and allowable operating costs, as determined by commission, would be inadequate to enable authority to meet its obligations to its bondholders or seriously jeopardize security of bonds, additional allowance should be made, and consumers outside borough limits should be required to carry proper share of burden—State College Borough Authority v Pennsylvania Public Utility Commission, supra

62. Pa—State College Borough Authority v Pennsylvania Public Utility Commission, supra

63. Mo—City of Lebanon v Schneider, 163 SW 2d 588, 349 Mo 712

64. RI—East Providence Water Co v. Public Utilities Commission, 128 A 556, 46 RI 458

65. Philippine—Metropolitan Water District v Public Utility Commission, 46 Philippine 412

Water districts in general see supra §§ 243 (1)–243 (9)

66. RI—Kennelly v Kent County Water Authority, 89 A 2d 188, 79 RI 376

#### Filing rates with utility administrator required

RI—Kennelly v Kent County Water Authority, supra

rate or classification except after the required statutory notice to the commission and the public<sup>67</sup>

*Setting aside order, party in interest* An order of the Public Service Commission determining the rates for a municipally-owned water utility is prima facie lawful,<sup>68</sup> and the burden of showing unlawfulness is on the party seeking to set aside the order.<sup>69</sup> The fact that a city sells water to another city does not make the former a party in interest so as to entitle it to maintain an action to set aside an order of the Public Service Commission fixing the rates to be charged by the latter city in extending its services.<sup>70</sup>

*On appeal* from a commission's order to reduce the rates charged by a municipal authority to consumers outside the municipality, the court is bound to consider the question whether the commission had jurisdiction to regulate and control the rates, whether or not the question was raised before the commission.<sup>71</sup>

## § 291. Propriety and Regulation of Rates of Water Companies

An ordinance regulating a water company's charges must fix the rates with certainty and definiteness

A municipal ordinance regulating the charges to

be made by a water company must fix the rates with certainty and definiteness<sup>72</sup>

## § 292. — Power to Regulate Rates

- a In general
- b Power of municipality

### a In General

Water companies' rates are subject to regulation by the state or any agency to which it has lawfully delegated the power of regulation

The business of supplying the public with water is one impressed with a public use,<sup>73</sup> and the rates to be charged by companies and persons engaged in public water service are subject to regulation under the police power of the state,<sup>74</sup> a water company can lawfully charge no higher rates than those duly established by public authority.<sup>75</sup> The right to establish and regulate the charges to be made for public water service belongs to the state,<sup>76</sup> and can be exercised only by it or by some agency to which it has lawfully delegated such power.<sup>77</sup> The state may delegate its power to municipal corporations, as to the rates of water companies operating within their respective limits,<sup>78</sup> but a statute attempting to confer such power on the courts is unconstitutional, as providing for the exercise by the judicial

67 W Va.—City of Wheeling v Benwood-McMeehan Water Co, 176 S E 234, 115 W Va 353

68 Wis.—Village of Fox Point v Public Service Commission, 7 NW 2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 NW 2d 574, 242 Wis 105, and Village of Whitefish Bay v Public Service Commission, 7 NW 2d 575, 242 Wis 106

69 Wis.—Village of Fox Point v Public Service Commission, 7 NW 2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 NW 2d 574, 242 Wis 105, and Village of Whitefish Bay v Public Service Commission, 7 NW 2d 575, 242 Wis 106

70 Wis.—City of Milwaukee v Public Service Commission, 11 NW 2d 643, 244 Wis 73, rehearing denied 12 NW 2d 606, 244 Wis 73

71 Pa.—State College Borough Authority v Pennsylvania Public Utility Commission, 31 A 2d 557, 152 Pa Super 363

72 Cal.—San Francisco Pioneer Woolen Factory v Brickwedel, 60 Cal 166, 9 P CLJ 136

### Average price in other cities

A requirement that the company shall furnish water at the average price paid therefor in other cities of the United States having efficient wa-

terworks operated by private companies is not sufficiently certain Colo.—Denver v Denver Union Water Co, 91 P 918, 41 Colo 77

Iowa—Des Moines v Des Moines Waterworks Co, 64 NW 269, 95 Iowa 348

### "Domestic purpose;" "room"

An ordinance is not void for uncertainty because it fixes rates for "domestic purposes" without stating what constitutes a domestic purpose, or because it fixes the rate according to the number of rooms in the building supplied, without defining a "room"—Crosby v Montgomery, 18 So 723, 108 Ala 498

73. Mo.—State ex rel St Joseph Water Co v Geiger, 154 SW 486, 246 Mo 74, L R A 1916A 1060, certiorari dismissed 35 S Ct 208, 235 US 695, 59 L Ed 430  
67 C J p 1244 note 56

74. N J.—New Jersey Suburban Water Co v Town of Harrison, 1 A 2d 61, 120 NJ Law 546, reversed on other grounds 3 A 2d 623, 122 NJ Law 189

Pa.—Borough of Clarks Summit v Public Service Commission, 92 Pa Super 591

67 C J p 1244 note 58

Power of city water commissioner to fix water rates see Municipal Corporations § 635 a

Water company as public utility see supra § 247

### Rates not limited to prior maximum charge

Where, after enactment of public utilities law, water company filed schedule which contained no mention of maximum charge allowance, but continued to make such charge until September 1, 1935, when company duly filed and placed in effect new rates, consumers were liable for water in accordance with new rates, which were not limited to the prior maximum charge—Eastport Water Co v Raye, 4 A 2d 841, 136 Me 175

75. N Y.—Pond v New Rochelle Water Co, 76 NE 211, 183 NY 330, 1 L R A, N S, 958, 5 Ann Cas 504  
67 C J p 1244 note 61

76. N J.—New Jersey Suburban Water Co v Town of Harrison, 1 A 2d 61, 120 NJ Law 546, reversed on other grounds 3 A 2d 623, 122 NJ Law 189  
67 C J p 1244 note 66

77. N Y.—New York Interurban Water Co v City of Mt Vernon, 180 NYS 304, 110 Misc 281  
Tex.—Ball v Texarkana Water Corporation, Civ App, 127 SW 1068

78. Ill.—City of Danville v Danville Water Co, 53 NE 118, 178 Ill 299, 69 Am SR 304  
67 C J p 1244 note 68  
Power of municipalities see infra subdivision b of this section



department of powers which belong to the legislative department,<sup>79</sup> and, in general, a court of equity has no power to prescribe water rates<sup>80</sup>

Even a provision in a water company's charter as to the rates which it may charge for its service may be modified or superseded,<sup>81</sup> and is superseded by subsequent general legislation providing for the regulation of rates<sup>82</sup>

*Continuing power; nonuser or abandonment* The power to regulate water rates is not exhausted by exercise, but is a continuing one, which may be exerted, from time to time, whenever necessary in the public interest<sup>83</sup>

*Nonuser of power* to regulate water rates is not an abandonment of it<sup>84</sup>

*Private water companies* The rates to be charged by private water companies, organized to furnish water merely to their own members or stockholders, are not subject to public regulation,<sup>85</sup> the power to fix rates by public authority depending on whether the company has devoted its property to public use<sup>86</sup> A state cannot entirely divest itself of, or abandon, its powers to regulate water rates<sup>87</sup>

## b. Power of Municipality

Apart from contract with a water company, a municipality has power to regulate such company's rates only where clearly given such power by statute

A municipal corporation has authority to regulate the rates to be charged by a public service water company for its service, where it is given such authority by statute,<sup>88</sup> except as it may have restricted its rights by contract<sup>89</sup> In the absence of statute, a municipality has no power to regulate water rates,<sup>90</sup> except as it may do so by contract with the company, as discussed supra § 287 a.

Such power is not to be implied, and cannot be exercised unless it is clearly and unmistakably granted by the state<sup>91</sup> Thus, a municipality is not given power to regulate rates by a general welfare clause in its charter or the statute under which it is organized,<sup>92</sup> or by a statute merely authorizing it to provide a water supply for its inhabitants, or to cause such supply to be provided,<sup>93</sup> or by a statute conferring on it power to regulate the measuring of water sold within its boundaries and to regulate and inspect water meters,<sup>94</sup> and a statute authorizing a municipality to contract for a water supply does not empower it to regulate or control rates for water service except by contract with the person or corporation furnishing the service<sup>95</sup>

79. U.S.—*Helena Water Co v City of Helena*, D.C. Ark., 277 F. 86

80. U.S.—*City of Pocatello v Murray*, C.C. Idaho, 173 F. 382

81. U.S.—*Spring Valley Water-Works v Schottler*, Cal., 4 S.Ct. 48, 110 U.S. 347, 28 L.Ed. 173 67 C.J. p. 1244 note 59

82. Pa.—*Borough of White Haven v Public Service Commission*, 80 Pa. Super. 536—*Staples v Public Service Commission*, 79 Pa. Super. 6

83. Ill.—*Rogers Park Water Co v Fergus*, 53 NE 363, 178 Ill. 571, affirmed 21 S.Ct. 490, 180 U.S. 624, 45 L.Ed. 702

84. Md.—*Yeatman v Towers*, 95 A. 158, 126 Md. 513

85. Cal.—*McFadden v Los Angeles County*, 16 P. 397, 74 Cal. 571

86. Cal.—*City of San Leandro v Railroad Commission*, 191 P. 1, 183 Cal. 229

87. Me.—*In re Guilford Water Co's Service Rates*, 108 A. 446, 118 Me. 367

88. Cal.—*Title Guaranty & Trust Co v Railroad Commission of California*, 142 P. 878, 168 Cal. 295, Ann. Cas. 1916A. 738 67 C.J. p. 1245 note 74

**Ordinance held not invalid as leaving rates indefinite**  
An ordinance fixing water rates

and giving every householder the option to require a meter on his premises, to be placed there by the water company, at its expense, and to pay for the water furnished at rates different from the house rate, is not invalid as leaving the rates indefinite or uncertain—*Spring Valley Water-Works v San Francisco*, 22 P. 910, 1046, 82 Cal. 286, 16 Am. S.R. 116, 6 L.R.A. 756

**Place of service of waterworks commission**

With respect to whether city council had jurisdiction, under statute, to revise rate at which municipal water plant furnished water to water company for distribution in other city, service rendered by waterworks commission was performed within first municipality, where water was delivered and measured at meter located within corporate limits—*North Little Rock Water Co v Waterworks Commission of City of Little Rock*, 136 S.W.2d 194, 199 Ark. 773

89. U.S.—*City of Owensboro v Owensboro Waterworks Co*, Ky., 24 S.Ct. 82, 191 U.S. 358, 48 L.Ed. 217 67 C.J. p. 1245 note 75

Contract with water company as to rates as binding on parties see supra § 287 a (2)

**Suspension of power for specified time**

The making of a municipal con-

tract to suspend for a specified time the power of the city to regulate the rates which a company shall collect from private consumers, in consideration of the construction and operation of waterworks, is not an unreasonable exercise of the power to contract therefor—*Omaha Water Co v Omaha, Neb.*, 147 F. 1, 77 C.C.A. 267, 12 L.R.A.N.S. 736, 8 Ann. Cas. 614, appeal dismissed 28 S.Ct. 262, 207 U.S. 584, 52 L.Ed. 351

90. Ga.—*Washington Water & Electric Co v Pope Mfg Co*, 167 SE 286, 176 Ga. 155 67 C.J. p. 1245 note 76

91. U.S.—*City of Winchester v Winchester Waterworks Co*, Ky., 40 S.Ct. 123, 251 U.S. 192, 64 L.Ed. 221 67 C.J. p. 1245 notes 78, 79

92. Pa.—*Schroeder v Scranton Gas & Water Co*, 20 Pa. Super. 255  
W.Va.—*Bluefield Waterworks & Improvement Co v City of Bluefield*, 70 SE 772, 69 W.Va. 1, 33 L.R.A., NS, 759

93. Tex.—*Ball v Texarkana Water Corporation*, Civ. App., 127 SW 1068 67 C.J. p. 1245 note 80

94. Pa.—*York Water Co v City of York*, 95 A. 396, 250 Pa. 115

95. Ga.—*Washington Water & Electric Co v Pope Mfg Co*, 167 SE 286, 176 Ga. 155

Under a statute conferring power to regulate the rates to be charged, a municipality may establish absolute rates, and is not limited to fixing maximum rates,<sup>96</sup> but it may establish rates for the future only, and is not empowered to make retroactive rates.<sup>97</sup> A municipal corporation's power to regulate water rates is not affected by the fact that it is itself a patron of the water company.<sup>98</sup>

**Annexation of territory** Where the territory of one municipality is annexed to another and larger one, the power of regulating water rates is thenceforth to be exercised by the larger municipality.<sup>99</sup>

**Control of state** A statute authorizing a municipal corporation to fix water rates is ordinarily of the nature of a license, revocable at will, and does not amount to a surrender of the state's power to regulate such rates,<sup>1</sup> and so a municipality has no power to fix rates inviolably, and free from the control of the legislature, at least where such power has not been clearly and expressly conferred on it by statute.<sup>2</sup>

**Delegation of power.** Statutory authority conferred on a municipal corporation to regulate rates for water service is a purely legislative function,<sup>3</sup> and cannot be delegated by the legislative body of the municipality to a municipal officer or a commission.<sup>4</sup>

## § 293. — Reasonableness of Rates

- a In general
- b Matters considered
- c Change of rates
- d Presumptions and burden of proof

### a. In General

A water company is entitled only to such rates as will give it a fair and reasonable return on its property devoted to the public service. The rates must not be so low as to be confiscatory or so high as to exceed the value of the service to consumers.

Ultimate conclusions as to the reasonableness of rates to be charged by a water company must be reached with due regard to their effect both on the company and on the public.<sup>5</sup> A public service water company is entitled to charge for its services such rates, and such only, as will give it a fair and reasonable return on its property devoted to the public service,<sup>6</sup> or a fair and just compensation for the services which it renders,<sup>7</sup> while the public is entitled to demand that no more be exacted by the company than the services are reasonably worth.<sup>8</sup> Rates established by public authority, under the power of regulation, must be reasonable, compensatory, and nonconfiscatory,<sup>9</sup> and cannot be arbitrarily established or made unreasonably low,<sup>10</sup> but must be such as, after due allowance is made for depreciation, upkeep, and legitimate operating expense, will afford a fair return to the company.<sup>11</sup>

96. Tex.—Community Natural Gas Co v Natural Gas & Fuel Co, Civ App, 34 S W 2d 900

97. NJ.—Federal Shipbuilding & Dry Dock Co v City of Bayonne, 141 A 455, 102 N J Eq 475, affirmed 144 A 918, 104 N J Eq 196

98. US.—Spring Valley Water-Works v Bartlett, C C Cal, 16 F 615, 8 Sawy 555

Tenn.—Knoxville v Knoxville Water Co, 64 S W 1075, 107 Tenn 617, 61 L R A 888, affirmed 23 S Ct 531, 189 US 434, 47 L Ed 887

99. Ill.—Rogers Park Water Co v Fergus, 53 NE 363, 178 Ill 571, affirmed 21 S Ct 490, 180 US 624, 45 L Ed 702

1. Me.—In re Guilford Water Co's Service Rates, 108 A 446, 118 Me 367

2. W Va.—City of Benwood v Public Service Commission, 83 SE 295, 75 W Va 127, L R A 1915C 261

3. Mo.—State ex inf Barrett ex rel Callaghan v. Matland, 246 S W 267, 296 Mo. 338

4. Mo.—State ex inf Barrett ex rel Callaghan v Matland, supra  
NY.—Johnson-Kahn Co. v Thompson, 125 N.Y.S. 443, 68 Misc 639.

5. Conn.—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

6. US.—Beaver Val Water Co v Driscoll, D C Pa., 23 F Supp 795  
S C.—Simons v City Council of Charleston, 187 SE 545, 181 SC 353

67 C J p 1246 note 92

Determination of adequacy of return see infra subdivision b (1) of this section

"The [company] is entitled to a fair and reasonable return upon the fair and reasonable value of its property, and that is all to which it is entitled"—Indianapolis Water Co v McCart, D C Ind., 13 F Supp 110, 113, reversed on other grounds, C C A., 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct 324, 302 US 419, 82 L Ed 336

### Property necessarily employed

RI.—Town of Narragansett v Kennelly, 114 A 2d 393, reargument denied 115 A 2d 693

### Return on property used and useful

For rate-making purposes, company was entitled to earn a reasonable return on value of all property used and useful in providing service—New

Rochelle Water Co v Maltbie, 289 NYS 388, 248 App Div 66

7. NJ.—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

**Just compensation consists** in fair return on reasonable value of company's property useful and being used in service of public—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

8. Me.—Gay v Damariscotta-Newcastle Water Co, 162 A 264, 131 Me 304

67 C J p 1246 note 93

9. Va.—Roanoke Water Works Co v Commonwealth, 124 SE 652, 140 Va 144

67 C J p 1246 note 95

10. NY.—Silberberg v Citizens' Water Supply Co of Newtown, 190 NYS 349, 116 Misc 595

67 C J p 1246 note 96

11. Conn.—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

RI.—Town of Narragansett v. Ken-

and, on the other hand, must not be unreasonably high so as to produce an excessive profit to the company and inflict hardship upon the consumers<sup>12</sup> Thus, the rates must not be so low as to be confiscatory<sup>13</sup> or so high as to exceed the value of the service to the consumers<sup>14</sup> The company is not entitled to charge rates which, in addition to giving it a fair return, provide revenues sufficient to pay the cost of construction, acquisition, or extension of the system<sup>15</sup>

No satisfactory definition of "reasonable," as applied to rates, applicable to each case, can be made,<sup>16</sup> each case must be decided on its own facts,<sup>17</sup> and on a consideration of many varying elements<sup>18</sup> The nature and scope of the inquiry are such that the question of what constitutes a reasonable rate is primarily one of fact,<sup>19</sup> depending largely on the circumstances of the particular case<sup>20</sup>

Generally, the courts will not, at the instance of an individual consumer, interfere with the collection of rates fixed by legislative authority on the ground that such rates are excessive or unreasonable, if the rates charged are less than the maximum or within

the limits prescribed by the public authorities<sup>21</sup>

*Unit for rate-making* Normally, the unit for rate-making purposes would be the entire interconnected operating property used and useful for the convenience of the public in the territory served,<sup>22</sup> without regard to particular groups of consumers or local subdivisions,<sup>23</sup> but conditions may be such as to require or permit the fixing of a smaller unit<sup>24</sup>

## b. Matters Considered

(1) In general

(2) Value of company's properties

### (1) In General

In determining the reasonableness of a water company's rates, principles governing public utilities generally, with respect to such matters as going value, working capital, operating expenses, depreciation, and adequacy of return, apply.

In determining the reasonableness of rates to be charged by water companies for water service, there are to be applied the general principles applicable in the cases of other public utilities, as discussed in Public Utilities §§ 13-30, as to the rate base and the elements thereof<sup>25</sup> In fixing reasonable rates, it is

nelly, 114 A 2d 393, reargument denied 115 A 2d 693  
67 C J p 1246 note 97

12 Fla—State v Tampa Water Works Co, 47 So 358, 56 Fla 858, 19 L R A NS, 183  
67 C J p 1246 note 98

#### Evidence; increased rate

Evidence warranted decision of Board of Public Utility Commissioners that an increased rate for service furnished by a consolidated water company serving certain municipalities was reasonable—City of Long Branch v Board of Public Utility Com'rs, 24 A 2d 505, 128 N J Law 91

13. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

#### Temporary rate; effect of statute

The fact that the Public Utility Act authorizes a temporary larger rate than the final rate determined to recompense a utility for losses occasioned it by the establishment of a temporary rate less than the final did not alter the confiscatory nature of an order of the Public Service Commission for a rate base, where no assurance exists as to the length of time the temporary rate will be in effect, or that the present water consumers will remain such—Beaver Val Water Co v Driscoll, D C Pa, 23 F Supp 795

#### Effect of erroneous valuation of property

Even though value of property of company, as fixed by Public Service

Commission is erroneous, if revenue from schedule of rates fixed by commission is sufficient to constitute fair and reasonable return on actual value, commission's action in determining erroneous value does not constitute confiscation—Indianapolis Water Co v McCart, D C Ind, 13 F Supp 110, reversed on other grounds, C C A, 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct 324, 302 US 419, 82 L Ed 336

14 Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

15. US—Reno Power, Light & Water Co v Public Service Commission of Nevada, D C Nev, 300 F 645  
67 C J p 1246 note 99

16. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

17 Conn—City of New Haven v New Haven Water Co, supra  
67 C J p 1251 note 7 [a] (1)

#### Rates held not unlawful or unjust to complainant

Pa—Brown v Pennsylvania Public Utility Commission, 31 A 2d 435, 152 Pa Super 58

18. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

19 Conn—City of New Haven v New Haven Water Co, supra

20 Conn—City of New Haven v New Haven Water Co, supra

21 Miss—Womack v Peoples Water Service Co, 61 So 2d 785, 216 Miss 169

22 Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

23 Conn—City of New Haven v New Haven Water Co, supra

#### Business in two or more states

NH—Petition of Fryeburg Water Co, 115 A 2d 420, 99 NH 487

24 Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

NH—Petition of Fryeburg Water Co, 115 A 2d 420, 99 NH 487

25 RI—Public Utilities Commission v East Providence Water Co 136 A 447, 48 RI 376, reargument denied 137 A 387

67 C J p 1246 note 2, p 1247 note 3, p 1249 note 4, p 1250 notes 5, 6

#### Dividends on company's stock held improperly included

RI—Town of Narragansett v Kennelly, 114 A 2d 393, reargument denied 115 A 2d 693

#### Cost of plant disconnected from system

Evidence was held not to show that department acted arbitrarily when it refused to include in rate base the cost of company's plant which was disconnected from system after use of water from creek was condemned—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278

essential to take into consideration the principles applicable to going value,<sup>26</sup> working capital,<sup>27</sup> operating or other expenses of the company,<sup>28</sup> overhead cost items,<sup>29</sup> taxes,<sup>30</sup> the income of the company,<sup>31</sup> its past losses and profits,<sup>32</sup> the adequacy of

#### Nonproducing wells

Evidence was held not to show that department acted arbitrarily when it refused to include in rate base the cost of nonproducing wells which had been dug several years before hearing, and cost of which had been previously taken care of out of earnings of company—*State ex rel Winlock Water Co v Department of Public Works*, supra

#### Inflated or fictitious base not shown

In water rate proceeding before public utility administrator, evidence relied on by administrator did not show that rate base was inflated or fictitious, but sustained his rate order—*Town of Jamestown v Kennelly*, R I, 100 A 2d 649

26 US—*Indianapolis Water Co v McCart*, CCA Ind, 89 F 2d 522, modified on other grounds *McCart v Indianapolis Water Co*, 58 S Ct 324, 302 US 419, 82 L Ed 336

67 C J p 1250 note 5

#### Matter of judgment

The determination of "going concern value" is largely a matter of sound judgment—*Alexandria Water Co v City Council of Alexandria*, 177 SE 454, 163 Va 512

#### Finding of particular value sustained

Commissioner's finding that going concern value of company was sixty thousand dollars was held sustained by evidence—*Alexandria Water Co v City Council of Alexandria*, supra

#### Conjectural and arbitrary estimate

A water company's claim of value, for rate-making purposes, for the intangible element of good will or standing as a going concern, in addition to property value, will be disallowed, and is not entitled to adoption in any measure in determining rates, where going concern value is a conjectural estimate, arbitrary in character—*State v Hampton Water Works Co*, 18 A 2d 765, 91 NH 278, rehearing denied 19 A 2d 435, 91 NH 278

27 US—*McCardle v Indianapolis Water Co*, Ind, 47 S Ct 144, 272 US 400, 71 L Ed 316

67 C J p 1251 note 6

#### Allowance for cash or supplies

Public Utility Commission properly refused an allowance for cash working capital, but made allowance of working capital for materials and supplies—*City of Pittsburgh v Pennsylvania Public Utility Commission*, 101 A 2d 761, 174 Pa Super 363

#### Allowances held arbitrary and unreasonable

Allowances of Department of Public Works for capital invested in materials and supplies, and for cash

working capital, were held arbitrary and unreasonable—*State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington*, 51 P 2d 610, 184 Wash 451

28 Pa—*Beaver Val Water Co v Pennsylvania Public Utility Commission*, 14 A 2d 205, 140 Pa Super 297—*Scranton-Spring Brook Water Service Co v Public Service Commission*, 181 A 77, 119 Pa Super 117

67 C J p 1251 note 8

Company's report showing actual amount of expense in year should be considered by commission—*State v Hampton Water Works Co*, 18 A 2d 765, 91 NH 278, rehearing denied 19 A 2d 435, 91 NH 278

#### Undistributed construction costs

US—*Indianapolis Water Co v McCart*, CCA Ind, 89 F 2d 522, modified on other grounds *McCart v Indianapolis Water Co*, 58 S Ct 324, 302 US 419, 82 L Ed 336

#### Company engineer's statement held erroneously adopted

R I—*Town of Narragansett v Kennelly*, 114 A 2d 393, reargument denied 115 A 2d 693

#### Office salary expense

Finding of State Corporation Commission that office salary expense paid by company under management contract should be reduced by four thousand five hundred dollars a year was held not sustained by evidence—*Alexandria Water Co v City Council of Alexandria*, 177 SE 454, 163 Va 512

#### Municipal taxes

Commissioners properly reduced item of municipal taxes, included in company's operating expenses, in ratio which assessment on its used and useful property bore to total assessment—*New Jersey Suburban Water Co v Board of Public Utility Com'rs* 8 A 2d 350, 123 N J Law 303, certiorari denied *McGregor v Board of Public Utility Com'rs*, 60 S Ct 582, 309 US 663, 84 L Ed 1010

#### Expenses in rate case

Under statutory requirement, the expense of Public Service Commission in rate case should be charged to the company's operating expenses and amortized over such period as the commission should fix, company's rate case expenses should be amortized over a five-year period, in absence of evidence that another investigation would be had in five years, notwithstanding difficulty in determining reasonable allowance—*State v Hampton Water Works Co*, 18 A 2d

765, 91 NH 278, rehearing denied 19 A 2d 435, 91 NH 278

#### Finding upheld with exceptions

Finding of Department of Public Works as to future operating expenses and other proper deductions from gross revenue by disallowance of increased labor costs, costs for services of tax, sanitary, and other experts, failure of department to make sufficient allowance for taxes, elimination of certain items of general expense, and refusing to allow all of expense incurred in rate proceeding, held not error except that items of labor costs and taxes should be reexamined—*State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington*, 51 P 2d 610, 184 Wash 451

#### 29 Items included by company's engineers

Municipalities objecting to Public Service Commission's order fixing rates could not object to inclusion of overhead cost items included by their engineers as part of rate base—*Scranton-Spring Brook Water Service Co v Public Service Commission*, 181 A 77, 119 Pa Super 117

30 Pa—*Beaver Val Water Co v Pennsylvania Public Utility Commission*, 14 A 2d 205, 140 Pa Super 297

67 C J p 1251 note 8 [b]

31 Company's report showing actual amount of receipts in year should be considered by commission—*State v Hampton Water Works Co*, 18 A 2d 765, 91 NH 278, rehearing denied 19 A 2d 435, 91 NH 278

#### Acceptance of special master's figures

Company, declining to offer proof of its net income for first year under new rates promulgated by state Public Service Commission when given opportunity by special master before making his report of company's income applicable to return for such year, is in no position to complain of his finding, approved by district court, and circuit court of appeals will accept his figures—*Indianapolis Water Co v McCart*, CCA Ind, 89 F 2d 522, modified on other grounds *McCart v Indianapolis Water Co*, 58 S Ct 324, 302 US 419, 82 L Ed 336

32 US—*Bluefield Waterworks & Improvement Co v Public Service Commission of West Virginia*, W Va, 43 S Ct 675, 262 US 679, 67 L Ed 1176

67 C J p 1251 note 10

#### Overruled case

*Hackensack Water Co v Board of Public Utility Com'rs*, 119 A 84, 98 N J Law 41, affirmed 124 A 925, 100 N J Law 177, is expressly overruled

the return to the company,<sup>33</sup> and other matters affecting the reasonableness of the rates<sup>34</sup> Comparative rates in localities similarly situated have been held properly considered,<sup>35</sup> but evidence of rates prevailing in several neighboring communities is properly rejected where similarity of conditions does not appear and there is no evidence of improvident investment or any other evidence which would justify a comparison of rates<sup>36</sup>

In a proceeding to fix permanent rates, disputed questions as to the rate of return are questions of fact for a public service commission to determine from the evidence<sup>37</sup>

*Depreciation* of the company's property is a matter to be considered in determining the reasonableness of rates,<sup>38</sup> a water plant, with all its additions, begins to depreciate in value from the moment

—New Jersey Power & Light Co v State Dept of Public Utilities Board of Public Utility Com'rs, 104 A 2d 1, 15 NJ 82

33 Va—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512  
67 C J p 1252 note 11

**Return higher than bare cost of capital**

Rate of return of five and eighty-one hundredths per cent was not excessive, although higher than the bare cost of capital, which was found by commission to be five and thirty-eight hundredths per cent—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 761, 174 Pa Super 363

**Return held confiscatory and unreasonable**

(1) Less than four per cent of the present fair value of the company's property—Beaver Val Water Co v Driscoll, D C Pa., 23 F Supp 795—67 C J p 1252 note 11 [f] (4)

(2) Other rates of return—City and County of Denver v Denver Union Water Co, Colo., 78 S Ct 278, 246 US 178, 62 L Ed 649—67 C J p 1252 note 11 [f] (1)–(3), (5), (6)

**Return held not confiscatory or unreasonable**

(1) Four and eight tenths per cent on average of depreciated original and reproduction costs—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 403, 171 Pa Super 409

(2) Four and ninety-eight hundredths per cent—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

(3) Six per cent  
US—Indianapolis Water Co v McCart, CCA Ind., 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct 324, 302 US 419, 82 L Ed 336

NY—People ex rel Consol Water Co of Utica v Maltbie, 9 NE 2d 961, 275 NY 357, appeal dismissed  
People ex rel State of New York ex rel Consol Water Co of Utica, NY v Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 724  
67 C J p 1252 note 11 [g] (8)

(4) Evidence was held to show that return at rate of six and three-fourths per cent was fair and just

—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 NJ Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

(5) Finding of Department of Public Works that return of six and seventy-five hundredths per cent per annum for ensuing period of two or three years was reasonable was held not arbitrary—State ex rel Oregon—Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 610, 184 Wash 451

(6) Other rates of return—State ex rel City of St Joseph v Public Service Commission, 30 SW 2d 8, 325 Mo 209—67 C J p 1252 note 11 [g] (1)–(7), (9), (10)

**Six per cent held adequate**

US—Indianapolis Water Co v McCart, D C Ind., 13 F Supp 110, reversed on other grounds, CCA, 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct 324, 302 US 419, 82 L Ed 336

67 C J p 1252 note 11 [g] (8)

**Six per cent held justified**

Pa—Scanton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super 117

34 US—Middlesex Water Co v Board of Public Utility Commissioners of New Jersey, D C N J., 10 F 2d 519, appeal dismissed 48 S Ct 18, 275 US 483, 72 L Ed 385

67 C J p 1251 note 7

**Statutory requirement of water for fire protection**

Statute requiring companies to provide water adequate for proper fire protection was held not to prevent company from including cost of such service and reasonable return on property used and useful therefor in amount to be raised by rates charged—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

**Managerial and supervisory services by other company**

In setting a temporary rate base, the public Service Commission should have allowed some reasonable amount for managerial and supervisory services rendered the company by another water company, which owned all its

stock—Beaver Val Water Co v Driscoll, D C Pa., 23 F Supp 795

**Comparative cost as between group and individuals**

Calculations by company as to comparative cost of water furnished to industrial housing group supplied by manufacturer, who received water through single pipe, and individual consumers held unreasonable, in absence of consideration of fact that water consumed by group included fire protection and sewage disposal and that manufacturer bore expenses of distribution—Viscose Co v Public Service Commission, 187 A 454, 123 Pa Super 223

**Output charge; average use**

Where manufacturer received water through single pipe for housing group and distributed it through own pipes for domestic use, fire protection, and sewage disposal, water company's output charge, sought to be applied to average use of each building, family, or establishment supplied, held unreasonable as seeking to allocate to each dwelling unit, as part of domestic use, proportionate part of wholesale consumption of water used for fire protection and sewage disposal—Viscose Co v Public Service Commission, supra

35 NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 NJ Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

36 Pa—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409

37. NY—New Rochelle Water Co v Maltbie, 288 NY S 82, 158 Misc 752, reversed on other grounds 292 NY S 650, 249 App Div 378

38. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

Pa—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409—Beaver Val Water Co v Pennsylvania Public Utility Commission, 14 A 2d 205, 140 Pa Super 297

67 C J p 1249 note 4 [b], p 1251 note 9

Depreciation in connection with reproduction cost see *infra* subdivision b (2) (b) of this section.

of its use, so as to require reduction from its value for depreciation from such time, in fixing the water rate.<sup>39</sup> A depreciation reserve is an asset of the company,<sup>40</sup> and does not belong to the customers,<sup>41</sup> and if, by its use in maintenance, it adds to actual value, the addition inures to the benefit of the owners of the utility.<sup>42</sup> A company's actual depreciation reserve, found by the commission to be adequate and proper, should be applied in proportion to reproduction costs.<sup>43</sup> A public utilities commission, in fixing the rates to be charged by a water company, may properly allow an annual accrual for depreciation reserve for the replacement of worn-out units, notwithstanding a provision in the contract between the company and the municipality limiting the company to the amount necessary for current annual renewals, repair, and replacement of plant only.<sup>44</sup>

#### **Compound interest or straight line method**

(1) Whether compound interest method or straight line method of computing accrued depreciation should be used was a matter for the Public Utility Commission to decide, and its determination was essentially a matter of judgment, commission, in using compound interest method, properly considered result of application of that method as a guide merely, rather than as an absolute measure of accrued depreciation.—*City of Pittsburgh v Pennsylvania Public Utility Commission*, 101 A 2d 761, 174 Pa Super 363

(2) "Straight line method" is a calculation based on age and on the estimated assumed useful life of the elements entering into the property.—*State ex rel Winlock Water Co v Department of Public Works*, 39 P 2d 603, 180 Wash 278

(3) Commission's deduction for accrued depreciation of an amount twice as large as largest amount estimated by any witness was held arbitrary and confiscatory, where computation was on straight-line method, and was mere paper calculation unsupported by any proof.—*New Rochelle Water Co v Maltbie*, 289 N Y S 388, 248 App Div 66

#### **Replacement or reproduction cost as basis**

State Corporation Commission, in determining amount to be allowed as an expense item for annual depreciation, need not base estimate on present fair cost of replacement of the property or reproduction cost new.—*Alexandria Water Co v City Council of Alexandria*, 177 SE 454, 163 Va 512.

#### **Allowance held fair and reasonable**

(1) In general.—*Alexandria Water Co v City Council of Alexandria*, 177 SE 454, 163 Va 512

In a proceeding to fix permanent rates, disputed questions as to depreciation are questions of fact for a public service commission to determine from the evidence.<sup>45</sup>

#### **(2) Value of Company's Properties**

- (a) In general
- (b) Reproduction cost

##### **(a) In General**

In determining the reasonableness of a water company's rates, the value of its properties must be considered, the ascertainment thereof is not a matter of formulas but of reasonable judgment, based on the proper consideration of all relevant facts

In determining the reasonableness of the rates charged, or to be charged, by a water company, there must be considered the value of the company's physical and other properties<sup>46</sup> and the factors

(2) Finding that nature of the enterprise and other factors peculiar to it which produce strength and soundness of investment created an increase of value over value tested only by investment costs, with due adjustment for price changes in costs, was not inadequate as not making allowance for depreciation, though depreciation reserve was treated as an asset.—*State v Hampton Water Works Co*, 19 A 2d 435, 91 NH 278

#### **Determination held not reversible error**

Determination by commission of accrued depreciation by ascertaining expected life of items based on their past conditions of service, their present physical condition, and possibility of their continued usefulness in public service, and by following age-life method of computing allowances for depreciation of four per cent sinking fund basis was held not reversible error.—*Scranton-Spring Brook Water Service Co v Public Service Commission*, 181 A 77, 119 Pa Super 117

**Evidence was held to support reduction of eighty-three thousand three hundred fifteen dollars from value of company's property for depreciation at two per cent per annum for thirty-two years on basis of fifty-year life thereof by Board of Public Utility Commissioners**—*New Jersey Suburban Water Co v Board of Public Utility Com'rs*, 8 A 2d 350, 123 N J Law 303, certiorari denied *McGregor v Board of Public Utility Com'rs*, 60 S Ct 582, 309 US 663, 84 L Ed 1010

39. US—*City of Knoxville v Knoxville Water Co*, Tenn., 29 S Ct 148, 212 US 1, 53 L Ed 371

NJ—*New Jersey Suburban Water Co v Board of Public Utility Com'rs*, 8 A 2d 350, 123 N J Law 303, certiorari denied *McGregor v Board of Public Utility Com'rs*, 60 S Ct 582, 309 US 663, 84 L Ed 1010

#### **Burial of pipe**

This is especially true when practically all the pipe is buried in the ground, except for a short distance where it is above ground but submitted to locomotive gases.—*New Jersey Suburban Water Co v Board of Public Utility Com'rs*, 8 A 2d 350, 123 N J Law 303, certiorari denied *McGregor v Board of Public Utility Com'rs*, 60 S Ct 582, 309 US 663, 84 L Ed 1010

40. NH—*State v Hampton Water Works Co*, 19 A 2d 435, 91 NH 278

41. NH—*State v Hampton Water Works Co*, supra

42. NH—*State v Hampton Water Works Co*, supra

43. NH—*State v Hampton Water Works Co*, 18 A 2d 765, 91 NH 278, rehearing denied 19 A 2d 435, 91 NH 278

Reproduction cost generally see infra subdivision b (2) (b) of this section

44. Conn—*City of New Haven v New Haven Water Co*, 172 A 767, 118 Conn 389

45. N Y—*New Rochelle Water Co v Maltbie*, 288 N Y S 82, 158 Misc 752, reversed on other grounds 292 N Y S 650, 249 App Div 378

46. Pa—*Orlosky v Pennsylvania Public Utility Commission*, 89 A 2d 903, 171 Pa Super 409

67 C J p 1247 note 3

**Fair value as basic consideration**  
In determining reasonable and proper rates to be charged by company, basic consideration is fair value of its property useful and being used in service of public, as just compensation consists in fair return on such reasonable value

Conn—*City of New Haven v New Haven Water Co*, 172 A 767, 118 Conn 389

entering into the ascertainment or determination thereof,<sup>47</sup> including the original cost of construction,<sup>48</sup> the cost of additions to the physical plant

Wash—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 610, 184 Wash 451  
67 C J p 1246 note 2 [a]

**Value of property necessarily employed**

RI—Town of Narragansett v Kennelly, 114 A 2d 393, reargument denied 115 A 2d 693

**Present value**

(1) In setting a temporary rate base, the Public Service Commission erred in disregarding all evidence of the present value of the company's property and adopting as a rate base, solely and alone, an estimate of the original cost of certain of the company's property less depreciation—Beaver Val Water Co v Driscoll, D C Pa., 23 F Supp 795—67 C J p 1247 note 3 [a]

(2) In determining value of properties, any increase or decrease in values at time under consideration should be recognized in order to reach fair valuation, not only for moment, but for reasonably near future—Indianapolis Water Co v McCart, C C A Ind., 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

**Periods after determination of value**

Public Service Commission's determination of fair value of company's property for three consecutive periods after July 1, 1928, when value was determined, by applying to 1928 valuation the unit prices on labor and materials entering into construction of company's works prevailing during those periods held proper—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super 117.

**Value of water rights attaching to property acquired by company must be included in total value of its property for rate-making purposes**

US—Indianapolis Water Co v McCart, D C Ind., 13 F Supp 110, reversed on other grounds, C C A., 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

Wash—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 610, 184 Wash 451

**Main and pipe**

(1) A company is entitled only to fair and just return based on fair valuation of its main, with due regard to its excessive size and fair and just value of services rendered by company, even though it was obliged to use such main to serve only one of several customers originally served by it—New Jersey Suburban Water Co v. Board of Public Utility

Com'rs, 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

(2) Commission should not determine quantity of water pipe where engineers of company and of municipalities objecting to company's schedule of rates could not agree on quantity by accepting testimony of engineers to which there was no rebuttal testimony, but should arrive at correct figure by having its own engineering force go over measurements, if measurements were made by scaling maps, or if quantity could not be determined by scaling maps, by some other method—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super 117

**Money advanced by consumers for extensions**

A commission has no authority to deduct, from the value of the property used and useful in providing the service, the sums advanced by consumers for extensions, title to which is in the company—New Rochelle Water Co v Maltbie, 289 N Y S 388, 248 App Div 66

47. Pa—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409

67 C J p 1246 note 2, p 1248 note 4

**Value dependent on use and profitability**

(1) The value of company's plant for rate-making purposes depends on use and is measured, or at least significantly indicated, by profitability of present and prospective services which are just and reasonable as between owner of, and those served by, property—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

(2) Commissioners, in fixing base values for rate-making purpose, were justified in finding present value of only that portion of company's property which was used and useful, with respect to value of service rendered—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 4 A 2d 47, 123 N J Law 54, affirmed 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

**Price paid, cost of improvements or additions**

(1) The cost price of the property to the water company, although a relevant fact, is not an exclusive or final test of value of property, since the actual price paid may not have represented the fair value of the property—Town of Jamestown v Kennelly, R I., 100 A 2d 649

(2) Present value of property cannot be determined by addition of cost of improvements, or their value, to previously found value of property, since cost of additions is merely relevant and is not final test, original cost of property plus cost of additions, etc., which aggregate amount of investments, is not proper method of determining present value—Indianapolis Water Co v McCart, D C Ind., 13 F Supp 110, reversed on other grounds, C C A., 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

**Inadequacy or overadequacy**

Value of a plant or unit may be adversely affected by either inadequacy or overadequacy to meet present or reasonably probable future use thereof, even though it is rendering efficient service—Alexandria Water Co v City Council of Alexandria, 177 S E 454, 163 Va 512

**Distribution system; payment under contract**

Fact that city which obtained water at wholesale rates from company through distribution system owned by company made additional annual payments to company under contract did not render improper the inclusion in company's rate base of value of the distribution system—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 761, 174 Pa Super 363

**Receipt of assets from other company**

Evidence sustained commission's finding that item carried on company's books, as representative of assignment of assets received from another company, legitimately represented property transferred to company in exchange for stock, as against contention that item represented an illusory transfer because of the close relationship between the two companies—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409

48. Pa—Scranton-Spring Brook Water Service Co v Pennsylvania Public Utility Commission, 67 A 2d 735, 165 Pa Super 286

Wash—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278

**Determination in prior proceeding**

In fixing rate base in 1952, commission properly based its finding of original cost on determination made in prior rate proceeding in 1949, adding to that figure the cost of subsequent additions—City of Pittsburgh v Pennsylvania Public Utility Com-



as well as improvements and betterments,<sup>49</sup> a world-wide depression,<sup>50</sup> or a general, persistent rise in commodity prices during the period between the date on which the valuations of the company's properties were fixed, for rate-making purposes, by the state Public Service Commission and the date on which a federal court decree was entered sustaining the rates promulgated by the commission.<sup>51</sup> So, the judicial determination of the fact of value is usually of controlling importance on the question whether an order relating to rates constitutes a confiscation of the company's property.<sup>52</sup> Disputed questions as to values are questions of

fact for a public service commission to determine from the evidence, in a proceeding to fix permanent rates.<sup>53</sup> A decree determining the value of the company's property as of the date of the decree, although the evidence before the court related to an earlier date, is erroneous because it is without basis in the evidence.<sup>54</sup>

The ascertainment of the fair value of the property of a water company, as a basis for reasonable rates, is not a matter of formulas,<sup>55</sup> but of reasonable judgment,<sup>56</sup> having its basis in the proper consideration of all relevant facts.<sup>57</sup> So, in valuing

mission, 101 A 2d 761, 174 Pa Super 363

49. Wash—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278

#### Property in two states

NH—Petition of Fryeburg Water Co., 115 A 2d 420, 99 NH 487

50. Va—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

51. US—Indianapolis Water Co v McCart, CCA Ind., 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

#### Cause remanded for consideration of price trend

District court decree, sustaining rates promulgated by commission, must be reversed and cause remanded by circuit court of appeals, with direction to grant company relief prayed, where proper consideration of upward trend of prices since date as of which valuations of properties were fixed by commission would enhance value thereof so substantially as to render rates complained of clearly confiscatory—Indianapolis Water Co v McCart, CCA Ind., 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

52. NY—Consolidated Water Co of Utica v Maltbie, 3 NYS 2d 799, 167 Misc 269

53. NY—New Rochelle Water Co v Maltbie, 288 NYS 82, 158 Misc 752, reversed on other grounds 292 NYS 650, 249 App Div 378

54. US—McCart v Indianapolis Water Co, Ind., 58 S Ct 324, 302 US 419, 82 L Ed 336

55. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

Pa—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409—Borough of Ben Avon v Ohio Valley Water Co., 103 A 744, 260 Pa 289, reversed on other grounds 40 S Ct 527, 253 US 287, 64 L Ed 908

Va—Alexandria Water Co v City

Council of Alexandria, 177 SE 454, 163 Va 512

56. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

Pa—Borough of Ben Avon v Ohio Valley Water Co., 103 A 744, 260 Pa 289, reversed on other grounds 40 S Ct 527, 253 US 287, 64 L Ed 908

Va—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

**Material and supplies** to be included in inventory of physical property of company rests largely in judgment of department of public works—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278

57. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

Pa—Borough of Ben Avon v Ohio Valley Water Co., 103 A 744, 260 Pa 289, reversed on other grounds 40 S Ct 527, 253 US 287, 64 L Ed 908—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409

Va—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

Wash—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278  
67 C J p 1246 note 2 [c] (1)

#### Property not being used held improperly considered

RI—Town of Narragansett v Kennelly, 114 A 2d 393, reargument denied 115 A 2d 693

#### Value of stocks

General rule that aggregate market value of stocks and bonds of public utility may not be considered in determining fair value of its property for rate purposes held not to apply to purchase of all stock of water company at practically one time, where transaction was, in substance, a purchase of all the property and franchises of the utility, of which part of purchase price was paid by assumption of mortgage on the physical

properties—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

#### Payment by company of more than fair value

Finding of department of public works that company had paid more than fair value for system held sustained by evidence—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 613, 184 Wash 460

#### Purchase of company; deductible items

In order to use the purchase price paid for company to arrive at its value for rate purposes, there must be deducted, as items which cannot be included in rate base, value of right to be a corporation, franchise to occupy roads and streets, amount by which current assets exceeded current liabilities, plus working capital reasonably necessary, purchase price of lands, and other physical properties not used or useful held deductible as items which could not be included in rate base—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

#### Particular amounts; evidence

(1) Evidence held to sustain determination of commission of value of company's property used and useful in public service—People ex rel Consolidated Water Co of Utica v Maltbie, 9 NE 2d 961, 275 NY 357, appeal dismissed People of State of New York ex rel Consolidated Water Co of Utica, NY v Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 721

(2) Evidence held to show that fair value of company's property used and useful was one million three hundred fifty thousand dollars—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

(3) Evidence held to show that present value, as the rate base, was five hundred sixty thousand dollars—State v Hampton Water Works Co., 18 A 2d 765, 91 NH 278, rehearing denied 19 A 2d 435, 91 NH 278

(4) Evidence held to show that fair



a company's property for rate purposes, a public service commission is not required to adopt the lowest figures testified to by any witness for the company,<sup>58</sup> but should exercise its independent judgment<sup>59</sup>

The judgment of a court fixing a basic valuation of the company's property as of a certain date in the past, after a full consideration of the constitutional elements entering into such determination, and affirmed by the supreme judicial authority of the state, must be accepted and followed by a public service commission in fixing future rates,<sup>60</sup> the commission should start with such judgment, making the necessary deductions and additions to provide for intervening changes<sup>61</sup>

It is not feasible, practicable, or necessary for a public service commission, in determining the value of a company's plant, used and useful in the public service, to itemize and value every piece of pipe, fitting, and tract of land,<sup>62</sup> but a fair measure of

the value arrived at for an item of property can be applied to other items similarly placed and bearing a relation which justifies approximately the same valuation<sup>63</sup>

A commission's finding as to value is not res judicata,<sup>64</sup> and is subject to change<sup>65</sup>

*Issuance of stock; promoters' fees and expenses*  
A commission is not required to include, in base value, any allowance for the issuance of stock<sup>66</sup> or promoters' fees and expenses<sup>67</sup>

*The base price for common labor* should be fixed at the fair average rate for which labor is obtainable,<sup>68</sup> and not at the "distress" prices for which labor is sporadically obtainable during the extreme depth of the depression<sup>69</sup>

*Lands* The value of a water company's property, for rate-making purposes, includes the fair market value of lands for all of its available used and useful purposes,<sup>70</sup> including any peculiar value or

valuation of suburban company's property was one hundred thirty thousand one hundred eighty dollars, as fixed by order of Board of Public Utility Commissioners—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 532, 309 US 663, 84 L Ed 1010

(5) Evidence held not to show that department of public works acted arbitrarily when it fixed thirty-four thousand eight hundred dollars as fair value of property of company serving two hundred fifty-six customers in town—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278

(6) Fixing by department of public works of ninety thousand dollars as the fair value of all operating property held arbitrary—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 613, 184 Wash 460

(7) Valuation placed by the department of public works on company's operating property held not sustained by evidence—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 610, 184 Wash 451

(8) Evidence held to sustain determination by commission of value of company's property used and useful in public service, on which determination commission based orders requiring company to cancel its suspended tariff schedule and to put into effect new schedule reducing annual operating revenues one hundred twenty

thousand dollars below those for years 1930 and 1931—People ex rel Consolidated Water Co of Utica v Maltbie, 282 NYS 412, 245 App Div 866, affirmed 9 NE 2d 961, 275 NY 357, appeal dismissed People of State of New York ex rel Consolidated Water Co of Utica, N Y, v Maltbie, 58 S Ct 506

(9) Evidence held to sustain commission's finding as to depreciated original cost of company's property—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409

58 Pa.—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super 117

59. Pa.—Scranton-Spring Brook Water Service Co v Public Service Commission, supra

60. Pa.—Beaver Val Water Co v Pennsylvania Public Utility Commission, 14 A 2d 205, 140 Pa Super 297

61. Pa.—Beaver Val Water Co v Pennsylvania Public Utility Commission, supra

**Particular deductions and admissions**  
The commission should deduct, from the amount determined by the court, reasonable amounts because of retirements, depreciation, and obsolescence, should add thereto the fair and reasonable cost or value of additions, improvements, and betterments, and should consider any distinct trend or change in basic prices since rendition of the judgment—Beaver Val Water Co v Pennsylvania Public Utility Commission, supra

62 Pa.—Scranton-Spring Brook Water Service Co v Public Service

Commission, 181 A 77, 119 Pa Super 117

63 Pa.—Scranton-Spring Brook Water Service Co v Public Service Commission, supra

64. U S.—Indianapolis Water Co v McCart, D C Ind, 13 F Supp 110, reversed on other grounds, CCA, 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct 324, 302 US 419, 82 L Ed 336

65 Pa.—Beaver Val Water Co v Pennsylvania Public Utility Commission, 14 A 2d 205, 140 Pa Super 297

66 N Y.—New Rochelle Water Co v Maltbie, 289 NYS 388, 248 App Div 66

67 N Y.—New Rochelle Water Co v Maltbie, supra

68 Pa.—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super 117

69. Pa.—Scranton-Spring Brook Water Service Co v Public Service Commission, supra

70. Pa.—Scranton-Spring Brook Water Service Co v Public Service Commission, supra

**Farm lands** bought to preserve water supply from contamination and thereafter devoted to woodland should be valued as improved or tillable lands, and not as "raw" lands—Scranton-Spring Brook Water Service Co v Public Service Commission, supra

**Allowance for reforestation**

Company held not entitled to allowance for reforestation of lands bought to preserve water supply, where reforestation was included in

special adaptation that it may have for water supply purposes<sup>71</sup> Other decisions as to lands of water companies as property, for rate-making purposes, are summarized in the note<sup>72</sup>

### (b) Reproduction Cost

**Reproduction cost must be considered in determining**

determination of real estate values—Scranton-Spring Brook Water Service Co v Public Service Commission, *supra*

71. Pa—Scranton-Spring Brook Water Service Co v Public Service Commission, *supra*

#### Combination of separate tracts

Fair market value of lands did not include added value supposed to result from combining separate tracts purchased for water supply purposes into one and operating unit as a whole—Scranton-Spring Brook Water Service Co v Public Service Commission, *supra*

#### 72 Land purchased for future needs

Value of land, providently purchased in good faith by company to establish reservoir for future water needs and reasonably useful for its business, should have been included in valuation of its property by Public Service Commission, even though depression retarded consumption of water and completion of project, time and manner of bringing land into active use being for owners thereof to determine—Indianapolis Water Co v McCart, CCA Ind., 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

#### Tract adjacent to water supply

For rate-making purposes, value of entire tract adjacent to canal and bounded on north, west, and south sides by river constituting source of water supply held required to be included in value of company's property, where, if strip of two hundred feet only was used for means of access to canal, owner of balance would be deprived of ingress or egress, except by water or across strip—Indianapolis Water Co v McCart, D C Ind., 13 F Supp 110, reversed on other grounds, CCA, 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

#### Computation of engineering and construction costs

In determining value of property of company, inclusion of realty when computing costs of "engineering and supervision" and "interest during construction" held not error, since engineering assistance is needed to determine necessity or advisability of securing lands for purposes of water plant and proper layout of system, and money must be expended in purchase of lands before any works or impounding and distribution systems

the fair value of a company's property, but it is not a conclusive or exclusive test, or the sole criterion, and its weight must be determined in the light of the facts of the particular case

The cost of reproduction is relevant, and must be given consideration, in determining the fair value of a water company's property,<sup>73</sup> but such cost is not a conclusive<sup>74</sup> or exclusive test in determin-

can be started—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super 117

73 US—Indianapolis Water Co v McCart, D C Ind., 13 F Supp 110, reversed on other grounds, CCA, 89 F 2d 522, modified on other grounds 58 S Ct 324, 302 US 419, 82 L Ed 336

NH—State v Hampton Water Works Co, 19 A 2d 435, 91 NH 278

NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

Pa—Olosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409

Wash—State ex rel Winlock Water Co v Department of Public Works, 39 P 2d 603, 180 Wash 278 67 C J p 1249 note 4 [a]

#### Production of substantially similar system

Estimate of cost of reproduction of company's plant and property by use of materials and methods which would produce a system substantially, if not exactly, similar furnished a criterion of value which was not unreasonable—People ex rel Consol Water Co of Utica v Maltbie, 9 NE 2d 961, 275 NY 357, appeal dismissed People of State of New York ex rel Consol Water Co of Utica, N Y v Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 724

#### Period for averaging prices

In fixing rate base in 1952, commission properly computed reproduction cost on basis of average prices from 1947 through 1951 rather than basing estimates on ten-year average prices—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 761, 174 Pa Super 363

Modern inventions apart from modern conditions could not be applied to reproduction of company's plant, with respect to valuation—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A 77, 119 Pa Super. 117

#### Allowance for overheads

(1) In proceeding to determine legality of proposed rates, weight of evidence on amount of overhead charges to be included in reproduction cost was for Public Utility Com-

mission—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 761, 174 Pa Super 363

(2) In considering allowances for general overheads in arriving at reproduction cost, certain administrative, legal, engineering, and supervision costs, and interest on money expended in acquisition and construction until property is usable are as much a part of cost of producing or reproducing a property as is the cost of labor and materials, and in estimating cost of producing or reproducing a property, the sums added to labor and material costs and to present value of land for general overheads should be determined in same general manner, with neither more nor less stringency, as labor and material costs—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

(3) Preliminary and organization expense relating to organization and establishment of company and cost of acquisition of business, and administrative and legal expenses not directly connected with cost of acquisition of land or acquisition or construction of other physical properties, may be amortized over a period of years, but should not be capitalized or carried into a rate base—Alexandria Water Co v City Council of Alexandria, *supra*

(4) Reasonable allowance should be made for cost of overlooked items, but no allowance should be made in respect of present value of land, although some allowance is proper, in some circumstances, for contingencies and omissions in the amount added to present land value for engineering, supervision, interest during construction, and administrative and legal costs incident to acquisition and development for use—Alexandria Water Co v City Council of Alexandria, *supra*

(5) Allowance by commission of thirteen and ninety-one hundredths per cent of stipulated undepreciated reproduction cost of physical properties, for general overheads, held sustained by evidence—Alexandria Water Co v City Council of Alexandria, *supra*

74. NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed. 1010

ing the present fair value of the plant for rate-making purposes,<sup>75</sup> or the sole criterion on the issue of value,<sup>76</sup> and the weight thereof must be determined in the light of the facts of the particular case.<sup>77</sup> It is not necessary that reproduction costs be studied in the light of the fact that the necessity of complete reproduction of the plant as a result of physical deterioration, obsolescence, or major disaster, is improbable.<sup>78</sup>

Estimates of costs of reproduction new less depreciation are at best, to a material extent, conjectural.<sup>79</sup> In making a study of the cost of reproduction new, less depreciation, of a property, the depreciation to be ascertained is depreciation in value whatever the cause to which it may be due,<sup>80</sup> while observable physical deterioration is always an important factor in determining accrued depreciation,<sup>81</sup> due weight should also be given to every other existing factor which has the effect of re-

ducing the present fair value of the property below its reproduction new cost.<sup>82</sup>

The fact that a plant or a unit thereof is not well adapted to, or is inappropriate for, its present use or its future use which is reasonably to be anticipated tends materially to reduce its value below its reproduction new cost.<sup>83</sup>

### c. Change of Rates

A water company's rates may require revision in consequence of changing circumstances and conditions.

A company's water rate which, when fixed, is just and reasonable may become unreasonable, and require revision, in consequence of changing circumstances and conditions, even within a short time.<sup>84</sup> A company is not entitled to an increase of rates, however, because conditions have changed to its detriment, where such change was due to its own voluntary acts.<sup>85</sup>

### Cost not synonymous with fair value

The fair value of the property is not necessarily synonymous with reconstruction cost depreciated, especially where the reconstruction cost is based on abnormally low prices—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, 51 P 2d 610, 184 Wash 451.

### Denial of benefits of returning prosperity

Rates should not be based on reconstruction costs where to do so would be to deny to the company all of the benefits of returning prosperity generally believed to be at hand—State ex rel Oregon-Washington Water Service Co v Department of Public Works of Washington, supra.

75. NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 NJ Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010.

76. NH—State v Hampton Water Works Co, 19 A 2d 135, 91 NH 278.

77. NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 NJ Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010.

### Preponderant weight over book value

Commission did not err in giving preponderant weight to cost of reproduction less depreciation over "historical value," or "book value," which was cost of property to company which acquired assets of ex-

isting corporation in exchange for capital stocks and bonds—People ex rel Consol Water Co of Utica v Maltbie, 9 NE 2d 961, 275 NY 357, appeal dismissed People of State of New York ex rel Consol Water Co of Utica, N Y v Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 724.

78. Pa—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super 409.

79. Va—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512.

Evidence held to sustain commission's finding as to depreciated reproduction cost—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 403, 171 Pa Super 409.

80. Va—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512.

Depreciation of company's property generally see supra subdivision b (1) of this section.

### Finding held too large

State corporation commission's finding that accrued depreciation amounted to three hundred sixty-five thousand seven hundred forty-six dollars, or a composite depreciation of twenty-four and seven tenths per cent of reproduction cost new, including overheads, held approximately fifty thousand six hundred dollars too large—Alexandria Water Co v City Council of Alexandria, supra.

81. Va—Alexandria Water Co v City Council of Alexandria, supra.

82. Va—Alexandria Water Co v City Council of Alexandria, supra.

### Particular factors

In this connection, depreciation is the loss, not restored by current maintenance, which is due to all the

factors causing the ultimate retirement of the property, which factors embrace wear and tear, decay, inadequacy, and obsolescence—Alexandria Water Co v City Council of Alexandria, supra.

### Obsolescence

A unit may not be depreciated on ground of obsolescence on mere conjecture that improvements may render unit obsolete, but obsolescence must actually exist, although a unit still rendering efficient service may be obsolete or outmoded in whole or in part to a degree that affects the value of the property—Alexandria Water Co v City Council of Alexandria, supra.

83. Va—Alexandria Water Co v City Council of Alexandria, supra.

Inappropriate engineering layout is one of the forms of inappropriateness—Alexandria Water Co v City Council of Alexandria, supra.

84. Ill—Danville v Danville Water Co, 54 NE 224, 180 Ill 235.

Appeal from commission's order involving change of rate see infra § 296.

Increase or reduction as affecting uniformity or discrimination see infra § 297 a.

Burden of establishing case for increase see infra subdivision d of this section.

Reasonable expenses for additions or improvements to system as a whole, which are required in order to provide adequate service to all consumers of the same class, must be considered—Petition of Fryeburg Water Co, 115 A 2d 420, 99 NH 487.

85. NY—Town of Mamaroneck v New York Interurban Water Co, 212 NY S 639, 126 Misc 382.

67 C J p 1253 note 13.

A reduction in the rate of interest paid for money borrowed by a water company should be reflected in lower rates.<sup>86</sup>

On the question of the confiscation of a company's property by an order of the public service commission directing it to reduce its rates, the company is entitled to an independent judicial determination of the law and the facts,<sup>87</sup> including the valuations involved.<sup>88</sup> Certiorari to review the order does not afford a remedy in the scope indicated,<sup>89</sup> and a plenary action in equity will lie,<sup>90</sup> in which the judicial function does not go beyond the decision of the constitutional question of confiscation.<sup>91</sup>

A statute authorizing a public utility administrator to make investigations as to the propriety of a proposed change in rates has been held not to require that a public utility engineer or an accountant be called in.<sup>92</sup>

*Charter restriction on amount of property* Complainants seeking to compel a reduction in the rates charged by a water company may not make use of the restriction, contained in the company's charter, on the amount of property which the company may hold.<sup>93</sup>

#### d. Presumptions and Burden of Proof

A rate established for a water company by public authority is presumed reasonable. Authorities differ as to whether rates fixed by a company are to be presumed reasonable.

A rate established by public authority for water service furnished by a water company is presumed

to be reasonable,<sup>94</sup> although the presumption is rebuttable by evidence,<sup>95</sup> and the burden of proving its unreasonableness is on the one asserting it.<sup>96</sup>

There is authority for the view that rates fixed by a water company are to be presumed to be reasonable,<sup>97</sup> but other authority is opposed to this view,<sup>98</sup> holding that the burden of establishing the reasonableness of the rates is on the company,<sup>99</sup> except as acquiescence in such rates by the consumers may have created an estoppel.<sup>1</sup>

It has been said that rates fixed by voluntary contract between a water company and a municipality are to be presumed to be just and reasonable until otherwise determined.<sup>2</sup>

*A company petitioning for an increase in the rate* has the burden of establishing its case.<sup>3</sup>

#### § 294. — Establishment, Filing, and Promulgation of Rate Schedules

Where the mode of filing or promulgating water rates is prescribed by law, there can be no legal rate in effect except one so filed or promulgated. A schedule promulgated as contemplated by law cannot be departed from or varied until set aside or changed in the manner provided by law.

Where the mode of filing, establishing, or promulgating water rates is prescribed by law, there can be no legal rate in effect for a water company except one filed, established, or promulgated in such mode,<sup>4</sup> and the last rate published is the legal, suable rate,<sup>5</sup> and controls.<sup>6</sup> A rate schedule established and promulgated in the manner contemplated

86. NH—State v Hampton Water Works Co, 18 A.2d 765, 91 NH 278, rehearing denied 19 A.2d 435, 91 NH 278.

87. NY—Consolidated Water Co of Utica v Maltbie, 3 N.Y.S.2d 799, 167 Misc 269.

88. NY—Consolidated Water Co of Utica v Maltbie, supra.

89. NY—Consolidated Water Co of Utica v Maltbie, supra.

90. NY—Consolidated Water Co of Utica v Maltbie, supra.

91. NY—Consolidated Water Co of Utica v Maltbie, supra.

92. RI—Town of Jamestown v Kennelly, 100 A.2d 649.

93. Me—City of Rockland v Camden & Rockland Water Co, 181 A. 818, 134 Me 95.

94. SC—Poole v Paris Mountain Water Co, 62 SE 874, 81 SC 438, 128 Am SR. 923.  
67 C.J. p 1253 note 14.

95. NY—Town of Mamaroneck v New York Interurban Water Co, 212 N.Y.S. 639, 126 Misc 382.

96. Neb—McCook Waterworks Co v City of McCook, 124 NW 100, 85 Neb 677.  
67 C.J. p 1253 note 15.

97. NY—Follett v Waterworks Co of Seneca Falls, 206 N.Y.S. 464, 123 Misc 825.  
67 C.J. p 1253 note 16.

98. NY—Town of Mamaroneck v New York Interurban Water Co, 212 N.Y.S. 639, 126 Misc 382.  
67 C.J. p 1253 note 17.

99. Pa—Scranton-Spring Brook Water Service Co v Public Service Commission of Pennsylvania, 160 A. 230, 105 Pa. Super 203.  
67 C.J. p 1253 note 18.

1. NY—Town of Mamaroneck v New York Interurban Water Co, 212 N.Y.S. 639, 126 Misc 382.

2. Me—In re Searsport Water Co, 108 A. 452, 118 Me 382.  
Utah—Brummitt v Ogden Waterworks Co, 93 P. 828, 33 Utah 285.

3. NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 4 A.2d 47, 122 N.J. Law 54, affirmed 8 A.2d 350, 123 N.J. Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S.Ct. 582, 309 U.S. 663, 84 L.Ed. 1010.

4. Pa—Suburban Water Co v Borough of Oakmont, 110 A. 778, 268 Pa. 243.

#### Allowance of time to file schedules

Municipalities objecting to Public Service Commission's order fixing rates of water company were not hurt by allowance in order to company of sixty days from date of final adjudication to file tariff schedules, where schedules became effective from respective dates fixed in order—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A. 77, 119 Pa. Super 117.

5. Pa—Brown v Pennsylvania Public Utility Commission, 31 A.2d 435, 152 Pa. Super 58.

6. Pa—Brown v Pennsylvania Public Utility Commission, supra.

by law becomes a rate established by law, which cannot be departed from or varied until set aside or changed in such manner as the law may provide.<sup>7</sup>

Where a municipal corporation or public water district takes over the plant and system of a water company, and adopts the rates then in force, such rates are no longer those of the company, but such adoption amounts to the establishment of rates by the municipality or district,<sup>8</sup> so as to come within a statute requiring schedules of rates on establishment or promulgation to be filed with the state public utility commission<sup>9</sup>

*Change of contract rates* Where water rates have been fixed by contract between a municipality and a water company, as discussed supra § 287 a, the company cannot establish new rates, superseding those fixed by contract, merely by filing a schedule with the public utility commission in the manner prescribed for the establishment of rates in the first instance, but must institute proper proceedings to have it determined that the contract rates are unreasonable and inadequate, and have them set aside<sup>10</sup>

# § 295. — Proceedings for Relief against Unreasonable Rates

- a. By water company
- b By, or on behalf of, consumer

## a. By Water Company

A water company may maintain an action or proceeding for relief against unreasonable or inadequate rates prescribed by public authority; but rates so established may be enjoined or set aside only where so palpably inadequate as to amount to confiscation.

A proper action or proceeding may be maintained by a water company,<sup>11</sup> or, under proper circumstances, by its receiver,<sup>12</sup> or by its mortgagee, or the trustee of its mortgage bonds,<sup>13</sup> for relief against unreasonable or inadequate rates prescribed by public authority While the court in such a proceeding is without authority to fix or establish rates,<sup>14</sup> it may interfere to enjoin or set aside rates which are confiscatory,<sup>15</sup> and may determine what rate would be reasonable for the sake of deciding whether or not a particular rate is unreasonable.<sup>16</sup> Rates established by public authority will not be interfered with by the courts, however, merely because they are lower than the court itself would fix if it had authority to do so,<sup>17</sup> but may be enjoined or set aside

7. Pa—Beaver Valley Water Co v Public Service Commission, 114 A 373, 271 Pa 358—Suburban Water Co v Borough of Oakmont, 110 A 778, 268 Pa 243

## Failure to apply or contract for service

Consumer's failure to make written application for water service, as required by company regulation, or to enter into written contract for service, did not preclude company from enforcing its published schedules for service furnished—Brown v Pennsylvania Public Utility Commission, 31 A 2d 435, 152 Pa Super 58

8. Me—Kennebunk, Kennebunkport & Wells Water Dist v Inhabitants of Town of Wells, 147 A 188, 128 Me 256

9. Me—Kennebunk, Kennebunkport & Wells Water Dist v Inhabitants of Town of Wells, supra

- 10 Me—In re Searsport Water Co, 108 A 452, 118 Me 382

11. US—San Diego Land & Town Co v National City, C C Cal, 74 F 79, affirmed 19 S Ct 804, 174 US 739, 43 L Ed 1154

Cal—Spring Valley Water-Works v San Francisco, 22 P 910, 82 Cal 286, 16 Am SR 116, 6 L R A 756  
Review of rate orders of public utility commission or other board see infra § 296 b.

## Amendment of bill and answer; recoupment

- Pa—Beaver Val Water Co v Driscoll, Com Pl, 51 Dauph Co 105

## Extent of inquiry

- Pa—Beaver Val Water Co v Driscoll, supra

## Disposal of property during pendency of inquiry

- Pa—Beaver Val Water Co v Driscoll, supra

## Allegations of bill taken as true

- Pa—Beaver Val. Water Co v Driscoll, supra

12. US—Ward v San Diego Land, etc, Co, C C Cal, 79 F 665—Lanning v Osborne, C C Cal, 79 F 657

- 13 US—Consolidated Water Co v San Diego, C C Cal, 89 F. 272—Consolidated Water Co v San Diego, C C Cal, 84 F 369

14. US—Osborne v San Diego Land, etc, Co, Cal, 20 S Ct 860, 178 US 22, 44 L Ed 961  
67 C J p 1254 note 32

- 15 Cal—San Diego Water Co v San Diego, 50 P 633, 118 Cal 556, 62 Am SR 261, 38 L R A 460

- Pa—Beaver Val Water Co v Driscoll, Com Pl, 51 Dauph Co 105  
67 C J p 1254 note 33

## Effect of changed circumstances

An action for injunction has been held to lie in favor of a water company to determine whether the rate fixed by a commission was originally confiscatory and whether the rate

was confiscatory because of changed circumstances after it was fixed by the commission, the failure of company to apply for an increase of rates prior to bringing of equitable action to determine whether rates fixed by commission were confiscatory because of changed conditions did not defeat the action, where the commission denied an application for rehearing made by the company, which contended that the rate was confiscatory when fixed, since the denial of the application constituted a final legislative act—Consolidated Water Co of Utica v Maltbie, 3 N Y S 2d 799, 167 Misc 269

## Effect of supreme court decision

An action for injunction will lie where United States supreme court, on company's appeal from certiorari proceedings to review order of the commission, declined to consider merits of contention that company did not have benefit of exercise of independent judgment of court as to law and facts on issue of confiscation, because company had not sought to invoke equitable jurisdiction of court—Consolidated Water Co of Utica v Maltbie, supra.

16. N.Y—Town of Mamaroneck v New York Interurban Water Co, 212 N Y S 639, 126 Misc 382

17. US—Spring Valley Water Co v City and County of San Francisco, D C Cal, 252 F 979, appeal dismissed 253 F 991, 165 C C A 672.

only where they are so palpably unreasonable and inadequate as to amount to confiscation,<sup>18</sup> particularly where they have not been in force for a sufficient length of time to demonstrate their actual effect<sup>19</sup>

It is incumbent on a water company assailing rates as inadequate and confiscatory to make full disclosure of the value of its property and of its earnings and expenses,<sup>20</sup> and, where the rates have been in effect a sufficient length of time to show the actual results, it cannot prevail on mere opinions of experts as to probable results<sup>21</sup>. A company is not precluded or estopped to seek relief against rates, on the ground that they are unreasonable, by its failure to render adequate service, particularly where the inadequacy of the service is due to inadequate rates,<sup>22</sup> or by the fact that it did not produce any evidence as to the value of its property at the hearing at which the rates complained of were established,<sup>23</sup> or that the rates were established subject to permission given the company to apply for their modification after a specified period of trial,<sup>24</sup> and the bringing of an action by a water company against a municipal corporation to recover for water furnished it, at rates established by a municipal ordinance, does not estop the company to maintain a suit to enjoin the enforcement of the ordinance rates as inadequate or confiscatory<sup>25</sup>

*When suit may be brought* Where a rate schedule established by public authority is alleged to be confiscatory, a water company need not wait to apply for relief until the rates thereby prescribed have become effective, but may bring suit at once to enjoin their enforcement<sup>26</sup>

*Contract rates.* Rates fixed by contract between

a municipal corporation and a water company cannot be enjoined or set aside at the suit of the latter, on the ground that they are inadequate, or will result in its bankruptcy, any more than contracts between private persons can be interrupted on such ground,<sup>27</sup> except where the term of the contract is indefinite, or unreasonably long, in which case the company is entitled to relief against the rates thereby fixed where they have become unreasonable<sup>28</sup>

*Preliminary, temporary, or interlocutory injunction* Where a public service commission, in studying a temporary rate base for a water company, disregards all evidence of the present value of the company's property, and does not accord it due process of law, a preliminary or interlocutory injunction will be granted<sup>29</sup>. A temporary injunction restraining the enforcement of the rate fixed by the commission may be granted on the company's furnishing a sufficient undertaking<sup>30</sup> and on condition that the injunction will be vacated if, for any reason attributed to the company, a trial on the issues is not commenced by a date specified by the court<sup>31</sup>

*Amendment of commission's answer; evidence of value.* In a suit to enjoin the enforcement of a rate schedule made by a public service commission, it has been held not error to permit the commission, after the introduction of evidence, to amend its answer and aver that the value of the company's property did not exceed a certain sum, instead of substantially that amount, as alleged in the original answer<sup>32</sup>. In such a suit, defendants may introduce evidence of value different from that found by the commission on the rate hearing,<sup>33</sup> since the

18. U.S.—City of Knoxville v Knoxville Water Co, Tenn, 29 S Ct 148, 212 U.S. 1, 53 L Ed 371.  
67 C.J. p 1254 note 36

19. Neb.—McCook Waterworks Co v City of McCook, 124 NW 100, 85 Neb 677

20. Ill.—Lake Forest Water Co v City of Lake Forest, 94 NE 517, 249 Ill 382

Neb.—McCook Waterworks Co v City of McCook, 124 NW 100, 85 Neb 677

21. Ill.—Lake Forest Water Co v City of Lake Forest, 94 NE 517, 249 Ill 382.

22. N.J.—City of Elizabeth v Board of Public Utility Commissioners, 123 A 358, 99 N.J. Law 496, 1 N.J. Misc 274

23. U.S.—Van Dyke v Geary, D.C. Ariz., 218 F. 111, affirmed 37 S Ct 483, 244 U.S. 39, 61 L Ed. 973

24. U.S.—Henderson Water Co v Corporation Commission of State of North Carolina, N.C., 46 S Ct 112, 269 U.S. 278, 70 L Ed 273

25. Ill.—Lake Forest Water Co v City of Lake Forest, 94 NE 517, 249 Ill 382

26. U.S.—City of Kankakee v American Water Supply Co, Ill, 199 F 757, 118 C.C.A. 195

27. Ark.—Town of Lonoke v W Y Bransford & Son, 216 SW 38, 141 Ark 18

N.Y.—Condon v New Rochelle Water Co, 116 N.Y.S. 142, affirmed 120 N.Y.S. 1119, 136 App Div. 897, affirmed 95 NE 1126, 202 N.Y. 535  
Contracts between municipality and water company as to rates see supra § 287 a

28. Conn.—New Haven Water Co v City of New Haven, 139 A 99, 106 Conn 562

29. U.S.—Beaver Val Water Co v Driscoll, D.C.Pa., 23 F Supp. 795

30. N.Y.—Consolidated Water Supply Co of Utica v Maltbie, 3 N.Y.S. 2d 799, 167 Misc 269

31. N.Y.—Consolidated Water Co. of Utica v Maltbie, supra.

32. U.S.—Indianapolis Water Co v McCart, D.C. Ind., 13 F Supp 110, reversed on other grounds C.C.A., 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct 324, 302 U.S. 419, 82 L Ed 336.

33. U.S.—Indianapolis Water Co v McCart, D.C. Ind., 13 F Supp 110, reversed on other grounds, C.C.A., 89 F 2d 522, modified on other grounds McCart v Indianapolis Water Co, 58 S Ct. 324, 302 U.S. 419, 82 L Ed 336.

commission's finding as to value is not res judicata<sup>34</sup>

**Costs** The successful party in proceedings for relief against unreasonable rates is ordinarily entitled to costs<sup>35</sup>

### b. By, or on Behalf of, Consumer

A patron of a water company may maintain a proper proceeding for relief against unreasonable rates. The court may annul or set aside such rates, but will do so only in a clear case.

A patron of a water company is entitled to maintain a proper action or proceeding, in a court of competent jurisdiction,<sup>36</sup> for relief against unreasonable water rates,<sup>37</sup> and is not estopped to question or attack such rates by ordering or using water from the system, at least where it has a monopoly in the locality,<sup>38</sup> nor is he precluded from bringing suit to enjoin the enforcement of unreasonable rates by the fact that he might wait and defend against an action for water charges, the latter not being an adequate and convenient remedy<sup>39</sup>

The court, in such an action or proceeding, may determine the reasonableness or unreasonableness of the rate complained of,<sup>40</sup> and, if it finds the rate to be unreasonable and excessive, may annul it or set it aside,<sup>41</sup> but it is unauthorized to act as

a supervisory or reviewing body and readjust or correct the rate,<sup>42</sup> and it has no jurisdiction to fix or establish a rate for the future, or to compel the furnishing of water at a rate determined by it to be proper,<sup>43</sup> except, it has been held, where rates have not been regulated by public authority and no provision has been made by law for such regulation.<sup>44</sup> On the other hand, the court may not, in setting aside as excessive the rate against which relief was sought by a consumer, restore or permit the restoration of a former rate schedule which, according to undisputed evidence, is inadequate and confiscatory.<sup>45</sup> If the court finds that the rate complained of is not unlawful, its duty and authority in the matter cease.<sup>46</sup>

The court will interfere with, or set aside, a lawfully established rate, as excessive, only in a clear case of unreasonableness, amounting to a violation of the consumer's legal rights,<sup>47</sup> but where it is demonstrated by a fair preponderance of the credible evidence that rates are unfair and excessive, the consumer is entitled to relief.<sup>48</sup>

**Parties** Where the statutory intention is that the Public Service Commission be made a necessary party to an action attacking its rate order, and, in such an action, the commission is not made a party,

34. *U.S.—Indianapolis Water Co v McCart*, D.C. Ind., 13 F.Supp. 110, reversed on other grounds, C.C.A., 89 F.2d 522, modified on other grounds *McCart v Indianapolis Water Co*, 58 S.Ct. 324, 302 U.S. 419, 82 L.Ed. 336.

35. *Mass.—Danvers v Commonwealth*, 69 N.E. 320, 184 Mass. 502.

36. *Pa.—Barnes Laundry Co v City of Pittsburgh*, 109 A. 535, 266 Pa. 24, followed in *Ohio & Pittsburgh Milk Co v City of Pittsburgh*, 109 A. 541, 266 Pa. 46 and *Consolidated Ice Co v City of Pittsburgh*, 109 A. 541, 266 Pa. 45.

67 C.J. p. 1255 note 50.

Proceedings for relief against rates of municipal water system see *supra* § 289 d.

37. *N.C.—Griffin v Goldsboro Water Co*, 30 S.E. 319, 122 N.C. 206, 41 L.R.A. 240.

67 C.J. p. 1255 note 51.

Restraining enforcement of improper charges in general see *infra* § 307 b (1).

38. *Pa.—Barnes Laundry Co v City of Pittsburgh*, 109 A. 535, 266 Pa. 24, followed in *Ohio & Pittsburgh Milk Co v City of Pittsburgh*, 109 A. 541, 266 Pa. 46 and *Consolidated Ice Co v City of Pittsburgh*, 109 A. 541, 266 Pa. 45.

39. *Pa.—Barnes Laundry Co v. City*

*of Pittsburgh*, 109 A. 535, 266 Pa. 24, followed in *Ohio & Pittsburgh Milk Co v City of Pittsburgh*, 109 A. 541, 266 Pa. 46 and *Consolidated Ice Co v City of Pittsburgh*, 109 A. 541, 266 Pa. 45.

40. *Pa.—Brymer v Butler Water Co*, 36 A. 249, 179 Pa. 231, 36 L.R.A. 260.

*Tex.—West v Probst*, Civ.App., 251 S.W. 289, reversed on other grounds *Com.App.*, 6 S.W.2d 96.

### Holding held proper

Holding of trial court that rates exacted by the municipal authority were necessary for completion of water supply project under construction and that they were reasonable was proper—*Rankin v Chester Municipal Authority*, 68 A.2d 458, 165 Pa.Super. 438.

### Deduction of value of property used outside city

Court, in proceeding to enjoin collection of rates by municipally-owned plant, has power to ascertain value of property used and useful in connection with service outside city and deduct such value from value of entire property, in determining rate base for charges within city—*Shirk v. City of Lancaster*, 169 A. 557, 313 Pa. 158, 90 A.L.R. 688.

### Company owned by city

Water company, capital stock of

which was owned solely by city, had authority to collect water rents in excess of sum sufficient to pay operating expenses, maintenance, and debts of company, and courts could not interfere as long as the rates were not exorbitant or unreasonable—*Dolan v Louisville Water Co*, 174 S.W.2d 425, 295 Ky. 291.

41. *U.S.—Osborne v San Diego Land & Town Co*, Cal., 20 S.Ct. 860, 178 U.S. 22, 44 L.Ed. 961.

67 C.J. p. 1255 note 55.

42. *Iowa.—Knotts v Nollen*, 218 N.W. 563, 206 Iowa 261.

43. *Ala.—Hodge v Alabama Water Co*, 88 So. 585, 205 Ala. 472.

67 C.J. p. 1255 note 57.

44. *N.Y.—Waterloo Water Co v Village of Waterloo*, 193 N.Y.S. 360, 200 App.Div. 718.

45. *Ark.—Van Buren Waterworks v City of Van Buren*, 237 S.W. 696, 152 Ark. 83.

46. *Iowa.—Knotts v Nollen*, 218 N.W. 563, 206 Iowa 261.

47. *Iowa.—Knotts v Nollen*, *supra* W.Va.—*City of Huntington v Public Service Commission*, 110 S.E. 192, 89 W.Va. 703.

Right of consumer to be served at reasonable rates see *supra* § 293 a.

48. *N.Y.—Town of Mamaroneck v. New York Interurban Water Co*, 212 N.Y.S. 639, 126 Misc. 382.

the court has no jurisdiction to enjoin the operation of increased rates authorized by the commission's order,<sup>49</sup> even though the property owner did not seek to enjoin the operation of the rate structure established by the order<sup>50</sup>

**Pleading** A bill by a consumer to enjoin the enforcement of an unreasonable rate schedule for water service must allege that such rates are unreasonable<sup>51</sup> A petition alleging that the water rates charged by a company of which the city was the sole stockholder were exorbitant and unreasonable, but not alleging the rates charged or showing the value of the property used and useful in the public service has been held not to state a cause of action for an injunction<sup>52</sup>

**Admissibility of evidence** In an action to enjoin municipal commissioners from imposing charges for water service for private fire protection, evidence that plaintiffs are paying twenty-five per cent of the total of the metered water charges while their property is only twenty per cent of the assessed valuation of the city is competent<sup>53</sup>

**Burden of proof; weight of evidence** One seeking to restrain municipal authorities from collecting water rates on the ground that the rates are unreasonable and excessive has the burden of proof,<sup>54</sup> or, in such action, the burden is on plaintiff to show that the charges are unreasonable and discriminatory<sup>55</sup> In such action, evidence has been held not to require a finding, as a matter of law, that the rates were unreasonable or discriminatory,<sup>56</sup> and a taxpayer has been held not to have sustained the burden of proof as to the value of the water system<sup>57</sup> Particular evidence has been held to sustain a commission's finding that a water company's new tariff eliminating flat service rates and substituting meter rates was reasonable, equitable, and provi-

dent, and would conserve the company's water supply and its distribution capacity, as well as provide for more equitable distribution of service charges<sup>58</sup>

A municipality seeking an injunction restraining another municipality from collecting increased water rates from domestic consumers in the former municipality has the burden of proving that an ordinance relied on is a contract, and not an easement on condition,<sup>59</sup> that it was not terminated by any breach,<sup>60</sup> and that it was perpetual in term.<sup>61</sup>

**Right to jury trial.** The question whether a particular rate is excessive is one of fact,<sup>62</sup> on which, it has been held, either party may demand a jury trial<sup>63</sup>

**Matters considered.** Where a new schedule of water rates, proposed or promulgated by the company and attacked by a consumer, is much higher than the rates theretofore in force, that fact, while not conclusive on the question of reasonableness vel non,<sup>64</sup> suggests the possibility of unreasonableness and calls for careful consideration of the grounds on which the advance is made<sup>65</sup> In a suit for relief against rates for domestic water service, the rates charged for industrial service are not relevant to the inquiry<sup>66</sup>

**Proceeding by municipality in behalf of consumers** A municipal corporation, where it is not a patron of a water company, has no such interest as to entitle it to maintain an action to enjoin or set aside, as unreasonable and excessive, the rates charged by such company to inhabitants of the municipality<sup>67</sup>

**Injunction pendente lite** A temporary injunction will not ordinarily be granted to restrain a water company from putting into effect or collecting rates, alleged to be excessive, pending a determination of

49. Ind—Indianapolis Water Co v Moynahan Properties Co, 198 NE 312, 209 Ind 453

50. Ind—Indianapolis Water Co v Moynahan Properties Co, supra

51. Miss—Bell v Kaye, 89 So 910, 127 Miss 165

52. Ky—Dolan v Louisville Water Co, 174 S W 2d 425, 295 Ky 291

53. NH—Chicopee Mfg Corp v Manchester Board of Water Com'rs, 81 A 2d 837, 97 NH 109

54. Pa—Rankin v. Chester Municipal Authority, 68 A 2d 458, 165 Pa Super 438

55. NH—Chicopee Mfg Corp v Manchester Board of Water Com'rs, 81 A 2d 837, 97 NH 109.

56. NH—Chicopee Mfg. Corp. v.

Manchester Board of Water Com'rs, supra

57. Pa—Shirk v City of Lancaster, 169 A 557, 313 Pa 158, 90 A.L.R. 688

58. Pa—Orlosky v Pennsylvania Public Utility Commission, 89 A 2d 903, 171 Pa Super. 409

59. Colo—City of Englewood v City & County of Denver, 229 P 2d 667, 123 Colo 290

60. Colo—City of Englewood v City & County of Denver, supra

61. Colo—City of Englewood v City & County of Denver, supra

62. NY—Follett v Waterworks Co of Seneca Falls, 206 N.Y.S. 464, 123 Misc 825

63. NY—Follett v Waterworks Co of Seneca Falls, supra.

64. RI—Public Utilities Commission v East Providence Water Co., 136 A 447, 48 RI 376, reargument denied 137 A 387

65. NY—Town of Mamaroneck v New York Interurban Water Co., 212 N.Y.S. 639, 126 Misc 382

RI—Public Utilities Commission v East Providence Water Co., 136 A 447, 48 RI 376, reargument denied 137 A 387

66. Pa—Turtle Creek Borough v Pennsylvania Water Co., 90 A 199, 243 Pa 415

67. NY—City of Mt Vernon v New York Interurban Water Co., 101 N.Y.S. 232, 115 App Div 658—City of New York v Citizens' Water Supply Co., 189 N.Y.S. 929, affirmed 91 N.Y.S. 430, 199 App Div. 169.



the reasonableness or unreasonableness of such rates,<sup>68</sup> at least where no facts are alleged which, prima facie, justify a conclusion that such rates will produce unreasonable compensation for the service rendered,<sup>69</sup> and where there is no showing that the company is not financially responsible and could not be made to refund the excess if such rates should finally be determined to be unreasonable.<sup>70</sup> It is not an abuse of discretion to deny an injunction pendente lite to restrain a municipality from collecting increased water rates, pending a determination of the reasonableness of such increase, in view of the relative inconveniences to the parties which would result from granting or denying it.<sup>71</sup>

68. Wis—J Greenebaum Tanning Co v Railroad Commission of Wisconsin, 217 NW 282, 194 Wis 634. 67 C J p 1256 note 71

69. N Y—Silberberg v Citizens' Water Supply Co of Newtown, 190 N Y S 349, 116 Misc 595

70. N Y—Silberberg v Citizens' Water Supply Co of Newtown, supra Pa—Beaver Valley Water Co v Public Service Commission, 114 A. 373, 271 Pa. 358.

Recovery of overpayments in general see infra § 307 c

71. Wis—J Greenebaum Tanning Co v Railroad Commission of Wisconsin, 217 NW 282, 194 Wis 634.

72. Idaho—City of Pocatello v Murray, 130 P 383, 23 Idaho 447, Ann Cas 1914C 1050

67 C J p 1256 note 78

73. La—Baton Rouge Waterworks Co v Louisiana Public Service Commission, 100 So 710, 156 La 539

67 C J p 1257 note 79

#### Application of general powers under statute

Whether company acted illegally in collecting charges above those in effect before Nov 1, 1939, when the commission authorized the company to charge increased rates, must be determined by the application to the situation of the general powers of the commission over rates vested in it by 1935 statute—City of New Haven v New Haven Water Co, 45 A 2d 831, 132 Conn 496

#### Commission's failure to exercise power

Failure of commission to exercise power over rates charged and services rendered by city-owned water company in furnishing water to consumers residing outside of city limits for sixteen years since passage of act defining commission's powers did not amount to acknowledgment, by contemporaneous construction, that com-

pany had right to fix rates outside city—Louisville Water Co v Preston St Road Water Dist No 1, KY, 256 S W 2d 26

**Arbitration not required by contract**  
Under contract between city and water company as to rates, water company held under no obligation to resort to arbitration instead of applying to commission for increase of rates—City of New Haven v New Haven Water Co, 172 A. 767, 118 Conn 389

#### Statutory provision not excluding jurisdiction

(1) Provision of public service law that subdivision relating to rate-fixing should not apply to state, municipal, or federal contracts held not general exclusion of jurisdiction by commission over rate charged by private waterworks corporation to municipal corporation, in absence of existence of contract between them fixing rate—New York City v Maltbie, 287 N Y S 868, 159 Misc 276, affirmed City of New York v Maltbie, 289 N Y S 562, 248 App Div 39, affirmed 8 NE 2d 289, 274 N Y. 90

(2) Contracts between municipalities and water companies as to rates generally see supra § 287 a.

#### Repeal and invalidity of charter provision

Statute vesting commission with jurisdiction over private waterworks corporation, including determination of fair rates, held not to repeal provision of charter investing commissioner of water supply with jurisdiction over rates charged by private companies supplying city, but such provision of charter held invalid delegation of power, notwithstanding provision for judicial review of rates fixed, and hence provisions of statute conferring power on commission to determine water rates applied to hydrant service furnished by private water company to city.—New York

## § 296. — Regulation by Board or Commission

- a. In general
- b. Appeal and review

### a. In General

General principles relating to public utility commissions apply to commissions regulating rates of water companies. A commission's order regulating rates is not res judicata.

The general principles relating to public utility commissions, as discussed in Public Utilities §§ 31-68, are applicable in the case of boards and commissions regulating rates for water service rendered by water companies, as to such matters as the creation and membership of the commission,<sup>72</sup> its power to regulate water rates,<sup>73</sup> and the exercise of such power by the commission.<sup>74</sup>

City v Maltbie, 287 N Y S 868, 159 Misc 276, affirmed City of New York v Maltbie, 289 N Y S 562, 248 App Div 39, affirmed 8 NE 2d 289, 274 N Y 90

#### Private water line

Where owners of a private water line outside of city charged a fee for each neighbor who tapped onto the line, and required signing of a contract whereby owners were not to be held responsible for loss of service, and each person agreed to share expense of maintenance, but the city installed the meters and charged all water users the regular rate, there was not a distribution of water for compensation and the line was not a public utility within the regulatory jurisdiction of the commission—Austin v City of Louisa, Ky, 264 S. W 2d 662

74. Wash—Raymond Lumber Co v Raymond Light & Water Co, 159 P 133, 92 Wash 330  
67 C J p 1256 note 80

#### Board as fact-finding body

(1) The board of public utility commissioners is a fact-finding body, and on petition of company for an increase in rate, its function is to weigh evidence, ascertain facts, and fix, on those facts, a rate which will bring a just return to company for service rendered—New Jersey Suburban Water Co v. Board of Public Utility Com'rs, 4 A 2d 47, 122 N J Law 54, affirmed 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

(2) Change of rates generally see supra § 293 c

#### Finding of reasonableness of service charge

Commission's finding that company's rule as to service charge for each consumer, pursuant to which manufacturer constructed distribution system for industrial housing group, was

In a proceeding involving a water company's rates, it is the function of a public service commission to determine whether the company is receiving a fair return on its property devoted to public use.<sup>75</sup> In such a case, the jurisdiction of a public utilities commission is to determine judicially the fair value of the utility property devoted to public service, figure a just return thereon, and establish a rate which shall be reasonable, to apply with substantial equality to all receiving a similar service.<sup>76</sup> The commission, in fixing the rates to be charged by a water company, is authorized to act irrespective of the provisions and restrictions of a contract between the company and the municipality,<sup>77</sup> and is to be guided and controlled by the rules and principles governing its general functions in rate making rather than by the provisions of the contract.<sup>78</sup>

A commission's order fixing rates is not res judicata,<sup>79</sup> but as long as it stands, a municipality affected thereby is bound by its terms.<sup>80</sup> A commission's order fixing temporary rates is not a final legislative act such as could operate to confiscate the company's property in any permanent sense, where a statute requires the commission, on final determination of the rates, to permit the company to recoup its loss through a temporary increase should the final rates prove to be higher than the temporary ones.<sup>81</sup>

A municipality which feels itself aggrieved by the order of a public utilities commission fixing rates has the right to apply to the commission for a modification thereof.<sup>82</sup> The staying of such orders may also be considered.<sup>83</sup>

reasonable and in conformity with the law, held binding notwithstanding reasonableness of rates was not involved—*Viscose Co v Public Service Commission*, 187 A. 454, 123 Pa Super 223

#### Reconsideration by commission; temporary rates

Where commission prescribed temporary rates, which were sustained, without appeal from federal court to which company resorted, commission could not be required to reconsider matters adjudicated in the order, because of evidence submitted by company bearing on, and relevant to, question of rates finally to be determined—*Beaver Val Water Co v Pennsylvania Public Utility Commission*, 14 A 2d 205, 104 Pa Super 297

#### Duty to hold hearing; rehearing

(1) A letter from corporation counsel asking for a hearing and an order suspending the effective date of new rate schedule filed by company was not such a complaint as the commission was bound to heed, and imposed no duty on it to hold a hearing, but where the commission accepted the assurance given by the company of its willingness to make refunds, the commission could not properly have then suspended the effective date of the schedule—*City of New Haven v New Haven Water Co*, 45 A 2d 831, 132 Conn. 496

(2) Denial by commission of company's application for rehearing held not illegal or abuse of discretion—*Western N Y Water Co v Public Service Commission*, 124 N Y S 2d 612

(3) Commission, in water rate case, acted properly in undertaking investigation of proposed rates filed by company and in holding hearings—*Gulford-Chester Water Co v Loughlin*, 113 A 2d 608, 19 Conn Sup 355.

#### Suspension of new schedule or increase

(1) Until the commission decided to suspend the effectiveness of new rate schedule filed by company because of lack of assurance by the company of its ability and willingness to make a refund, there was no occasion for any "order" in which the commission found no cause to suspend the effective date of the schedule, and such order was a nullity, order purporting to suspend the effective date of new rate schedule filed by company was fatally defective where it failed to give the company the opportunity of filing assurance of its ability and willingness to refund any excess charges and the commission failed to find first that the rates fixed in the new schedule were unreasonably discriminatory and more than just and reasonable—*City of New Haven v New Haven Water Co*, 45 A 2d 831, 132 Conn. 496

(2) Where commission had twice suspended operation of rate increase, whereupon company stipulated that existing rates would continue until fixed otherwise by commission, denial of company's recovery of increased rates could not be attacked on ground that commission could not lawfully suspend increased rates for more than two three-month periods; the statutory limitation on commission's power of suspension of operation of rates increase was intended to furnish a reason for prompt action by commission within the limited period—*New Jersey Suburban Water Co v Town of Harrison*, 3 A 2d 623, 122 N. J Law 189

75. N Y—*New Rochelle Water Co v Maltbie*, 288 N Y S 82, 158 Misc 752, reversed on other grounds 292 N Y S 650, 249 App Div 378

Regulation by commission of rates of municipal water system see supra § 290.

76. Me—*City of Rockland v. Camden & Rockland Water Co*, 181 A. 818, 134 Me 95

Uniformity and discrimination see infra § 297

Provisions of contract between city and water company held to relate to rates to be charged for water services, within jurisdiction of commission—*City of New Haven v New Haven Water Co*, 172 A 767, 118 Conn 389

77. Conn—*City of New Haven v. New Haven Water Co*, supra. Contracts between water companies and municipalities as to rates generally see supra § 287 a

78. Conn—*City of New Haven v. New Haven Water Co*, supra

79. Pa—*Beaver Val Water Co v. Pennsylvania Public Utility Commission*, 14 A 2d 205, 140 Pa Super 297

80. Me—*Milo Water Co v Inhabitants of Town of Milo*, 7 A 2d 895, 136 Me 228

81. US—*Beaver Val Water Co v Driscoll*, D C Pa., 28 F Supp 722

82. Me—*Milo Water Co v Inhabitants of Town of Milo*, 7 A 2d 895, 136 Me 228

#### 83. Substantial questions and irreparable damage

Special term held bound to stay commission's order on company's proof of substantial questions for consideration of appellate division on certiorari, together with proof of irreparable damage, and special term was not first required, nor did it have jurisdiction, to determine that order was unreasonable, arbitrary, or capricious—*New Rochelle Water Co v. Maltbie*, 292 N Y S 650, 249 App Div. 378.

#### Determination of merits; prima facie case

Application for stay of commis-

*Setting aside findings or order.* It has been held, under statute, that where no constitutional rights were violated, the court cannot set aside, or vacate, a water rate order of a public utility commission in whole or part, except for error of law or lack of substantial evidence to support the commission's findings.<sup>84</sup> Where a public utilities commission made findings with respect to water rates, the burden rests on complainants to show that the findings should be set aside.<sup>85</sup> Likewise, where a public utilities administrator fixes rates on the basis of substantial evidence before him, a town objecting to his rates has the duty to shoulder the burden of showing that his order should be set aside.<sup>86</sup>

*Costs of rate proceeding.* An order of a public service commission taxing the costs of a rate pro-

ceeding against a water company has been held valid<sup>87</sup> and not invalidated by the judgment of a federal court enjoining the enforcement of the rates established by the commission's order.<sup>88</sup>

### b. Appeal and Review

General principles relating to public utility commissions apply to appeals from, and the review of, orders of commissions regulating rates of water companies. The reviewing court can ordinarily consider only whether the commission acted reasonably and in accordance with the available evidence.

General principles relating to public utility commissions, as discussed in Public Utilities §§ 64, 65, apply to appeals from, and the review of, the orders of commissions with respect to the rates of water companies,<sup>89</sup> including the right to appeal as a party affected.<sup>90</sup> Statutory provisions as to the time for

sion's order pending review thereof by appellate division, does not involve determination of merits by special term, but calls for exercise of sound judicial discretion, which can be exercised only on finding that petitioner has made prima facie case warranting interlocutory relief—*New Rochelle Water Co v Maltbie*, supra.

#### **Failure to file new rates not fatal to application**

Company's failure to file new rates for one of two divisions of municipalities served thereby to produce necessary revenue for fair return on its property held not fatal to its application for stay of commission's order fixing lower rates for other division without changing rates applicable to former division, where commission found, after considering properties and earnings of both divisions, that rates charged in division not affected by order were just and reasonable—*New Rochelle Water Co v Maltbie*, supra.

#### **Stay by special term pending review**

(1) Special term cannot review commission's order, requiring company to put reduced rates in effect, but will enjoin enforcement thereof, by stay or suspension of order, pending review before appellate division on condition that company file bond to repay excessive amounts charged, if order is affirmed—*Consolidated Water Co of Utica v Maltbie*, 266 N Y S 597, 148 Misc 903.

(2) Change of rates generally see supra § 293 c.

84. Pa—*City of Pittsburgh v Pennsylvania Public Utility Commission*, 101 A.2d 761, 174 Pa Super 363.

85. Conn—*Gulford-Chester Water Co v Loughlin*, 113 A.2d 608, 19 Conn Sup 355.

R.I.—*Town of Middletown v Newport Water Corporation*, 167 A. 114, 53 R.I. 435.

86. R.I.—*Town of Jamestown v Kennelly*, 100 A.2d 649.

The order is entitled to great weight and will be set aside only when clearly unreasonable, illegal, or improper, and prejudicial to party appealing or in excess of the administrator's authority—*Town of Jamestown v Kennelly*, supra.

87. Ind—*State ex rel Thompson v City of Greencastle*, 40 NE 2d 388, 111 Ind App 640.

88. Ind—*State ex rel Thompson v City of Greencastle*, supra.

89. N.J.—*Plainfield-Union Water Co v Board of Public Utility Com'rs of New Jersey*, 140 A. 785, 6 N.J. Misc 267.

67 C.J. p. 1257 note 81.

#### **Laws determining scope of review**

Laws relating to proceedings before the Public Service Commission, rather than the Administrative Procedure Act, determine scope of review by court in passing on validity of order of commission approving a new schedule of rates and charges to be made by privately owned utility supplying water and fire hydrant service—*State ex rel City of St. Louis v Public Service Commission*, 245 S.W. 2d 851, 362 Mo. 977.

#### **Full revision by court; no recommendation**

On company's appeal from rate order of commission, supreme court would fully exercise its revisory powers and would not recommit to commission for further proceedings in nature of general new trial, where company lacked confidence in commission's fairness and commission was aware of that fact—*State v Hampton Water Works Co*, 18 A.2d 765, 91 N.H. 278, rehearing denied 19 A.2d 435, 91 N.H. 278.

#### **Exclusion of evidence**

In reviewing rulings of the Public Utilities Commission, court was not required to decide whether exclusion

of evidence of purchase price of water plant bought from receiver several years previously was technically correct, since substantial prejudice must be shown—*Damariscotta-Newcastle Water Co v Damariscotta-Newcastle Water Co*, 186 A. 799, 134 Me. 349.

#### **Order not appealable because not final**

Order of commission refusing to dismiss appeal of water works company from a rate ordinance enacted by city was not a final order from which city could appeal, since it did not finally dispose of appeal pending before commission, and did not affect a substantial right—*City of Ashtabula v Public Utilities Commission*, 39 NE 2d 144, 139 Ohio St. 213.

#### **Reinstatement of former maximum charge**

Where new schedule of water rates filed by water company had been made effective by commission, court, under statute, could not reinstate a former maximum charge made by company—*Eastport Water Co v Raye*, 4 A.2d 841, 136 Me. 175.

#### **90. City as party affected**

(1) A city is a "party affected" by an application for an increase of rates within the city, and such interest does not terminate on the entry of an order adverse to city's residents but favorable to the city itself, particularly where the resident consumers are not parties before the commission, and hence city may appeal from such order; city recognized by commission and company seeking permission to increase rates, as having sufficient interest to be made a party to the proceeding was a "party affected" by the order awarding an increase in rates of consumers, within provision of Public Utilities Act authorizing any one affected by a rule, regulation, or order to appeal to circuit court or to superior court of county in which subject matter of the hearing is situated—*Inter-State Wa-*

appeal or review must be complied with<sup>91</sup>

Certiorari is available for the review of a rate order of a public service commission<sup>92</sup>

In reviewing the determination of a commission in a water rate case, the court can ordinarily consider only whether the commission acted reasonably and in accordance with the evidence available at the time,<sup>93</sup> and may not substitute its judgment or discretion for that of the commission when acting within its administrative power,<sup>94</sup> so, the court

may not substitute its judgment for that of the commission as to what is the reasonable value of the company's property<sup>95</sup> or whether the rate of return on the company's property, as fixed by the commission, is sufficient, unless the court is to determine that such return is confiscatory.<sup>96</sup> As long as the commission acts in accordance with the due administration of law by affording a hearing, taking evidence, and giving its judgment or award, the court cannot, or must not, interfere with its conclusions<sup>97</sup> However, the reviewing court has been

ter Co v City of Danville, 39 N E 2d 356, 379 Ill 41

(2) Change of rates generally see supra § 293 c

91. Pa—Beaver Val Water Co v Pennsylvania Public Utility Commission, 14 A 2d 205, 140 Pa Super 297

#### Final order

An order of commission, directing company to make certain journal entries found necessary to adjust its accounts, books, and records, was final order, in absence of any move by company with respect to provisions of order until after commencement of certification proceeding over three years after entry of order, so that company's proceeding to review order was barred by statute of limitations—Western N Y Water Co v Public Service Commission, 124 N Y S 2d 612.

92. N Y—City of New York v Maltbie, 289 N Y S 558, 248 App Div 36, affirmed 8 N E 2d 605, 274 N Y 464—Consolidated Water Co of Utica v Maltbie, 3 N Y S 2d 799, 167 Misc 269

93. N Y—People ex rel Consol Water Co. of Utica v Maltbie, 9 N E 2d 961, 275 N Y 357, appeal dismissed People of State of New York ex rel Consol Water Co of Utica, N Y v. Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 724

R I—Town of Narragansett v Kennelly, 114 A 2d 393, reargument denied 115 A 2d 693

**Question presented on appeal from commission's finding** was whether commission had acted illegally, or had exceeded or abused its power, or had acted arbitrarily or without notice and a reasonable opportunity to be heard—Guilford-Chester Water Co v Loughlin, 113 A 2d 608, 19 Conn Sup 355

#### Evidence to support findings

In certiorari proceedings to review an order of the commission establishing a rate, the judicial inquiry generally goes no further than to ascertain whether there is evidence to support the findings of the commission—Consolidated Water Co. of

Utica v Maltbie, 3 N Y S 2d 799, 167 Misc 269

#### Water and fire hydrant service

On appeal from judgment of court approving schedules of rates for water and fire hydrant service, as approved by the Public Service Commission, question was whether order of commission was reasonable and lawful, or, conversely, whether order was arbitrary and without reasonable basis—State ex rel City of St Louis v Public Service Commission, 245 S W 2d 851, 362 Mo 977

94. Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 761, 174 Pa Super 363

#### Petition for rate increase

(1) Where there was ample testimony to support, as a reasonable conclusion, findings of commissioners on company's petition for an increase in rate, the reviewing court could not substitute its judgment for that of board, comparability of other rates in adjacent communities and weight of testimony relating thereto were within board's sound discretion—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 4 A 2d 47, 122 N J Law 54, affirmed 8 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct. 582, 309 US 663, 84 L Ed 1010

(2) Court would not disturb findings of commission in hearing to increase rates, where evidence on which findings were based was not before court and there was nothing to indicate that such findings were not justified, determination of commission that town should pay four thousand five hundred dollars instead of two thousand eight hundred thirty-five dollars for fire service on condition that company install specified number of additional hydrants without cost to town, without determining sum chargeable per hydrant, held not shown to be improper, especially where evidence on which findings were based was not before reviewing court—Damariscotta-Newcastle Water Co v Damariscotta-Newcastle Water Co, 186 A 799, 134 Me 349.

(3) Change of rates generally see supra § 293 c

95. N Y—People ex rel Consol Water Co of Utica v Maltbie, 9 N E 2d 961, 275 N Y 357, appeal dismissed People of State of New York ex rel Consol Water Co of Utica, N Y v Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 724

#### Decision only as to proper result

On appeal from judgment affirming order of board of commissioners fixing rate, court need not decide whether board was right in its reasoning that present value of company's plant should be determined on analogous basis of initially overbuilt plant, but must decide only whether board reached proper and right result—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 4 A 2d 350, 123 N J Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

96. N Y—New Rochelle Water Co v Maltbie, 288 N Y S 82, 158 Misc 752, reversed on other grounds 292 N Y S 650, 249 App Div 378

#### Commission's opinion of fair return on valuation

On a judicial review of rates prescribed for company by commission, court is not concerned with the percentage the commission deemed a fair return on its valuation of company's property, but only with the question whether prescribed rates were confiscatory—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512

97. N Y—New Rochelle Water Co v Maltbie, 288 N Y S 82, 158 Misc 752, reversed on other grounds 292 N Y S 650, 249 App Div 378

#### Illegal or arbitrary action not shown

Record on appeal from commission's order disclosed that commission had considered all essential elements involved and arrived at decision based on evidence without acting illegally or arbitrarily or in excess of abuse of powers, although rate fixed was insufficient to pay dividend and provide surplus as requested by company—Guilford-Chester Water Co v Loughlin, 113 A 2d 608, 19 Conn Sup 355.

required to make an independent finding of facts in reaching its determination that an order of commissioners fixing the rate was justified by the proofs.<sup>98</sup> The party attacking the correctness of the decision of the commission must show that intervening events have destroyed the force of the opinion testimony on which the decision is based.<sup>99</sup>

With respect to review, a commission's finding constitutes error of fact where it is without foundation in the record and in the teeth of the record evidence on a former appeal, offered in evidence,<sup>1</sup> and the commission's failure to give effect to its decision on a former appeal is an error of law.<sup>2</sup>

## § 297. Uniformity and Discrimination

### a. In general

### b. Rates outside municipal boundaries

98. NJ—New Jersey Suburban Water Co v Board of Public Utility Com'rs, 8 A 2d 350, 123 NJ Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

### Conflicting proofs; judgment of court not substituted

When conflicting proofs support conclusion that order of board of commissioners was not arbitrary, but based on legal proofs, court does not substitute its judgment for that of board in reviewing such order, for board acts as legislative agency in performance of legislative duty in finding rate—New Jersey Suburban Water Co v. Board of Public Utility Com'rs, 8 A 2d 350, 123 NJ Law 303, certiorari denied McGregor v Board of Public Utility Com'rs, 60 S Ct 582, 309 US 663, 84 L Ed 1010

### Finding held sustained; land excluded

On appeal from order of state corporation commission fixing rates to be charged by company, finding that certain tracts of land suitable for subdividing should be excluded from property on which company was entitled to receive return from rates charged held sustained by the evidence—Alexandria Water Co v City Council of Alexandria, 177 SE 454, 163 Va 512.

### Supplemental report to court

Where report of commission in water rate case was sent back to it with directions to supply court with material necessary to permit court to exercise its independent judgment on commission's findings, valuations, and rates, commission should have referred to its data and made supplemental report supplying needed information, with such changes and

modifications in findings as court had indicated—Scranton-Spring Brook Water Service Co v Public Service Commission, 181 A. 77, 119 Pa Super 117

99. NY—People ex rel Consol Water Co of Utica v Maltbie, 9 NE 2d 961, 275 NY 357, appeal dismissed People of State of New York ex rel Consol Water Co of Utica, N Y v Maltbie, 58 S Ct 506, 303 US 158, 82 L Ed 724

1. Pa—Viscose Co v Public Service Commission, 187 A 454, 123 Pa Super 223

2. Pa—Viscose Co v Public Service Commission, supra

3. Ill—Wagner v City of Rock Island, 34 NE 545, 146 Ill 139, 21 L R A 519  
67 C J p 1257 note 85

4. Ga—Alford v City of Eatonton, 162 SE 495, 174 Ga 169

5. Ala—City of Roanoke v Johnson, 158 So 182, 229 Ala 496

Ga—Corpus Juris cited in Jarrett v City of Boston, 74 SE 2d 549, 551, 203 Ga 530.

NY—Weiskopf v City of Saratoga Springs, 279 NY S 878, 244 App Div 417, reversed on other grounds 200 NE 33, 269 NY 634

Ohio—State ex rel Mt Sinai Hospital of Cleveland v Hickey, 30 NE 2d 802, 137 Ohio St 474

Tex—Dittmar v. New Braunfels, 48 SW. 1114, 20 Tex Civ App 293.  
67 C J p 1257 note 87.

Discriminations as to service see supra § 278

Free service or service at nominal charge as unjust discrimination see supra § 283

### Waterworks plant as public utility

In operating a waterworks plant, the city is operating a public utility, and must treat all alike within the

### a. In General

Absolute uniformity or equality of rates is generally not required, but only an absence of unjust discrimination, so, a classification of water users, with different rates, does not constitute unjust discrimination where the classification is on a reasonable basis.

Inasmuch as the rates or charges of a municipality operating a water system, for water service furnished, are ordinarily not taxes, as discussed supra § 284, the rules as to uniformity of taxation, discussed in Taxation §§ 21-38, do not apply thereto,<sup>3</sup> and so no objection can be founded on the fact that such rates do not affect and apply to every citizen of the municipality, but only to those using water<sup>4</sup> It is, nevertheless, a fundamental rule that rates for water service, whether it is furnished by a municipal corporation or by a water company, must be uniform, in the sense that they must not be unreasonably or unjustly discriminatory as between consumers,<sup>5</sup> a municipality operating a water

same classification, making the same charge for water used—Almaras v City of Hattiesburg, 180 So 392, 181 Miss 752

An ordinance fixing water rates for water furnished by municipal plant must have reasonable standards, and the rates must be substantially equal to all within the same classification, or engaged in the same business—Almaras v City of Hattiesburg, supra

### Burden of proving unreasonable reclassification

Pa—First Nat Bank of Strasburg v Borough of Strasburg, Com Pl, 54 Lanc L Rev 45

### Distance from source of supply

Rates imposed on like consumers within water system must be just and reasonable inter se, as well as in toto, and no distinction which would result in unreasonable preference or disadvantage is permitted between consumers of same class on basis of their proximity to, or distance from, source of supply—Petition of Fryeburg Water Co, 115 A.2d 420, 99 N. H 487

### Passing on taxes imposed

Fact that privately owned public utility supplying water service to residents of numerous incorporated and unincorporated areas of county was taxed by certain of the incorporated areas, but not by other incorporated areas or in the unincorporated areas, did not empower commission to approve new schedule of rates and charges passing on to the users of water service in incorporated areas where taxes were imposed the amount of the taxes paid by the company where the consumers resided—State ex rel. City of St. Louis v Public Service Commission, 245 S. W.2d 851, 362 Mo. 977.

plant or system is prohibited from practicing discrimination in rates just as any other public utility is prohibited,<sup>6</sup> or, more precisely, is prohibited from practicing unreasonable or unjustified discrimination.<sup>7</sup> The courts have no broader power over discriminatory rates than over unreasonable rates,<sup>8</sup> the question of unjust discrimination is ordinarily a question of fact<sup>9</sup> to be decided by the rate-making authority.<sup>10</sup>

Absolute uniformity or equality of rates is not required, but only an absence of arbitrary or unjust

discrimination,<sup>11</sup> except where it is otherwise provided by statute or a franchise,<sup>12</sup> and a classification of water users, and the fixing of different rates for different classes, or for service rendered under varying conditions and circumstances, is permissible, and does not constitute unjust discrimination,<sup>13</sup> where the classification is on a reasonable basis.<sup>14</sup> Thus, classification may be made according to the quantity or amount used or received,<sup>15</sup> the time of use,<sup>16</sup> the manner,<sup>17</sup> conditions,<sup>18</sup> character,<sup>19</sup> or cost<sup>20</sup> of the service furnished, the nature and use made

6. Ark—City of Malvern v Young, 171 S W 2d 470, 205 Ark 886

7. Tex—City of Texarkana v Wiggins, 246 S W 2d 622, 151 Tex 100

8. Md—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

9. Md—Lewis v Mayor and City Council of Cumberland, supra

#### Best possible classification as not question

On a challenge to a municipal water rate ordinance, court cannot determine whether ordinance embodies best possible classification of rates, but only whether ordinance is so unjustly discriminatory, and therefore so clearly unreasonable, that it is invalid—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

10. Md—Lewis v Mayor and City Council of Cumberland, supra

11. Me—Kennebunk, Kennebunkport & Wells Water District v Inhabitants of Town of Wells, 147 A 188, 128 Me 256

67 C J p 1258 note 88

"Not every discrimination is condemned, but only a discrimination that is arbitrary and without a reasonable fact basis or justification"—Caldwell v City of Abilene, Tex Civ App, 260 S W 2d 712, 715, error refused

"Discrimination to be objectionable must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges"—Durant v City of Beverly Hills, 102 P 2d 759, 762, 39 Cal App 2d 133

12. Ark—Town of Lonoke v W Y Bransford & Son, 216 S W 38, 141 Ark 18

67 C J p 1258 note 89

13. Pa—Brown v. Pennsylvania Public Utility Commission, 31 A 2d 435, 152 Pa Super 58

Tex—Botkin v City of Abilene, Civ App, 262 S W 2d 732, refused no reversible error.

14. Tex—Caldwell v City of Abilene, Civ App., 260 S W 2d 712, error refused

67 C J p 1258 note 90.

#### Practical standards

A city operating a water system is permitted, within reasonable limits, to classify water rates in a practical business manner, determined by practical standards for securing practical justice, but it must use reasonable classifications—Almaras v City of Hattiesburg, 180 So 392, 181 Miss 752

#### Discrimination within class

When classification is justified, question of discrimination is confined to members of the class, and there may be no gain of one of a class at the expense of another of the same class—Village of Fox Point v Public Service Commission, 7 N W 2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 N W 2d 574, 242 Wis 105, and Village of Whitefish Bay v Public Service Commission, 7 N W 2d 575, 242 Wis 106

#### Discrimination by comparison

A charge made to one patron which is different from that made to another, for same service and under like circumstances, constitutes an undue discrimination and renders charge improper, but fact that a rate is discriminatory by comparison with another rate does not imply that either of them is unreasonable, since a utility may classify its customers on any reasonable basis—Durant v City of Beverly Hills, 102 P 2d 759, 39 Cal App 2d 133

#### Domestic and commercial-industrial consumers

Water company's classification of private consumers as domestic and commercial-industrial was held reasonable—Hunter v Public Service Commission of Pennsylvania, 168 A 541, 110 Pa Super 589

15. Conn—Manchester Gardens Corp v Town of Manchester, 58 A 2d 734, 134 Conn 499

Tex—Caldwell v City of Abilene, Civ App, 260 S W 2d 712, error refused

67 C J p 1258 note 91

16. Pa—American Aniline Products v City of Lock Haven, 135 A 726, 288 Pa 420, 50 A L R 121.

Tex—Caldwell v City of Abilene, Civ App, 260 S W 2d 712, error refused

17. Pa—American Aniline Products v City of Lock Haven, 135 A 726, 288 Pa 420, 50 A L R 121

18. Ga—Jarrett v City of Boston, 74 S E 2d 549, 209 Ga 530.

19. Tex—Caldwell v City of Abilene, Civ App, 260 S W 2d 712, error refused

67 C J p 1258 note 96

#### Relation of variation to difference in service

Where difference in rates is based on difference in service, variation must have some reasonable relation to amount of difference and cannot be so great as to produce unjust discrimination—Jarrett v City of Boston, 74 S E 2d 549, 209 Ga 530

20. Conn—City of New Haven v New Haven Water Co, 172 A 767, 118 Conn 389

Tex—Caldwell v City of Abilene, Civ App, 260 S W 2d 713, error refused

#### One of most important considerations

Under statute requiring the commission to classify the service of a utility, taking into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration, comparative costs of the services is one of the most important considerations in classifying the service of a municipally owned water utility—Village of Fox Point v Public Service Commission, 7 N W 2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 N W 2d 574, 242 Wis 105 and Village of Whitefish Bay v Public Service Commission, 7 N W 2d 575, 242 Wis 106

#### Minimum charges

(1) Municipality's right of reasonable classification, in determining minimum water rate charges, is not restricted to rates based on determination of cost of serving a family unit or of serving each customer or group of customers—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 189 Md 58

(2) Minimum charge generally see infra § 300.

of the premises to which the water is supplied,<sup>21</sup> the purpose for which the service or product is received,<sup>22</sup> or the line of business carried on therein,<sup>23</sup> or other matters which present a substantial difference as ground for the distinction.<sup>24</sup> Classification of water services, with a different rate for each service, is warranted only if the services are in fact different,<sup>25</sup> and the rates, tolls, and charges are required to conform to a proper classification when made.<sup>26</sup>

Many factors are properly considered in determining the reasonableness of a classification,<sup>27</sup> and no single factor is controlling to the exclusion of all others,<sup>28</sup> each case must be decided on its own facts,<sup>29</sup> and the burden of proof is on the party claiming an unreasonable discrimination.<sup>30</sup> Similarly, higher rates may be charged consumers whose situation, or the character of whose demand

for water, makes it specially expensive or troublesome to serve them.<sup>31</sup>

Where water furnished is all supplied from the same sources, and is supplied to several contiguous communities embraced in one general district, with no unreasonable extensions to serve lean territory or other elements creating material difference in cost, a uniform rate for the entire territory is indicated and ordinarily justified,<sup>32</sup> but it is not essential that all rates throughout a large territory served from a single water system be the same, and rates in each part of such territory may be fixed at a level which is fair and reasonable in view of the existing conditions.<sup>33</sup> Moreover, it is not of itself unjust discrimination to furnish water to some consumers at flat rates and to others of the same class at meter or quantity rates,<sup>34</sup> even though the rate by the gallon actually used is ordinarily lower to

21. Ohio—*Rogers v City of Cincinnati*, 14 Ohio N.P.N.S., 193 67 C.J. p 1258 note 94

22. Tex—*Caldwell v City of Abilene*, Civ App, 260 S.W.2d 712, error refused

23. N.J.—*Woodruff v East Orange*, 64 A 466, 71 N.J.Eq 419 67 C.J. p 1258 note 95

24. Iowa—*Knotts v Nollen*, 218 N.W 563, 206 Iowa 261 67 C.J. p 1258 note 97

#### Apartment houses; consuming units

Classification of apartment houses under residential classification based, for rate purposes, on consuming units, rather than number of meters, is not unreasonable or unjustified, as such water users constitute type or class substantially different and distinct from other users—*Caldwell v City of Abilene*, Tex Civ App, 260 S.W.2d 712, error refused

#### City and suburban service

(1) Where peak demands on municipally owned water utility by service furnished to villages differed in amount from peak demand by service to city consumers, distance which water had to travel to serve villagers differed from average distance required to serve city consumers, suburban rate included cost of fire protection, while city rate did not, and service to suburbs was wholesale, while service to city consumers was retail, classification of service into urban and suburban service with a different rate for each was lawful—*Village of Fox Point v Public Service Commission*, 7 N.W.2d 571, 242 Wis 97, followed in *Village of Shorewood v Public Service Commission*, 7 N.W.2d 574, 242 Wis 105 and *Village of Whitefish Bay v Public Service Commission*, 7 N.W.2d 575, 242 Wis 106

(2) Rates outside municipal boundaries generally see *infra* subdivision b of this section

25. Wis—*Village of Fox Point v Public Service Commission*, 7 N.W.2d 571, 242 Wis 97, followed in *Village of Shorewood v Public Service Commission*, 7 N.W.2d 574, 242 Wis 105 and *Village of Whitefish Bay v Public Service Commission*, 7 N.W.2d 575, 242 Wis 106

26. Wis—*Village of Fox Point v Public Service Commission*, 7 N.W.2d 571, 242 Wis 97, followed in *Village of Shorewood v Public Service Commission*, 7 N.W.2d 574, 242 Wis 105 and *Village of Whitefish Bay v Public Service Commission*, 7 N.W.2d 575, 242 Wis 106

27. Tex—*Caldwell v City of Abilene*, Civ App, 260 S.W.2d 712, error refused

28. Tex—*Caldwell v City of Abilene*, *supra*.

#### Basis other than cost of service

A classification on different basis than economic factor of cost of service is not arbitrary and unreasonable—*Caldwell v City of Abilene*, *supra*

29. Tex—*Caldwell v City of Abilene*, *supra*.

30. Tex—*Caldwell v City of Abilene*, *supra*.

31. Mass—*Souther v Gloucester*, 73 N.E 558, 187 Mass 552, 69 L.R.A. 309

Mo—*St Louis Brewing Assoc v St Louis*, 37 S.W. 525, 41 S.W. 911, 140 Mo 419

32. Conn—*City of New Haven v New Haven Water Co*, 172 A 767, 118 Conn 389

N.H.—*Petition of Fryeburg Water Co*, 115 A.2d 420, 99 N.H. 487

33. Pa—*Scranton-Spring Brook Water Service Co v Public Service*

*Commission of Pennsylvania*, 160 A 230, 105 Pa Super 203

#### Consumers in large and small communities

(1) Where water company served large municipality and smaller surrounding towns in same general district, higher rates may be prescribed for consumers in smaller communities, without unlawful discrimination, provided rate is not unreasonably high in comparison with city rates, and considering respective costs of service and other conditions affecting rates, but departure from uniform rates for entire consuming territory and fixing of special rates for large municipality should not be undertaken unless there are such differences in circumstances and conditions between different parts of territory served as to justify departure—*City of New Haven v New Haven Water Co*, 172 A 767, 118 Conn 389

(2) In these circumstances, action of Public Utilities Commission in prescribing schedule of rates and charges in city identical or uniform with those specified for similar service in smaller municipalities held not to constitute unlawful discrimination which invalidated action fixing rates and charges—*City of New Haven v New Haven Water Co*, *supra*.

34. Ga—*Corpus Juris* cited in *Jarrett v City of Boston*, 74 S.E.2d 549, 551, 209 Ga 530 67 C.J. p 1259 note 1

#### Rates held not unjustly discriminatory

(1) Where city charged consumers having meters a fixed monthly charge of fifty cents, one dollar and fifty cents per month for first three thousand gallons and fifty cents for each additional one thousand gallons, but charged those not having meters fixed charge of fifty cents and one dollar



the former than to the latter;<sup>35</sup> and the imposition on meter-rate consumers of a minimum or "ready to serve" charge, without imposing a like charge on flat-rate consumers, is not necessarily unjust discrimination, since the latter pay a fixed sum whether they use water or not, and the former may likewise be required to pay for the service of being ready to supply them with such quantity of water as they may desire or need to use.<sup>36</sup>

A classification must, however, in order to be valid, comport with the rule or principle of sound legislative classification, in that there must be some actual difference of situation and condition, bearing a reasonable and just relation to the matter of rates,<sup>37</sup> and an arbitrary or unreasonable classification amounts to unjust discrimination.<sup>38</sup> Likewise, it is unjust discrimination to differentiate be-

tween different services by charging rates for one which are out of all proportion as compared with the rates charged for another,<sup>39</sup> or to impose on one consumer, or class of consumers, losses caused by charging inadequate rates to another consumer or class.<sup>40</sup>

The tests of the validity of a classified rate are, therefore, whether there is reasonable ground for the classification, or whether it is arbitrary, discriminatory, and unjust,<sup>41</sup> and, beyond that, whether the particular rate is reasonable, having in view the dissimilarity of the situation, the difference in the cost of furnishing the service, and other relevant factors.<sup>42</sup> Furnishing water to a particular consumer at less than the cost of the service constitutes an improper, discriminatory, and preferential

and fifty cents for all water used, allowing those having meters larger discount for prompt payment for amounts in excess of one dollar and fifty cents, rates were not unjustly discriminatory—*Jarrett v City of Boston*, supra.

(2) Fact that resolution in ordinance fixed a flat rate for all industrial plant consumers who were supplied with meters, while other industrial users and others who had not yet received meters were billed on an outlet basis, did not establish that classification was unjustly discriminatory—*P. J. Ritter Co v Mayor of City of Bridgeton*, 50 A 2d 1, 135 N.J. Law 22, affirmed 59 A 2d 422, 137 N.J. Law 279.

#### Gradual adoption of meter rates

Where municipality originally provided service on a flat rate basis, it was not guilty of unjust discrimination in adopting meter rates gradually, so that at certain times it was serving old customers at flat rates and new customers at meter rates—*Lewis v Mayor and City Council of Cumberland*, 54 A 2d 319, 189 Md 58.

#### Election to use water through meter

Where ordinance fixed flat rates for those engaged in restaurant business and consumer operating restaurant did not, on city's attempt to collect meter rates, proceed to compel furnishing of service at flat rate, or to compel city to make proper classification, giving fair rates to all users of water, but elected to use water through meter, he became liable for reasonable rate for water consumed as measured by meter, and where he admitted that rate was reasonable, he could not escape liability for such rate because others in same business had been furnished water at lower flat rate—*Almaras v City of Hattiesburg*, 180 So 392, 181 Miss 752.

35. Ga.—*Corpus Juris* cited in *Jar-*

*rett v City of Boston*, 74 S.E.2d 549, 351, 209 Ga. 530.

Pa.—*Consolidated Ice Co v City of Pittsburgh*, 118 A 544, 274 Pa. 558.

36. Pa.—*Central Iron & Steel Co v City of Harrisburg*, 114 A 258, 271 Pa. 340.

Minimum and "ready to serve" charges generally see *infra* § 300.

37. Mo.—*State ex rel Laundry, Inc. v Public Service Commission*, 34 S.W.2d 37, 327 Mo. 93.

Pa.—*American Aniline Products v City of Lock Haven*, 135 A 726, 288 Pa. 420, 50 A.L.R. 121.

Increase from single to double dwelling rate held not improper classification—*Brown v Pennsylvania Public Utility Commission*, 31 A 2d 435, 152 Pa. Super 58.

38. Mo.—*State ex rel Laundry, Inc. v Public Service Commission*, 34 S.W.2d 37, 327 Mo. 93.

N.Y.—*Weiskopf v City of Saratoga Springs*, 279 N.Y.S. 878, 244 App. Div. 417, reversed on other grounds 200 N.E. 33, 269 N.Y. 634.

39. Iowa.—*J. W. Edgerly & Co v City of Ottumwa*, 156 N.W. 388, 174 Iowa 205.

40. Mo.—*State ex rel St. Louis Water Co v Public Service Commission*, 291 S.W. 788, 316 Mo. 842.

41. Iowa.—*Knotts v Nollen*, 218 N.W. 563, 206 Iowa 261.

Charge for connecting with water mains held unreasonable and discriminatory—*City of De Pere v Public Service Commission*, 63 N.W.2d 764, 266 Wis. 319.

Imposition of "fire rate" held arbitrary, discriminatory, and void—*Weiskopf v City of Saratoga Springs*, 279 N.Y.S. 878, 244 App. Div. 417, reversed on other grounds 200 N.E. 33, 269 N.Y. 634.

Proposed surcharge held invalid as making unreasonable discrimination, in absence of evidence of change in conditions or additional expenditures, etc.—*City of Malvern v Young*, 171 S.W.2d 470, 205 Ark. 886.

#### Minimum service charge, apartment houses

Ordinance making the minimum service charge for apartment buildings in which only one meter is installed, the minimum service rate multiplied by the number of apartments, thereby basing charges on family unit as a consumer unit, makes a reasonable classification, notwithstanding that a residential building, including an apartment house, might also be a reasonable basis for classification, ordinance is not unreasonable for classifying apartment houses with other dwellings for purpose of determining minimum service charge rather than with hotels or other business establishments, since an apartment house, although a business, remains an aggregation of dwellings—*Lewis v Mayor and City Council of Cumberland*, 54 A 2d 319, 189 Md 58.

#### Itinerant trade; industrial or residential class

Discrimination against apartment house owners by furnishing services to hotels, tourist camps, and other places where itinerant trade is predominant under industrial classification with single minimum charges, instead of residential classification based for rate purposes on number of consuming units, is not arbitrary and unreasonable, although some units in some of such places are used as family units—*Caldwell v City of Abilene*, Tex. Civ. App., 260 S.W.2d 712, error refused.

42. N.Y.—*People v. Albion Waterworks Co*, 125 N.Y.S. 589, 140 App. Div. 646.

67 C.J. p. 1259 note 11.



charge;<sup>43</sup> but a rate is not necessarily unjustly discriminatory merely because, either as to individuals or as to a class, it does not exactly reflect the cost of the service, the determination of the schedule of rates to be charged for particular services or to particular classes of consumers being largely a function of management, into which discretion necessarily enters.<sup>44</sup>

**Classification by commission** The reasonableness of the classification of premises for rate purposes,<sup>45</sup> and of the different rates applicable,<sup>46</sup> has been held an administrative or factual question for the consideration of a public utility commission, whose finding, if supported by competent evidence, may not be disturbed by the court,<sup>47</sup> and if there is no manifest injustice, unreasonable discrimination, or undue preference in the rates fixed by a municipal authority, the courts will not interfere.<sup>48</sup>

**Increase or reduction of rates.** Making an increase of water rates effective as to one or some consumers before it takes effect as to others is unjust discrimination.<sup>49</sup> Where a city water department's contracts with the county provide that water rates shall be uniform to all consumers, the city may increase the rate to users outside the city only when it makes a similar increase to users within the city.<sup>50</sup>

No reduction of rates is valid which is discriminatory in its character, or is not operative alike on all consumers of the same class.<sup>51</sup>

**Discrimination as to deposits or advance payment** A requirement that domestic consumers of water make deposits to cover charges for water to

be furnished, or pay for water in advance, without requiring such deposits or advance payments by commercial or mercantile consumers, is unreasonable and arbitrary, and constitutes unjust discrimination.<sup>52</sup>

**Special contracts fixing discriminatory rates.** As a general rule, a contract between a water company and a customer for furnishing him with water service at rates less than those charged to other consumers of the same class for similar service is void, as nonuniform and discriminatory,<sup>53</sup> and cannot be upheld in favor of such customer on the ground of an estoppel on the part of the company to assert its invalidity.<sup>54</sup> It has, however, been held that where only maximum rates are prescribed by public authority, and not absolute or minimum rates, there is no unjust discrimination in charging one or more consumers a rate less than such maximum and less than that charged other consumers, as long as the discrimination or favor is at the expense of the company, and does not impinge on the rights of any other consumers.<sup>55</sup>

**Rights of consumers discriminated against.** Where a water company unjustly discriminates by charging some of its patrons a lower rate than that charged or enforced generally, the consumers paying the higher rate are not entitled as of right to receive water service at the more favorable rate,<sup>56</sup> but their remedy is rather, by injunction or otherwise, to have an end put to the discrimination in favor of the other patrons,<sup>57</sup> although if lower rates are granted to any considerable number of consumers the fact may be evidential that the general

43. R.I.—Public Utilities Commission v. East Providence Water Co., 136 A 447, 48 R.I. 376, reargument denied 137 A 387.

44. Wis.—Pabst Corporation v. Railroad Commission, 227 N.W. 18, 199 Wis. 536.

45. Pa.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 64 A.2d 500, 164 Pa. Super. 320.—Brown v. Pennsylvania Public Utility Commission, 31 A.2d 435, 152 Pa. Super. 58.

Regulation of rates by board or commission generally see supra §§ 290, 296.

46. Pa.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 64 A.2d 500, 164 Pa. Super. 320.—Brown v. Pennsylvania Public Utilities Commission, 31 A.2d 435, 152 Pa. Super. 58.

47. Pa.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 64 A.2d 500, 164 Pa. Super. 320.—Brown v. Pennsylvania

Public Utility Commission, 31 A.2d 435, 152 Pa. Super. 58.

48. Pa.—Rankin v. Chester Municipal Authority, 68 A.2d 458, 165 Pa. Super. 438.

49. N.J.—Federal Shipbuilding & Dry Dock Co. v. City of Bayonne, 141 A. 455, 102 N.J.Eq. 475, affirmed 144 A. 918, 104 N.J.Eq. 196.

50. Ohio.—Wagner v. City of Youngstown, 75 N.E.2d 724.

51. Ala.—Birmingham Waterworks Co. v. Brown, 67 So. 613, 191 Ala. 457, L.R.A. 1915D 1086.

52. Ohio.—Rogers v. City of Cincinnati, 14 Ohio N.P.N.S., 193.

Deposits and payment in advance in general see infra § 302 c.

53. Ala.—Birmingham Waterworks Co. v. Brown, 67 So. 613, 191 Ala. 457, L.R.A. 1915D 1086.

**City's contract with water company** Where city purchased water plant and agreed to sell water to water company for distribution in another

city, contract wherein company reduced sale price and waived claim for severance damages in consideration of preferential rate was unenforceable.—North Little Rock Water Co. v. Waterworks Commission of City of Little Rock, 136 S.W.2d 194, 199 Ark. 773.

Contracts with patrons as to rates in general see supra § 287 b.

54. Ala.—Birmingham Waterworks Co. v. Brown, 67 So. 613, 191 Ala. 457, L.R.A. 1915D 1086.

55. Ala.—Brown v. Birmingham Waterworks Co., 52 So. 915, 169 Ala. 230.—State v. Birmingham Waterworks Co., 51 So. 354, 164 Ala. 586, 27 L.R.A., N.S., 674, 137 Am. S.R. 69, 20 Ann. Cas. 951.

56. Ala.—State v. Birmingham Waterworks Co., supra.

57. S.C.—Paris Mountain Water Co. v. Camperdown Mills, 82 S.E. 417, 98 S.C. 304.

57. S.C.—Paris Mountain Water Co. v. Camperdown Mills, supra.

rate is unreasonably high, and should be revised by the proper regulatory authorities<sup>58</sup>

**Assessments by state engineer** A state engineer cannot, without some reasonable basis for the differentiation, render services for the users of water on one fork of a stream, and assess them for such services, and omit to render similar services, with assessments, against the users on other forks<sup>59</sup>

#### b. Rates outside Municipal Boundaries

Higher rates may be charged against water consumers outside municipal limits than against those with-

in, provided there is a reasonable basis for the difference other than the mere fact of municipal boundaries.

A municipal corporation may classify rates to be charged in outlying territories<sup>60</sup> The classification of water consumers according to whether they reside within or without the limits of a municipality, and charging higher rates to those outside such limits than are charged to those within the municipality, has been held reasonable and not unjustly discriminatory<sup>61</sup> However, for this principle to apply there has been required to be a reasonable basis for the difference in rates,<sup>62</sup> other than the

58. Ala.—State v Birmingham Waterworks Co., 51 So 354, 164 Ala. 586, 27 L.R.A., NS, 674, 137 Am SR 69, 20 Ann Cas 951

59. Utah—Tracy v Peterson, 265 P 2d 393, 1 Utah2d 213

60. Ga.—Barr v City Council of Augusta, 58 SE2d 823, 206 Ga 753 —Collier v City of Atlanta, 173 SE 853, 178 Ga 575

#### Intention of lawmaking body

In adopting ordinance designating as a nonresident bulk user any consumer located outside corporate limits of city to whom water was supplied by city, lawmaking body intended to draw a geographical line of demarcation so that one who used water within city limits would be a resident consumer of water, to be charged a fixed rate, and one who used water outside city limits would be a nonresident consumer, to be charged a different rate—City of Covington v Sohio Petroleum Co., 279 SW2d 746

#### Different rates for city and suburban services

Where service furnished by municipally owned water utility to suburban retailer differed from that furnished to city consumers, fact that rate for each service differed, or that rate of return accorded utility by the rates differed, did not render the rates unlawful, where no question of reasonableness was involved—Village of Fox Point v Public Service Commission, 7 NW2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 NW2d 574, 242 Wis 105 and Village of Whitefish Bay v Public Service Commission, 7 NW2d 575, 242 Wis. 106

#### Resale by suburb

In classifying service of a municipally owned water utility for rate-fixing purposes, fact that suburb owning its own distributing system bought water from utility for resale was a proper factor to consider—Village of Fox Point v Public Service Commission, 7 NW2d 571, 242 Wis 97, followed in Village of Shorewood v Public Service Commission, 7 NW2d 574, 242 Wis 105 and Village of

Whitefish Bay v Public Service Commission, 7 NW2d 575, 242 Wis 106  
**United States hospital charged with in-city rate**

Where city agreed to furnish water to the United States for a hospital, which was situated within boundaries of the city but was not a part thereof, in consideration of a right of way granted to city by the United States over hospital grounds for constructing a pipe line to serve other within-city customers, city had right to treat the hospital as a within-city customer and charge the within-city rate rather than outside-city rate—Department of Water and Power of City of Los Angeles v U S, 62 F Supp 938, 105 Ct Cl 72

61. Cal.—Durant v City of Beverly Hills, 102 P2d 759, 39 Cal App 2d 133

Ga.—Barr v City Council of Augusta, 58 SE2d 825, 206 Ga 756—Collier v City of Atlanta, 173 SE 853, 178 Ga 575

NC—Fulghum v Town of Selma, 76 SE2d 368, 238 NC 100

Pa.—Youngman v Commissioners of Waterworks in City of Erie, 110 A 174, 267 Pa 490—State College Borough Authority v Pennsylvania Public Utility Commission, 31 A2d 557, 152 Pa.Super 363

Tex.—Botkin v City of Abilene, Civ App, 262 SW2d 732, refused no reversible error

#### Ordinance held constitutional or valid

(1) Ordinance requiring users of city water outside corporate limits to pay double city water rate was held not unconstitutional, unreasonable, or discriminatory

Ga.—Barr v City Council of Augusta, 58 SE2d 823, 206 Ga 753

Tex.—Botkin v City of Abilene, Civ App, 262 SW2d 732, refused no reversible error

(2) An ordinance fixing rates for water sold by city to water company for supply of consumers outside city, was not void ab initio as discriminating in favor of company against other users charged higher rates by city, but continued in force until repealed by later ordinance increasing rates charged company.—

Water Works Commission of City of Little Rock v North Little Rock Water Co., 180 SW2d 526, 207 Ark 349

#### Allocation of investment and charges

A borough which supplies water to its inhabitants and to consumers in abutting township can establish rate schedule for such consumers different from that used in borough, based on specific investment in township and allocation of proper proportion of general plant investment, in arriving at rate base, and similar division and allocation of operating, maintenance, and depreciation charges, the operation of the plant as a unit and the charging of same rates to customers in municipality and in adjoining township did not prevent municipality from thereafter establishing such rate schedule—Borough of Ambridge v Pennsylvania Public Utility Commission, 8 A2d 429, 137 Pa.Super. 50

#### Water taken from mains inside city

Where water for refinery, although taken from mains at a point inside corporate limits of city adjacent to property owned by refinery operator, was carried through line installed at city's expense to refinery just outside corporate limits, and was there metered, operator was a nonresident consumer of water within ordinance fixing different rates for resident and nonresident consumers—City of Covington v Sohio Petroleum Co., 279 SW2d 746

62. Tex.—City of Texarkana v Wiggins, 246 SW2d 622, 151 Tex 100

#### Rule held not changed by statute

Tex.—City of Texarkana v Wiggins, supra.

#### Purchase of waterworks by bonds

Fact that city waterworks was purchased by bonds on which taxpayers were liable, could be considered as a justification for establishing higher rates for nonresident users than for resident users—Botkin v City of Abilene, Tex Civ App, 262 SW2d 732, refused no reversible error

#### Contributions to cost of constructing plant

A municipally owned water utility was not entitled to earn on special assessments, known as customer contributions, for cost of constructing

mere fact of municipal boundaries,<sup>63</sup> in the absence of some physical difference to justify a separate classification, persons living outside the corporate limits of a municipality must be furnished with water service at the same rates as those within such limits, and a classification based wholly on the corporate line as the line of demarcation is unreasonable and constitutes unjust discrimination.<sup>64</sup> So, such discrimination has been held not justifiable on the ground that the residents of the municipality are liable to taxation to pay for the acquisition of the water system.<sup>65</sup>

It has also been held that a municipal water system may serve residents within the city at cost, but is entitled to a profit on service in territory outside its boundaries,<sup>66</sup> and that it is immaterial that a nonresident deems the rates for nonresidents to be exorbitant or unreasonable.<sup>67</sup>

### § 298. Flat Rates

Flat rates, without reference to the quantity of water used, may be fixed for water. Such rates do not entitle the consumer to use water wastefully, and meter rates have been held more equitable.

Water service is frequently supplied at flat rates, or rates fixed without reference to the quantity of water used, to dwelling houses,<sup>68</sup> or other buildings,<sup>69</sup> which rates may vary with the number of rooms,<sup>70</sup> or the number or character of faucets and

other appliances connected with the water system,<sup>71</sup> and may include the use of water for all ordinary domestic purposes or for certain enumerated purposes only.<sup>72</sup> A particular ordinance has been held to fix a maximum flat rate for the ordinary consumer, based on the fixtures used and the business for which the supply is intended.<sup>73</sup>

A flat rate does not entitle the consumer to use water wastefully, but only to use it in such reasonable quantities as are sufficient, without inconvenient economy, for the purposes covered by the rate.<sup>74</sup> Where flat rates are fixed in contemplation of a general or established practice of using service pipes or connections of a certain diameter, a consumer is not entitled to take water, and the company is not bound to supply it, through a larger pipe or connection at the same rate, and, if so taken or supplied, a higher rate may be charged.<sup>75</sup>

It has been held that meter rates are more equitable than flat rates,<sup>76</sup> since all consumers do not use the same amount of water, a uniform flat rate unfairly distributes the cost,<sup>77</sup> while metering, on the other hand, distributes the cost to the consumer in proportion to his use of the service and facilities of the water company.<sup>78</sup> Flat rate service is naturally conducive to careless and extravagant use of water,<sup>79</sup> metered service, with charges based on quantity used, tends to reduce waste, inasmuch as

the plant, but the contributors were entitled to have the benefit thereof as against consumers outside the city, who did not make such payments—*Village of Fox Point v Public Service Commission*, 7 NW 2d 571, 242 Wis 97, followed in *Village of Shorewood v Public Service Commission*, 7 NW 2d 574, 242 Wis 105 and *Village of Whitefish Bay v Public Service Commission*, 7 NW 2d 575, 242 Wis 106.

63. Tex.—*City of Texarkana v Wiggins*, 246 SW 2d 622, 151 Tex 100

64. Ala.—*City of Montgomery v Greene*, 65 So 783, 187 Ala 196, error dismissed 37 S Ct 20, 242 US 613, 61 L Ed 528—*City of Montgomery v Greene*, 60 So 900, 180 Ala 322

#### Annexation; adjoining city

Adjoining city had power to exact a higher rate to furnish water to residents of area later incorporated into second city than rate at which adjoining city furnished water to its own residents, or in water control and improvement district annexed at same time, but could not arbitrarily thereafter change the rate if in doing so it would further discriminate between residents of annexed area and

residents of adjoining city—*State ex rel Richmond Plaza Civic Ass'n v City of Houston*, Tex Civ App, 270 SW 2d 235, error refused no reversible error

65. Tex.—*City of Texarkana v Wiggins*, 246 SW 2d 622, 151 Tex 100

66. Pa.—*City of Altoona v Pennsylvania Public Utility Commission*, 77 A 2d 740, 168 Pa Super 246

Municipal rate producing profit generally see supra § 289 b

67. NC.—*Fulghum v Town of Selma*, 76 SE 2d 368, 238 NC 100

#### Showing required for relief

A person residing outside city limits was not entitled to relief against act of city council in fixing a different rate for water than that charged to those residing within city limits, in the absence of a showing that charges were unreasonable, unfair, or fraudulently or arbitrarily established—*Durant v City of Beverly Hills*, 102 P 2d 759, 39 Cal App 2d 133

68. Me.—*Robbins v Bangor Ry & Electric Co*, 62 A 136, 100 Me 496, 1 L R A NS, 963.

67 C J p 1260 note 27

69. NY.—*Cromwell v Stephens*, 2 Daly 15, 3 Abb Pr NS, 26.

67 C J p 1260 note 28

70. Ala.—*Birmingham v Birmingham Waterworks Co*, 42 So 10

67 C J p 1260 note 29

71. RI.—*Walsh v Bristol & Warren Waterworks*, 97 A 798, 39 RI 292

67 C J p 1260 note 30

72. Minn.—*Allen v Duluth Gas & Water Co*, 48 NW 1128, 46 Minn 290

67 C J p 1260 note 31

73. Fla.—*Wilson v Tallahassee Waterworks Co*, 36 So 63, 47 Fla 351

74. Ala.—*Brown v Birmingham Waterworks Co*, 52 So 915, 169 Ala 230—*Smith v Birmingham Waterworks Co*, 16 So 123, 104 Ala 315

75. NY.—*Condon v New Rochelle Water Co*, 116 NY S 142, affirmed 120 NY S 1119, 136 App Div 897, affirmed 95 NE 1126, 202 NY 535

76. Pa.—*Orlosky v Pennsylvania Public Utility Commission*, 89 A 2d 903, 171 Pa Super 409

77. Pa.—*Orlosky v Pennsylvania Public Utility Commission*, supra

78. Pa.—*Orlosky v Pennsylvania Public Utility Commission*, supra

79. Pa.—*Orlosky v Pennsylvania Public Utility Commission*, supra

inordinate use will be tempered by consumer self-interest<sup>80</sup>

### § 299. What Rate Applies

The water rate applicable in a particular situation may depend on such factors as the purpose for which the water is used and the quantity used. A doubt as to which rate applies is to be resolved in the consumer's favor.

The use made of the property to which water is furnished is an important factor to be considered in determining the proper applicable rates.<sup>81</sup> Where different rates are established for water taken for uses of different characters, charges are to be made according to the purposes for which the water is used,<sup>82</sup> the criterion being the use actually made of the water and not the character or use made of the building or premises to which it is supplied.<sup>83</sup> If part of the water taken is used for one purpose and part for another, water used for each purpose is to be separately charged for at the rate applicable, even though the whole supply enters the consumer's premises through a single service pipe.<sup>84</sup>

The words "domestic rates," as used in a contract for water supply, have been held to signify rates allowed to be charged where water is furnished for domestic purposes.<sup>85</sup>

Where different rates are established for different classes of water service or water consumers, and it is doubtful in a particular instance which rate is

applicable, the doubt is to be resolved in favor of the consumer.<sup>86</sup>

**Flat rate or meter rate.** Under an ordinance providing that water consumers may demand a meter and pay meter rates, the flat rates apply where no such demand has been made, and the water company, by installing a meter on its own motion, does not become entitled to charge meter rates.<sup>87</sup> Under an ordinance establishing maximum flat rates, but providing that where a meter has been installed water furnished shall be charged for at meter rates, a consumer taking water through a meter is liable therefor at meter rates, even though the amount of the charge exceeds the prescribed maximum flat rate.<sup>88</sup> A patron who takes water through an unmetered line is liable to pay therefor at the established flat rates, even though he supposes he is taking the water through a meter.<sup>89</sup> A schedule of meter rates commencing with the rate for a daily consumption of, or exceeding, a specified amount is not applicable where not as much as such specified amount per day is consumed.<sup>90</sup> Somewhat similarly, a schedule of flat rates based on building heights up to a specified number of stories has no application to buildings of greater height.<sup>91</sup>

Where part of particular premises comes within ordinance provisions as to flat rates, and part within the provisions as to meter rates, water used in the separate parts may be charged and paid for on separate bases where that is feasible,<sup>92</sup> but

80. Pa.—Orlosky v Pennsylvania Public Utility Commission, *supra*

81. Pa.—Brown v Pennsylvania Public Utility Commission, 31 A. 2d 435, 152 Pa Super 58

Purposes for which water may be taken under flat rates see *supra* § 298

**Annual rate basis for "business purposes"**

A building used partly as a lodging house and partly for other business was used wholly for "business purposes" and not for combined business and domestic purposes within rule permitting installation of fire lines on an annual rate basis in buildings used for combined business and domestic purposes or solely for domestic purposes.—N H Lyons & Co v Cannella, 82 N Y S 2d 174, affirmed 88 N Y S 2d 247, 275 App Div. 705.

**Average use in residence; meter tampered with**

Where contractor who used water in construction of apartments knew, from schedule printed on water bills and permits, of rates provided by ordinance for unmetered water, and meter was tampered with, it was proper to charge him on basis of amount of masonry and plastering being used in

construction, plus miscellaneous and extra charges, rather than on basis of average subsequent use of water, as authorized by charter, since he had actual notice of ordinance and charter basis was applicable solely to residences.—Parsons Const Corp v City of New York, 298 N Y S 276, 163 Misc 932

82. Me.—Pejepscot Paper Co v Town of Lisbon, 142 A 194, 127 Me 161

**Washtubs; "baths"**

Fixtures in private apartments without bathrooms, used primarily as washtubs held not "baths" for which ordinance imposes extra water charges, even though some tenants sometimes used them as bathtubs, ordinance fixing rates for baths in barber shops, public houses, and bathing establishments and for washtubs in laundries, imposed no extra or miscellaneous rate for washtubs in private apartments by provision imposing extra charges for baths therein.—Eiffel Realty Corp v City of New York, 299 N Y S 373, 165 Misc 176, affirmed 11 N Y S 2d 250, 256 App Div 972, affirmed 24 NE 2d 978, 282 N Y 541.

83. Me.—Pejepscot Paper Co. v.

Town of Lisbon, 142 A 194, 127 Me 161

67 C J p 1262 note 51

84. Me.—Pejepscot Paper Co v Town of Lisbon, *supra*

85. Ala.—Birmingham Water Works Co v Truss, 33 So. 657, 135 Ala 530

86. Mo.—State ex rel Laundry, Inc. v Public Service Commission, 34 SW 2d 37, 327 Mo 93

67 C J p 1261 note 35

Classification of water rates see *supra* § 297

87. Cal.—Shaw v. San Diego Water Co, 50 P 693, 118 Cal xvi

88. S C.—Charleston Light & Water Co v Lloyd Laundry & Shirt Mfg Co, 62 S E 873, 81 S C 475

89. N Y.—J N Matthews Co v City of Buffalo, 126 N Y S 596

90. Ala.—Birmingham Waterworks Co v. Keiley, 56 So 838, 2 Ala App 629

91. N Y.—In re Herrman, 123 N Y S 752, 138 App Div 780—Johnson-Kahn Co v Thompson, 130 N Y S 216, 73 Misc 103

92. N Y.—Johnson-Kahn Co. v. Thompson, *supra*.

where it is not practicable to distinguish between the water used in the respective portions of the premises, meter rates may be applied to the whole<sup>93</sup>

Where an ordinance fixes a flat rent for restaurants and fixes meter rates without classification of the users of meters, and a restaurant owner protests against the use of a meter and refuses to pay meter rates until compelled to do so under penalty of having the water connection discontinued, a contract to use the meter does not exist<sup>94</sup>

**Applicability of single-unit rate** The fact that the owner of a property is the sole party contracting for water is not controlling in determining whether the consumer is entitled to a rate based on a single unit<sup>95</sup>

**Rates diminishing with quantity used; sliding scales** Whether a schedule of water rates, prescribing progressively lower rates as the quantity used increases, is to be construed as establishing an accumulative or sliding scale, or as classifying consumers according to amount of water taken and establishing absolute rates for each classification, depends on its terms<sup>96</sup> Under such a schedule, a person owning and occupying several buildings is entitled to the benefit of the rate applicable to the entire quantity of water used in all of them, and the rate is not to be computed separately for each building, even though, for convenience, separate meters are installed for each,<sup>97</sup> but where several dwellings or buildings, although under common owner-

ship, are separately occupied and used, the rates are to be separately computed for each and the owner is not entitled to quantity rates for the entire amount of water taken<sup>98</sup>

**Change of rates.** A patron claiming the existence of a contract for water service at particular rates, who continues to take water after being notified that thenceforth he will be charged at different rates, and makes no objection thereto, thereby impliedly agrees to pay at the new rates<sup>99</sup> Where, however, a consumer denies the right of a company, attempting to increase its rates, to do so, and it continues to furnish him with water without making any effort to collect the higher rate, it cannot recover more than the rate previously in effect<sup>1</sup> A municipality having an option to change from a flat rate to a meter rate must do something more than install meters to indicate its election to exercise its option<sup>2</sup>

### § 300. Minimum Charge

A minimum charge may be made for water provided it is reasonable and uniform in its application.

Where the consumption of water, charged at quantity or meter rates, does not reach a reasonable amount, a minimum charge may properly be made, to cover the cost of being ready to serve the consumer and the general overhead expenses which accrue regardless of the quantity of water used,<sup>3</sup> but such minimum charges must be reasonable in

93. NY—Johnson-Kahn Co v Thompson, supra

94. Miss—Almaras v City of Hattiesburg, 180 So 392, 181 Miss 752

95. Pa—Brown v Pennsylvania Public Utility Commission, 31 A 2d 435, 152 Pa Super 58

96. Ark—Walton v Proutt, 174 S W 1152, 117 Ark 388, L R A 1915D 917

67 C J p 1261 note 44

**Sliding scale construed to avoid waste** NJ—Jersey City v Central R Co of New Jersey, 191 A 745, 118 N J Law 176.

97. Conn—Scovill Mfg Co v Kilduff, 64 A 218, 79 Conn 279

Mo—St Louis Brewing Ass'n v City of St Louis, 37 S W 525, 41 S W 911, 140 Mo 419

**Distribution by manufacturer to housing group**

(1) Where manufacturer received water through single pipe for its industrial housing group and distributed water through own pipes, company held not entitled to charge manufacturer on basis of average amount used by each house, but manufacturer

was entitled to have consumption charges based on entire amount of water used, so as to obtain benefit of sliding scale of unit consumption charges—Lewistown-Reedsville Water Co v Public Service Commission, 169 A 406, 111 Pa Super 24

(2) In such situation, company, which needed only to extend main and install two meters, held not justified in charging against group general expenses incurred in improving distribution system and increasing capacity for benefit of general public served, or even for manufacturer's plant, and company was held not entitled to charge manufacturer by dividing all water used for all purposes by number of houses and bill result as average use, but manufacturer was entitled to have group regarded and billed as one consumer—Viscose Co v Public Service Commission, 187 A 454, 123 Pa Super 223

98. Pa—Hunter v Public Service Commission of Pennsylvania, 168 A 541, 110 Pa Super 589

67 C J p 1261 note 46

99. Mass—Scott v Dedham Water Co, 113 N E 282, 224 Mass 398

1. NH—Haverhill Aqueduct Co v Page, 52 N H 472

2. NJ—Jones v Bloomfield, Ch, 69 A 1106

3. SC—Cox v Abbeville Furniture Factory, 54 S E 830, 75 S C 48

67 C J p 1262 note 53

**Application to apartment house**

Minimum charges graduated according to size of meter installed on premises or according to the maximum use at any one time, are combination minimum service charges and readiness-to-serve charges which, as applied to apartment house, give such building benefit of wholesale rates for large average consumption with corresponding responsibility for a capital charge for maximum potential use substantially in excess of average use—Lewis v Mayor and City Council of Cumberland, 54 A 2d 319, 139 Md 58

**Rules held reasonable**

Water company's rules providing for minimum rates, service lines to single buildings only, and minimum charges to each subdivision thereof, held reasonable—Hunter v. Public Service Commission of Pennsylvania, 168 A. 541, 110 Pa Super. 589.

amount<sup>4</sup> and uniform in their application<sup>5</sup> Where water service is supplied to two or more houses or families through a single service pipe, the question whether a single minimum charge or separate charges should be made depends on the circumstances and the terms of the ordinance or rate schedule.<sup>6</sup>

### § 301. Charges for Installation, Meters, Meter Rent, Reading Meters, and Other Service Charges

Authorities are not uniform as to the propriety of charges for installing water connections, the cost of meters and installation thereof, meter rent, reading the meter, turning off water for nonpayment of charges, or turning it on again

A municipal ordinance requiring the payment, by inhabitants of one part only of the municipality, of a fee for installing a water connection, is void, as unjust and discriminatory.<sup>7</sup>

*Cost of meters and installation* A consumer of water cannot be required to pay the cost of a meter installed to measure the amount of water taken by him, or the expense of installing such meter, and cannot be required to furnish or install a meter at his own expense,<sup>8</sup> except where it is otherwise provided by statute<sup>9</sup> Authority to make such a charge, or to compel consumers to furnish and install meters, is conferred by a statute authorizing the adoption of regulations as to the ascertainment of the amount to be paid for water supplied,<sup>10</sup> and, it

has been held, by a statute authorizing the making of all rules and regulations proper and necessary to the operation of a water system or the use of water therefrom,<sup>11</sup> but on the latter point there is also authority to the contrary.<sup>12</sup> A statute conferring on a municipality power to fix the rates to be charged by water companies authorizes it to say who shall provide and pay for meters and service connections, as part of its power to determine the amount the consumer shall pay for water service.<sup>13</sup>

*Meter rent, service charge, or deposit.* It has been held that no separate and additional charge, over and above a charge for water taken, may be made for meter rent,<sup>14</sup> even under a special contract providing therefor, since such a contract will be deemed coercive,<sup>15</sup> but, according to other authority, a service charge, in addition to charges for water consumed, may properly be made, as long as it is reasonable in amount,<sup>16</sup> and a classification of service charges in accordance with the size of the meter or connection is not unreasonable<sup>17</sup> In determining whether a meter charge is excessive, the cost or value of the meter is not the only consideration, since labor is required to install it, keep it in order, and have it read<sup>18</sup>

A meter deposit collected from users of municipal water to guarantee the return of the meter does not become the property of the town,<sup>19</sup> but is held in trust for, and belongs to, the property owner who

4. US—City of Pocatello v Murray, D C Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628 Reasonableness of charges generally see supra §§ 289, 293

5. US—City of Pocatello v Murray, D C Idaho, 206 F 72, affirmed 214 F 214, 130 CCA 628 67 C J p 1262 note 55 Uniformity and discrimination in general see supra § 297

6. Ala—City of Montgomery v Smith, 88 So 671, 205 Ala 557 67 C J p 1262 note 56

The words "each consumer," as used in ordinance fixing minimum charge for each consumer to whom company supplied its services, regardless of amount of water actually consumed, meant each householder or family unit, and plaintiff was not entitled to pay only such minimum charge for furnishing of water to tract of land owned by him and on which there were several occupied tenant houses—Womack v Peoples Water Service Co, 61 So.2d 785, 216 Miss 169

7. Tex—Town of Highland Park v Guthrie, Civ App, 269 S W 193.

Uniformity and discrimination as to rates in general see supra § 297

8. Ark—Wilson Water & Electric Co v City of Arkadelphia, 129 S W 1091, 95 Ark 605 67 C J p 1262 note 59

Right or duty of company or consumer to install meter in general see supra § 280

9. Ga—Farkas v City of Albany, 82 S E. 144, 141 Ga 833, Ann Cas 1915C 1194, L R A 1915A 320 67 C J p 1263 note 60

**Regulation held not discriminatory**

Fact that persons who had already installed meters on their premises would not have advantage of securing meters on terms offered under water department regulation, did not render regulation discriminatory, and fact that, under universal water metering plan provided for in regulation, large consumers would receive large meters and small consumers would receive small meters was not discriminatory, since charges for meters would be reflected in water rates—Vitacolonna v City of Philadelphia, 115 A 2d 178, 382 Pa 399.

10. Wis—State v Gosnell, 93 NW 542, 116 Wis 606, 61 L R A 33

11. Kan—Cooper v City of Goodland, 102 P 244, 80 Kan 121, 23 L R A, N S., 410 67 C J p 1263 note 62

12. Ala—City of Montgomery v Smith, 88 So 671, 205 Ala. 557 67 C J p 1263 note 63

13. Cal—Title Guaranty & Trust Co v Railroad Commission of California, 142 P 878, 168 Cal 295, Ann Cas 1916A 738

14. Tex—Green v San Antonio Water Supply Co, Civ App, 193 S W. 453

15. Tex—Green v San Antonio Water Supply Co, supra.

16. Ohio—Rogers v City of Cincinnati, 14 Ohio N P, N S., 193

17. Ohio—Rogers v City of Cincinnati, supra

18. N J—Acquackanonk Water Co v Board of Public Utility Com'rs, 125 A 33, 100 N J Law 169, 1 N J Misc 575

19. US—Federal Deposit Ins Corp. v Casady, CCA Okl, 106 F 2d 784. Deposit generally see supra § 284

secures the use of the meter by making the deposit <sup>20</sup>

*Repair of meter.* The purchaser of property may properly be required to pay for repairs made to the water meter after the purchase <sup>21</sup>

*Charge for reading meter* Where water furnished is metered, and charged for according to the quantity used, a separate or additional charge cannot be made for reading the meter or keeping a record of the readings <sup>22</sup>

*Fee for turning off water for nonpayment of charges, or for turning it on again.* It has been held that a fee or charge may be made for shutting off water supply to a consumer for nonpayment of water rates or other charges, or for turning the supply on again after it has been shut off, <sup>23</sup> which fee, it has been held, should equal the proper cost of the work entailed, and cannot be arbitrarily fixed, <sup>24</sup> but a rule imposing a charge of one dollar has been held reasonable <sup>25</sup> According to other authority, however, a requirement that such a fee or charge be paid, as a condition precedent to the consumer's right to be furnished again with water service, is unreasonable and discriminatory <sup>26</sup>

## § 302. Amount, Payment, and Collection of Rates and Charges

### a In general

20. U S—Federal Deposit Ins Corp v Casady, supra

21. D C—Uricolo v District of Columbia, Mun App, 82 A 2d 909

22. Ohio—Bancroft v Wall, 6 Ohio S & CP 22

23. Ky—Combs v Prestonsburg Water Co, 84 S W 2d 15, 260 Ky 169 67 C J p 1263 note 72

Cutting off water supply for nonpayment of charges in general see infra § 305

24. N Y—People v Monroe, 83 N Y S 995, 41 Misc 198

25. Ky—Combs v Prestonsburg Water Co, 84 S W 2d 15, 260 Ky 169

26. Neb—American Waterworks Co v State, 64 N W 711, 46 Neb 194, 50 Am SR 610, 30 L R A 447.

27. Wis—Pabst Corporation v City of Milwaukee, 213 N W 888, 215 N W. 670, 193 Wis 522

28. Ala—MacMahon v Baumhauer, 175 So 299, 234 Ala 482

Actions for collection see infra § 304

### Acceptance of wage assignments

An Illinois city has no legal right to accept wage assignments in payment of water bills—Getz v. City of Harvey, C C A Ill, 118 F 2d 817, certiorari denied City of Harvey v Getz,

62 S Ct 59, two cases, 314 U S 628, 86 L Ed 504

### Statutes as to defeat of assessment

The purpose of statutes providing that assessments of water rates are not to be set aside for irregularities or illegality and authorizing court to fix amount due and to make a proper levy is to destroy the power to defeat a tax, assessment, or water rate imposed or levied except on a meritorious ground—P J Ritter Co v Mayor of City of Bridgeton, 50 A 2d 1, 135 N J Law 22, affirmed 59 A 2d 422, 137 N J Law 279

### Ordinance rather than resolution

Even though ordinance rather than resolution should have been employed in regulating water rates, the court was without power to set aside an assessment for any irregularity or defect in form or illegality in assessing or levying it—P J Ritter Co v. Mayor of City of Bridgeton, supra.

29. N Y—Rupersam Realty Corp v Larpeg Realty Corp, 3 N Y S 2d 840, 253 App Div 695

Water charges as not taxes see supra § 284

### Collection by water company

Railroad and Public Utilities Commission was within its authority in

b Persons liable

c Time for payment; payment in advance

### a. In General

By taking water, a consumer obligates himself to pay for it according to the terms and conditions publicly promulgated, or according to his contract Water rates may be collected by methods not available for the collection of taxes.

A city collecting water rates is acting in its proprietary capacity and not as a governmental agency of the state <sup>27</sup> In the exercise of the police power, a municipality may, by ordinances not arbitrary or discriminatory, fix water charges that may be enforced by the usual and appropriate procedure for the collection of such charges, <sup>28</sup> methods not available for the collection of taxes are usually provided for the collection of water rates <sup>29</sup>

A patron of a water system, by taking water therefrom, obligates himself to pay for it according to the terms and conditions publicly established and promulgated, or according to such express contract as he may have made <sup>30</sup> Where the water is taken through a meter, he is liable for all the water passing through the meter, <sup>31</sup> including water which escapes from a leak in his service pipe and of which

approving contract between city and water company whereby company would collect, from users of water service, charges for city's sewer service—Patterson v City of Chattanooga, 241 S W 2d 291, 192 Tenn 267

30. Pa—Rieker v City of Lancaster, 7 Pa Super 149

"One main" rate held applicable, although new main was never laid—Jersey City v Central R Co of New Jersey, 191 A 745, 118 N J Law 176

### Sum claimed not yet due

Where water company filed writ Dec 12, 1938, to recover from town charges for fire protection service, and it appeared that sums claimed became due Dec 31st of each year, company was entitled to recover only for amounts claimed to Dec 31, 1937, since sum claimed for year 1938 was not then due and payable—Milo Water Co v Inhabitants of Town of Milo, 7 A 2d 895, 136 Me 228

31. Ala—Anderson v City of Montgomery, 89 So 857, 18 Ala App 233

### Water going through several meters

Owner of group of buildings supplied with water through separate meters was not entitled to pay smaller charge for total amount used as though the water had gone through one meter, where town had no rule

he has no benefit<sup>32</sup> Where water entering a pipe supplying two consumers is metered, and the water taken by one of such consumers is measured by another meter, the other consumer cannot complain because the amount due from him is ascertained by deducting the reading of one meter from the other, and such an arrangement is not against public policy<sup>33</sup> A provision, in a contract for water service, as to the mode of ascertaining the amount of water used does not furnish the exclusive mode of determining how much water has been furnished,<sup>34</sup> but any proper method of making such determination may be employed<sup>35</sup>

**Right to meter service.** The owner of residence property is not entitled to metered water service under a company rule providing for service through meters to all industries, large commercial establishments, public garages, and consumers whose use of water is unusually large or wasteful<sup>36</sup>

**Requirement of meter; "business purposes," "hotel"** In determining whether premises are used for "business purposes" within a regulation that fire lines in buildings used solely for business purposes shall be metered, the test to be applied is the purpose for which the occupants use the premises, and not the purpose for which the owner uses them<sup>37</sup> A charter provision authorizing the installation of water meters in hotels does not apply to a lodging house<sup>38</sup>

**Single-point meter service** The owner of an eleven-building apartment development has been held entitled to single-point water meter service as a single commercial consumer of water<sup>39</sup> A consumer is not barred from seeking such service by

the fact that he has previously taken water illegally and contrary to existing service contracts and has not paid the water company the amounts demanded as undercharges<sup>40</sup>

**Inaccuracy of meter, or failure to register**

Where a water meter has been out of repair for a long period of time, and has failed to register part or all of the water passing through it, it has been held proper to ascertain the amount due from the consumer by averaging the last known correct amount per month which passed through the meter and the amount registered per month after the repair or replacement of the meter, in the absence of anything to show that such method is not proper under the circumstances,<sup>41</sup> except where it is provided by statute that the charge for water service shall be determined solely by the quantity of water taken as shown by the meter, in which case no charge can be made except for the water, if any, registered by the meter<sup>42</sup> On discovery, however, that a meter registers only a part of the water passing through it, a charge cannot be made on the assumption that the defect has been constant over a long prior period, without any evidence of the fact, and a charge on such basis is too conjectural and speculative to be supported<sup>43</sup> Mere negligence or laxity in failing to repair or replace a water meter known to be inaccurate, or not to be registering the full amount of water passing through it, does not prevent the collection of proper charges for the amount of water actually taken, unless the consumer has been misled thereby to his detriment<sup>44</sup>

**Right to replacement of meter.** A water user is not entitled to have another meter immediately in-

providing for such method of calculating the charges, but only a rule for a smaller charge where all water for several buildings or houses went through one meter—*Manchester Gardens Corp v Town of Manchester*, 58 A 2d 734, 134 Conn 499

32. Ala—*Anderson v City of Montgomery*, 89 So 857, 18 Ala App 233

33. Mass—*Fire Dist No 2 Waterworks v Canney*, 168 NE 159, 269 Mass 12

34. Miss—*Vicksburg Waterworks Co v Yazoo & M V R Co*, 59 So 825, 102 Miss 504.

35. Miss—*Vicksburg Waterworks Co v Yazoo & M V R Co*, supra

36. Pa—*Brown v Pennsylvania Public Utility Commission*, 31 A 2d 435, 152 Pa Super 58

37. NY—*Lyoles Realty Corp v Cannella*, 73 NYS 2d 10.

**Premises held used for domestic purposes, and not for business purposes**—*Lyoles Realty Corp v Cannella*, supra.

38. NY—*Lyoles Realty Corp. v Cannella*, supra.

39. Pa—*Philadelphia Suburban Water Co v Pennsylvania Public Utility Commission*, 64 A.2d 500, 164 Pa Super 320

**Evidence establishing commercial character**

Evidence that development was operated under uniform leases in which all utility services were covered by rent, with common maintenance and supervision, common garage facilities, on a single tract mortgaged as a unit, taxed as a unit, and billed for utility services as a unit, established that development was a commercial establishment—*Philadelphia Suburban*

*Water Co v Pennsylvania Public Utility Commission*, supra.

40. Pa—*Philadelphia Suburban Water Co v Pennsylvania Public Utility Commission*, supra

41. Miss—*Vicksburg Waterworks Co v Yazoo & M V R Co*, 59 So 825, 102 Miss 504

42. NY—*People ex rel Lind v City of New York*, 117 NYS 1068, 63 Misc 511, affirmed 118 NYS 1134, 134 App Div 951.

67 CJ p 1265 note 15

43. NJ—*Lehigh Valley R. Co v Jersey City*, 138 A 467, 103 NJ Law 574, affirmed 140 A 920, 104 NJ Law 437—*Armour & Co v Jersey City*, 138 A 469, 5 NJ Misc 813, affirmed 140 A 918, 104 NJ Law 432

44. Miss—*Vicksburg Waterworks Co v Yazoo & M V R Co*, 59 So 825, 102 Miss 504.



stalled when it is ascertained that the original meter has been broken or tampered with.<sup>45</sup>

### b. Persons Liable

In general, and in the absence of statute or ordinance providing otherwise, a person is liable only for water consumed by him and cannot be made liable for water consumed by another.

The obligation to pay for water is ordinarily on him who buys and consumes it,<sup>46</sup> and is not affected by the uses to which the water is put.<sup>47</sup>

It has been held that a purchaser of house property may be liable for unpaid water bills accrued against his vendor.<sup>48</sup> Under other authorities, the rule is otherwise,<sup>49</sup> so, a purchaser of property cannot be compelled to pay for water purchased by former occupants of the purchased property,<sup>50</sup> either by statutes regulating the water system or

regulations issued by commissioners pursuant thereto,<sup>51</sup> and a lessee of property cannot be required to pay the bills of a prior lessee as a condition to his obtaining a supply of water.<sup>52</sup>

As between the landlord and tenant of premises supplied with water, liability for payment of the water rent is usually a matter of private arrangement.<sup>53</sup> In the absence of such arrangement, express or implied, or of statute imposing liability,<sup>54</sup> there is no liability on the part of the former to pay for water supplied to the latter,<sup>55</sup> and, although it has been said that the legislature may authorize a water company to refuse to deal with tenants of premises which it is under obligation to supply with water,<sup>56</sup> it has been held that the company may not impose a condition that the landlord become responsible for the charges.<sup>57</sup> The company may, how-

45. NY—Parsons Const Corp v City of New York, 298 NYS 276, 163 Misc 932

46. NY—New York University v American Book Co., 90 NE 819, 197 NY 294—Rankin v City of New York, 130 NYS 427, 145 App Div. 838, affirmed 98 NE 1114, 204 NY 684

A metered water charge is the personal obligation of the consumer—Bea v Turner & Co., 169 A. 332, 115 N.J. Eq. 189

### Tenants of distinct tenements or storehouses

A city has power to install water meters and charge for water furnished by it to tenants of distinct tenements or storehouses on basis of family or individual business units—Caldwell v City of Abilene, Tex Civ App., 260 SW 2d 712, error refused.

47. Iowa—Spaulding Mfg Co v City of Grinnell, 136 NW 649, 155 Iowa 500

67 C.J. p 1263 note 84

48. N.J.—Howe v Orange, 62 A. 777, 70 N.J. Eq. 648, affirmed 75 A. 1101, 73 N.J. Eq. 410

67 C.J. p 1264 note 85

Water charge as lien on premises see infra § 308

49. Ky—Covington v Batterman, 108 SW 297, 128 Ky 336, 32 Ky L 1225, 17 L.R.A., NS, 923

Pa—Tyrone Gas & Water Co v Public Service Commission, 77 Pa Super 292

50. DC—Farrell v. Ward, Mun App., 53 A. 2d 46

Pa—Schleicher v Harris, Com Pl., 41 Sch L.R. 47

### Effect of rule requiring new application

Municipal water company's rule that, in absence of application by new owner, use of company's service might be taken as acceptance by new owner of all contract obligations of

preceding owner "accruing from and after date of change of ownership," makes new owner liable for service while owning property, and not liable for services furnished to old owner—Home Owners' Loan Corp of Washington, D.C., v Mayor and City Council of Baltimore, 3 A. 2d 747, 175 Md 676

### Effect of covenant in mortgage

Purchaser of property at mortgage foreclosure sale did not become liable for water rents charged against mortgagors, in default, under covenant that until default mortgagors should possess premises, on paying "ground rents," "taxes," "assessments," "levies," and "public debts or charges," since none of those items included water rent, and since there was no privity of estate between mortgagors and purchaser—Home Owners' Loan Corp of Washington, D.C., v Mayor and City Council of Baltimore, supra

51. DC—Farrell v. Ward, Mun App., 53 A. 2d 46

52. Mass—Turner v Revere Water Co., 50 NE 634, 171 Mass 329, 68 Am SR 432, 40 L.R.A. 657

Pa—Schleicher v Harris, Com Pl., 41 Sch L.R. 47

67 C.J. p 1264 note 87

Refusal to supply and cutting off supply for nonpayment see infra § 305

53. N.J.—Jersey City v Morris Canal, etc., Co., 41 N.J. Law 66

67 C.J. p 1264 note 88

### Liability under city charter

Minn—Prudential Co of Minn v City of Minneapolis, 277 NW. 351, 202 Minn 70

### Both liable; accrual before and after conveyance

(1) Under statute, the owner of property and his tenant are liable to New York City for water consumed thereon—Dunbar v City of New

York, 164 NYS 519, 177 App Div 647, affirmed 119 NE 1039, 223 NY 597, affirmed 40 S Ct 250, 251 US 516, 64 L Ed 384—City of New York v Idlewild Beach Co., 43 NYS 2d 567, 182 Misc 205, affirmed 50 NYS 2d 341, 182 Misc 213

(2) Where defendant conveyed to its codefendant land on which water rents were delinquent, and became codefendant's tenant on land, both were liable for water rent accruing during defendant's occupancy as a tenant, and defendant alone was liable for water rent which had accrued before the conveyance—City of New York v Idlewild Beach Co., supra

55. Cal—Page v City of Santa Rosa, 65 P 2d 775, 8 Cal 2d 311

Mass—B & B Amusement Enterprises v City of Boston, 8 NE 2d 788, 297 Mass 307

Pa—Roma E Provincia Building & Loan Ass'n v Penza, 175 A. 430, 115 Pa Super 201—Securities Guaranty Corporation v Pacheto Co., 171 A. 291, 112 Pa Super 360—Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n, 171 A. 287, 112 Pa Super 352—Duddy v Ciccarone, Pa Com Pl., 57 Montg Co 7

67 C.J. p 1264 note 89

### Effect of authority to file lien

(1) Statutory authority to file municipal lien or claim against realty for water rents or rates imposes no personal liability on owner—Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n, 171 A. 287, 112 Pa Super 352.

(2) Liens generally see infra § 308

56. Vt—Waldron v. International Water Co., 112 A. 219, 95 Vt. 135, 13 A L.R. 340

57. Tenn—Farmer v. City of Nashville, 156 SW. 189, 127 Tenn. 509, 45 L.R.A., NS, 240.

67 C.J. p 1264 note 91.

ever, do so where there is statutory authority therefor,<sup>58</sup> and, under constitutional authority, an ordinance may be adopted making the owner of realty liable for all charges for service and water supplied by the city through connections installed and maintained by him<sup>59</sup>

Where water is used in common by two parties out of one connection, they are jointly liable for the rents,<sup>60</sup> although the house was rented in the name of only one of them,<sup>61</sup> and notwithstanding the water company had no knowledge that the water was being used by the other party,<sup>62</sup> and, on refusal of one of the joint users to pay, the other is liable for the entire rent<sup>63</sup> A party otherwise entitled to service on individual meter connection is not, however, liable to pay additional charges accrued against a common service connection to the group of residences in which he lives<sup>64</sup>

A husband required by court order to provide his wife with a house, pay taxes, "and so on," is liable for water furnished to her.<sup>65</sup>

The lessee of a suite of rooms having separate water fixtures in an apartment house is liable for the rents for water furnished to him under a statute imposing liability on the "occupant of any tenement."<sup>66</sup>

*Notice of purchase.* A regulation providing that one purchasing property without notifying the Water Registrar may be compelled to pay the full current water rate for the property has been held reasonable<sup>67</sup> and to impose no undue hardship on the

purchaser.<sup>68</sup>

### c. Time for Payment; Payment in Advance

In general, a municipality or water company may decide when payment for water shall be due. Payment for a reasonable time in advance, or a reasonable deposit, may be required; but authorities differ as to whether a penalty may be imposed for late payment.

Generally speaking, a municipal corporation operating a water system may adopt such rules as to the time for payment for water supplied to consumers as its authorities may deem expedient,<sup>69</sup> and a water company may make its charges fall due at such times, as quarterly or at other stated intervals, as it may see fit<sup>70</sup>

*Payment in advance, or deposit as security.* Consumers may lawfully be required to pay water rates for a reasonable time in advance,<sup>71</sup> or to make a reasonable deposit as security for payments to become due<sup>72</sup> A regulation, however, requiring takers of water to pay rent for a whole year, in advance, whether or not they actually use water for that length of time, has been held unreasonable and unenforceable, in the absence of special agreement<sup>73</sup>

*Discount for prompt payment* of water rates may be provided for<sup>74</sup>

*Penalty for late payment* It has been held that an extra charge, of the nature of a penalty, may rightfully be made when water rates are not paid when due,<sup>75</sup> but, according to other authority, a regulation requiring the payment of an additional

Duty to supply all applicants see supra § 278

58. Mich—Kelsey v Marquette Fire, etc., Com'rs, 71 N.W. 589, 113 Mich 215, 37 L.R.A. 675  
67 C.J. p 1264 note 92

59. Ohio—Pfau v City of Cincinnati, 50 N.E.2d 172, 142 Ohio St 101

**Owner impliedly accepts terms of ordinance** by continuing to maintain water service connections after adoption of ordinance—Pfau v. City of Cincinnati, supra.

60. Ala—Birmingham Waterworks Co v Edwards, 81 So 194, 16 Ala App. 674, certiorari denied 80 So 791, 202 Ala. 503

61. Ala—Birmingham Waterworks Co v Edwards, supra.

62. Ala—Birmingham Waterworks Co. v Edwards, supra.

63. Ala—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So 995, 200 Ala. 697.

64. Ala—Alabama Water Co v Knowles, 124 So 96, 220 Ala 61

65. Pa—Borough of Oakdale v Knepper, 96 Pa Super 517

66. Mass—Young v Boston, 104 Mass 95  
67 C.J. p 1264 note 4

67. D.C.—Urciolo v District of Columbia, Mun App, 82 A 2d 909—Farrell v Ward, Mun App, 53 A 2d 46

**Highest bidder at a foreclosure sale** of realty under a deed of trust became owner as of date of sale and not as of date of delivery of deed, for purposes of determining when he should give notice—Urciolo v District of Columbia, D.C. Mun App, 82 A 2d 909

68. D.C.—Urciolo v District of Columbia, supra—Farrell v Ward, Mun App, 53 A 2d 46

69. Pa—Girard Life Ins Co v City of Philadelphia, 88 Pa 393  
67 C.J. p 1264 note 5

70. Ala.—Brown v Birmingham Wa-

ter Works Co, 52 So 915, 169 Ala 230

71. N.J.—Vanderbilt v Hackensack Water Co, 166 A 298, 113 N.J. Eq 166

67 C.J. p 1264 note 8  
Requiring advance payment or deposit from some and not from other consumers as unjust discrimination see supra § 297

72. Ky—Combs v Prestonsburg Water Co, 84 S.W.2d 15, 260 Ky 169  
Ohio—Rogers v City of Cincinnati, 14 Ohio N.P.N.S. 193  
Meter deposit see supra § 301

73. Me—Rockland Water Co v Adams, 24 A 840, 84 Me 472, 30 Am SR 368  
67 C.J. p 1265 note 10

74. Kan—City of Great Bend v Great Bend Water & Electric Co, 189 P 146, 106 Kan 553  
67 C.J. p 1265 note 11

75. Wash—Tacoma Hotel Co. v Tacoma Light & Water Co, 28 P. 516, 3 Wash 316, 28 Am.S.R. 35, 14 L.R.A. 669  
67 C.J. p 1265 note 12.

sum for delay or delinquency is unreasonable and void, in the absence of a statute authorizing it <sup>76</sup>

### § 303. Remedies

A municipality or company may make reasonable rules and regulations to assure payment for water furnished.

The right of the citizen to be supplied with water by a public company, as discussed supra § 278, is qualified by the duty of the citizen to pay or tender the customary rents<sup>77</sup> and provide the means of conveying the water from the water mains onto his property,<sup>78</sup> and a municipality or a company furnishing water may make reasonable rules and regulations to assure the payment of bills therefor <sup>79</sup>

### § 304. — Of Water Company or Municipality Supplying Water in General

A municipality or water company supplying water may have an action for the amount due therefor. In such action, questions as to such matters as pleading, evidence, and instructions are governed by the principles relating to civil actions generally.

It has been held that a city has no right to bring an action of assumpsit against an owner of premises, not in occupancy thereof, for water rents or water rates,<sup>80</sup> its rights against such owner being

limited to filing a municipal claim against the premises, a lien in rem.<sup>81</sup>

Either a municipality or private water company may have an action against a private consumer for the amount due from him,<sup>82</sup> and, although the statute of limitations may be pleaded in defense to such an action,<sup>83</sup> it is no defense that no water was actually used if defendant had the facilities for drawing it and plaintiff was ready and able to supply it <sup>84</sup> So, it is no defense that failure to furnish sufficient pressure was a breach of contract precluding recovery for water actually furnished where the water supplied was accepted and no counterclaim was pleaded,<sup>85</sup> nor is a city estopped to pursue the remedy by having previously accepted less than full payment, there being no plea of accord and satisfaction,<sup>86</sup> or to collect back water taxes from a purchaser at a sheriff's sale by having neglected to collect from year to year <sup>87</sup> Likewise, where a city charter provides for recovery by the city against an owner of property for water used on the premises, the city's failure immediately to shut off the water supply of a tenant in arrears for water does not estop the city to collect from the owner, within a year, the amount of its claim for water used by the tenant <sup>88</sup>

76. Miss—Carmichael v. City of Greenville, 73 So 278, 112 Miss 426—Ford v Vicksburg Waterworks Co., 59 So 880, 102 Miss 717, 43 L.R.A.N.S., 63

77. Ala—Alabama Water Co v Knowles, 124 So 96, 220 Ala 61—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So 995, 200 Ala 697

78. Ala—Alabama Water Co v. Knowles, 124 So 96, 220 Ala 61—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So. 995, 200 Ala 697

79. N.M.—State v Water Supply Co of Albuquerque, 140 P 1059, 19 N M 27, L.R.A 1915A 242.  
67 C.J p 1266 note 39

80. Pa—Roma E Provincia Building & Loan Ass'n v Penza, 175 A. 430, 115 Pa Super 201

Persons liable see supra § 302 b

#### No subrogation against owner

(1) Water rents are not recoverable by purchaser at sheriff's sale from owner not in occupancy, since city has no right to bring assumpsit to which purchaser can be subrogated against such owner—Roma E Provincia Building & Loan Ass'n v. Penza, supra

(2) Mortgagee purchasing on foreclosure cannot acquire by subrogation

to city's rights any right of personal action against owner not in possession for water rents—Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n, 171 A 287, 112 Pa Super 352

(3) Mortgagee paying water rents on foreclosure and seeking subrogation to city's rights against mortgagor's alienee, whose tenant occupied premises, was held limited to municipal claim—Securities Guaranty Corporation v Pacheto Co., 171 A 291, 112 Pa Super 360

81. Pa—Roma E Provincia Building & Loan Ass'n v Penza, 175 A 430, 115 Pa Super 201.

Liens generally see infra § 308.

82. Mo—St Louis v. Arnot, 7 S.W. 15, 94 Mo 275  
67 C.J p 1265 notes 19, 20

#### Quantum meruit; judicial questions

Where contract by city to furnish water to adjoining city at specified rates was terminated, city furnishing water, if able to establish that service rendered, on basis of quantum meruit, was worth more than amount which it had received, would be entitled to recover therefor unless precluded on other grounds; and whether it was entitled to recover, and amount of recovery, would be judicial questions not within jurisdiction of Railroad Commission—City of Milwaukee v. City of West Allis, 258 N

W 851, 217 Wis 614, rehearing denied 259 NW 724, 217 Wis 614

#### Revival of right to maintain action; condemnation

Where tax liens and delinquent water rents were bid in for city, and title to realty incumbered thereby had vested in city as result of condemnation proceedings, evidence established that instrument canceling tax liens was properly executed, so that city's right to maintain an action to enforce awardees' personal liability for the water rents was revived—City of New York v. Idlewild Beach Co., 43 N.Y.S 2d 567, 182 Misc 205, affirmed 50 N.Y.S 2d 341, 182 Misc 213

83. Iowa—Marion Water Co. v. Marion, 96 N.W 883, 121 Iowa 306

84. Ala—Montgomery v. Montgomery Water Works Co., 77 Ala 248  
S.C.—Cox v. Abbeville Furniture Factory, 54 S.E 830, 75 S.C 48.

85. Mo—State ex rel. St Joseph Water Co v Eastin, 213 S.W. 59, 278 Mo 662.

86. Mo—State ex rel St. Joseph Water Co v Eastin, supra.  
67 C.J p 1265 note 24.

87. Pa—Girard L. Ins., etc, Co v. Philadelphia, 12 Phila 293

88. Minn—Prudential Co. of Minn v. City of Minneapolis, 277 N.W. 351, 202 Minn. 70.

In an action by a water company to recover charges for water furnished, a defense of deficiency in service, set up by defendant in his answer, will not be stricken by the court for want of jurisdiction, although such matter is within the jurisdiction of the Public Service Commission and must first be determined by it,<sup>89</sup> but a court has been held to be without jurisdiction to determine defendant's right, in such action, to a set-off for allegedly illegal charges made in preceding years, where a statute gives the Public Service Commission sole jurisdiction to determine the propriety of rates fixed and charges made<sup>90</sup>

In a municipality's suit for the cost of water used, an amended petition has been held not subject to defendant's exceptions for vagueness<sup>91</sup> The municipality's claim, in such suit, as alleged in its petition, has been held not based on mere conclusions and suppositions so far as it was predicated on particulars which the municipality failed to allege because such particulars were in defendant's possession<sup>92</sup>

Ordinances adopted by the city under its power to regulate the use of meters and the prices charged are admissible in evidence,<sup>93</sup> as is evidence tending to show that defendant did not use the amount of water alleged,<sup>94</sup> but evidence immaterial to the issue or not tending to prove any issue should be excluded.<sup>95</sup>

A plea that the rates are unreasonable is not es-

tablished where there is no evidence touching the usual rates charged in other cities under like conditions or of the value of the plants during the period involved<sup>96</sup> The amount of the charge for water service must be reached with that certainty which would warrant a recovery in an action for goods sold and delivered<sup>97</sup> In an action by a utility company to recover the value of fire hydrant services rendered to a community, evidence has been held not to show an express agreement by defendant to pay for such services,<sup>98</sup> and in an action by a water company against a municipality to recover increased rates, evidence has been held to show that the company waived its right to immediate enforcement of the rate increase<sup>99</sup> Particular evidence has been held to sustain a finding as to the reasonable value of water supplied<sup>1</sup>

Defendant cannot complain of an instruction that, in order to find for plaintiff, the jury must believe that it furnished the exact number of gallons mentioned in its bill<sup>2</sup> In an action against a city for hydrant water rentals, wherein the city counter-claimed for half the price of hydrants furnished under contract, the court's conclusion fixing the number of the hydrants bought and furnished by the city has been upheld<sup>3</sup>

The recovery may include interest on the amount due,<sup>4</sup> although such recovery has been denied where the contract did not provide for interest and there was no testimony showing that the parties had agreed as to the amount due<sup>5</sup>

89 Pa.—Rouzerville Water Co v Peters, 76 Pa Dist & Co 125, 3 Lebanon 28

90 Pa.—Ambler Spring Water Co v Marple, 24 Pa Dist & Co 318

91 La.—City of Gretna v Gulf Distilling Corp, 21 So 2d 884, 207 La 719

**Inconsistent allegations** of original and amended petitions as to period during which water was used by defendant did not constitute such change of issues as to require dismissal on exceptions of vagueness—City of Gretna v Gulf Distilling Corp, *supra*

92 La.—City of Gretna v Gulf Distilling Corp, *supra*

93 Ala.—Anderson v City of Montgomery, 89 So. 857, 18 Ala App 233

94 Pa.—Scranton Gas & Water Co v Sturgess, 47 Pa Super. 203 67 C J p 1265 note 28

95 N J.—City of Bayonne v Standard Oil Co, 78 A 146, 81 N J Law 717

67 C J p 1266 note 29.

96 Ala.—Mitchell v City of Mobile, 13 So 2d 664, 244 Ala 442

97 N J.—Lehigh Valley R Co v Jersey City, 138 A 467, 103 N J Law 574, affirmed 140 A 920, 104 N J Law 437

98 Minn.—Country Club District Service Co v Village of Edina, St Paul Fire & Marine Ins Co, Intervener, 8 N W 2d 321, 214 Minn 26

99 N J.—New Jersey Suburban Water Co v Town of Harrison, 3 A 2d 623, 122 N J Law 189

1. N J.—City of Bayonne v North Jersey Dist. Water Supply Commission, 105 A 2d 19, 30 N J Super 409

**One hundred two dollars and fifty cents per million gallons**

N J.—City of Bayonne v North Jersey Dist Water Supply Commission, *supra*.

2. Ky.—Louisville Tobacco Warehouse Co v Louisville Water Co, 172 S W. 928, 162 Ky 478.

3. Ky.—City of Whitesburg v Whitesburg Water Co, 78 S W 2d 330, 257 Ky. 444

4. Mass.—Fire Dist No 2 Waterworks v Canney, 168 NE 159, 269 Mass 12—Danvers v Commonwealth, 69 NE 320, 184 Mass 507

**Interest at the legal rate** must be paid, in the absence of an agreement as to the rate of interest, where a city, agreeing to pay another city for water service at a rate to be fixed by the Public Service Commission, which fixed rate higher than that at which payments were made, is required to pay the deficiency—City of Milwaukee v City of West Allis, 294 N W 625, 236 Wis 371, certiorari denied 61 S Ct 941, 313 US 567, 85 L Ed 1525

**Disputed claim for liquidated amount** On a water company's claim against a town for fire protection service, based on the rate fixed by the Public Utilities Commission, interest is allowable, since the claim is for a liquidated amount, notwithstanding the claim is disputed by the town, where the law relative to the claim is not unsettled—Milo Water Co. v Inhabitants of Town of Milo, 7 A 2d 895, 136 Me 228

5. S.C.—Paris Mountain Water Co.

*Judgment and sale.* Statutes making water taxes, rates, or rents a lien on the premises and authorizing a municipality to provide means for the enforcement thereof do not give it power to provide for the collection by a judgment and sale as in the case of delinquent taxes <sup>6</sup>

Proceedings for relief against unreasonable rates are discussed *supra* § 295.

### § 305. — Refusal to Supply or Cutting Off Supply for Nonpayment

- a. In general
- b. Bills incurred by third persons

#### a. In General

The general rule, as variously qualified, is that payment of lawful water charges may be enforced by

*v* Camperdown Mills, 82 S E 417, 98 SC 304

3. Ill.—People *v* Schlitz Brewing Co., 103 N E 555, 261 Ill 22

7. Cal.—Schultz *v* Town of Lakeport, 54 P 2d 1110, 5 Cal 2d 377, 108 A L R 1168—Schultz *v* Town of Lakeport, 55 P 2d 485, 5 Cal 2d 377, 108 A L R 1168

D C.—Quick *v* District of Columbia, Mun App, 90 A 2d 235

Fla.—Corpus Juris cited in State *v* City of Miami, 27 So 2d 118, 126, 157 Fla 726

Ga.—Collier *v* City of Atlanta, 173 S E 853, 178 Ga 575

Ill.—Barry *v* Commonwealth Edison Co., 29 N E 2d 1014, 374 Ill 473

La.—Coult *v* Mayor and Board of Aldermen, City of Gretna, App, 11 So 2d 424

Miss.—Womack *v* Peoples Water Service Co., 61 So 2d 785, 216 Miss 169

N J.—Munson Dye Works *v* Mayor and Aldermen of Jersey City, 174 A 740, 116 N J Eq 568—Vanderbilt *v* Hackensack Water Co., 166 A 298, 113 N J Eq 166

Ohio.—Gatton *v* City of Mansfield, 36 N E 2d 306, 67 Ohio App 210

Tenn.—Patterson *v* City of Chattanooga, 241 S W 2d 291, 192 Tenn 267

Wash.—Home Owners' Loan Corp *v* City of Tacoma, 102 P 2d 832, 4 Wash 2d 166—Moran *v* City of Seattle, 38 P 2d 391, 179 Wash 555 67 C J p 1266 note 41

#### Reasonableness and constitutionality

(1) Statute so providing held reasonable and constitutional—Schmidt *v* Village of Kimberly, 256 P 2d 515, 74 Idaho 48.

(2) Statute so providing held not unreasonable or unlawful—Ripperger *v* City of Grand Rapids, 62 N W 2d 585, 338 Mich 682.

(3) Ordinance so providing held reasonable—Barr *v* City Council of Augusta, 58 S E 2d 823, 206 Ga 753

(4) Ordinance so providing held reasonable and constitutional—Schmidt *v* Village of Kimberly, 256 P 2d 515, 74 Idaho 48

#### Rule applied to territories outside of municipality

Ga.—Barr *v* City Council of Augusta, 58 S E 2d 823, 206 Ga 753

#### Rule applied to delinquent sewer users

Ky.—Rash *v* Louisville & Jefferson County Metropolitan Sewer Dist., 217 S W 2d 232, 309 Ky 442

#### Water fire line

A city was authorized to shut off a water fire line to a warehouse for default in payment of assessment, notwithstanding warehouse was surrounded by dwellings and other structures built with, and containing, combustible materials—Wayne Furniture Co *v* City of Dayton, Ohio App, 57 N E 2d 667

8. Ga.—Collier *v* City of Atlanta, 173 S E 853, 178 Ga 575

N J.—Munson Dye Works *v* Mayor and Aldermen of Jersey City, 174 A 740, 116 N J Eq 568

Wash.—Home Owners' Loan Corp *v* City of Tacoma, 102 P 2d 832, 4 Wash 2d 166 67 C J p 1266 note 40

#### Statute empowering cities held valid

Wash.—Moran *v* City of Seattle, 38 P 2d 391, 179 Wash 555—Metropolitan Life Ins Co *v* Hansen, 38 P 2d 387, 179 Wash 537

9. N J.—Munson Dye Works *v* Mayor and Aldermen of Jersey City, 173 A 92, 116 N J Eq 245, reversed on other grounds 174 A 740, 116 N J Eq 568

10. La.—Coult *v* Mayor and Board of Aldermen, City of Gretna, App, 11 So 2d 424

shutting off water when bills are overdue and refusing to furnish water until they are paid.

A water company or a municipality may enforce payment of its lawful charges by shutting off the water from particular premises when the bills for water furnished there are overdue, and refusing to furnish water until the bills are paid,<sup>7</sup> such right being specifically granted by some statutes or charters,<sup>8</sup> but the service may not be discontinued arbitrarily,<sup>9</sup> unjustly,<sup>10</sup> inequitably,<sup>11</sup> or without legal right<sup>12</sup> Thus, this measure cannot be resorted to where the company is itself at fault in having failed to furnish a sufficient supply according to contract,<sup>13</sup> nor can it be used to enforce payment of charges for an excess of water not properly measured,<sup>14</sup> or to coerce the consumer into paying an unjust<sup>15</sup> or incorrect<sup>16</sup> bill, or one which, in good faith, he disputes,<sup>17</sup> or a bill for something

11. N J.—Munson Dye Works *v* Mayor and Aldermen of Jersey City, 173 A 92, 116 N J Eq 245, reversed on other grounds 174 A 740, 116 N J Eq 568

12. La.—Coult *v* Mayor and Board of Aldermen, City of Gretna, App, 11 So 2d 424

13. N Y.—McEntee *v* Kingston Water Co., 58 N E 785, 165 N Y 27.

14. Ala.—City of Montgomery *v* Greene, 60 So 900, 180 Ala 322

#### False report of excess water used

If company's local manager, in scope of his employment, knowingly made false report of excess water used by customer, which caused company to cut off water supply after customer's refusal to pay for such excess, wanton wrong was perpetrated on customer for which company was liable, notwithstanding district manager acted in good faith in cutting off water on basis of report—Alabama Water Service Co *v* Wakefield, 163 So 626, 231 Ala 112

15. Ky.—Schoening *v* Paducah Water Co., 19 S W 2d 1073, 230 Ky 453

SC.—Benson *v* Paris Mountain Water Co., 70 S E 897, 88 SC 351.

16. Ky.—Camp Taylor Development Co *v* Wimberg, 113 S W 2d 9, 271 Ky 635

17. SC.—Poole *v* Paris Mountain Water Co., 62 S E 874, 81 SC 438, 128 Am SR 923 67 C J p 1267 note 45

#### Dispute as to liability or amount

(1) Generally

Ill.—Barry *v* Commonwealth Edison Co., 29 N E 2d 1014, 374 Ill. 473

Miss.—Womack *v* Peoples Water Service Co., 61 So 2d 785, 216 Miss. 169

(2) While consumer will not be granted relief because of discontinu-

else besides water service.<sup>18</sup>

Likewise, the measure cannot be resorted to as a means of collecting an overdue and disputed installment of water rent after the company has accepted payment of a subsequent installment,<sup>19</sup> or of collecting a debt for water supplied at a previous time and by another company assigned to the one asserting the right,<sup>20</sup> and, when a consumer tenders payment of the established rate in advance for the service he is demanding, the company cannot, as a condition precedent to supplying him, require him to pay an old or disputed bill for water furnished him at some previous time,<sup>21</sup> or for some other and independent use,<sup>22</sup> or at some place other than that for which he is demanding water.<sup>23</sup>

Where the right to shut off the water is given in a contract authorizing the company to require payment of all rents therein agreed to be paid as a condition of turning on the water, the charges referred to are for water supplied under the contract, and not for water supplied previously at a different place.<sup>24</sup> A company may refuse to make stipulations not called for by its contract and subsequently shut off the water on the consumer's failure to pay as a result of such refusal.<sup>25</sup>

Refusal to restore water service is not justified, however, by the customer's refusal to sign a receipt which would constitute evidence that he had paid on another's account, not on his own, and which tended to justify the cutting off of his water, which had already occurred,<sup>26</sup> nor is refusal of water service paid for as per bill erroneously

made out for service at the customer's former residence excused by failure to pay the balance due for service at the new residence,<sup>27</sup> it is not the duty of the customer in such case to assume the initiative in adjusting the difference.<sup>28</sup>

The fact that a resident who has failed to pay water rents refuses to permit the owners of the water system to cut off his water supply, and prevents them from doing so, does not warrant the issuance of an injunction, at the request of the owners, to restrain the residents of the town from interfering with the operation of the water system.<sup>29</sup>

**Period of default** Where the rules of the company authorize termination of the supply a certain time after date of bill, the supply cannot be cut off until the time has elapsed.<sup>30</sup> Where a statute gives a city the right to cut off water service until delinquent charges are paid, an amendment providing that the lien shall not be for more than four months' charges has been held not retroactive,<sup>31</sup> so that the four months' limitation does not apply to charges becoming delinquent before the effective date of the statute.<sup>32</sup>

**Notice.** An ordinance requiring ten days' notice before a company is authorized to shut off a consumer's supply even though he is in arrears with his rent is valid.<sup>33</sup> Where the company refuses to accept the rent tendered until it has investigated the consumer's premises, it must notify him of the result of the investigation or make further demand for payment before cutting off the water.<sup>34</sup>

ance of service for nonpayment of bill where he has not presented basis for bona fide dispute of amount claimed to be due, where facts indicate there is ground in good faith to dispute correctness of amount claimed by company, the consumer, upon tendering rate for current term, is entitled to have service continued pending settlement of disputed overdue account—*Schultz v Town of Lakeport*, 54 P 2d 1110, 55 P 2d 485, 5 Cal 2d 377, 108 A L R 1168

#### Reason for rule

(1) Otherwise the utility, in effect, would pass judgment on its own case—*Barry v Commonwealth Edison Co.*, 29 NE 2d 1014, 374 Ill 473

(2) Summary power of shutting off water to coerce payment of current bills or water rent, vested in water company, is not deemed to exist concurrently with necessity to litigate claim disputed in good faith—*Schultz v Town of Lakeport*, 54 P 2d 1110, 55 P 2d 485, 5 Cal 2d 377, 108 A L R 1168.

18. Ill—*Hiller v City of Pinckneyville*, 269 Ill App 53  
67 C J p 1267 note 46

**Garbage collection**  
Neb—*Garner v City of Aurora*, 30 NW 2d 917, 149 Neb 295

19. Ill—*Hiller v City of Pinckneyville*, 269 Ill App 53  
67 C J p 1267 note 47

20. SC—*Johnson v Carolina Gas & Electric Co.*, 91 SE 734, 106 SC 447

21. Idaho—*Hatch v Consumers Co.*, 104 P 670, 17 Idaho 204, 40 L R A, NS, 263, affirmed 32 S Ct 465, 224 US 148, 56 L Ed 703

22. Idaho—*Hatch v Consumers Co.*, supra.

23. Idaho—*Hatch v Consumers Co.*, supra.

24. SC—*Benson v Paris Mountain Water Co.*, 70 SE 897, 88 SC 351

25. Ala—*Sims v Alabama Water Co.*, 87 So 688, 205 Ala 378, 28 A L R 461

67 C J p 1267 note 53.

26. Ala—*Alabama Water Service Co v Harris*, 129 So 5, 221 Ala 516

27. Ala—*Alabama Water Service Co v Harris*, supra.

28. Ala—*Alabama Water Service Co v Harris*, supra.

29. Tex—*Harding v Watson*, Civ. App., 91 SW 2d 956

30. SC—*Poole v Paris Mountain Water Co.*, 62 SE 874, 81 SC 438, 128 Am SR 923  
67 C J p 1267 note 57.

31. Wash—*Moran v City of Seattle*, 38 P 2d 391, 179 Wash 555

32. Wash—*Moran v City of Seattle*, supra.

33. Ala—*Sims v Alabama Water Co.*, 87 So 688, 205 Ala 378, 28 A L R 461.

34. Ala—*Birmingham Water Works Co v Bailey*, 59 So 338, 5 Ala App 474.

*Statutes providing for a lien for municipal claims* do not take from the municipality or water company the remedy of cutting off the water supply<sup>35</sup>

*Default of one of several joint users* Although it has been held that a municipality, operating its own waterworks, cannot refuse to furnish water to a tenant acting in good faith who is not in exclusive possession of the premises because the tenant of the other portion has not paid for water furnished,<sup>36</sup> in other jurisdictions the rule is that where water is supplied to joint users one of whom is in arrears and on demand refuses to pay the amount justly due, the company is under no duty to supply water through a joint service pipe to consumers who have paid if in doing so the person in arrears would also be supplied,<sup>37</sup> and failure of the party paying his just proportion also to pay that of the defaulter excuses refusal to supply him with water<sup>38</sup> So, a company is not required to supply water to a residence on demand of a member of the family there residing while there is an unpaid bill for water furnished there on demand of another member of the family.<sup>39</sup> The company is not, however, justified in turning off the water on refusal of one joint user to pay the whole amount, there must be a refusal of both to pay<sup>40</sup> If a claim was not justly due, the existence of a demand therefor affords no excuse for refusal to supply the water<sup>41</sup>

*Failure to pay cost of connection.* A regulation providing for discontinuance of service on failure to pay reasonable expenses of making a water connection is valid and enforceable,<sup>42</sup> although, in the absence of statute, charter provision, or regulation, a city, after making the connection and turning on the water under a contract, cannot discontinue it for failure to pay the cost of such connection<sup>43</sup> Ordinances requiring that owners of land formerly for-

feited to the state for delinquent taxes pay, as a connection charge and as a prerequisite to securing water service, that portion of a special assessment against the land, for water improvements, not realized from the proceeds of the sale of land by the city have been held invalid<sup>44</sup>

*Expense of turning water off and on.* When water has been lawfully turned off, it has been held that the company may refuse to restore the supply until reimbursed for the expense of turning the water off and on,<sup>45</sup> but there is authority denying the right<sup>46</sup>

*Waste.* An ordinance providing that water may be shut off in case of unreasonable waste, until such waste is stopped and all arrears are paid, does not authorize the discontinuance of water service for nonpayment of accounts that may be rendered for reasonable waste<sup>47</sup>

*Tender of full amount due,* although after default, defeats the right to shut off the water,<sup>48</sup> and, where the tender is made before the water is turned off, no fee can be charged for turning it on<sup>49</sup>

*Waiver.* The company turning on the water on false representation of the user's nonliability does not waive the right to turn it off again on his failure to pay<sup>50</sup> A city has been held not to waive its statutory right to shut off water service by allowing water charges to accumulate, and failing to cut off the water supply, for a considerable period of time<sup>51</sup>

#### b. Bills Incurred by Third Persons

It is only where a statute expressly or in effect so permits that water may be cut off for nonpayment of bills incurred by one other than the current occupant or consumer.

A municipality or water company cannot resort

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| <p>35. Ga.—Dodd v City of Atlanta, 113 SE 166, 154 Ga 33, 28 ALR 465<br/>67 C J p 1267 note 61<br/>Lien for charges generally see infra § 308</p> <p>36. Miss.—Ginnings v Meridian Waterworks Co, 56 So 450, 100 Miss 507, Ann Cas 1914A 540.</p> <p>37. Ala.—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So 995, 200 Ala 697</p> <p>Ky.—Cox v City of Cynthiana, 96 SW 456, 29 Ky L 780</p> <p>38. Ala.—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So 995, 200 Ala 697<br/>67 C J p 1268 note 64</p> <p>39. Ala.—Eutaw Ice, Water &amp; Power</p> | <p>Co v McGee, 81 So 354, 17 Ala App 18</p> <p>40. SC.—Gaines v Charleston Light &amp; Water Co, 88 SE 378, 104 SC 136, L R A 1916E 417</p> <p>41. Ala.—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So 995, 200 Ala 697</p> <p>42. Ga.—Dodd v City of Atlanta, 113 SE 166, 154 Ga 33, 28 ALR 465</p> <p>43. Ga.—Dodd v City of Atlanta, supra</p> <p>44. Minn.—Fortman v City of Minneapolis, 4 NW 2d 349, 212 Minn 340</p> <p>45. Ohio.—Mansfield v Humphreys Mfg Co, 92 NE 233, 82 Ohio St 216, 31 L R A, NS, 301, 19 Ann Cas 842<br/>67 C J p 1268 note 77</p> | <p>Right to charge fee for turning water on and off see supra § 301</p> <p>46. Neb.—American Water Works Co v State, 64 NW 711, 46 Neb 194, 50 Am SR 610, 30 L R A 447</p> <p>47. NY.—J N Matthews Co v Buffalo, 126 N Y S 596<br/>Right of company to make regulations to prevent waste of water see supra § 280</p> <p>48. Ga.—Royal v Cordele, 63 SE 826, 132 Ga 125</p> <p>49. Ga.—Royal v Cordele, supra</p> <p>50. Ala.—Birmingham Waterworks Co v Edwards, 81 So 194, 16 Ala App 674, certiorari denied 80 So 791, 202 Ala 503<br/>67 C J p 1268 note 82</p> <p>51. Wash.—Moran v City of Seattle, 38 P 2d 391, 179 Wash 555</p> |
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to cutting off the water supply as a means of collecting bills left unpaid by a former tenant, occupant, or owner of the building, in the absence of a statute expressly authorizing it or making the arrearages a lien on the lands,<sup>52</sup> or of contractual authority,<sup>53</sup> although it may do so where such a statute or lien exists,<sup>54</sup> but not where a lien once had has been lost.<sup>55</sup> In other words, no right exists to cut off the water supply to compel payment of a bill which it is not the duty of the consumer to pay.<sup>56</sup> So, a company's rule that service might be discontinued if the water rates are unpaid for a specified period makes the new owner of property liable for service rendered while the property is owned by him, but not for service rendered while the property was owned by the prior owner.<sup>57</sup>

Except where there is a statute making the charge a lien on the premises,<sup>58</sup> a tenant cannot be denied water service because the landlord is in arrears,<sup>59</sup> and the tenant need not, in such case, pay the arrears of the landlord as a condition to water service;<sup>60</sup> nor may an owner be refused water for failure of a tenant to pay his bill where the owner has not guaranteed payment.<sup>61</sup>

Where the discontinuance of service for nonpayment of another's arrearages is authorized, the water may not be shut off unless the consumer had notice that he would be required to pay.<sup>62</sup> The right to shut off the water for nonpayment of another's bills, where it exists, is not waived by the failure of the city to exercise its statutory right to require a deposit for the payment of the bills.<sup>63</sup>

### § 306. — Water Wrongfully Taken

The full value of water wrongfully taken may be recovered, with interest.

A municipality or water company supplying water to private consumers has the right to maintain an action in tort for unlawfully abstracting water from the public supply,<sup>64</sup> and the same relief may be had by cross bill for an accounting therefor filed by defendant in a suit to enjoin shutting off the water.<sup>65</sup> The right is not divested by a charter providing for water commissioners who would be vested with the ownership of the municipal water plant and the revenue thereof.<sup>66</sup> The liability of a corporation exists even though its officers, directors, and stockholders did not know that the water was being un-

52. D C—Farrell v Ward, Mun App, 53 A 2d 46

Md—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

Mich—Home Owners' Loan Corp v City of Detroit, 290 NW 888, 292 Mich 511

N J—Home Owners' Loan Corp v City of New Brunswick, 1 A 2d 854, 124 N J Eq 305

Utah—Home Owners' Loan Corp v Logan City, 92 P 2d 346, 97 Utah 235

67 C J p 1268 note 70

Liens generally see *infra* § 308

Persons liable generally see *supra* § 302 b

#### Reason for rule

To compel the new owners to assume payment of the arrearages for water furnished to the former owner would be the equivalent of establishing a lien on the premises for the amount thereof, this is a legislative, and not a judicial, function—Vanderbilt v Hackensack Water Co, 166 A 298, 113 N J Eq 166

#### Ordinance held not authorized

The statute authorizing cities and towns to enact ordinances, rules, and regulations for management and conduct of waterworks owned by them did not authorize ordinance forbidding the furnishing of water for failure of former tenant or owner of premises to pay water bill—Home Owners' Loan Corp v Logan City, 92 P 2d 346, 97 Utah 235.

#### Mortgagee securing possession

Md—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

N J—Vanderbilt v Hackensack Water Co, 166 A 298, 113 N J Eq 166

53 Md—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

Utah—Home Owners' Loan Corp v Logan City, 92 P 2d 346, 97 Utah 235

54. Colo—Home Owners' Loan Corp v Public Water Works Dist No 2, 92 P 2d 745, 104 Colo 466

N J—Munson Dye Works v Mayor and Aldermen of Jersey City, 174 A 740, 116 N J Eq 568

67 C J p 1268 note 69

**Mortgagee's lien held inferior** to previously granted statutory right of city to cut off water supply from mortgaged premises until delinquent charges are paid, even though mortgage antedates particular service for which charges are delinquent—Metropolitan Life Ins Co v Hansen, 38 P 2d 387, 179 Wash 537

#### Implied assent by mortgagee

Mortgagee, by taking mortgage with knowledge of statute permitting city to discontinue water service until delinquent charges were paid, must be considered as having assented to terms and provisions of statute—Metropolitan Life Ins. Co v Hansen, *supra*.

55. Mass—B & B Amusement Enterprises v City of Boston, 8 NE 2d 788, 297 Mass 307

56. D C—Farrell v Ward, Mun App, 53 A 2d 46

57. Md—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

58. N J—Munson Dye Works v Mayor and Aldermen of Jersey City, 174 A 740, 116 N J Eq 568

59. Ala—Alabama Water Co v Knowles, 124 So 96, 220 Ala 61

60. Ala—Alabama Water Co v Knowles, *supra*

61. Utah—Home Owners' Loan Corp v Logan City, 92 P 2d 346, 97 Utah 235

62. Pa—Rochester Bldg & Loan Ass'n v Beaver Valley Water Co, 68 Pa Super 122

63. Wash—McCormacks, Inc v City of Tacoma, 15 P 2d 688, 170 Wash 103

64. Mich—City of Kalamazoo v Standard Paper Co, 148 NW 743, 182 Mich 476

N J—City of Dover v Richardson & Boynton Co of Dover, 80 A 97, 81 N J Law 278

65. Pa—American Conduit Mfg Co v Kensington Water Co, 83 A 70, 234 Pa 208

66. N J—City of Dover v Richardson & Boynton Co of Dover, 80 A 97, 81 N J Law 278.



lawfully used,<sup>67</sup> but, where the complaint is predicated on a wilful, intentional, and fraudulent stealing of the water, the question of defendant's knowledge is material<sup>68</sup> and will not be presumed as a matter of law from the mere fact that a valve was opened with the knowledge of defendant's chief engineer.<sup>69</sup>

The measure of damages is the full value of the water at the time of the conversion,<sup>70</sup> together with interest on that value from that time,<sup>71</sup> and, in computing the amount thereof, every presumption will be made against the tort-feasor.<sup>72</sup> The amount of water taken, and for which payment must be made, is necessarily to be arrived at by approximation from such evidence as is available,<sup>73</sup> and, the fault having been the customer's, he cannot require that the amount taken be proved with certainty, but must bear the risk of the uncertainty produced by his own wrong.<sup>74</sup> Where there is no evidence as to the amount, at least a nominal sum is recoverable.<sup>75</sup> Particular evidence has been held sufficient to justify a finding that defendant corporation authorized the opening of a valve connecting its pipes with plaintiff's water mains.<sup>76</sup>

### § 307. — Of Private Consumer

- a. In general
- b. Injunction
- c. Recovery back of amounts paid
- d. Action for wrongful discontinuance of service

#### a. In General

A consumer in a bona fide dispute with a water company as to the amount due must pay the amount demanded and sue for its recovery or seek an injunction against the cutting off of the water supply pending a judicial determination of the matter in issue.

Where there is a bona fide dispute between a water supply company and a consumer as to the

amount due for water supplied or to be supplied under a reasonable regulation requiring payment in advance, the consumer, in order to save his supply of water pending settlement of the dispute, is required to pay the amount demanded, and sue for its recovery if unjust in law and fact, or to invoke the equity jurisdiction of the court to enjoin the company from cutting off the water supply pending a judicial determination of the matter in issue, offering to pay the sum the court may ascertain to be due.<sup>77</sup> If the water supply has wrongfully been cut off, the consumer may bring an action at law for damages therefor, as discussed *infra* subdivision d of this section.

A consumer who protests against the water company's method of computing and billing for water, and persistently renews his objections, does not acquiesce in such method by failing to file promptly a formal complaint with the Public Service Commission.<sup>78</sup>

In an action to declare that the acts and proceedings of a municipality in readjusting the water rates are void, a complaint has been dismissed as not stating facts sufficient to constitute a cause of action, where the rate complained of was fixed by a local law or ordinance enacted in accordance with the charter.<sup>79</sup>

*Accounting and restoration of funds* Within a statute permitting a taxpayer to sue for misapplication of municipal funds only where the city solicitor fails to file suit, plaintiffs are entitled to be regarded as water rent payers, and not necessarily as taxpayers, where they allege that they are water rent payers and sue to compel an accounting and restoration of funds of the water department, and the petition contains no mention of surplus funds or payment of taxes,<sup>80</sup> plaintiffs could institute such action without alleging that they first made demand on the city solicitor to bring the suit.<sup>81</sup>

67. Mich.—City of Kalamazoo v Standard Paper Co, 148 NW 743, 182 Mich 476

67 C J p 1269 note 88

68. N J.—City of Dover v Richardson & Boynton Co of Dover, 80 A 97, 81 N J Law 278

69. N J.—City of Dover v Richardson & Boynton Co of Dover, supra

70. Mich.—City of Kalamazoo v Standard Paper Co, 148 NW 743, 182 Mich 476

Pa.—American Conduit Mfg Co v Kensington Water Co, 83 A 70, 234 Pa 208

71. Mich.—City of Kalamazoo v Standard Paper Co, 148 NW 743, 182 Mich 476.

Pa.—American Conduit Mfg Co v Kensington Water Co, 83 A 70, 234 Pa 208

72. Pa.—American Conduit Mfg Co v Kensington Water Co, supra. 67 C J p 1269 note 91

73. Mich.—City of Kalamazoo v Standard Paper Co, 148 NW 743, 182 Mich 476

74. Mich.—City of Kalamazoo v Standard Paper Co, supra

75. N J.—City of Dover v Richardson & Boynton Co of Dover, 80 A 97, 81 N J Law 278

76. N J.—City of Dover v Richardson & Boynton Co of Dover, supra

77. Ala.—Sims v. Alabama Water Co, 87 So 688, 205 Ala 378, 28 A L R 461.

Mandamus

To compel corporation to supply water to private or municipal consumer see Mandamus § 231 g To compel municipal authorities to furnish water to private consumer see Mandamus § 180 g

78. Pa.—Viscose Co v Public Service Commission, 187 A 454, 123 Pa Super 223

79. N Y.—Franc v Davidson, 278 N Y S 559, 155 Misc 382

80. Ohio.—Himebaugh v. City of Canton, 61 NE 2d 483, 145 Ohio St 237

Water charges as not taxes see supra § 284.

81. Ohio.—Himebaugh v. City of Canton, supra.

**b. Injunction**

- (1) Restraining enforcement of improper charges in general
- (2) Preventing discontinuance of supply

- (1) Restraining Enforcement of Improper Charges in General

A consumer may seek an injunction against enforcement of a charge which he claims to be unreasonable or improper.

A consumer of water may apply to the courts to restrain the enforcement of a charge which he claims to be unreasonable or improper.<sup>82</sup> So, where the water furnished is unfit for domestic use, an injunction against the collection of charges other than for the furnishing of water for the extinguishing of fires and the flushing of pipes and sewers has been held proper.<sup>83</sup>

*Company exceeding lawfully established rates*  
Where rates established by public authority or in the manner contemplated by law have not been changed by proper proceedings, a water company is properly enjoined, at the suit of a customer, from charging higher rates.<sup>84</sup> An order restraining the collection of rates exceeding those theretofore duly established ceases, however, to have restraining force when such rates are changed in the manner provided by law.<sup>85</sup>

A complaint alleging the promulgation and publication of rates for water service, that such rates were the only ones in force during the period in

question, and that defendant charged plaintiff in excess of such rates, states a cause of action for injunctive relief.<sup>86</sup>

- (2) Preventing Discontinuance of Supply

- (a) In general
- (b) Proceedings in suit

- (a) In General

An injunction will lie to prevent the shutting off of a water supply in order to force payment of an unreasonable or improper rate or charge.

Where a water company or municipality threatens to shut off the supply, in order to force payment of an arbitrary, unreasonable, or excessive rate, or an improper charge, a court of equity has jurisdiction to prevent it by injunction,<sup>87</sup> and injunction is the proper remedy where the consumer denies in good faith either his liability<sup>88</sup> or the amount of the charge.<sup>89</sup> The application for injunctive relief should be accompanied by a tender of the amount conceded to be due,<sup>90</sup> or by an offer to pay the sum which the court may ascertain to be due<sup>91</sup> or to furnish security for such sum,<sup>92</sup> and an injunction will not issue at the suit of one who refuses to pay a reasonable amount for the water.<sup>93</sup> Even where plaintiff has unlawfully abstracted water without paying for it, on paying for the water thus wrongfully taken he is entitled to an injunction preventing discontinuance of the supply furnished by meter so long as he complies with the reasonable rules of the company.<sup>94</sup> Discontinuance of water service

82. Ala.—*Mitchell v City of Mobile*, 13 So 2d 664, 244 Ala 442  
67 C.J. p 1255 note 51 [a], p 1269 note 2

**Charge for water wasted; lowering street grade**

A property owner seeking to restrain village from taxing him for water necessarily wasted in an effort to keep pipe from freezing as result of lowering of street grade, and to compel village to abate the nuisance thereby caused, was not required to bring action under statute providing for recovery of damages for change of grade, where his claim is that village owed him same duty as private corporation would owe under same circumstances.—*McCabe v Village of Waterville*, 14 N.Y.S.2d 908, 257 App Div 609.

83. Pa.—*Brymer v Butler Water Co*, 33 A 707, 172 Pa 489  
Proceedings for relief against unreasonable rates see supra § 295 b

84. Wis.—*Pabst Corporation v. City of Milwaukee*, 213 N.W. 888, 215 N.W. 670, 193 Wis 522.

85. Wis.—*Pabst Corporation v. City of Milwaukee*, supra.

86. Vt.—*Hall v Village of Swanton*, 35 A 2d 381, 113 Vt 424

87. La.—*Coult v Mayor and Board of Aldermen, City of Gretna*, App., 11 So 2d 424  
67 C.J. p 1269 note 4

**Arrearages of former owner**

N.J.—*Home Owners' Loan Corp v City of New Brunswick*, 1 A 2d 854, 124 N.J.Eq 305

**Validity of old bill not litigated**

Where a city which has continued to furnish a consumer with water for which he has paid, shuts off his water supply because of his refusal to pay an old water bill, and the consumer sues for an injunction, the city cannot litigate the validity of the old bill in the injunction suit, but must sue thereon at law.—*Hiller v City of Pinckneyville*, 269 Ill App 53

**Claim against city not thus enforceable**

A physician rendering medical services to city employees and refusing, unless the city credited him with his charge therefor, to pay a water bill, was not entitled to a mandatory injunction, issued without notice and continued after answer and mo-

tion to dissolve, to compel the city to restore his water supply which the city had shut off because of nonpayment of water bill, his claim against the city, if any, being enforceable not in such manner, but only by a suit at law.—*Hiller v City of Pinckneyville*, supra.

88. Vt.—*Hall v Village of Swanton*, 35 A 2d 381, 113 Vt 424

89. Vt.—*Hall v Village of Swanton*, supra  
67 C.J. p 1270 note 5

90. Ala.—*Sims v Alabama Water Co*, 87 So 688, 205 Ala 378, 28 A.L.R 461

67 C.J. p 1270 note 6

91. Ohio.—*City of Mansfield v. Humphreys Mfg Co*, 92 NE 233, 82 Ohio St 216, 31 L.R.A.N.S. 301, 19 Ann Cas 842

92. Tex.—*Vinson v City of Winters*, Civ App., 178 S.W.2d 142

93. Mo.—*Mulrooney v Obear*, 71 S.W. 1019, 171 Mo 613  
67 C.J. p 1270 note 8

94. Pa.—*American Conduit Mfg. Co. v Kensington Water Co.*, 83 A. 70, 234 Pa. 333

will also be enjoined where it is threatened as a means of compelling payment of a bill for something other than water <sup>95</sup>

The fact that public utility commissions have jurisdiction in cases involving the correctness of charges does not deprive courts of equity of their jurisdiction,<sup>96</sup> although it has been held that equity has, in an injunction suit, no jurisdiction to consider the reasonableness of effective regulations of a water company where the legislature has made that a matter purely for the public service commission.<sup>97</sup> A municipal corporation has no legal interest to enjoin a discontinuance of service to private consumers refusing to pay increased rates where no contract with the municipality is involved,<sup>98</sup> and the owner of a building in the possession of a tenant has no standing to enjoin a water company from shutting off the supply <sup>99</sup>

The remedy by injunction does not lie where plaintiffs are receiving water, no threats or attempts had been made to shut it off, no suit has been filed to collect the unjust rate, and no irreparable injury would result to plaintiff if the injunction were refused.<sup>1</sup>

The general rule that equitable relief does not lie where there is an adequate remedy at law by mandamus or otherwise, as discussed in Equity §§ 20, 31, is applicable <sup>2</sup>

*Failure to protest against a minimum charge* has been held not to constitute fraud or unclean hands, so as to preclude relief by way of injunction <sup>3</sup>

*A temporary injunction* may issue,<sup>4</sup> at least where the consumer seeking it is apparently quite solvent and an injunction bond with a presumably solvent surety has been given <sup>5</sup> So, a temporary injunction may properly be issued where there is a good-faith dispute as to the correctness of the amount of the bill<sup>6</sup> or of the consumer's liability therefor;<sup>7</sup> and a temporary injunction will issue pending a hearing to determine whether increased rates are reasonable <sup>8</sup> Where the ordinance under which defendant's right to furnish water is secured provides for denial of compensation in case the water furnished is below a certain standard of purity, a temporary injunction based thereon is proper notwithstanding a statute conferring on the public utilities commission jurisdiction over facilities and service of public utilities <sup>9</sup>

*Where water rates have not been fixed* as provided by the legislature, a consumer is entitled to an injunction restraining the municipal authorities from cutting off his water supply, on condition that he permits a meter to be installed to measure the water actually used while the injunction continues <sup>10</sup>

#### (b) Proceedings in Suit

In suits to enjoin the discontinuance of service for nonpayment of water charges, general rules have been applied as to parties, pleading, and evidence.

In a suit to enjoin the discontinuance of service to private consumers for nonpayment of water rents or charges, there has been held to be, in the particular circumstances, no misjoinder of parties plaintiff<sup>11</sup> or, under the specific facts of another case, of

Remedy of company or municipality for wrongful taking see *supra* § 306

95. Neb—Garner v City of Aurora, 30 NW 2d 917, 149 Neb 295

**Garbage collection**

Neb—Garner v City of Aurora, *supra*

96. Md—Carter v Suburban Water Co., 101 A 771, 131 Md 91, LRA 1918A 764

97. Pa—Rochester Bldg & Loan Ass'n v Beaver Valley Water Co., 68 Pa Super 122

98. NY—City of New York v Citizens' Water Supply Co of Newtown, 191 NYS 430, 199 App Div 169

99. NY—Brass v Rathbone, 47 NE 905, 153 NY 435

1. Ala—Hodge v Alabama Water Co., 88 So 585, 205 Ala 472

2. NY—Johnson-Kahn Co v Thompson, 130 NYS 216, 73 Misc 103

67 CJ p 1270 note 17.

3. La—Coult v Mayor and Board of

Aldermen, City of Gretna, App, 11 So 2d 424

4. La—Coult v Mayor and Board of Aldermen, City of Gretna, *supra*  
Tex—Vinson v City of Winters, Civ App, 178 SW 2d 142

5. La—Coult v Mayor and Board of Aldermen, City of Gretna, App, 11 So 2d 424

6. Tex—Vinson v City of Winters, Civ App, 178 SW 2d 142

7. Tex—Vinson v City of Winters, *supra*

**Controversy as to right to free service**

(1) Where grantors, conveying land to city, and city entered into contract providing for free water service, and right of grantors and subsequent grantees to free service had been uniformly and continuously recognized for 32 years, grantees were entitled to temporary injunction to have status quo preserved pending determination of controversy regarding right to free service—Vinson v City of Winters, *supra*

(2) Free supply generally see *supra* § 283

8. NY—Whitmore v New York Interurban Water Co., 142 NYS 1098, 158 App Div 178—New York Interurban Water Co v City of Mt Vernon, 180 NYS 304, 110 Misc 281

9. Ill—City of Lawrenceville v Central Illinois Public Service Co., 197 Ill App 59

10. NY—Johnson-Kahn Co v Thompson, 125 NYS 443, 68 Misc 639

**11. Interest of owners of realty**

In action by owners of realty and distilling corporation to which realty was leased to restrain city from shutting off water supply to the realty, where part of the rent was based on number of wine gallons of alcohol produced in the distillery, the owners had an "interest" in the litigation, and hence there was no misjoinder of parties plaintiff—Coult v Mayor and Board of Aldermen, City of Gretna, La App, 11 So.2d 424.

parties defendant<sup>12</sup> The complaint must contain a plain and intelligible statement of the grounds for relief,<sup>13</sup> and should allege that complainant has been damaged or would likely be injured by the act complained of<sup>14</sup> If the threatened discontinuance of service is for refusal to pay increased rates, the complaint must allege that the proposed rates are unjust or unreasonable,<sup>15</sup> and, where it is claimed that the rates demanded are excessive, the complaint must allege the establishment of legal rates<sup>16</sup>

It will be presumed that meter readings are accurate,<sup>17</sup> and that the charge for the water is correct<sup>18</sup> or reasonable,<sup>19</sup> also, where a municipal charter requires that water for domestic quantity use in a reasonable quantity be furnished free to inhabitants, a presumption arises, in the absence of a showing to the contrary, that the municipal utilities board fixed a standard of reasonableness in the amount to be used, that a charge would be made for any excessive use, and that service would be discontinued on nonpayment thereof<sup>20</sup> On an issue as to the amount of water furnished, the user has the burden of showing that the charge is incorrect<sup>21</sup> Where, however, the city claims that, because of the improper functioning of the consumer's meter, he has been charged insufficient water rent over a period of months, and the consumer honestly disputes the amount of the present claim, it is held

incumbent on the city to prove the correctness of the amount claimed<sup>22</sup>

Particular evidence has been held sufficient to show that the difference in the parties' estimate of water used was due to a leak in the consumer's pipes,<sup>23</sup> and that plaintiff's bathtubs were being used by his tenants, although without faucets attached<sup>24</sup> There should be a finding as to the amount due, although defendant does not ask for such judgment<sup>25</sup>

#### c. Recovery Back of Amounts Paid

- (1) In general
- (2) Voluntary payments; payments under duress
- (3) Payment under mistake of fact or law
- (4) Proceedings in actions

##### (1) In General

In various circumstances, a consumer of water may recover money paid by him, as where he has been compelled to pay a bill accruing during a prior tenancy or where part of his advance payment remains unearned on discontinuance of the service

Where a water company requires payment of its charges in advance, on discontinuance of service, so much of the payment as is unearned must be returned<sup>26</sup> A consumer may recover money paid by him as a trust fund for water in excess of amounts shown by meters, where such fund is misappropriated<sup>27</sup> He has no right to complain of wrong-

#### 12. Failure to sue sewerage and water board alone

In action against city, its mayor and board of aldermen, and the superintendent of its waterworks, to enjoin defendants from shutting off the water supply, failure to sue the city sewerage and water board alone did not constitute a misjoinder of parties defendant, where board was not a legal entity, but was created by city council and was composed of two members of the board of aldermen, together with the city superintendent, and was operated under the city's general direction—*Coult v Mayor and Board of Aldermen, City of Gretna*, supra

13. Tex.—*Raley v San Antonio Water Supply Co*, Civ App, 233 SW 318

#### Cause of action held not stated

Ohio—*Wayne Furniture Co. v City of Dayton*, 14 Ohio Supp 131, appeal dismissed 55 NE 2d 808, 143 Ohio St 517

14. Tex.—*Raley v San Antonio Water Supply Co*, Civ App, 233 SW 318.

15. N.Y.—*City of New York v Citizens' Water Supply Co of New-*

town, 191 NYS 430, 199 App Div 169

67 C.J. p 1270 note 23

16. Cal.—*Hatfield v People's Water Co*, 145 P 164, 25 Cal App 711

17. Iowa—*Spaulding Mfg Co v City of Grinnell*, 136 NW 649, 155 Iowa 500

Ohio—*City of Mansfield v Humphreys Mfg Co*, 92 NE 233, 82 Ohio St 216, 31 L.R.A.N.S., 301, 19 Ann Cas 842

18. Ohio—*City of Mansfield v Humphreys Mfg Co*, supra.

19. Ohio—*Wayne Furniture Co v City of Dayton*, 14 Ohio Supp 131, appeal dismissed 55 NE 2d 808, 143 Ohio St 517

20. Cal.—*Page v City of Santa Rosa*, 65 P 2d 775, 8 Cal 2d 311.

21. Iowa—*Spaulding Mfg Co v City of Grinnell*, 136 NW 649, 155 Iowa 500

22. La.—*Coult v Mayor and Board of Aldermen, City of Gretna*, App, 11 So 2d 424

23. Iowa—*Spaulding Mfg Co v City of Grinnell*, 136 NW 649, 155 Iowa 500.

24. RI.—*Walsh v Bristol & Warren Waterworks*, 97 A 798, 39 RI 292

25. Iowa—*Spaulding Mfg Co v City of Grinnell*, 136 NW 649, 155 Iowa 500

26. NJ.—*Millville Improvement Co v Millville Water Co*, 113 A 516, 92 NJ Eq 480

27. Cal.—*Imperiale v City and County of San Francisco*, 275 P 2d 569, 275 Cal App 2d 277

#### Transfer of money to department's general funds

Where water department received money from customer to be deposited in trust fund as guarantee, under agreement requiring determination "by agreement, negotiation or court action," as to payment, if any, due for water deliveries, in excess of those registered by meters, and department, after ex parte determination as to sum due, transferred money to own general funds, department, by so doing, cut off possibility of "court action" for determination of amount owed, and even if its claims were not barred by limitation, they were not valid defense to customer's recovery for misappropriation—*Imperiale v City and County of San Francisco*, supra.

ful collections on the ground that the trustees of a municipal waterworks were not lawfully appointed where all the funds collected were turned over to the city treasurer and properly applied<sup>28</sup>

Where rates have been held unreasonable, the right of water users to recover reparations, in accordance with the order so holding, does not depend on their having signed the original complaint against the proposed rates<sup>29</sup>

Where collection of a water bill is erroneously made and it is paid under protest, and the collector of taxes took no part in the controversy, committed none of the acts which compelled the payment, and had no notice that the bill was being paid under protest, no personal liability rests on him<sup>30</sup> The fact that the citizens of a municipality have not asked for reparations because of excessive payments made by them does not give the municipality the right to have such excess credited on its unpaid debt to the water company<sup>31</sup>

*Recovery by tenant from prior tenant.* A tenant, threatened under statute with the cutting off of his water supply for failure to pay a water bill which accrued during a prior tenancy, has been held entitled to pay such bill and look to the prior tenant for indemnity,<sup>32</sup> regardless of the latter's lack of consent<sup>33</sup> and notwithstanding his protest,<sup>34</sup> and the fact that the tenant paying is himself secondarily liable does not relieve the prior tenant of his primary liability<sup>35</sup> In seeking reimbursement, the tenant paying stands in the shoes of a creditor;<sup>36</sup>

he cannot recover more than was actually due from the prior tenant,<sup>37</sup> and that amount is required to be established by evidence<sup>38</sup>

*Estoppel.* Although a water user might recover an excess of illegal water rates under a complaint demanding treble damages, he is estopped so to recover when he did not question the city's right to collect, and permitted the city to expend money for the benefit of all patrons of the water plant<sup>39</sup>

## (2) Voluntary Payments, Payments under Duress

Payments of excessive water charges are ordinarily not recoverable if voluntarily made, but where payments are made under threat of shutting off the water, the excess over the amount legally due is recoverable.

Voluntary payments for excessive water charges are ordinarily not recoverable;<sup>40</sup> but under an ordinance making it the duty of proper city officials to refund duplicate payments, overpayments, payments on wrong property, or any payment occasioning the necessity, voluntary payments may be recovered<sup>41</sup>

A municipality's demand for the payment of back water rent as a condition to the turning on of water does not constitute duress, so that the payment of such arrearages by a principal tenant is a voluntary act, and the amount paid cannot be recovered<sup>42</sup>

If a consumer pays an excessive water charge, under protest and because of a threat to shut off the water, he may recover back the excess above the amount legally due<sup>43</sup> With respect to the right

28. Iowa.—Sloan v City of Cedar Rapids, 142 N W 970, 161 Iowa 307

29. Pa.—Manning v Newville Water Co, 169 A 254, 111 Pa Super 229

30. D C.—Farrell v Ward, Mun App, 53 A 2d 46

31. Pa.—Borough of Greensburg v Public Service Commission, 73 Pa Super 75, affirmed 110 A 750, 268 Pa 177

32. D C.—Simmons v Quick, Mun App, 37 A 2d 656

33. D C.—Simmons v. Quick, supra

34. D C.—Simmons v. Quick, supra

35. D C.—Simmons v Quick, supra

36. D C.—Simmons v Quick, supra.

37. D C.—Simmons v Quick, supra.

38. D C.—Simmons v Quick, supra.

39. Wis.—Pabst Corporation v City of Milwaukee, 213 N W 888, 215 N.W 670, 193 Wis 522

40. Mo.—National Enameling & Stamping Co v City of St. Louis, 40 S W 2d 593, 328 Mo 648

Tex.—San Antonio Water Supply Co v. Green, Civ App, 198 S W 631

Assent to delivery of water without protest

Town which contracted with city for water supply was not liable for refund of excess of town rate, charged to an individual, over city rate, notwithstanding individual's application to city for supply, in view of statutes giving town right to supply water to inhabitants and to contract with city therefor, where user had actual knowledge of contract between city and town and had assented to delivery of water without protest—Lefebvre v Town of Pembroke, 194 NE 698, 290 Mass 8

Purpose or importance of water

An owner of premises, seeking to recover money paid under protest for water previously furnished to tenant, was not bound in order to prevent payment from being regarded as voluntary, to show purpose for which it wanted water or importance or necessity of having it, but merely that it would have been deprived of its right to water had it not submitted to unlawful exaction—B & B Amusement Enterprises v. City of Boston, 8 NE 2d 788, 297 Mass 307.

Payment held not voluntary

An apartment house owner's payment of illegal city tax on washtubs in apartments under protest in order to relieve property from lien and avoid penalty for delay in payment, was not so far voluntary as to deprive owner of right to recover amount illegally exacted—Effel Realty Corp v City of New York, 299 N Y S 373, 165 Misc 176, affirmed 11 N Y S 2d 250, 256 App Div 972, affirmed 24 NE 2d 978, 282 N Y. 541

41. Ill.—N K Fairbank Co v City of Chicago, 153 Ill App 140

42. D C.—Quick v District of Columbia, Mun App, 90 A 2d 235.

43. Mass.—B & B Amusement Enterprises v City of Boston, 8 NE 2d 788, 297 Mass. 307. 67 C J p 1271 note 39.

Payment by mortgagee

Mass.—Cambridgeport Sav Bank v. City of Boston, 8 NE 2d 790, 297 Mass. 309.

Acceptance of payment under protest

In action against city to recover money paid under protest, defense

to recover excess payments made, such payments are not voluntary where there is a threat to shut off the supply in case of nonpayment,<sup>44</sup> or where unpaid charges become a lien with penalties added for delay,<sup>45</sup> nor does the fact that a consumer may resort to equity to enjoin the collection make the payment without resort to equity a voluntary one.<sup>46</sup>

A payment may be recovered where no threat was alleged, but only that plaintiff was wholly dependent on defendant for its water supply,<sup>47</sup> the power to withhold service places the parties on unequal terms, and the law will regard as involuntary any payment made to secure the service.<sup>48</sup> Where plaintiff permitted by leakage in his pipes an unnecessary waste of much more water than he paid for, he is not entitled to recover the amount involuntarily paid in settlement of his bill.<sup>49</sup>

*Who may sue* The action must be brought by the owner of the claim,<sup>50</sup> and a tenant cannot sue for money paid under protest in his name by the landlord for illegal water rates.<sup>51</sup>

### (3) Payment under Mistake of Fact or Law

An institution entitled to free water may recover back payments made under mistake of fact.

Payments made under a mistake of fact for water furnished to an institution entitled to a free supply may be recovered back.<sup>52</sup> Where a charge does not, on its face, betray any illegality or invalidity, and the rule of law involved is dependent on the solution of a disputed issue of fact, recovery of

money improperly exacted cannot be prevented on the ground that payment was made under a mistake of law.<sup>53</sup>

### (4) Proceedings in Actions

In actions for the recovery of excessive or wrongful payments for water, general rules have been applied as to laches, pleading, evidence, and the amount of recovery.

Unreasonable delay in bringing a suit for an injunction and the refund of alleged excessive payments for water is such laches as to preclude recovery.<sup>54</sup>

In an action by a consumer of water to recover excessive payments made for the water, a complaint is fatally defective if it is not shown that the payment was involuntary.<sup>55</sup> In an action by a mortgagee, a declaration alleging that the city demanded payment by him of back charges contracted for by another, that the city, despite his protest, threatened to shut off the water, and that he made payment under protest, has been held sufficient.<sup>56</sup>

A statute making the fact that a water meter has been tampered with presumptive evidence that the water user tampered with it with intent to defraud has been held applicable in such an action.<sup>57</sup>

The burden is on plaintiff to show an excess charge<sup>58</sup> and the amount of such excess.<sup>59</sup> Where his theory is that the payment was made under duress, he has the burden of proving duress,<sup>60</sup> and,

that collector had no authority to bind city by accepting payment under protest would not preclude recovery, where city cashed check, which recited that it was for payment under protest, without seeking further information or notifying plaintiff that it did not receive money subject to conditions imposed.—*Cambridgeport Sav Bank v City of Boston*, supra.

44. Ill.—*Chicago v Northwestern Mut L Ins Co*, 75 NE 803, 218 Ill 40, 1 LRA, NS, 770

67 C J p 1271 note 40

Shutting off supply generally see supra § 305

A tenant who failed to give written notice of acquiring control of premises within five days thereof, as required by statute and order issued by commissioners, and who was thereafter required to pay water bill which accrued during a prior tenancy on municipal authorities' threatening suspension of water service, was not a mere volunteer so as to preclude recovery from prior tenant.—*Summons v Quick*, D C Mun App, 37 A 2d 656

45. NY.—*Effell Realty Corp. v. City*

of New York, 299 NYS 373, 165 Misc 176, affirmed 11 NYS 2d 250, 256 App Div 972, affirmed 24 NE 2d 978, 282 NY 541.—*Subin v City of New York*, 229 NYS 628, 132 Misc 426

Charge as lien generally see infra § 308

46. Wis.—*Pabst Corporation v City of Milwaukee*, 213 NW 888, 215 NW 670, 193 Wis 522

47. Mo.—*American Brewing Co v City of St Louis*, 86 SW 129, 187 Mo 367

48. Kan.—*Holly v City of Neodesha*, 127 P 616, 88 Kan 102

49. Ala.—*Capital City Water Co v Carey*, 13 So 276, 99 Ala 539

50. Me.—*Randolph v Bar Harbor Water Co*, 32 A 790, 87 Me 126

51. Me.—*Randolph v. Bar Harbor Water Co*, supra

52. NY.—*St Patrick's Church Soc v. Heermans*, 124 NYS 705, 68 Misc 487

67 C J p 1271 note 51

Free supply for municipal uses or public institutions generally see supra § 283.

53. NY.—*Effell Realty Corp v. City*

of New York, 299 NYS 373, 165 Misc 176, affirmed 11 NYS 2d 250, 256 App Div 972, affirmed 24 NE 2d 978, 282 NY 541

*Fixtures as washtubs or baths*

NY.—*Effell Realty Corp v City of New York*, supra

54. Pa.—*Ohio & Pittsburgh Milk Co v City of Pittsburgh*, 109 A 541, 266 Pa 46

67 C J p 1272 note 62

55. NY.—*Garber v City of New York*, 5 NYS 2d 110, 166 Misc 580  
Voluntary payments generally see supra subdivision c (2) of this section

56. Mass.—*Cambridgeport Sav Bank v City of Boston*, 8 NE 2d 790, 297 Mass 309

57. NY.—*Parsons Const Corp v City of New York*, 298 NYS 276, 163 Misc 932

58. Wash.—*Morck v City of Aberdeen*, 169 P 466, 99 Wash 268

59. Wash.—*Morck v. City of Aberdeen*, supra.

60. Mo.—*National Enameling & Stamping Co v City of St Louis* 40 S.W 2d 593, 328 Mo 648.

if he alleges that the water was used for purely manufacturing purposes for which a lower rate was chargeable, he must prove that the water was so used.<sup>61</sup>

Evidence has been held sufficient to support particular findings<sup>62</sup> or insufficient to show duress<sup>63</sup>

A city wrongfully exacting payments is liable for interest thereon<sup>64</sup> and, under at least one statute, for treble damages<sup>65</sup> However, in a customer's action against a city water department for misappropriation of a sum received for deposit in a trust fund as a guarantee of payment, if any, due for water in excess of the amount registered by meters, under an agreement requiring determination by agreement, negotiation, or court action, interest before judgment is not recoverable, even if the department was guilty of tortious conversion<sup>66</sup>

#### d. Action for Wrongful Discontinuance of Service

- (1) In general
- (2) Proceedings in actions
- (3) Damages

##### (1) In General

A municipality or water company is liable in an action for damages for unlawfully discontinuing service.

Although an entry on the premises of the con-

sumer for the purpose of disconnecting water appliances is not a trespass where he has failed to pay just and reasonable charges,<sup>67</sup> a municipality or water supply company is liable in an action for damages for wrongfully discontinuing service,<sup>68</sup> and it is no objection to such an action that plaintiff should have commenced a proceeding for an injunction to restrain the threatened discontinuance of the service<sup>69</sup> Thus, the company is liable if it cuts off its service on the mistaken belief that the user has not paid,<sup>70</sup> or on the refusal of a consumer to pay an erroneous or unjust bill<sup>71</sup> or a bill for something else beside water service<sup>72</sup> In order to recover, plaintiff must show not merely good faith in his refusal to pay the charges demanded,<sup>73</sup> but also reasonable grounds for disputing the claim<sup>74</sup>

The action being individual with plaintiff and for a specific act, the jurisdiction of the public service commissions is not exclusive, and the action may be brought at law<sup>75</sup> The user need not pay, under protest, an amount unjustly demanded in order to maintain his action<sup>76</sup> It is not necessary that there should have been a written contract to supply,<sup>77</sup> nor need plaintiff prove that the tax collector who wrongfully cut off the supply had qualified by giving bond<sup>78</sup> Where it does not appear that plaintiff knew the exact amount due and the amount demanded was exorbitant, the question of tender is not involved<sup>79</sup>

61. Mo—American Brewing Co v City of St Louis, 108 SW 1, 209 Mo 600

62. Refusal to turn on water until charges paid

In action against city to recover money paid under protest for water charges contracted for by person other than plaintiff, evidence held sufficient to sustain finding that plaintiff applied to city to turn on water, but that city refused to do so until back charges were paid—Cambridgeport Sav Bank v City of Boston, 8 NE 2d 790, 297 Mass 309

##### Supplemental agreement

Evidence held sufficient to support finding that plaintiff, suing city to recover money paid for water exceeding the contract rate with city's predecessor, entered into a supplemental agreement with a predecessor, releasing it from further obligation, if the city raised the rates—Cudahy Packing Co v City of Omaha, CCA Neb, 24 F2d 3, certiorari denied 49 S Ct 9, 278 US 601, 73 L Ed 530

63. Mo—National Enameling & Stamping Co v City of St Louis, 40 SW 2d 593, 328 Mo 648

64. Ill—Chicago v Northwestern Mut. L Ins Co, 75 NE 803, 218 Ill 40, 1 LRA, NS., 770.

65. Wis—Pabst Corporation v City of Milwaukee, 213 NW 888, 215 NW 670, 193 Wis 522  
67 CJ p 1272 note 61

66. Cal—Imperiale v City and County of San Francisco, 275 P 2d 569, 275 Cal App 2d 277

67. NY—Greenberger v Queens County Water Co, 144 NYS 535, 159 App Div 401  
67 CJ p 1272 note 63

Right to cut off water supply for nonpayment see supra § 305

68. Ala—Alabama Water Service Co v Wakefield, 163 So 626, 231 Ala 112

Cal—Schultz v Town of Lakeport, 54 P 2d 1110, 55 P 2d 485, 5 Cal 2d 377, 108 ALR 1168

Mo—Whitsett v City of St Clair, App, 30 SW 2d 696  
67 CJ p 1272 note 64

69. Cal—Schultz v Town of Lakeport, 54 P 2d 1110, 55 P 2d 485, 5 Cal 2d 377, 108 ALR 1168

70. Ala—Alabama Water Service Co v Harris, 129 So 5, 221 Ala 516—Birmingham Waterworks Co v Wilson, 56 So 760, 2 Ala App 581.

71. Ala—Brooks v Town of Oxford, 135 So 575, 223 Ala 264  
67 CJ p 1272 note 66

72. Ala—Eutaw Ice, Water & Pow-

er Co v McGee, 81 So 144, 16 Ala App 652

73. Ky—Louisville Tobacco Warehouse Co v Louisville Water Co, 172 SW 928, 162 Ky 478

Miss—Womack v Peoples Water Service Co, 61 So 2d 785, 216 Miss 169

74. Ky—Louisville Tobacco Warehouse Co v Louisville Water Co, 172 SW 928, 162 Ky 478

Miss—Womack v Peoples Water Service Co, 61 So 2d 785, 216 Miss 169

Reasonable grounds held not shown  
Miss—Wemack v Peoples Water Service Co, supra

75. Wash—Johnson v Pacific Power & Light Co, 156 P 530, 90 Wash 492

76. Ala—Birmingham Waterworks Co v Davis, 77 So 927, 16 Ala App 333—Birmingham Waterworks Co v Keiley, 56 So 838, 2 Ala App 629

77. Ala—Brooks v Town of Oxford, 135 So 575, 223 Ala 264

78. Miss—Woods v Town of Indianola, 75 So 549, 114 Miss 722

79. Ala—Birmingham Waterworks Co v Davis, 77 So. 927, 16 Ala. App 333.

## (2) Proceedings in Actions

In actions against a municipality or water company to recover damages for wrongfully discontinuing service, general rules have been applied as to parties, pleading, evidence, questions for court and jury, and instructions.

The action will lie against a town even though its agents who are not liable individually are joined as defendants therein.<sup>80</sup> Where a contract between a municipality and a private company makes it the duty of the latter to supply water to all inhabitants of the former, such an inhabitant may sue in his own name for a breach thereof.<sup>81</sup> A wife has been held entitled to maintain a suit, after her husband's death, to recover damages from a city for the unwarranted discontinuance of water service, as against the contention that no privity of contract exists between the wife and the city.<sup>82</sup>

**Pleading** A general averment in the complaint in an action for wrongful discontinuance of service that the discontinuance or refusal of service was wrongful, negligent, or wanton is sufficient.<sup>83</sup> Where plaintiff alleges that he paid for the water as per bill rendered, it is not necessary to aver that the bill rendered and paid was for the correct amount or that it identified the premises.<sup>84</sup> An allegation that defendant and his servants and employees committed the act is equivalent to an averment that defendant, through his servants and employees, committed the act,<sup>85</sup> and hence is sufficient.<sup>86</sup>

**Evidence.** In an action for damages for cutting off the supply of water, evidence tending to show that the rate demanded was discriminatory has been held admissible,<sup>87</sup> as has evidence on the question whether there was an actual tender before service was discontinued,<sup>88</sup> as to what rate obtained at the time of the tender,<sup>89</sup> and as to the damage done by the discontinuance of service.<sup>90</sup>

General rules as to weight and sufficiency of evidence are applicable.<sup>91</sup>

**Questions for court and jury** In an action for damages for wrongfully cutting off plaintiff's supply of water, on conflicting evidence, it has been held to be for the jury to determine whether the municipality or water company acted wrongfully, or without just cause, in cutting off a customer's water supply,<sup>92</sup> whether the customer was damaged thereby,<sup>93</sup> whether the customer made proper efforts to reduce or minimize his damages,<sup>94</sup> whether the company refused to restore service save on payment of an unlawful exaction,<sup>95</sup> and whether the customer is indebted to the municipality for several months' supply, payment for which is demanded in the counterclaim,<sup>96</sup> and the question of the wantonness of the company in cutting off the supply and refusing to restore it is also for the jury.<sup>97</sup>

Instructions should correctly state the applicable law.<sup>98</sup>

80 Ala.—Brooks v Town of Oxford, 135 So 575, 223 Ala 264

81 Ala.—Birmingham Waterworks Co v Kelley, 56 So 838, 2 Ala App 629

82 Tex.—City of Dallas v Brown, Civ App, 150 SW 2d 129, error dismissed

**Husband presumed to act as community agent**

Tex.—City of Dallas v Brown, supra

**Estoppel of city to deny wife's beneficial interest**

City, acquiescing in wife's payment of water bills with money and checks after death of husband, who originally contracted for service, is estopped to claim that wife had no beneficial interest in prior agreement—City of Dallas v Brown, supra

83 Ala.—Alabama Water Service Co v Harris, 129 So 5, 221 Ala 516

84 Ala.—Alabama Water Service Co v Harris, supra

85 Ky.—Camp Taylor Development Co v Wimberg, 113 SW 2d 9, 271 Ky 635.

86 Ky.—Camp Taylor Development Co v Wimberg, supra

**Action within scope of authority**

If act was committed by defendant through its servants, necessarily they were acting within scope of their authority—Camp Taylor Development Co v Wimberg, supra

87 Ala.—City Cleaning Co v Birmingham Waterworks Co, 85 So 291, 204 Ala 51

88 Ala.—City Cleaning Co v Birmingham Waterworks Co, supra 67 C J p 1272 note 78

89 Ala.—City Cleaning Co v Birmingham Waterworks Co, supra

90 Cal.—Schultz v Town of Lakeport, 55 P 2d 1110, 55 P 2d 485, 5 Cal 2d 371, 108 ALR 1168

**91. Evidence held sufficient**

(1) To establish that plaintiffs had notice of order requiring a guaranty deposit to be made by consumers to defendant water company—Maricopa Utilities Co v Cline, 134 P 2d 156, 60 Ariz 209

(2) Other evidence held sufficient—Tackett v Prestonsburg Water Co, 38 SW 2d 687, 238 Ky 613—67 C J p 1272 note 81 [a]

92 Ala.—Birmingham Water Works Co v Barksdale, 150 So 139, 227 Ala 354.

Mo.—Whitsett v City of St Clair, App, 80 SW 2d 696

93 Mo.—Whitsett v City of St Clair, App, 80 SW 2d 696

94 Tex.—City of Dallas v Brown, Civ App, 150 SW 2d 129, error dismissed

95 Ala.—Alabama Water Service Co v Harris, 129 So 5, 221 Ala 516

96 Mo.—Whitsett v. City of St Clair, App, 80 SW 2d 696

97 Ala.—Alabama Water Service Co v Wakefield, 163 So 626, 231 Ala 112—Alabama Water Service Co v Harris, 129 So 5, 221 Ala 516

98 Ala.—Alabama Water Service Co v Wakefield, 163 So 626, 231 Ala 112

Ky.—Camp Taylor Development Co v Wimberg, 113 SW 2d 9, 271 Ky 635

**Confinement to issue in dispute**

An instruction that, if jury believed that meter did not correctly measure water consumed, that bill render-



### (3) Damages

In an action for wrongful discontinuance of water service, plaintiff is entitled to damages that will compensate him for his loss and for inconvenience and annoyance, and punitive damages may be awarded.

A water supply company which wrongfully discontinues service for nonpayment of charges is liable to the amount of damages that will compensate plaintiff for the loss he has suffered,<sup>99</sup> the measure of damages is governed by the rules of tort actions<sup>1</sup> Where plaintiffs had rented the building from which the supply had improperly been cut off, the loss of rents is an element of the damages<sup>2</sup>

Inconvenience and annoyance constitute proper elements of damage in actions of this sort.<sup>3</sup> Where the customer sustained no financial loss, he may be entitled, under the pleadings and proof, to recover only for the trouble, annoyance, and inconvenience caused by the wrongful act<sup>4</sup> The fact that plaintiff's wife was sick when the supply was cut off may be considered in aggravation of damages,<sup>5</sup> but only in so far as it resulted in annoyance and inconvenience of plaintiff himself<sup>6</sup>

When the circumstances justify it, punitive dam-

ed was incorrect, and that, by customer's refusal to pay bill, company turned off the water, jury should find for customer, was not prejudicially erroneous, but instruction should have been confined to the one issue in dispute, which was the correctness of the bill—Camp Taylor Development Co v Wimberg, supra

#### Employees bringing water to place of business

In action in which there was evidence that customer and his employees carried water to customer's place of business, refusal to instruct that customer could not recover damages on account of any one other than himself bringing water to his place of business, if he was thereby put to no expense, was held not error, since customer was entitled to employee's time in service for which employee was engaged—Alabama Water Service Co v Wakefield, 163 So 626, 231 Ala 112

99. Ala.—Sims v Alabama Water Co, 87 So 688, 205 Ala 378, 28 A L R 461

67 C J p 1273 note 85

Right to cut off supply for nonpayment see supra § 305

#### Damages held excessive

(1) Judgment for \$450 was held excessive, in view of evidence showing only partial destruction of consumer's floral and vegetable gardens on one-fifth acre of land, and judgment was reduced to \$226.50—Schultz v Town of Lakeport, 54 P 2d 1110, 55 P 2d 485, 5 Cal 2d 377, 108 A L R 1168.

(2) A verdict of \$1,000 for cutting off, for 27 days in May, the water supply to customer living with wife and seven children, so that they were required to carry water from neighbor's home, about 300 feet, was excessive, where there was no proof that company acted maliciously and evidence disclosed that customer refused to permit company agents to go on his premises to make an investigation to ascertain whether other service lines tapped the water line leading to customer's residence—Camp Taylor Development Co v Wimberg, 113 S W 2d 9, 271 Ky 635

#### Showing required as to loss of business

Operator of restaurant and rooming house, suing for loss of business, was required to produce evidence which, in light most favorable to him, would fairly show that his trade left him because of lack of water supply, that he was damaged thereby, actual damages, and that his conduct did not contribute to damages, where operator gave company no notice, for more than six months after he paid bill in dispute, that he had made improvements to free pipes from leaks, as required by company as prerequisite to reinstating service, and made no demand that company again assume business relations with him, he could not recover damages for such period—Salaban v East St Louis & Interurban Water Co, 1 N E 2d 731, 284 Ill App 358

1. Ala.—Alabama Water Service Co.

ages may be awarded,<sup>7</sup> and it is for the jury to say whether plaintiff is entitled to punitive damages where the company demands more than is due and shuts off the water knowing the bill is excessive<sup>8</sup> Such damages may be awarded even though plaintiff declared on simple negligence, where his complaint stated the facts under which the alleged tort was committed<sup>9</sup> The amount of punitive damages rests largely in the discretion of the jury which is not, however, unbridled<sup>10</sup>

## § 308. Liens and Enforcement Thereof

- a. In general
- b. Nature, operation, and effect
- c. Enforcement

### a. In General

A lien on realty for water charges exists only where created or authorized by statute, and a statute doing so is a valid exercise of the police power. All statutory formalities must be complied with.

In the absence of statute, or legislative authority, there is no lien on real estate for water rents or for water supplied to it,<sup>11</sup> and where such a lien

v Wakefield, 163 So 626, 231 Ala. 112

2. Ala.—City Cleaning Co v Birmingham Waterworks Co, 85 So. 291, 204 Ala. 51.

3. Ala.—Alabama Water Service Co v Wakefield, 163 So 626, 231 Ala. 112

Embarrassment and humiliation are included in inconvenience and annoyance—Alabama Water Service Co v Wakefield, supra.

4. Ky—Camp Taylor Development Co v Wimberg, 113 S W 2d 9, 271 Ky 635

5. Ala.—Alabama Water Service Co v Harris, 129 So 5, 221 Ala 516

6. Ala.—Alabama Water Service Co. v Harris, supra

7. Ala.—Sims v Alabama Water Co, 87 So. 688, 205 Ala 378, 28 A L R 461

67 C J p 1273 note 89

8. Ala.—Birmingham Waterworks Co v Davis, 77 So 927, 16 Ala App 333

9. Ala.—Birmingham Waterworks Co v Brooks, 76 So 515, 16 Ala App 209, certiorari denied 76 So 995, 200 Ala 697

10. Ala.—Alabama Water Service Co v. Harris, 129 So 5, 221 Ala 516

67 C J p 1273 note 92.

11. Md.—Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore, 3 A 2d 747, 175 Md 676

67 C J p 1273 note 93.

exists, it exists only by force of statute<sup>12</sup> In the absence of such authorization, an ordinance or regulation,<sup>13</sup> or a charter provision,<sup>14</sup> attempting to establish such a lien is invalid; water rents do not constitute a lien on the property supplied unless it is so provided by statute in express terms or by necessary implication,<sup>15</sup> although it has been held that liens cannot be created by construction<sup>16</sup> So, in the absence of such statute, charges for water service furnished to mortgagors are not a lien on the property as against the purchasers at a mortgage foreclosure sale.<sup>17</sup>

The legislature may provide for the establishment and enforcement of such liens,<sup>18</sup> even for water furnished on the order of tenants and in the absence of an express direction by the owner,<sup>19</sup> but it has also been held that a municipality is not entitled to a statutory lien for water supplied at a

tenant's request without the owner's permission, knowledge, or consent<sup>20</sup>

The legislative right is on the broad ground that the liens may aid in providing an adequate supply of water at reasonable rates and hence may be an appropriate element in a scheme of legislation for a public water supply,<sup>21</sup> the lien has been held to be imposed either on the theory that water rents and charges may be collected as taxes or on the theory that they may be collected as compensation for water consumed<sup>22</sup> Where a case does not fall within the statute, a city is not entitled to a lien until it establishes its right to compensation by a judgment<sup>23</sup>

The purpose of the enactment of provisions for liens was to facilitate and increase, and not to restrict and hamper, the collection of water rates,<sup>24</sup> they are designed to prevent losses to the public revenue<sup>25</sup>

#### **Lien held not created or authorized by statute**

(1) In general—*Hohly v State ex rel Summit Superior Co*, 191 NE 1, 128 Ohio St 257

(2) The statutes authorizing city to shut off water supply on failure to pay water bill and providing that city may require owner of premises to guarantee payment before furnishing water to tenant does not impress a lien on property for payment of delinquent water bills or authorize city to pass ordinance impressing such lien—*Home Owners' Loan Corp v Logan City*, 92 P 2d 346, 97 Utah 235

(3) Cutting off supply generally see supra § 305

12. N.Y.—*Sayer v City of New York*, 101 NE 764, 208 NY 159—*Security Bldg & Loan Ass'n v City of Oswego*, 18 NYS 2d 511, 259 App Div 42, affirmed *Security Bldg & Loan Ass'n v Carey*, 36 NE 2d 690, 286 NY 646—*Rupersam Realty Corp v Larpeg Realty Corp*, 3 NYS 2d 840, 253 App Div 695

Pa.—*Home Protective Sav & Loan Ass'n v Aliquippa*, Com Pl., 37 Mun L R 284

#### **Amendment without retroactive effect**

The amendment of statute governing lien for delinquent charges for water, providing that no lien should exist for charges for services furnished after giving of notice to cut off service, did not have a retroactive effect so as to destroy rights that city had before effective date of the amendment—*Home Owners' Loan Corp v City of Tacoma*, 102 P.2d 832, 4 Wash 2d 166.

13. Cal.—*Nourse v. City of Los Angeles*, 143 P. 801, 25 Cal App. 384.

Tex.—*City of Houston v Lockwood Inv Co*, Civ App, 144 SW 685

14. Mich.—*Home Owners' Loan Corp v City of Detroit*, 290 NW 888, 292 Mich 511

15. D.C.—*Farrell v Ward*, Mun App., 53 A 2d 46

16. Pa.—*Estate of Cornelius*, 13 Pa Super 531  
67 C J p 1273 note 1.

17. Md.—*Home Owners' Loan Corp of Washington, D C, v Mayor and City Council of Baltimore*, 3 A 2d 747, 175 Md 676

18. Ill.—*People ex rel. Brockamp v Schlitz Brewing Co*, 103 NE 555, 261 Ill 22—*Town of Cicero v Township High School Dist No 201*, 20 NE 2d 114, 299 Ill App 237

N.J.—*Munson Dye Works v Mayor and Aldermen of Jersey City*, 174 A 740, 116 N J Eq 568

N.Y.—*Rupersam Realty Corp v Larpeg Realty Corp*, 3 NYS 2d 840, 253 App Div 695—*City of New York v Idlewild Beach Co*, 43 NYS 2d 567, 182 Misc 205, affirmed 50 NYS 2d 341, 182 Misc 213—*Parsons Const Corp v City of New York*, 298 NYS 276, 163 Misc 932

Pa.—*Girard Trust Corn Exchange Bank v Ermilio*, 115 A 2d 922, 178 Pa Super 316—*Roma E Provincia Building & Loan Ass'n v Penza*, 175 A 430, 115 Pa Super 201—*Provident Trust Co of Philadelphia v Judicial Building & Loan Ass'n*, 171 A 287, 112 Pa. Super 352  
67 C J p 1273 notes 95, 98

Priorities as between water lien and mortgage see Mortgages § 222.

**Waterworks district and municipal waterworks held not distinguishable with respect to rights to lien.**—*Home*

*Owners' Loan Corp v Public Works Dist No 2*, 92 P 2d 745, 104 Colo 466

#### **Estimate of amount for period without meters**

A water lien, including an estimated amount for the months during which no meter was installed, based on the metered consumption, in May of the same year, which may be considered a month of average consumption, will be upheld, especially where there has been a history of leakage and wastage—*City of Philadelphia v Goetz*, 71 Pa Dist & Co 500

19. Mass.—*Loring v Commissioner of Public Works of City of Boston*, 163 NE 82, 264 Mass 460

20. N.J.—*Diorio v Borough of Fair Lawn*, 180 A 557, 118 N J Eq 556

21. Mass.—*Loring v Commissioner of Public Works of City of Boston*, 163 NE 82, 264 Mass 460

22. N.Y.—*Sayer v City of New York*, 101 NE 764, 208 NY 159—*Security Bldg & Loan Ass'n v City of Oswego*, 18 NYS 2d 511, 259 App Div 42, affirmed *Security Bldg & Loan Ass'n v Carey*, 36 NE 2d 690, 286 NY 646

Water rents as taxes or compensation see supra § 284

23. N.Y.—*Sayer v City of New York*, 101 NE 764, 208 NY 159  
Ohio—*City of Cincinnati v Schultz*, 120 NE 176, 97 Ohio St. 317.  
67 C J p 1273 note 2.

24. Mass.—*Loring v Commissioner of Public Works of City of Boston*, 163 NE 82, 264 Mass 460

25. Mass.—*Loring v Commissioner of Public Works of City of Boston*, supra.

The lien for water charges does not exist until the statutory formalities have been complied with<sup>26</sup> or until the amount has been determined and entered on the books of the water supply company or department<sup>27</sup> No statutory lien exists for water furnished prior to the date of the ordinance required by the terms of the statute to make such lien effective<sup>28</sup> Where the lien is declared by statute, a municipal ordinance undertaking to declare it is unnecessary and ineffective,<sup>29</sup> and, so far as it makes provisions unauthorized by the statute, void<sup>30</sup>

*Validity of statutes* The fact that a lien is given for water rates does not affect the validity of the act imposing such lien,<sup>31</sup> the creation of such a lien is an exercise of the police power,<sup>32</sup> and is not an extreme instance of such exercise,<sup>33</sup> since property interests are not really harmed,<sup>34</sup> on the contrary, the system of which the lien is an incident saves property from the disuse and desolation that, under modern urban conditions, must be the lot of a building without a dependable supply of water<sup>35</sup> Statutory liens on the landlord's estate in leased real property for water rents or charges for water supplied thereon to the tenant must depend for their validity either on the taxing power or on contract<sup>36</sup> If it is the taxing power which is relied on, the imposition, in order to be constitutional, must be laid under uniform rules according to the true value of the property taxed, or in accordance with special benefit to it as a property<sup>37</sup> Such a lien for charges

for water supplied to a tenant by measure at a fixed price per thousand cubic feet cannot be sustained under the taxing power,<sup>38</sup> but must depend on contract expressly or impliedly authorized by the landlord<sup>39</sup>

A statute creating such a lien has been held not invalid because of its failure to fix a date on which the lien shall begin or expire,<sup>40</sup> to provide any manner of enforcement of such lien,<sup>41</sup> to make it clear whether the Department of Water or the city itself shall enforce it,<sup>42</sup> or to prescribe the rights and priorities of other liens<sup>43</sup>

A statute making the lien applicable for water furnished thereafter does not impair the obligation of a contract between the lessor and the lessee that the latter should pay the water rates;<sup>44</sup> an amendment of a lien statute has been held not unconstitutional, as impairing the obligations of contracts, as to a mortgagee, where the right was conferred on the city before the execution of the mortgage and the mortgagee impliedly assented thereto by taking the mortgage with knowledge of the law.<sup>45</sup> A statute making water rents a charge on land with a lien prior to all other encumbrances whether the water was introduced onto the encumbered property before or after the giving of the encumbrance is not objectionable, as to mortgages given after its passage, on the theory that it is a deprivation of property without due process of law.<sup>46</sup>

A statute attempting to impose a lien on real es-

26. N.Y.—Title Guarantee & Trust Co v Allen, 256 N.Y.S. 400, 142 Misc. 764

Ohio—Home Owners' Loan Corp v Tyson, 12 N.E.2d 478, 133 Ohio St. 184

**Filing statement of arrearages**

Under statute providing that, when water rent is in arrears for six months, a statement of arrearages shall be filed with collector of taxes and rents shall be a lien thereafter on realty to which water was furnished, municipality had a lien on realty to which water was furnished between April 1, 1930, and Jan. 1, 1934, notwithstanding statement of arrearages was filed on Jan. 2, 1934, only, and not every six months—New Brunswick Sav. Inst. v City of New Brunswick, 1 A.2d 378, 134 N.J.Eq. 258

27. N.Y.—Mandel v Weschler, 112 N.Y.S. 813, 128 App.Div. 505, affirmed 92 N.E. 1091, 198 N.Y. 518

28. Colo.—Town of Ordway v Kaiser, 9 P.2d 287, 90 Colo. 313

29. Ill.—Rockford Savings & Loan Ass'n v City of Rockford, 185 N.E. 623, 352 Ill. 348.

30. Ill.—Rockford Savings & Loan Ass'n v. City of Rockford, supra

31. N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App.Div. 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

32. Mass.—Mechanics Sav. Bank v Kennedy, 12 N.E.2d 852, 299 Mass. 404

33. Mass.—Mechanics Sav. Bank v Kennedy, supra

34. Mass.—Mechanics Sav. Bank v Kennedy, supra

35. Mass.—Mechanics Sav. Bank v Kennedy, supra.

36. N.J.—Ford Motor Co v Town of Kearny, 103 A.2d 54, 91 N.J.Law 671, 1 L.R.A. 1918D 361

37. N.J.—Ford Motor Co v Town of Kearny, supra

38. N.J.—Ford Motor Co v. Town of Kearny, supra

39. N.J.—Ford Motor Co v. Town of Kearny, supra.

40. N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App.Div. 42, affirmed

Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

41. N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 12 N.Y.S. 2d 511, 259 App.Div. 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

N.Y.—Security Bldg & Loan Ass'n v City of Oswego, supra

42. N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App.Div. 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

43. N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App.Div. 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

44. Mass.—Loring v Commissioner of Public Works of City of Boston, 163 N.E. 82, 264 Mass. 460 67 C.J. p. 1274 note 14

45. Wash.—Metropolitan Life Ins. Co v Hansen, 38 P.2d 387, 179 Wash. 537.

46. U.S.—Provident Institution for Savings v Jersey City, N.J., 5 S.Ct. 612, 118 U.S. 506, 28 L.Ed. 1102.

tate for water rents or taxes without regard to the use of water thereon is invalid <sup>47</sup>

*Where no water has been contracted for, furnished to, or used on, the property, it cannot be subjected to a lien for water rates <sup>48</sup>*

*Authority of tenant to subject leased property to lien* Although it has been held that water furnished a tenant creates no lien on the landlord's property in the absence of privity of contract with the landlord,<sup>49</sup> the fact that a statute providing for a lien against the "premises" for unpaid bills for water supplied thereto by a municipality is on the statute books reads into every lease, when made, an authorization to the tenant to subject such premises to such lien for unpaid bills for water as the circumstances indicate the parties contemplated should be supplied, within the limitations of the statute, to the tenant on the premises, in pursuance of the lease <sup>50</sup>

*Lien as specific and perfected* A lien for water rent, attaching to specific pieces of real property, is specific,<sup>51</sup> and it is perfected, in the sense that there is nothing more to be done to have a choate lien, when the identity of the lienor, the property subject to the lien, and the amount of the lien are established <sup>52</sup>

#### b. Nature, Operation, and Effect

A lien for water charges, although somewhat analo-

gous to a lien for taxes, is not a tax or a special assessment. It is in addition to other remedies available, and not an alternative to any of them.

A lien for water rates or charges is neither a tax<sup>53</sup> nor a special assessment for particular benefits,<sup>54</sup> it is a method of securing the collection of a charge arising from the use on real estate of a public utility essential to the health and safety of the community,<sup>55</sup> and is founded on an underlying contractual relationship between the municipality and the property owner for the sale and purchase of water <sup>56</sup> It is supported on the general principles which justify the imposition of liens of numerous kinds,<sup>57</sup> and the lien, although enforced or enforceable by the same officers,<sup>58</sup> and in the same manner,<sup>59</sup> as a lien for taxes, as by sale of the premises,<sup>60</sup> is really a lien for an indebtedness like that enforced on mechanics' contracts or against ships and vessels <sup>61</sup>

The sale of water being on credit, a lien is imposed on the property as security for the payment of the debt <sup>62</sup> It is somewhat analogous to a lien for taxes, which attaches to the property itself and for the payment of which the property is subject,<sup>63</sup> with this difference, however, that, while the lien for taxes attaches without the consent of the owner, no charge for water can arise against any premises unless the owner or occupant thereof has voluntarily requested the supply to be turned on <sup>64</sup>

47. Ill—Rockford Savings & Loan Ass'n v. City of Rockford, 185 N E 623, 352 Ill 348

48. N.J.—Austin v Mayor and Common Council of Borough of Union Beach, 160 A 318, 10 N.J. Misc 670 67 C.J. p 1274 note 17

49. Ohio—Bucyrus v. Sears, 27 Ohio N.P., N.S., 427.

50. N.Y.—Dunbar v City of New York, 164 N.Y.S 519, 177 App Div. 647 67 C.J. p 1274 note 19

51. U.S.—U.S. v City of New Britain, Conn., 74 S.Ct. 367, 347 U.S. 81, 98 L.Ed 520

52. U.S.—U.S. v. City of New Britain, Conn., supra

53. Mass—Loring v. Commissioner of Public Works of City of Boston, 163 N.E. 82, 264 Mass 460 N.J.—Diorio v Borough of Fair Lawn, 180 A 557, 118 N.J. Eq 556 Nature and legal character of water charge see supra § 284

#### Reason for rule

The amount of the lien is not fixed by governmental authority, a landowner may avoid it altogether by preventing the use of water or by causing the rates and charges to be paid

promptly, and the amount of the lien depends on the voluntary act of the landowner or his tenant in consuming more or less water, the account for which he suffers to remain wholly or in part unpaid—Mechanics Sav Bank v Kennedy, 12 N.E.2d 852, 299 Mass. 404

54. Mass—Loring v Commissioner of Public Works of City of Boston, 163 N.E. 82, 264 Mass 460

55. Ill—Rockford Savings & Loan Ass'n v City of Rockford, 185 N.E. 623, 352 Ill 348

Mass—Loring v Commissioner of Public Works of City of Boston, 163 N.E. 82, 264 Mass 460

56. N.J.—Diorio v Borough of Fair Lawn, 180 A 557, 118 N.J. Eq 556

57. Ill—Rockford Savings & Loan Ass'n v City of Rockford, 185 N.E. 623, 352 Ill 348

Mass—Loring v Commissioner of Public Works of City of Boston, 163 N.E. 82, 264 Mass 460

58. N.J.—Diorio v Borough of Fair Lawn, 180 A 557, 118 N.J. Eq 556

59. Mich—Jones v Board of Water Com'rs, 34 Mich 273

N.J.—Diorio v Borough of Fair Lawn, 180 A 557, 118 N.J. Eq 556

60. Mich—Jones v Board of Water Com'rs, 34 Mich 273

61. Mich—Jones v Board of Water Com'rs, supra

62. N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App Div 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646.

63. Ga.—City of Atlanta v. Burton, 16 S.E. 214, 90 Ga 486 Pa.—City of Harrisburg v Morrett, Com Pl., 49 Dauph Co 156

#### Preferential treatment in collection

(1) Statute providing that taxes and water rents shall continue to be a lien on realty until paid, and shall be preferred in payment to all other charges, indicates that charges for metered water are to receive the same preferential treatment in collection as taxes—City of New York v Idlewild Beach Co., 43 N.Y.S.2d 567, 182 Misc 205, affirmed 50 N.Y.S.2d 341, 182 Misc 213

(2) Collection of rates and charges generally see supra § 302

64. Ga.—City of Atlanta v. Burton, 16 S.E. 214, 90 Ga 486.

The lien remedy is provided in addition to all other and previous remedies open to the city, and not as an alternative to any of them,<sup>65</sup> it does not impair or cut down such remedies in any particular.<sup>66</sup>

Where the nature of the lien is undefined or limited by statute, it will not be extended by judicial construction.<sup>67</sup>

The default of the tenant in possession does not relieve the real estate from the lien,<sup>68</sup> nor does the fact that the tenant has become insolvent.<sup>69</sup>

*Lien not limited to owner's interest.* A statutory requirement that the name of the owner of the realty shall be given in the statement of lien, and that notice and demand shall be directed to the owner, merely provides workable machinery for the administration of the statute, and shows no intent to limit the lien to the interest of the owner named.<sup>70</sup>

*Subsequent purchaser is charged with knowledge* that, if there was a default, the amount of the water rent was a lien on the premises.<sup>71</sup>

### c. Enforcement

Statutory provisions as to the enforcement of water liens must be complied with. A municipality may be estopped to enforce such lien.

Remedies may be provided by statute for the enforcement of liens for water charges.<sup>72</sup> Where the statute declaring water charges a lien on the property to which the water is furnished authorizes the city council to enforce it, no other body or officer can do so,<sup>73</sup> and, if a specific manner in which the power should be exercised is specified, any other manner is excluded.<sup>74</sup> Where, under statute, water rate liens are like assessment and tax liens, the city may enforce them in the manner provided in its charter for the enforcement of liens in the case of delinquent taxes and assessments.<sup>75</sup> In case of a judicial sale of the property, such a lien must be filed as a claim like other private liens.<sup>76</sup>

The lien of attorneys for services in condemnation proceedings by a city cannot be burdened with the city's lien for water charges, notwithstanding the city by mistake paid to their clients the full amount of their awards without deducting the water charges, where the attorneys are not responsible for any of the water consumed by the clients on the property condemned.<sup>77</sup>

*Failure to shut off water.* Unreasonable delay in shutting off the water for nonpayment of the water bills does not affect the enforcement of the lien where the legislature has not imposed any such limitation on the lien,<sup>78</sup> particularly where the statute

65. Mass.—Loring v Commissioner of Public Works of City of Boston, 163 NE 82, 264 Mass 460

Pa.—Altoona v Shellenberger, 6 Pa Dist 544

66. Mass.—Loring v Commissioner of Public Works of City of Boston, 163 NE 82, 264 Mass 460

Pa.—Altoona v Shellenberger, 6 Pa Dist 544

67. NY.—Corpus Juris cited in Rupersam Realty Corp v Larpeg Realty Corp, 3 NYS 2d 840, 842, 253 App Div 695

67 C J p 1273 note 1

68. Mass.—Loring v Commissioner of Public Works of City of Boston, 163 NE 82, 264 Mass 460

Pa.—City of Harrisburg v Morrett, Com Pl, 49 Dauph Co 156

69. Mass.—Loring v Commissioner of Public Works of City of Boston, 163 NE 82, 264 Mass 460

Pa.—City of Harrisburg v Morrett, Com Pl, 49 Dauph Co 156

70. Mass.—Mechanics Sav Bank v Kennedy, 12 NE 2d 852, 299 Mass 404.

71. Ill.—Rockford Savings & Loan Ass'n v City of Rockford, 185 NE 623, 352 Ill 348

72. NY.—Rupersam Realty Corp v Larpeg Realty Corp, 3 NYS 2d 840, 253 App Div 695.

Cutting off supply of water see supra § 305

Proceeding in rem, not in personam  
Pa.—Girard Trust Corn Exchange Bank v Ermilio, 115 A 2d 922, 178 Pa Super 316

Relief from default

Although city acquired property assessed at \$52,000 through an in rem tax foreclosure sale for nonpayment of water charges amounting to \$387, as a result of the default of owners' trusted bookkeeper, power to afford relief was not possessed by court—City of New York v Nelson, 127 N. E 2d 827, 309 NY 94

73. Ill.—Rockford Savings & Loan Ass'n v City of Rockford, 185 NE 623, 352 Ill 348

74. Ill.—Rockford Savings & Loan Ass'n v City of Rockford, supra

Time for filing

Pa.—Home Protective Sav & Loan Ass'n v Aliquippa, Com Pl, 37 Mun LR 284

Lien for each separate account; last item

The statute creating a lien on real estate for all charges of gas, water, or electricity furnished to patrons on the real estate does not provide one lien for all charges, but a lien attaches for each separate account and the provision that the lien shall continue for one year from the last item

charged means, not against any patron of premises, but the last item charged in the particular account—Whitefield Village Fire Dist v Bobst, 39 A 2d 566, 93 NH 229

Apportionment on taking land for street

Purpose of statute providing that when part of parcel of land has been taken for the opening, widening, or extension of a street, all water rents which shall be liens on the whole parcel of land from which part has been taken, shall be equitably apportioned between the parcel so taken and the balance remaining, is to facilitate public improvements of streets by enabling the governmental authority to secure title to needed land at its fair value, freed of all such municipal liens—Olbis v. City Council of City of Clifton, 7 A 2d 424, 123 NJ Law 45

75. NY.—Security Bldg & Loan Ass'n v City of Oswego, 18 NYS 2d 511, 259 App Div 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 NE 2d 690, 286 NY. 646.

76. Pa.—Grubb v. Weaver, 19 Pa. Co 609.

77. NY.—City of New York v. Chambers, 17 NYS 2d 46, 258 App. Div 499.

78. Mass.—Loring v. Commissioner of Public Works of City of Boston, 163 NE 82, 264 Mass. 460.

provides that the lien shall become and be a continuing one<sup>79</sup> So, a city is not precluded from invoking its statutory lien by its failure to shut off the water after twenty days' default in payment,<sup>80</sup> since it is the failure to make payments, and not failure to shut off the water, that initiates the lien, which becomes effective when the city official delivers to the Department of Water the list showing unpaid water rates<sup>81</sup>

However, it has been held that, where the statute makes it the duty of the municipality to shut off the supply of water for nonpayment at maturity of any bill for charges for water, there can, in the absence of other authority, be no lien against the landlord's estate in the property for water supplied to the tenant on his contract alone, in violation of this duty, after such default and after a reasonable time thereafter for ascertaining the default and for shutting off the supply<sup>82</sup>

**Estoppel to enforce.** A city is estopped to enforce its lien for water rates as against a bona fide purchaser where no lien appeared of record,<sup>83</sup> or after it has erroneously informed the property owner that none exists and he has released his security therefor<sup>84</sup>

**Action.** With respect to the right to enforce a lien against a mortgagee for water supplied to the mortgagor, where, in an action to enforce the lien, plaintiff obtained judgment and took out execution against the mortgagor, who was the sole defendant named in the writ, the mortgagee does not become a party to the action until the motion to make him a party defendant is filed<sup>85</sup> Where no suit is instituted against the mortgagee within the period prescribed by statute, the lien is lost as far as it extends to the mortgagee's interest,<sup>86</sup> and is unenforceable against his title<sup>87</sup>

## G. LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE

### § 309. Injuries from Construction or Maintenance of Works

- a. In general
- b. Lateral service pipes, and meter and stop boxes
- c. Dams, reservoirs, and incidental facilities

#### a. In General

A water company must exercise due care in the construction and operation of its works and is liable

for injuries resulting from its negligence or other tortious conduct.

In constructing its works, a water company must use reasonable care under the circumstances,<sup>88</sup> taking greater precautions in places of potential danger,<sup>89</sup> and competent hydraulic engineers should be consulted and their advice followed<sup>90</sup> The duty of a water company in maintaining its system is that of care proportioned to the danger reasonably to be anticipated.<sup>91</sup> A water company making repairs

<sup>79</sup> Colo.—Home Owners' Loan Corp v Public Water Works Dist No 2, 92 P 2d 745, 104 Colo 466

**Waterworks district not estopped**  
Colo.—Home Owners' Loan Corp v Public Water Works Dist No 2, supra

<sup>80</sup> N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App Div 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

<sup>81</sup> N.Y.—Security Bldg & Loan Ass'n v City of Oswego, 18 N.Y.S. 2d 511, 259 App Div 42, affirmed Security Bldg & Loan Ass'n v Carey, 36 N.E.2d 690, 286 N.Y. 646

<sup>82</sup> N.J.—Ford Motor Co v Town of Kearny, 103 A 254, 91 N.J.Law 671, L.R.A.1918D 361

<sup>83</sup> N.Y.—Title Guarantee & Trust Co v Allen, 256 N.Y.S. 400, 142 Misc. 764

<sup>84</sup> N.Y.—Rankin v City of New York, 130 N.Y.S. 427, 145 App Div. 838, affirmed 98 N.E. 1114, 204 N.Y. 684.

<sup>85</sup> N.H.—Newmarket Water Works v Strafford Sav Bank, 5 A.2d 673, 90 N.H. 143

<sup>86</sup> N.H.—Newmarket Water Works v Strafford Sav Bank, supra.

#### Supplemental bill ineffective

Where no suit was instituted against mortgagee to enforce lien within statutory period, supplemental bill in equity as an aid to perfect lien as against mortgagee's interest would not cure bar of statutory limitation for enforcement of lien for charges, where three years had elapsed since suit to enforce lien was commenced against mortgagor—Newmarket Water Works v Strafford Sav. Bank, supra.

<sup>87</sup> N.H.—Newmarket Water Works v Strafford Sav Bank, supra

<sup>88</sup> Colo.—Public Service Co of Colorado v Williams, 270 P. 659, 84 Colo 342.

Idaho—Yearsley v City of Pocatello, 210 P.2d 795, 69 Idaho 500

Contractual obligation between water company and municipality see supra § 264

Injuries from pollution of stream see supra §§ 43-57, 232

Liability of municipal corporations for injuries resulting from municipal waterworks see Municipal Corporations § 915

#### Parkways

Water company is not required to exercise same degree of care for safety of pedestrians in parkways as for those in streets and sidewalks—Dramstadt v City of West Palm Beach, Fla., 81 So.2d 484

<sup>89</sup> Colo.—Public Service Co of Colorado v Williams, 270 P. 659, 84 Colo 342

67 C.J. p 1275 note 44

<sup>90</sup> Wis.—State Journal Printing Co v City of Madison, 134 N.W. 909, 148 Wis 396

<sup>91</sup> Ky.—Stein v Louisville Water Co., 249 S.W.2d 750

#### Not dangerous commodity

Water companies in supplying water to their customers are not dealing with commodity which is dangerous in itself, and they are required only to exercise ordinary care—City of

on a highway must restore the highway to a condition of reasonable safety after completing its work<sup>92</sup> The company is liable for the resulting injury where, in laying its mains and pipes, it is guilty of negligence in using dangerous machinery,<sup>93</sup> or where it maintains excavations or obstructions which render a street or sidewalk unsafe,<sup>94</sup> or leaves dangerous apertures without proper protective devices whereby people are likely to be injured,<sup>95</sup> or damages underground facilities of others<sup>96</sup> Further, the company is liable for damage resulting from the bursting or leaking of underground pipes when the pipes were negligently constructed or laid, or the company has negligently failed to make repairs,<sup>97</sup> but ordinarily there is no liability in the absence of negligence<sup>98</sup> If a water company sees fit to use a protective device constructed by some one else, it thereby becomes re-

sponsible for structural defects therein which are discoverable by due care, and for the maintenance thereof in a reasonably safe condition<sup>99</sup>

A water company is not liable for injuries which it had no reason to apprehend,<sup>1</sup> and the fact that the company afterward took measures to prevent other such accidents is not proof of negligence,<sup>2</sup> but where a defect, although not due to negligence, creates a dangerous condition, the company is liable for injuries which are natural and probable results<sup>3</sup> The water company is not liable for a mutual mistake in making repairs which causes injury.<sup>4</sup> Having cut off water on the instructions of the consumer, a water company has no duty to take precautions against freezing of pipes in the consumer's building, to prevent the water being turned on again, or to warn the consumer of danger<sup>5</sup> In

Richmond v Hood Rubber Products Co, 190 S E 95, 168 Va 11

#### Excavations

A water company may make such obstructions in the street as are reasonably required to make repairs, it must take necessary precautions to inform the public of dangers resulting, but is not required to give warning where the danger is obvious

Del—Burk v Artesian Water Co, 91 A.2d 545, 8 Terry 405

RI—Sullivan v Wakefield Water Co, 15 A 2d 23, 65 RI 335

#### Meters and curb boxes

The water company has duty of reasonable care to maintain meters and curb boxes under its control in safe condition

Ind—Indianapolis Water Co v Schoenemann, 20 NE 2d 671, 107 Ind App 308

Ky—Lutz v Louisville Water Co, 163 S W 2d 29, 291 Ky 31

Pa—Burkholder v Philadelphia Suburban Water Co, Com Pl, 41 Del Co 222—Pischke v Borough of Dormont, Com Pl, 91 Pittsb Leg J, 559, affirmed 33 A 2d 480, 153 Pa Super 205

92. NJ—Reinauer v Hackensack Water Co, 105 A. 15, 92 NJ Law 8  
Tenn—Radnor Water Co v Draughton, 89 S W 2d 186, 19 Tenn App 371

93 US—St Paul Water Co v Ware, Minn, 16 Wall 566, 21 L Ed 485  
67 C J p 1275 note 49

94. US—Klein v City of Juneau, D C Alaska, 112 F Supp 191  
La—Smith v City of Baton Rouge, 117 So 559, 166 La 472.

#### Deposit

Fact that permit granted to water company to do work in street provided for deposit by company to be held

for certain time did not warrant inference that return of deposit released water company from liability for damages caused by negligent replacement of dirt—Rudman v City of Scranton, 173 A 892, 114 Pa Super 148

#### Excavation adjacent to sidewalk

A water company was liable for its negligence in failing properly to refill hole on school property adjacent to sidewalk, where pedestrian stepped off sidewalk into hole—Frye v East St Louis & Interurban Water Co, 14 NE 2d 263, 294 Ill App 468

#### Leaving earth on highway

A water company which left clay from an excavation on the highway was liable for injuries caused by slippery condition—Radnor Water Co v Draughton, 89 S W 2d 186, 19 Tenn App 371

#### No liability as to parkway

Where pedestrian at night alighted from parked automobile and proceeded along parkway at place where there was no walkway, to effect a short cut to her destination, and she tripped over water meter box, which was located in parkway, and which protruded above the ground about two inches, and was injured, water company was not liable for pedestrian's injuries—Dramstadt v City of West Palm Beach, Fla, 81 So 2d 484

95. Cal—Meindersee v Meyers, 205 P 1078, 188 Cal 498

#### Excavation on private property

Where a city left an unguarded excavation on private property, without notice to the owner, it was liable for injuries to the owner's four-year-old child who fell into the excavation—Sample v City of Melrose, 43 NE 2d 665, 312 Mass 170

96. Ohio—Cincinnati & Suburban

Bell Tel Co v City of Cincinnati, 85 NE 2d 393, 84 Ohio App 521

#### Damage to telephone line

Ohio—Cincinnati & Suburban Bell Tel Co v City of Cincinnati, supra

97. Idaho—Yearsley v City of Pocatello, 231 P.2d 743, 71 Idaho 347  
Pa—Hindes v City of Pittsburgh, Com Pl, 92 Pittsb Leg J, 414, affirmed 38 A 2d 420, 155 Pa Super 314

67 C J p 1275 note 51

#### Hole in highway

A water company is liable for injuries to a motorcyclist who strikes hole in highway resulting from escape of water from broken pipe—Juchert v California Water Service, 106 P 2d 886, 16 Cal 2d 500

98. NY—Empire State Ice Co v Rochester & Lake Ontario Water Service Corp, 8 NE 2d 481, 274 N Y 186

SD—Midwest Oil Co v City of Aberdeen, 10 NW 2d 701, 69 SD 343  
67 C J p 1275 note 51 [b]

99 NH—Duteny v Pennichuck Water Co, 146 A 161, 84 NH 65

67 C J p 1276 note 52

1. Pa—Philadelphia Ritz Carlton Co v City of Philadelphia, 127 A 843, 282 Pa 301  
67 C J p 1276 note 54

2. La—Smith v City of Baton Rouge, 119 So 98, 9 La App 19  
67 C J p 1276 note 55

3. Pa—Barrett v Lally, 37 Pa Dist & Co 545, 42 Lack Jur 67

4. Me—People's Nat Bank v Kennebec Water Dist, 81 A 866, 107 Me 542  
67 C J p 1276 note 56

5. Tex—City of Bryan v Jenkins, Civ App, 247 S W 2d 925, error refused no reversible error.

an action for injuries from an overflow of a stand-pipe, the fact that no such previous overflow had occurred has been held not to exonerate the city from liability from its overflow.<sup>6</sup> A water company is liable for damage to a customer's plumbing system and property because of sediment in the water,<sup>7</sup> and it is liable for injuries caused by rust in the water resulting from its negligence.<sup>8</sup> A city may be liable to a property owner injured by falling on ice formed from water cast on his property by defendant's negligence in flushing its hydrant.<sup>9</sup> A water company is not liable for injuries on the theory that it maintained a nuisance where the instrumentality is not dangerous to the general public.<sup>10</sup>

An irrigation district in furnishing a supply of water is to be governed by the same rules as to its liability for torts as those which control a municipal corporation<sup>11</sup> and, where engaged in a construction project as a part of a plan for the conveyance and distribution of water, may be liable for the negligence of its agents in permitting water to escape into a tunnel resulting in the death of persons therein through drowning.<sup>12</sup>

A metropolitan water district is a governmental agency, and has been held not to be liable for its torts.<sup>13</sup>

**Inspection.** It is the water company's duty to exercise ordinary diligence to discover defects in its equipment<sup>14</sup> and the duty of a water company to maintain its instrumentalities implies the duty of inspection at reasonable intervals,<sup>15</sup> but it has been held that a water company is not required to maintain a patrol along all of its water pipes to prevent some person from unlawfully cutting off service pipes and plugging them up without permission.<sup>16</sup> A city cannot escape liability for failure to test its water mains by showing that a proper inspection would be expensive,<sup>17</sup> but the city has no duty to inspect a deeply buried main in the absence of some warning of danger.<sup>18</sup> After notice of the presence of water which indicates the possibility of a leak, the company is required to exercise only reasonable diligence to discover and repair it.<sup>19</sup> A mere failure to inspect the appliances of each consumer has been held not to constitute a waiver of a regulation requiring certain safety devices.<sup>20</sup>

**Knowledge of defects or dangerous situation.** A water company is bound to use due diligence in shutting off the water from a water main after it is notified that the main is broken and damage likely to result.<sup>21</sup> The company must be diligent in correcting defects in its instrumentalities when they

6. Mass.—Kelly v Inhabitants of Town of Winthrop, 107 NE 414, 219 Mass 471.

7. N.J.—Seiden v Passaic Valley Water Commission, 199 A 420, 16 N.J. Misc 301.

8. Mass.—Gordon v City of Medford, 117 NE 2d 284.

9. S.D.—Kukegaard v City of Sioux Falls, 8 NW 2d 862, 69 SD 214.

10. Ind.—Town of Kirklín v Everman, 28 NE 2d 73, 217 Ind 683, mandate modified on other grounds 29 NE 2d 206, 217 Ind 683.

#### Pit

Where pit which was part of waterworks plant leased by town from municipal waterworks corporation, and in which gasoline engine was located, was covered with protective planks and was not dangerous to general public, and plaintiff went to plant by appointment to see its manager concerning employment, entered pit and ignited a match which caused explosion of gasoline fumes in the pit, the town and the corporation were not liable for injuries sustained by plaintiff on ground that the pit constituted a "nuisance"—Town of Kirklín v Everman, supra.

11. Cal.—Morrison v Smith Bros, 293 P 53, 211 Cal 36.

12. Cal.—Morrison v Smith Bros, supra.

13. Tex.—Bexar Metropolitan Water

Dist v Kuntscher, Civ App, 274 S W 2d 121.

#### Overflow from water tower

Action by owner of home against metropolitan water district for damages to home as result of water overflowing from district's water storage tower on about fifteen occasions was an action grounded on negligence, and therefore there could be no recovery, since district was a governmental agency enjoying nonliability for its torts—Bexar Metropolitan Water Dist v Kuntscher, supra.

14. Ala.—Birmingham Water Works Co v Walker, 8 So 2d 827, 243 Ala 149.

Ky.—Stein v Louisville Water Co, 249 S W 2d 750.

15. Iowa.—City of Des Moines v Des Moines Water Co, 175 NW 821, 188 Iowa 24, 67 C.J. p 1277 note 67.

16. N.Y.—Wimpfheimer v City of New York, 171 N.Y.S 701, 184 App Div 494.

17. N.Y.—Haas v City of New York, 176 N.Y.S 433, 107 Misc 427, affirmed 179 N.Y.S 924, 190 App Div 939, 67 C.J. p 1277 note 69.

18. N.Y.—George Foltis, Inc, v City of New York, 38 NE 2d 455, 287 N.Y. 108, 153 A.L.R. 1123.

19. Mass.—Gerard v City of Boston, 13 NE 2d 415, 299 Mass 483.

N.Y.—Biancaniello v Town of Colonie, 24 N.Y.S 2d 883, 261 App Div 161, appeal dismissed 35 NE 2d 510, 285 N.Y. 848.

#### Company held not negligent

(1) Where city was notified by a property owner of the seepage of water in his basement wall near the place where the break in a main later took place, due care on the part of the city did not require it to expose and examine all the pipes at the intersection where break occurred.—Gerard v City of Boston, 13 NE 2d 415, 299 Mass 488.

(2) A town which controlled and was responsible for maintenance of water mains was not liable for damages resulting from accumulation of water in cellar of a house, where evidence disclosed that town on receiving notice of alleged leak applied customary tests which failed to show any evidence of a leak, and that leak was not discovered until excavations were made by house owner's son about forty feet away from hydrant where leak was thought to be—Biancaniello v Town of Colonie, 24 N.Y.S 2d 883, 261 App Div 161, motion granted 35 NE 2d 510, 285 N.Y. 848.

20. Me.—De Rochemont v Camden & Rockland Water Co, 152 A 534, 129 Me 421.

21. N.Y.—Von Longerke v City of New York, 134 N.Y.S 832, 150 App.



have been brought to its attention,<sup>22</sup> and it has been held that a private water company may be liable for injuries resulting from a dangerous condition even though it has no notice of the defect.<sup>23</sup> Knowledge of employees of defects in a water company's works has been held to be knowledge of the company.<sup>24</sup> Where defendant was chargeable with knowledge of a dangerous situation created by its works, the fact that plaintiff was precipitated on it involuntarily, as a result of a loss of balance, is immaterial.<sup>25</sup>

**Proximate cause.** The water company is not liable for injury not proximately caused by its negligence.<sup>26</sup> Where the condition causing injury is caused by the act of another, the company is not liable unless in the exercise of ordinary care it should have discovered and corrected the condition.<sup>27</sup> The company is liable when its negligence is a proximate cause of the injury, although the

negligence of another is a concurring cause.<sup>28</sup> A water company is liable for injuries resulting from a combination of its negligence and natural causes, provided the injury would not have occurred but for its negligence.<sup>29</sup> Whether a water company had a permit to dig in the street is immaterial to the question whether its negligence caused injury.<sup>30</sup>

**Statutes, franchises, and grants** The grant to a water company by a city of the right to lay its pipes in the streets carries with it an obligation to keep them in repair,<sup>31</sup> and authority granted by franchise to place service pipes in sidewalks does not excuse the water company for a negligent construction of such service pipes.<sup>32</sup> A right to place hydrants in the streets gives the water company no right to use them in such a manner as to impede travel or to imperil the safety of those passing over the street,<sup>33</sup> and if a city does not possess power itself to obstruct streets by fire hydrants, it cannot give a water company such power.<sup>34</sup>

Div 98, affirmed 105 NE 1101, 211 NY 558

22. Ala.—Birmingham Water Works Co v Walker, 8 So 2d 827, 243 Ala 149

NY—Lauer v City of New York, 43 NYS 2d 251, affirmed 44 NYS 2d 680, 266 App Div 959, reargument and appeal denied 45 NYS 2d 413, 266 App Div 1003

23. Cal.—Juchert v California Water Service Co, 106 P 2d 886, 16 Cal 2d 500

24. NH.—Duteny v Pennichuck Water Co, 146 A 161, 84 NH 65 67 C J p 1277 note 73

#### Defect held not to constitute notice

Where pedestrian, who had lived only two houses away from water box in sidewalk for over a year, had not observed depression and sloping of the adjacent sidewalk which allegedly caused pedestrian to fall, the alleged defect would not put meter reader on notice of any hazard to pedestrians, as ground for recovery from water company—Pischke v Borough of Dormont, 33 A 2d 480, 153 Pa Super 205

25. NH.—Duteny v Pennichuck Water Co, 146 A 161, 84 NH 65

26. Ill.—Wilson v East St Louis & Interurban Water Co, 15 NE 2d 599, 295 Ill App 603.

NY—Swift v City of New York, 200 NE 681, 270 NY 162

Pa.—Pischke v Borough of Dormont, Com Pl, 91 Pittsb Leg J 559, affirmed 33 A 2d 480, 153 Pa Super 205

R.I.—Sullivan v Wakefield Water Co., 15 A 2d 23, 65 RI 335

**Act of another correcting condition**  
In action against water company

for injuries sustained when pedestrian stepped on a lid covering a manhole in dirt sidewalk and lid tilted causing pedestrian to fall, where company's employee had removed lid to read meter, and third person, who subsequently noticed lid was tilted, pushed it down with his foot, company was, as a matter of law, not liable for negligence either in permitting cover to become defective or loose, since causal connection was lacking—Wilson v East St Louis & Interurban Water Co, 15 NE 2d 599, 295 Ill App 603

#### Closing house after removing meter

Where water company, through its employees, authorizedly entered plaintiff's vacant house to remove water meter and subsequently closed house as effectively as it had previously been closed, company was not liable for loss sustained by plaintiff when unknown persons subsequently entered house burglariously and stole property, since company's alleged negligence in closing house was not proximate cause of damage—Breker v Lakewood Water Co, 174 A 478, 12 NJ Misc 721.

27. Tex.—Texas Public Utilities Corp v Martin, Civ App, 136 S W 2d 889

28. Cal.—Juchert v California Water Service Co, 106 P 2d 886, 16 Cal 2d 500

#### Negligence of city

A water company which was alleged to have been guilty of negligence in permitting water to escape from broken pipe into filled ground, so as to cause a hole in highway, was not relieved from liability to motorcyclist for injuries sustained when motor-

cycle struck hole in road, on ground that city was under a duty to repair the hole, and, but that for lack of repair, injuries would not have been sustained—Juchert v California Water Service Co, supra.

#### Negligence of another in refilling excavation

Company was liable for injuries sustained by pedestrian from falling into a hole dug by company in school property adjoining sidewalk, notwithstanding alleged intervention of negligence of school janitor in refilling the hole with loose dirt during few days between digging of hole and date of accident since such negligence if any was insufficient to constitute an efficient intervening cause—Frye v East St Louis & Interurban Water Co, 14 NE 2d 263, 294 Ill App 468

29. Utah—Egelhoff v Ogden City, 267 P 1011, 71 Utah 511.

30. Del.—Burk v Artesian Water Co, 91 A 2d 545, 8 Terry 405

31. Ind.—Indianapolis Water Co v. Schoeneman, 20 NE 2d 671, 107 Ind App 308

Mont.—Nord v Butte Water Co, 30 P 2d 809, 96 Mont 311

32. Idaho—Osier v Consumers' Co, 239 P 735, 41 Idaho 268

Iowa—City of Des Moines v Des Moines Water Co., 175 N W 821, 188 Iowa 24

33. Kan.—Topeka Water Co v. Whiting, 50 P. 877, 58 Kan 639, 39 L.R.A. 90

34. Ala.—Decatur Waterworks Co. v Foster, 49 So 759, 161 Ala 176. 67 C J. p 1277 note 79.

**Contributory negligence.** Plaintiff is not required to have acted with absolute wisdom, but only to have exercised that care which a man of ordinary prudence would have exercised when so placed,<sup>35</sup> but he must not be guilty of contributory negligence<sup>36</sup>

**Failure to prosecute** The failure of the city to prosecute plaintiff for a failure to install sufficient cellar drains, as required by ordinance, has been held not to affect the situation, when plaintiff's injury was caused solely by such failure<sup>37</sup>

**Duty to turn off water** It has been held that a consumer of water cannot recover against a water company for damages occasioned by the company's breach of an alleged contract to shut off the supply of water at the property line where a consideration is not shown for the promise of defendant to do so<sup>38</sup> However, where a city had been requested to cut off water from a particular pipe in order that the owner might install an additional sprinkler system, and negligently failed to do so, it is no defense that the ordinance granting a permit for the extension of the system across a street provided that the owner would indemnify the city for damages resulting from the laying, existence, or use of the new system<sup>39</sup>

**Adjacent owners.** In the absence of negligence, a consumer is not liable for injuries caused to an adjacent owner by a leak in the consumer's service pipe<sup>40</sup> A consumer who negligently allows water to run onto an adjoining landowner's property is liable for damages resulting,<sup>41</sup> and the fact that it seeped through the foundation of plaintiff's building makes no difference<sup>42</sup>

**Liabilities of those who are not consumers or suppliers of water.** A corporation engaged in laying water pipes under contract with the city,<sup>43</sup> or a company exposing water pipes in the course of its work under contract with a landowner,<sup>44</sup> is not liable for injuries where it has not been guilty of negligence causing the injury

#### b. Lateral Service Pipes, and Meter and Stop Boxes

A water company may be liable for injuries resulting from defects in lateral service lines, and meter and stop boxes where the company has the duty to maintain them

A water company is not bound to repair private lateral service pipes,<sup>45</sup> and it is not liable for defects in lateral service pipes which are inserted in

35 NC—Woodie v Town of North Wilkesboro, 74 SE 924, 159 NC 353

36 La—Howard v Great American Indem Co, App, 36 So 2d 881, former decree amended and rehearing denied 37 So 2d 463

Me—Olsen v Portland Water Dist, 107 A 2d 480

#### Contributory negligence shown

(1) In general—Burkholder v Philadelphia Suburban Water Co, Pa Com Pl, 41 Del Co 222

(2) Plaintiff who stepped backward without looking and fell over manhole cover which she would have seen had she looked around was guilty of contributory negligence—Olsen v Portland Water Dist, Me, 107 A 2d 480

(3) In action against water company and borough for injuries sustained by pedestrian who stepped into hole and fell, under evidence that accident occurred in broad daylight, that defect was plainly visible, and that there were no other surrounding circumstances to handicap pedestrian's vision or distract pedestrian's attention, pedestrian was properly held guilty of contributory negligence as a matter of law—D'Annunzio v Philadelphia Suburban Water Co, 18 A 2d 86, 143 Pa.Super. 422.

(4) Where pedestrian had for some time seen water company employee working in the street, and pedestrian,

without any apparent reason, except to satisfy his curiosity, left the sidewalk where there was nothing to obstruct his course and walked in the road where he knew work was in progress, and pedestrian talked to such employee while he was digging holes in the street and had ample opportunity to observe other holes in the area which had been previously dug, pedestrian was contributorily negligent and could not recover from water company for broken leg sustained when pedestrian stepped into one of the holes as he turned to leave after conversing with such employee—Burk v Artesian Water Co, 91 A 2d 545, 8 Terry, Del, 405

#### Contributory negligence not shown

(1) A pedestrian suing waterworks company for injuries sustained when pedestrian fell into sidewalk hole adjacent to water meter box was not contributorily negligent, where night was dark and pedestrian did not see hole which was obscured by grass—Howard v Great Am Indem Co, La App, 36 So 2d 881

(2) A subscriber whose plumbing system was damaged by excessive sand in water furnished by public quasi corporation was not guilty of contributory negligence which would bar recovery, since the subscriber was under no duty to investigate the water supply—Selden v Passaic Valley Water Commission, 199 A. 420, 16 NJ Misc. 801

(3) Other instances see 67 CJ p 1278 note 85 [a]

37. Wash—Hub Clothing Co v. City of Seattle, 201 P 6, 117 Wash 251

38. Ind—Frankfort Waterworks Co v McBride, 175 NE 140, 92 Ind App 680

39. Va—City of Richmond v. Virginia Bonded Warehouse Corporation, 138 SE 503, 148 Va. 60, 54 A. L.R 1485

40. Mo—Schindler v Standard Oil Co of Indiana, 232 SW 735, 207 Mo App 190

41. NY—Woodruff v Oleite Corporation, 192 NYS 189, 199 App Div. 772

42. NY—Woodruff v. Oleite Corporation, supra  
67 CJ p 1278 note 91.

43. NY—Swift v City of New York, 200 NE 681, 270 NY 162

#### Notice of special danger

Waterworks corporation was not liable for injury to child, in absence of evidence that corporation was chargeable with notice of special danger to children from conditions it allowed to exist in violation of city ordinance or that such violation proximately caused injury—Swift v. City of New York, supra

44. Ind—Pokraka v Lummus Co, 104 NE 2d 669, 230 Ind 523

45. Tex—Josey v Beaumont Waterworks Co, Civ App, 183 SW. 26.

the main street pipes by private individuals at their own cost and risk<sup>46</sup> It has been held that water companies are not liable for injuries resulting from the condition of stop boxes or meter boxes in or near the sidewalk, outside the property line, which have been installed by the consumer or at his expense,<sup>47</sup> where an ordinance places the burden of maintenance on the consumer<sup>48</sup> On the other hand it has been held that the water company may be liable for injuries resulting from defects in meter and stop boxes or similar appliances attached to them, on the ground that they are part of the company's system and subject to its control, although installed by, or at the expense of, the consumer,<sup>49</sup> at least where they are outside the property line<sup>50</sup> Where the company undertakes to make repairs on the consumer's premises, although it has no duty to do so, it is liable for injuries resulting from its negligence.<sup>51</sup> A water company is not liable for injuries to a pedestrian caused by projection of a curb box above the sidewalk, where the box was installed by the company at the expense of the municipality, the box was the city's property, and the defect resulted from settling of the sidewalk laid by the city<sup>52</sup>

46. Mo—Fisher v St Joseph Water Co, 132 SW 288, 151 Mo App 530 67 C J p 1276 note 62

47. Mo—Fisher v St Joseph Water Co, *supra*  
Tex—Neal v San Antonio Water Supply Co, Civ App, 318 SW 35—San Antonio Water Supply Co v Castle, Civ App, 199 SW 300

**Bumper of vehicle extending over curb**

Pa—Burkholder v Philadelphia Suburban Water Co, Com Pl, 41 Del Co 222

48. Mo—Williams v Independence Waterworks Co, 171 SW 2d 759, 237 Mo App 1231—Banty v City of Sedalia, App, 120 SW 2d 59

49. Ind—Indianapolis Water Co v Schoenemann, 20 NE 2d 671, 107 Ind App 308

Iowa—City of Des Moines v Des Moines Water Co, 175 NW 321, 188 Iowa 24

50. Neb—Harms v City of Beatrice, 5 NW 2d 287, 142 Neb 219, 142 ALR 239

**Company held liable without discussion of any possible duty of consumer**—Birmingham Water Works Co, 8 So 2d 827, 243 Ala 149

**Effect of regulations or agreements**

(1) A water company had the right to require, as a condition precedent, to furnishing water to a consumer, that the consumer install a service line in the street, and place a curb box therein and agree to maintain it, but such rule and contract were

not binding on the traveling public, so as to preclude recovery from water company by one who was injured when he tripped over the curb box—Indianapolis Water Co v Schoenemann, 20 NE 2d 671, 107 Ind App 308

(2) Water company, imposing upon consumer duty of keeping curb box in repair, made consumer its agent in performing public duty to maintain curb box, and did not relieve company from liability for pedestrian's injuries when stumbling over curb box projecting above sidewalk—Nord v Butte Water Co, 30 P 2d 809, 96 Mont 311

50 Mont—Nord v Butte Water Co, *supra*.

51. NJ—Walsh v Hackensack Water Co, 181 A. 422, 13 NJ Misc 815

**Effect of relationship of parties**

Water company was not exempt from liability for injuries sustained when tenant tripped into pit allegedly left uncovered through water company employees' failure to replace boards after removing meter housed in pit, on ground that there was neither privity of estate nor contract between tenant and water company—Walsh v Hackensack Water Co, *supra*

52 NJ—Folk v Hackensack Water Co, 2 A 2d 324, 121 NJ Law 278, affirmed 5 A 2d 698, 122 NJ Law 381

53. Mass—Kelly v Inhabitants of

### c. Dams, Reservoirs, and Incidental Facilities

A water company may be liable for injuries resulting from negligence in the construction or operation of its reservoirs, or for improper diversion, or for flooding of lands.

A water company is liable in damages if its negligence in the construction or maintenance of its dams and reservoirs permits the leakage or escape of water so as to injure the property of others,<sup>53</sup> or unlawfully diverts or abstracts water to which others are entitled,<sup>54</sup> including subsurface water<sup>55</sup> A city may be liable in trespass for damage from water leaking from its reservoir, regardless of the care used<sup>56</sup> Likewise, a city may be liable to riparian owners for damages resulting from its operation of its dams, reservoirs, and filtration plants<sup>57</sup> A water supply corporation is not liable for damage resulting from the opening of the spillway or flood gates on its dam during a storm of unprecedented violence, provided due care is used under the circumstances.<sup>58</sup> A city, in erecting a dam for its reservoir, must use ordinary care in its construction so as to prevent its being swept

Town of Winthrop, 107 NE 414, 219 Mass 471

67 C J p 1275 note 46

**Liability of licensor**

Where owners of mine licensed town to maintain and operate a dangerous reservoir on mine property, owners became liable with town for damages caused by negligent maintenance and operation of reservoir—Shell v Town of Evarts, 178 SW 2d 32, 296 Ky 602

54 Tex—Town of Jacksonville v Ragsdale, Civ App, 202 SW 774 67 C J p 1275 note 47

55 Pa—Stone v Providence Gas, etc, Co, 13 Pa Dist 557 67 C J p 1275 note 48

56. Ohio—City of Barberton v Miksch, 190 NE 387, 128 Ohio St. 169

57. Okl—City of Henryetta v Runyan, 219 P 2d 220, 203 Okl 153

**Loss of cattle**

A city was held liable not only for flooding of lands, but for cattle lost by a riparian owner by reason of a boggy condition of water holes caused by the discharge of chemically treated silt by the city's filtration plant—City of Henryetta v Runyan, 219 P 2d 220, 203 Okl 153

58. NY—Deerpark Brewing Co v Port Jarvis Water Works Co, 114 NYS 119, 129 App Div. 420 67 C J. p 1277 note 63.

away,<sup>59</sup> but it will not be liable for damage resulting from an act of God causing its dam to break thereby flooding the lands of lower owners<sup>60</sup> A flood, in order to constitute an act of God, must be so unusual or unprecedented in character that it could not have been anticipated<sup>61</sup> Where a city made no alterations in a stream, except on its own property, it has been held not liable for damage caused by an unprecedented flood<sup>62</sup> A city using a lake as a reservoir is not liable for flood resulting from an increase of natural water and not from water pumped in by the city<sup>63</sup> However, a city, which had left a partially completed dam in its water supply canal which concurred with unprecedented rainfall in producing overflow which flooded lands, may not escape liability on ground that rainfall was an act of God<sup>64</sup>

A city which, by means of dams and other works, had diverted the waters of a river from a lake for so long that the diversion appeared permanent is liable for damages to a company engaged in extracting minerals from the subsurface under a mineral lease from the state, where the city permitted river water to flow into the lake,<sup>65</sup> and the state as owner of the lake bed is entitled to an injunction limiting the release of water into the lake<sup>66</sup>

## § 310. Insufficiency of Supply or Pressure

### a In General

59. Wash—Maplewood Farm Co v City of Seattle, 153 P 1061, 88 Wash 634

67 C J p 1277 note 64

60. Wash—Maplewood Farm Co v. City of Seattle, supra

61. NY—Van Alstyne v City of Amsterdam, 197 NYS 570, 119 Misc 817, affirmed 201 NYS 954, 206 App Div 805

67 C J p 1277 note 66

62. NY—Wright v City of Oneonta, 1 NYS 2d 295, 165 Misc 492

63. Minn—Mitchell v City of St Paul, 31 NW 2d 46, 225 Minn 390

64. Va—City of Portsmouth v Culpepper, 64 SE 2d 799, 192 Va. 362

65. Cal—Natural Soda Products Co v City of Los Angeles, 143 P 2d 12, 23 Cal 2d 193, certiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 88 L Ed 1594—Natural Soda Products Co v City of Los Angeles, 240 P 2d 993, 103 Cal App 2d 440

### Defenses

City could not justify its act in permitting water again to flow into lake on ground that as a riparian

owner city had right to full flow of river past its lands below dam, where city made no claim that it had any beneficial use for the water—Natural Soda Products Co v City of Los Angeles, 143 P 2d 12, 23 Cal 2d 193, certiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 88 L Ed 1594.

66. Cal—People v City of Los Angeles, 214 P 2d 1, 34 Cal 2d 695

### Defenses

City could not resist injunctive relief sought by state against release of water on ground a public use had attached to the release, if an injunction framed with reference to legal rights of the parties would not place an undue burden on operation of the aqueduct system—People v City of Los Angeles, supra

67. Ark—Jones House Furnishing Co v Arkansas Water Co, 166 S W 557, 112 Ark 425, 52 L.R.A.N.S., 402

67 C J p 1278 note 92.

68. Ky—Springfield F & M Ins Co v. Graves County Water, etc., Co,

b. Losses from insufficiency to extinguish fire

### a. In General

A city or a consumer having a definite contract with a company for a supply of water may recover for insufficiency of supply which is a breach thereof A breach by a city of its statutory duty to supply water may be negligence.

Either a municipality or a private citizen having a definite contract with a water company for a supply of water may maintain an action for damages resulting from the failure or insufficiency of the supply,<sup>67</sup> unless caused by unavoidable accident without the company's negligence or fault,<sup>68</sup> but its liability is only such as is created by contract<sup>69</sup> A water consumer's agreement to claim no damage because of stoppage of flow from an accident, or necessary repairs, applies only where the stoppage is necessary and reasonable<sup>70</sup> A consumer's failure to use an ordinary safety device, prescribed by the rules of the company, on his own piping has been held to constitute such negligence on his part as to deprive him of his right to recover for a wrongful temporary cutting off of the water supply<sup>71</sup> A failure to notify consumers that the water supply would be cut off temporarily has been held not to render the company liable for fires caused by gas heaters of which the water company had no notice.<sup>72</sup> A violation by a city of its statutory duty to furnish water, due to failure of its employee to open water gates shut because of a tempo-

85 SW 205, 120 Ky 40, 27 Ky L 420

67 C J p 1278 note 93

69. Ark—Jones House Furnishing Co v Arkansas Water Co, 166 S W 557, 112 Ark 425, 52 L.R.A.N.S., 402

### Particular use

A water company is not liable for damages resulting from failure to supply water for a particular use in absence of a specific undertaking to supply water for such use—Gelhaus v Nevada Irr Dist, 278 P 2d 689, 43 Cal App 2d 779

### Liability for contempt

Pa—Public Service Commission of Commonwealth of Pennsylvania v. Sinking Spring Water Co, Com Pl, 46 Dauph Co 9

70. Ala—Alabama Water Co v Willson, 107 So 821, 214 Ala 364

71. Me—De Rockemont v Camden & Rockland Water Co, 152 A 534, 129 Me 421

67 C J p 1278 note 96

72. Miss—Brame v Jackson Light, etc., Co, 48 So 728, 95 Miss 26, 21 L.R.A.N.S., 468, 20 Ann Cas 1293

67 C J p 1279 note 99

rary difficulty, constitutes negligence.<sup>73</sup> A consumer of a city water supply may recover damages from the owner of a part of the supply who cut off the entire supply, even if the consumer's attempts to restore the supply to his line increased the damage.<sup>74</sup>

**b. Losses from Insufficiency to Extinguish Fire**

- (1) Under general rules
- (2) Under rule of liability to consumer on contract with municipality

**(1) Under General Rules**

Generally, the water company is not liable for insufficiency of supply or pressure to extinguish a fire in the absence of express contract. The company is not liable for injuries to the property owner on the company's contract with the municipality.

A water company may bind itself by contract to furnish at all times a sufficient supply of water for protection against fires, in which case, in the absence of a provision to the contrary in the contract,<sup>75</sup> it is liable for property destroyed by a con-

flagration which could have been extinguished if the water supply had been sufficient.<sup>76</sup> When the duty violated by the water company was created solely by contract, a cause of action arising out of such violation is limited strictly to the parties to such contract and those in privity with them.<sup>77</sup> A breach of a contract to furnish water for domestic purposes does not call for damages caused to the house by fire while the water was cut off.<sup>78</sup>

According to the weight of authority,<sup>79</sup> a contract between a municipal corporation and a water company by which the latter undertakes to supply the city with water in sufficient quantities and pressure for extinguishing fires does not give a private consumer who pays water rents a right of action against the company if his property is destroyed by a fire which could have been extinguished but for the failure of the company to supply water as agreed,<sup>80</sup> although the company in failing to supply water was actuated by malice,<sup>81</sup> and the consumer may have had a right to appropriate water during fire because of extreme necessity.<sup>82</sup> Under this rule

73. NY—Lightboro Realty Corp v City of New York, 81 NYS 2d 465, 192 Misc 947, affirmed 88 NY S 2d 272, 275 App Div 748, appeal denied 89 NYS 2d 702, 275 App Div 822

74. Utah—Beagley v U S Gypsum Co, 235 P 2d 783

75. Ark—Jones House Furnishing Co v Arkansas Water Co, 166 S W 557, 112 Ark 425, 52 L.R.A., NS, 402

NJ—Buchanan, etc, Lumber Co v East Jersey Coast Water Co, 59 A 31, 71 NJ Law 350

76. Me—Milford v Bangor R, etc, Co, 71 A 759, 104 Me 233, 30 L.R.A., NS, 531

67 C.J. p 1279 note 2

77. Tex—City of Wichita Falls v Swartz, Civ App, 57 SW 2d 236

78. Ala—Bessemer Waterworks v Murphy, 60 So 533, 6 Ala.App 603

79. Ark—Collier v Newport Water, Light & Power Co, 139 SW 635, 100 Ark 47, Ann Cas 1913D 458

NY—H R Moch Co v Rensselaer Water Co, 159 NE 896, 247 NY 160

Minority rule see *infra* subdivision b (2) of this section

80. Ariz—Cole v Arizona Edison Co, 86 P 2d 946, 53 Ariz. 141

Ga—Wilson v Georgia Power & Light Co, 36 SE 2d 757, 200 Ga 207, answer to certified question conformed to 36 SE 2d 847, 73 Ga App 436—Martha Mills v Moseley, 179 SE 159, 50 Ga App 536

III—Consolidated Biscuit Co v Illinois Iowa Power Co, 24 NE 2d 582, 303 Ill App 80.

NJ—Reimann v Monmouth Consol Water Co, 87 A 2d 325, 9 NJ 134  
Pa—Rainey v Natrona Water Co, 49 Pa Dist & Co 152, 35 Mun 94, 91 Pittsb Leg J 451—St Mary's Greek Catholic Church of Taylor v Scranton-Spring Brook Water Service Co, Com Pl, 51 Lack Jur. 227, 42 Mun LR 157  
67 C.J. p 1279 note 6

**Liability on theory of tort**

The water company cannot be held liable on the theory that its violation of its contractual duty to the city is a tort as to the property owner

Ariz—Cole v Arizona Edison Co, 86 P 2d 946, 53 Ariz. 141

Ga—Wilson v Georgia Power & Light Co, 36 SE 2d 757, 200 Ga 207, answer to certified question conformed to 36 SE 2d 847, 73 Ga App 436—Martha Mills v Moseley, 179 SE 159, 50 Ga App 536

**In Indiana**

(1) The text rule was applied and the water company was held not liable where it was contended that the damage resulted also from deficiencies in the fire fighting equipment provided by the city—Larimore v Indianapolis Water Co, 151 NE 333, 197 Ind 457

(2) Other particulars of Indiana rule see 67 C.J. p 1279 note 6 [d]

**In Louisiana**

(1) On an appeal from a judgment on an exception of no cause of action, which had dismissed a property owner's suit against a city and the water company except as to the water company's duty under a verbal contract with the property owner, the

supreme court indicated that the company might be liable on the contract with the city and remanded that branch of the case for trial.—Planters' Oil Mill v Monroe Waterworks, etc, Co, 27 So 684, 52 La. Ann. 1243

(2) On appeal from a final judgment for defendant, the supreme court affirmed, remarking that the contract with the city contained no stipulation of liability to citizens, but holding the judgment correct on evidence that the loss was attributable to the escape of water from the mains through plaintiff's sprinkler system—Planters' Oil Mills v Monroe Waterworks, etc, Co, 32 So 376, 108 La 236

(3) In a later case the supreme court expressly overruled the decision in *Planters' Oil Mill v Monroe Waterworks, etc, Co*, 27 So 684, 52 La. Ann. 1243, made no mention of its opinion in *Planters' Oil Mills v Monroe Waterworks, etc, Co*, 32 So 376, 108 La. 236, and held that a judgment for a property owner for damages by fire because of a defective hydrant should be reversed because plaintiff was not privy to the contract with the city. The court noted that the suit was *ex contractu* and not *ex delicto* on the breach of a general duty to society or a duty specially imposed by statute—Allen, etc, Mfg. Co v Shreveport Waterworks Co, 37 So 980, 113 La 1091, 104 Am SR 525, 68 L.R.A. 650

81. Ga—Martha Mills v Moseley, 179 SE 159, 50 Ga App 536.

82. Ga—Martha Mills v Moseley, *supra*.

liability for fire loss due to an insufficient supply of water can arise only from express contract,<sup>83</sup> and cannot arise from implication.<sup>84</sup> In some jurisdictions following this rule, where a municipal corporation enters into a contract with a company to supply water for the extinguishment of fires, such contract being entered into for general purposes and for the benefit of all its inhabitants and no protection to any specific property is contemplated, the relation of the water company is not different as to the property of the municipality from the relation of any of its citizens to such company, and it cannot recover for the loss of its property from the failure of the water company to furnish an adequate supply of water as provided for in such contract.<sup>85</sup> A taxpayer does not gain a right of action as a third party beneficiary to the contract between the city and the water company.<sup>86</sup> Engaging in the public water supply business has been held not to be a "dangerous calling" so as to impose such a duty on the persons or corporation so doing as to subject them to liability to property owners for damages caused by mere nonfeasance.<sup>87</sup> A water company's violation of a statutory duty to furnish an adequate supply has been held not to authorize an action by an individual consumer for fire loss resulting from an inadequate supply.<sup>88</sup>

## (2) Under Rule of Liability to Consumer on Contract with Municipality

In some jurisdictions, the company may be liable to an individual citizen for damages resulting from its failure to supply water for fire protection as required by its contract with the municipality.

In a few jurisdictions it is held that the water company is liable to the property owner for failure to supply sufficient water for fire fighting, although its contract to do so is with the municipal corporation,<sup>89</sup> and where a water company continues service after its franchise has expired, its obligation to supply sufficient pressure for fire protection continues, and it can be held liable for breach.<sup>90</sup> However, there can be no recovery against the company where it appears that the apparatus of the fire department was insufficient for the quantity and force of water actually supplied.<sup>91</sup> Likewise, where the water company is required only to have sufficient water in its mains, and the city is to furnish the means of getting the water to its fire engines, the water company is not liable for defective means of getting the water from the mains to the fire engines.<sup>92</sup>

The water company is not liable for a failure to have more than the required amount of pressure, although it may have had more than the required amount at other times,<sup>93</sup> and the water company is

83. Cal—Niehaus Bros Co v Contra Costa Water Co, 113 P 375, 159 Cal 305, 36 L.R.A., NS, 1045 67 C.J. p 1280 note 7

84. N.J.—Atlas Finishing Co v Hackensack Water Co, 163 A 20, 10 N.J. Misc 1197 67 C.J. p 1280 note 8

85. Cal—Ukiah City v Ukiah Water, etc., Co, 75 P 773, 142 Cal 173, 100 Am SR 107, 64 L.R.A. 231 Me—Milford v Bangor R., etc., Co, 76 A 696, 106 Me 316, 30 L.R.A., NS, 526, 20 Ann Cas 622

86. Pa—St Mary's Greek Catholic Church v Scranton-Spring Brook Water Service Co, 51 Lack Jur 227, 42 Mun 157. 67 C.J. p 1281 note 11

87. U.S.—German Alliance Ins. Co v Home Water Supply Co, S.C., 174 F 764, 99 C.C.A. 258, affirmed 33 S.Ct. 32, 226 U.S. 220, 57 L.Ed. 195, 42 L.R.A., NS, 1000 67 C.J. p 1281 note 12

88. Ariz.—Cole v Arizona Edison Co, 86 P.2d 946, 53 Ariz. 141

Ill.—Consolidated Biscuit Co v Illinois Iowa Power Co, 24 N.E.2d 582, 303 Ill. App. 80

Pa.—Rainey v Natrona Water Co, 49 Pa. Dist & Co 152, 35 Mun. 94, 91 Pittsb. Leg. J. 451—Hudak v Scranton Spring Brook Water Service

Co, 39 Pa. Dist. & Co 346, 35 Luz Leg. Reg. 241, 32 Mun. L.R. 100 67 C.J. p 1279 note 6 [d], [e], p 1281 note 13

### Franchise

(1) A public service corporation operating a municipality's waterworks under franchise requiring corporation to furnish to the town water necessary to the extinguishment of fires was not liable on basis of breach of franchise to resident of municipality whose property was destroyed by fire in consequence of corporation's failure to maintain proper pressure in water mains—Cole v Arizona Edison Co, 86 P.2d 946, 53 Ariz. 141

(2) A city ordinance, providing that waterworks company, granted franchise thereby and contracting to furnish city sufficient water to extinguish fires therein, should be liable for all damage because of its negligent exercise of privileges granted and hold city free from such liability, meant only such damages as are recoverable under law, and hence did not constitute exception to general rule that resident of city cannot recover damages from waterworks company for loss by fire because of company's failure to furnish sufficient water to extinguish fire—Wilson v Georgia Power & Light Co, 36 S.E.2d 757, 200 Ga. 207, answer to cer-

tified question conformed to 36 S.E.2d 847, 73 Ga. App. 436

(3) Other decisions with respect to liability under franchises see 67 C.J. p 1281 note 13 [a]

89. Ky—Pineville Water Co v Bradshaw, 266 S.W.2d 305—Nerren v Kentucky Water Service Co, 230 S.W.2d 615, 313 Ky 151—Clay v Catlettsburg, Kenova & Ceredo Water Co, 192 S.W.2d 358, 301 Ky 456

67 C.J. p 1281 note 14

90. Ky—Clay v Catlettsburg, Kenova & Ceredo Water Co, supra

91. Ky—Mountain Water Co v Davis, 241 S.W. 901, 195 Ky 193 67 C.J. p 1281 note 15

92. Ky—Terrell v Louisville Water Co, 105 S.W. 100, 127 Ky 77, 31 Ky L. 1281

### Duty to clean fire plugs

Generally, city fire department assumes duty of periodically opening fire plugs and flushing out mud and filth accumulating during periods of nonuse, with respect to liability of water company for destruction of building by fire—Prestonsburg Water Co v Dingus, 111 S.W.2d 661, 271 Ky 240, followed in Prestonsburg Water Co v Neeley, 111 S.W.2d 665, 271 Ky 247.

93. Ky—Georgetown Water, Gas,

not bound to maintain high pressure on its mains until it has notice of a fire, but it is bound to be ready to put on such pressure when it receives such notice<sup>94</sup> A franchise providing that a water company has no obligation to provide service for fire protection and shall be under no liability for failure to furnish it is not void as against public policy,<sup>95</sup> and relieves the company of liability to the consumer.<sup>96</sup> The water company is liable for loss by fire only on its contract with the city, in the absence of a contractual liability to the contrary, and it is not liable for fire losses on its contract to furnish water for domestic purposes<sup>97</sup> The company cannot be held liable on a tort theory<sup>98</sup>

Where the contract requires that the water company put in self-draining hydrants, which it did not properly do, the company cannot relieve itself from liability on the ground that the loss was caused by an act of God freezing water in the hydrant<sup>99</sup> A water company's contract with the city has been held not to be for the benefit of fire insurers, and a breach of such contract not to render the company liable to them<sup>1</sup> No greater force can be given the testimony of the city officials than would be given the same testimony by persons not in the employment of the city<sup>2</sup>

Electric & Power Co v Neale, 125 SW 293, 137 Ky 197

94. Ky—Georgetown Water, Gas, Electric & Power Co v Neale, supra

95. Ky—Nerren v Kentucky Water Service Co, 230 SW 2d 615, 313 Ky 151

96. Ky—Nerren v Kentucky Water Service Co, supra

97. Ky—Kenton Water Co v Glenn, 133 SW 573, 141 Ky 529

98. Ky—Pineville Water Co v Bradshaw, 266 SW 2d 305—Nerren v Kentucky Water Service Co, 230 SW 2d 615, 313 Ky 151—Clay v Catlettsburg, Kenova & Ceredo Water Co, 192 SW 2d 358, 301 Ky 456

99. Ky—Harlan Water Co v Carter, 295 SW 426, 220 Ky 493

1. Ky—William Buiford & Co v Glasgow Water Co, 2 SW 2d 1027, 223 Ky 54, 62 ALR 1195  
67 C J p 1282 note 23

2. Ky—Georgetown Water, Gas, Electric & Power Co v Neale, 125 SW. 293, 137 Ky 197

3. Mo—Martin v Springfield City Water Co, App, 128 SW 2d 674

**Effect of statute**

Under a statute providing that  
" . . . every water corporation

shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable," it has been held that the company must provide safe water and that a failure to do so is negligence per se—Martin v Springfield City Water Co, supra

4. NJ—Corpus Juris quoted in Seiden v Passaic Valley Water Commission, 199 A. 420, 422, 16 NJ Misc 301  
67 C J p 1282 note 25

Municipality does not guarantee that water supply for domestic use is fit therefor

Ohio—City of Salem v Harding, 169 NE 457, 121 Ohio St 412

Vt—Boguski v City of Winooski, 187 A 808, 108 Vt 380

5. Mont—Safransky v. City of Helena, 39 P 2d 644, 98 Mont 456

NJ—Corpus Juris quoted in Seiden v Passaic Valley Water Commission, 199 A. 420, 422, 16 NJ Misc 301

Pa—Public Service Commission of Commonwealth of Pennsylvania v Sinking Spring Water Co, 46 Dauph Co 9

Vt—Boguski v City of Winooski, 187 A 808, 108 Vt 380

67 C J p 1282 note 26

Effect of creation of state board  
Statutes creating state health board

**§ 311. Liability for Pollution of Water Used for Domestic or Drinking Purposes**

A water company is not an insurer of the purity of its water, but must use reasonable care to supply pure water and may be liable to those injured by its failure to do so

Although, in the absence of a statute to the contrary,<sup>3</sup> a water company is not an insurer or a guarantor of the purity of its water or of its freedom from infection,<sup>4</sup> it is bound to use reasonable care in ascertaining whether there is a reasonable probability that its water supply may be infected with a communicable disease from causes which are known to exist,<sup>5</sup> or which could have been known or foreseen by the exercise of such care,<sup>6</sup> and for a failure to use reasonable care it will be liable in damages to persons injured by reason of the impurity,<sup>7</sup> and if the exercise of such care would have disclosed a reasonable probability of such infection, then it is the duty of a water company to adopt whatever approved precautionary measures are, under the circumstances, reasonably proper and necessary to protect the community which it serves from the risk of infection<sup>8</sup> Under an implied contract to furnish water that is as reasonably pure and wholesome as possible, it is the duty of a city to furnish water free from any contamination rendering it unfit for domestic use<sup>9</sup> It has been held

with subordinate county and city departments was held not to take control of water systems out of the hands of city so as to relieve it of duty to maintain pure water supply—Safransky v City of Helena, 39 P 2d 644, 98 Mont 456—Campbell v City of Helena, 16 P 2d 1, 92 Mont 366

6. Mass—Horion v Inhabitants of North Attleboro, 19 NE 2d 15, 302 Mass 137

NJ—Corpus Juris quoted in Seiden v Passaic Valley Water Commission, 199 A. 420, 422, 16 NJ Misc 301

67 C J p 1282 note 27.

7. NJ—Corpus Juris quoted in Seiden v Passaic Valley Water Commission, 199 A. 420, 422, 16 NJ Misc 301

67 C J p 1282 note 28

**Liability for contempt**

Pa—Public Service Commission of Commonwealth of Pennsylvania v Sinking Spring Water Co, 46 Dauph Co 9

8. NJ—Corpus Juris quoted in Seiden v Passaic Valley Water Commission, 199 A. 420, 422, 16 NJ Misc 301

67 C J p 1282 note 29

9. ND—McGurgen v. City of Fargo, 66 N.W 2d 207.

that although a town may assume that water once inside a house would be used properly, and need not inspect inside the house,<sup>10</sup> if the town knows that water supplied is to pass through a lead service pipe, it must supply water which will be potable after passing through the pipe.<sup>11</sup> It is no part of the duty of the consumer to investigate the water supply and ascertain possible sources of pollution.<sup>12</sup>

Where polluted water was permitted to pass into a city main through a by-pass connection at a mill, any promise made by the mill company to remove such by-pass does not relieve the city from liability to users of such water.<sup>13</sup> It is no defense to a city that pollution resulted from its performance of a related governmental function.<sup>14</sup> One using a single supply line to get water from the city water main and another source may be liable for injuries resulting to a customer of the city from pollution of the city supply.<sup>15</sup>

**Notice.** Complaints made to the health officers of the polluted condition of the water have been held to be at least some notice to the city.<sup>16</sup> A statute

requiring notice to the city of injuries suffered because of a defect in public works has been held not to apply where a consumer contracted a disease from contaminated water furnished by the city.<sup>17</sup>

## § 312. Actions

- a. In general
- b. Persons liable and parties
- c. Pleadings
- d. Evidence
- e. Trial and judgment
- f. Damages

### a. In General

Notice or presentation of claim may be a condition precedent to an action against a municipality for injuries incident to the water supply. Such an action must be instituted within the time limited by statute.

Requirements of notice and presentment of claim in tort actions, considered generally in Municipal Corporations § 922 et seq., may be applicable to actions for injuries incident to the water supply,<sup>18</sup> and where applicable must be satisfied.<sup>19</sup>

10. Mass—Horton v Inhabitants of North Attleboro, 19 NE 2d 15, 302 Mass 137

11. Mass—Horton v Inhabitants of North Attleboro, supra

12. Me—Hamilton v Madison Water Co, 100 A 659, 116 Me 157, Ann Cas 1918D 853

NJ—Corpus Juris cited in Seiden v Passaic Valley Water Commission, 199 A 420, 422, 16 NJ Misc 301

13. Wash—Roscoe v City of Everett, 239 P 831, 136 Wash 295

14. Vt—Boguski v City of Winooski, 187 A 808, 108 Vt 380

#### By-pass for fire purposes

City was not exempt from liability for death from typhoid caused by drinking city water polluted with river water on ground that river water got in through by-pass which was maintained solely for fire-fighting purposes, since negligence charged did not arise from use of by-pass for fire protection, but in supplying water for domestic purposes—Boguski v City of Winooski, supra.

15. Miss—Carey-Reed Co v. Farmer, 192 So 48, 187 Miss 12

#### Company held liable

A corporation which used, in building roads, large amounts of water from city water mains and from bayou, was bound to know that the bayou water was unfit for human consumption, and that greater pressure at pump end of the corporation's water line than at other end would result in forcing bayou water into the city water supply, and hence such corporation was liable on ground of

negligence for illness caused by such pollution, which might have been avoided by installation of safety valve—Carey-Reed Co v Farmer, supra

16. Ind—Pennsylvania R Co v Lincoln Trust Co, 167 NE 721, 170 NE 92 91 Ind App 28

Mont—Safransky v City of Helena, 39 P 2d 644, 98 Mont 456

Wash—Roscoe v City of Everett, 239 P 831, 136 Wash 295

17. Mont—Campbell v City of Helena, 16 P 2d 1, 92 Mont 366

18. Wash—Dempsey v City of Seattle, 59 P 2d 923, 187 Wash 38

#### Statute held inapplicable

(1) Statute requiring notice within sixty days of injury by reason of any defect in bridge, street, road, sidewalk, culvert, park, public grounds, ferryboat, or public works of any kind is not applicable to suit by one injured by drinking contaminated water—Safransky v City of Helena, 39 P 2d 644, 98 Mont 456—Campbell v City of Helena, 16 P 2d 1, 92 Mont. 366

(2) The statute requiring filing of claim with officer and city within ninety days for injuries or damages resulting from dangerous or defective condition of any public property was inapplicable to plaintiff's claim against city for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plant for extraction of chemicals from subsurface of lake—Natural Soda Products Co v City of Los Angeles, 143 P 2d 12, 23 Cal 2d 193, cer-

tiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 322 US 768, 88 L Ed 1594

19. Wash—Dempsey v City of Seattle, 59 P 2d 923, 187 Wash 38

#### Sufficiency of notice

Where notice to city with respect to plaintiff's claim for damages from flooding of basement of building occupied by plaintiff when leak developed in cutoff pipe leading from city water main described plaintiff's general grievance, as set out in petition, against city and in a general way apprised city of time, place, and extent of alleged injury, notice was sufficient, and there was no fatal variance between notice and petition—City of Tallapoosa v Goebel, 10 SE 2d 201, 63 Ga App 1

#### Claim held filed with appropriate officer

Cal—Natural Soda Products Co v City of Los Angeles, 143 P 2d 12, 23 Cal 2d 193, certiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct. 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 322 US 768, 88 L Ed 1594.

#### Time of notice or filing of claim

(1) The cause of action for damage by water escaping from a broken water main accrued when the main broke and was barred when notice was not filed within six months as required by city charter—National Lead Co v City of New York, CC AN Y., 43 F.2d 914.



**Limitations** The action must be instituted within the time limited by statute.<sup>20</sup> Where the injury complained of is a negligent laying of mains and pipes, the cause of action accrues at, and the statute of limitations runs from, the date of such laying,<sup>21</sup> and the fact that the extent of the resulting damage does not become at once apparent is immaterial.<sup>22</sup>

### b. Persons Liable and Parties

Water companies are liable only for their own negligence. A city is not a necessary party to a consumer's suit for fire loss based on the city's contract with a water company.

A water company is liable only for its own negligence.<sup>23</sup> Where a construction company has contracted with the water company to guard all excavations, the construction company may be held liable for injuries resulting from a failure properly to guard excavations.<sup>24</sup> It has been held, in a

jurisdiction which permits a consumer to sue the water company for its failure to provide the water pressure required by its contract with the city, for fire prevention, that the city need not be made a party defendant.<sup>25</sup>

### c. Pleadings

In an action for injuries incident to a public and municipal water supply, the complaint must state a cause of action, and matters of defense must be pleaded in the answer.

Applying the general rules, the complaint or petition must state a cause of action,<sup>26</sup> and must be reasonably definite and certain.<sup>27</sup> In an action based on the negligence of a water company, the complaint must show the existence of such negligence,<sup>28</sup> set out the duties of defendant,<sup>29</sup> allege damages,<sup>30</sup> allege that the negligence of defendant was the proximate cause of the injury complained

(2) Cause of action for damage by water escaping from broken water main accrued when main broke and was barred against city not notified within 30 days thereafter, even if claim was filed within 30 days after damage was discoverable—*Dempsey v City of Seattle*, 59 P 2d 923, 187 Wash 38.

(3) Plaintiff's claim against city for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plant for extraction of chemicals from subsurface of lake was filed within six months after the "occurrence from which the damage arose," as required by city charter, where it appeared that city opened gates in its dam intermittently beginning on February 6 until the last day of June, that water reached its peak in May and did not entirely disappear until some time in September, and that plaintiff's claim was filed on December 30—*Natural Soda Products Co v City of Los Angeles*, 143 P 2d 12, 23 Cal 2d 193, certiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 322 US 768, 88 L Ed 1594.

(4) Where lessee of lake bed property brought action against city for damages caused by inundation of lake bed by negligent operation of aqueduct system, although statutory claim might have been filed with city as late as six months from time waters in lake bed dissipated, filing of claim before dissipation of waters did not preclude maintenance of action—*Natural Soda Products Co v City of Los Angeles*, 240 P 2d 993, 109 Cal App 2d 440.

#### 20. Action held timely

Cal.—*Natural Soda Products Co v*

City of Los Angeles, 143 P 2d 12, 23 Cal 2d 193, certiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 322 US 768, 88 L Ed 1594.

21. Tex.—*Houston Water-Works Co v Kennedy*, 8 SW 36, 70 Tex 233, 67 CJ p 1282 note 38.

22. Tex.—*Houston Water-Works Co v Kennedy*, supra.

23. NY.—*Monomoy Co v City of New York*, 132 NYS 438.

24. Ind.—*Marion County Const Co v Claycomb*, 98 NE 744, 52 Ind App 681, 67 CJ p 1282 note 35.

25. Ky.—*Tobin v Frankfort Water Co*, 164 SW 956, 158 Ky 348—*Kenton Water Co v Glenn*, 133 SW 573, 141 Ky 529.

26. US.—*Smillie v Continental Oil Co*, D C Colo, 127 F Supp 508, 67 CJ p 1283 note 42.

#### Pleadings held sufficient

Fla.—*City of Blountstown v Florida Public Utilities Co*, 24 So 2d 238, 156 Fla. 721.

Ga.—*City of Tallapoosa v Goebel*, 10 SE 2d 201, 63 Ga App 1.

Neb.—*Harms v City of Beatrice*, 5 NW 2d 287, 142 Neb 219, 142 ALR 239.

27. Ga.—*City of Tallapoosa v Goebel*, 10 SE 2d 201, 63 Ga App 1.

#### Complaint held sufficient

In action against city for damages from flooding of basement of building occupied by plaintiff when leak developed in cutoff pipe leading from city water main, where act of negligence alleged in one paragraph of petition was a nonfeasance and act

of negligence alleged in another paragraph was a misfeasance, petition was not subject to special demurrer on grounds of indefiniteness and uncertainty, where there was a subsequent allegation that damage to plaintiff's property was direct and proximate result of defendant's negligence as alleged, which subsequent allegation was a general allegation of negligence—*City of Tallapoosa v Goebel*, supra.

28. Cal.—*Bouris v Spring Valley Water Co*, 97 P 530, 8 Cal App 588.

Pa.—*Elkins v Philadelphia Suburban Water Co*, Com Pl, 70 Montg Co 127.

#### Notice

Injured pedestrian's complaint alleging that water company negligently failed to maintain the portion of a street occupied by unused water meter box between sidewalk and curb or immediately adjacent thereto in reasonably safe condition for travel of pedestrians implied notice to water company for a sufficient time in which to remedy the defect or negligence in not discovering the defect, if water company had duty to maintain the adjoining strip of land—*Birmingham Water Works Co v Walker*, 8 So 2d 827, 243 Ala. 149.

29. Ky.—*Mountain Water Co v Davis*, 241 SW 801, 195 Ky. 193.

**Complaint held sufficient to show duty of defendant**—*Birmingham Water Works Co v Walker*, 8 So 2d 827, 243 Ala. 149.

30. N.Y.—*Thompson v. City of New York*, 133 NYS. 934, 74 Misc 271.

Pa.—*Burkholder v Philadelphia Suburban Water Co*, Com. Pl., 41 Del. Co 222.

of,<sup>31</sup> and in some jurisdictions it has been held that it must show plaintiff's freedom from contributory negligence.<sup>32</sup> Plaintiff is not bound to plead his evidence.<sup>33</sup> In an action for death from drinking polluted water furnished by the city, plaintiff is not bound to specify the cause or place of the pollution.<sup>34</sup> If the water became polluted, and the city, on knowledge thereof, notified the users to boil the water, such matter is affirmative defense,<sup>35</sup> and plaintiff is not required to negative such matter by his complaint.<sup>36</sup> It is unnecessary to allege that the consumer's contract with the water company had been made in compliance with the rules and regulations as a state public service commission.<sup>37</sup> If liability for failure to supply sufficient water or pressure to extinguish a fire is based on the water company's contract with the municipality, the complaint must allege a breach of contract.<sup>38</sup> Where contributory negligence is a defense, it must be pleaded in the answer.<sup>39</sup>

*Issues, proof, and variance.* Under general rules, only evidence which is within the issues made by the pleadings is admissible.<sup>40</sup> If there is a substantial variance between the complaint and the proof adduced in support thereof, plaintiff cannot recover.<sup>41</sup>

#### d. Evidence

The plaintiff has the burden of proving all matters essential to recovery by a preponderance of the evidence. In a proper case the doctrine of *res ipsa loquitur* may be invoked.

Following the general rules, plaintiff has the burden of proof as to matters necessary to his recovery,<sup>42</sup> for example, when such are relied on as a basis for recovery, he has the burden of proving a contract to furnish water to fight fire, and its breach,<sup>43</sup> the negligence of defendant in constructing, maintaining, or repairing its piping system,<sup>44</sup> and that defendant's negligence was the proximate cause of his injury.<sup>45</sup> Plaintiff must also prove his

31. Fla.—Woodbury v Tampa Water Works Co, 49 So 556, 57 Fla 243, 249, 21 L.R.A.N.S., 1034  
67 C.J. p 1283 note 46

32. Cal.—Bourie v Spring Valley Water Co, 97 P. 530, 8 Cal App 588  
67 C.J. p 1283 note 47.

33. Tex.—City of Comanche v Hoff & Harris, Civ App, 170 SW 135

34. Wash.—Aronson v City of Everett, 239 P 1011, 136 Wash 312

35. Wash.—Aronson v City of Everett, supra

36. Wash.—Aronson v City of Everett, supra

37. Ala.—Alabama Water Co v Wilson, 107 So 821, 214 Ala 364  
67 C.J. p 1283 note 52

38. Ky.—Pineville Water Co v Bradshaw, 266 SW 2d 305

39. La.—Howard v Great Am Indem Co, App, 36 So 2d 881, decree amended, rehearing denied, 37 So 2d 463

#### Plea held sufficient

In pedestrian's action against waterworks company for injuries sustained when pedestrian fell into sidewalk hole adjacent to water meter box, allegation in company's answer that pedestrian was guilty of negligence proximately contributing to accident in that pedestrian knew or should have known of hole by reason of having lived in neighborhood for many months and having walked on sidewalk daily and that pedestrian would have seen and avoided hole had he been exercising ordinary care was sufficient plea of contributory negligence.—Howard v Great Am Indem. Co, supra

40. Ohio.—Heyman v. City of Belle-

vue, 108 NE 2d 161, 91 Ohio App 321

#### Evidence held admissible under pleadings

In action against city for death of resident from typhoid fever allegedly caused by drinking impure city water, evidence as to absence of any sickness among hotel and cottage patrons who drank water taken from allegedly contaminated creek at point near city's intake was properly admitted to disprove alleged source of disease.—Stoker v Ogden City, 54 P 2d 849, 88 Utah 389

#### Evidence held inadmissible under pleadings

(1) In suit for damages from typhoid fever allegedly caused by drinking water furnished by defendant, admitting testimony relating to analysis of milk furnished by third persons, notwithstanding witness testified he made no analysis for typhoid, was error, since evidence was beyond issues.—Cady Lumber Co v Fain, C.A. Ariz, 65 F 2d 644, certiorari denied Fain v Cady Lumber Co, 54 S Ct 92, 290 US 674, 78 L Ed 582

(2) Evidence of damages not alleged was not admissible  
Mass.—Gordon v City of Medford, 117 NE 2d 284

Ohio.—Heyman v City of Bellevue, 108 NE 2d 161, 91 Ohio App 321

41. N.J.—Jones v Mt Holly Water Co, 93 A 860, 87 N.J. Law 106  
67 C.J. p 1283 note 53.

42. Ky.—Prestonsburg Water Co v Dingus, 111 SW 2d 661, 271 Ky 240, followed in Prestonsburg Water Co v Neeley, 111 SW 2d 665, 271 Ky 247

67 C.J. p 1283 note 55.

43. Ariz.—Warren Co v Hanson, 150 P 238, 17 Ariz 252

44. Ohio.—Taphorn v City of Cincinnati, 122 NE 2d 307, 162 Ohio St 454—Republic Light & Furniture Co v City of Cincinnati, 127 NE 2d 767, 97 Ohio App 532

Pa.—Peskin v Philadelphia Suburban Water Co, Com Pl, 35 Del Co 413

Tex.—Paris v. Tucker, Civ App, 93 SW 233.

#### Knowledge of defect

Customer suing for damages caused by water escaping from defective meter was required to show that city maintaining water system had knowledge of defect.—City of Richmond v Hood Rubber Products Co, 190 SE 95, 168 Va 11

#### Standard of care

Customer suing for damages caused by water escaping from defective meter had burden of proving what common usage required in such cases as standard of ordinary care, and also of proving that city failed to measure up to that standard.—City of Richmond v Hood Rubber Products Co, supra.

45. Ohio.—Republic Light & Furniture Co v City of Cincinnati, 127 NE 2d 767, 97 Ohio App 532—Cincinnati & Suburban Bell Tel Co v City of Cincinnati, 85 NE 2d 393, 84 Ohio App 521

Tex.—City of Wichita Falls v Swartz, Civ App, 57 SW 2d 236

#### Absolute precision not required

In action against city for injuries sustained by four-year-old boy when he fell into excavation dug without knowledge of occupants of premises, by city water department's employees on premises occupied by boy's parents

damages<sup>46</sup> In some jurisdictions, defendant has the burden of proving plaintiff's contributory negligence<sup>47</sup>

In those jurisdictions where the water company is liable to the consumer on its contract with the city to provide water to fight fires it has been held that the burden of proof is on plaintiff to prove that the water company failed to supply water in the quantity called for by its contract with the city,<sup>48</sup> and that but for such failure plaintiff's property could have been saved from destruction<sup>49</sup>

In an action for injuries from impure water furnished for drinking purposes, plaintiff must establish by a fair preponderance of the evidence three propositions, namely, that the sickness from which he suffered was contracted from the use of the water furnished by defendant,<sup>50</sup> that defendant was guilty of negligence in supplying him with such contaminated water,<sup>51</sup> and that plaintiff exercised due care on his part and was not guilty of contributory negligence.<sup>52</sup> However, plaintiff is not required to prove by positive testimony and with absolute certainty that the injury was caused by impure water furnished by the water company,<sup>53</sup> since the burden of proof is satisfied by proving facts and circumstances from which it might reasonably appear that the drinking water was the probable efficient cause of the injury<sup>54</sup> It is only where it appears that the

injuries were occasioned by one of two causes, for one of which defendant is responsible, but not for the other, that plaintiff must prove such facts and circumstances as will exclude the equal probability of the injury having resulted from the cause for which defendant is not liable<sup>55</sup>

**Presumptions** In an action against a water company for negligently causing the death of a person found dead in one of its excavations, the presumption against contributory negligence has been recognized<sup>56</sup>

**Res ipsa loquitur** Invoking the rule *res ipsa loquitur*, it has been held that the breaking of a tank appurtenant to a waterworks system proves negligence in the absence of proof that such was caused by the wrongful act of a third person or an act of God,<sup>57</sup> the bursting of a water main<sup>58</sup> which was under great pressure<sup>59</sup> has been held to be of itself evidence of negligence in maintaining it The presence of sand in a customer's plumbing system supplied exclusively by a company's mains has been held evidence of negligence.<sup>60</sup> However, the doctrine has been held inapplicable when the facts do not permit an inference that the injury was caused by the company's negligence,<sup>61</sup> or where the cause of damage is established,<sup>62</sup> or where the instrumentality involved was not in defendant's exclusive control<sup>63</sup> It has been held that when the doctrine is

and negligently left unguarded, proof of precisely what act or movement of the boy or his playmates immediately preceded the fall was not necessary to warrant recovery—*Sample v City of Melrose*, 43 NE 2d 665, 312 Mass 170

46. Okl.—*City of Okmulgee v Wall*, 144 P 2d 103, 193 Okl 333

Pa.—*Burkholder v Philadelphia Suburban Water Co*, 41 Del Co 222

47. La.—*Howard v Great Am Indem Co*, App, 36 So 2d 881, decrees amended, rehearing denied 37 So 2d 463

48. Fla.—*Tampa Waterworks Co v Mugge*, 53 So 943, 60 Fla 263  
67 C J p 1284 note 64

49. Fla.—*Tampa Waterworks Co v Mugge*, supra

50. Utah—*Corpus Juris* cited in *Stoker v Ogden City*, 54 P.2d 849, 853, 88 Utah 389  
67 C J p 1283 note 59

51. Me.—*Hamilton v. Madison Water Co*, 100 A 659, 116 Me 157, Ann Cas 1918D 853  
Utah—*Stoker v Ogden City*, 54 P 2d 849, 88 Utah 389

52. Me.—*Hamilton v Madison Water Co*, 100 A 659, 116 Me 157, Ann Cas 1018D 853.

53. Me.—*Hamilton v Madison Water Co*, supra

67 C J p 1283 note 61

54. Me.—*Hamilton v Madison Water Co*, supra

67 C J p 1283 note 62

55. Me.—*Hamilton v Madison Water Co*, supra.

67 C J p 1284 note 63

56. N J.—*McManus v. New Jersey Water Co*, 91 A 2d 868, 22 N J Super 253.

57. W Va.—*Jackson v City of Parkersburg*, 81 SE 559, 74 W Va. 37  
67 C J p 1277 note 76.

58. Cal.—*Juchert v California Water Service Co*, 106 P 2d 886, 16 Cal 2d 500

59. Wash.—*Rainier Heat & Power Co v City of Seattle*, 193 P 233, 113 Wash 95

60. N J.—*Seiden v Passaic Valley Water Commission*, 199 A 420, 16 N J Misc 301

#### Unusual occurrence

The presence of excessive sand in water furnished to subscriber by a public quasi corporation was an "unusual occurrence" which would make the doctrine of *res ipsa loquitur* applicable in subscriber's action for damage to plumbing system—*Seiden*

*v Passaic Valley Water Commission*, supra

61. Ill.—*Wilson v East St Louis & Interurban Water Co*, 15 NE 2d 599, 295 Ill App 603

Me.—*Great Atlantic & Pacific Tea Co v Kennebec Water Dist*, 34 A 2d 729, 140 Me 166

Ohio.—*Republic Light & Furniture Co v City of Cincinnati*, 127 NE 2d 767, 97 Ohio App 532

#### Doctrine held inapplicable

In action against water company for injuries sustained when pedestrian stepped on manhole cover in dirt sidewalk and fell when it tilted, where company's employee had that day left cover in a tilted position and a third person shortly thereafter pushed it down into place, fact that company did not examine cover between time when third person pushed it down and when accident happened nine hours later did not give rise to inference of negligence—*Wilson v East St Louis & Interurban Water Co*, 15 NE 2d 599, 295 Ill App 603

62. Va.—*City of Richmond v Hood Rubber Products Co*, 190 SE 95, 168 Va 11

63. Tex.—*City of Bryan v Jenkins*, Civ App, 247 SW 2d 925, error refused no reversible error

applied it produces merely an inference of negligence<sup>64</sup> which does not shift the burden of proof,<sup>65</sup> which is not conclusive on the trier of fact,<sup>66</sup> and which may be rebutted,<sup>67</sup> but it may be sufficient to make a prima facie case which will prevent dismissal<sup>68</sup>

**Admissibility** In an action for damages arising

from a public or municipal water supply, any evidence which is competent, relevant, and material is admissible<sup>69</sup>

**Weight and sufficiency** Following the general rule, the party having the burden of proof must prove the issues of fact by a preponderance of the evidence<sup>70</sup> It has been held, in an action for dam-

64. S D—Midwest Oil Co v City of Aberdeen, 10 NW 2d 701, 69 SD 343

65. N Y—George Foltis, Inc, v City of New York, 38 NE 2d 455, 287 NY 108, 153 ALR 1122

66. S D—Midwest Oil Co v City of Aberdeen, 10 NW 2d 701, 69 SD 343

67. N Y—George Foltis, Inc, v City of New York, 38 NE 2d 455, 287 NY 108, 153 ALR 1122

68. N Y—George Foltis, Inc, v City of New York, supra.

#### Effect of other facts

In action against city for damages from broken water main, wherein plaintiff produced no evidence of cause of break or negligence in construction or maintenance of main, but relied on res ipsa loquitur rule for inference or presumption of negligence, fact that break occurred in water main which had been buried in ground for several years weakened probative value of evidence of break in main, but did not completely destroy such value—George Foltis, Inc, v City of New York, supra

#### 69. Evidence held admissible

(1) Evidence of other nearby leaks in water main—Stein v Louisville Water Co, Ky, 249 SW 2d 750—Felsway Shoe Corp v Louisville Water Co, 223 SW 2d 875, 311 Ky 259

(2) Evidence of complaints about taste and odor of water, on question of negligence, in view of development of facts when evidence was offered—Safransky v City of Helena, 39 P 2d 644, 98 Mont 456

(3) In action for damages by one contracting typhoid fever from drinking contaminated water from city's water system, evidence of presence of bacilli coli in water after plaintiff became ill was admissible as tending to show source of bacilli causing illness, in view of evidence concerning relation between bacilli coli and typhoid bacilli—Safransky v City of Helena, supra

(4) In action against city for death of resident from typhoid fever, allegedly caused by drinking impure city water, city's evidence tending to show probable source of infection at two eating houses was properly admitted as tending to illuminate source of infection—Stoker v Ogden City, 54 P 2d 849, 88 Utah 389.

(5) Other evidence held admissible see 67 C J p 1284 note 68 [a]

#### Evidence held inadmissible

(1) Evidence of other breaks in water main at places remote from plaintiff's property—Stein v Louisville Water Co, Ky, 249 SW 2d 750

(2) In action by owners of farm against city for damages to farm allegedly caused by improper construction of pipe line through farm to reservoir where there was no evidence indicating any possible damage to farm north of highway, evidence of value of portion of farm north of highway was inadmissible—Heyman v City of Bellevue, 108 NE 2d 161, 91 Ohio App 321

(3) In action against city to recover damages to plaintiffs' land resulting from water leakage from pipe line across plaintiffs' realty, grant of right of way instrument under which city obtained easement, although easement contained provision that damages were to be determined by arbitration, was admissible in absence of showing that either party at any time tried to avail himself of rights under arbitration clause—City of Okmulgee v Shelton, 240 P 2d 764, 206 Okl 22

(4) In suit for damages from typhoid fever allegedly caused by water furnished by defendant, testimony regarding analysis of milk furnished by third persons when witness stated he made no analysis for typhoid—Cady Lumber Co v Fain, CCA Ariz, 65 F 2d 644, certiorari denied Fain v Cady Lumber Co, 54 S Ct 92, 290 US 674, 78 L Ed 582

(5) Other evidence held inadmissible—Frinzi v City of Easton, Pa Com Pl, 24 Lehl J 271—67 C J p 1284 note 68 [b]

#### 70 Evidence held sufficient

(1) To support finding, verdict, or judgment for plaintiff

Ala—Birmingham Water Works Co v Walker, 8 So 2d 827, 243 Ala 149  
Cal—Natural Soda Products Co v City of Los Angeles, 143 P 2d 12, 23 Cal 2d 193, certiorari denied City of Los Angeles v Natural Soda Products Co, 64 S Ct 790, 321 US 793, 88 L Ed 1082, rehearing denied 64 S Ct 942, 322 US 768, 88 L Ed 1594—Juchert v California Water Service Co, 106 P 2d 886, 16 Cal 2d 500

Ga—City of Tallapoosa v. Goebel, 10 SE 2d 201, 63 Ga App 1.

Ill—Frye v East St Louis & Interurban Water Co, 14 NE 2d 263, 294 Ill App 468

Ind—Indianapolis Water Co v Schoenemann, 20 NE 2d 671, 107 Ind App 308

Iowa—Dougherty v. Sioux City, 66 NW 2d 275  
67 C J p 1284 note 70 [a] (8)

(2) To support recovery by plaintiff for injuries from impure water supplied for domestic purposes

Mont—Safransky v City of Helena, 39 P 2d 644, 98 Mont 456

Vt—Boguski v City of Winooski, 187 A 808, 108 Vt 380

67 C J p 1284 note 70 [a] (7)

(3) To establish prima facie case Ky—Stein v Louisville Water Co, 249 SW 2d 750—Felsway Shoe Corp v Louisville Water Co, 223 SW 2d 875, 311 Ky 259

N Y—Laver v City of Buffalo, 8 NE 2d 307, 274 NY 135, followed in Reino v City of Buffalo, 298 NY 158, two cases, 251 App Div 779, and Santino v City of Buffalo, 298 NY 159, 251 App Div 779

67 C J p 1284 note 70 [a] (6)

(4) To show defendant was negligent

Cal—Gerdes v Pacific Gas & Electric Co, 27 P 2d 365, 219 Cal 459, 90 ALR 1071

Ga—City of Tallapoosa v. Goebel, 10 SE 2d 201, 63 Ga App 1

Mass—Buono v City of Boston, 194 NE 658

N J—Seiden v Passaic Valley Water Commission, 199 A. 420, 16 NJ Misc 301

N Y—Central Park Plaza Corp v City of New York, 26 NYS 2d 241.

67 C J p 1284 note 70 [a] (9)

(5) To show defendant's negligence was proximate cause of injury

Cal—Lummus v City of Vernon, 97 P 2d 838, 36 Cal App 2d 369

N Y—Central Park Plaza Corp v City of New York, 26 NYS 2d 241.

Okl—City of Henryetta v Runyan, 249 P 2d 425, 207 Okl 300

67 C J p 1284 note 70 [a] (2)

(6) To show plaintiff not guilty of contributory negligence—Russell v City of Grandview, 236 P 2d 1061, 39 Wash 2d 551

(7) To show other matters

Ala—Birmingham Water Works Co v Walker, 8 So 2d 827, 243 Ala 149.

N J—Seiden v Passaic Valley Water

ages from the breaking of a water main, that much evidence of negligence should not be required of plaintiff, who is in no position thoroughly to investigate the cause of the break, since evidence must be weighed according to the respective power of parties to prove or contradict matters in issue.<sup>71</sup>

### e. Trial and Judgment

In actions involving damages incident to a public or municipal water supply, questions of fact should be submitted to the jury under proper instructions from the court.

General rules as to trial and judgment apply in actions involving injuries incident to a water supply.<sup>72</sup>

*Questions of law and fact.* The weight and probative effect of evidence,<sup>73</sup> and the credibility of witnesses,<sup>74</sup> are for the jury. Where the evidence is sufficient to present an issue of fact, whether defendant is liable generally,<sup>75</sup> whether defendant was negligent,<sup>76</sup> whether such negligence was the

Commission, 199 A. 420, 16 N.J. Misc. 301

S.D.—Midwest Oil Co. v. City of Aberdeen, 10 N.W.2d 701, 69 S.D. 343

Utah—Beagley v. U. S. Gypsum Co., 235 P.2d 783

Va.—City of Portsmouth v. Culpepper, 64 S.E.2d 799, 192 Va. 382

Wash.—Amick v. Flash, 251 P.2d 172, 41 Wash.2d 666

67 C.J. p. 1284 note 70 [a]

#### Evidence held insufficient

(1) To support finding, verdict, or judgment for plaintiff

Ga.—Georgia Power & Light Co. v. Baxter, 171 S.E. 309, 47 Ga.App. 727

Ky.—Prestonsburg Water Co. v. Dingus, 111 S.W.2d 661, 271 Ky. 240, followed in Prestonsburg Water Co. v. Neeley, 111 S.W.2d 665, 271 Ky. 247

Ohio—Heyman v. City of Bellevue, 108 N.E.2d 161, 91 Ohio App. 321  
67 C.J. p. 1284 note 70 [b] (7)

(2) To show negligence of defendant

Mass.—Gerard v. City of Boston, 13 N.E.2d 415, 299 Mass. 488

Mich.—A. J. Brown & Son v. City of Grand Rapids, 251 N.W. 561, 265 Mich. 465

Ohio—Taphorn v. City of Cincinnati, 122 N.E.2d 307, 162 Ohio St. 454

Utah—Beagley v. U. S. Gypsum Co., 209 P.2d 750, 116 Utah 337

Va.—City of Richmond v. Hood Rubber Products Co., 190 S.E. 95, 168 Va. 11

67 C.J. p. 1284 note 70 [b] (1), (3)

(3) To show that defendant's negligence was proximate cause of injury

La.—Coyle v. Gulf Public Service Co., 155 So. 252, 179 La. 867

Ohio—Republic Light & Furniture Co. v. City of Cincinnati, 127 N.E.2d 767, 97 Ohio App. 532

Okl.—Runyan v. City of Henryetta, 280 P.2d 712—City of Henryetta v. Runyan, 249 P.2d 425, 207 Okl. 300

Tex.—City of Bryan v. Jenkins, Civ. App., 247 S.W.2d 925, error refused no reversible error

67 C.J. p. 1284 note 70 [b] (4), (6).

(4) To show other matters

La.—Coyle v. Gulf Public Service Co., 155 So. 252, 179 La. 867.

Me.—Olsen v. Portland Water Dist., 107 A.2d 480

Ohio—Republic Light & Furniture Co. v. City of Cincinnati, 127 N.E.2d 767, 97 Ohio App. 532.

67 C.J. p. 1284 note 70 [b].

#### Circumstantial evidence

(1) Circumstantial evidence would justify verdict against city for death by typhoid allegedly caused by drinking city water polluted by water from river, if there could be drawn therefrom rational inference that such water was source of infection, and while something more than possibility, suspicion, or surmise must be created in minds of jurors it is sufficient if existence of such fact is made more probable hypothesis when considered with reference to possibility of others, and reasoning to be employed is that of ordinarily intelligent understanding—Boguski v. City of Winoski, 187 A. 808, 108 Vt. 380

(2) In action against city for damages by one contracting typhoid fever from drinking contaminated water from city's water system, circumstantial evidence that water contained typhoid bacilli was sufficient—Safransky v. City of Helena, 39 P.2d 644, 98 Mont. 456

(3) Where user of public sidewalk was found dead from rupture of heart vein in excavation across public sidewalk, the causal relation between his fall into excavation and water company's failure to guard excavation properly might be shown by circumstances pointing to a reasonably probable relation between the two, so strong that jury might properly, on ground of probability, rather than certainty, exclude inference favorable to defendant—McManus v. New Jersey Water Co., 91 A.2d 868, 22 N.J. Super. 253

71. N.Y.—Layer v. City of Buffalo, 8 N.E.2d 307, 274 N.Y. 135, followed in Reino v. City of Buffalo, 298 N.Y.S. 158, two cases, 251 App.Div. 779, and Santino v. City of Buffalo, 298 N.Y.S. 159, 251 App.Div. 779

72. Cal.—Natural Soda Products Co. v. City of Los Angeles, 240 P.2d 993, 109 Cal.App.2d 440

Mass.—Suburban Land Co. v. Town of

BillERICA, 49 N.E.2d 1012, 314 Mass. 184, 147 A.L.R. 660.

#### Findings

(1) Where lessee of lake bed property brought action for damages caused by inundation of lake bed by negligent operation by city of its aqueduct system, finding that city had or had not been guilty of negligent engineering practice in failing to construct sufficient headwater storage was without legal effect when supreme court in lessor's suit for injunction had ruled that city owed no duty to lessee to construct additional headwater surface storage facilities.—Natural Soda Products Co. v. City of Los Angeles, 240 P.2d 993, 109 Cal.App.2d 440

(2) A finding that the failure of a city to shut off water from a broken main for over an hour after notice of the break was negligence was not erroneous as a matter of law—Monomoy Co. v. City of New York, 132 N.Y.S. 438

73. Utah—Stoker v. Ogden City, 54 P.2d 849, 88 Utah 389

#### Cause of typhoid fever

In action for death of consumer from typhoid fever, weight and probative effect of evidence tending to show another probable source of infection are for the jury—Stoker v. Ogden City, supra.

74. Ky.—Lutz v. Louisville Water Co., 163 S.W.2d 29, 291 Ky. 31

#### Testimony held sufficient for jury

Ky.—Lutz v. Louisville Water Co., supra.

75. Ga.—City of Tallapoosa v. Goebel, 10 S.E.2d 201, 63 Ga.App. 1

Ky.—Shell v. Town of Evarts, 178 S.W.2d 32, 296 Ky. 602

Mo.—Martin v. Springfield City Water Co., App., 128 S.W.2d 674

N.C.—Sink v. City of Lexington, 200 S.E. 4, 214 N.C. 548

67 C.J. p. 1284 note 70 [a] (3).

76. Ky.—Shell v. Town of Evarts, 178 S.W.2d 32, 296 Ky. 602

Mass.—Sample v. City of Melrose, 43 N.E.2d 665, 312 Mass. 170

Mont.—Safransky v. City of Helena, 39 P.2d 644, 98 Mont. 456

N.J.—McManus v. New Jersey Water

cause of the injury,<sup>77</sup> whether plaintiff was guilty of contributory negligence,<sup>78</sup> whether defendant had constructive, if not actual, notice of the pollution of the water supply,<sup>79</sup> or of other defects or dangers;<sup>80</sup> whether plaintiff is entitled to damages,<sup>81</sup> or, when the action is based on contract, whether the alleged contract existed,<sup>82</sup> and was

breached,<sup>83</sup> are questions for the jury. The court may, where proper, direct a verdict, or order a nonsuit<sup>84</sup>

**Instructions** Following the general rules, the court should give appropriate instructions governing the law of the case.<sup>85</sup>

Co., 91 A 2d 868, 22 N J Super 253  
—Walsh v Hackensack Water Co.,  
181 A 422, 13 N J Misc 815

SD—Kirkegaard v City of Sioux  
Falls, 8 NW 2d 862, 69 SD 214

Tenn—City Water Co v Butler, 251  
S W 2d 433, 36 Tenn App 55

Utah—Stoker v Ogden City, 54 P  
2d 849, 88 Utah 389

Vt—Boguski v City of Winooski,  
187 A 808, 108 Vt 380

Va—City of Portsmouth v Culpeper,  
64 S E 2d 799, 192 Va 362

Wash—Russell v City of Grandview,  
236 P 2d 1061, 39 Wash 2d 551

67 C J p 1285 notes 73, 79 [b] (1)

77. N J—McManus v New Jersey  
Water Co., 91 A 2d 868, 22 N J Super  
253

Tenn—City Water Co v Butler, 251  
S W 2d 433, 36 Tenn App 55

Va—City of Portsmouth v Culpeper,  
64 S E 2d 799, 192 Va 362

67 C J p 1285 note 74

#### Source of disease

Mass—Sample v City of Melrose, 43  
NE 2d 665, 312 Mass 170

Vt—Boguski v City of Winooski, 187  
A 808, 108 Vt 380

67 C J p 1285 note 73 [c]

78. Ky—Krieger v Louisville Water  
Co., 115 S W 2d 286, 272 Ky  
746

Mo—Banty v City of Sedalia, App.,  
120 S W 2d 59

SD—Kirkegaard v City of Sioux  
Falls, 8 NW 2d 862, 69 SD 214

Tenn—City Water Co v Butler, 251  
S W 2d 433, 36 Tenn App 55

Wash—Rainier Heat & Power Co v  
City of Seattle, 193 P 233, 95 Wash  
95

79. Mont—Safransky v City of Hel-  
ena, 39 P 2d 644, 98 Mont 456

Wash—Roscoe v City of Everett,  
239 P 831, 136 Wash 295

80. Ky—Louisville Water Co v  
Lutz, 177 S W 2d 570, 296 Ky. 432

Tenn—City Water Co v Butler, 251  
S W 2d 433, 36 Tenn App 55

81. Fla—Florida Public Utilities Co  
v. Wester, 7 So 2d 788, 150 Fla  
378

Okl—City of Henryetta v Runyan,  
219 P 2d 220, 203 Okl 153

67 C J p 1285 note 79 [b] (1).

82. Fla—Florida Public Utilities Co  
v. Wester, 7 So 2d 788, 150 Fla  
378

Okl—City of Henryetta v Runyan,  
219 P 2d 220, 203 Okl 153

67 C J p 1285 note 79 [b] (1).

83. Fla—Florida Public Utilities Co  
v. Wester, 7 So 2d 788, 150 Fla  
378

Okl—City of Henryetta v Runyan,  
219 P 2d 220, 203 Okl 153

67 C J p 1285 note 79 [b] (1).

whether property could have been  
saved if water supply had been am-  
ple was for jury—Florida Public  
Utilities Co v Wester, 7 So 2d 788,  
150 Fla 378

#### Flooding of land

In action against city for damages  
to plaintiff's property resulting from  
overflow of stream caused by opera-  
tion of city's reservoir, spillway, fil-  
tration plant and other incidental  
facilities, whether dangerous condi-  
tion in bed of creek resulting from  
discharge of sediment therein, caus-  
ing plaintiff's damages, could be rem-  
edied and abated by city's expendi-  
ture of labor and money was for  
jury—City of Henryetta v Runyan,  
219 P 2d 220, 203 Okl 153

#### Evidence held insufficient to take case to jury

Okl—City of Okmulgee v Wall, 144  
P 2d 103, 193 Okl 333

82. Ala—Birmingham Water Works  
Co v Ferguson, 51 So 150, 164 Ala  
494

Ariz—Warren Co v. Hanson, 150 P  
238, 17 Ariz 252

83 Ky—Pineville Water Co v  
Bradshaw, 266 S W 2d 305

84 N J—Stein v. City of Newark, 52  
A 2d 66, 25 N J Misc 170

Pa—Rainey v Natrona Water Co.,  
49 Pa Dist & Co 152, 35 Mun 94,  
91 Pittsb Leg J 451—Burkholder v  
Philadelphia Suburban Water Co.,  
Com Pl, 41 Del Co 222—Peskin v  
Philadelphia Suburban Water Co.,  
Com Pl, 35 Del Co 413

67 C J p 1285 note 79 [a]

#### Absence of constructive notice

Whether city operating water  
works system had constructive no-  
tice of defect causing damage to pri-  
vate property is ordinarily a question  
for jury, but where defect was not  
observable and could only be discov-  
ered by a close examination, absence  
of constructive notice was established  
as a matter of law—Stein v City of  
Newark, 52 A 2d 66, 25 N J Misc 170

#### Matters held not established as a matter of law

Del—Fine v Mayor & Council of  
Wilmington, 94 A 2d 393

#### 85. Instructions held proper or er- roneously refused

(1) In action against city for death  
of resident from typhoid fever alleg-  
edly caused by drinking impure city  
water, instruction stating that plain-  
tiff was required to prove case by  
preponderance of evidence and that

jury could refuse to find for plaintiff  
even if they believed defendant had  
not proved its contentions was not  
objectionable as requiring plaintiff to  
prove case to a moral certainty—  
Stoker v Ogden City, 54 P 2d 849, 88  
Utah 389

(2) Instruction should have been  
given that if jury found that overflow  
was caused by erection and operation  
of waterworks, and not from some  
other factors such as excessive rain-  
fall, then it might find for plaintiff,  
and omission in instruction given of  
reference to such other factors was  
improper—City of Henryetta v Run-  
yan, 249 P 2d 425, 207 Okl 300

(3) In action by owners of farm  
against city for damages to farm al-  
legedly caused by improper construc-  
tion of pipe line through farm to  
reservoir built by city, instruction  
that mere construction and exist-  
ence of the reservoir was not basis  
for damage was proper—Heyman v  
City of Bellevue, 108 NE 2d 161, 91  
Ohio App 321

(4) Where no damage to entire  
farm as unit was alleged and no evi-  
dence was submitted to show damage  
to farm north of highway, trial court  
properly excluded that portion of  
farm north of highway from con-  
sideration of jury—Heyman v City  
of Bellevue, supra

(5) Instruction that finding that  
damages were caused by acts of de-  
fendant was prerequisite to liability  
—City of Henryetta v Runyan, 249  
P 2d 425, 207 Okl 300

(6) Instruction that "ordinary  
care" means that degree of care  
which is usually exercised by ordi-  
narily careful and prudent persons  
operating water systems under same  
circumstances or circumstances simi-  
lar to those existing in this case is  
sufficient—Stein v Louisville Water  
Co., Ky, 249 S W 2d 750

(7) Instruction that rules of water  
company, placing on property owner  
the burden of construction and main-  
tenance of curb box, over which  
plaintiff tripped, would not relieve  
company of the duty to exercise care  
so as not to obstruct the lawful use  
of the street, was proper—Indianap-  
olis Water Co v Schoenemann, 20  
NE 2d 671, 107 Ind App 308

(8) Refusal of instructions that  
city was chargeable with negligence  
only if damage was caused by leak-  
ing after notice thereof, or if leak

**f. Damages**

Damages should be proportionate to the injury suffered by the plaintiff.

Damages should be awarded which are proportionate to the injury suffered by plaintiff,<sup>86</sup> and, if such damages are based on a breach of contract, which are within the contemplation of the contract<sup>87</sup> Personal inconvenience, in connection with proof of pecuniary loss, may form an item of recoverable damages,<sup>88</sup> although it has been held that, where the action is based on a breach of contract, the only recovery that plaintiff could have would be such as naturally flowed from a breach of the contract, and that damages could not be recovered for personal inconvenience<sup>89</sup> Where a water company has shut off the water from a house, a person who did not live in it, or who did not personally use the water, has been held not to be entitled to damages for mental harassment or vexation that he may have suffered.<sup>90</sup> In a suit by a municipal corporation, damages suffered by individuals by reason of the failure to furnish the stipulated quantity of water cannot be taken into account<sup>91</sup> The damages awarded must not be excessive<sup>92</sup> Punitive damages may be allowed where the act complained of has been committed wilfully and maliciously,<sup>93</sup> or where, in the absence of actual malice, it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness.<sup>94</sup> Where a

water consumer violated rules of the company which provided that the company could turn off the water for such violations, and the water was turned off, he was not entitled to exemplary damages in the absence of an ulterior motive on the part of the company<sup>95</sup>

The damages which the owner of property may recover for injuries thereto by a bursting main have been held to be limited to those caused by failure of the water company to exercise due diligence in shutting off the water after it had notice of the break in the main<sup>96</sup> Where a person's water right is wrongfully interfered with by a city in taking water under a supposed statutory authority, he may have his damages assessed in a proceeding for an injunction without resorting to the proceeding for the assessment of damages provided in the statute under which defendants are supposedly acting,<sup>97</sup> and this is true, although while the proceeding for an injunction is pending defendants comply with the statutory requirement with respect to the taking<sup>98</sup>

**§ 313. Criminal Offenses; Penalties**

Some statutes and ordinances provide punishments or penalties for acts interfering with the water supply

Frequently there are statutory provisions or appropriate municipal ordinances making it a criminal

had existed for such time that city should have known of defect, was error—*Yearsley v City of Pocatello*, 210 P 2d 795, 69 Idaho 500

(9) Other instructions held proper see 67 C J p 1284 note 72 [a]

**Instructions held improper or properly refused**

(1) Concerning subordination of local health officers to state board of health—*Safransky v City of Helena*, 39 P 2d 644, 98 Mont 456

(2) Permitting weighing of mere probabilities—*Stoker v. Ogden City*, 54 P 2d 849, 88 Utah 389

(3) Limiting questions with respect to other leaks to particular lateral of which broken elbow was part—*A J Brown & Son v City of Grand Rapids*, 251 N.W 561, 265 Mich 465.

(4) That town's responsibility for quality of water stopped at water gate—*Horton v Inhabitants of North Attleboro*, 19 NE 2d 15, 302 Mass 137

(5) Instructions dealing with the installation and ownership of curb box and entirely overlooking the elements of control of the installation and control of the curb box—*Indian-*

*apolis Water Co v Schoenemann*, 20 NE 2d 671, 107 Ind App 308

(6) In action against water company for destruction of buildings by fire alleged to have resulted from company's failure to comply with its franchise, use of words "unrestricted use" in instructions authorizing recovery if company failed to furnish unrestricted use of water for fire plugs—*Prestonsburg Water Co v Dingus*, 111 SW 2d 661, 271 Ky 240, followed in *Prestonsburg Water Co v Neeley*, 111 SW 2d 665, 271 Ky 247

(7) Other instructions—*Stein v. Louisville Water Co, Ky*, 249 SW 2d 750  
67 C J p 1284 note 72 [b]

86. *Ariz—Warren Co v Hanson*, 150 P 238, 17 Ariz 252  
67 C J p 1285 note 80

87. *Ariz—Warren Co v Hanson*, supra  
67 C J p 1285 note 81

88. *Ala—Birmingham Water Works Co v Ferguson*, 51 So 150, 164 Ala 494, 501  
67 C J p 1285 note 82

89. *N.Y—Welch v Jamaica Water Supply Co*, 171 NYS 101.

90. *Ala—Bessemer Waterworks v. Murphy*, 60 So 533, 6 Ala App 603

91. *Mass—Wiley v. Athol*, 23 NE. 311, 150 Mass 426, 6 L R A 342

92. *Ala—Birmingham Waterworks Co v Bailey*, 59 So 338, 5 Ala App 474

**Damages held excessive**

*Okl—City of Henryetta v. Runyan*, 219 P 2d 220, 203 Okl 153.  
67 C J p 1286 note 87 [a].

**Damages held not excessive**

*Okl—City of Okmulgee v. Shelton*, 240 P 2d 764, 206 Okl 22  
67 C J. p 1285 note 80 [a] (1)

93. *Pa—Greeney v Pennsylvania Water Co*, 29 Pa Super. 136.

94. *Pa—Greeney v. Pennsylvania Water Co*, supra  
67 C J p 1286 note 89

95. *Ala—Bessemer Water Works v. Murphy*, 60 So 533, 6 Ala App 603

96. *N.Y—Regan v City of New York*, 162 NYS 400, 175 App Div. 861

97. *Mass—Lexington Print Works v Canton*, 50 NE 931, 171 Mass. 414

98. *Mass—Lexington Print Works v Canton*, supra

offense to turn on water without authority<sup>99</sup> or to pollute a public water supply,<sup>1</sup> or to go without permission on lands or waters outside a city set aside for water supply purposes<sup>2</sup> or to interfere with machinery used in supplying water,<sup>3</sup> or to wantonly and maliciously waste water<sup>4</sup> The general rules in criminal cases apply to prosecutions of

such an offense.<sup>5</sup> Where a water company is justified in turning off the water supplied a borough and the corporate officers of the borough turn it on again, although under cover of a resolution of the borough council, they are liable for the penalty imposed by statute for turning on the water of a water company without authority.<sup>6</sup>

## X. IRRIGATION

### A. IN GENERAL

#### § 314. Right to Use of Water for Irrigation Generally

- a. Riparian owner
- b. Other persons

##### a. Riparian Owner

- (1) In general
- (2) Quantity

##### (1) In General

In jurisdictions in which the doctrine of riparian

rights obtains, every riparian owner has a limited right to use the water to irrigate his riparian lands.

In jurisdictions wherein the doctrine of riparian rights obtains, as discussed supra § 6, every riparian owner on a stream has a limited right to use the water to irrigate his riparian lands.<sup>7</sup> The rights of different riparian owners are coequal in this respect<sup>8</sup> and there is no superiority growing out of prior riparian ownership by one.<sup>9</sup>

*Place of taking and use.* A riparian right to use water for irrigation is confined strictly to riparian

99. Mo—City of Poplar Bluff v Reynolds, 129 S W 36, 144 Mo App 536

1. Utah—Bountiful City v Granato, 292 P 205, 77 Utah 133

2. Ala—City of Birmingham v Lake, 10 So 2d 24, 243 Ala 367

##### Ordinance held valid

Ala—City of Birmingham v Lake, supra

3. Mo—Williams v Independence Waterworks Co., 171 S W 2d 759, 237 Mo App 1231

##### Construction and validity of ordinance

If ordinance providing punishment for any person who wrongfully interfered with machinery used in supplying water in the city were subject to the construction that consuming property owner had no right to keep and repair his meter box, ordinance would be unreasonable and void—Williams v Independence Waterworks Co., supra

4. N Y—People on Complaint of Begley v. Morgen, 102 N Y S 2d 267

5. N Y—People on Complaint of Begley v. Morgen, supra  
67 C J p 1286 note 96.

##### Indictment and information

Charge in language of statute held sufficient in prosecution for polluting a source of public water supply—State v. Corbin, 72 S E 1071, 157 N C 619

##### Jurisdiction

Recorder's court sitting within city had jurisdiction to enforce ordinance prohibiting unauthorized entry on

city water supply property thirty miles outside city—City of Birmingham v Lake, 10 So 2d 24, 243 Ala 367

##### Evidence held sufficient

N Y—People on Complaint of Begley v. Morgen, 102 N Y S 2d 267

6. Pa—Tyrone Gas, etc., Co v. Burley, 19 Pa Super 348

7. U S—State of Colorado v State of Kansas, Colo & Kan, 64 S Ct 176, 320 US 383, 88 L Ed 116, rehearing denied 64 S Ct 633, 321 US 803, 88 L Ed 1089

Kan—Frizell v Bindley, 58 P 2d 95, 144 Kan 84

SD—Platt v Rapid City, 291 NW 600, 67 SD 245

Tex—Chicago, R I & G Ry Co v Tarrant County Water Control & Improvement Dist No 1, 73 S W 2d 55, 123 Tex 432, certiorari denied 55 S Ct 921, 295 US 762, 79 L Ed 1704

67 C J p 1287 note 3

Right to supply of water from irrigation company see infra §§ 352-363

Right of riparian owner to use of water generally see supra §§ 10-12

##### Vested right

Right of riparian owners to use water for irrigation is a vested right which constituted part of grants of land when grants were made

Tex—Chicago, R I & G Ry Co v Tarrant County Water Control & Improvement Dist No 1, 73 S W 2d 55, 123 Tex 432, certiorari denied 55 S Ct 921, 295 US 762, 79 L Ed 1704.

##### Dual doctrines under riparian theory

The riparian theory comprises two doctrines: that of natural flow, which provides that each riparian owner is entitled to have the water-course maintained in its natural state without being sensibly diminished, and that of reasonable use, which enables the landowner to make any reasonable use, provided it does not unreasonably interfere with the beneficial use of the stream by others

Ark—Harrell v City of Conway, 271 S W 2d 924

Under doctrine of reasonable use, riparian owner may use water for irrigation or for any other purpose with reasonableness of the use being only measure of riparian rights Ark—Harrell v. City of Conway, supra

##### Ownership

Neither carrier nor landowner owns water diverted from natural stream, but they have only the use thereof under regulations prescribed by state with whom ownership remains

Colo—Northern Colorado Irr Co v Board of Com'rs of Arapahoe County, 38 P 2d 889, 95 Colo 555

8. Kan—Frizell v. Bindley, 58 P 2d 95, 144 Kan 84  
67 C J p 1287 note 4

9. Or—Little Walla Walla Irr Co v Finis Irr Co, 124 P 666, 62 Or 348, modified on other grounds 125 P 270, 62 Or 348  
67 C J p 1287 note 5.



lands;<sup>10</sup> and the limit is generally determined by the natural watershed of the stream.<sup>11</sup> However, a riparian owner having a right to take water for irrigation from a stream may take it from any convenient point on the stream, whether at a point on his own land or the land of another, with the consent of the latter, as long as the taking does not injuriously affect the rights of riparian owners between the point of diversion and the land to be irrigated.<sup>12</sup>

### (2) Quantity

A riparian owner is not entitled to use the entire volume of the stream to irrigate his lands, but his use of water for such purpose must be reasonable in the light of all the circumstances.

A riparian owner is not entitled to use the entire volume of the stream to irrigate his lands.<sup>13</sup> Also, he is not entitled to use for irrigation such quantities

of water as will deprive lower owners of a sufficient supply for their natural wants or domestic needs<sup>14</sup> or such quantities as will destroy or materially impair the rights of lower proprietors to use their due proportion of water for the irrigation of their riparian lands.<sup>15</sup> His use of water for irrigation must be reasonable,<sup>16</sup> and what is reasonable is ordinarily a question of fact depending on the circumstances of the particular case,<sup>17</sup> although there are some things which are clearly and obviously unreasonable,<sup>18</sup> such as a needless waste of water to the injury of other owners.<sup>19</sup> Reasonableness of use is not affected by the mode of diversion.<sup>20</sup>

The quantity of water which a riparian owner is entitled to use for irrigation is necessarily indefinite, uncertain,<sup>21</sup> and subject to fluctuations,<sup>22</sup> it depends on, and varies with, the volume of water in the stream,<sup>23</sup> seasons and climatic conditions,<sup>24</sup> and

10. Tex.—Watkins Land Co v Clements, 86 SW 733, 98 Tex 578, 107 AmSR 653, 70 LRA 964 67 CJ p 1287 note 6

11. Cal.—Bathgate v. Irvine, 58 P 442, 126 Cal 135, 77 AmSR 158 67 CJ p 1287 note 7

#### Restoring flow to old channel

Where an old channel of creek had been dry for more than sixty years with the possible exception of periods during flood conditions when the banks of the main channel overflowed, landowner could not require that water be permitted to flow in the old channel during irrigation season

Nev.—In re Bassett Creek and Its Tributaries in White Pine County, 155 P2d 324, 62 Nev 456

12. Cal.—Turner v James Canal Co., 99 P 520, 155 Cal 82, 132 AmSR 59, 22 LRA NS, 401, 17 Ann Cas 823

67 CJ p 1287 note 8.

#### Storage

Riparian owner has authority to adopt any lawful means of making exercise of riparian right effective, which in semiarid country means storage of water in streamways or their valleys consistent with rights of others and on reasonable legislative terms

Tex.—Chicago, R I & G Ry Co v Tarrant County Water Control & Improvement Dist No 1, 73 SW 2d 55, 123 Tex 432, certiorari denied 55 S Ct 921, 295 US 762, 79 LEd 1704

13. US—U S v Gerlach Live Stock Co, Ct Cl, 70 S Ct 955, 339 US 725, 94 LEd 1231, 20 ALR 2d 633, U S v James J Stevinson, 70 S Ct 955, 339 US 725, 94 LEd 1231, 20 ALR 2d 633 57 CJ p 1287 note 9.

14. Kan.—Frizzell v. Bindley, 58 P 2d 95, 144 Kan 84 67 CJ p 1288 note 10.

15. Kan.—Frizzell v Bindley, supra 67 CJ p 1288 note 11

16. US—U S v Gerlach Live Stock Co, Ct Cl, 70 S Ct 955, 339 US 725, 94 LEd 1231, 20 ALR 2d 633, U S v James J Stevinson, 70 S Ct 955, 339 US 725, 94 LEd 1231, 20 ALR 2d 633—State of Colorado v State of Kansas, Colo & Kan, 64 S Ct 176, 320 US 383, 88 LEd 116, rehearing denied 64 S Ct 633, 321 US 803, 88 LEd 1089

Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462

Kan.—Frizzell v. Bindley, 58 P 2d 95, 144 Kan 84 67 CJ p 1288 note 12

17. Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462 67 CJ p 1288 note 13

#### Determination of duty of water

There is no statute fixing a minimum or maximum duty of water, and the question is left to determination of courts, which must consider question with reference to territory to be irrigated, climatic conditions, and soil conditions, and, in absence of abuse of discretion, a decree fixing duty of water will be sustained Colo.—Trinchera Irr Dist v First Nat Bank, 102 P 2d 909, 106 Colo 128

18. Neb.—Meng v Coffey, 93 NW 713, 67 Neb 500, 108 AmSR 697, 60 LRA 910

19. US—U S v Gerlach Live Stock Co, Ct Cl, 70 S Ct 955, 339 US 725, 94 LEd 1231, 20 ALR 2d 633, U S v James J Stevinson, 70 S Ct 955, 339 US 725, 94 LEd 1231, 20 ALR 2d 633

Neb.—Meng v Coffey, 93 NW 713,

67 Neb 500, 108 AmSR 697, 60 LRA 910

"The lone star of utility of irrigation water is application to a beneficial use without waste, i e., using no more than is necessary according to the standards and practices of good husbandry for the particular crops sought to be grown, soil and all other essential factors and conditions being taken into consideration, but it does not place any restriction on the kind of crops one may desire to raise"

Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462

#### Statutory enforcement of economy

Statutes relating to irrigation manifest legislative intent to enforce and maintain rigid economy in use of waters of state.

Neb.—Enterprise Irr Dist v Willis, 284 NW 326, 135 Neb 827

20. Cal.—Charnock v Higuerra, 44 P 171, 111 Cal 473, 52 AmSR. 195, 32 LRA 190 67 CJ p 1288 note 16

21. SD.—Redwater Land & Canal Co v Jones, 130 NW. 85, 27 SD 194 67 CJ p 1288 note 17

22. Or.—Little Walla Walla Irr Co v Finis Irr Co, 124 P 666, 62 Or 348, modified on other grounds 125 P 270, 62 Or 348 67 CJ p 1288 note 18

23. US—State of Colorado v State of Kansas, Colo & Kan, 64 S Ct 176, 320 US 383, 88 LEd 116, rehearing denied 64 S Ct 633, 321 US 803, 88 LEd 1089 67 CJ p 1288 note 19

24. Or.—Jones v Conn, 64 P 855, 65 P 1068, 39 Or 30, 87 AmSR. 634, 54 LRA 630 67 CJ p 1288 note 20.

the needs of other riparian proprietors,<sup>25</sup> as well as his own needs,<sup>26</sup> and in determining such needs it is necessary to consider the area of irrigable land,<sup>27</sup> and the character of the soil,<sup>28</sup> owned by each riparian proprietor. Where a riparian owner or his grantor acquired title to the land from the government subsequent to the adoption by congress of the Desert Land Act and the statute is applicable to the land, he is entitled, as against a subsequent appropriator, to water for irrigation only to the extent to which he is a prior appropriator<sup>29</sup>

### b. Other Persons

In some jurisdictions, the doctrine that only riparian owners may divert water from streams for irrigation does not obtain; and in any event, the right to use such waters for irrigation may be granted by local law to persons other than riparian owners

Rights to the water of a stream for purposes of irrigation may be granted by local law to persons other than riparian owners,<sup>30</sup> at least, in accordance with the rules discussed supra §§ 169, 170, where the stream is a public one or is on public land and vested rights are not impaired, and in some jurisdictions the common-law doctrine that only riparian owners may divert water from streams for the purpose of irrigation does not obtain<sup>31</sup> It has been

held that surplus or waste waters remaining after irrigation are the property of the owner of the land as long as they exist and remain on his land<sup>32</sup> and that he may transfer to other persons a right thereto for irrigation<sup>33</sup>

In accordance with the rules, discussed supra §§ 167-172, public waters and streams flowing on public domain may, in a proper case, be appropriated for irrigation purposes<sup>34</sup>

## § 315. Public Rights, Supervision, and Control

- a. In general
- b Water officials

### a. In General

By virtue of its police power, a state may regulate and control irrigation and the distribution and use of water therefor.

The irrigation of all land in the state susceptible to irrigation is in the public interest,<sup>35</sup> hence, by virtue of its police power,<sup>36</sup> a state may regulate and control irrigation<sup>37</sup> and the distribution and use of water therefor<sup>38</sup> Regulatory statutes have been enacted in some jurisdictions<sup>39</sup> and such statutes, when free from constitutional objections,<sup>40</sup> are con-

25. US—State of Colorado v State of Kansas, Colo & Kan, 64 S Ct 176, 320 US 383, 88 L Ed 116, rehearing denied 64 S Ct 633, 321 US 803, 88 L Ed 1089.  
67 C J p 1288 note 21

### For domestic, agricultural, and manufacturing purposes

The general rule that every riparian proprietor has equal right to have stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality, is qualified by limitation that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes

Ala.—Elmore v Ingalls, 17 So 2d 674, 245 Ala. 481

26. Or—Hedges v Riddle, 127 P 548, 63 Or 257  
67 C J p 1288 note 22.

27. SD—Redwater Land & Canal Co v. Jones, 130 NW 85, 27 SD 194  
67 C J p 1288 note 23

28. Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462  
67 C J p 1289 note 24

29. Or—Hedges v. Riddle, 127 P 548, 63 Or 257  
Appropriation generally see supra §§ 167-193.

30. Puerto Rico—Russell v Henna, 10 Puerto Rico Fed. 484.

31. Ariz—Boquillas Land & Cattle Co v Curtis, 89 P 504, 11 Ariz 128, affirmed 29 S Ct 493, 213 US 339, 54 L Ed 822

32. Nev—Bidleman v Short, 150 P 834, 38 Nev 467  
Appropriation of waste or surplus water see supra § 185

33. Nev—Bidleman v Short, supra.

34. Mont—Clausen v Armington, 212 P 2d 440, 123 Mont 1—Federal Land Bank v Morris, 116 P 2d 1007, 112 Mont 445—State ex rel Silve v District Court of Tenth Judicial Dist in and for Judith Basin County, 69 P 2d 972, 105 Mont 106

35. Mont—Perkins v Kramer, 198 P 2d 475, 121 Mont 595

36. Neb—In re Birdwood Irr Dist Water Division No 1-A, 46 NW 2d 884, 154 Neb 52—Enterprise Irr Dist v Willis, 284 NW 326, 135 Neb 827  
67 C J p 1289 note 32

37. Neb—State ex rel Cary v Cochran, 292 NW 239, 138 Neb 163—Enterprise Irr Dist v Willis, 284 NW 326, 135 Neb 827  
Tex—Arneson v Shary, Civ App, 32 S W 2d 907, appeal dismissed 52 S Ct 202, 284 US 592, 76 L Ed 510

### Purpose

One of the very purposes of the state in administration of public

waters is to avoid waste and to secure greatest benefit possible from waters available for appropriation for irrigation purposes

Neb—In re Birdwood Irr Dist Water Division No 1-A, 46 NW 2d 884, 154 Neb 52

38. Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546  
Neb—In re Birdwood Irr Dist Water Division No 1-A, 46 NW 2d 884, 154 Neb 52—Enterprise Irr Dist v Willis, 284 NW 326, 135 Neb 827  
67 C J p 1289 note 34

39. Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546  
67 C J p 1289 note 35

### Purpose

The Irrigation Code was enacted in the furtherance of a public policy to afford an economical and speedy remedy for those whose rights were wrongfully disregarded by others, as well as to prevent unnecessary waste and useless diminution of the waters of streams, and to avoid unseemly controversies that may occur where many persons are entitled to share in a limited supply of public water for irrigation and power purposes  
Neb—State ex rel Cary v Cochran, 292 NW 239, 138 Neb 163

40. Colo—Hinderlider v Everett, 19 P 2d 211, 92 Colo 159.  
67 C J p 1289 note 36

trolling in so far as they are applicable,<sup>41</sup> indeed, in some jurisdictions rights of irrigation have their foundation and source in statutory enactments and constitutional provisions and exist only as thus created and defined, and such rights are necessarily limited in their scope by the language of their creation.<sup>42</sup> Some regulatory statutes do not apply to owners in common of a ditch for irrigation purposes who are not carriers of water for hire.<sup>43</sup> Also, drawing water through a canal from one state into another for the purpose of irrigating lands in the latter state is not necessarily a violation of the constitution, laws, or policy of the former state.<sup>44</sup> The mere management and operation of an irrigation system for the benefit of the landowners is not an exercise of any of the powers of state sovereignty.<sup>45</sup>

*Supplying of water as public use* The supplying of water for irrigation is a public use when the water rights and system are dedicated to a service offered as a utility to the public generally or such portion thereof as can be served,<sup>46</sup> but not where there is no offer or holding out to the public and the

service is extended only to certain individuals as a matter of accommodation or for particular reasons.<sup>47</sup> This test is applied in determining whether the power of eminent domain may be exercised, as discussed in Eminent Domain § 47, and whether the individual, association, or corporation supplying the water is subject to control and regulation by a public utility commission.<sup>48</sup>

#### b. Water Officials

The administration of laws relating to the distribution of water for irrigation purposes may be committed by statute to certain officers or boards.

The administration of laws relating to the distribution of water for the purpose of irrigation may be committed by statute to certain officers or boards.<sup>49</sup> "Water commissioners," "water masters," "superintendents of irrigation," and other similar officials are generally public officers,<sup>50</sup> appointed or elected as provided by statute,<sup>51</sup> and compensated by the state or the counties,<sup>52</sup> except in some special cases where particular work is done for private persons<sup>53</sup> or a statute provides that the compensation shall be borne pro rata by the users of water.<sup>54</sup>

#### Statute held constitutional

The act to conserve, protect, control, and regulate the use, development, diversion, and appropriation of water for beneficial and public purposes, and to prevent waste and unreasonable use of water, is not unconstitutional as taking of pre-existing vested riparian rights of down stream owners

Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546

41. Colo—White v Farmers' High Line Canal, etc., Co., 43 P 1028, 22 Colo 191, 31 LRA 828  
67 C J p 1289 note 37

42. Neb—Drainage Dist No 1 of Lincoln County v Suburban Irr Dist, 298 NW 131, 139 Neb 460  
NM—State ex rel Bliss v Dority, 225 P 2d 1007, 55 NM 12, appeal dismissed Dority v State of N M ex rel Bliss, 71 SCt 798, 341 US 924, 95 LEd 1356

43. Neb—Larned v Jenkins, 169 NW 723, 102 Neb 796

44. US—Perkins County v Graff, Neb., 114 F 441, 52 CCA 243  
certiorari denied 23 SCt. 843, 187 US 642, 47 LEd 346

45. US—New York Trust Co v Farmers' Irr Dist, CCA Neb., 280 F 785

46. Cal—Traber v Railroad Commission, 191 P. 366, 183 Cal 804  
67 C J p 1290 note 42

Supplying water for general use of inhabitants of municipality as public use see supra § 226

47. Cal—Southern California Edison Co v Railroad Commission of California, 230 P 661, 194 Cal 757

67 C J p 1290 note 43

48. Cal—Stratton v Railroad Commission of California, 198 P 1051, 186 Cal 119.

67 C J p 1290 note 45

49. Idaho—State Water Conservation Board v Enking, 58 P 2d 779, 56 Idaho 722

Utah—Utah Power & Light Co v Richmond Irr Co., 204 P 2d 818, 115 Utah 352

67 C J p 1290 note 47

#### Constitutionality

Statute creating state water conservation board empowered to sell, lease, or otherwise dispose of property, if contemplating that property acquired by board exercising governmental functions should become state property, was unconstitutional because divesting board of land commissioners of control and disposition of public lands or of right of protection, sale, or rental of state lands  
Idaho—State Water Conservation Board v Enking, 58 P 2d 779, 56 Idaho 722

The attorney general, on behalf of the state, could maintain suits to enjoin the use of unappropriated water for irrigation in violation of statute

NM—State ex rel Bliss v Dority, 225 P 2d 1007, 55 NM 12, appeal dismissed Dority v State of N

M ex rel Bliss, 71 SCt 798, 341 US 924, 95 LEd 1356

50. Cal—Charnock v Rose, 11 P 625, 70 Cal 189

Idaho—Big Wood Canal Co v Chapman, 263 P 45, 45 Idaho 380

51. Idaho—Whitten v Chapman, 264 P 871, 45 Idaho 653

67 C J p 1290 note 49

52. Colo—Board of Com'rs of Elbert County v Cutler, 257 P 1093, 82 Colo 169

67 C J p 1290 note 50

53. Idaho—Boise City Irr, etc., Co v Stewart, 77 P 25, 321, 10 Idaho 38

54. Utah—Utah Power & Light Co v Richmond Irr Co., 204 P 2d 818, 115 Utah 352—Minersville Reservoir & Irrigation Co v Rocky Ford Irr Co., 61 P 2d 605, 90 Utah 283  
—Bacon v Plain City Irr Co., 52 P 2d 427, 87 Utah 564  
67 C J p 1290 note 52

#### Method of apportionment

Utah—Utah Power & Light Co v Richmond Irr Co., 204 P 2d 818, 115 Utah 352

#### Basis of assessment

Utah—Utah Power & Light Co v Richmond Irr Co., supra.

Unpaid assessment as incumbrance  
Utah—Minersville Reservoir & Irrigation Co v Rocky Ford Irr Co., 61 P 2d 605, 90 Utah 283

#### Action to recover assessment

Utah—Bacon v Plain City Irr Co., 52 P 2d 427, 87 Utah 564

They are executive officers<sup>55</sup> or administrative agents,<sup>56</sup> their powers and duties are variously described as executive,<sup>57</sup> ministerial,<sup>58</sup> or quasi-judicial,<sup>59</sup> and they have such,<sup>60</sup> and only such,<sup>61</sup> jurisdiction, powers, and duties as are committed to them by statute. Such an officer does not have territorial jurisdiction beyond the boundaries of the state.<sup>62</sup>

### § 316. — Reclamation of Arid Land by Public Authorities

- a By state
- b By United States

#### a. By State

The reclamation of arid land by irrigation is a matter of public interest, and statutes providing therefor are within the power of the legislature to enact. In a number of states, reclamation projects have been provided for under the terms of a federal statute, known as the Carey Act, enacted to aid states in this respect.

The term "reclamation" is sufficiently broad and comprehensive to include the control or regulation of waters to the extent necessary to bring lands into a state suitable for cultivation, not only by draining, or excluding water from, lands which are excessively wet, as discussed in Drains §§ 1, 4, but also by irrigating lands which are excessively dry

and arid.<sup>63</sup> The reclamation of arid land by irrigation is a matter of public interest, for the general welfare, and is a governmental function.<sup>64</sup> So, a statute providing for reclamation by the state of arid land by an irrigation project is for a public purpose<sup>65</sup> and hence is within the power of the legislature to enact.<sup>66</sup>

*Under Carey Act* A federal statute, known as the Carey Act and enacted for the purpose of aiding states in the reclamation of public desert lands and the settlement, cultivation, and sale thereof in small tracts to actual settlers, authorizes the secretary of the interior to contract with each state in which public desert lands are situated to donate, grant, and patent to the state such desert lands as the state may cause to be irrigated, reclaimed, and occupied, and it authorizes each state so contracting to make all necessary contracts to cause the lands to be reclaimed and to induce their settlement and cultivation.<sup>67</sup> Furthermore, the statute, as amended, authorizes a contracting state to create liens on separate legal subdivisions of reclaimed land for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until the land is disposed of to actual settlers.<sup>68</sup> In carrying out this statute and state

55. Or—Brosnan v. Boggs, 198 P 890, 101 Or 472

56. Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb 410—Plunkett v Parsons, 10 NW 2d 169, 143 Neb 535

Wyo—Ryan v Tutty, 78 P 661, 13 Wyo 122

57. Colo—Farmer's Independent Ditch Co v. Agr Ditch Co, 45 P 444, 22 Colo 513

Wyo—Ryan v Tutty, 78 P 661, 13 Wyo 122.

58. Neb—State ex rel Cary v Cochran, 292 NW 239, 138 Neb 163

59. Neb—Plunkett v Parsons, 10 NW 2d 469, 143 Neb 535

#### Limitation on quasi-judicial power

The department of roads and irrigation is an administrative body, possessing incidental quasi-judicial powers not within prohibition of constitutional provision that judicial power is vested in the courts and that powers of state government are divided into legislative, executive, and judicial departments, and that one of those departments shall not exercise any power properly belonging to either of the others, except as expressly directed or permitted. Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb. 410.

60. Neb—Claim of Parsons, 27 N W 2d 190, 148 Neb 239

67 C J p 1290 note 56

61. Neb—Plunkett v Parsons, 10 NW 2d 469, 143 Neb 535

Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9

67 C J p 1290 note 57

#### Matters outside jurisdiction

Neb—Plunkett v Parsons, 10 NW 2d 469, 143 Neb 535

62. N M—Turley v Furman, 114 P 278, 16 N M 253

63. Cal—Hershey v Reclamation Dist No 108, 254 P 542, 200 Cal 550, followed in Browning v Reclamation Dist No 108, 254 P 551, 200 Cal 799

64. US—In re Cameron County Water Improvement Dist No 1, DC Tex, 9 F Supp 103, reversed on other grounds, CCA, Cameron County Water Improvement Dist No 1 v Ashton, 81 F 2d 905, reversed on other grounds 56 S Ct 892, 298 US 513, 80 L Ed 1309, rehearing denied 57 S Ct 5, 299 US 619, 81 L Ed 457

65. Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

Or—McMahan v Olcott, 133 P 836, 65 Or 537

66. Or—McMahan v Olcott, supra

#### Statutes held constitutional

Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546.

Mont—Allendale Irr Co v State Water Conservation Bd, 127 P 2d 227, 113 Mont 436

67 US—Carter v Blaine County Inv Co, DC Idaho, 45 F 2d 643

67 C J p 1291 note 64

#### Intent

The intention of congress, in enacting Carey Land Act, and of Montana legislature, in enacting statutes establishing machinery to accept benefits of the Carey Land Act, was that such Carey Act lands could be finally acquired only by actual settlers thereon in separate tracts and not to exceed 160 acres to each qualified settler.

Mont—Valier Co v State, 215 P 2d 966, 123 Mont 329, certiorari denied 71 S Ct 63, 340 US 827, 95 L Ed 607

68 US—Equitable Trust Co of New York v Cassia County, CCA. Idaho, 5 F 2d 955

67 C J p 1291 note 65

#### Intent of provision

The language of amendment to Carey Land Act empowering states to provide for granting liens to construction companies for their construction costs by appropriate legislation does not manifest intent to authorize acquisition of large areas of lands by individuals or companies or to change provisions of original act prohibiting states from disposing of more than one hundred and sixty

legislation relating to the same subject matter, there are contracts between the government and a state,<sup>69</sup> between the state and a construction company,<sup>70</sup> between the construction company and an operating

company, at least in some cases,<sup>71</sup> and between the construction company or operating company and settlers;<sup>72</sup> and the reclamation is carried forward pursuant to the contracts.<sup>73</sup> The various contracts

acres of lands to any one person  
Mont—Valier Co v State, 215 P2d 966, 123 Mont 329, certiorari denied 71 S Ct. 63, 340 US 827, 95 L Ed. 607

#### Statute as not creating lien

The Carey Act providing for grant of desert lands by federal government to state in which lands are located, conditioned upon state causing land so segregated to be reclaimed, occupied and cultivated by actual settlers, does not create a lien nor does it define any lien so created, and amendment to the act empowering states concerned to provide for liens by appropriate legislation is an "enabling act"  
Mont—Valier Co v State, supra.

#### Right to, and extent of, lien

US—North Side Canal Co v Idaho Farms Co, CCA Idaho, 107 F2d 481, rehearing denied 109 F2d 354 67 CJ p 1291 note 65 [b]

#### Effect of foreclosure

(1) Statutes compelling a Carey Act construction company to sell its water rights within a certain time limit do not apply after purchase of land at foreclosure or by deed, and a construction company after the foreclosure of its lien on land, for failure of entryman to pay contract price, does not hold land as a construction or selling agent of the state in view of statute disclaiming any liability on part of state for a Carey Act construction project  
Idaho—North Side Canal Co v Idaho Farms Co, 96 P2d 232, 60 Idaho 748

(2) Where a Carey Act construction company has obtained title to land and water rights by foreclosure of its lien for construction costs, transfer of place of use of water owned by construction company would be governed by same rules applicable to any other water user, and company is not prohibited from selling the land at an increased price over original price  
Idaho—North Side Canal Co v Idaho Farms Co, supra

(3) A Carey Act construction company by foreclosing its liens on lands in the district for construction costs or by obtaining deeds in lieu of foreclosure did not acquire title to the land and water appurtenant thereto, but such title was within framework of the statutes and contracts of the project, and was still subject to the covenants until sold to settlers  
Mont—Valier Co v State, 215 P2d 966, 123 Mont 329, certiorari de-

nied 71 S Ct. 63, 340 US 827, 95 L Ed 607

#### Statute allowing maintenance assessments

Statute allowing maintenance assessments by operating company on lands purchased by Carey Act construction company, on foreclosure of its lien for construction costs is not unconstitutional as impairing obligation of construction company's contract for full reimbursement for construction costs, where construction company by statute was limited in default of payments of its costs, to sale of lands and water and recovery of whatever sum was paid at sale

Idaho—North Side Canal Co v Idaho Farms Co, 96 P2d 232, 60 Idaho 748

69. Idaho—State v Twin Falls-Salmon River Land & Water Co, 166 P 220, 30 Idaho 41 67 CJ p 1292 note 67

70. US—Twin Falls Land & Water Co v Twin Falls Canal Co, CCA Idaho, 79 F2d 431, certiorari denied 56 S Ct. 381, 296 US 654, 80 L Ed 466 67 CJ p 1292 note 68

#### Operation and effect generally

US—Twin Falls Land & Water Co v Twin Falls Canal Co, supra.  
Mont—Valier Co v State, 215 P2d 966, 123 Mont 329, certiorari denied 71 S Ct. 63, 340 US 827, 95 L Ed 607

#### Transfer of contractor's interest

US—Twin Falls Land & Water Co v Twin Falls Canal Co, DCA Idaho, 7 F Supp 238, affirmed, CCA, 79 F2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466 67 CJ p 1292 note 68 [1]

#### Rights and title of construction company

(1) Corporation organized to construct irrigation system under Carey Act, although originally holding legal title to irrigation system and water rights, holds property subject to public use and in trust for state and prospective owners, it does not become owner of water rights or irrigation system, but is only given right to sell water rights for purpose of reimbursing it for cost of construction  
US—Twin Falls Land & Water Co v Twin Falls Canal Co, supra.

(2) Other rights see 67 CJ p 1292 note 68 [d]

71. US—Twin Falls Land & Water Co v Twin Falls Canal Co, supra.

#### Construction and operation of contract

US—Idaho Farms Co v. North Side Canal Co, DCA Idaho, 24 F Supp 139, reversed on other grounds, CCA, North Side Canal Co v Idaho Farms Co, 107 F2d 481, rehearing denied 109 F2d 354—Twin Falls Land & Water Co v Twin Falls Canal Co, DCA Idaho, 7 F Supp 238, affirmed, CCA, 79 F2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

#### Lien of operating company

Liens of a Carey Act operating company on land and water rights for maintenance costs were not merged because construction company obtained title to the land by foreclosure proceedings, where liens of operating company were asserted only after successor of construction company had acquired title by foreclosure proceedings, and the operating company is not prevented from foreclosing liens for maintenance assessments on land of Carey Act construction company obtained by foreclosure of its lien for construction costs because of fact that the statute does not limit the lien of construction company for construction costs to time of foreclosure, but gives one until payment, since payment, in case of default is under the statutes, accomplished by foreclosure or deed in lieu thereof

Idaho—North Side Canal Co v Idaho Farms Co, 96 P2d 232, 60 Idaho 748

72. Idaho—State v Twin Falls-Salmon River Land & Water Co, 166 P 220, 30 Idaho 41 67 CJ p 1292 note 69

#### Construction company taking over land of settlers

Land and water rights obtained by a Carey Act construction company on foreclosure of its lien for construction costs are subject to maintenance assessments by Carey Act operating company and operating company is entitled to foreclose its lien on such land for maintenance assessments, and construction company was required to pay such assessments, although land was almost valueless and no water had been used on it.

Idaho—North Side Canal Co v Idaho Farms Co, 96 P2d 232, 60 Idaho 748.

73. Or—Skinner v. Jordan Valley Irr. Dist, 300 P 499, 137 Or. 480, modified on other grounds and rehearing denied 3 P2d 534, 137 Or. 480.

are to be read together,<sup>74</sup> and they must not only conform to the pertinent statutory provisions,<sup>75</sup> but they must also be read in the light thereof,<sup>76</sup> all parties to the contracts are charged with knowledge of,<sup>77</sup> and are bound by,<sup>78</sup> the pertinent state and federal laws, as well as all the provisions of the respective contracts,<sup>79</sup> and state officials must not act in contravention of the statutes<sup>80</sup>

Statutes of the character under discussion have been held valid as against various constitutional objections,<sup>81</sup> and, where they are susceptible of another construction, neither the statutes<sup>82</sup> nor contracts entered into pursuant thereto<sup>83</sup> should be so construed as to impair the obligations of a prior contract

#### b. By United States

Under the terms of the National Reclamation Act, the

United States, through the secretary of the Interior, has power to construct, operate, and maintain irrigation works, and to enter into contracts for related purposes with irrigation districts, water users' associations, and others.

Congress has power to promote the general welfare through large scale projects for reclamation, irrigation, and other internal improvements<sup>84</sup> In the valid exercise of this power, it enacted the National Reclamation Act, 43 USCA. § 371 et seq,<sup>85</sup> and under this act and the construction placed thereon, the secretary of the interior is authorized to construct,<sup>86</sup> operate, and maintain<sup>87</sup> irrigation works, make an equitable apportionment per acre of the construction charges on the entries and privately owned lands which may be irrigated by the waters of the project,<sup>88</sup> fix an operation and maintenance charge to be paid by each water-right

74. US—Twin Falls Land & Water Co v Twin Falls Canal Co, D C Idaho, 7 F Supp 238, affirmed, C CA, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

67 C J p 1293 note 71.

75. US—McKinney v. Big Horn Basin Development Co, 167 F 770, 93 CCA 258

Idaho—Parrott v Twin Falls Salmon River Land & Water Co, 188 P 451, 32 Idaho 759

76. US—Idaho Irr Co v Gooding, Idaho, 44 S Ct 618, 265 US 518, 68 L Ed 1157

Carter v Blaine County Inv Co, D C Idaho, 45 F 2d 643  
67 C J p 1293 note 73

77. US—Twin Falls Salmon River Land & Water Co v Caldwell, Idaho, 242 F 177, 155 CCA 17

78. Mont—Valer Co v State, 215 P 2d 966, 123 Mont 329, certiorari denied 71 S Ct 63, 340 US 827, 95 L Ed 607

67 C J p 1293 note 75

79. Mont—Valer Co v State, supra.

80. US—Twin Falls Salmon River Land & Water Co v. Caldwell, Idaho, 45 S Ct 22, 266 US 85, 69 L Ed 178

67 C J p 1293 note 76

#### Duties of state board

The Carey Land Act Board of the state of Montana has duty to comply with general philosophy of Carey Land Act and to comply with restrictions inherent therein and Montana Acts enacted as machinery to accept benefits of the Carey Land Act, and in contracts between state and construction company constructing irrigation project thereunder

Mont—Valer Co v State, 215 P 2d 966, 123 Mont 329, certiorari denied 71 S Ct. 63, 340 US. 827, 95 L Ed. 607.

94 C J S —17

81. Mont—Habets v Carey Land Act Bd, 244 P 2d 511, 126 Mont 46

N M—Middle Rio Grande Water Users Ass'n v Middle Rio Grande Conservancy Dist, 258 P 2d 391, 57 NM 287

82. Idaho—Aberdeen-Springfield Canal Co v Bashor, 214 P 209, 36 Idaho 818

83. Idaho—Vinyard v North Side Canal Co, 274 P 1069, 47 Idaho 272, appeal dismissed and certiorari denied 50 S Ct 67, 280 US 520, 74 L Ed 589

Or—Skinner v Jordan Valley Irr Dist, 300 P 499, 137 Or 480, modified on other grounds and rehearing denied 3 P 2d 534, 137 Or 480

84. US—U S v Gerlach Live Stock Co, Ct Cl, 70 S Ct 955, 339 US 725, 94 L Ed 1231, 20 ALR 2d 633, U S v James J Stevinson, 70 S Ct 955, 339 US 725, 94 L Ed 1231, 20 ALR 2d 633  
Hudspeth County Conservation and Reclamation Dist No 1 v Robbins, CA Tex, 213 F 2d 425, certiorari denied 75 S Ct 56, 348 US 833, 99 L Ed 657.

#### Change of policy

Congress had power to change its standing policy that primary purpose in Reclamation Laws was irrigation, and that development of hydroelectric power was incidental

US—Winston Bros Co v. U S, Ct Cl, 130 F Supp 374

85. US—United States v Hanson, Wash, 167 F 881, 93 CCA 371  
67 C J p 1293 note 79

86. US—U S v Ide, CCA Wyo, 277 F 373, affirmed 44 S Ct 182, 263 US 497, 68 L Ed. 407  
67 C J p 1293 note 80

87. DC—Burley Irr Dist v Ickes, 116 F 2d 529, 73 App DC 23, certiorari denied 61 S Ct 614, 312 US 687, 85 L Ed 1124

The primary object of statute dealing with reclamation of land by federal government is the reclamation of arid lands through irrigation, and production of power for pumping in connection with irrigation is an important incident to the main object, but disposition of surplus power not required for pumping or other uses of irrigation for commercial uses is authorized only as an incidental phase of reclamation and not as a primary or independent act in itself  
DC—Burley Irr Dist v Ickes, supra.

#### Powers of secretary of interior

The secretary of interior had power to execute a plan of conservation whereby he stopped winter flow of water through power plant in irrigation district, ceased producing power in nonirrigating season for purpose of conserving such water for irrigating season, contracted with private power company to supply commercial demand in district, and preserved the profitable commercial power business which would otherwise have been lost through lack of dependable source of power during irrigation season

DC—Burley Irr Dist v. Ickes, supra.

#### Incidental legislative authorization

Congress had power to enact the statute authorizing the secretary of the interior to purchase and improve suitable land for a townsite to replace a portion of a town flooded by a reservoir of a reclamation project, and under such a statute, the fee-simple title to land purchased by the secretary of the interior for such townsite is in the United States until it disposes of it  
US—U. S v. Power County, DC Idaho, 21 F Supp 684

88. US—Ickes v Fox, App DC, 57 S Ct 412, 300 US 82, 81 L Ed 525,

applicant, entryman, or landowner according to the quantity of water delivered,<sup>89</sup> and to enter into contracts for specified purposes with irrigation districts, water users' associations, corporations, entrymen, or water users.<sup>90</sup> The rights, obligations, and liabilities under such contracts are governed by

the terms and provisions thereof as affected by general rules of law and applicable statutes,<sup>91</sup> and in a number of cases courts have had occasion to construe and apply provisions for the government to receive credit for return flow, drainage water, and waste water.<sup>92</sup>

rehearing denied 57 S Ct 504, 300 US 640, 81 L Ed 888  
67 C J p 1293 note 82

#### Propriety of charges

The secretary of interior can make only such charges to reimburse reclamation fund for construction of project as are provided for in the Reclamation Act

DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v Park, 64 S Ct 204, 320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 US 792, 88 L Ed 477

#### Unauthorized construction

Where construction of new reservoir was undertaken in violation of Reclamation Act providing that no work shall be undertaken on which construction charge has been fixed by public notice if work increases construction charge above charge in notice unless water right applicants and entrymen agree to pay cost thereof, secretary of interior could not collect costs for unauthorized construction on ground of unjust enrichment of water users

DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v Park, 64 S Ct 204, 320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 US 792, 88 L Ed 477

89. US—Ickes v Fox, App DC, 57 S Ct 412, 300 US 82, 81 L Ed 525, rehearing denied 57 S Ct 504, 300 US 640, 81 L Ed 888

Moody v Johnston, CCA Mont, 66 F 2d 999, followed in Moody v Smith, 66 F 2d 1003, Moody v Francis, 66 F 2d 1003, and Moody v Scheer, 66 F 2d 1004  
67 C J p 1294 note 83

#### Exclusive power of secretary

US—Moody v Johnston, CCA Mont, 66 F 2d 999, followed in Moody v Smith, 66 F 2d 1003, Moody v Francis, 66 F 2d 1003, and Moody v Scheer, 66 F 2d 1004

#### Proceedings to test validity of charges

US—Moore v Anderson, CCA Wash, 68 F 2d 191, certiorari denied Anderson v Moore, 55 S Ct 78, 293 US 567, 79 L Ed 666, and Graham v Moore, 55 S Ct 78, 293 US 567, 79 L Ed 666—Moody v Johnston, CCA Mont, 66 F 2d 999, followed in Moody v Smith, 66 F 2d 1003, Moody v Francis, 66

F 2d 1003, and Moody v Scheer, 66 F 2d 1004

#### Projects constructed by private enterprises

The Reclamation Extension Act of August 13, 1914, applied not only to projects constructed by the secretary of the interior under the reclamation Act but applied to those constructed by private enterprises and taken over by the United States  
Wash—Caruthers v Sunnyside Val Irr Dist, 188 P 2d 136, 29 Wash 2d 530

90. US—U S v Warm Springs Irr Dist, DCO, 38 F Supp 239  
DC—Burley Irr Dist v Ickes, 116 F 2d 529, 73 App DC 23, certiorari denied 61 S Ct 614, 312 US 687, 85 L Ed 1124  
67 C J p 1294 note 84

91. US—U S v Warm Springs Irr Dist, DCO, 38 F Supp 239  
DC—Burley Irr Dist v Ickes, 116 F 2d 529, 73 App DC 23, certiorari denied 61 S Ct 614, 312 US 687, 85 L Ed 1124

#### Validity of statute

Statute providing for application of net revenues from operation of power plant in connection with Shoshone irrigation project was within constitutional power of congress  
DC—U. S ex rel Shoshone Irr Dist v Ickes, 70 F 2d 771, 63 App DC 167, certiorari denied 55 S Ct 82, 293 US 571, 79 L Ed 670

#### Applicability of state law

The United States, in the construction of reservoirs for impounding waters of river and of irrigation system and in the distribution of water therefrom, acted solely under and subject to appropriation and irrigation laws of the state  
Wash—Lawrence v Southard, 73 P 2d 722, 192 Wash 287, 115 ALR 1308

#### Right to collect seepage waters

(1) Under Reclamation Act, right of United States as storer and carrier was not exhausted when waters had been once used, but extended to recapture and re-use of waters  
US—Hudspeth County Conservation and Reclamation Dist No 1 v Robbins, CA Tex, 213 F 2d 425, certiorari denied 75 S Ct 56, 348 US 833, 99 L Ed 657.

(2) The scope of the United States appropriative rights in connection with a federal reclamation project are the same, under the Nebraska law, as those in connection with any

irrigation canal, and includes the right, by proper means, to collect seepage waters from any part of the land and to reapply them on other lands within the project and under the appropriation, hence under Nebraska law, the fact that the United States has divided reclamation project into several divisions which have been completed at different times does not preclude the United States from recapturing seepage waters from lands in one division for use of another division, where the grouping of the lands into divisions was simply a matter of mechanical organization and administrative convenience in the sound development of the project as a whole and the reservoirs and diversion works by means of which the waters were supplied remain in the control of the United States  
US—U S v Tilley, CCA Neb, 124 F 2d 850, certiorari denied Scott v U S, 62 S Ct 1281, 316 US 691, 86 L Ed 1762

#### Actions to enforce rights

US—American Falls Reservoir Dist No 2 v Crandall, CCA Idaho, 82 F 2d 973, modified on other grounds and rehearing denied 85 F 2d 864

92. US—U S v Warm Springs Irr Dist, DCO, 38 F Supp 239

"Drainage" as used in contract involving water rights can be the result of a subsurface flow, and the word may express the concept of water which has escaped from a reservoir by percolation and is drawn off when it appears again on the surface

US—U S v Warm Springs Irr Dist, supra

"Return flow" is water drawn from a stream and impounded or used in irrigation which subsequently arrives again at the stream from which it was initially abstracted, and may be found either in surface or in percolating waters

US—United States v. Warm Springs Irr Dist, supra.

#### Public character of percolating water

Water escaping from United States government irrigation project by deep percolation was, under Oregon law, of a "public character," even against the United States

US—U. S v. Warm Springs Irr Dist, supra.

#### Consideration

A contract between United States and local irrigation district downstream from government irrigation



*Rights of landowner or water user* The right, if any, to water from a government irrigation project is limited to such water as is reasonably necessary,<sup>93</sup> the rights of the users being determined not by contract, but by beneficial use.<sup>94</sup> However, a landowner cannot be compelled to use his water right on any particular part of his land.<sup>95</sup> Vested rights of a water user may not be destroyed by action of the secretary of the interior,<sup>96</sup> but interference with such rights by action pursuant to acts of congress and authorized by state legislation cannot be prevented by landowners and other water users, although they may be entitled to damages.<sup>97</sup> Interference by the manager of a reclamation project

with private ditches and water rights constitutes a trespass<sup>98</sup> for which the manager is personally liable.<sup>99</sup> Diversion, storage, and distribution of the water by the federal government does not vest the United States with ownership of the water rights, which remain vested in the owners as appurtenant to the land wholly distinct from the property of the government in the irrigation works;<sup>1</sup> and the government remains a carrier and distributor of water with the right to receive the sums stipulated in the contract for construction and the annual charges for the operation and maintenance of the works.<sup>2</sup>

project, providing that government should receive credit for "return flow" in lieu of stored water to which local district would otherwise be entitled, was based on sufficient consideration, where not all the water for which the government received credit was of public character, and district could promise to return more water than it received from surface runoff, within the limits of beneficial use and the terms of appropriation.

US—U S v. Warm Springs Irr Dist, *supra*.

93. US—Scheer v Moody, DC Mont, 48 F2d 327, reversed on other grounds, CCA, Moody v Johnston, 66 F2d 999.

94. DC—Fox v Ickes, 137 F2d 30, 78 US App DC 84, certiorari denied 64 SCt 204, 320 US 792, 88 LEd 477, Ickes v Park, 64 SCt 204, 320 US 792, 88 LEd 477, and Ickes v Eder, 64 SCt 204, 320 US 792, 88 LEd 477.

95. Idaho—Nampa & Meridian Irr Dist v Petrie, 223 P 531, 37 Idaho 45.

96. US—Rank v Krug, DC Cal, 90 F Supp 773.

#### Action held unauthorized

Notice issued by secretary of interior expressly limiting measure of water right of water users in Sunnyside division of Yakima reclamation project to three acre feet and providing that water in excess of three acre feet might be rented by water users and money collected applied to payment of unsecured portion of reservoir system of Yakima project was a nullity, as unauthorized and constituting an attempt to destroy vested rights.

Wash—Lawrence v Southard, 73 P 2d 722, 192 Wash 287, 115 ALR 1308.

#### Intent of congress

Congress, in making appropriations for construction of dam on river which was navigable in part, regardless of whether dam was for improvement of navigation or flood

control, did not intend that riparian owners whose lands were located on river below dam should have no water rights and did not authorize the taking of any water rights without just compensation.

US—Rank v Krug, DC Cal, 90 F Supp 773.

#### Question of fact

Declaration by congress that the works to be constructed under the Central Valley Project were for river regulation, improvement of navigation, flood control, irrigation, and domestic uses and power, coupled with requirement that all such works would be constructed and operated under the reclamation laws, established that the relation to navigation, flood control, irrigation, river regulation or power of each dam or works should be determined as a question of fact, with due regard to private rights and rights of the State of California.

US—Rank v Krug, *supra*.

#### Rights not protected

Riparian owners whose lands were located on river below dam constructed under federal reclamation laws were not, as parties in interest entitled to enforce any right of use to flow of waters of river for spawning and fishing of salmon and other fish for both general commercial purposes and general recreational purposes of plaintiffs and public under federal statute requiring that adequate provision be made in construction by United States of any dams or diversionary works for the conservation, maintenance and management of wild life resources and its habitat.

US—Rank v Krug, *supra*.

97. Kan—State ex rel Emery v Knapp, 207 P2d 440, 167 Kan 546.

98. US—Scheer v Moody, DC Mont, 48 F2d 327, reversed on other grounds, CCA, Moody v Johnston, 66 F2d 999.

99. US—Scheer v Moody, DC Mont, 48 F2d 327, reversed on oth-

er grounds, CCA, Moody v Johnston, 66 F2d 999.

1. US—State of Neb v State of Wyo, Neb & Wyo, 65 SCt 1332, 325 US 589, 89 LEd 1815—Ickes v Fox, App DC, 57 SCt 412, 300 US 82, 81 LEd 525, rehearing denied 57 SCt 504, 300 US 640, 81 LEd 888.

#### Acquisition of rights by landowner

Where water rights on which federal water project rested pursuant to Reclamation Act had been obtained in compliance with state law, and pursuant to government's action individual landowners had become the appropriators of the water rights, the United States being the storer and carrier, the rights acquired by landowners were as definite and complete as if they were obtained by direct cession from the federal government, so that even though the government owned unappropriated rights, they were acquired by landowners in manner contemplated by congress.

US—State of Nebraska v. State of Wyoming, Neb & Wyo, 65 SCt 1332, 325 US 589, 89 LEd 1815.

2. US—State of Nebraska v State of Wyoming, *supra*—Ickes v Fox, App DC, 57 SCt 412, 300 US 82, 81 LEd 525, rehearing denied 57 SCt 504, 300 US 640, 81 LEd 888—Ickes v Parks, 57 SCt 412, 300 US 82, 81 LEd 525, rehearing denied 57 SCt 504, 300 US 640, 81 LEd 888—Ickes v Ottmuller, 57 SCt 412, 300 US 82, 81 LEd 525, rehearing denied 57 SCt 504, 300 US 640, 81 LEd 888.

Hudspeth County Conservation and Reclamation Dist No 1 v. Robbins, CA Tex, 213 F2d 425, certiorari denied 75 SCt 56, 348 US 833, 99 LEd 657.

#### Property rights distinguished

In constructing reclamation project pursuant to Reclamation Act, property right in water right is separate and distinct from property right in reservoirs, ditches, or ca-



*Withdrawal of lands from entry* The secretary of the interior may, as directed by statute, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of the statute.<sup>3</sup> Under his general statutory authority to perform any acts and to make such rules and regulations as may be necessary and proper to carry out the provisions of the statute, the secretary may establish rules as to the use of withdrawn lands while not needed for the purpose for which they are reserved,<sup>4</sup> and may lease them for grazing.<sup>5</sup>

### § 317. Actions to Establish and Protect Rights

A person, corporation, district, or government claiming a right to the use of waters or works for irrigation

purposes may bring an appropriate action or suit to establish, protect, and enforce the right.

Provided the assertion of the right is not barred by laches<sup>6</sup> or estoppel,<sup>7</sup> a person, corporation, district, or government possessing or claiming a right to the use of waters or works for irrigation purposes may bring an appropriate action or suit to establish, protect, and enforce the right,<sup>8</sup> such as an action for damages,<sup>9</sup> a suit to enforce a contract,<sup>10</sup> an action of ejectment to recover possession of a water ditch or canal,<sup>11</sup> an action to abate a defective impounding dam as a nuisance causing the loss of water to plaintiff for irrigation purposes,<sup>12</sup> a suit to quiet title,<sup>13</sup> or, where there is no adequate remedy at law, a suit to restrain wrongful and injurious acts,<sup>14</sup> as, for example, interference with, or in-

nals, in that water right is appurtenant to land owner of which is the appropriator, and is acquired by perfecting an "appropriation," that is, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use

US—State of Nebraska v State of Wyoming, 65 S Ct 1332, 325 US 589, 89 L Ed 1815

3. US—U S v Hanson, Wash, 167 F 881, 93 CCA 371

Cal—Donley v. West, 189 P 1052, reheard 193 P 519, 49 Cal App 796, error dismissed 43 S Ct 87, 260 US 697, 67 L Ed 469

4. Utah—Clyde v Cummings, 101 P 106, 35 Utah 461

5. Utah—Clyde v. Cummings, supra

6. Cal—Empire West Side Irr Dist v Stratford Irr Dist, 74 P 2d 248, 10 Cal 2d 376

Colo—Putnam Ditch Co v Bijou Irr Co, 114 P 2d 284, 108 Colo 124

Wyo—Anderson v Wyoming Development Co, 154 P 2d 318, 60 Wyo 417

67 CJ p 1294 note 94

#### Facts held to show laches

Doctrine of laches was applicable to plaintiff's claim that they acquired not only a proportionate perpetual water right but also proportionate interest in all irrigation works constructed by vendor, where plaintiffs had stood by and observed vendor and agents protecting, caring for and operating the irrigation works, with acquiescence of everyone concerned, over a period far beyond the ten-year limitation of actions statute

Wyo—Anderson v Wyoming Development Co, supra.

#### Facts held not to show laches

(1) Riparian owners whose lands were located on river below dam constructed under federal reclamation laws would not be denied in-

junctive relief against officials of the Bureau of Reclamation, operating dam to enjoin interference with their right of use of waters of river for agricultural and domestic purposes on grounds of laches under the circumstances

US—Rank v Krug, DCCal, 90 F Supp 773

(2) Where it is not shown that a diversion of water was such as to challenge the notice of an irrigation district, it cannot be charged with laches in failing to bring an action to enforce its rights

Mont—Canyon Creek Irr Dist v Martin, 159 P 418, 52 Mont 339

7. Wyo—Anderson v Wyoming Development Co, 154 P 2d 318, 60 Wyo 417

8. Neb—Robinson v Dawson County Irr Co, 8 NW 2d 179, 142 Neb 811

67 CJ p 1294 note 95

#### Statutory remedy

Where parties use water which should have been placed on certain other lands to which it was appurtenant without permission of state engineer and in violation of irrigation code, party suffering the wrong has a remedy under the statute

NM—Chavez v. Gutierrez, 213 P 2d 597, 54 NM 76

9. US—Denver & R. G. W. R. Co v Himonas, CA Utah, 190 F 2d 1012

10. Cal—Daly v. Ruddell, 70 P 784, 137 Cal 671

67 CJ p 1295 note 96

11. Cal—Dondero v O'Hara, 86 P 985, 3 Cal App 633

12. Colo—Seven Lakes Water Users' Ass'n v Fort Lyon Canal Co, 4 P 2d 1112, 89 Colo 515

13. US—Idaho Farms Co v North Side Canal Co, D C Idaho, 24 F Supp 189, reversed on other grounds North Side Canal Co v Idaho Farms Co, 107 F 2d 481, rehearing denied 109 F 2d 354

Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499

67 CJ p 1295 note 99.

#### Nature of suit

Suit to quiet title to water rights for irrigation purposes is in the nature of an action to quiet title to real estate

Utah—Hammond v Johnson, 66 P 2d 894, 92 Utah 20, rehearing denied 75 P 2d 164, 94 Utah 35

#### Issues involved

In government's suit to quiet title and determine rights to use of waters of Walker River used for irrigating lands in Nevada and California, and wherein Nevada and California defendants appeared and submitted themselves to jurisdiction, all of the rights of parties were before court

US—U S v Walker River Irr. Dist, D C Nev, 11 F Supp 158, exceptions dismissed 14 F Supp 10, reversed on other grounds, C. CA, 104 F 2d 334

14. Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111

Wyo—Linck v Brown, 96 P 2d 909, 55 Wyo 100

67 CJ p 1295 note 1.

#### Remedy at law adequate

The statute providing that any public power and irrigation district shall be liable for all seepage damage, and that damages from seepage shall be recoverable when and if it accrues, gives a plain, complete, adequate, and speedy remedy at law, and landowners were not entitled to injunctive relief to abate seepage on their lands allegedly caused by irrigation districts

Neb—Halligan v Elander, 25 N.W 2d 13, 147 Neb 709

State may maintain action in equity to compel irrigation district to refrain from using water without complying with regulatory statute, although purpose of action is to

jury to, a ditch, canal, or other works,<sup>15</sup> the unauthorized taking of water from plaintiff's ditch or source of supply,<sup>16</sup> or the diversion or shutting off of a supply of water to which plaintiff is entitled.<sup>17</sup> Also, in a case of continuing wrong and irreparable injury, a landowner may sue to restrain the maintenance of an irrigation ditch on his lands<sup>18</sup> or the use of water by an upper owner for irrigation purposes in such a way as to interfere with his lands<sup>19</sup>

In an action to establish or enforce water rights necessary parties must,<sup>20</sup> and proper parties may, be joined.<sup>21</sup>

To warrant recovery or relief, the facts must disclose plaintiff's substantive right, defendant's violation or threatened violation thereof, and the appropriateness of the particular relief sought;<sup>22</sup> but, where a right to recovery or relief is established,

protect rights of all users of water for irrigation purposes

Neb—State ex rel Sorensen v Mitchell Irr Dist, 262 NW 543, 129 Neb 586, certiorari denied Mitchell Irr Dist v State of Nebraska ex rel Sorensen, 56 S Ct 667, 297 US 723, 80 LEd 1007

15 Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P 2d 582, 34 Cal App 2d 159 67 C J p 1295 note 2

16 Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111 67 C J p 1295 note 3

17. Mont—Koch v Colvin, 105 P 2d 334, 110 Mont 594—Sherlock v Greaves, 76 P 2d 87, 106 Mont 206 Tex—City of Wichita Falls v Bruner, Civ App, 165 S W 2d 480, error refused 67 C J p 1295 note 4

#### Adequacy of remedy at law

Riparian owners whose lands were located on river below dam constructed under federal reclamation laws would not be denied injunctive relief against officials of the Bureau of Reclamation, in operation of the dam, from interfering with their right of use of waters of river for agricultural and domestic purposes on ground that they had a plain, speedy and adequate remedy at law under the Tucker Act US—Rank v Krug, D C Cal, 90 F Supp 773

#### Appointment of water master

In suit by the United States to enjoin an irrigation company from diverting irrigation water allegedly purchased and owned by the United States, the appointment of a water master was unnecessary, since injunction could enjoin company from interfering with diversion and storage of water by the United States and could enjoin company from diverting and storing water, and by such an injunction the district court could protect the United States against unlawful invasions of its rights by company without the appointment of a water master US—U S v Humboldt Lovelock Irr Light & Power Co, 97 F 2d 38, CCA Nev, certiorari denied Humboldt Lovelock Irr, Light & Power Co v U S, 59 S Ct. 94, 305 US 630, 83 LEd 404.

#### "Public interest"

With respect to right to enjoin diversion of water from creek, use to which appropriators of water, who supplied people of community with water, applied their rights, was a "public use," since property becomes clothed with a "public interest" when it is used in a manner to make it of public consequence, and affect the community at large, and it is the extent and character of use which make it "public" Mont—Sherlock v Greaves, 76 P 2d 87, 106 Mont 206

#### Conditions precedent

Injunction may issue in proper case to compel distributor to supply water for irrigation to consumer, but relief will not be granted unless consumer pays amount properly payable for delivery of water Wyo—McHale v Goshen Ditch Co, 52 P 2d 678, 49 Wyo 100

18 SD—Geiger v McMahon, 139 NW 958, 31 SD 95

19. Nev—Johnston v Rosaschi, 194 P 1063, 44 Nev. 386

20. Colo—Cox v Olsen, 41 P 2d 296, 96 Colo 233 67 C J p 1295 note 7

#### Who are necessary parties

Owners of seven-eighths of water decreed to irrigation ditch were indispensable party to proceeding wherein decree was made placing burden of maintenance on owners of one-eighth of ditch water and placing regulation of headgate in control of water commissioner with directions concerning interests of parties to action only Colo—Cox v Olsen, supra

#### Who are unnecessary parties

(1) Irrigation district that brought action against water master to require distribution in accordance with its adjudicated rights and joined as defendant drainage district, the recipient of water allegedly diverted from irrigation district was not required to join as defendants water users of the drainage district, since their rights depended on the rights of the drainage district from which they obtained use of the water and they could have no defense not available to drainage district

Idaho—Nampa & Meridian Irr. Dist

v Barclay, 47 P 2d 916, 56 Idaho 13, 100 ALR 557.

(2) An action to establish and protect an irrigation company's water rights or enjoin the unlawful diversion of its supply by water may be brought by the company without joining its stockholders or consumers as parties

Neb—Robinson v Dawson County Irr Co, 8 NW 2d 179, 142 Neb. 811

#### (3) Other parties

Colo—Hackett v Larimer & Weld Reservoir Co, 109 P 965, 48 Colo 178

21. Tex—Arneson v Shary, Civ App, 24 S W 2d 1116 67 C J p 1295 note 7 [b]

#### Parties plaintiff

Ditch companies, operating separate canals diverting water from river, could join as plaintiffs to bring suit for wrongful diversion of water by parties over whom plaintiffs had priorities

Colo—Reorganized Catlin Consol Canal Co v Sunnyside Park Ditch Co, 54 P 2d 560, 98 Colo 148

#### Proper parties defendant

Ditch companies, operating canals diverting water from river, who brought suit for wrongful diversion of water, properly joined as defendants several separate offenders who were not acting jointly in diverting water

Colo—Reorganized Catlin Consol Canal Co v Sunnyside Park Ditch Co, supra

#### Improper parties defendant

In action to restrain adjoining landowner from interfering with the use of an irrigation ditch constructed through plaintiff's land, it was improper to join attorneys as defendants on ground of alleged unsound legal advice given by them to defendant concerning removal of a dam in ditch in question

Colo—Lestoque v Arnold, 180 P 2d 862, 116 Colo 293

22. Cal—Hannah v Pogue, 147 P 2d 572, 23 Cal 2d 849

Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111

Mont—Hansen v Galiger, 208 P 2d 1049, 123 Mont 101

Or—Smyth v Jenkins, 33 P 2d 1007, 148 Or 165

matters not constituting a defense will not defeat the action.<sup>23</sup> Where the remedy of injunction for enforcement of provisions of the irrigation laws are conferred on a water improvement district by statute, the granting of such relief does not depend on

equitable principles.<sup>24</sup>

*Pleadings, evidence, and trial* In order that recovery or relief may be warranted, the pleadings must be sufficient under the rules governing pleadings generally.<sup>25</sup> The issues are confined to those

Utah—Yardley v Long Canal Co, 177 P 2d 530, 111 Utah 247  
67 C J p 1295 note 8

#### Parties in interest

(1) In general  
NM—Middle Rio Grande Conservancy Dist v Chavez, 101 P 2d 190, 44 NM 240

(2) Riparian owners of land below dam constructed under reclamation laws are not proper parties in interest to enforce maintenance of flow for commercial or recreational fishing or spawning for reason that state of California in Water Code and Fish and Game Code placed that responsibility on public officials of the state of California

US—Rank v. Krug, D C Cal, 90 F Supp 773

(3) Protective association alleging facts showing that it represented, as a corporate entity, its own rights and the rights of its constituent members who were littoral owners around a lake and reservoir was a real party in interest in suit to enjoin breach by reservoir company of contract relative to the maintenance and variation of lake levels

Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111

(4) Attorney general, on behalf of state, was authorized to institute and carry on action to compel irrigation district to refrain from using water for irrigation purposes without complying with regulatory statute

Neb—State ex rel Sorensen v Mitchell Irr Dist, 262 N W 543, 129 Neb 586, certiorari denied Mitchell Irr Dist v State of Nebraska ex rel Sorensen, 56 S Ct 667, 297 US 723, 80 L Ed 1007

(5) In suit by landowners to prevent irrigation district from depriving them of full use of water rights decreed to them by using waste water, which had escaped from land of district to natural flow of river, to satisfy water rights junior to plaintiffs, that there were other parties with water rights superior to plaintiffs, did not prevent plaintiffs from maintaining suit against district

#### Right to use water

As general rule, the right to use of water is requisite to valid claim for damages for deprivation of its use

US—Denver & R G W R Co v Hironas, C A Utah, 190 F 2d 1012

#### Right to use ditch

In suit to enjoin wrongful interference with exclusive use of irrigation ditch, in absence of written evidence of contract, plaintiff was required to find basis for claimed right in acts or omissions of parties giving him easement by adverse possession or application of some equitable principle

Wyo—Lanck v Brown, 96 P 2d 909, 55 Wyo. 100

#### Continuing trespass

A complaint for injunction and damages for interfering with irrigation rights stated a cause of action, notwithstanding that primary trespass complained of occurred before plaintiffs acquired title, where trespass was in fact and of necessity a continuing one

Colo—Young v Corey, 73 P 2d 1384, 101 Colo 463

23. Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499  
67 C J p 1296 note 12

#### Waiver of defense

In suit for injunction and damages for interference with irrigation rights, defendant's point that property rights, which could not be determined in injunction suit, were involved, was waived where defendant also prayed injunction and damages

Colo—Young v Corey, 73 P 2d 1384, 101 Colo 463

24. Tex—Biggs v Red Bluff Water Power Control Dist, Civ App, 131 S W 2d 274, error refused

#### Trivial trespass

An injunction sought by water power and improvement district to prevent owner of land bordering on lake created by district's dam from using lake for recreational purposes, without paying customary charge imposed on general public, would not be denied because petition for injunction alleged a technical trespass too trivial to be considered by a court of equity, since district's right to injunctive relief did not depend on equitable considerations but on a statute

Tex—Biggs v Red Bluff Water Power Control Dist, supra

25. Idaho—Gerber v Nampa, etc, Irr Dist, 100 P 80, 16 Idaho 1, 22 Tex—Rowles v Hadden, Civ App, 210 S W 251  
67 C J p 1295 note 9

#### Pleadings construed

(1) In general

Wyo—Lanck v Brown, 96 P 2d 909, 55 Wyo 100

(2) The prayer for a "physical solution" as that term is used and understood in the laws and by the courts of California, in complaint by riparian owners whose lands were located on river below dam constructed under federal reclamation laws against officials of the bureau of reclamation, which operated dam, was another way of asking court to determine total amount of water which each plaintiff and each member of their class had vested in each separate parcel of land for reasonable and beneficial uses under California law, and to restrain defendants from taking any but the excess of such total waters of the river as were put to reasonable and beneficial uses

US—Rank v Krug, D C Cal, 90 F Supp 773

#### Pleadings held sufficient

(1) In general.

Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111

Neb—Central Nebraska Public Power & Irrigation Dist v Walston, 299 N W 609, 140 Neb 190

Tex—Biggs v Red Bluff Water Power Control Dist, Civ App, 131 S W 2d 274, error refused  
67 C J p 1295 note 9 [c]

(2) Complaint by owners of riparian lands located on river below dam constructed under federal reclamation laws, which alleged that certain officials of the bureau of reclamation in operation of dam were threatening to take their water rights without compensation by diverting entire flow of river at the dam, that such taking would be an irreparable injury, and that such acts would be in excess of powers granted to defendants by any act of congress, stated cause of action for injunctive relief as far as water rights of plaintiffs were concerned relating to agricultural and domestic uses, unless shown that plaintiffs had a plain, speedy and adequate remedy at law

US—Rank v Krug, D C Cal, 90 F. Supp 773

#### Pleadings held insufficient or demurrable

US—Rank v. Krug, supra

Idaho—Reynolds Irr Dist v Sproat, 151 P 2d 773, 65 Idaho 617.

#### Allegations held insufficient

Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P 2d 582, 34 Cal App 3d 159.

raised by the pleadings,<sup>26</sup> and the evidence must conform to the pleadings<sup>27</sup> Any competent, material, and relevant evidence tending to prove or disprove an issue in the case is admissible, while incompetent, irrelevant, or immaterial evidence is inadmissible<sup>28</sup> The questions of burden of proof<sup>29</sup> and weight and sufficiency of the evidence<sup>30</sup> are governed by general rules of evidence in civil cases. The findings should conform to the issues<sup>31</sup> In an action tried before a

jury, questions of fact are to be submitted to the jury<sup>32</sup> with correct instructions applicable to the evidence,<sup>33</sup> and where a prima facie case is made out by the evidence, grant of a nonsuit is error<sup>34</sup>

*The judgment or decree should conform to the pleadings and evidence,<sup>35</sup> and the findings<sup>36</sup> should grant the relief warranted by the facts,<sup>37</sup> and should contain provisions which are adequate to guard and protect the rights of the parties,<sup>38</sup> and it should*

#### Amendment

Where landowners brought suit against city for mandatory injunction to require city to remove obstruction placed in canal leading from lake to their land and enjoining city from closing canal but no damages were sought or recovered when court heard injunction phase of case, plaintiffs could, by timely amendments in same suit, properly present their claims for damages caused by city's acts which court had required it to remedy  
Tex—City of Wichita Falls v Bruner, Civ App, 191 SW 2d 912

#### 26. Title in injunction suit

Generally, title to water and rights to its use may not be established between the parties where the action is solely for injunctive relief and the rights are not clear or certain  
Colo—Blanchard v Holland, 103 P 2d 18, 106 Colo 147, 139 A L R 159

27. Idaho—Reynolds Irr Dist v Sproat, 206 P 2d 774, 69 Idaho 315

#### 28. Evidence held admissible

(1) In general  
Utah—Christenson v Nielsen, 54 P 2d 430, 88 Utah 336  
67 C J p 1296 note 10 [e].

(2) In suit to enjoin construction of irrigation ditch, evidence that defendant gave up old ditch for unkept promise of plaintiff to get defendant right of way through ditch was admissible because relevant to chancellor's discretion to refuse injunction despite infringement of plaintiff's rights  
Utah—Christenson v Nielsen, supra

29 Colo—Water Supply & Storage Co v Larimer & Weld Reservoir Co, 179 P 870, 65 Colo 504  
67 C J p 1296 note 10 [d]

30. Colo—Haines v. Marshall, 185 P 651, 67 Colo 28  
67 C J p 1296 note 10.

#### Evidence held sufficient

(1) To establish plaintiff's right to relief or recovery generally  
Cal—Morris v George, 135 P 2d 195, 57 Cal App 2d 665  
Mont—Allendale Irr Co v. State Water Conservation Board, 127 P 2d 227, 113 Mont. 436  
Neb—Faught v. Platte Val. Public

Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032  
Or—Smyth v Jenkins, 33 P 2d 1007, 148 Or 165

(2) To establish plaintiff's claim to water rights and stock by adverse possession

Cal—Locke v Yorba Irr Co, 217 P 2d 425, 35 Cal 2d 205

(3) To justify denial of particular relief prayed for  
Mont—Blaser v Clinton Irr Dist, 53 P 2d 1141, 100 Mont 459  
Wyo—Lunck v. Brown, 96 P 2d 909, 55 Wyo 100

#### Evidence held sufficient to authorize, require, or sustain findings

(1) In general  
Cal—Empire West Side Irr Dist v Stratford Irr Dist, 74 P 2d 248, 10 Cal 2d 376

Furtado v Taylor, 194 P 2d 770, 86 Cal App 2d 346—Fresno Irr Dist v Smith, 136 P 2d 382, 58 Cal App 2d 48

Colo—Dillinger v North Sterling Irr Dist, 266 P 2d 776, 129 Colo 17

N M—Venegas v. Luby, 164 P 2d 584, 49 N M 381

Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499—Christenson v Nielsen, 54 P 2d 430, 88 Utah 336

(2) Entitling party to use of ditch  
Utah—Sharp v Bowen, 48 P 2d 905, 87 Utah 327.

(3) Requiring denial of defense of adverse possession

Cal—Furtado v Taylor, 194 P 2d 770, 86 Cal App 2d 346

#### Evidence held insufficient

(1) In general  
Cal—Hannah v Pogue, 147 P 2d 572, 23 Cal 2d 849

Colo—Lestoque v Arnold, 180 P 2d 862, 116 Colo 293

Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111.

Wyo—Laramie Rivers Co v Le Vasseur, 202 P 2d 680, 65 Wyo 414

(2) To support findings  
Cal—Simon Newman Co v Sanches, 159 P 2d 81, 69 Cal App 2d 432

(3) To support particular apportionment of water

Cal—Simon Newman Co v. Sanches, supra.

31. Idaho—Hailey v. Riley, 95 P. 686, 14 Idaho 481, 499, 17 L R A N S, 86  
67 C J p 1296 note 11

32 Ariz—Gila Water Co v Gila Land & Cattle Co, 249 P 751, 30 Ariz 569

Tex—Goodwin v. Hidalgo County Water Control & Improvement Dist No 1, Civ App, 58 SW 2d 1092

33 Ariz—Gila Water Co v Gila Land & Cattle Co, 249 P 751, 30 Ariz 569

34. Colo—Blanchard v Holland, 103 P 2d 18, 106 Colo 147, 139 A L R. 159

35 Utah—Christenson v Nielsen, 54 P 2d 430, 88 Utah 336  
67 C J p 1295 note 9 [b]

36 Cal—Parks v Gates, 199 P 40, 186 Cal 151

Tex—Pitts v Zavala-Dimmit Counties Water Improvement Dist No 1, Civ App, 81 SW 2d 801.

Utah—Christenson v Nielsen, 54 P. 2d 430, 88 Utah 336

37. Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111.

#### Injunctive relief held proper

Cal—Furtado v Taylor, 194 P 2d 770, 86 Cal App 2d 346—Morris v. George, 135 P 2d 195, 57 Cal App 2d 665

#### Injunction as to past acts

Where there was no evidence that one taking dirt and branches on two occasions from land over which he had easement for maintenance of dam and ditch intended to continue such taking, judgment enjoining him from taking dirt or branches from such land was erroneous as violating rule that injunction is ordered against past acts only if there is evidence that they will probably recur

Cal—Hannah v Pogue, 147 P 2d 572, 23 Cal 2d 849

38 Colo—Cox v. Olsen, 41 P 2d 296, 96 Colo. 233

Utah—Christenson v. Nielsen, 54 P 2d 430, 88 Utah 336.  
67 C J p 1296 note 17

#### Defendant's rights held adequately guarded

In action involving oral contract made between predecessors in inter-

not be so indefinite as to be unenforceable<sup>39</sup> Rights of defendants inter sese will not ordinarily be adjudicated,<sup>40</sup> but under some statutes it is otherwise as to equitable matters.<sup>41</sup> In an action against a company owning an irrigation canal by a stockholder and water user, the decree should not take the control of the corporate property away from the company unless it is absolutely necessary to do so in order to secure the right of plaintiff<sup>42</sup>

General rules governing construction and operation of judgments, as discussed in Judgments §§ 436-453, and of decrees in equity, as discussed in

Equity §§ 612-615, are applicable to judgments and decrees in actions to protect and enforce water rights<sup>43</sup> The right to use waters to irrigate certain lands conferred on a party by a decree extends only to the reasonably necessary use of the water for the proper irrigation of the lands specifically described<sup>44</sup> A decree conferring the personal right on certain parties to use the water of a certain stream in specified quantities grants a privilege which cannot be delegated to third persons<sup>45</sup>

*Costs.* In a proper case, costs should be apportioned among the unsuccessful parties.<sup>46</sup>

## B. IRRIGATION DISTRICTS AND SIMILAR DISTRICTS FOR PURPOSES OF IRRIGATION

### § 318. Character, Status, and Power of Legislature to Create

- a. In general
- b. Power of legislature to create

#### a. In General

An irrigation district is a creature of statute, a legal

entity in the nature of a public corporation rather than a private corporation. In some respects it is regarded by some courts as a public body, exercising some public or governmental functions, while in other respects or by other courts it is regarded as no political subdivision and as performing no governmental functions.

While an irrigation district is purely a creature of statute,<sup>47</sup> such a district has a legal exist-

est of the respective parties concerning delivery of irrigation water to lands of plaintiff, judgment in effect that contract, providing for delivery perpetually and without cost to plaintiff's predecessor of two second feet of water, with right of accumulation, was valid and existing, was not erroneous because placing no limitation on plaintiffs' right to accumulate their flow of water since right to accumulate water was of necessity limited to capacity of ditch

Cal—Corporation of America v Durham Mut Water Co, 123 P 2d 81, 50 Cal App 2d 337

39. Tex—Watkins Land Co v Clements, 86 SW 733, 98 Tex 578, 107 Am SR 653, 70 L R A 964

Judgment held sufficiently clear  
Cal—Morris v George, 135 P 2d 195, 57 Cal App 2d 665

40. Colo—Wannamaker v Pendleton, 121 P 108, 21 Colo App 174

41. Or—Hough v Porter, 95 P 732, 98 P. 1083, 102 P. 728, 51 Or 318

42. Idaho—Young v Extension Ditch Co, 156 P 917, 28 Idaho 775

43. Cal—Hannah v Pogue, 147 P 2d 572, 23 Cal 2d 849

Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499

Wyo—Linck v Brown, 96 P 2d 909, 55 Wyo. 100.

#### Res judicata

Validity of water-right contract for irrigation, which had been judicially determined in prior action to which irrigation company and owner of contract were parties, could not

be questioned in subsequent action between owner of contract and successor to irrigation company

Neb—Vonburg v Farmers Irr Dist, 270 NW 835, 132 Neb 12

#### Effect of subsequent river compact

River compact between Colorado and New Mexico was not available to protect state water officials in violation of previous valid decree adjudicating prior right to water for irrigation

Colo—La Plata River & Cherry Creek Ditch Co v Hinderlider, 25 P 2d 187, 93 Colo 128, appeal dismissed Hinderlider v La Plata River & Cherry Creek Ditch Co, 54 S Ct 557, 291 US 650, 78 L Ed 1004

44. US—Pacific Live Stock Co v Hanley, Or, 200 F 468, 118 CCA 494

67 CJ p 1296 note 20

45. Neb—Slattery v Harley, 79 N W 151, 58 Neb 575

46. Utah—Whittaker v. Spencer, 206 P 2d 612, 115 Utah 499

47. Cal—Woody v. Security Trust & Savings Bank, 29 P 2d 898, 137 Cal App 29

Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355

Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458

Tex—Grand Lodge of Order of Sons of Hermann in Texas v Curry, Civ App, 108 SW 2d 574, error refused

67 CJ p 1297 note 23, p 1299 note 54

#### Purpose

(1) An irrigation district is created and exists for the primary benefit of the owners of land within its limits

Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160

Idaho—Eldridge v Black Canyon Irr Dist, 43 P 2d 1052, 55 Idaho 443

Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

Wyo—In re Greybull Valley Irr. Dist, 76 P 2d 339, 52 Wyo 479, followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479

(2) The purpose of an irrigation district is to furnish water for irrigation purposes to be usefully and beneficially applied to lands within the district, and the appropriation of the district is dedicated to the lands within the district to which water has been beneficially applied and which has not come within provisions of the nonuser statute

Neb—In re Birdwood Irr Dist, Water Division No 1-A, 46 NW 2d 884, 154 Neb 52

(3) Irrigation districts are established under governmental authority to accomplish the purpose of irrigation by the united efforts of landowners

Kan—Mizer v Kansas Bostwick Irr. Dist. No. 2, 239 P 2d 370, 172 Kan. 157, appeal dismissed 72 S Ct. 1053, 343 US 954, 96 L Ed 1355.

#### Construction of statute

(1) Water Conservancy District Act must be construed so as to give

ence and is a legal entity,<sup>48</sup> a body corporate<sup>49</sup> in the nature of a public corporation rather than a private corporation,<sup>50</sup> although, with respect to ordinary business, it has the status of a private corporation<sup>51</sup> and its directors are on the same footing as private individuals or the directors of a private corporation similarly situated<sup>52</sup> In the absence of statute an irrigation district is not a public service corporation in the sense that it is a common

carrier<sup>53</sup>

The nature and status of irrigation districts, with respect to whether they exercise governmental functions or partake of the nature of political bodies, have been variously described by the courts Thus, it has been held, on the one hand, that an irrigation or reclamation district is a quasi-municipal corporation,<sup>54</sup> or state agency,<sup>55</sup> or that it is a public

force and effect to all of its provisions

Colo—People ex rel Dunbar v San Luis Val Water Conservancy Dist, 261 P 2d 704, 128 Colo 193

(2) In construing Water Conservancy Act, the purpose of the act, not only as disclosed by its words, but also in the light of the physical conditions of the state, its needs, and character, and extent of the projected benefits, must be considered

Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

48 Or—Harney Valley Irr Dist v Weittenhiller, 198 P 1093, 101 Or 1

Wash—Board of Directors of Riverside Irr Dist v Cummings, 230 P 649, 131 Wash 532

49. ND—In re Heart River Irr Dist, 49 NW 2d 217, 78 ND 302

#### Legislative declaration of nature

A legislative declaration of nature and character of corporation intended to be created under Water Conservancy Act is not conclusive on court, but must be considered in construction of the act

Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

50 US—Corpus Juris cited in Kiles v Trinchera Irr Dist, CCA Colo, 136 F 2d 894, 895—Northport Irr Dist v Henry Wilcox & Son, CCA Neb, 131 F 2d 113—Nev-Cal Electric Securities Co v Imperial Irr Dist, CCA Cal, 35 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 871

In re Lindsay-Strathmore Irr Dist, DCCal, 21 F Supp 129, motion denied U. S v Bekins, 58 S Ct 647 and Lindsay-Strathmore Irr Dist v Bekins, 58 S Ct 649, reversed on other grounds 58 S Ct 811, 304 US 27, 82 L Ed 1137, rehearing denied 58 S Ct 1043, 304 US 589, 82 L Ed 1549, and 58 S Ct 1044, 304 US 589, 82 L Ed 1549

Cal—Williams v Merced Irr Dist, 48 P 2d 664, 4 Cal 2d 238—Box v Young, 26 P 2d 290, 219 Cal 243

Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457—Jordan v Williams Irr Dist, 57 P 2d 566, 13 Cal App 2d 465.

Colo—Logan Irr Dist v. Holt, 133 P 2d 530, 110 Colo. 253—People ex

rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

Idaho—Lewiston Orchards Irr Dist v Gilmore, 23 P 2d 720, 53 Idaho 377

Mont—State ex rel Blenker v Stillwater County, 66 P 2d 788, 104 Mont 387

Neb—Loup County v Rumbaugh, 38 NW 2d 745, 151 Neb 563—Doup River Public Power Dist v North Loup River Public Power & Irrigation Dist, 5 NW 2d 240, 142 Neb 141, followed in Loup River Public Power Dist v Middle Loup Public Power & Irrigation Dist, 5 NW 2d 249, 142 Neb 156

67 CJ p 1297 note 25—14 CJ p 74 note 15

#### Quasi-public

An irrigation district is a quasi-public corporation for which no stock is issued

Idaho—Hale v McCommon Ditch Co, 244 P 2d 151, 72 Idaho 478

#### Filing acceptance of constitution

The constitutional provision, requiring corporations existing at time of adoption of constitution to file acceptances of provisions thereof with secretary of state, does not apply to irrigation districts

Idaho—Reynolds Irr Dist v Sproat, 151 P 2d 773, 65 Idaho 617

51. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160—Maricopa County Municipal Water Conservation Dist No 1 v La Prade, 40 P 2d 94, 45 Ariz 61

Idaho—Nampa & Meridian Irr Dist v Barclay, 47 P 2d 916, 56 Idaho 13, 100 A L R. 557.

#### Characteristics compared

Irrigation districts are municipal in nature in some respects, as they exercise taxing power and compel inclusion of unwilling owners' lands within their bounds, but in other ways they resemble private corporations, for they are liable for their servants' torts in same manner and to same extent and generally have same rights and responsibilities as such corporations

Ariz—Taylor v Roosevelt Irr. Dist, 232 P 2d 107, 72 Ariz 160

#### Service of process

An irrigation district is a "corporation," within statute providing for service of process in suit against

corporation on president, secretary, cashier, or managing agent thereof, and service of process is not required to be made on members of district's board of directors personally. Idaho—Tingwall v King Hill Irr Dist, 129 P 2d 898, 64 Idaho 207

52. Mont—State v Dilworth, 246 P 167, 76 Mont 218

#### Not administrative agency

An irrigation district is a body corporate and its board of directors is not an administrative agency as it lacks requisite of state-wide jurisdiction, and rules of appellate procedure applicable to such agencies do not apply in irrigation matters ND—In re Heart River Irr Dist, 49 NW 2d 217, 78 ND 302

53. Idaho—Nampa & Meridian Irr Dist v Briggs, 147 P 75, 27 Idaho 84

67 CJ p 1297 note 27

54. Ariz—Shumway v Fleishman, 187 P 2d 636, 66 Ariz 290

Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

Idaho—Tingwall v King Hill Irr. Dist, 155 P 2d 605, 66 Idaho 76

Neb—Corpus juris quoted in Bliss v. Pathfinder Irr Dist, 240 NW 291, 292, 122 Neb 203

Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458—In re Central Pac Ry Co, 25 P 2d 927, 144 Or 527

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

67 CJ p 1297 note 28—43 CJ p 73 notes 83, 87

#### Incidental municipal powers

Irrigation district is public corporation having incidental municipal powers necessary to internal management and proper conduct of business

Idaho—Lewiston Orchards Irr Dist v Gilmore, 23 P 2d 720, 53 Idaho 377.

55. US—Fletcher v. Mapes, DC Cal, 62 F Supp 351—In re Cameron County Water Improvement Dist No 1, DCTex, 9 F Supp 103, reversed on other grounds, CCA, Cameron County Water Improvement Dist No 1 v Ashton, 81 F 2d 905, reversed on other grounds 56 S Ct 892, 298 US 513, 80 L Ed 1309, rehearing denied

agency in which the public has an interest<sup>56</sup> carrying on public business<sup>57</sup> and, within the limits of the authority granted it, exercising public functions,<sup>58</sup> that, at least under certain circumstances and in some respects, it may be regarded as a political subdivision of the state<sup>59</sup> or an arm of the government,<sup>60</sup> that because of the close similarity between irrigation districts and municipal corporations the general principles applicable to one are applicable to the other,<sup>61</sup> and that the latter term, when

broadly used, may include the former.<sup>62</sup> So too, it has been held that an irrigation district does exercise some governmental functions,<sup>63</sup> such as levying taxes,<sup>64</sup> and even, under some statutes, that it exercises exclusively governmental functions.<sup>65</sup> On the other hand, it has frequently been held that, strictly speaking, irrigation districts are not municipal corporations<sup>66</sup> or political subdivisions of the state,<sup>67</sup> or of the coun-

57 S Ct 5, 299 US 619, 81 L Ed 457

Cal—El Camino Irr Dist v El Camino Land Corp, 85 P 2d 123, 12 Cal 2d 378

Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457

Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

56. Cal—Laguna Beach County Water Dist v Orange County, 87 P 2d 46, 30 Cal App 2d 740

Nev—State v Lincoln County Power Dist No 1, 111 P 2d 528, 60 Nev 401

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

57. US—In re Cameron County Water Improvement Dist No 1, D C Tex, 9 F Supp 103, reversed on other grounds, CCA, Cameron County Water Improvement Dist No 1 v Ashton, 81 F 2d 905, reversed on other grounds 56 S Ct 892, 798 US 513, 80 L Ed 1309, rehearing denied 57 S Ct 5, 299 US 619, 81 L Ed 457

58. Cal—Metcalf v Merritt, 111 P 505, 14 Cal App 244

59. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160—Shumway v Fleishman, 187 P 2d 636, 66 Ariz 290

La—State v Coulon, 3 So 2d 241, 197 La 1058

Mont—Crow Creek Irr Dist v Crittenden, 227 P 63, 71 Mont 66

Tex—Willacy County Water Control and Improvement Dist No 1 v Abendroth, 177 S W 2d 936, 142 Tex 320

#### Interference by federal government

Irrigation district organized under state statute permitting creation of political divisions of state was a "political subdivision of state" created for local exercise of her sovereign powers and possessing right to borrow money as necessary incident to its operation, and, as such, its fiscal affairs were those of the state, not subject to control or interference by national government, unless right to do so was definitely accorded by federal Constitution

US—Ashton v Cameron County Water Improvement Dist No 1, Tex, 56 S Ct 892, 298 US 513,

80 L Ed 1309, rehearing denied 57 S Ct 5, 299 US 619, 81 L Ed 457

60. Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

#### Attributes of sovereignty

Irrigation districts are corporations having public purpose, which may be vested with so much of attributes of sovereignty as are necessary to carry out such purpose, and are subject only to constitutional limitations and responsibilities appropriate thereto

Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160

61. Cal—La Mesa, Lemon Grove & Spring Valley Irr Dist v Halley, 239 P 719, 197 Cal 50

#### Rights and duties

An irrigation district being public in its purpose and nature, its rights and duties must be determined generally by same considerations as determine those of municipal or public bodies

Utah—Upper Blue Bench Irr Dist v Continental Nat Bank & Trust Co, 72 P 2d 1048, 93 Utah 325

62. Wash—Brown v Columbia Irr Dist, 82 Wash 274, 144 P 74. 43 C J p 75 note 15 [e]

63. Idaho—Eldridge v Black Canyon Irr Dist, 43 P 2d 1052, 55 Idaho 443

Nev—State v Lincoln County Power Dist No 1, 111 P 2d 528, 60 Nev 401

Tex—Willacy County Water Control and Improvement Dist No 1 v Abendroth, 177 S W 2d 936, 142 Tex 320

64. Ariz—Shumway v Fleishman, 187 P 2d 636, 66 Ariz 290

Mont—Crow Creek Irr Dist v Crittenden, 227 P 63, 71 Mont 66  
Assessments and taxes generally see *infra* §§ 332-337

65. Cal—El Camino Irr Dist v El Camino Land Corp, 85 P 2d 123, 12 Cal 2d 378

Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457—Laguna Beach County Water Dist v Orange County, 87 P 2d 46, 30 Cal App 2d 740—Woody v Security Trust & Savings Bank, 29 P 2d 898, 137 Cal App 29

66. US—Northport Irr Dist v Henry Wilcox & Son, CCA Neb, 131 F 2d 113—California Electric Securities Co v Imperial Irr Dist, CCA Cal, 85 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 371

Ariz—Maricopa County Municipal Water Conservation Dist No 1 v La Prade, 40 P 2d 94, 45 Ariz 61

Cal—Laguna Beach County Water Dist v Orange County, 87 P 2d 46, 30 Cal App 2d 740

Colo—Logan Irr Dist. v Holt, 133 P 2d 530, 110 Colo 253

Idaho—Tingwall v King Hill Irr Dist, 155 P 2d 605, 66 Idaho 76

Neb—Loup County v Rumbaugh, 38 N W 2d 745, 151 Neb 563—Loup

River Public Power Dist v North Loup River Public Power & Irrigation Dist, 5 N W 2d 240, 142

Neb 141, followed in Loup River Public Power Dist v Middle Loup

Public Power & Irrigation Dist, 5 N W 2d 249, 142 Neb 156

Tex—Willacy County Water Control and Improvement Dist No 1 v

Abendroth, 177 S W 2d 936, 142 Tex 320

67 C J p 1297 note 31—43 C J p 74 note 12 [f]

#### Distinction

A water conservancy district is an arm of the government separate and distinct from any municipality, with powers and rules of its own, and the mere fact that its territorial boundaries may encompass boundaries of a city does not make it a part of the city

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

67. US—Fletcher v Mapes, D C Cal, 62 F Supp 351—In re Lindsay-Strathmore Irr. Dist, D C Cal,

21 F Supp 129, motion denied U S v Bekins, 58 S Ct 647, and

Lindsay-Strathmore Irr Dist v Bekins, 58 S Ct 649, reversed on

other grounds 58 S Ct 811, 304 US 27, 82 L Ed 1137, rehearing denied

58 S Ct 1043, 304 US 589, 82 L Ed 1549, and 58 S Ct 1044, 304 US

589, 82 L Ed 1549

Ariz—Maricopa County Municipal Water Conservation Dist No 1 v

La Prade, 40 P 2d 94, 45 Ariz 61.



ty,<sup>68</sup> or subdivisions of the sovereignty<sup>69</sup> possessing in any degree general powers of government<sup>70</sup> or performing governmental functions<sup>71</sup> Under some statutes, it is held that an irrigation district, in the operation of its irrigation system, acts in a proprietary rather than a public capacity,<sup>72</sup> but under other statutes the property of irrigation districts is state owned for governmental purposes, not in a proprietary sense<sup>73</sup>

*Nature of interest of landowners.* Members of an irrigation district have been held to have a proprietary interest in the district's property,<sup>74</sup> and for practical purposes bear the same relation to it that stockholders in a private corporation sustain to the corporation<sup>75</sup> While an irrigation district owning stock in a water company has legal title thereto, the

landowners within the district have been held to be the beneficial and equitable owners of such stock.<sup>76</sup>

*Public nature of water use.* The use to which the water owned and controlled by an irrigation district is put is a "public use"<sup>77</sup>

#### b. Power of Legislature to Create

Legislation relating to the creation of an irrigation district is a valid exercise of legislative power and, in the absence of constitutional limitation, may control the operations of such district.

Since the formation of irrigation districts for the taking of water for irrigation purposes in arid regions is for a public purpose,<sup>78</sup> legislation relating to the creation of an irrigation district is a valid exercise of legislative power<sup>79</sup> or of the state's po-

68. Cal—Huck v Rathjen, 225 P 33, 66 Cal App 84

69. Colo—Logan Irr Dist v Holt, 133 P 2d 530, 110 Colo 253

70. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160  
Cal—Metcalf v Merritt, 111 P 505, 14 Cal App 244

Nev—State v Lincoln County Power Dist No 1, 111 P 2d 528, 60 Nev 401

71. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160  
Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

72. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160  
Idaho—Tingwall v King Hill Irr Dist, 155 P 2d 605, 66 Idaho 76—  
Eldridge v Black Canyon Irr Dist, 43 P 2d 1052, 55 Idaho 443  
Or—Smith v Enterprise Irr Dist, 85 P 2d 1021, 160 Or 372

Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218  
"An irrigation district . . . is brought into existence for the private benefit of the owners of land within its limits, it owns and operates its irrigation system in a proprietary rather than a public capacity, and assumes and must bear burdens of property ownership"  
Idaho—Eldridge v Black Canyon Irr Dist, 43 P 2d 1052, 1053, 55 Idaho 443.

73. Cal—El Camino Irr Dist v El Camino Land Corp, 85 P 2d 123, 12 Cal 2d 378

Laguna Beach County Water Dist v Orange County, 87 P 2d 46, 30 Cal App 2d 740.

#### Liability to execution

Neither the property of irrigation district nor its funds deposited with a bank may be taken by execution at suit of judgment creditor thereof

Utah—Upper Blue Bench Irr Dist

v Continental Nat Bank & Trust Co, 72 P 2d 1048, 93 Utah 325

74. Cal—Hall v Superior Court in and for Imperial County, 245 P 814, 198 Cal 373

Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

75. Idaho—Nampa & Meridian Irr Dist v Barclay, 47 P 2d 916, 56 Idaho 13, 100 A L R 557

Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

#### Trust relationship

(1) The relationship between irrigation district and its constituent landowners as to water rights and other property of district is that of trustee and cestui que trustant  
Or—Smith v Enterprise Irr Dist, 85 P 2d 1021, 160 Or 372

(2) Owners of property within irrigation district are beneficiaries of trust for public uses, and their interests are to be protected along with those of bondholders and general creditors

Cal—Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457

76. Cal—Lindsay-Strathmore Irr Dist v Wutchumna Water Co, 296 P. 933, 111 Cal App 688

77. US—Fletcher v Mapes, D C Cal, 62 F Supp 351  
Supplying of water as public use generally see supra § 315

78. Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284  
Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355

67 C J p 1298 note 36

Supplying of water as public use generally see supra § 315

#### Policy of state

(1) The policy of the state is to encourage formation of irrigation districts, so that arid lands may be brought under cultivation, the wel-

fare and comfort of its inhabitants enhanced, and the taxable value of the state enlarged

Nev—Magee v Whitacre, 106 P 2d 751, 60 Nev 202

(2) Provisions of Texas constitution declaring that reclamation and irrigation of arid and other lands are public rights and duties and authorizing creation of conservation and reclamation districts with authority to incur indebtedness and levy necessary taxes constitute a mandate declaring the policy of Texas with reference to irrigation and drainage of lands within the state  
US—Hydrocarbon Production Co v Valley Acres Water Dist, C A Tex 204 F 2d 212, certiorari denied 71 S Ct 44, 346 US 825, 98 L Ed 350

#### As fulfilling "natural want"

A "natural want" within meaning of constitutional provision that the necessity of water for domestic use and for irrigation purposes is declared to be a "natural want", is one absolutely necessary to human existence, and therefore its legislative conservation and control for such uses is a public purpose

Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb 410

79. US—Hydrocarbon Production Co v Valley Acres Water Dist, C A Tex, 204 F 2d 212, certiorari denied 74 S Ct 44, 346 US 825, 98 L Ed 350

Ariz—Reichenberger v Salt River Project Agr Improvement and Power Dist, 70 P 2d 452, 50 Ariz 144

Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355

La—State v Coulon, 3 So 2d 241, 197 La 1058

67 C J p 1298 note 37.

#### What law governs

Irrigation district organized under



lice power,<sup>80</sup> or plenary power.<sup>81</sup> In the absence of a constitutional limitation, the legislature may control the manner in which the affairs of the district shall be carried on,<sup>82</sup> describe the boundaries of the district<sup>83</sup> and the water supply and irrigation system by which the land shall be irrigated,<sup>84</sup> designate the land which will be benefited by such irriga-

tion,<sup>85</sup> and the method of calculating and apportioning such benefits,<sup>86</sup> without giving the property owners an opportunity to be heard on the matter.<sup>87</sup> Likewise, the legislature may provide that the formation of such irrigation district shall be accomplished by procedure before some designated tribunal<sup>88</sup> and vest such tribunal with jurisdiction

laws of Nebraska and irrigating lands wholly within Nebraska was subject to Nebraska irrigation laws, notwithstanding district's headgates and diversion works were in adjoining state, and that district's appropriation was granted by adjoining state

Neb—State ex rel Sorensen v Mitchell Irr Dist, 262 N W 543, 129 Neb 586, certiorari denied Mitchell Irr Dist v State of Nebraska ex rel Sorenson, 56 S Ct 667, 297 US 723, 80 L Ed 1007

#### Statutes or particular provisions upheld

##### (1) In general

Mont—State ex rel Normile v Cooney, 47 P 2d 637, 100 Mont 391  
Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 N W 2d 397, 152 Neb 410—State ex rel Loseke v Fricke, 254 N W 409, 126 Neb. 736

Tex—San Saba County Water Control & Improvement Dist No 1 v Sutton, Com App, 12 SW 2d 134, 70 A L R 1255

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

(2) Statute authorizing development of electric power by irrigation district to be financed by special assessment was not unconstitutional on theory that such development by district was not for a public purpose, even though power could be sold outside district

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, C C A Cal, 85 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 871

(3) Statutory amendment allowing irrigation districts to be organized to provide funds to pay for irrigating systems already serving lands of district or for indebtedness incurred in construction of such systems by another organization is within legislature's power

Ariz—Reichenberger v Salt River Project Agr Improvement and Power Dist, 70 P 2d 452, 50 Ariz 144

(4) The statute creating conservation district contemplating construction of dam on river did not violate constitutional provision authorizing legislature to provide for systems of levees, drains, and ditches

Okl—Sheldon v Grand River Dam Authority, 76 P 2d 355, 182 Okl 24.

#### Statutes construed

Statute providing for creation of water conservation board and for financing of projects only by sale of revenue bonds, and pledging of gross revenues, was not impliedly repealed by later statutes providing for construction of projects with federal aid and creation of revolving fund to insure repayment of moneys borrowed, since all the statutes may stand together

Mont—State ex rel Normile v Cooney, 47 P 2d 637, 100 Mont 391

80. Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157

81. Cal—Sutter Basin Corp v Brown, 253 P 2d 649, 40 Cal 2d 235, certiorari denied Brown v Sutter Basin Corp, 74 S Ct 71, 346 US 855, 98 L Ed 369  
67 C J p 1299 note 54 [a]

82. Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

Or—Twohy Bros Co v Ochoco Irr Dist, 210 P 873, 216 P. 189, 108 Or 1, 52

#### Unconstitutional application

State legislature of Texas has complete and perfect constitutional power to create reclamation and conservation districts, but if the consequences and effect of provisions by which such exercise of legislative power is effectuated are unconstitutional and invalid when applied to a complainant, the court should so declare and award relief accordingly

US—Hydrocarbon Production Co v Valley Acres Water Dist, C A Tex, 204 F 2d 212, certiorari denied 74 S Ct 44, 346 US 825, 98 L Ed 350

#### Reposing government in board of directors

The Water Conservancy Act reposing the government of a water conservancy district in a board of directors to be appointed by district court was not invalid on ground that act denied to property owners within district any voice with respect to government of district

Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

83. Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v Board of Directors of

Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

Or—In re Harper Irr Dist, 216 P 1020, 108 Or 498

#### Provision for modification by court

The Water Conservancy Act is not violative of "due process of law" on theory that there is no provision by which court can modify boundaries of proposed district

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

84. Or—In re Harper Irr. Dist, 216 P 1020, 108 Or 498

85. Cal—Palo Verde Irr Dist v Seeley, 245 P 1092, 198 Cal 477  
Or—In re Harper Irr Dist, 216 P 1020, 108 Or 498

#### Effect of legislative conclusion

With respect to constitutionality of statute authorizing development of electric power by irrigation district, legislative conclusion that land included in district would be benefited was correctly upheld, unless court could see that it was contrary to any rational view of fact and that lands had been included that plainly could not by any fair or proper view of facts be benefited

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, C C A Cal, 85 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 871

#### Provision for determination by court

The Water Conservancy Act is not violative of "due process of law" on the theory that there is no provision by which the court can determine that individual properties will not benefit by creation of the district.

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

86. Or—In re Harper Irr Dist, 216 P 1020, 108 Or 498

87. Cal—In re Bonds of South San Joaquin Irr Dist, 119 P. 198, 161 Cal 345

67 C J p 1298 note 42.

88. Mont—O'Neill v. Yellowstone Irr Dist, 121 P 283, 44 Mont. 492  
67 C J p 1299 note 43

#### Propriety of delegation of functions

Statute providing for organization of water conservancy districts through the agency of district court does not delegate nonjudicial functions to court in violation of constitution.

and power to determine any or all of the questions of fact essential to the organization of the same <sup>89</sup>

The legislature is not precluded from exercising its power in this respect by the fact that the proposed district embraces a municipality<sup>90</sup> or land which happens to be covered by a building or other structure which unfits it for cultivation<sup>91</sup> Likewise, the fact that the use of the water is limited to the landowner is not a fatal objection to such legislation,<sup>92</sup> and the right of the individual landowner in the district to assign the whole or any portion of the water apportioned to him does not alter the use from a public to a private one <sup>93</sup>

The requirement as to due process of law has been held to give a property owner an absolute right to notice and hearing before his property may be included in an irrigation district by a tribunal <sup>94</sup> The fact that the landowner does not desire the inclusion of his land in an irrigation district does not render its inclusion contrary to due process of law <sup>95</sup> According to some authority it is not necessary that property receive direct benefits in order to be lawfully included in the district and under its taxes <sup>96</sup> Statutes creating or authorizing the organization of such districts are valid and constitutional, although they invest such corporations with quasi-

legislative powers, authorize the condemnation of private property for the public use, and provide for the levy of taxes and assessments <sup>97</sup>

*Curative statutes.* Statutes curing defects or irregularities in the organization, not jurisdictional in character, have been held to be a valid exercise of legislative power.<sup>98</sup>

### § 319(1). Organization of District

The method by which an irrigation district may be organized depends on the governing statutory provisions.

Since, as discussed supra § 318 a, an irrigation district is purely a creature of statute, the method by which an irrigation district may be organized, depends on the statutory provisions of the particular jurisdictions <sup>99</sup> Such statutes are not subject to the rule of strict construction<sup>1</sup> and should be so construed as to effectuate their purpose to irrigate arid lands,<sup>2</sup> although it has been held that the statutory requirements for the organization of such a district must be fully met <sup>3</sup>

Generally all proceedings in connection with the organization of an irrigation district are in rem,<sup>4</sup> presenting all the elements of a judicial proceeding.<sup>5</sup> Mere irregularities, not jurisdictional, in the formation of the district do not affect the validity of the district.<sup>6</sup>

Colo.—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284 67 C J p 1299 note 43 [a]

89. Or.—In re Harper Irr Dist, 216 P 1020, 108 Or 498 67 C J p 1299 note 44

90. Tex.—Parker v. El Paso County Water Improvement Dist No 1, 297 SW 737, 116 Tex 631 67 C J p 1299 note 45

91. US.—Fallbrook Irr Dist v Bradley, Cal, 17 S Ct. 56, 164 US 112, 41 L Ed 369

92. US.—Fallbrook Irr. Dist v Bradley, supra

93. US.—Fallbrook Irr. Dist. v Bradley, supra.

94. US.—Fallbrook Irr Dist. v Bradley, supra 67 C J p 1299 note 49.

95. Tex.—Parker v El Paso County Water Improvement Dist No 1, 297 SW 737, 116 Tex 631

96. Tex.—Western Union Telegraph Co v Wichita County Water Improvement Dist No. 1, Com App, 30 SW 2d 801

97. US.—Fallbrook Irr. Dist v Bradley, Cal, 17 S Ct. 56, 164 US 112, 41 L Ed 369. 67 C J. p 1299 note 52.

98. Mont.—State v Board of Com'rs of Fergus County, 285 P. 932, 86 Mont. 595.

99. Kan.—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355 67 C J p 1300 note 55.

#### Naming of district

(1) Where a statute requires the board of county commissioners to name a proposed irrigation district, although it also authorizes reclamation districts, the name "Wenatchee Reclamation District" is not so confusing as to warrant a holding that an irrigation district could not be organized with such a name

Wash.—In re Board of Directors of Wenatchee Reclamation Dist, 157 P 38, 91 Wash 60

(2) Under a statute requiring the petition to give the name of the irrigation district, the insertion of the number of the district by the clerk filing a petition omitting such number has been held to be sufficient

Cal.—Bliss v. Hamilton, 152 P 303, 171 Cal 123

1. Wyo.—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253 67 C J p 1300 note 63

2. Idaho.—Nampa & Meridian Irr Dist v. Petrie, 153 P. 425, 28 Ida-

ho 227, error dismissed 39 S Ct 25, 248 US 154, 63 L Ed 178.

3. Mont.—In re Gallatin Irrigation Dist, 140 P 92, 48 Mont 605

4. Wyo.—Corpus Juris cited in In re Greybull Valley Irr Dist, 76 P 2d 339, 343, 52 Wyo 479 67 C J p 1300 note 57

5. Cal.—Chambers v. Board of Sup'rs of Tehama County, 207 P 288, 57 Cal App 401

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

6. Utah.—State v Weber County Irr Dist, 218 P 732, 62 Utah 209.

#### Nonjurisdictional irregularities

(1) Failure to give notice of filing of petition for organization of irrigation district, amendment of petition as to name of district, inadequacy of engineer's report, and organization of another district within district did not deprive trial court of jurisdiction it had once rightly acquired, since, generally, jurisdiction once acquired is not defeated by subsequent events

Wyo.—Padlock Ranch v. Washakie Needles Irr Dist, 61 P 2d 410, 50 Wyo 253

(2) Failure to verify the petition is not a jurisdictional defect

Wyo.—In re Bear River Irr Dist, 65 P 2d 686, 51 Wyo. 343.

*Political activity prior to organization* Ordinarily, mere political activity prior to the formation of an irrigation district has no bearing on the validity of the district<sup>7</sup>

*Superimposing districts* One irrigation district may be superimposed on another since one merely supplements the other<sup>8</sup>

*What law governs.* In the absence of a subsequent retroactive statute the power to create an irrigation district must be governed by the law in existence at the time of the exercise of the power<sup>9</sup> In an action to exclude land from the district it has been held that a statute repealing the former statute and intended to apply to districts organized under the former statute governs the right to have land excluded from the district<sup>10</sup>

## § 319(2). — Proceedings to Establish

- a. Petition
- b. Bond
- c. Notice
- d. Engineer's report
- e. Hearing, determination and order, and expenses
- f. Submission to voters of district

### a. Petition

- (a) In general
- (b) Petitioners
- (c) Description of district

#### Effect of validating acts

The fact that certain persons had conspired together and were promoting the creation of a water control and improvement district with evil intentions and fraudulent purposes would not render creation of district invalid where statute was actually complied with and especially where legislature passed two validating acts after district was created

Tex—Miller v State ex rel Abney, Civ App, 115 SW 2d 1027, reversed on other grounds State ex rel Abney v Miller, 128 SW 2d 1134, 133 Tex 498

7. Or—Harney Valley Irr Dist v Weitenheller, 198 P 1093, 101 Or 1  
67 C J p 1300 note 62

8. Wash—Board of Directors of Riverside Irr Dist v Cummings, 230 P. 649, 131 Wash 532

9. Tex—Hester & Roberts v Donna Irr Dist, Hidalgo County, No 1, Civ.App, 239 SW 992, error refused

#### Subsequent change of statute

The applicable statute in force

when irrigation district is organized does not constitute such a contract between state and incorporators of district and other landowners therein that it cannot be changed by subsequent legislation

Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355

10. Nev—H H Springmeyer Land Development & Live Stock Co v Irrigation Dist No 1, Carson Valley Unit, Truckee-Carson Project, 251 P 351, 50 Nev 80  
67 C J p 1300 note 67.

11. Cal—Miller & Lux, Inc. v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29

12. N D—In re Fort Clark Irr Dist of Mercer and Oliver Counties, 48 NW 2d 741, 78 ND 107

#### Constitutionality

Statutes providing that majority of qualified owners of irrigable lands, within proposed drainage district may petition and make application to chief engineer of Division of Water Resources for establishment of

### (a) In General

Proceedings for the organization of an irrigation district are generally instituted by the presentation of a petition to the proper officer or body, and the contents of such petition must satisfy the statutory requirements

Under some statutes proceedings are begun by the presentation to the board of supervisors of the county<sup>11</sup> or to the state engineer<sup>12</sup> of a petition signed by a prescribed number or majority of the landowners in the proposed district The petition constitutes the basis of all the proceedings,<sup>13</sup> all else being merely evidentiary and procedural<sup>14</sup> In the absence of statutory provision to the contrary, the petition need not enumerate the qualifications of the petitioners<sup>15</sup> In the absence of statutory permission for the petition to consist of a number of separate instruments, it is permissible, for convenience, to have separate petitions circulated to obtain the necessary signatures, and then to bind them together and to present them as one petition.<sup>16</sup>

*Contents generally.* The proponents of the formation of an irrigation district should furnish the board of supervisors with sufficient information as to the source of the water supply,<sup>17</sup> and also such information as to enable them intelligently to exercise their discretion in establishing the boundaries of the proposed district<sup>18</sup> Where the statute so requires, the petition must include a preliminary engineering report on the feasibility of the project, the sufficiency of the water supply, the approximate area of irrigable land within the proposed district, and an estimate of the cost of construction, all of which must be approved by the state engineer<sup>19</sup> A

an irrigation district which may cooperate with United States under reclamation laws, are not unconstitutional as improperly conferring legislative or judicial powers on the chief engineer

Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546

13. Cal—Rich v Connelly, 199 P 540, 52 Cal App 556

14. Cal—Rich v Connelly, supra

15. Or—Greig v Owyhee Irr Dist, 202 P 222, 102 Or 265—William Hanley Co v Harney Valley Irr Dist No 1, 180 P 724, 182 P 559, 93 Or 78

16. Or—In re Harper Irr Dist, 216 P. 1020, 108 Or 598

17. Cal—Miller & Lux, Inc v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29—Sleeper v Board of Sup'rs of Lake County, 214 P 292, 60 Cal App 744

18. Cal—Sleeper v Board of Sup'rs of Lake County, supra.

19. Wyo—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d

petition containing all that is required of it by the statute is sufficient<sup>20</sup> Under a statute requiring that "the petition shall state the proposed means of water supply," a mere designation of the lake, stream, or body of water by its usual name has been held to be sufficient<sup>21</sup>

**Date of filing** In at least one jurisdiction it has been held that the petition need not be filed in the county court before the day it is presented for action<sup>22</sup>

**Protests.** Under a statutory provision that protests to the proposed irrigation district must be filed within a certain time before the hearing, it has been held that protests not filed within the required time need not be considered<sup>23</sup>

### (b) Petitioners

**The proper number of qualified petitioners must sign the petition**

The legislature may authorize the initiatory proposal for organization of the district to be made by such persons as it sees fit<sup>24</sup> Under statutes making holders of title or evidence of title to land within the district qualified petitioners, it has been held that

holders of small residence lots in towns and villages,<sup>25</sup> a wife, by virtue of her interest in community property,<sup>26</sup> holders of certificates of purchase from the state,<sup>27</sup> and a homestead entryman prior to the making of final proof,<sup>28</sup> are not such landowners within the spirit of the act as to qualify them to be signers of the petition In the absence of a statutory disqualification a person with a special interest may sign the petition<sup>29</sup> Under a statute permitting entrymen on lands under federal or state statutes to be competent to sign the petition, entrymen holding such receipts may be counted in computing the requisite number of signers<sup>30</sup> The signature of a duly authorized attorney in fact to the petition will bind the principal as fully as though he had personally signed the petition.<sup>31</sup> In the absence of a statutory provision to the contrary, a guardian or administrator need not get authority from the probate court to sign the petition<sup>32</sup>

**Number of petitioners** The required statutory number of petitioners must have signed the petition before the district may be organized.<sup>33</sup> Under a statute providing that fifty or a majority of holders of title of land susceptible of one mode of irrigation

319, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

20. Or—Herrett v Warm Springs Irr Dist, 168 P 609, 86 Or. 343 67 C J p 1300 note 71

#### Necessary allegations

The petition must allege that all the property in the proposed district will be benefited by one of the named purposes of the organization

NM—In re Arch Hurley Conservancy Dist, Hudson Irr Extension, 191 P 2d 338, 52 N.M. 34

#### Cure of omissions

A petition for the creation of water improvement district which omitted name of county and number from name of proposed district was sufficient, where application and notice of hearing stated that proposed district was situated wholly within designated county, and order calling election properly described name of proposed district, since it would be presumed, and all persons interested would be charged with knowledge, that, when created, name of county and consecutive number would be included in name

Tex—Amberson v Henderson, Civ App, 127 S W 2d 553, error refused

#### Effect of accompanying letter

Fact that part of petition for organization of irrigation district was circulated for signature with letter attached providing that district would not be formed if cost exceeded designated average per acre did not deprive district court of juris-

diction to hear proceedings on ground that signatures obtained to such petition were conditional, where letter was but mere representation, and it did not appear that parties signing petition relied on condition as to costs, or that such parties had complained

Wyo—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

21. Utah—State v Weber County Irr Dist, 218 P 732, 62 Utah 209 67 C J p 1301 note 76

22. Or—Greig v Owyhee Irr Dist, 202 P 222, 102 Or. 265

23. Cal—Bliss v Hamilton, 152 P 303, 171 Cal 123

24. Cal—Imperial Water Co No 1 v Board of Sup's of Imperial County, 120 P 780, 162 Cal 14

#### Constitutionality

Provisions of Water Conservancy Act precluding owners of property having assessed valuation of less than three hundred dollars to act on petitions for proposed conservancy district are not violative of constitutional provision that people have right to alter or reform their government as public welfare may require

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

25. Cal—In re Central Irr. Dist, 49 P 354, 117 Cal 382

67 C J p 1301 note 79

26. Cal—Fallbrook Irr Dist v Abila, 39 P 794, 106 Cal 355

27. Cal—Fallbrook Irr Dist v Abila, supra

28. Mont—In re Gallatin Irrigation Dist, 140 P 92, 48 Mont 605

29. Mont—O'Neill v Yellowstone Irr Dist, 121 P 283, 44 Mont 492 67 C J p 1301 note 83

30. Idaho—Gem Irr Dist v Johnson, 109 P 845, 18 Idaho 386 67 C J p 1301 note 84

31. Idaho—Black Canyon Irr Dist v. Marple, 112 P. 766, 19 Idaho 176.

32. Or—In re Harper Irr Dist, 216 P 1020, 108 Or 598 67 C J p 1301 note 86

33. Utah—Eames v Board of Com'rs of Cache County, 199 P 970, 58 Utah 495

#### Majority or specified number

Under the statute, the requisite number of petitioners is either a majority in number and assessed value of the landowners or at least five hundred petitioners, each of whom is an elector, residing in the proposed district, or the holder of title to land therein, and who in the aggregate own not less than twenty per cent in assessed value of the land proposed to be included within the contemplated district.

Cal—Miller & Lux, Inc v Board of Sup's of Merced County, 258 P.2d 570, 119 Cal App 2d 29.

from a common source, and by the same system of works, may propose the organization of an irrigation district it has been held that fifty freeholders, although they are a minority of freeholders in the district,<sup>34</sup> or less than fifty freeholders, if they are a majority of the freeholders in the district,<sup>35</sup> are all that are required to sign the petition for organization. Where it is so provided by statute, a county and city lying within a proposed district are authorized to sign the petition in a representative capacity on behalf of the owners of the land of such public corporation, as they appear on the tax rolls, thereby dispensing with signature of the petition by individuals within such county or city.<sup>36</sup>

**Fraud** Fraud in the obtaining of the requisite number of signatures to the petition has been held not to render the organization void, but merely voidable,<sup>37</sup> and persons dealing with the district after the organization was completed and perfected on the face of the record would not be presumed to know of the fraud<sup>38</sup> and, if ignorant thereof, would be protected against it.<sup>39</sup> Where the signers of the petition were made freeholders temporarily and nominally only by a conveyance to them of undivided interests of land in the district, on condition that they were to take the deeds, sign, and present the petition, and reconvey to the grantor after the organization was effected, such conduct has been held to be fraud in the organization of the district.<sup>40</sup>

**Withdrawal of petitioners.** Petitioners for the organization of an irrigation district may effectively

withdraw from the petition at any time prior to the presentation of the petition to the petitioned body on the date fixed in the notice for such presentation,<sup>41</sup> with the result that at the time of such presentation they can no longer be considered by the board as petitioners.<sup>42</sup>

*The relationship between the state and petitioners for the creation of an irrigation district is not contractual, but the proceeding is in invitum.*<sup>43</sup>

### (c) Description of District

The petition must contain an adequate description of the proposed district and the lands to be contained therein.

Ordinarily the statutes provide that the petition must contain a description of the proposed district and the lands to be included therein.<sup>44</sup> The description must be sufficiently definite and certain to enable the land to be identified<sup>45</sup> or to furnish the means of identifying the land under the maxim that, "that is certain which may be rendered certain."<sup>46</sup> Descriptions by the legal subdivisions of the United States government survey,<sup>47</sup> and descriptions which would be good in a deed,<sup>48</sup> or which would be sufficient in an act of the legislature creating a political district or a municipal corporation,<sup>49</sup> have been held to be sufficient. If the course of a boundary is given, it is not necessary that such course shall have been actually surveyed on the ground before the boundary can be said to be particularly described.<sup>50</sup> A reference to an official map, or to a landmark designated on such map, is as definite as would be a reference to the landmark it-

34. Wash—Rothchild Bros v Rolinger, 73 P 367, 32 Wash 307

35. Wash—Rothchild Bros. v Rolinger, supra.

36. N.M.—In re Sandia Conservancy Dist., 259 P 2d 577, 57 N.M. 413

37. Cal—Fogg v Perris Irr. Dist., 97 P 316, 154 Cal 209.

38. Cal—Fogg v Perris Irr. Dist., supra.

39. Cal—Fogg v Perris Irr. Dist., supra.

40. Cal—Fogg v Perris Irr. Dist., supra.

41. Cal—McAulay v Board of Sup'rs of Merced County, 174 P 30, 178 Cal 628

42. Cal—McAulay v Board of Sup'rs of Merced County, supra.

43. Kan—Mizer v. Kansas Bostwick Irr. Dist. No. 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355.

### Rights of petitioners and nonpetitioners

After organization of irrigation district under statute authorizing contract between district and United States, pursuant to federal reclamation laws, for construction of irrigation works and levy and collection of assessments against lands benefited, landowners who signed original organization petition have no other or additional rights than those of other property owners, residents and electors in district.  
Kan—Mizer v Kansas Bostwick Irr. Dist. No. 2, supra

44. Cal—Miller & Lux, Inc. v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29  
67 C.J. p 1301 note 94.

45. Tex—Dallas County Fresh Water Supply Dist. No. 7 v Mercantile Securities Corp., Civ. App., 110 SW 2d 187, error dismissed

### General description

Petition for formation of irriga-

tion district is required to give only a general description of land proposed to be included, and absolute accuracy is not required

Cal—Miller & Lux, Inc. v. Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29

46. Or—Hamilton v Rudeen, 224 P 92, 112 Or 268  
67 C.J. p 1301 note 95

47. Or—Board of Directors of the Payette-Oregon Slope Irr. Dist. v Peterson, 128 P 837, 64 Or 46, modified on other grounds 129 P 123, 64 Or 46

48. Neb—Baker v Central Irr. Dist., 140 NW 765, 93 Neb 460  
67 C.J. p 1302 note 97

49. Cal—In re Bonds of Madera Irr. Dist., 28 P 272, 92 Cal 296, 27 Am S.R. 106, 14 L.R.A. 755  
Idaho—Oregon Short Line R. Co. v Pioneer Irr. Dist., 102 P 904, 16 Idaho 578

50. Cal—In re Bonds of Madera Irr. Dist., 28 P 272, 92 Cal 296, 27 Am S.R. 106, 14 L.R.A. 755

self,<sup>51</sup> and if the landmarks called for in the petition can be found on the ground the description is sufficiently definite.<sup>52</sup>

### b. Bond

Under some statutes the petition must be accompanied by a bond conditioned to pay all costs if the organization is not completed

Under some statutes the petition must be accompanied by a bond conditioned to pay all costs if the organization is not completed<sup>53</sup> As long as the sureties are worth the sum in which the bond is conditioned, the bond is sufficient,<sup>54</sup> and the fact that the sureties were also signers of the petition has been held immaterial<sup>55</sup> Under a statute requiring the bond to be conditioned to pay in a certain contingency, a bond conditioned to pay in any event is sufficient.<sup>56</sup> A bond, reciting that certain persons, including some persons not signers of the petition presented, propose to present a petition, accompanied in part by the petition, and no other petition is presented, identifies the petition sufficiently<sup>57</sup> Where the bond must be filed with the petition, a bond filed eight days after the petition has been held sufficiently within the spirit of the statute when the date for hearing had been postponed due to a faulty notice.<sup>58</sup> Where it is evident that the parties intended to make a statutory bond, a repugnant condition caused by a clerical error does not vitiate the bond<sup>59</sup>

*Determination of sufficiency* The tribunal authorized to receive a petition to organize an irrigation district has been held to be the sole judge of the sufficiency of the bond,<sup>60</sup> and, where an in-

formal bond presented with the petition for organization of an irrigation district is not invalid and binds those who signed it, the determination of its sufficiency by the board of supervisors is conclusive<sup>61</sup>

*Bond as not jurisdictional.* Since the bond is designed as security for costs only, it is not a jurisdictional prerequisite,<sup>62</sup> and under a statutory provision that the court should disregard any error, irregularity, or omission in the organization of the district which did not affect the substantial rights of the parties, a failure to file the required bond is not a jurisdictional defect.<sup>63</sup>

### c. Notice

Due notice must be given of the meeting of the tribunal which is to determine the advisability of organizing the district.

Under most statutes a notice must be given in a prescribed manner containing the time of the meeting of the tribunal which is to determine the advisability of organizing the irrigation district<sup>64</sup> This giving of notice is generally a jurisdictional requirement,<sup>65</sup> a failure to have the required number of days between the last publication of notice and the hearing renders the court without jurisdiction to enter a decree binding on the landowners not appearing,<sup>66</sup> but the court can determine the legality of the district as against the objections of a landowner who appeared and answered<sup>67</sup> However, under some statutes it is held that, at least with respect to the subject matter, the court acquires jurisdiction on the filing of the petition and before the giving of any notice<sup>68</sup> There is no

51. Cal—Metcalf v Merritt, 111 P 505, 14 Cal App 244  
67 C J p 1302 note 1

52. Cal—Cullen v Glendora Water Co., 39 P 769, 113 Cal 503

53. Or—Greig v Owyhee Irr Dist., 202 P 222, 102 Or 265

54. Or—Greig v Owyhee Irr Dist., supra

55. Or—Greig v Owyhee Irr. Dist., supra

56. Cal—Central Irr Dist v De Lappe, 21 P 825, 79 Cal 351

57. Cal—Central Irr Dist v De Lappe, supra.

58. Cal—Bliss v Hamilton, 152 P 303, 171 Cal 123

59. N M—Davy v McNeill, 240 P. 482, 31 N M 7.

67 C J p 1302 note 11.

60. Cal—In re Bonds of Madera Irr Dist., 28 P 272, 92 Cal 296, 27 Am SR 106, 14 L R A 755

61. Cal—In re Bonds of Madera Irr Dist., supra.

62. Mont—O'Neill v Yellowstone Irr Dist., 121 P 283, 289, 44 Mont 492

67 C J p 1302 note 15.

63. Mont—O'Neill v. Yellowstone Irr Dist., supra.

64. Cal—Miller & Lux, Inc v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29

67 C J p 1303 note 16

#### Places of posting

The posting of notices of hearing on petition for creation of water improvement district on gates of three farms more than one mile apart within territorial limits of proposed district and facing on public highway traversing district was in substantial compliance with requirement of statute for posting of notices in three public places within proposed district

Tex—Amberson v Henderson, Civ App, 127 SW 2d 553, error refused

#### As not "process"

The statutory notice required of

time and place of hearing on petition to establish water conservancy district is not a "process" within constitutional provision requiring process to be in name of the state Utah—Patterick v Carbon Water Conservancy Dist., 145 P 2d 503, 106 Utah 55

65. Mont—Scilley v Red Lodge-Rosebud Irr Dist., 272 P 543, 83 Mont 282

67 C J p 1303 note 17

66. Or—Board of Directors of Medford Irr Dist. v. Hill, 190 P 957, 96 Or 649

67. Or—Board of Directors of Medford Irr Dist v Hill, supra.

68. Wyo—Padlock Ranch v Washakie Needles Irr. Dist., 61 P 2d 410, 50 Wyo 253

#### Time of notice

Failure to give notice of filing of petition for organization of irrigation district "forthwith" or within reasonable time was not jurisdictional, and hence did not deprive

legal objection to embodying the notice and petition in one document and using it for each purpose successively.<sup>69</sup> A failure of the notice to state whether the hearing was to be held at a regular or special meeting of the board of supervisors, if otherwise proper, is immaterial.<sup>70</sup> The fact that the landowner was ignorant of the statutory provisions has been held not to release him from the binding effect of a notice given in conformity with the statute.<sup>71</sup>

*Description of district.* The notice need not describe the different tracts or legal subdivisions within the boundaries of the proposed district.<sup>72</sup> A notice which described the section, township, and range of a point in the boundary line of the district by numbers, without using the words "section," "township," and "range" has been held sufficient.<sup>73</sup>

*Who must sign notice.* The question of what persons must sign the notice is generally determined by the governing statutory provisions.<sup>74</sup> In the absence of statutory authority a notice signed only by the clerk of the county court is insufficient.<sup>75</sup> It is not material in what part of the notice it appears that the signers signed in their official capacities.<sup>76</sup> A notice of hearing signed by the petitioners has been held sufficient.<sup>77</sup>

*Publication.* Under some statutes, publication of notice of the hearing, as well as of the petition, is required,<sup>78</sup> and such publication must be made in all the counties whose lands are included in the proposed district.<sup>79</sup> Publication conforming to the statutory method of constructive notice is sufficient to give all interested their day in court,<sup>80</sup> and under a statute not requiring personal service of notice such service is unnecessary.<sup>81</sup> It is unnecessary that the notice be addressed to anyone, if it is published in connection with the petition which describes the lands fully.<sup>82</sup> Under a statute requiring a publication of the petition once a week for two "successive" calendar weeks, two publications one week apart have been held sufficient.<sup>83</sup>

#### d. Engineer's Report

The statutes may require a survey to be made by the state engineer on the feasibility of the proposed district and a report of his findings.

Under some statutes the state engineer is to make a survey of the feasibility of the proposed district and is to report his findings to the board of supervisors, after the receipt of which they are to hold a hearing.<sup>84</sup> The hearing on the report of the state engineer is not a jurisdictional matter.<sup>85</sup>

district court of jurisdiction to hear proceedings

Wyo—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

69. Cal—Fogg v Perris Irr Dist, 97 P 316, 154 Cal 209  
Miller & Lux v Board of Sup'rs of Madera County, 5 P 2d 612, 118 Cal App 416.

70. Wash—In re Board of Directors of Wenatchee Reclamation Dist, 157 P 38, 91 Wash 60

71. Utah—Parry v. Bonneville Irr Dist, 263 P 751, 71 Utah 202

72. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, 102 P 904, 16 Idaho 578

73. Wash—In re Board of Directors of Wenatchee Reclamation Dist, 157 P 38, 91 Wash 60  
67 C J p 1303 note 24

74. Cal—In re Central Irr Dist, 49 P 354, 117 Cal 382  
67 C J p 1303 note 29

75. Or—In re Harper Irr Dist, 216 P 1020, 108 Or 598.

76. Colo—Lockard v People, 205 P 944, 71 Colo 213

77. Or—Greig v Owyhee Irr Dist, 202 P 222, 102 Or. 265

78. Cal—Miller & Lux, Inc v

Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29

79. Cal—Miller & Lux, Inc v Board of Sup'rs of Merced County, supra

80. US—Fallbrook Irr Dist v Bradley, Cal, 17 S Ct 56, 164 US 112, 41 L Ed 369  
67 C J p 1303 note 25

#### Constitutionality of provision

The Water Conservancy Act provision that after filing of petition for organization of district, court shall fix place and time for hearing thereon, and cause notice by publication to be made thereof, is not violative of due process clause of constitution in failing to give due notice to bring property or property owners into court and subject their property to taxation.

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

81. Mont—In re Ft Shaw Irr Dist, 261 P 962, 81 Mont 170

82. Colo—Lockard v People, 205 P 944, 71 Colo 213

83. Mont—Scilley v Red Lodge-Rosebud Irr. Dist, 272 P 543, 83 Mont 282

84. Certificate based on engineer's report

Where certificate of state engineer

approving feasibility and cost of constructing irrigation district was based on engineer's report which was two years old and failed to show in the face of changed conditions that project was feasible, objectors to formation of new district were entitled to a new engineer's report and a finding by district court as to effect of formation of such district

Wyo—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

85. Cal—Rich v Connelly, 199 P 540, 52 Cal App 556.

#### Time of making report

Date of making of engineer's report in proceedings for organization of irrigation district cannot ordinarily be considered jurisdictional unless time intervening between making of report and filing of petition is so great that trial court must say that it is equivalent to no report at all

Wyo—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P. 2d 410, 50 Wyo 253

#### Stale report

Fact that engineer's report filed with petition for organization of irrigation district was two years old did not render report of no value so

Under a statute requiring the state engineer to make a water survey and water allotment it has been held that the fact that the survey was imperfect and insufficient in certain particulars did not defeat the jurisdiction of the board or invalidate the organization of the district <sup>86</sup>

**e. Hearing, Determination and Order, and Expenses**

- (a) In general
- (b) Determination and order
- (c) Expenses incident to organization

**(a) In General**

Where the statutes so require, a sufficient hearing must be held on the proposal to organize the district

Several statutes provide that there shall be a hearing on the formation of the proposed irrigation district,<sup>87</sup> which affords due process of law to the property owner on the question of whether or not his property should be included in the district <sup>88</sup> The same technical precision that should be observed in a regular law action is not required in a hearing for the organization of an irrigation district <sup>89</sup> The hearing may be continued <sup>90</sup> A statutory provision that the hearing be set not less than a certain number of days from the making of the order for hearing has been declared to be mandatory,<sup>91</sup> but a provision that the hearing be set within a certain time has been held to be merely di-

rectory<sup>92</sup> The tribunal conducting the hearing must acquire jurisdiction of the subject matter and of the parties before it can order a district created<sup>93</sup> The report of the state engineer on the feasibility of the project,<sup>94</sup> the certificate of acknowledgment,<sup>95</sup> or the affidavit of the petitioner,<sup>96</sup> may be considered by the tribunal conducting the hearing in reaching its conclusion on jurisdictional facts On requests to exclude land included within the proposed district, an issue is raised which requires proof of the actual conditions existing before the tribunal can determine whether the land should be excluded<sup>97</sup> The organization of an irrigation district is not "county business" within a constitutional provision requiring the county commissioners to sit with the county judge in the transaction of county business<sup>98</sup>

**(b) Determination and Order**

The official or body passing on the petition must determine the questions raised by the proceedings, and make an order predicated on a proper showing and sufficient findings.

The official or body passing on the petition must determine the questions raised by the proceedings <sup>99</sup> Under some statutes such official or body is given the power to make an order allowing the petition and to call an election of the landowners of the district on the question of its establishment<sup>1</sup> The order must be predicated on a proper showing and

as to deprive district court of jurisdiction to hear proceedings

Wyo—Padlock Ranch v Washakie Needles Irr Dist, *supra*

86. Utah—Argyle v Bonneville Irr Dist, 280 P 722, 74 Utah 480 67 C J p 1303 note 36

87. Cal—Miller & Lux, Inc v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29 ND—In re Fort Clark Irr Dist of Mercer and Oliver Counties, 48 N. W 2d 741, 78 ND 107.

67 C J p 1304 note 37

**Requirement of finding**

The provision of the Conservancy Act requiring that conservancy court, before it can declare district organized, must find, among other things, that allegations of petition are true, one of the prime allegations being that property in proposed district will be benefited by one of the named purposes of organization, constitutes a provision for a hearing as to whether or not lands included in proposed boundaries will be benefited within constitutional requirement of due process.

N M—In re Arch Hurley Conservancy Dist, Hudson Irr Extension, 191 P 2d 338, 52 N.M. 34.

88. Cal—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

89 Or—William Hanley Co v Harney Valley Irr Dist No 1, 180 P 724, 182 P 559, 93 Or 78

90 Cal—Central Irr Dist v De Lappe, 21 P 825, 79 Cal. 351. 67 C J p 1304 note 40

91. Cal—Bliss v Hamilton, 152 P 303, 306, 171 Cal 123

92 Cal—Bliss v. Hamilton, *supra* 67 C J p 1304 note 42

93. Mont—In re Gallatin Irrigation Dist, 140 P 92, 48 Mont 605 Or—In re Harper Irr Dist, 216 P 1020, 108 Or 598

94. Cal—Miller & Lux v. Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

95. Cal—Miller & Lux v Board of Sup'rs of Madera County, *supra*

96. Cal—Miller & Lux v. Board of Sup'rs of Madera County, *supra*

97. Or—William Hanley Co v Harney Valley Irr Dist No 1, 180 P 724, 182 P 559, 93 Or 78.

98 Or—Harney Valley Irr Dist v Wettenhiller, 198 P. 1093, 101 Or 1.

**99. Feasibility**

District court has duty in proceedings for organization of irrigation district to determine feasibility of district based on cost of construction

Wyo—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

1. Cal—Miller & Lux, Inc. v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29 ND—In re Fort Clark Irr Dist of Mercer and Oliver Counties, 48 N W 2d 741, 78 ND 107. 67 C J p 1304 note 52.

**Ungrounded objections**

An order for an election on petition for creation of a water improvement district was not subject to attack on ground that officials would so operate irrigation system as to impair individual property and vested rights, since courts could not assume that citizens and officials would unlawfully destroy rights and could not be called on to interfere until unlawful acts were threatened and had become immediately imminent Tex—Amberson v Henderson, Civ. App, 127 S W 2d 553, error refused.



sufficient findings.<sup>2</sup> Thus, under various statutes, it must be shown by satisfactory proofs and determined that there is a reasonably definite irrigation plan<sup>3</sup> which is feasible and practical from an engineering view,<sup>4</sup> together with a source of an adequate water supply therefor, available to, and obtainable by, the district when organized,<sup>5</sup> that the purposes of the statute will best be accomplished by the organization of an additional district,<sup>6</sup> and what lands are susceptible to irrigation from the proposed system and will be benefited thereby.<sup>7</sup>

The order should state all the facts found or determined,<sup>8</sup> and should not be uncertain,<sup>9</sup> but superfluous in the order does not vitiate it.<sup>10</sup> The or-

der need not set out specifically within itself the boundaries of the district as this may be done by reference to the petition.<sup>11</sup> The order for allowing the petition for organization, establishing the boundaries, and naming the district need not be made separate from the order calling the election.<sup>12</sup> A person against whom an order is entered by default must move to set it aside at the earliest practicable moment.<sup>13</sup> The legislature has the power to declare that the order of the county court should be conclusive of the facts found.<sup>14</sup>

Under some statutes, the board is given discretionary power to refuse to organize a district, even though all the statutory procedural requirements for formation of the district have been met.<sup>15</sup>

2. Tex.—*Amberson v. Henderson*, supra  
67 C.J. p 1304 note 54 [a]

3. Or.—In re Harper Irr. Dist., 216 P 1020, 108 Or 598

#### Definite terminus

In proceeding to establish irrigation district, evidence of definite plan of irrigation system is required, but such evidence need not include fixing of definite terminus of canal. *Mont—Blaser v. Clinton Irr. Dist.*, 53 P 2d 1141, 100 Mont 459.

#### Change of plan

The plans for obviating serious defects in proposed reservoir which were likely to produce great leakage and cause expense to prevent heavy water losses should be considered at time of creation of irrigation district and should not be deferred until after costly experiments have been imposed upon property owners, and the changes should be reasonable in view of the original plan and not formulated with the idea of adding a heavy item of cost for construction under plans never intended or considered originally when the scope of those plans is viewed as an entirety.

*Wyo—In re Washakie Needles Irr. Dist.*, 76 P 2d 617, 52 Wyo 518.

4. Or.—In re Harper Irr. Dist., 216 P 1020, 108 Or 598

*Wyo—In re Washakie Needles Irr. Dist.*, 76 P 2d 617, 52 Wyo 518

#### Relationship to cost of construction

(1) Statute authorizing organization of irrigation district contemplates that feasibility thereof based on cost of construction shall fairly and reasonably appear at time of organization of district, and the petitioners have the burden of proving such feasibility.

*Wyo—Padlock Ranch v. Washakie Needles Irr. Dist.*, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

(2) Under statute providing that

petition for organization of irrigation district must show by an accompanying engineering report approved by state engineer, the feasibility of the project, and requiring court to determine issue of feasibility before establishing district, the cost of the project is a determining factor in deciding whether project is capable of being utilized or dealt with successfully, since the word "feasible" means practically possible or capable of being managed, utilized, or dealt with successfully. *Wyo—In re Washakie Needles Irr. Dist.*, 76 P 2d 617, 52 Wyo 518

5. Or.—In re Harper Irr. Dist., 216 P 1020, 108 Or 598

#### Evidence held sufficient

In proceeding for organization of irrigation district, evidence sustained finding that there would be sufficient storable water to make the project feasible.

*Wyo—In re Washakie Needles Irr. Dist.*, 76 P 2d 617, 52 Wyo 518

#### Sufficiency of finding

Where petition for organization of a Conservancy District specifically alleged that property of proposed district would be benefited by accomplishment of any one of specified purposes, including the preventing of floods and protection of property from inundation, a finding of the conservancy court that that allegation of the petition was true was a sufficient determination that the purposes of the Conservancy Act warranted the creation of an additional district.

*NM—In re Sandia Conservancy Dist.*, 259 P 2d 577, 57 NM 413

7. Mont.—*Blaser v. Clinton Irr. Dist.*, 53 P 2d 1141, 100 Mont 459

#### Evidence held sufficient

*Wyo—In re Washakie Needles Irr. Dist.*, 76 P 2d 617, 52 Wyo 518.

#### Benefit to all property

Under requirements of the Conservancy Act that petitioners must

allege and that conservancy court must find that property described in petition will be benefited by organization of conservancy district, not merely some of property described in petition, act is not unconstitutional as an unlawful delegation of legislative powers by permitting individual petitioners to determine whether or not property included will be benefited.

*NM—In re Arch Hurley Conservancy Dist., Hudson Irr. Extension.*, 191 P 2d 338, 52 NM 34.

8. Or.—*William Hanley Co v. Harney Valley Irr. Dist. No 1*, 180 P 724, 182 P 559, 93 Or 78

9. Mont.—*Walden v. Bitter Root Irr. Dist.*, 217 P 646, 68 Mont 281  
67 C.J. p 1304 note 54

10. Mont.—*Walden v. Bitter Root Irr. Dist.*, supra.

11. NM.—*Davy v. McNeill*, 240 P 482, 31 NM 7.

12. NM.—*Davy v. McNeill*, supra.

13. Mont.—In re East Bench Irr. Dist., 224 P 859, 70 Mont 186  
67 C.J. p 1304 note 59

14. Or.—*Links v. Anderson*, 168 P 605, 1182, 86 Or 508

15. Ariz.—*Peters v. Frye*, 223 P 2d 176, 71 Ariz 30

#### Ground of refusal

Under statute authorizing county board of supervisors to hear and consider objections to proposals to create an irrigation water delivery district, board could refuse to organize proposed district on ground that there was no present need for such district, notwithstanding all statutory procedural requirements for formation of district had been met.

*Ariz—Peters v. Frye*, supra.

#### Constitutionality

The statutory power granted to county board of supervisors to refuse in its discretion to create an irrigation water delivery district is not a

## (c) Expenses Incident to Organization

An irrigation district is liable for expenses incident to its organization only to the extent provided for by statute.

In the absence of express statutory authorization, an irrigation district is not liable for legal services rendered to procure its organization.<sup>16</sup> Under a statute permitting the district to become indebted not to exceed a certain sum for preliminary expenses, and providing that all preliminary indebtedness in excess of that sum should be void, it has been held that warrants for salaries of the regular officers of the district must be deducted in determining whether outstanding unpaid warrants exceed the limitation permitted,<sup>17</sup> and that, taking the warrants in the order in which the obligations were incurred, every warrant which carried the aggregate sum beyond the limitation is void,<sup>18</sup> as is also every warrant issued after the aggregate sum of valid warrants had equalled the limitation.<sup>19</sup> The objectors to the creation of an irrigation district are entitled, on the dismissal of the petition for want of a requisite number of qualified signers, to recover as costs fees of witnesses to testify to facts on the merits, although they were not subpoenaed, sworn, or examined.<sup>20</sup>

*Who may raise question* A taxpayer and resident of the district may sue to restrain an expenditure of the district funds, in payment of organization expenses, which is not sanctioned by law.<sup>21</sup>

## f. Submission to Voters of District

Under some statutes, the question of organizing the district must be submitted to a vote of the people within the territory proposed to be included.

Under some statutes the question of organizing the district must be submitted to a vote of the people within the territory proposed to be included,<sup>22</sup> of which notice must be published in com-

pliance with the directions of the statute.<sup>23</sup> The clerk, under direction of the court, has been held to be the proper person to sign the notice of election.<sup>24</sup> A notice posted in conformity with the statute is sufficient.<sup>25</sup> Under a statute requiring that the notice shall describe the boundaries of the district, a notice which exempted a different tract of land from that described in the original petition and final order was not fatally defective,<sup>26</sup> particularly where the area involved was almost negligible in comparison to the area of the district.<sup>27</sup> Where a statute provides that publication of notice may be made in any newspaper of general circulation in the county, a publication in a newspaper of general circulation very near the proposed district is sufficient, although such newspaper is not the one designated generally by the county commissioners as the official newspaper of the county.<sup>28</sup>

It is not necessary that the court state the facts from which it derives its authority in an order calling an election.<sup>29</sup> A failure to recite in the order calling an election that the persons designated as judges and clerks of the election are qualified voters of the district constitutes a mere irregularity not invalidating the election.<sup>30</sup> The fact that the tribunal conducting the organization proceedings did not declare the district duly organized or the day that the vote for organization of the district was taken has been held not to affect the order declaring the organization of the district.<sup>31</sup>

*Election contests* In contesting an election it is necessary to plead and prove the ground of disqualification of votes,<sup>32</sup> and that such votes were cast adverse to the contesting parties.<sup>33</sup> Where the election is contested, and not the canvass of election, the failure of the election board to make certificates of canvass has been held not to be before the court.<sup>34</sup>

delegation of power to make a law and is not an unconstitutional delegation of legislative power  
Ariz.—Peters v Frye, supra.

16. Cal.—Biggart v. Lewis, 192 P 437, 183 Cal 660.  
67 C J p 1305 note 63.

17. Cal.—Wilbur v Board of Directors of Tia Juana River Irr Dist, 271 P. 514, 94 Cal App 511.

18. Cal.—Wilbur v. Board of Directors of Tia Juana River Irr Dist, supra.

19. Cal.—Wilbur v. Board of Directors of Tia Juana River Irr Dist, supra.

20. Mont.—In re Gallatin Irrigation Dist., 140 P 92, 48 Mont. 605.

21. Cal.—Biggart v. Lewis, 192 P 437, 183 Cal 660

22. Cal.—Miller & Lux, Inc v Board of Sup'rs of Merced County, 258 P 2d 570, 119 Cal App 2d 29

Canvass of votes held proper  
Or—Petition of Board of Directors of North Unit Irr Dist, 178 P 186, 91 Or 33.

23. Cal.—Central Irr Dist v. De Lappe, 21 P 825, 79 Cal 351.  
67 C J p 1305 note 70

24. Or.—Greig v Owyhee Irr Dist, 202 P 222, 102 Or 265

25. Or.—Smith v Hurlburt, 217 P 1093, 108 Or 690

26. Wash.—In re Board of Direc-

tors of Wenatchee Reclamation Dist, 157 P 38, 91 Wash 60

27. Wash.—In re Board of Directors of Wenatchee Reclamation Dist, supra.

28. Wash.—In re Peshastin Irr. Dist, 200 P 88, 116 Wash 440

29. Or.—Greig v Owyhee Irr Dist, 202 P 222, 102 Or 265

30. Or.—Greig v. Owyhee Irr. Dist, supra.

31. Idaho—Progressive Irr. Dist v Anderson, 114 P 16, 19 Idaho 504.

32. Or.—Links v. Anderson, 168 P. 605, 1182, 86 Or 508

33. Or.—Links v Anderson, supra.

34. Or.—Links v. Anderson, supra.

§ 319(3). — Lands Included

- a. Lands included
- b. Inclusion or exclusion after organization

a. Lands Included

Generally speaking, the lands to be included within an irrigation district are those which will be benefited by the irrigation system to be adopted, which are susceptible to irrigation from such system, and which are not already irrigated.

Under a statute providing that the district shall include lands which will be benefited by irrigation by the system to be adopted, the benefit to the land must be substantial<sup>35</sup> and not limited to the creation of an opportunity thereafter to use the land for a new kind of crop, while not substantially benefiting it for the cultivation of a crop already produced thereon in reasonable quantities without the aid of artificial irrigation<sup>36</sup>. The question of whether any particular land would thus be benefited is necessarily one of fact,<sup>37</sup> and objections to the inclusion of land must be made at the hearing afforded for that purpose<sup>38</sup>. Generally, the determination of the lands which are susceptible of irrigation and which will be benefited in the irrigation district must be made at the time the district is organized or before bonds are issued<sup>39</sup>.

In the absence of an abuse of discretion the decision of the tribunal conducting the hearing as

to the inclusion in, or exclusion of, lands from the district will not be disturbed<sup>40</sup>. So, where an opportunity has been given to be heard before a proper tribunal on the question of benefits, in the absence of actual fraud and bad faith, the decision of such a tribunal is conclusive<sup>41</sup> except as to grounds arising since such decision<sup>42</sup> and on matters affecting its jurisdiction<sup>43</sup>. The question of benefits is to be determined with reference to the natural state and condition of the land, and not with reference to the use being made of such land<sup>44</sup>.

A statute providing that all lands susceptible of irrigation from the same system of works applicable to other lands in such proposed district should be included in the district has been held to withdraw from the tribunal hearing the organization proceedings all jurisdiction to determine whether a particular tract of land would be benefited by the contemplated improvement,<sup>45</sup> and that lands included within the district by such tribunal are conclusively presumed to be benefited by the improvement,<sup>46</sup> in the absence of a contrary determination obtained later on a petition for the exclusion of particular tracts of land by the owners thereof<sup>47</sup>.

Under a statute providing that the directors of a district may change the boundaries of the divisions of the district when they deem it advisable for the best interest of the district, provided such changes shall be made to keep each division as

35. US—Fallbrook Irr. Dist. v. Bradley, Cal., 17 S Ct 56, 164 US 112, 41 L Ed 369.  
67 C J p 1305 note 82

**Land not currently used for agriculture**

Under statute, brick company which owned property which it did not contemplate using as a source of clay for brick for 10 or 12 years to come, but which would be directly benefited at small expense by proposed stream storage project by reason of enhanced value of property for agricultural purposes from which it could profit by renting, was not entitled to have such property excluded from irrigation district, notwithstanding its charter did not authorize it to engage in irrigation or agricultural pursuits, although such refusal to permit exclusion was without prejudice to maintain subsequent proceeding for exclusion under changed conditions.

Nev.—In re Reno Press Brick Co., 73 P 2d 503, 58 Nev 164.

**Railroad right of way**

The inclusion of a strip of railroad right of way in an extension of a conservancy district created for irrigation purposes because of incidental economic benefits to railroad, al-

though it would not be directly benefited by irrigation, was not an abuse of legislative purpose of Conservancy Act in applying act to a factual situation not contemplated.

N M.—In re Arch Hurley Conservancy Dist., Hudson Irr. Extension, 191 P 2d 338, 52 N M 34.

**Water district's reservoir and distributing system** could not be benefited by irrigation, even though irrigable in its natural state, and therefore, reservoir and system were not properly included within district, even though district's board of directors found that reservoir and system could be irrigated from works of district and that sole owner had consented in writing to its inclusion within district.

Cal.—Rock Creek Water Dist. v. Calaveras County, App., 283 P 2d 740.

36. US—Fallbrook Irr. Dist. v. Bradley, Cal., 17 S Ct 56, 164 US 112, 41 L Ed 369.

37. US—Fallbrook Irr. Dist. v. Bradley, supra.  
Cal.—Hand v. El Dorado Irr. Dist., 276 P 137, 97 Cal App 740.  
67 C J p 1306 note 84.

38. US—Tomich v. Union Trust Co., CCA Mont., 31 F.2d 515.

39. US—Denver-Greeley Valley Irr. Dist. v. McNeil, CCA Colo., 106 F 2d 288.

40. Wash.—Bleakley v. Priest Rapids Irr. Dist., 11 P 2d 597, 168 Wash 267.  
67 C J p 1306 note 86.

41. US—Fallbrook Irr. Dist. v. Bradley, Cal., 17 S Ct 56, 164 US 112, 41 L Ed 369.  
67 C J p 1306 note 87.

42. Colo.—Yellow Jacket Irr. Dist. v. Pleasant Valley Ranch Co., 243 P 635, 78 Colo 543.

43. Cal.—Modesto Irr. Dist. v. Tregoe, 26 P. 237, 88 Cal 334, error dismissed 17 S Ct 52, 164 US 179, 41 L Ed 395.  
67 C J p 1306 note 89.

44. US—Fallbrook Irr. Dist. v. Bradley, Cal., 17 S Ct 56, 164 US 112, 41 L Ed 369.  
67 C J p 1306 note 90.

45. Or.—In re Harper Irr. Dist., 216 P 1020, 108 Or 498.

46. Or.—In re Harper Irr. Dist., supra.

47. Or.—In re Harper Irr. Dist., supra.

nearly equal in area and population as may be practicable, the motives of the directors in changing the boundaries are immaterial if they have power so to change them,<sup>48</sup> and the elements of both area and population are to be taken into consideration and the question of which element should be considered the more important rests in the discretion given to the directors.<sup>49</sup> The courts should sustain the directors in making a change in boundaries unless a plain abuse of discretion appears from the records.<sup>50</sup>

*Legislative inclusion.* Where the legislature establishes the boundary of the district, it is assumed that it took such evidence and made such inquiry as was necessary in order to determine whether or not the property included by it would be benefited by its action,<sup>51</sup> and in such case, a statute establishing the procedure for the creation of districts by petition of landowners and affording landowners a hearing on the question of exclusion of their lands on the ground of absence of benefits, is inapplicable.<sup>52</sup> The mere fact that the finding of a benefit was made after the boundaries of the irrigation district were fixed does not militate against the validity of such a finding by the legislature.<sup>53</sup> However, the inclusion of land in the irrigation district by the legislature should not be palpably unjust and absurd.<sup>54</sup>

*Incapability of irrigation.* Under some statutes, land which, from any natural cause, cannot be irrigated, may not be included in an irrigation district,<sup>55</sup> and whether a particular tract of land falls within this category is a question which goes to the jurisdiction of the tribunal over such tract,<sup>56</sup>

and may be raised at any time in a proper case,<sup>57</sup> although the inclusion of such land cannot be raised by a collateral attack.<sup>58</sup> The fact that there are comparatively small knolls or sloughs on a tract of land does not necessarily require that the tract be excluded.<sup>59</sup> However, under other statutes, the inclusion of nonirrigable land is not a material defect.<sup>60</sup> In at least one jurisdiction a statutory provision prohibiting the inclusion of land which from any natural cause cannot be irrigated applies only where proceedings are brought for the exclusion of such nonirrigable lands from a legally organized district, and not to the lands included in the district on its formation,<sup>61</sup> the inclusion of such lands does not render illegal and void organizational proceedings had in compliance with all applicable statutory requirements.<sup>62</sup>

*Lands already irrigated.* Land already irrigated by an irrigation company should be excluded.<sup>63</sup> A statute providing that lands which are already irrigated from another source should be excluded from the district has been held not necessarily to mean another system of irrigation works similar to that provided by the district,<sup>64</sup> but also to include irrigation systems which have their origin in wells.<sup>65</sup> Under such a statute land should not be excluded from the district because of a right to obtain water elsewhere for mining purposes,<sup>66</sup> nor does the fact that the landowner had a plan to acquire independent means of irrigation entitle his lands to be excluded from the district.<sup>67</sup> Whether or not land is exempt from inclusion in an irrigation district because it is provided with water by a pump is a question which goes to the jurisdiction of the county board over such land

48. Cal—McKim v. Imperial Irr Dist, 255 P 506, 201 Cal 110

49. Cal—McKim v. Imperial Irr Dist, *supra*

50. Cal—McKim v. Imperial Irr Dist, *supra*

51. Cal—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

52. US—Hydrocarbon Production Co v Valley Acres Water Dist, C A Tex, 204 F 2d 212, certiorari denied 74 S Ct 44, 346 US 825, 98 L Ed 350

53. Cal—Palo Verde Irr Dist v. Seeley, 245 P 1092, 198 Cal 477.

54. Cal—Palo Verde Irr Dist v Seeley, *supra*  
67 C J p 1307 note 16.

55. Neb—Smith v Frenchman-Cambridge Irr Dist, 51 N.W.2d 376, 155 Neb 270.

56. Nev—Smith v. Frenchman-Cambridge Irr. Dist., *supra*—Bird-

wood Irr Dist v. Brodbeck, 29 N W 2d 621, 148 Neb 824—State v Several Parcels of Land, 114 NW 283, 80 Neb 424

57. Neb—Smith v Frenchman-Cambridge Irr Dist, 51 N.W.2d 376, 155 Neb 270—Birdwood Irr Dist v Brodbeck, 29 N.W.2d 621, 148 Neb 824  
67 C J p 1307 note 98

58. Neb—State v Several Parcels of Land, 114 NW 283, 80 Neb 424  
67 C J p 1307 note 99.

59. Neb—Wight v McGuigan, 143 N.W. 232, 94 Neb 358

60. Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546

61. ND—In re Fort Clark Irr Dist of Mercer and Oliver Counties, 48 N.W.2d 741, 78 ND 107.

62. ND—In re Heart River Irr Dist, 49 N.W.2d 217, 78 ND 302  
—In re Fort Clark Irr. Dist of

Mercer and Oliver Counties, 48 N W 2d 741, 78 ND 107

63. Or—Rathfon v Payette-Oregon Slope Irr Dist, 149 P. 1044, 76 Or 606

64. Cal—Harelson v South San Joaquin Irr Dist, 128 P 1010, 20 Cal App 324  
67 C J p 1307 note 3.

65. Cal—Harelson v South San Joaquin Irr Dist, *supra*

#### Pump

Land provided with water by pump for its irrigation may not be included in an irrigation district except on written application or consent of owner thereof.

Neb—Smith v. Frenchman-Cambridge Irr Dist, 51 N.W.2d 376, 155 Neb 270

66. Cal—Hand v. El Dorado Irr Dist, 276 P 137, 97 Cal App 740.

67. Cal—Hand v. El Dorado Irr Dist, *supra*

67 C J. p 1307 note 6.

and which may be raised at any time in a proper case.<sup>68</sup> Realty owned jointly by two irrigation districts may be included within each of the owning districts.<sup>69</sup>

*Public lands, towns, villages, etc.* The organization is not necessarily invalidated by the fact that public lands are included,<sup>70</sup> or excluded,<sup>71</sup> provided all requirements of the federal statutes are met,<sup>72</sup> and under some statutes it has been held that land entered under the federal land laws may be included in the district.<sup>73</sup> Whether or not state-owned school lands may be included in an irrigation district depends on the legislative policy as ascertained from the legislative acts in force when the district is created.<sup>74</sup> Towns, villages, and even cities may be included in an irrigation district, if their gardens, orchards, and other lands are susceptible of irrigation by the system.<sup>75</sup>

*Conservancy districts.* A statutory provision that conservancy districts formed for the protection and conservation of property cannot include a certain designated area has been held not to prohibit the inclusion of part of this area in a conservancy district organized for irrigation only.<sup>76</sup> In the organization of an artesian conservancy district, all land overlying the artesian basin underlying the land of the district should be included.<sup>77</sup> Land embraced within a conservancy district organized primarily for irrigation purposes may be included in a proposed new conservancy district organized

primarily for the purpose of protecting the public and private property from damages resulting from flash floods and in which irrigation is only an incidental purpose.<sup>78</sup>

*Water storage districts.* The word "may," in a statute providing that water storage districts "may include the major portion of the lands situated within two or more district agencies of the state," has been construed not to mean "must."<sup>79</sup>

*Objections to, or applications for, exclusion or inclusion of particular lands.* Under a statute providing that any person whose lands are susceptible of irrigation from the same source shall, on application, be entitled to have such lands included, it has been held that a verbal application is sufficient.<sup>80</sup> The inclusion of a small tract of land which was not included in the petition, or for the inclusion of which the owner did not petition, has been held not to invalidate the organization.<sup>81</sup>

In the absence of an agreement not to have the exclusion of plaintiff's lands determined in such proceedings,<sup>82</sup> a landowner who fails to appear before such a tribunal and make a showing why his lands should be excluded from the district, and who does not appeal in the prescribed manner from the order there issued establishing the district, is bound by its action in that respect.<sup>83</sup>

If a substantial portion of a tract sought to be excluded is properly included in the district, the

68. Neb.—Smith v Frenchman-Cambridge Irr Dist, 51 N W 2d 376, 155 Neb 270

69. Cal.—Oakdale Irr Dist v Calaveras County, App, 283 P 2d 732.

**Lands held in trust**

Where two irrigation districts jointly owned certain realty, such realty from each district was, in limited sense, held in trust for benefit of district's landowners, but inclusion proceedings, by which each district included all of such jointly owned realty within its boundaries, did not constitute a violation of such trust in view of fact that there was not any conveyance or transfer of the realty involved, and the realty remained subject to the same ownership and subject to the same control and operation as it had before the inclusions.

Cal.—Oakdale Irr Dist v Calaveras County, supra.

70. Cal.—Cullen v Glendora Water Co, 39 P 769, 45 P 822, 1047, 113 Cal 503

67 C J p 1306 note 93

71. Utah.—Stevens v Melville, 175 P 602, 52 Utah 524

72. Ariz.—In re Verde River Irriga-

tion and Power Dist. Bonds, 296 P 804, 37 Ariz 580

73. Idaho.—Indian Cove Irr Dist v Prideaux, 136 P 618, 25 Idaho 112, Ann Cas 1916A 1218  
67 C J p 1307 note 96

**Lands not subject to entry**

Lands within irrigation district which were designated as public or which were owned by the United States resettlement administration were not "public lands" subject to entry within federal statute making such land subject to state laws relating to irrigation, and hence were not subject to assessment to pay debts of district, notwithstanding state law making public lands within irrigation district, whether entered or not entered, subject to taxation for irrigation purposes.

Or.—Buell v Jefferson County Court, 152 P 2d 578, 175 Or 402, 155 A L R 1135, rehearing denied 154 P 2d 188, 175 Or 402, 155 A L R. 1135

74. Mont.—Tongue River and Yellowstone River Irr Dist v Hyslop, 96 P 2d 273, 109 Mont 190

**Held not subject to inclusion.**

Mont.—Tongue River and Yellow-

stone River Irr Dist v Hyslop, supra.

75. Cal.—Oakdale Irr Dist v Calaveras County, App, 283 P 2d 732.  
67 C J p 1306 note 91

76. N M.—Cater v Sunshine Valley Conservancy Dist, 274 P 52, 33 N M. 583

77. N M.—Pecos Val Artesian Conservancy Dist v. Peters, 173 P 2d 490, 50 N M 165.

78. N M.—In re Sandia Conservancy Dist, 259 P 2d 577, 57 N M. 413

79. Cal.—Tarpey v. McClure, 213 P 983, 190 Cal 593.

80. Cal.—Central Irr Dist v. De Lappe, 21 P 825, 79 Cal 351.

81. Cal.—Imperial Water Co. No 1 v Board of Sup'rs of Imperial County, 120 P 780, 162 Cal 14

82. Or.—Rathfon v Payette-Oregon Slope Irr Dist, 149 P. 1044, 76 Or. 606

83. Colo.—Andrews v. Lillian Irr Dist, 92 N W. 612, 97 N.W 336, 66. Neb 458

67 C J p 1307 note 11

entire tract must be included unless the portion which is not benefited can be reasonably defined and segregated from the tract <sup>84</sup>

The owner seeking to have his land excluded has the burden of proving the facts warranting its exclusion,<sup>85</sup> but a preponderance of the evidence is sufficient <sup>86</sup>

#### b. Inclusion or Exclusion after Organization

- (a) In general
- (b) Proceedings for inclusion
- (c) Proceedings for exclusion

##### (a) In General

Statutory provisions for the changing of boundaries of an irrigation district after its organization should be liberally construed.

A liberal rule of construction should be adopted in carrying out the provisions of a statute providing for the changing of boundaries of a district

and the annexation of additional territory,<sup>87</sup> although jurisdictional requirements must be substantially met,<sup>88</sup> in the absence of which the action of the board of directors is void and subject to collateral attack <sup>89</sup> The fact that, after the original organization of the district, changes were made in its boundaries does not render the mere name of the district insufficient as an identification, since, if the proceedings to change the boundaries were regular and valid on their face, they are matters of record which can be ascertained by examination <sup>90</sup>

##### (b) Proceedings for Inclusion

There must be a substantial compliance with statutory requirements in order to bring lands within an irrigation district after its organization.

In a proceeding for the inclusion of land in an irrigation district the petition must be sufficient to confer jurisdiction on the board,<sup>91</sup> which ques-

**84.** Cal—San Joaquin Agr Corporation v Board of Sup'rs of Madera County, 8 P 2d 1051, 121 Cal App 468.

67 C J p 1306 note 92

**85.** Nev—In re Reno Press Brick Co, 73 P 2d 503, 58 Nev 164

67 C J p 1308 note 22

**86.** Wyo—In re Washakie Needles Irr. Dist, 76 P 2d 624, 52 Wyo 515

**87.** Cal—Vista Irr Dist v San Diego County, 219 P 2d 793, 98 Cal App 2d 270

67 C J p 1308 note 23

#### Validating acts

Any defect in proceedings by which land owned by irrigation district and located outside its boundaries was included within the district in 1947 with respect to authority of district to itself file the petition for such inclusion was cured by validating acts of 1949 in so far as county and its power to tax such land were concerned.

Cal—Vista Irr Dist v. San Diego County, supra

#### Validity of provision

The provision of the Conservancy District Reclamation Contract Act giving the secretary of interior the same voice that is ordinarily extended to other money lenders or mortgagees regarding any change calculated to increase or diminish acreage which, in part at least, constitutes security for money advanced, in light of purpose of act to permit a conservancy district to avail itself of government aid in constructing its works and irrigation system, is not invalid as an unlawful delegation of legislative power.

N.M.—In re Arch Hurley Conservancy Dist, Hudson Irr Extension, 191 P 2d 338, 52 N.M. 34.

#### Particular terms

In statute providing that in no case shall any land be held in an irrigation district if from any cause it cannot be irrigated thereby, the word "any" land does not mean all lands, and the word "shall" may be construed as "may"

N.D.—In re Heart River Irr Dist, 49 NW 2d 217, 78 N.D. 302

**88.** Cal—People v Cardiff Irr Dist of San Diego County, 197 P 384, 51 Cal App 307

67 C J p 1308 note 24

**89.** Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, Civ App, 128 S.W.2d 535, affirmed 153 S.W.2d 463, 137 Tex 338

#### By original petitioner

A landowner was not precluded from questioning an order of the board of directors of a water improvement district approving his petition to annex land to the district by previous ex parte proceedings to establish validity of district and securities issued by it, where matters involved in proceedings questioning the order had not been determined in the ex parte proceedings, and landowner was not a party thereto

Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, supra

**90.** Cal—Fogg v Perris Irr Dist, 97 P 316, 154 Cal 209

**91.** Colo—People ex rel Dunbar v San Luis Val Water Conservancy Dist, 261 P 2d 704, 128 Colo 270

Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, Civ App, 128 S.W.2d 535, affirmed 153 S.W.2d 463, 137 Tex 338—Grand Lodge of Order of Sons of Hermann in Texas v Curry, Civ App, 108 S.W.2d 574, error refused

67 C J p 1308 note 24 [b].

#### Description of land

(1) In inclusion proceedings, an area contiguous or noncontiguous to water conservancy district may, by petition, be made part of district, and in such petition, it is not the area, but the territory in the area, which must be generally described

Colo—People ex rel Dunbar v San Luis Val Water Conservancy Dist, 261 P 2d 704, 128 Colo 270

(2) Where petition to annex lands to water improvement district failed to describe lands by metes and bounds as provided by statute, the board of directors acquired no jurisdiction to act, and its order attempting to annex such lands to district was void

Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, 153 S.W.2d 463, 137 Tex 338

(3) Term "metes and bounds" as used in statute providing for the annexation of adjacent land to water improvement district meant the boundary lines of land with their terminal points and angles

Tex—Grand Lodge of Order of Sons of Hermann in Texas v Curry, Civ. App., 108 S.W.2d 574, error refused

(4) Fact that petition referred to records which, if pursued, might have ultimately disclosed descriptions by metes and bounds was not sufficient to satisfy express requirement of statute concerning annexation of an existing district

Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, Civ App, 128 S.W.2d 535, affirmed 153 S.W.2d 463, 137 Tex 338

#### Number of petitioners

(1) Under provision of Water Conservancy Act requiring that petition for inclusion of additional areas to

tion is to be determined at the hearing thereon held pursuant to the order of publication.<sup>92</sup> Under statutory provisions to such effect, nonirrigable lands may be included in an existing district even though such lands could not have been embraced within the district on its formation.<sup>93</sup> Where the statutory method of bringing land within an irrigation district is exclusive, such inclusion cannot be effected indirectly by any other method.<sup>94</sup>

An order extending the boundaries of a district amounts to a finding of every fact necessary to the validity of the order,<sup>95</sup> and express findings will not be disturbed if there is evidence to support them.<sup>96</sup> A statutory provision that the board of

directors, to whom a petition for inclusion in an irrigation district is presented, may require as a condition precedent to granting the prayer that the petitioners pay a pro rata share of the bonded indebtedness of the district,<sup>97</sup> and may be waived by the board.<sup>98</sup>

*On appeal*, since a proceeding for the extension of the boundaries of a district is wholly statutory, it has been held that the reduction of the testimony to narrative form does not violate a rule of court providing testimony be presented in question and answer form in equity cases or proceedings of an equitable nature.<sup>99</sup>

an organized conservancy district be signed by not fewer than five per cent of owners of nonirrigated lands "and/or" lands embraced within incorporated limits of a city or town, requirement is satisfied when petition is signed by either five per cent of owners of nonirrigated lands or five per cent of owners of lands within corporate limits of city and town. *Colo—People ex rel Dunbar v San Luis Val Water Conservancy Dist*, 261 P 2d 704, 128 Colo 270.

(2) Requirement of irrigation district law that a petition for inclusion of land might be filed by holders of title representing half or more of any body of land adjacent to boundary of district does not mean that there must be more than one property owner involved.

*Cal—Mariposa County v Merced Irr Dist*, 196 P 2d 920, 32 Cal 2d 467.

#### **Irrigation district as petitioner**

(1) An irrigation district, as holder of title to land located outside its boundaries, may itself petition for the inclusion of such land within the district.

*Cal—Mariposa County v Merced Irr Dist*, supra.

*Vista Irr Dist v San Diego County*, 219 P 2d 793, 98 Cal App 2d 270.

(2) Provisions of Water Code authorizing irrigation district to petition for inclusion in district of land owned by district and located outside its boundaries are not unconstitutional on ground that they permit district to pass on and judge the advisability of its own act, since district has no such personal or private interest as would disqualify it to pass on its own petition for such inclusion. *Cal—Vista Irr Dist v San Diego County*, supra.

#### **Validation of proceedings**

(1) On failure to follow mode created by legislature for inclusion of land within irrigation districts, legislature could, by ratifying that which was done, validate the inclu-

sion proceedings notwithstanding defects in such proceedings.

*Cal—Oakdale Irr Dist v Calaveras County*, App, 283 P 2d 732.

(2) Failure of water district to comply with statutory requirements governing mode of inclusion within its boundaries of reservoir and distributing system was cured by validating act which was thereafter passed by legislature, and effect of such act was to ratify and confirm inclusion of such property within district boundaries, and, therefore, county could not thereafter tax such property after effective date of validating act.

*Cal—Rock Creek Water Dist v Calaveras County*, 283 P 2d 740.

92. *Colo—People ex rel Dunbar v San Luis Val. Water Conservancy Dist*, 261 P 2d 704, 128 Colo 270.

#### **Similar or duplicate petitions**

Under Water Conservancy District Act where petition is filed for inclusion of lands within conservancy district, court is not empowered to determine its jurisdiction until date of hearing fixed in order and published notice, and until full opportunity has been afforded all persons desiring to file similar or duplicate petitions to do so, and when similar and duplicate petitions are filed, all must be considered as if filed contemporaneously with the first petition; hence where on day of hearing petition for inclusion of lands in water conservancy district, the original inclusion petition, together with similar or duplicate petitions theretofore filed by petitioners, contained signatures of owners of various classes sufficient to satisfy requirements of Water Conservancy District Act, court had jurisdiction of persons and subject-matter involved, notwithstanding insufficiency of original petition, with respect to signers, at time of its filing.

*Colo—People ex rel. Dunbar v San Luis Val Water Conservancy Dist*, supra.

#### **Protesting petition**

In proceeding for inclusion of lands in water conservancy district, failure of protesting petition to contain signatures of any owners of irrigated lands in area described in inclusion petition, as required by statute, made it obligatory upon trial court, on day of hearing, to dismiss protesting petition, leaving for court's determination the legal sufficiency of inclusion petition only.

*Colo—People ex rel Dunbar v San Luis Val. Water Conservancy Dist*, supra.

93. *Cal—Mariposa County v Merced Irr Dist*, 196 P 2d 920, 32 Cal 2d 467.

*Rock Creek Water Dist v Calaveras County*, App, 283 P 2d 740—*Oakdale Irr Dist v Calaveras County*, App, 283 P 2d 732.

94. *Neb—In re Birdwood Irr Dist*, Water Division No 1-A, 46 NW 2d 884, 154 Neb 52.

#### **Complaint to enjoin inclusion**

Complaint in a suit to restrain the inclusion of land in the enlargement of the district should state facts sufficient to authorize an injunction.

*Cal—Harbough v Enlarged Baxter Creek Irr Dist*, 207 P 1018, 58 Cal App 134.

67 C J p 1309 note 37.

95. *Mont—In re Extension of Boundaries of Crow Creek Irr Dist*, 207 P 121, 63 Mont 293.

96. *Colo—People ex rel Dunbar v San Luis Val Water Conservancy Dist*, 261 P 2d 704, 128 Colo 270.

97. *US—Nile Irr Dist v Gas Securities Co*, Colo, 248 F 861, 160 CCA 619.

98. *US—Nile Irr Dist v Gas Securities Co*, supra.

99. *Mont—In re Extension and Enlargement of Boundaries of Bitter Root Irr Dist*, Ravalli County, 218 P 945, 946, 67 Mont 436.

## (c) Proceedings for Exclusion

Substantial compliance with statutory requirements is necessary in order to effect the exclusion of particular lands from an irrigation district after its organization

Provision is made in the various jurisdictions for proceedings whereby lands may, in proper cases, be excluded from irrigation districts in existence.<sup>1</sup> Under a statute prescribing the procedure whereby a landowner might obtain the exclusion of his land from the district after its organization, but specifying no time within which such petition for exclusion must be filed, it has been held that participation in the election forming the district,<sup>2</sup> and the fact that an opportunity was given at the hearing to object to the inclusion of the land,<sup>3</sup> do not estop the landowner from subsequently objecting to the boundaries established, although a district bonded indebtedness and a sale of the bonds creating a lien on the land may raise a question of estoppel,<sup>4</sup> but the mere voting of a bonded indebtedness,<sup>5</sup> and the passing of a resolution by the board of directors of the district authorizing the issuance of bonds,<sup>6</sup> before the time of the filing of the petition for exclusion are insufficient to create a lien on the land raising the question of estoppel. A statute requiring the consent of bondholders, if any, to the exclusion of any territory

after organization of the district has been held not to apply to successful bidders on bonds who have been relieved from their offer.<sup>7</sup> Ordinary rules applying to civil actions do not apply to matters governed by provisions of a special statutory proceeding for the exclusion of lands.<sup>8</sup> The following of a statutory procedure for the exclusion of some of the land included in the district does not destroy the identity of the district.<sup>9</sup> Lands included in an irrigation district after its bonded indebtedness was authorized may be excluded on application of the owner when it appears that no irrigation system has been furnished the lands and extension of the system is improbable.<sup>10</sup>

Under a statute to such effect, lands which are not susceptible to irrigation or would not be benefited thereby should, or at least may, be excluded on proper application therefor,<sup>11</sup> and such a statute may be mandatory,<sup>12</sup> but lands which are irrigable should not be excluded on the basis of a petition alleging that they are nonirrigable.<sup>13</sup>

The determination of whether the land sought to be excluded will or will not be benefited by the operations of the district rests in the first instance on the board, not on the landowners,<sup>14</sup> and unless

1. Wyo.—In re Owl Creek Irr. Dist., 253 P.2d 867, 71 Wyo. 30, rehearing denied 258 P.2d 220, 71 Wyo. 30.

2. Cal.—Harelsan v. South San Joaquin Irr. Dist., 128 P. 1010, 20 Cal. App. 324.

Nev.—H. H. Springmeyer Land Development & Live Stock Co. v. Irrigation Dist. No. 1, Carson Valley Unit, Truckee-Carson Project, 251 P. 351, 50 Nev. 80.

3. Cal.—Harelsan v. South San Joaquin Irr. Dist., 128 P. 1010, 20 Cal. App. 324.

4. Cal.—Harelsan v. South San Joaquin Irr. Dist., supra, 67 C.J. p. 1308 note 31.

5. Cal.—Harelsan v. South San Joaquin Irr. Dist., supra.

6. Cal.—Harelsan v. South San Joaquin Irr. Dist., supra.

7. Cal.—Modesto Irr. Dist. v. Tregea, 26 P. 237, 88 Cal. 334, error dismissed 17 S.Ct. 52, 164 U.S. 179, 41 L.Ed. 395.

8. Or.—In re Central Pac. Ry. Co., 25 P.2d 927, 144 Or. 527.

#### Notice of appeal

Landowners who appeared and objected to exclusion of railroad's lands from irrigation district were not adverse parties entitled to notice of appeal to circuit court from order denying petition, and railroad's service

of notice of appeal on secretary of district only was sufficient.

Or.—In re Central Pac. Ry. Co., supra.

9. Cal.—Modesto Irr. Dist. v. Tregea, 26 P. 237, 88 Cal. 334, error dismissed 17 S.Ct. 52, 164 U.S. 179, 41 L.Ed. 395.

10. Utah.—Whitcher v. Bonneville Irr. Dist., 256 P. 785, 69 Utah 510.

11. Idaho.—Nielson v. Board of Directors of Big Lost River Irr. Dist., 117 P.2d 472, 63 Idaho 108.

N.D.—In re Heart River Irr. Dist., 49 N.W.2d 217, 78 N.D. 302.

Or.—In re Central Pac. Ry. Co., 25 P.2d 927, 144 Or. 527.

#### Requisites and sufficiency of petition

##### (1) In general

Idaho.—Nielson v. Board of Directors of Big Lost River Irr. Dist., 117 P.2d 472, 63 Idaho 108.

(2) The statute providing for exclusion from irrigation districts of lands which cannot derive benefit therefrom requires that landowner desiring to have his land excluded from irrigation district shall describe it in his petition filed for that purpose with board of directors of irrigation district.

Idaho.—Nielson v. Board of Directors of Big Lost River Irr. Dist., 117 P.2d 472, 63 Idaho 108.

(3) Petition, alleging that petitioner was successor in interest to one

whose land had previously been decreed to be excluded from irrigation district which wrongfully levied and collected assessments on such land, was not demurrable on ground that petitioner had no legal capacity to sue, that action was barred by statute of limitations, and by laches of petitioner.

Idaho.—Nielson v. Board of Directors of Big Lost River Irr. Dist., supra.

#### Description of excluded and retained lands

Where statute providing for manner of describing lands in petition for exclusion from irrigation district contained no provision that lands must be described by metes and bounds, but required description to be no more definite than that provided by law to be used by assessor in listing lands for taxation, and where board of directors of irrigation district described lands to be retained in district by legal subdivisions of 10 acres, such descriptions were permissible although certain 10 acre tracts retained in district contained portions of nonirrigable lands.

N.D.—In re Heart River Irr. Dist., 49 N.W.2d 217, 78 N.D. 302.

12. Or.—In re Central Pac. Ry. Co., 25 P.2d 927, 144 Or. 527.

13. N.D.—In re Heart River Irr. Dist., 49 N.W.2d 217, 78 N.D. 302.

14. Cal.—Hobe v. Madera Irr. Dist., 274 P.2d 874, 128 Cal.App.2d 9.



there is no evidence to support its conclusion, the determination by the board will not be overruled by the courts<sup>15</sup> An owner's petition for exclusion should not be denied merely on the ground that such exclusion will result in slightly increased costs of maintenance and operation to the objecting landowners<sup>16</sup> Where land has been improperly included in an irrigation district contrary to the express provisions of the statute, the owner is not necessarily required to resort to the statutory procedure for detachment of land from a district, but he may maintain an original action in equity<sup>17</sup>

Under provisions to such effect, an appeal may be taken from a decision of the board of an irrigation district on a petition for exclusion of particular lands from the district,<sup>18</sup> but such appeal must be taken within the time specified in the statute<sup>19</sup> Where the statute so provides, the matter is heard in the appellate court and determined de novo, and the court may enter such order as it deems just and proper<sup>20</sup> An appeal from that part of a judgment which excluded the lands of a landowner has been held to be the equivalent of an appeal from the whole judgment and not to be within a rule that an appeal will not lie from a part of a judgment.<sup>21</sup>

15. Cal—Hobe v Madera Irr Dist, supra

16. Or—In re Central Pac Ry Co, 25 P 2d 927, 144 Or 527

17. Neb—Smith v Frenchman-Cambridge Irr Dist, 51 NW 2d 376, 155 Neb 270

18 ND—In re Heart River Irr Dist, 49 N.W 2d 217, 78 ND 302

**Hearing**

In proceeding for organization of irrigation district, fact district at time of petition for rehearing in Supreme Court was not adverse to permitting exclusion of objectant's land was not ground for rehearing, since exclusion could be had in trial court and all controversy ended

Wyo—Padlock Ranch v Washakie Needles Irr Dist, 61 P 2d 410, 50 Wyo 253

19 ND—In re Heart River Irr Dist, 49 NW 2d 217, 78 ND 302

**When time commences to run**

Action of board of directors of irrigation district in considering petitions for exclusions from district, designating those lands excluded on map, and directing secretary to prepare order to that effect for approval, did not amount to an order, and time for appeal from such order did not begin to run until subsequent meeting at which board signed and dated order for exclusion and entered it on

minutes, and an appeal prior to second meeting would have been premature

ND—In re Heart River Irr Dist, supra

20 ND—In re Heart River Irr Dist, supra

**Evidence dehors the record**

On trial de novo in district court on appeal from order of board of directors of irrigation district, trial court was not limited to consideration of record made before board, but properly received and considered in addition thereto other competent evidence, oral and documentary, relevant and pertinent to the issues

ND—In re Heart River Irr Dist, supra

**Weight of board's findings**

On trial de novo in supreme court on appeal from decision of district court entered on appeal from order of board of directors of irrigation district, retaining in district portions of lands, owners petitioned to leave excluded therefrom, court was required to find facts independently of trial court's findings, but such findings were nevertheless entitled to appreciable weight

ND—In re Heart River Irr. Dist, supra

**Weight and sufficiency of evidence**

In petitions by landowners for exclusion of their lands from irrigation

**§ 319(4). — Proceedings to Determine Validity**

- a In general
- b Time for attacking organization
- c. Evidence

**a. In General**

The question of the validity of the organization of the district can be raised only by those directly interested in, and affected by, the provisions of such plans, in reviewing the organization of a district, each case to a large extent must be governed by its own facts.

The question of the validity of the organization of the district can be raised only by those directly interested in, and affected by, the provisions of such plans<sup>22</sup> Accordingly, a proceeding whereby no relief is sought on behalf of plaintiffs other than to have it adjudged that the proceedings of organization of the irrigation district were void, in the absence of statutory permission, cannot be maintained by private individuals,<sup>23</sup> and a proceeding by the district's directors to test the validity of organization, provided by statute, is exclusive,<sup>24</sup> although the directors refuse to institute it.<sup>25</sup>

A declaration or order establishing or organizing the district may, under proper authority, be re-

district on ground that certain areas of their lands were nonirrigable from natural causes, evidence was sufficient to establish that lands were irrigable and cost of leveling for irrigability was not so high as to make it economically unsound or prohibitive to do so

ND—In re Heart River Irr Dist, supra

21. Mont—In re Extension and Enlargement of Boundaries of Bitter Root Irr Dist, Ravalli County, 218 P 945, 67 Mont 436

67 C J p 1309 note 39

22. Cal—Reclamation Dist No 108 v Ash, 208 P 394, 58 Cal App 238

**Land outside original boundaries**

A person not interested in land lying outside the original boundaries of a proposed irrigation district, but included by the board of supervisors in the district, may not attack the validity of the district because it includes such land, particularly where the land is an insignificant part of the district

Cal—Imperial Water Co No 1 v Board of Sup'rs of Imperial County, 120 P 780, 162 Cal 14

23. Utah—Surrage v McKay, 206 P. 722, 60 Utah 117.

24. Utah—Surrage v McKay, supra. Confirmation proceedings see infra § 319 (5)

25. Utah—Surrage v. McKay, supra.

viewed on appeal<sup>26</sup> or by certiorari.<sup>27</sup> Under a constitutional provision empowering the courts to entertain writs of review it has been held that a statute providing that a finding of the board of supervisors in favor of the genuineness and sufficiency of the petition and notice should be conclusive against all persons except the state on suit instituted by the attorney-general did not limit the determination of the validity of the formation of the district to quo warranto proceedings by the attorney-general.<sup>28</sup> A statute purporting to limit all inquiry into the action of the board of supervisors in forming the district is unavailing to prevent such inquiry where that board has proceeded without jurisdiction.<sup>29</sup> When it appears at any stage of the proceedings that the county court, in the proceedings to organize the district, has acted without jurisdiction, and the proceedings are subject to review, a duty has been held to devolve on the court to set aside the proceedings on its own motion,<sup>30</sup> to purge the record of informalities<sup>31</sup> and to refuse to proceed further,<sup>32</sup> although the defect has not been challenged in a formal way.<sup>33</sup>

In reviewing proceedings for the organization

of irrigation districts, each case to a large extent must be governed by its own facts.<sup>34</sup> The action or decision objected to, or appealed from, will not be disturbed in the absence of error in the organizational proceedings.<sup>35</sup> Where there has been a radical change in the fact situation between the time of the order establishing the district and the time of the appeal, the appellate court may remand the proceeding for further consideration in the light of the existing circumstances.<sup>36</sup>

**Proof of publication of petition and notice.** If there is proof of the publication of the petition and notice reasonably sufficient to satisfy the board of supervisors, its conclusion of its sufficiency will not be disturbed because additional proof or more satisfactory proof might have been presented.<sup>37</sup>

**Estoppel.** An owner who signed the petition for organization of the district,<sup>38</sup> and who paid district taxes on his land without protest,<sup>39</sup> and who took no appeal from a judgment adjudging the validity of the district is estopped from attacking the validity of the district. A proceeding to compel an irrigation district to comply with the law does not admit the existence of the district

26. Wyo.—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

#### Decisions appealable

(1) The declaration by the county court that the district "has been duly and legally incorporated" is a judicial declaration which, if erroneous, may be reviewed by appeal.

Or.—Smith v Hurlburt, 217 P. 1093, 108 Or 690

(2) In proceedings for organization of irrigation district, appeal from order organizing district was not required to be dismissed because notice thereof was given before final order entered in the cause, where final order was merely an amendment of the original order correcting an honest mistake and no one was misled.

Wyo.—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

#### Attempted abrogation of right

The provision of Water Conservancy Act abrogating right of appeal from a judgment allowing or dismissing petition seeking creation of water conservancy district violates constitutional provision giving right of appeal to supreme court from all final judgments of district court, but the sections of the act concerning acts of district board, only duty in respect to which district court has to perform being to sign orders of board, which is a ministerial duty, are not

invalid because of failure to provide for appeal from district board.

Utah.—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55

27. Cal.—Security-First Nat Bank v Board of Sup'rs of Riverside County, 26 P 2d 862, 135 Cal App 208

#### Incomplete return

Where return to writ of certiorari to review proceedings before board of supervisors in organization of irrigation district was incomplete, order requiring supplemental return was proper.

Cal.—Security-First Nat Bank v Board of Sup'rs of Riverside County, supra

#### Matters not reviewable

Matter of canvassing vote at election for organization of irrigation district, declaring result of election, and declaring district organized, held not reviewable on certiorari to review proceedings of board of supervisors in matter of organization of drainage district.

Cal.—Security-First Nat Bank v Board of Sup'rs of Riverside County, supra

28. Cal.—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254.

29. Cal.—Miller & Lux v Board of Sup'rs of Madera County, supra

30. Or.—William Hanley Co v Harney Valley Irr Dist No. 1, 180 P. 724, 182 P. 559, 93 Or 78.

31. Or.—William Hanley Co v Harney Valley Irr Dist No. 1, supra

32. Or.—William Hanley Co v Harney Valley Irr Dist No. 1, supra

33. Or.—William Hanley Co. v Harney Valley Irr Dist No. 1, supra

34. Wyo.—In re Washakie Needles Irr Dist, 76 P 2d 624, 52 Wyo 515 —In re Washakie Needles Irr Dist, 76 P 2d 617, 52 Wyo 518

#### 35. Error not shown

In proceeding for organization of irrigation district permitting files and documents to be withdrawn and changing of name of irrigation district from "Owl Creek" to "Washakie Needles Irrigation District" was not error where proceedings were the same and continuous and could be considered as having taken place in the same case.

Wyo.—Padlock Ranch v Washakie Needles Irr Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

36. Wyo.—In re Washakie Needles Irr. Dist, 76 P 2d 617, 52 Wyo 518

37. Cal.—Miller & Lux v. Board of Sup'rs of Madera County, 5 P 2d 612, 118 Cal App 416

38. U.S.—Tomich v Union Trust Co., CCA Mont, 31 F 2d 515 67 C J p 1309 note 51

39. Colo.—Montezuma Valley Irr. Dist v. Johnson, 131 P 265, 54 Colo. 400—Montezuma Valley Irr Dist v. Longenbaugh, 131 P. 262, 54 Colo. 391.

as a corporation, so as to preclude determining its de jure existence in a direct attack to review the validity of the order of the county board of supervisors fixing its boundaries and ordering an election to determine whether or not it should be incorporated<sup>40</sup>

### b. Time for Attacking Organization

An attack on the organization must be made within the time provided by statute.

The legislature has power to limit the right to assail the regularity of the formation or organization of a district, provided a reasonable time is given within which to bring an action for that purpose<sup>41</sup>. A statutory provision that, unless the due and lawful organization of the district shall have been questioned by proceedings in quo warranto instituted within one year, the district shall conclusively be deemed to be legally and regularly organized has been held to relate to matters pertaining to the formation and organization of the district,<sup>42</sup> and not to substantive rights which might arise under a statutory proviso that lands already irrigated before the passage of the act should be exempt from the operation of the law<sup>43</sup>. A curative act prohibiting the bringing of any action attacking the organization of a district cannot cure a want of jurisdiction over an individual owner so as to prevent such landowner from setting aside the judgment including his property in the district<sup>44</sup>.

### c. Evidence

In the absence of a statute to the contrary, the common-law rules of evidence apply in judicial proceedings passing on the validity of the organization of the district.

In the absence of a statutory rule to the contrary, the common-law rules of evidence apply with respect to the kind of evidence by which any fact at issue in the proceedings to organize the district may be established in a court of justice.<sup>45</sup>

So, in the absence of statutory provision as to the effect as evidence of the action of the board of supervisors on the petition, facts showing that the board had jurisdiction must be proved by competent evidence<sup>46</sup>. A declaration by the board that a satisfactory petition had been presented, even though such declaration was spread on their records, is not competent evidence in the proceeding, since it is only hearsay<sup>47</sup>. The report of the state engineer on the feasibility of the project,<sup>48</sup> the certificate of acknowledgment,<sup>49</sup> or the affidavit of the petitioner<sup>50</sup> may constitute evidence in proceedings to review the action of the board. On writ of review from an order of a board of supervisors denying a petition to establish an irrigation district, the investigation is limited to the evidence before that board in determining whether it had any discretion to dismiss the petition<sup>51</sup>. The determinations of the board on questions of weight of evidence and credibility of witnesses are conclusive<sup>52</sup>. However, there must be some sort of evidence or proof, not only as to the allegations of the petition<sup>53</sup> but also as to the sufficiency of the signatures thereto,<sup>54</sup> or the order for the organization of the district will be annulled, and, if the evidence is insufficient, the court may remand the proceeding for the taking of additional testimony<sup>55</sup>.

### § 319(5). — Confirmation Proceedings

In some jurisdictions, provision is made for the institution of confirmation proceedings within a limited time after organization of the district.

The statutes sometimes provide for a judicial proceeding, to be instituted within a limited time, to test the validity of the organization of an irrigation district, in which it is the duty of the court to examine into, and decide on, the legality and sufficiency of each essential step in the organization. These proceedings are proceedings in rem,<sup>56</sup> the object and purpose of which are to bind the state as well as all others with respect to all the pro-

40 Cal—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

41 Utah—Horn v. Shaffer, 151 P 555, 47 Utah 55

42. Utah—Horn v Shaffer, supra

43. Utah—Horn v Shaffer, supra 67 C J p 1312 note 2

44. Cal—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

Mont—Scilley v. Red Lodge-Rosebud Irr Dist, 272 P. 543, 83 Mont 282

45 Cal—In re Bonds of Madera Irr. Dist, 28 P 272, 92 Cal 296, 27 Am SR 106, 14 L R A 755 67 C J p 1309 note 54.

46. Cal—In re Bonds of Madera Irr Dist, supra. 67 C J p 1310 note 55

47. Cal—In re Bonds of Madera Irr Dist, supra

48 Cal—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

49. Cal—Miller & Lux v Board of Sup'rs of Madera County, supra.

50. Cal—Miller & Lux v Board of Sup'rs of Madera County, supra

51. Cal—Chambers v Board of Sup'rs of Tehama County, 207 P 288, 57 Cal App 401.

52 Cal—Chambers v Board of Sup'rs of Tehama County, supra 67 C J p 1310 note 61

53 Cal—Miller & Lux v Board of Sup'rs of Madera County, 208 P 304, 189 Cal 254

54. Cal—Miller & Lux v Board of Sup'rs of Madera County, supra.

55. Wyo—Padlock Ranch v. Wash-akie Needles Irr. Dist, 60 P 2d 819, 50 Wyo 253, rehearing denied 61 P 2d 410, 50 Wyo 253

56. Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, 153 SW 2d 463, 137 Tex. 338 67 C J p 1310 note 65.

ceedings for the organization of the district,<sup>57</sup> its boundaries,<sup>58</sup> and to set at rest at an early date the legal existence of the district.<sup>59</sup> It is the duty of the court to examine every question presented by the record, whether or not discussed in the briefs.<sup>60</sup> Where it appears to the court that the district contains some lands not benefited, the court has jurisdiction to exclude such lands.<sup>61</sup> The court is justified in refusing to approve organization proceedings when no feasible plan of irrigation is presented.<sup>62</sup> Where the organization has already been confirmed, an application for a reconfirmation of all proceedings made in connection with a proceeding for confirmation of an assessment does not waive any benefits secured to the district by the first confirmation.<sup>63</sup>

*Limitations.* Suits to attack the validity of confirmation proceedings may be barred by limitations.<sup>64</sup> When the bar of the statute of limitations appears on the face of the bill, the statute, or objections in analogy to it, on the ground of laches, may be taken advantage of by demurrer, as well as by plea.<sup>65</sup>

*Institution of proceedings.* The directors of an irrigation district may bring these proceedings.<sup>66</sup> If the district officers do not move to have the proceedings for organization confirmed within the statutory period of limitations for such proceedings, anyone interested may, by proper action, have the question as to the legality of the organization determined.<sup>67</sup> A statute providing that the directors of the district "may" institute confirmation proceedings has been construed as permissive rather than mandatory.<sup>68</sup>

*Petition.* Under a statutory provision that the petition for confirmatory proceedings shall state

generally that the district was duly organized, it is unnecessary for the petition to allege that the order establishing the district was filed with the county clerk as it was required to be by statute.<sup>69</sup> A petition and notice asking for the confirmation of the proceedings to issue and sell the bonds have been held sufficient to support a decree confirming the proceedings to organize the district, although such confirmation was not asked.<sup>70</sup>

*Notice.* Since confirmatory proceedings are proceedings in rem, personal service need not be made on the landowners in the district to render a judgment of confirmation binding as against them,<sup>71</sup> constructive service being sufficient to give every person interested his day in court,<sup>72</sup> and to give the court jurisdiction of the person and subject matter.<sup>73</sup> The fact that portions of a notice originally typewritten were erased and rewritten with pen does not invalidate the notice.<sup>74</sup>

*Evidence.* Where the statutory power of the court is judicially to examine the proceedings of the board conducting the hearing it has been held that the right to review is limited to the record made by the board.<sup>75</sup> This does not mean that the findings of fact made by the board may not be reviewed in any manner by the reviewing court,<sup>76</sup> but that such findings can be reviewed only on the evidence introduced before the board.<sup>77</sup> Adjournments of the board may be shown by parol, where such showing is supplementary and not contradictory to the record.<sup>78</sup> Under a statute providing that the county court shall make a determination of the facts requisite to the organization of the district, which shall be conclusive evidence of the facts found, a full and complete order of the county court determining such facts is prima facie sufficient in the circuit court to establish such facts.<sup>79</sup>

57. Tex.—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, supra.

67 C J p 1310 note 66

58. Idaho—Progressive Irr Dist v Anderson, 114 P 16, 19 Idaho 504

59. Idaho—Progressive Irr Dist v Anderson, supra.

60. Or.—Board of Directors of Medford Irr Dist v Hill, 190 P 957, 96 Or 649

61. Idaho—Progressive Irr Dist v Anderson, 114 P 16, 19 Idaho 504

62. Neb.—In re Gothenburg South Side Irr Dist, 202 NW 452, 113 Neb 99.

63. Idaho—Progressive Irr Dist v Anderson, 114 P. 16, 19 Idaho 504

64. U.S.—Miller v Perris Irr Dist, C C Cal., 85 F 693.

65. U.S.—Miller v Perris Irr Dist, supra.

66. Or.—Petition of Board of Directors of North Unit Irr. Dist, 178 P 186, 91 Or 33

67. Idaho—Progressive Irr Dist v Anderson, 114 P 16, 19 Idaho 504

68. Utah—Surrage v. McKay, 206 P 722, 60 Utah 117

69. Wash.—In re Peshastin Irr Dist, 200 P 88, 116 Wash 440

70. Cal.—Fogg v Perris Irr Dist, 97 P 316, 154 Cal 209

71. Idaho—Smith v Progressive Irr Dist, 156 P 1133, 28 Idaho 812  
67 C J p 1311 note 82

72. Idaho—Knowles v New Sweden Irr Dist, 101 P. 81, 16 Idaho 217, 235

73. Idaho—Knowles v New Sweden Irr Dist, supra

74. Wash.—Hanson v Kittitas Reclamation Dist, 134 P 1083, 75 Wash 297

75. Wash.—In re Board of Directors of Wenatchee Reclamation Dist, 157 P 38, 91 Wash 60

76. Wash.—In re Board of Directors of Wenatchee Reclamation Dist, supra

77. Wash.—In re Board of Directors of Wenatchee Reclamation Dist, supra  
67 C J p 1311 note 88

78. Wash.—In re Board of Directors of Wenatchee Reclamation Dist, supra.  
67 C J p 1311 note 89

79. Or.—Board of Directors of Payette-Oregon Slope Irr. Dist v

*Effect.* Since a confirmation proceeding is in the nature of a proceeding in rem and its object is to determine the legal status of the district, in the absence of fraud, perjury, or bribery,<sup>80</sup> a decree confirming the proceedings is final and conclusive<sup>81</sup> unless an appeal is taken within the time prescribed.<sup>82</sup> However, a confirmation decree is not res judicata as to matters jurisdictional,<sup>83</sup> such as the proper description of the lands.<sup>84</sup> Under a statute giving the court power to "examine and determine the legality and validity of, and approve and confirm," it has been held that the court in confirmation proceedings is without power to grant an injunction against those who might not have seen fit to question the court's action in that proceeding<sup>85</sup> or against those on whom there had been no service except by the publication of the notice directed by the court.<sup>86</sup>

On appeal, in the absence of error, the judgment of confirmation will be affirmed.<sup>87</sup>

### § 319(6). — Collateral Attack

Unless the organization of the district is void on its face, it is not subject to collateral attack.

Unless the order creating the district, or the confirmation of such order, is void on its face,<sup>88</sup> it is not subject to collateral attack,<sup>89</sup> particularly under a statutory prohibition of such an attack,<sup>90</sup> and it can be reviewed only by the method pointed out by the statute.<sup>91</sup> However, it has been held that a landowner whose lands have been included in such a district without his consent and without giving him notice,<sup>92</sup> or without giving him an opportunity to be heard on the question of benefits to his land,<sup>93</sup> may attack the validity of the judg-

ment declaring the organization of the district, where his attack does not go to the existence of the corporation by seeking to destroy it, but goes only to the validity of the judgment in so far as it affects such lands and seeks to take and hold them without due process of law.

*De facto districts.* Even though not regularly organized, an irrigation district acting under forms of law and unchallenged by the state is at least a de facto public corporation and its officers are de facto officers, so that the legality of its organization cannot be collaterally attacked by any private individual,<sup>94</sup> and for which reason its property is not subject to a mechanic's lien.<sup>95</sup> The fact that the electors of the district have voted for incorporation does not render it too late to inquire by a writ of review into the validity of the order calling the election.<sup>96</sup> One who bids for bonds on condition that they be legal and valid can question any proceeding which was so defective as to invalidate the bonds, as discussed *infra* § 331, but he cannot attack the validity of the organization of the district, if the district had a de facto existence when it issued the bonds.<sup>97</sup>

### § 319(7). — Similar Districts

Rules governing the organization of irrigation districts may be applied, in proper cases, to proceedings for the organization of similar districts.

Various rules discussed *supra* §§ 319(1)-319(6), have been applied to the organization of districts similar to irrigation districts although otherwise denominated. Thus, it has been held that the petition for organization of a public utility district need not describe the boundaries of the district by metes and bounds.<sup>98</sup> In the absence of statutory

Peterson, 128 P 837, 129 P 123, 64 Or 46

80. Cal—People v Perris Irr Dist, 76 P 381, 142 Cal 601

81. Nev—In re Walker River Irr Dist, 195 P 327, 44 Nev 321, 67 C J p 1311 note 93

82. Cal—Palmdale Irr Dist v Rathke, 27 P 783, 91 Cal 538  
Idaho—Knowles v New Sweden Irr Dist, 101 P 81, 16 Idaho 217, 235

83. Utah—Argyle v Bonneville Irr Dist, 280 P 722, 74 Utah 480

84. Utah—Argyle v. Bonneville Irr Dist, *supra*

85. Cal—In re Bonds of Madera Irr Dist, 28 P 272, 675, 92 Cal 296, 27 Am SR 106, 14 L R A 755

86. Cal—In re Bonds of Madera Irr Dist, *supra*

87. Idaho—Sunnyside Irr. Dist v Stephens, 120 P 169, 21 Idaho 94

88. Mont—Scilley v Red Lodge-Rosebud Irr Dist., 272 P 543, 83 Mont 282

67 C J p 1312 note 4

89. Kan—Mizer v. Kansas Bostwick Irr Dist. No. 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed. 1355, 67 C J p 1312 note 5

#### Nonjurisdictional defect

Failure to verify petition for organization of irrigation district is not a jurisdictional defect and is not available on collateral attack in proceeding by irrigation commissioners for authority to issue warrants

Wyo—In re Bear River Irr Dist, 65 P 2d 686, 51 Wyo 343

90. Ariz—Mitchell v. Power, 255 P. 481, 32 Ariz 1

91. Or—Northern Pac. Ry Co v.

John Day Irr Dist, 211 P. 781, 106 Or 140

67 C J p 1312 note 7.

92. Mont—Scilley v Red Lodge-Rosebud Irr. Dist., 272 P 543, 83 Mont 282

67 C J p 1312 note 8.

93. Mont—Scilley v. Red Lodge-Rosebud Irr Dist, *supra*

94. US—Tulare Irr Dist v Shepard, Cal, 22 S Ct. 531, 185 U.S 1, 46 L Ed 773

67 C J p 1312 note 10

95. Colo—Fisher v Pioneer Const Co, 163 P 851, 62 Colo 538

96. Cal—Miller & Lux v. Board of Sup'rs of Madera County, 208 P. 304, 189 Cal 254

97. Cal—Metcalf v. Merritt, 111 P. 505, 14 Cal App 244

98. Cal—Randolph v. Stanislaus County, 186 P 625, 44 Cal App 322.

provision so requiring, such a district need not be composed of contiguous units of land.<sup>99</sup>

**Electrical districts.** A statute providing for the creation of an assessment district for the purpose of supplying power to users primarily for the purpose of pumping water for the irrigation of arid lands is a valid exercise of legislative power.<sup>1</sup> It has been held essential to the validity of a statute creating an electrical district that a hearing be given on the question of benefits.<sup>2</sup> Where authorized by statute, the county board of supervisors may include or exclude lands in the organization of the district on a proper showing being made.<sup>3</sup> Where the board of supervisors accepted a petition for the organization of an electrical district, took evidence thereunder, and treated it in all ways as sufficient, there is no basis for an objection that the board did not find the petition sufficient.<sup>4</sup>

**Improvement districts** The formation of an improvement district within an irrigation district, under appropriate statutory provision, has been held not to be the taking of private property for the benefit of private parties,<sup>5</sup> since the use of water in such a manner is a public use.<sup>6</sup>

## § 320. Officers and Employees

- a. In general
- b. Election
- c. Duties and liabilities
- d. Meetings
- e. Recall or removal
- f. Employees

### a. In General

Officers of an irrigation district are public officers.

They must possess any qualifications set forth in the governing statutes.

The officers of an irrigation district are public officers,<sup>7</sup> although they are not necessarily state officers,<sup>8</sup> and they must possess the statutory qualifications, such as residence or ownership of property in the district, etc.,<sup>9</sup> although it has been held that, where a person acted as the collector of an irrigation district in a sale under an assessment, and his right to the office was not questioned, the proceedings were not invalid because, by reason of his residence, he might have been disqualified to become a de jure officer.<sup>10</sup> The board of directors of an irrigation district is not an administrative agency, since it lacks requisite of state-wide jurisdiction, and the rules of appellate procedure governing such agencies do not apply in irrigation matters.<sup>11</sup>

**Officers as trustees.** The officers of an irrigation district who must provide for the levy and collection of a tax sufficient to meet the interest and principal on irrigation bonds, and the county treasurer who is made the custodian of the funds of the district, stand in the relation of trustees for the bondholders of the district.<sup>12</sup>

**Term of office, qualification** The terms of office must not exceed a constitutional limitation for the terms of such officers.<sup>13</sup> A statute providing that district officers shall hold over on the expiration of their terms until their successors shall qualify does not render vacant such offices, so that where a general irrigation election at which such officers are voted on is declared void, the incumbents continue to hold office for the new term commencing on the expiration of the old term.<sup>14</sup> Moreover, such

99. Cal—Randolph v. Stanislaus County, *supra*.

1. Ariz—Brown v. Electrical Dist No 2, Pinal County, 223 P 1068, 26 Ariz 181  
67 C J p 1313 note 18.

2. Ariz—Kinne v. Burgess, 211 P. 573, 24 Ariz 463

3. Ariz—Brown v. Electrical Dist No 2, Pinal County, 223 P 1068, 26 Ariz 181

4. Ariz—Brown v. Electrical Dist No 2, Pinal County, *supra*

5. Cal—Moore v. Thornburg, 284 P 218, 208 Cal 657

6. Cal—Moore v. Thornburg, *supra*.

7. US—Northport Irr Dist. v. Henry Wilcox & Son, CCA Neb, 131 F 2d 113

Neb—Loup County v. Rumbaugh, 38 N.W 2d 745, 151 Neb 563.

Or—Twohy Bros Co v. Ochoco Irr Dist, 210 P 873, 108 Or 1.  
67 C J p 1313 note 25

8. Cal—Rose v. Superior Court in and for Imperial County, 252 P 765, 80 Cal App 739  
67 C J p 1313 note 26

9. Tex—Schrock v. Hylton, Civ App, 133 S.W 2d 175  
67 C J p 1313 note 27.

### Length of residence

Candidates for positions of supervisor of, and of assessor and collector of taxes for, fresh water supply district who resided within the district were eligible for the positions even though they had not resided within the district six months next preceding the election as required by general election law, in view of special statutes relating to the fresh water supply districts

Tex—Schrock v. Hylton, *supra*.

10. Cal—Baxter v. Dickinson, 68 P 601, 136 Cal 185.

11. ND—In re Heart River Irr Dist, 49 N.W 2d 217, 78 ND 302

12. Mont—State ex rel Central Auxiliary Corp v. Rorabeck, 108 P 2d 601, 111 Mont 320

13. Tex—White v. Fahrang, Civ App, 212 S.W 193, error refused  
67 C J p 1313 note 29

14. Cal—Holbrook v. Board of Directors of Imperial Irr Dist, 64 P 2d 430, 8 Cal 2d 158

### Tie vote

Where election for supervisor of and assessor and collector of taxes for fresh water supply district resulted in tie vote, the incumbents were authorized to continue to perform the duties of their office until their successors should be duly elected and qualified

Tex—Schrock v. Hylton, Civ App, 133 S.W 2d 175.

incumbents are not up for election at the next general irrigation election where the election is held before the expiration of the new term so begun<sup>15</sup> A statute requiring a person, if elected to be a director, to file an oath of office and bond before the commencement of his term has been held not to apply to a person claiming to have been elected to the office when another is in possession of the office under a claim of election and the right has not yet been tried<sup>16</sup>

**Compensation** The amount of compensation to be paid irrigation district officers is usually a matter of statutory regulation<sup>17</sup> An officer, having no jurisdiction outside his own district, cannot claim compensation for services performed in some other district<sup>18</sup>

### b. Election

The election of officers of an irrigation district is usually governed by a special statute, and not by the general election statute. The right to contest an election is purely statutory.

Although there is authority to the contrary,<sup>19</sup>

the elective franchise, in irrigation matters, is a privilege,<sup>20</sup> not governed by the general election laws of the state,<sup>21</sup> and one who would enjoy it must comply strictly with all the requirements which the legislature prescribes as a prerequisite to the right to vote,<sup>22</sup> and must possess all the qualifications,<sup>23</sup> otherwise he may not have his vote counted<sup>24</sup> Under some statutes it has been held that directors may be elected at large from the district<sup>25</sup> The secretary of an irrigation district,<sup>26</sup> or the presiding officers at a district election,<sup>27</sup> under some statutes have no authority to determine arbitrarily that certain persons are not entitled to vote, and the proper remedy for preventing unqualified persons from voting is by action in advance to purge the rolls<sup>28</sup> or by a challenge<sup>29</sup>

**Ballots** Under some statutes it has been held that, in order that a candidate for the office of director may get his name on the official ticket prepared by the election officials, it is requisite that he be properly nominated by a petition or an assembly of electors,<sup>30</sup> but this is only permissive,<sup>31</sup> and

15. Cal—Holbrook v Board of Directors of Imperial Irr Dist, 64 P 2d 430, 8 Cal 2d 153

16. Ariz—Post v Wright, 289 P 979, 37 Ariz 105

17. Colo—Board of Com'rs of Otero County v Otero Irr Dist, 139 P 546, 56 Colo 515  
67 C J p 1314 note 55

18. Colo—Fravert v Mesa County, 88 P 873, 39 Colo 71

19. Idaho—Pioneer Irr Dist v Walker, 119 P 304, 20 Idaho 605  
67 C J p 1313 note 31

20. Colo—People v. Milan, 5 P 2d 249, 89 Colo 556

21. Tex—Schrock v Hylton, Civ App, 133 S W 2d 175  
67 C J p 1313 note 33

#### Absence of poll list

Election of supervisors of, and assessor and collector of taxes for, fresh water supply district was not void for failure of election officers to have poll list at place of voting as prescribed in general election law Tex—Schrock v Hylton, supra

#### Recount of votes

Irrigation district is not a county or a city within meaning of general election laws confining election contests to any election held therein so that losing candidate for office of director of an irrigation district was confined to remedy of recount of votes as provided in Water Code

Cal—Hunt v Superior Court in and for Stanislaus County, 209 P.2d 411, 93 Cal App 2d 504.

22. Tex—Schrock v Hylton, Civ App, 133 S W 2d 175  
67 C J p 1313 note 34

#### Statute construed

Statute pertaining to irrigation ditch elections merely provides two alternative methods of voting and does not destroy any property rights recognized by prior statute defining rights or ownership in public or private ditches

N M—Holmberg v Bradford, 244 P 2d 785, 56 N M 401

23. Colo—People v Milan, 5 P 2d 249, 89 Colo 556

**Persons, who were not residents** of fresh water supply district at time of election of district supervisors and assessor and collector of taxes, were not entitled to vote at the election

Tex—Schrock v Hylton, Civ App, 133 S W 2d 175

24. Colo—People v. Milan, 5 P 2d 249, 89 Colo 556

25. Cal—Abbey v Board of Directors of Honcut-Yuba Irr Dist, 209 P. 709, 58 Cal App 757

26. Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

#### Names on assessment roll

Statute requiring names of voters at irrigation district elections in districts of over five hundred thousand acres to have appeared on last preceding assessment roll as holders of title or evidence of title to realty

held not to authorize secretary of district to determine arbitrarily that certain deeds were void or, in preparing roster of voters, to mark names of particular grantees with asterisks and certify that only persons whose names were not so marked were qualified to vote

Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v. Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

27. Tex—Schrock v Hylton, Civ App, 133 S W 2d 175.

#### Absence of poll list

Presiding officers at fresh water supply district election are without authority to deprive a qualified voter who has subscribed to prescribed oath affecting elections in such district, of right to vote, merely because of absence of poll list at place of voting

Tex—Schrock v Hylton, supra

28. Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

29. Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

30. Or—Henricksen v Clark, 201 P 1071, 102 Or 250

31. Or—Henricksen v. Clark, supra

the voter has the right to write in the name of, and vote for, any person he chooses<sup>32</sup> The failure of the ballot to designate the term of office for which the candidates were nominated, where there are candidates for terms of various durations, has been held to render void for uncertainty not only the returns made by the election officials<sup>33</sup> but the ballots as cast also<sup>34</sup> Specially marking some but not all of the ballots in an irrigation district election has been held to be unauthorized and illegal<sup>35</sup>

**Canvass.** Under a statute providing that the canvassing board shall open the returns and estimate the vote of the district for each person voted for and declare the result thereof, it has been held that the board had no power voluntarily to go behind the returns of the election as certified by the precinct officers and to pass on the original ballots<sup>36</sup>

**Certificate of election** Where new directors have been elected the mere fact that the district officers are suspicious as to the legality of the election has been held not to authorize them to try to extend their own tenure of office,<sup>37</sup> or to withhold certificates of election from the new directors,<sup>38</sup> without making any attempt to show how or why the election was invalid.

**Contest of election** The right to contest an election is purely statutory, and, unless specifically provided for, such contests cannot be had<sup>39</sup> In an election contest, the burden is on the contestants to allege and prove that a different result would be reached by rectifying alleged irregularities in the conduct of the election<sup>40</sup> In contesting the election of an irrigation director it has been held that contest must be against him in his official capacity,<sup>41</sup>

and a contest against private parties wholly disconnected with the district is ineffectual<sup>42</sup> A statement of contest which fails to show that the contestant was a qualified elector at the time of the election has been held to be fatally defective,<sup>43</sup> and, being jurisdictional,<sup>44</sup> incapable of amendment after the time limit permitting contest.<sup>45</sup> In an election contest proceeding it has been held that voters, not claiming privilege, could testify as to for whom they voted.<sup>46</sup> Under a statute providing that the contestant, if successful, may be awarded damages, an award of damages which is not excessive will be sustained<sup>47</sup> On appeal where the county court had jurisdiction, defects relating to procedure cannot be reviewed in a contest of election thereunder by those not making objection in the county court<sup>48</sup>

### c. Duties and Liabilities

Officers of an irrigation district are subject to the duties and liabilities imposed on them by law.

Officers of an irrigation district are subject to the duties and liabilities imposed on them by law.<sup>49</sup> When the district has been organized and the boundaries determined, its officers cannot arbitrarily assume the management of one portion of the district and reject that of another,<sup>50</sup> and mandamus will lie to compel them to perform their duty under the law<sup>51</sup> The officers of an irrigation company are personally liable for funds which they assess and collect to pay interest on bonds and fail to use for that purpose<sup>52</sup> The sureties on the bond of a district tax collector are not liable for funds which were misappropriated after the collector had actually turned over the funds to the district treasurer, although the funds were not properly receipted<sup>53</sup> Under a statute providing for

32. Or—Henricksen v Clark, supra  
33. Wash—Edes v Haley, 162 P 50, 94 Wash 232

34. Wash—Edes v. Haley, supra

35. Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

Some ballots stamped "cast by special permission" were unauthorized

Cal—Barry v Board of Directors of Imperial Irr Dist, 46 P 2d 298, 7 Cal App 2d 412, followed in McIver v. Board of Directors of Imperial Irr Dist, 46 P 2d 307, 7 Cal App 2d 754

36. Wash—Edes v. Haley, 162 P 50, 94 Wash. 232

37. Colo—Lockard v. People, 250 P 152, 80 Colo 31.

38. Colo—Lockard v People, supra

39. Idaho—Hertle v. Ball, 72 P 953, 9 Idaho 193  
67 C J p 1314 note 46

### Contest in superior court

Elections in irrigation districts are governed by the provisions of the Water Code, and not by provisions of the Election Code, and, therefore, since no provision is made in the Water Code for election contests in superior courts, superior court had no jurisdiction of proceedings to contest election of directors of irrigation district

Cal—Costa v Banta, 219 P 2d 478, 98 Cal App 2d 181

40. Tex—Schrock v Hylton, Civ App, 133 S W 2d 175

41. Or—Henricksen v. Clark, 201 P 1071, 102 Or 250  
67 C J p 1314 note 47.

42. Or—Henricksen v Clark, supra  
43. Ariz—Schahrer v Bell, 271 P 715, 34 Ariz 334

44. Ariz—Schahrer v Bell, supra

45. Ariz—Schahrer v Bell, supra.

46. Ariz—Post v Wright, 289 P. 979, 37 Ariz 105

47. Ariz—Post v Wright, supra.  
67 C J p 1314 note 53

48. Or—Links v Anderson, 168 P. 605, 1182, 86 Or 508

49. Wash—State ex rel Pryor v. Paul, 104 P 2d 745, 5 Wash 2d 90.

50. Utah—Harris v. Tarbet, 57 P 33, 19 Utah 328

51. Utah—Harris v. Tarbet, supra

52. U S—Thompson v Emmett Irr Dist, Idaho, 227 F 560, 142 C C A. 192

53. Cal—Turlock Irr Dist v Edwards, 270 P. 936, 205 Cal 320



the liquidation of irrigation districts which have no bonded indebtedness, the obligation of liquidating and distributing assets rests on the directors as trustees of creditors and of the property owners of the district, and directors are not entitled to a discharge until any balance of moneys shall be divided and refunded to the assessment payers, and the directors as trustees are subject to supervisory control of the courts, whose power is not limited merely to entering an order dissolving the district and discharging the directors.<sup>54</sup> Such courts are required to retain jurisdiction for the purpose of supervising the distribution of the assets by the district officers.<sup>55</sup>

#### d. Meetings

A failure to follow the statutory procedure for the calling of a meeting of the board of directors of a district does not necessarily render the acts done in such meeting void.

A failure to follow the statutory procedure for the calling of a meeting of the board of directors of an irrigation district has been held to be but a mere irregularity,<sup>56</sup> not rendering the acts done in such meeting void,<sup>57</sup> and which would be cured by a failure of assessment payers to bring an action within the time permitted by statute for actions on defects in the proceedings.<sup>58</sup> In the absence of statutory direction as to the time when an order calling a special meeting must be entered in the record, it has been held that the appropriate place for such entry would be in the minutes of the meeting held pursuant to the order.<sup>59</sup>

#### e. Recall or Removal

Legislation providing for the recall of irrigation district officials is a valid exercise of legislative power. The directors of an irrigation district are subject to the same laws as other public officials when removal from office is sought.

Under permissive constitutional provision, legislation providing for the recall of irrigation district officials is a valid exercise of legislative power.<sup>60</sup> A statutory provision that the signer of a recall petition shall affix the date of his signing has been held to be mandatory.<sup>61</sup> Under a statute providing that the secretary of the board shall examine and ascertain from the records of registration whether or not the signers of the petition of recall were qualified signers, it has been held that he is not required to go beyond the record to determine this.<sup>62</sup> Filing with the secretary of an irrigation district of the original and duplicate sections of a recall petition makes the petition a public document in the files of such district,<sup>63</sup> and the loss or destruction of such petition does not affect its validity,<sup>64</sup> and does not divest the secretary of the authority to make his certificate thereon to the board of directors of the irrigation district,<sup>65</sup> or divest the board of the jurisdiction to call an election.<sup>66</sup> Where the petition and certificate are sufficient, no justification can be found for the failure of the board to act thereon and proceed to call a special election.<sup>67</sup> The fact that two valid petitions may be on file at the same time does not warrant a refusal to act if either of them is sufficiently certified, since, when the election is called under one petition, any other petition for the same purpose then on file would have no further force.<sup>68</sup>

**Removal.** Directors are subject to the same laws as other public officials when removal from office is sought.<sup>69</sup> An illegal charge and collection of per diem and mileage fees has been held to be within the scope of a statute providing for the removal of a director from office for charging and collecting illegal fees for services in office,<sup>70</sup> although the moneys were illegally collected through taxing channels.<sup>71</sup> A statute authorizing the removal

54. Wash—State ex rel Pryor v Paul, 104 P 2d 745, 5 Wash 2d 90

55. Wash—State ex rel Pryor v Paul, supra.

Dissolution or other termination of district generally see *infra* § 338

56. Cal—Imperial Land Co v Imperial Irr Dist, 161 P 113, 173 Cal 660

57. NM—Davy v McNeill, 240 P 482, 31 NM 7

58. Cal—Imperial Land Co v Imperial Irr Dist, 161 P 113, 173 Cal 660

59. Cal—Imperial Land Co v Imperial Irr Dist, supra

60. Cal—Wigley v South Joaquin Irr Dist, 159 P 985, 31 Cal App 162

61. Cal.—Chambers v. Glenn-Colusa

Irr Dist, 206 P. 773, 57 Cal App 155

62. Cal—Chambers v Glenn-Colusa Irr Dist, supra

63. Cal—Box v Young, 26 P 2d 290, 219 Cal 243

64. Cal—Box v Young, supra.

Order of court restoring lost portions of petition was not necessary to give such petition validity Cal—Box v Young, supra

65. Cal—Box v. Young, supra

66. Cal—Box v Young, supra.

Petition "submitted"

When board of directors of irrigation district examines secretary's certificate and hears evidence of loss or destruction of recall petition, and concludes that a sufficient petition

was filed and properly certified, petition is "submitted" to board as required by statute Cal—Box v Young, supra

67. Cal—Morrow v Board of Directors of Imperial Irr Dist, 26 P 2d 292, 219 Cal 246

68. Cal—Morrow v Board of Directors of Imperial Irr Dist, supra.

69. Tex—J C Engleman Land Co v Donna Irr Dist No 1, Civ App, 209 SW 428, error refused 67 C J p 1315 note 68

70. Cal—Rose v. Superior Court in and for Imperial County, 252 P 765, 80 Cal App 739

71. Cal—Rose v. Superior Court in and for Imperial County, supra.

of irrigation district officials for willful violation of duty does not preclude removal for other causes under the statute providing generally for the grounds for removal of public officers<sup>72</sup> An appeal from a final judgment of the district court in a proceeding to remove a district director has been held to be governed by the statutes and rules of court relative to civil appeals<sup>73</sup>

#### f. Employees

The necessity for appointment of employees and their salaries may be determinable by the board of directors of an irrigation district.

The necessity for appointment of employees and their salaries has been held to be determinable by the board of directors<sup>74</sup> and not a question for a court or jury to decide<sup>75</sup> Under a statute providing that, in case of a vacancy in the board of directors, the vacancy shall be filled by the remaining directors, it has been held that where there are two vacancies on a board of three directors the remaining director cannot appoint another director,<sup>76</sup> and that between them they could not appoint a secretary to the board<sup>77</sup> Where an employee of a district accepts employment with notice that his salary is payable solely out of the proceeds of a bond issue, the employee is limited to such fund, and is not entitled to a general judgment against the district in an action to recover salary<sup>78</sup> The fact that any judgment against

a district in favor of an employee for his wages would be of doubtful value has been held immaterial<sup>79</sup> Neither a dissolved irrigation district nor its officers are liable for false representations of the district's secretary as to the validity of district bonds where neither the district nor the officer had any authority to make such representations as appeared of record<sup>80</sup>

### § 321. Powers and Proceedings

- a In general
- b Incurring debts
- c Contracts generally
- d Purchase and disposition of property
- e Construction of irrigation project
- f Control and disbursement of funds generally
- g Confirmation of proceedings
- h Actions by or against irrigation districts generally

#### a. In General

An irrigation district has only such powers as are given it by the legislature, either expressly or necessarily implied in order to carry out the purposes of the district. The board of directors of an irrigation district are clothed with a wide discretion as to the manner in which it shall manage the business of the district.

An irrigation district derives its powers from the statute under which it is created and acts,<sup>81</sup>

72. Cal—Rose v Superior Court in and for Imperial County, supra

73. Idaho—Worthman v Shane, 173 P 750, 31 Idaho 433

74. Tex—Brady v Hidalgo County Water Control and Improvement Dist No 12, Civ App, 56 SW 2d 298

67 C.J. p 1315 note 73

75. Tex—Brady v Hidalgo County Water Control and Improvement Dist No 12, supra.

76. Colo—Kepley v. People, 230 P 804, 76 Colo 233

77. Colo—Kepley v. People, supra

78. Tex—Brady v Hidalgo County Water Control & Improvement Dist No 12, 91 SW 2d 1058, 127 Tex 123

79. Tex—Brady v. Hidalgo County Water Control and Improvement Dist. No 12, Civ App, 56 S.W.2d 298

80. Neb—Lindeman v Calamus Irr Dist, 238 N.W. 762, 122 Neb. 1.

81. U.S.—Northport Irr Dist v Henry Wilcox & Son, CCA Neb, 131 F.2d 113

Cal—Selby v. Oakdale Irr. Dist, 35 P.2d 125, 140 Cal App 171.

Tex—Zavala-Dimmit Counties Wa-

ter Imp Dist No 1 v Hays, Civ App, 128 SW 2d 535, affirmed 153 SW 2d 463, 137 Tex 338

67 C.J. p 1316 note 80

Liability of irrigation district for torts see infra §§ 364-367

Power to

Grant option for sale of bonds see infra § 325

Levy assessments and taxes see infra § 332

Powers held granted

(1) To employ attorneys and other persons

Wyo—In re Bear River Irr Dist, 65 P.2d 686, 51 Wyo 343

(2) Other powers held granted see 67 C.J. p 1316 note 80 [b]

Statutes construed

(1) Under statute providing that officers of irrigation district should have same powers with respect to electric power as they had with respect to irrigation, and that irrigation act should be construed to apply to electric power as well as irrigation, board of directors of irrigation district was empowered to use district funds for power purposes

U.S.—Nev-Cal Electric Securities Co v Imperial Irr Dist, CCA Cal, 85 F.2d 886, certiorari denied 57

SCt 493, 300 US 662, 81 LEd 871

(2) The provision of Irrigation District Act that all provisions thereof shall apply to improvement districts, where applicable, does not give irrigation district board of directors all powers concerning improvement districts that board has concerning irrigation district

Nev—Penrose v Whitacre, 147 P 2d 887, 62 Nev 239

(3) Constitutional prohibition against contracting away taxing power was inapplicable to irrigation districts

Ariz—Maricopa County Municipal Water Conservation Dist No 1 v La Prade, 40 P.2d 94, 45 Ariz. 61

(4) Amendatory statute relating to powers and duties of irrigation district board was intended to operate prospectively, rather than retrospectively, and therefore did not impair the obligation of contract in violation of the federal Constitution

Kan—Kansas-Bostwick Irr Dist. No 2 v Larson, 245 P.2d 1213, 173 Kan. 379

Applicability of general laws

All provisions of the general law apply to water control and improve-

and from such other statutes as may have been enacted granting it additional powers or limiting those already granted,<sup>82</sup> and the districts have only such powers as are given by the legislature, either as are expressly stated or are necessarily implied in order to carry out the purposes of the dis-

trict.<sup>83</sup> The powers granted must be exercised in substantial compliance with the mode specified in the statute.<sup>84</sup> The officers of the district are charged with notice of the statutory powers and limitations thereof,<sup>85</sup> and the governing act of an irrigation district being a public statute, one deal-

ment districts when not inconsistent with specific acts of their creation. When specific provisions of the general law, if given effect, would nullify or modify specific provisions of special act concerning particularized rights and duties of water control and improvement districts created by it, the latter provisions must prevail over those of the general law. Tex.—Hidalgo County Water Control & Improvement Dist No 1 v Hidalgo County, Civ App, 134 S W 2d 464, error refused.

#### Questioning power to function

Owner of private property within public power and irrigation district was not in position to complain that district was without power to function until it obtained grant of water rights from department of roads and irrigation, where grant, if necessary, could be subsequently acquired. Neb.—State ex rel Loseke v Fricke, 254 NW 409, 126 Neb 736.

#### Conservancy district

Under the Conservancy Act a conservancy district which acquired after due appraisal and compensation a community ditch, had the right to supply from such ditch, to water user who had paid all assessments due from him to the district, water for use upon his immediately adjoining land.

NM—Middle Rio Grande Conservancy Dist v Chavez, 101 P 2d 190, 44 NM 240.

#### Artesian conservancy district

(1) Waters of artesian basin underlying artesian conservancy district, whether tapped on lands within or without territorial boundaries of district, are subject to conservation by the district and, within statutory limits, to the supervision of governing board of district.

NM—Pecos Val Artesian Conservancy Dist v Peters, 173 P 2d 490, 50 NM 165.

(2) The statutes, making it one of the prime objects of artesian conservancy districts to "conserve" the waters of artesian basins which supplies waters to users of district, uses quoted word in the sense of saving or preserving from loss.

NM—Pecos Val Artesian Conservancy Dist v Peters, supra.

(3) Such districts have no authority, however, under statute summarily to abate waste where well is situated outside territorial boundaries of district.

NM—Pecos Val Artesian Conservancy Dist v Peters, supra.

#### Statute held valid

Statute authorizing irrigation districts and others to contract for federal loans was held not unconstitutional.

Ariz.—Maricopa County Municipal Water Conservation Dist No 1 v La Prade, 40 P 2d 94, 45 Ariz 61.

82. Cal.—Crawford v Imperial Irr Dist, 253 P 726, 200 Cal 318, 67 CJ p 1316 note 81.

83. Cal.—Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457.

Idaho—Jensen v Boise-Kuna Irr Dist, 269 P 2d 755, 75 Idaho 133—Board of Directors of Wilder Irr Dist v Jorgensen, 136 P 2d 461, 64 Idaho 538—Lewiston Orchards Irr Dist v Gilmore, 23 P 2d 720, 53 Idaho 377.

Kan.—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355.

Mont.—State ex rel Blenkner v Stillwater County, 66 P 2d 788, 104 Mont 387.

Neb.—Loup County v Rumbaugh, 38 NW 2d 745, 151 Neb 563.

Or.—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458.

Tex.—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, Civ App, 128 SW 2d 535, affirmed 153 SW 2d 463, 137 Tex 338—Grand Lodge of Order of Sons of Hermann in Texas v Curry, Civ App, 108 SW 2d 574, error refused.

Wyo.—Corpus Juris cited in In re Bear River Irr Dist, 65 P 2d 686, 687, 51 Wyo 343.

67 CJ p 1316 note 82.

#### Incidental to direct power

(1) An irrigation district having only limited power, its giving of water storage capacity or water to individual must be at least incidental to its direct powers in order to be valid.

Wyo.—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479, followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479.

(2) In construing irrigation district's powers incidental to its direct power to dispose of surplus water, court must consider state's general public policy.

Wyo.—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479,

followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479.

#### Compliance with special election

Where irrigation district advanced money from its operation and maintenance general fund as part of an agreement whereby Federal Bureau of Reclamation constructed canal for improvement district of the irrigation district, under the Irrigation District Act, the money for completing the canal and repaying the money advanced by the irrigation district could not lawfully be raised without the holding of a special election.

Nev.—Penrose v. Whitacre, 132 P 2d 609, 61 Nev 440, opinion adhered to 147 P 2d 887, 62 Nev 239.

#### Directors of electrical district

The board of directors of electrical district supplying power to users primarily for purpose of pumping water for irrigation, being a creature of statute, can exercise no powers not expressly conferred on it or necessarily implied.

Ariz.—Brown v Electrical Dist No 2, Pinal County, 223 P 1068, 26 Ariz 181.

#### Water conservancy district

(1) It is within discretion of legislature to grant water conservancy district any powers not expressly inhibited by constitution to further its public purpose, including power of taxation.

Utah—Patterick v Carbon Water Conservancy Dist, 145 P 2d 503, 106 Utah 55.

(2) Water Conservancy Act authorizing voluntary application for special benefits, and providing for hearing on notice to persons interested, hearing of objections to assessments, and for appeal to district court from board's findings, sufficiently provides for all safeguards of a party's rights, and if board acts in manner which would be unconstitutional, aggrieved person may resort to court to have his rights protected.

Utah—Patterick v Carbon Water Conservancy Dist, supra.

84. Cal.—Selby v Oakdale Irr Dist, 35 P 2d 125, 140 Cal App 171. Or.—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458.

85. U.S.—Northport Irr Dist v Henry Wilcox & Son, CCA Neb, 131 F 2d 113.

ing with the corporation is charged with notice of the extent of its power and limitations and restrictions on the exercise thereof,<sup>86</sup> and also the mode in which it may be exercised,<sup>87</sup> and any act done in excess of the express or implied provisions of the statutes is ultra vires<sup>88</sup>

From the foregoing, it is clear that the statutes of the particular jurisdiction must be examined in determining the powers, duties, and methods of procedure of the officers of an irrigation district with respect to the government of the district,<sup>89</sup> the records of orders and resolutions of the officers,<sup>90</sup> estimating the cost of the project,<sup>91</sup> the issuance of bonds, as discussed infra §§ 322-331, making changes in the plan of the proposed proj-

ect,<sup>92</sup> employing agents,<sup>93</sup> draining of flooded lands,<sup>94</sup> interference with water rights of private individuals,<sup>95</sup> and the presentation and allowance of claims.<sup>96</sup> A constitutional provision forbidding ownership of corporate stock by a municipality or other subdivision of state does not apply to an irrigation district.<sup>97</sup>

*Interference with discretion of officers* The board of directors of an irrigation district being clothed with a wide discretion as to the manner in which it shall manage the business of the district, the courts are not warranted in interfering on any mere question of good business policy; nothing short of a gross abuse of its powers will warrant interference.<sup>98</sup>

Cal—Selby v Oakdale Irr Dist, 35 P 2d 125, 140 Cal App 171  
Neb—Loup County v Rumbaugh, 38 NW 2d 745, 151 Neb 563  
67 C.J. p 1316 note 83

86. U.S.—Northport Irr Dist v Henry Wilcox & Son, CCA Neb, 131 F 2d 113—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, CCA Tex, 93 F 2d 373  
67 C.J. p 1316 note 84

87. Cal—Bottoms v Madera Irr Dist, 242 P 100, 74 Cal App 681

88. Idaho—Board of Directors of Wilder Irr Dist v Jorgensen, 136 P 2d 461, 64 Idaho 538—Yaden v Gem Irr Dist, 216 P 250, 37 Idaho 300

**Sale and distribution of natural gas**  
Tex—Houston Natural Gas Corp v Nueces County Water Improvement Dist No 1, Civ App, 157 SW 2d 170

#### **Estoppel**

Officers of an irrigation district have no power to contract for the delivery or supplying of water, owned by the district and needed for use within the district, for use outside the district and any attempt by officers of the district to create such an obligation cannot be made the basis of estoppel against the district

Idaho—Jensen v Boise-Kuna Irr Dist, 269 P 2d 755, 75 Idaho 133

89. Wash—Barker v. Sunnyside Valley Irr Dist, 221 P 2d 827, 37 Wash 2d 115

67 C.J. p 1316 note 87

#### **Rules and regulations**

(1) Irrigation district has the right to make reasonable rules and regulations for the guidance of its officers, agents, and employees in the operation and maintenance of the irrigation and distribution system

Neb—Vonburg v. Farmers Irr Dist, 270 NW. 835, 132 Neb 12.

Wash—Barker v Sunnyside Valley Irr Dist, 221 P 2d 827, 37 Wash 2d 115

(2) Such rules and regulations must conform to existing court decrees

Wash—Barker v Sunnyside Valley Irr Dist, supra

(3) Such rules must not be made capriciously, must not be discriminatory in their operation and effect, and must be free from coercive aspects

Wash—Barker v Sunnyside Valley Irr Dist, supra

#### **Municipal powers**

Any municipal powers of an irrigation district are incidental and conferred for its government and regulation

Idaho—Tingwall v King Hill Irr Dist, 155 P 2d 605, 66 Idaho 76—Tingwall & Duffy v King Hill Irr Dist, 129 P 2d 898, 64 Idaho 207—Lewiston Orchards Irr Dist v Gilmore, 23 P 2d 720, 53 Idaho 377

90. Mont—State v Dilworth, 258 P 246, 80 Mont 102

67 C.J. p 1316 note 88

91. Wash—Hanson v Kittitas Reclamation Dist, 134 P. 1083, 75 Wash 297

67 C.J. p 1316 note 89

92. Cal—El Dorado Irr Dist v Browne, 13 P 2d 921, 216 Cal. 269  
67 C.J. p 1316 note 91

93. Cal—Crawford v Imperial Irr Dist, 253 P 726, 200 Cal 318  
67 C.J. p 1317 note 92

94. Neb—State v Farmers' Irr Dist, 217 NW 607, 116 Neb 373  
67 C.J. p 1317 note 93

95. Or—Little Walla Walla Irr Dist v. Preston, 73 P. 982, 46 Or 5  
67 C.J. p 1317 note 94.

96. Cal—Powers Farms v Consolidated Irr Dist, 119 P 2d 717.  
67 C.J. p 1317 note 95

#### **Filing mandatory**

(1) The compliance with statute requiring the filing of a claim within specified period as prerequisite to maintenance of an action against irrigation district for damages is mandatory, and hence such requirement may not be waived

Cal—Powers Farms v Consolidated Irr Dist, supra

(2) The courts may allow no exceptions to plain provisions of a statute requiring the filing of a claim as prerequisite to maintenance of an action against a public body, under guise of interpretation or construction

Cal—Powers Farms v Consolidated Irr Dist, 119 P 2d 717, 19 Cal 2d 123

(3) Statute providing that any claim against irrigation district must be presented to district court for allowance or rejection is mandatory, and board cannot waive substantial compliance therewith

Wash—Hamilton v Kiona-Benton Irr Dist, 276 P 2d 533, 45 Wash 2d 544

97. Ariz—Maricopa County Municipal Water Conservation Dist No 1 v La Prade, 40 P 2d 94, 45 Ariz 61.

98. Tex—King v Harris County Flood Control Dist, Civ App, 210 SW 2d 438, refused no reversible error

67 C.J. p 1317 note 96

#### **Purchase of land**

The discretion of board of directors of water control and improvement district in purchasing such lands for district as might be necessary or appropriate to its proper operation could not be questioned in the absence of fraud or palpable abuse

Tex—Willacy County Water Control and Improvement Dist No 1 v Nelson, Civ App, 108 SW 2d 271.

**Consolidation of districts.** Under some statutes irrigation districts are authorized to consolidate.<sup>99</sup> Where consolidation takes place with one irrigation district taking over the property of another there is an implied promise to pay the obligations of the absorbed district,<sup>1</sup> and an equitable trust is created making the promisor liable for such obligations.<sup>2</sup>

### b. Incurring Debts

The power of an irrigation district to incur indebtedness or to issue tax warrants is restricted to that granted to the district by statute.

An irrigation district has no power to incur any debt or liability in excess of statutory provisions with respect thereto,<sup>3</sup> or for any purpose not authorized by statute,<sup>4</sup> and, subject to certain exceptions,<sup>5</sup> an irrigation district may not incur any indebtedness except on compliance with prescribed statutory provisions.<sup>6</sup> Where, however, a water improvement district has lawfully incurred

an obligation and accepted the resulting benefits, it should be held as rigidly to its obligations as would an individual or private corporation,<sup>7</sup> notwithstanding it is a public or quasi-public corporation.<sup>8</sup> Under some statutes, the power of an irrigation district to incur obligations is ultimately left in the hands of those whose property is affected.<sup>9</sup>

Statutes relating to the incurring of indebtedness by irrigation districts must not violate the provisions of the constitution;<sup>10</sup> but a constitutional provision prohibiting the creation of debts in excess of taxes for the current year has been held not applicable to irrigation districts, as their exactions are essentially assessments for local benefits, and not levied for general governmental purposes, as are the taxes contemplated in the constitutional provision,<sup>11</sup> and an irrigation district has been held not within the classification of "other mu-

99. Cal—Jordan v Williams Irr Dist, 57 P 2d 566, 13 Cal App 2d 465

1. Cal—Jordan v. Williams Irr Dist, *supra*.

**Failure to apportion former indebtedness** to particular lands comprising consolidated irrigation district would not relieve consolidated district of liability for claim against district, since requirement of apportionment was merely to provide means of satisfying debt

Cal—Jordan v Williams Irr Dist, *supra*

2. Cal—Jordan v. Williams Irr Dist, *supra*

3. U.S.—Northport Irr Dist v Henry Wilcox & Son, CCA Neb., 131 F 2d 113

Nev—Penrose v Whitacre, 147 P 2d 887, 62 Nev 239

67 C J p 1317 note 98

Liability for debts on dissolution see *infra* § 338

### Restriction to revenue

(1) The power of irrigation district to incur debt or liability is not unlimited, but restricted to revenue sufficient to meet obligations voluntarily assumed by landowners within district, as voiced by their votes at elections held for such purpose

Nev—Penrose v Whitacre, *supra*

(2) Irrigation district had no power to incur an indebtedness with respect to airport on irrigation district's land that could not be paid out of revenue derived from the airport

Cal—Allen v. Hussey, 225 P 2d 674, 101 Cal App 2d 457.

### Indebtedness to United States

(1) Statute authorizing irrigation district to incur indebtedness to United States for improving irrigation system and requiring assessments to pay debt does not contemplate creation of specific lien against any land within district except by statutory assessment

Idaho—Van Hollebeke v Wheeler, 41 P 2d 603, 55 Idaho 268

(2) Irrigation district's indebtedness to United States for improving irrigation system under contract authorized by statute constitutes general obligation of district, and, until full payment thereof, all land in district remains subject to assessment

Idaho—Van Hollebeke v Wheeler, *supra*

4. Wyo—Corpus Juris cited in In re Bear River Irr Dist, 65 P 2d 686, 687, 51 Wyo. 343

67 C J p 1317 note 99

### Lawfully incurred indebtedness

Statute authorizing irrigation commissioners to borrow money "for the payment of any indebtedness they may have lawfully incurred" authorized borrowing only for cost of construction of irrigation work and other lawful and proper indebtedness incurred by the district

Wyo—In re Bear River Irr Dist, 65 P 2d 686, 51 Wyo 343.

5. Cal—Ser-Vis v Victor Valley Irr Dist, 214 P 223, 190 Cal 732

67 C J p 1317 note 1

6. Ariz—Ramirez v. Electrical Dist No 4, Pinal County, 294 P 614, 37 Ariz 360

7. Tex—Cameron County Water Improvement Dist No. 8 v. West-

ern Metal Mfg Co of Texas, Civ App, 125 S W 2d 650, error dismissed, judgment correct.

### Note for obligation

After it became apparent that payments could not be made at time of consummation of purchases of merchandise by water improvement district, directors of district could evidence obligation by executing a note under order of board, but directors could not bind district to pay ten per cent attorneys' fees provided for in note

Tex—Western Metal Mfg Co of Texas v Cameron County Water Imp Dist. No 8, Civ App, 105 S. W 2d 700, error dismissed.

8. Tex—Cameron County Water Improvement Dist No 8 v. Western Metal Mfg Co of Texas, Civ. App, 125 S W 2d 650, error dismissed, judgment correct

District as a public or quasi-public corporation generally see *supra* § 318.

9. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160—Day v. Buckeye Water Conservation & Drainage Dist., 237 P. 636, 28 Ariz 466.

10. Cal—In re Bonds of South San Joaquin Irr Dist, 119 P. 198, 161 Cal 345

67 C J p 1317 note 3.

11. Wyo—Sullivan v. Blakesley, 246 P 918, 35 Wyo. 73

Irrigation assessments as not within purview of constitutional regulations of general taxes see *infra* § 333

Nature of tax as special assessment see *infra* § 333

municipal corporations" in a constitutional provision limiting indebtedness<sup>12</sup>

Under some constitutional provisions relating to water improvement districts, the indebtedness which a legislature can authorize, but which requires the approval of the voters of a district, is any indebtedness, including maintenance costs, which is to be paid out of taxes rather than out of revenue<sup>13</sup> Where a note issued by such a district on the authorization of the district's board of directors, but without an election, creates an indebtedness of the district, the note is void and should be canceled.<sup>14</sup> The true test of whether an obligation is a debt is whether it imposes a burden on revenues of the district for future years<sup>15</sup> Judicial interpretations of what constitutes an indebtedness as defined by cases dealing with cities may control in cases dealing with improvement districts at least where the constitutional provision limiting the power of a water improvement district to incur indebtedness is similar to the constitutional limitations imposed on the power of cities to contract indebtedness<sup>16</sup>

*Issuance of warrants against a general fund levy.* The power of an irrigation district to issue warrants against the general fund levy may be limited by statute to the general fund levy for

the current year, and the fact that general fund warrants had not in a former year been issued against a percentage of the levy of that year affords no justification for the issuance of warrants against such levy in a subsequent year.<sup>17</sup> The issuance of such warrants is not a mere irregularity in the exercise of an existing power, but is wholly unauthorized and any warrants bearing on their face notice that they were chargeable against the general fund levy of a former year are unauthorized and void<sup>18</sup> Where, however, unauthorized and, therefore, void general fund warrants are used to pay just obligations legally incurred by a district, the district becomes obligated to a purchaser of the warrants as for money had and received for the amount paid therefor with interest thereon from the date of payment<sup>19</sup>

*Liens* Under a constitutional provision authorizing the creation of a reclamation district and providing that the legislature shall authorize the indebtedness necessary to provide improvements and maintenance thereof and that such indebtedness shall be a lien on the property assessed, charges and assessments which the district lays on landowners and lands within it take no lien, since indebtedness against the district, and not to it, has a lien thereunder<sup>20</sup>

12 Idaho—Jensen v Boise-Kuna Irr Dist., 269 P2d 755, 75 Idaho 133

67 C.J. p 1317 note 5

#### Lending or pledging credit

Contracts whereby irrigation district agreed to furnish seepage and waste waters to owners of land outside of irrigation district and to augment flow by pumping wells, drilling additional wells and construction of ditches if necessary, in consideration of landowners' drainage activities and assumption of liability for future damages within district caused by overflow of waters of a lake, were not lending or pledging of the credit or faith of the district within constitutional prohibition, directed towards municipalities and subdivisions of state Idaho—Jensen v Boise-Kuna Irr Dist., supra

13. Tex—Austin Mill & Grain Co v Brown County Water Improvement Dist No 1, Civ App., 128 SW2d 829, affirmed Brown County Water Improvement Dist No 1 v Austin Mill & Grain Co., 138 SW2d 523, 135 Tex 140

#### Debt not created

Contract whereby water improvement district employed financial adviser to secure approval of loan to district from Public Works Adminis-

tration and Reconstruction Finance Corporation, although not authorized by vote of qualified taxpayers of district was not ultra vires and did not create "debt" within constitution requiring election, where contract was for personal services to be performed within year, district had on hand sufficient funds available with which to pay for services, and parties contemplated that current revenues of district would be sufficient to make such payment

Tex—Hidalgo County Water Imp Dist No 2 v Feick, Civ App., 111 SW2d 742, error dismissed

14. US—Texas Agricultural Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist No 1, DCTex., 36 FSupp 314, reversed on other grounds, CCA, 125 F2d 829, certiorari denied Abraham v Hidalgo County Water Control and Improvement Dist No 1, 63 S Ct 35, 317 US 643, 87 L Ed 518, rehearing denied 63 S Ct 199, 317 US 709, 87 L Ed 565

15. Tex—Cameron County Water Improvement Dist No 8 v Western Metal Mfg Co of Texas, Civ App., 125 SW2d 650, error dismissed, judgment correct

#### Payment from current revenues

In action to recover for merchan-

dise sold water improvement district, evidence that portion of canal system in district was partially but inadequately constructed at time of purchase, that merchandise consisted of temporary installments, that sales were made on thirty days time with provision for interest after ninety days from date of invoice, and that note subsequently given by district in payment was payable in six months from its date, established that obligation was intended to be paid out of current revenues for year of contract, and therefore was not within inhibition of constitutional provision

Tex—Cameron County Water Improvement Dist No 8 v Western Metal Mfg Co of Texas, supra

16. Tex—Cameron County Water Improvement Dist No 8 v Western Metal Mfg Co of Texas, supra

17. US—Northport Irr Dist v. Henry Wilcox & Son, CCA Neb., 131 F2d 113

18. US—Northport Irr Dist v Henry Wilcox & Son, supra

19. US—Northport Irr Dist. v Henry Wilcox & Son, supra.

20 US—Hidalgo and Cameron Counties Water Control and Improvement Dist No 9 v American Rio Grande Land & Irrigation Co,

### c. Contracts Generally

Contracts which go beyond the power vested by statute in the officers exercising the functions of an irrigation district are void.

Since the powers of an irrigation district are limited to those conferred by statute, contracts

which go beyond the scope of the power vested in the officers exercising the functions of the district are void<sup>21</sup> The statutes in each jurisdiction must be examined in determining the power of an irrigation district to execute contracts generally,<sup>22</sup> contracts with the United States,<sup>23</sup> contracts to ob-

CCA Tex., 103 F2d 509, certiorari denied American Rio Grande Land & Irrigation Co v Hidalgo & Cameron County Water Control & Improvement Dist No 9, 60 SCt 88, 308 US 573, 84 LEd 481

Irrigation assessment as a lien on the lands within the district see *infra* § 336

21. Cal—Bottoms v Madera Irr Dist, 242 P 100, 74 Cal App 681  
Contracts for supply of water to consumers in general see *infra* § 361

#### Lease of airport

(1) Alleged benefit to irrigation district from airport on land of district did not furnish consideration for lease of airport by district to individual for \$1 a year, especially where airport was to be operated for private profit of individual Previous services of individual in assisting in procurement of government funds for construction of airport on land of irrigation district were not a legal consideration for lease Also, assumption by individual of responsibility for operation of airport was not consideration for lease  
Cal—Allen v Hussey, 225 P2d 674, 101 Cal App 2d 457

(2) Where United States government agencies expended about one million five hundred thousand dollars for development of airport on land of irrigation district, and district expended about twenty-five thousand dollars, lease by district of airport for thirty-four or sixty-nine years to individual who was to pay rental of one dollar a year and receive profits from operation of airport was a breach of trust, and airport could be recovered at suit of district or of property owner therein, though board acted in good faith and on legal advice  
Cal—Allen v Hussey, *supra*

(3) Where lease by irrigation district of airport to individual was void because in violation of district's agreement with and guaranty to Works Progress Administration, subsequent redrafting of lease at request of Civil Aeronautics Authority could not validate transaction  
Cal—Allen v Hussey, *supra*

22. Tex—Cameron County Water Improvement Dist No 1 v Parkhurst, Civ App, 46 SW2d 472  
67 CJ p 1318 note 9

#### Liberal construction

The power of water control and improvement district board to build

irrigating system clothed board with reasonable discretion with reference to making advantageous contracts for performance of its duty and grant should be liberally construed to accomplish purpose of the grant of power

Tex—Baugham v Willacy County Water Control & Improvement Dist No 1, Civ App, 112 SW2d 318, error refused

#### Vested water rights

Conservancy district had no authority to barter away vested water rights of landowners, who had applied them to beneficial use

NM—Middle Rio Grande Water Users Ass'n v Middle Rio Grande Conservancy Dist, 258 P2d 391, 57 NM 287

#### Contracts held valid

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, CCA Cal, 85 F2d 886, certiorari denied 57 SCt 493, 300 US 662, 81 LEd 871

Tex—Baugham v Willacy County Water Control & Improvement Dist No 1, Civ App, 112 SW2d 318, error refused

#### Contract held severable

Alleged invalidity of part of contract of irrigation district which called for construction work in state, on ground of failure to contain minimum wage and hour provisions required by state statute, did not affect rest of contract, where part of work to be done in state was easily separable from rest of project

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, CCA Cal, 85 F2d 886, certiorari denied 57 SCt 493, 300 US 662, 81 LEd 871

23. US—U S v Humboldt Lovelock Irr Light & Power Co, CCA Nev, 97 F2d 38, certiorari denied Humboldt Lovelock Irr Light & Power Co v U S, 59 SCt 94, 305 US 630, 83 LEd 404

Idaho—Board of Directors of Wilder Irr Dist v Jorgensen, 136 P2d 461, 64 Idaho 538

Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P2d 370, 172 Kan 157, appeal dismissed 72 SCt 1053, 343 US 954, 96 LEd 1355

NM—Middle Rio Grande Water Users Ass'n v Middle Rio Grande Conservancy Dist, 258 P2d 391, 57 NM 287

Wyo—In re Greybull Valley Irr Dist, 76 P2d 339, 52 Wyo. 479,

followed in Brewer v Greybull Valley Irr Dist, 76 P2d 351, 52 Wyo 513, rehearing denied 77 P2d 617, 52 Wyo 479  
67 CJ p 1318 note 10

#### Conditions precedent

The United States, as condition of furnishing financial aid, was at liberty to impose on irrigation district such terms as it deemed necessary and proper as conditions precedent to undertaking construction of airport on land of irrigation district  
Cal—Allen v Hussey, 225 P2d 674, 101 Cal App 2d 457

#### Power to contract

In proceedings for confirmation of contract between irrigation district and United States, record established that irrigation district had been legally organized and that it was qualified to enter into contract with United States

ND—In re Fort Clark Irr Dist of Mercer and Oliver Counties, 48 NW2d 741, 78 ND 107

#### Amended contract

Where the supreme court held that certain provision in reclamation contract between the United States and conservancy district was invalid, and thereafter the district filed in the supreme court an amendatory contract eliminating the invalid provision, and no objection to the amendatory contract was made by the opposing party, amendatory contract would be ratified, approved, and confirmed by the supreme court

NM—Middle Rio Grande Water Users Ass'n v Middle Rio Grande Conservancy Dist, 258 P2d 391, 57 NM 287

#### Contract defective

Commissioners of irrigation district had no authority to pay amounts due federal government for proposed irrigation works without obtaining for the district the property for which they made such payments out of district's assessments over a period of years, and contract between district and Bureau of Reclamation, which made no provision for transferring title to proposed irrigation works from United States to the district after payment therefor by district, was defective

Wyo—In re Owl Creek Irr Dist, 253 P2d 867, 71 Wyo 30, rehearing denied 258 P2d 220, 71 Wyo. 30

#### Inequitable contract

Where contract between Bureau of Reclamation and irrigation dis-

tain rights of way<sup>24</sup> and lands otherwise necessary for its purposes,<sup>25</sup> contracts to pay for services rendered,<sup>26</sup> contracts settling claims or disputes,<sup>27</sup> contracts to furnish water to owners of land outside the irrigation district,<sup>28</sup> contracts in which a director or officer of the district has an interest,<sup>29</sup> and contracts placing management of the system in the hands of others than officers of the district<sup>30</sup>

While an irrigation district has the power to make and enforce reasonable rules and regulations as to the operation and maintenance of the project as discussed supra subdivision a of this section, such rules and regulations must conform to existing contracts.<sup>31</sup> A contract executed by a water improvement district in consideration of the other contracting parties' agreement to commit bonds of the promisor, so that it can obtain a loan,

is supported by a valuable consideration<sup>32</sup>

*Municipal corporation with respect to contracts.* An irrigation district has been held to be a municipal corporation when it is considered in relation to its contracts made in the manner prescribed by law<sup>33</sup>

#### d. Purchase and Disposition of Property

Generally, an irrigation district, through its proper officers, may acquire, by purchase or condemnation, all property necessary for its system of works and the district may also acquire property through delinquencies. The officers of the district are without power to dispose of property of the district other than as provided by law

As a general rule, under the statutes relating to irrigation districts, an irrigation district, through its proper officers, may acquire, by purchase or condemnation, all property necessary for its system of works<sup>34</sup>. Thus, an irrigation district may

tract, and decree approving such contract, entered in proceeding to enlarge boundaries of irrigation district, obligated objecting landowners to liquidate an indebtedness which they had no part in incurring and which was designed only to furnish supplemental water to a comparatively small part of the proposed district, result was inequitable, unfair, and in serious disregard of landowners' rights

Wyo.—In re Owl Creek Irr Dist, 258 P 2d 220, 71 Wyo 70

#### Right to interpret contract

Provision in contract between Bureau of Reclamation and irrigation district, whereby secretary of interior reserved right to make rules, regulations, and directives providing for operating and accounting procedures and practices in district, and for maintenance of reserve funds and depreciation funds, and to add to and modify such rules, regulations and directives as may be deemed proper to carry out true intent and meaning of law and of the contract, undertook to surrender to secretary of interior right to construe and interpret the contract, a function vested only in the courts, and swept away the advantage of having a definite written contract indicating just what each party could rightly exact from the other

Wyo.—In re Owl Creek Irr Dist, supra.

24. Wyo.—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479, followed in *Brewer v Greybull Valley Irr Dist*, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479

25. Wyo.—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479, followed in *Brewer v Greybull Valley Irr Dist*, 76 P 2d 351, 52 Wyo

513, rehearing denied 77 P 2d 617, 52 Wyo 479

26. Cal.—*Bottoms v Madera Irr Dist*, 242 P 100, 74 Cal App 681 67 C J p 1318 note 11

27. Or.—*Barker v Sonner*, 294 P 1053, 135 Or 75 67 C J p 1318 note 12

28. Idaho.—*Jensen v Boise-Kuna Irr Dist*, 269 P 2d 755, 75 Idaho 133

#### Ultra vires contract

A contract attempting to create or impose an obligation on an irrigation district to supply or make available water owned by district and needed for irrigation of lands within the district for use outside the district is ultra vires and void

Idaho.—*Jensen v Boise-Kuna Irr Dist*, supra

#### Seepage and waste waters

Subject matter of contracts whereby irrigation district agreed to furnish seepage and waste waters to owners of lands outside of irrigation district was not ultra vires

Idaho.—*Jensen v Boise-Kuna Irr Dist*, supra

29. Wash.—*Beasley v Assets Conservation Co*, 230 P 411, 131 Wash 439

67 C J p 1318 note 13.

30. Idaho.—*Board of Directors of Wilder Irr Dist v Jorgensen*, 136 P 2d 461, 64 Idaho 538 67 C J p 1318 note 14.

#### Board of control

A contract between an irrigation district and the United States for the construction and operation of works necessary to provide increased water was not ultra vires on ground that it delegated the management of system out of the hands of the district to a board of control, where statute authorized directors

to enter into contract for water supply and to do any and every lawful act necessary to obtain sufficient water, and the board of control was chosen from the directors of districts which organized the contracting district

Idaho.—*Board of Directors of Wilder Irr Dist v Jorgensen*, supra

31. Wash.—*Barker v Sunnyside Valley Irr Dist*, 221 P 2d 827, 37 Wash 2d 115

32. Tex.—*Cameron County Water Imp Dist No 1 v Cameron County Water Imp Dist No 15*, Civ App, 134 S W 2d 491

33. Wash.—*State v Columbia Irr Dist of Stevens County*, 208 P 27, 121 Wash 79

Nature of irrigation district generally see supra § 318

34. Cal.—*Stratford Irr Dist v Empire Water Co*, 111 P 2d 957, 44 Cal App 2d 61

ND.—In re *Heart River Irr Dist*, 49 NW 2d 217, 78 ND 302 67 C J p 1319 note 17.

#### Purchase of canal

Conservation and reclamation district was authorized to purchase canal used to carry water for irrigation and other useful purposes which was constructed by the United States government near river, but which was outside the district

Tex.—*San Jacinto River Conservation and Reclamation Dist v Sellers*, 184 S W 2d 920, 143 Tex 328

#### Repudiation

Water control and improvement district could not keep land and repudiate its purchase-money obligation

Tex.—*Willacy County Water Control and Improvement Dist No 1 v Nelson*, Civ App, 108 S W 2d 271

If only objection to making of purchases for and incurring obliga-



acquire a pumping plant<sup>35</sup> or an existing irrigation system,<sup>36</sup> but it takes such a water system subject to the rights of consumers whether the rights exist by virtue of a contract or by a dedication of the system for use in connection with certain lands<sup>37</sup>. The right of water contract holders to contest assessments purporting to be waived, released, or extinguished by a contract with an irrigation district has been held not included with the classes of property which a district may purchase.<sup>38</sup> So, too, it has been held that an irrigation district has power to contract for the purchase of water.<sup>39</sup> A statute permitting an irrigation district to acquire the stock of water companies has been held to apply to irrigation districts organized prior to the passage of the statute<sup>40</sup>.

*Property acquired through delinquencies* Under permissive statutes, irrigation districts may purchase property which has been deeded for delinquent taxes to the state,<sup>41</sup> and property within the

district may be transferred to the directors of the district where it is subject to delinquent assessments.<sup>42</sup> Property transferred to the district for delinquent assessments is held by the directors of the district in trust for the district and its bondholders,<sup>43</sup> and if such directors use the land for their own profit, they must account to the beneficiaries for the profits.<sup>44</sup> In dealing with a situation not contemplated by the statute governing irrigation districts, and not covered by any clear provision thereof, wherein wholesale delinquencies result in the district's acquiring large tracts of land it cannot resell, a court need not find any express direction in the statute setting forth the exact procedure, but it will construe the general provisions of the statute in the light of equitable principles.<sup>45</sup>

*Disposition of property* While statutes in some jurisdictions expressly authorize irrigation districts to dispose of property,<sup>46</sup> the board of directors

tions on water improvement district was failure of board of directors to first make requisite budget and assessment, such irregularities were cured by subsequent act of district in receiving and using materials.

Tex.—Cameron County Water Improvement Dist No 8 v Western Metal Mfg Co of Texas, Civ App, 125 SW2d 650, error dismissed, judgment correct.

35. Or.—Board of Directors of the Payette-Oregon Slope Irr Dist v Peterson, 128 P 837, 129 P 123, 64 Or 46.

67 C J p 1319 note 18.

36. Cal.—Stratford Irr Dist v Empire Water Co, 111 P2d 957, 44 Cal App 2d 61.

67 C J p 1319 note 19.

37. Cal.—Stratford Irr Dist v Empire Water Co, supra.

38. Cal.—Danley v Merced Irr Dist, 226 P 847, 853, 854, 66 Cal App 97, 113.

39. Ariz.—Day v Buckeye Water Conservation & Drainage Dist, 237 P 636, 28 Ariz 466.

67 C J p 1320 note 21.

40. Cal.—Lindsay-Strathmore Irr Dist v Wutchumna Water Co, 296 P 933, 111 Cal App 638.

41. Cal.—South San Joaquin Irr Dist v Neumiller, 42 P2d 64, 2 Cal 2d 485.

42. Cal.—McKaig v Moutrey, 90 P. 2d 108, 32 Cal App 2d 537.

#### **Sale of land**

Where record showed that sale of land in irrigation district for delinquent assessments was noticed for Aug. 11, 1932, and that on Aug. 12, 1932, collector of district sold all of property to district, it would

be presumed, in absence of testimony to contrary that property was offered for sale on August 11, that sale was adjourned until August 12, and that there being no purchaser in good faith collector sold land to district.

Cal.—McKaig v. Moutrey, supra.

#### **Reclamation districts**

(1) Where former owner of land, sold to reclamation district for delinquent interest installments on reclamation district bonds, in accordance with terms of interlocutory decree, quieting title to land in reclamation district subject to right of former owner to redeem land or any portion thereof by payment within specified time of all delinquent assessments and taxes thereon, and within the time specified as extended by subsequent orders of court, exercised right to redeem a particular tract, and there were at the time in the hands of receiver sufficient funds belonging to former owner to effect such redemption, court had no authority to enter final judgment quieting title in reclamation district to all the land, including tract redeemed by former owner.

Cal.—Gibson v River Farms Co of California, 121 P2d 504, 49 Cal App 2d 278.

(2) In action by county treasurer and trustees of reclamation district to quiet title to defendant's land, which county treasurer had sold to himself as trustee for delinquent interest installments, court did not err in application of proceeds of crops on the land to the redemption of particular tracts rather than applying the proceeds to the land as a whole or to the particular tract whereon the crops were produced.

Cal.—Gibson v. River Farms Co of California, 83 P2d 966, 28 Cal App 2d 757.

43. Cal.—McKaig v Moutrey, 90 P 2d 108, 32 Cal App 2d 537.

Title to property generally see *infra* this subdivision.

#### **Reclamation district**

Cal.—Sutter Basin Corp v Brown, 253 P2d 649, 40 Cal 2d 235, certiorari denied Brown v Sutter Basin Corp, 74 S Ct 71, 346 US 855, 98 L Ed 369.

River Farms Co v Gibson, 42 P 2d 95, 4 Cal App 2d 731.

44. Cal.—McKaig v Moutrey, 90 P 2d 108, 32 Cal App 2d 537.

#### **Lease**

Land acquired by irrigation district because of delinquencies in assessments is trust property and proceeds of lease thereof have the same character.

Cal.—Provident Land Corp v Zumwalt, 85 P2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P2d 122, 12 Cal 2d 790.

45. Cal.—Provident Land Corp v Zumwalt, 85 P2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P. 2d 122, 12 Cal 2d 791, and Provident Land Corp v Benoit, 85 P2d 122, 12 Cal 2d 790.

46. Cal.—West Coast Life Ins Co v Glenn-Colusa Irr Dist, 122 P. 2d 595, 50 Cal App 2d 204.

67 C J. p 1320 note 25.

#### **Absolute title**

Where there was no showing of any confidential relationship between purchasers of farm at sheriff's sale

of a district is without power to dispose of the property other than as provided by law.<sup>47</sup> An irrigation district cannot convey to another any greater use or title to land than the district possesses.<sup>48</sup> Thus, where a deed of land to an irrigation district for canal and waterway provided that the land should revert if not needed or used or if the canal should be abandoned, the deed conveyed only an easement for irrigation purposes, so that use of the canal for purposes other than irrigation by the grantee of the district, and the abandonment of the use for irrigation by the district, result in a reversion.<sup>49</sup> Moreover, even if the district under such circumstances through use adverse to the grant acquired a prescriptive right in such lands, it cannot by a conveyance create a greater burden than the servient estate was then under.<sup>50</sup> Where the title to the property remains in the landholders, neither the district nor its trustees have any power to transfer, sell, or dispose of the interests, or any part thereof, of the landholders within and under its jurisdiction.<sup>51</sup>

**Title to property** Under statutes in some jurisdictions, the title to all property acquired by an irrigation district, by operation of law, vests immediate-

ly in the district and is held in trust for, dedicated to, and set apart to, the uses and purposes provided by law.<sup>52</sup> An irrigation district owns no lands in a proprietary sense, its property is owned by the state and is held only for governmental purposes,<sup>53</sup> and all assets of an irrigation district are held by the district for the benefit of the district's creditors and of the owners of land in the district.<sup>54</sup> The fact that a water improvement district acquired property as a result of ultra vires operations does not render void its title to such property,<sup>55</sup> nor does the use of such property in an unauthorized manner divest the district of its ownership thereof.<sup>56</sup>

#### e. Construction of Irrigation Project

An irrigation district generally has power to construct, or contract for the construction of, ditches, canals, reservoirs, etc. The liability of a contractor or surety on his bond depends on the terms of the contract, bond, and statutes relative thereto.

Under the statutes creating and regulating irrigation districts, an irrigation district generally has power to construct,<sup>57</sup> or contract for the construction of,<sup>58</sup> ditches, canals, reservoirs, etc., and may contract for, or purchase, surveys and engineering plans.<sup>59</sup> Contractors dealing with irrigation dis-

on execution of judgment, and grantees of that farm from irrigation district, and no showing of fraud in transfer from irrigation district, grantees of irrigation district acquired absolute title by conveyance from district.

Cal—Holcomb v Nunes, 283 P 2d 301, 132 Cal App 2d 776

#### Cash or installment

The right to "sell" would be construed to include not only a sale for cash, but also a sale in which payment of the purchase price was made in installments.

Cal—West Coast Life Ins Co v Glenn-Colusa Irr Dist, 122 P 2d 595, 50 Cal App 2d 204

47. Cal—Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457—Bottoms v Madera Irr Dist, 242 P 100, 74 Cal App 681

48. Cal—Smallpage v Turlock Irr Dist, 79 P 2d 752, 26 Cal App 2d 538

49. Cal—Smallpage v. Turlock Irr Dist, supra

50. Cal—Smallpage v. Turlock Irr Dist, supra

51. Utah—Thompson v. McFarland, 82 P 478, 29 Utah 455

52. Cal—Jordan v Williams Irr Dist, 57 P 2d 566, 18 Cal App 2d 465

Idaho—Jensen v Boise-Kuna Irr Dist, 269 P 2d 755, 75 Idaho 133.

67 C.J. p 1321 note 28.

53. Cal—Allen v Hussey, 225 P. 2d 674, 101 Cal App 2d 457—El Camino Irr Dist v El Camino Land Corp, 85 P 2d 123, 12 Cal 2d 378

54. Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

55. Tex—Houston Natural Gas Corp v Nueces County Water Improvement Dist No 1, Civ App, 157 S W 2d 170

56. Tex—Houston Natural Gas Corp v Nueces County Water Improvement Dist No 1, supra

57. Idaho—City of Nampa v Nampa & Meridian Irr Dist, 131 P 8, 23 Idaho 422

67 C J p 1321 note 30

#### Authorization of voters

(1) Assessments collected by an irrigation district cannot be expended for construction work without previous authorization by voters of district.

Cal—Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457

(2) Other decisions with respect to authorization of voters see 67 C J p 1321 note 30 a

58. US—Cove Irr Dist v American Surety Co of New York, CC A.Mont, 42 F 2d 957, certiorari denied 51 S Ct 103, 282 U.S. 891, 75 L Ed 785

67 C J p 1321 note 31

Power not exceeded

Board of directors of irrigation

district did not exceed power in determining upon project to protect reservoir dike by draining certain lakes

Colo—Rothwell v. Coffin, 220 P 2d 1063, 122 Colo 140

#### Liability

The facts that irrigation company, in light of events after execution of contract obligating it to pay drainage district stated sum in installments for placing pipe under company's main canal and draining company's land, did not receive all benefits which it hoped would flow from such contract and that some of benefits received therefrom might have come as result of district's construction work, did not relieve company from liability under contract.

Neb—Drainage Dist No 2 of Dawson County v Dawson County Irr. Co, 2 NW 2d 321, 140 Neb 866

59. Neb—Willow Springs Irr Dist v Wilson, 104 NW. 165, 74 Neb. 269

67 C J p 1321 note 32

#### Approval of state engineer

(1) Under statute which literally provided for the payment of fees to the state engineer for services on irrigation projects for which approval was requested or to be requested of the state certification board "of" involving examination, supervision, and inspection by the engineer, fees were to be paid when the board ap-

tricts are charged at their peril with knowledge of the authority of the officers of the district,<sup>60</sup> and the contracts for construction work must be let in the manner provided<sup>61</sup>

**Modification** Under statutes in some jurisdictions, a contract for the construction of irrigation works adopted by the voters in a district can be materially modified only in the manner provided by law,<sup>62</sup> and a clause in a contract approved by the voters that the contract may be modified has been held to contemplate only such slight changes as might be found necessary to the accomplishment of the result intended and not to abrogate the statutory provisions<sup>63</sup> Where a contract for the construction of irrigation works as modified is void because not approved by the electors as required, the acceptance by the district officers of the work performed under the contract has been held to be of no force<sup>64</sup>

proved a project "or" when the state engineer was compelled to supervise it without approval

Ariz—State ex rel Sullivan v Burns, 77 P 2d 215, 51 Ariz 384

(2) The lining of the canal of an irrigation district with cement with funds furnished by the Federal Public Works Administration was a "project" within meaning of statute requiring irrigation district to pay state engineer for services rendered on irrigation district "projects" for which approval of the state certification board is requested or to be requested

Ariz—State ex rel Sullivan v Burns, supra

(3) Whenever the approval of the state certification board is required for any project involving the construction or improvement of the works of an irrigation district, whether directly or indirectly, or when the law requires the services of the state engineer in the investigation and supervision of any irrigation project, it is mandatory that the district pay the fee fixed by the statute for services performed by the engineer

Ariz—State ex rel Sullivan v Burns, supra

#### Bridging and maintaining canals

The burden of building bridges over the canals of a water control and improvement district at intersections with county roads is on the district only where such canals were dug across roads already laid out and opened to public use so as to constitute the canal an obstruction of the existing road

Tex—Hidalgo County Water Control & Improvement Dist No 1 v Hidalgo County, Civ App, 134 S W 2d 464, error refused.

#### Mechanic's lien

In the absence of statute, a mechanic's lien does not attach to the property of an irrigation district

Calo—Fisher v Pioneer Constr Co, 163 P 851, 62 Colo 538

Idaho—Storey v Nampa, etc, Irr

Dist, 187 P 946, 32 Idaho 713

Or—Twohy Bros v Ochoco Irr

Dist, 210 P 873, 108 Or 1

60. Or—Twohy Bros Co v Ochoco Irr Dist, supra.

61. Cal—Andrews v Board of Directors & Treasurer of Modesto Irr Dist, 248 P 2d 971, 113 Cal App 2d 780

67 C J p 1321 note 34

#### Competitive bids

(1) Under statute requiring that bids be called for before contracts for construction of any works should be made by irrigation districts, legislature intended to limit requirement to works as defined in the Water Code, and such statute must be read as applying only to construction of works to be paid for by proceeds from sale of bonds or of a limited assessment The multitudinous purchases which irrigation districts must make from time to time in ordinary transaction of their business are excluded from the statute.

Cal—Andrews v Board of Directors & Treasurer of Modesto Irr Dist, supra.

(2) Performance of contract of irrigation district would not be enjoined on ground that it violated statute requiring competitive bidding, where work was to be paid for by bonds or special assessment, where statute afforded plaintiff ample opportunity to resist attempt by directors to raise money by special

**Deposit of contractor.** A contract bidder, who had access to the plans and specifications of an irrigation project, has been held not entitled to recover his deposit from the district on the ground of mistake as to the manner in which the work might be done,<sup>65</sup> or on the ground that the bid was amended, where the record showed the second bid was a separate bid<sup>66</sup>

**Contractors' bonds** The liability of a contractor or a surety on his bond depends, in the absence of an agreement after default, on the terms of the contract, bond, and statutes relative thereto<sup>67</sup> Although a statute exists allowing recovery by a third party on a contract made expressly for his benefit, it has been held that a subcontractor cannot recover against a surety on a bond running to an irrigation district and conditioned on payment of amounts contracted for labor and materials, as such a contract is made for the benefit of the irrigation

assessment or bonds to pay for work, and bill disclosed no actual attempt or imminent threat thereof

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, CCA Cal, 85 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 871

(3) Where contract of irrigation district not awarded on competitive bidding did not recite from what fund payment was to be made, there was no warrant for assuming that statute requiring competitive bidding for work to be paid for by bond issue or special assessment would be violated, since it must be presumed that board of directors would observe the law

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, supra.

(4) Other decisions with respect to competitive bids see 67 C J p 1321 note 34 [a]

62. Colo—Antero & Lost Park Reservoir Co v Lowe, 194 P 945, 69 Colo 409—Colorado Irr Const Co v Nile Irr Dist, 194 P 609, 69 Colo. 366

63. Colo—Colorado Irr Const Co v Nile Irr Dist, supra

64. Colo—Colorado Irr Const Co v Nile Irr Dist, supra.

65. Wash—Eagle Livery & Transfer Co v Lake Chelan Reclamation Dist, 283 P 678, 155 Wash 101.

66. Wash—Eagle Livery & Transfer Co v Lake Chelan Reclamation Dist, supra

67. Tex—Fidelity & Deposit Co of Maryland v Smith, Civ App, 270 S W 1071, reversed on other grounds, Com App, 280 S W 767. 67 C J p 1322 note 42.

district,<sup>68</sup> but where the bond to a district is a statutory bond,<sup>69</sup> the claim of all persons contemplated by the statute is secured under the bond after giving preference to the district.<sup>70</sup> A surety, in determining his liability to an irrigation district after a contractor's default, may deduct the interest from the proceeds of the sale of bonds, where such proceeds were payable to the contractor.<sup>71</sup> A surety has been held liable for interest from the date of completion of services rendered by a subcontractor under a fixed price contract,<sup>72</sup> but with respect to a quantum meruit claim, the surety is not liable for interest before a judgment is rendered determining such claim.<sup>73</sup>

*Contracts or agreements after default* An agreement between an irrigation district and the contractor, incorporated after the contractor's default in the surety's agreement with other contractors, has been held to govern the rights of the parties as to payment for completion of the work.<sup>74</sup> A contract releasing the surety from all claims, etc., provided, however, that if it was finally determined that the surety is liable under his bond to subcontractors, laborers, or materialmen, then the release should only operate as between the surety and the irrigation district, has been held to except from the release the claims of such persons.<sup>75</sup>

#### f. Control and Disbursement of Funds Generally

The control and disbursement of the funds of an irrigation or water storage district are generally regulated by statute.

The control and disbursement of the funds of an irrigation or water storage district are generally regulated by statute.<sup>76</sup> It is within the discretion of the directors of an irrigation district to use some portion of the money derived from land acquired by the district for delinquencies, for running expenses,<sup>77</sup> and their discretion will be upheld when such use is necessary.<sup>78</sup> Where a statute requires the deposit of funds of an irrigation district with the county treasurer and regulates the method of disbursement, the district has no power to place the funds in trust for the benefit of third persons,<sup>79</sup> or to disburse them in any manner other than that prescribed.<sup>80</sup> Under such a statute a debtor and creditor relationship is created by the deposit of irrigation district funds with the county treasurer.<sup>81</sup>

The directors or officers of an irrigation district may revoke or rescind a warrant on the custodian of the district funds directing payment of a claim against the district,<sup>82</sup> and where the district officers have stopped payment on warrants after their issuance, the custodian of the funds is justified in refusing payment,<sup>83</sup> and cannot thereafter be compelled by mandamus to pay such warrants.<sup>84</sup> Under a statute authorizing the employment of attorneys, etc., it has been held that the officers of a district have no authority to pay attorneys from district funds for services in defending their right to office in quo warranto proceedings, such statute being applicable only to the protection of rights of the district.<sup>85</sup>

*Bonding custodian of funds.* The funds of an irrigation district collected by a county treasurer<sup>86</sup>

68. *Mont—Martin v American Surety Co of New York*, 238 P 877, 74 Mont 43

69. *Tex—Southern Surety Co v W E Callahan Const Co*, Civ App, 283 SW 1098, reversed on other grounds, Com App, 298 SW 273 67 C J p 1322 note 44

70. *Tex—Southern Surety Co v W E Callahan Const Co*, supra 67 C J p 1322 note 45

71. *US—American Surety Co of New York v Cove Irr Dist*, CCA Mont, 24 F 2d 18, certiorari denied 49 S Ct 10, 278 US 602, 73 L Ed 531

72. *US—American Surety Co of New York v Cove Irr Dist*, CCA Mont, 54 F 2d 197

73. *US—American Surety Co of New York v Cove Irr Dist*, supra

74. *US—American Surety Co of New York v Cove Irr Dist*, CCA Mont, 24 F 2d 18, certiorari denied 49 S Ct 10, 278 US 602, 73 L Ed 531

75. *US—Cove Irr Dist v Ameri-*

*can Surety Co of New York*, CCA Mont, 42 F 2d 957, certiorari denied 51 S Ct 103, 282 US 891, 75 L Ed 785

76. *US—Northport Irr Dist v Henry Wilcox & Son*, CCA Neb, 131 F 2d 113

67 C J p 1323 note 52

Payment and collection of bonds and other obligations see *infra* § 330

77. *Cal—Provident Land Corp v Zumwalt*, 85 P 2d 116, 12 Cal 2d 365, followed in *Provident Land Corp v Provident Irr Dist*, 85 P 2d 122, 12 Cal 2d 791 and *Provident Land Corp v Benoit*, 85 P 2d 122, 12 Cal 2d 790

78. *Cal—Provident Land Corp v Zumwalt*, 85 P 2d 116, 12 Cal 2d 365, followed in *Provident Land Corp v Provident Irr Dist*, 85 P 2d 122, 12 Cal 2d 791 and *Provident Land Corp v Benoit*, 85 P 2d 122, 12 Cal 2d 790

79. *Mont—State v Dilworth*, 258 P 246, 80 Mont 102

80. *Mont—State v Dilworth*, supra

81. *Mont—State ex rel. Blenkner v. Stillwater County*, 66 P 2d 788, 104 Mont 387

#### County money

Where county treasurer wrongfully accepted irrigation district warrants and delivered to holders of those warrants money, such money was not that of irrigation district, but money belonging to county, and, in contemplation of law, money belonging to irrigation district remained in county treasury

*Mont—State ex rel. Blenkner v. Stillwater County*, supra

82. *Mont—State v Dilworth*, 246 P 167, 76 Mont 218 67 C J p 1323 note 55

83. *Mont—State v Dilworth*, 258 P 246, 80 Mont 102

84. *Mont—State v Dilworth*, 246 P 167, 76 Mont 218

85. *Colo—Ellis v Moses*, 230 P 802, 76 Colo 214

86. *Idaho—Hurlebaus v American Falls Reservoir Dist*, 286 P. 598, 49 Idaho 153.

or held by a state treasurer<sup>87</sup> have been held to be protected by his official bond, and hence an irrigation district has been held precluded from expending money for an additional bond

*Transfer of funds.* Under a statute providing that any surplus in the construction fund after the completion of any project may be transferred to another fund for the redemption of bonds, a direction to transfer money from the construction fund before the completion of a project has been held not effective to change the status of the fund with respect to warrants issued against it.<sup>88</sup>

#### g. Confirmation of Proceedings

Confirmation proceedings are special proceedings in rem wherein jurisdiction is given courts to render judgment on issues involved in a particular case presented.

Confirmation proceedings are special proceedings in rem,<sup>89</sup> wherein, on proper legal notice, jurisdiction is given courts to render a valid judgment on the issues appropriately involved in the particular case presented.<sup>90</sup> A statute, authorizing the bringing of special statutory proceedings to determine the validity of any prior proceeding of an irrigation district, has been held to authorize the directors of an irrigation district to bring such a proceeding to determine the validity of steps taken to authorize the district to contract with the United States.<sup>91</sup> Written, verified objections to a petition for confirmation of irrigation district commissioners' resolution to take over federal irrigation works and assess lands for payments may be considered as answers,<sup>92</sup> but objections not denying any averments of the petition to confirm irrigation district commissioners' resolution to take over federal irrigation works and assess lands for payments admit all material averments.<sup>93</sup>

Whether an irrigation district can assess non-irrigable lands, not affected by federal water right contracts, cannot be considered in a proceeding to confirm a resolution to take over federal irrigation works and assess irrigable lands for payments,<sup>94</sup> and objectors to the confirmation of irrigation district commissioners' resolution to take over federal irrigation works and assess irrigable lands for payments cannot complain of failure to determine in a statutory manner what lands are irrigable, there being still time to do so before attempting to levy and collect the tax.<sup>95</sup> However, a decree confirming irrigation district commissioners' resolution to take over federal irrigation works should exempt lands affected by paid-up federal water right contracts from assessment for payment of cost.<sup>96</sup>

*Conclusiveness of decree.* Where a petition has been presented to the court for confirmation of any proceedings of an irrigation district and a decree is entered and no appeal is taken, it is final and conclusive as to proceedings prior thereto,<sup>97</sup> unless assailed by a direct attack,<sup>98</sup> or unless it appears from the record that the proceedings taken and confirmed were taken in such manner that the court was without jurisdiction.<sup>99</sup>

#### h. Actions by or against Irrigation Districts Generally

Generally, an irrigation district may sue and be sued, and in such actions general rules apply with respect to the pleadings, parties, evidence, trial, etc.

In some jurisdictions, under the express provisions of the statutes, an irrigation district may sue and be sued,<sup>1</sup> and in such actions defendant may assert any defense which he may have,<sup>2</sup> but a de-

87. Idaho—Hurlebaus v. American Falls Reservoir Dist, supra.

88. Mont—State v District Court of Thirteenth Judicial Dist in and for Carbon County, 242 P 431, 75 Mont 132

89. Neb—Application of Frenchman-Cambridge Irr Dist, 46 NW 2d 692, 154 Neb 20

Proceedings in connection with the organization of an irrigation district as in rem see supra § 319 (1)

Issuance and sale of bonds as in rem proceeding see infra § 328

90. Neb—Application of Frenchman-Cambridge Irr Dist, supra

91. Idaho—Nampa & Meridian Irr Dist v Petrie, 153 P 425, 28 Idaho 227, certiorari dismissed 39 S Ct 25, 248 US 154, 63 LEd 178

92. Mont—In re Ft Shaw Irr Dist, 261 P. 962, 81 Mont. 170.

93. Mont.—In re Ft Shaw Irr Dist, supra.

94. Mont.—In re Ft Shaw Irr Dist, supra.

95. Mont.—In re Ft Shaw Irr Dist, supra.

96. Mont.—In re Ft Shaw Irr Dist, supra.

97. Idaho—American Falls Reservoir Dist v Thrall, 228 P 236, 39 Idaho 105

98. Idaho—American Falls Reservoir Dist v Thrall, supra

99. Idaho—American Falls Reservoir Dist v Thrall, supra

1. Cal—Powers Farms v Consolidated Irr Dist, 119 P2d 717, 19 Cal 2d 123

67 C J p 1324 note 74  
Actions relating to bonds see infra § 331

Liability in tort of an irrigation dis-

trict generally see infra §§ 364, 365

#### Statute construed

The term "and/or" within statute providing that whenever it is claimed that person or property has been injured or damaged as result of any dangerous or defective condition of property under control of irrigation district or its officers or employees and/or the negligence or carelessness of any officer or employee, a verified claim for damages shall be presented, refers to a claim for damage grounded upon any one of causes enumerated in statute, the term "and/or" being commonly defined to mean either "and" or "or"

Cal—Powers Farms v Consolidated Irr Dist, supra

2. U S—Cameron County Water Imp. Dist No 8 v De La Vergne Engine Co, CCA Tex, 93 F 2d 373  
67 C J. p 1324 note 75.

fense that the contracts of an irrigation district are ultra vires must be specially pleaded.<sup>3</sup> While it has been held that a taxpayer or landowner within an irrigation district may not, in the absence of fraud,<sup>4</sup> bring an action for the district against the will, discretion, and judgment of the officers of the district,<sup>5</sup> it has also been held that landowners in an irrigation district have a sufficient proprietary interest to entitle them to sue to restrain the dissipation of the district's property,<sup>6</sup> and to recover an amount unlawfully expended where the district officers have refused to compel its restitution,<sup>7</sup> and that injunction will lie in favor of a landowner to restrain the officers from entering into an ultra vires agreement.<sup>8</sup> The performance of a contract entered into by an irrigation district will not be enjoined, however, where adequate relief is afforded the petitioner by statute,<sup>9</sup> or where the work has been

substantially if not entirely completed by the district so that an injunction would be a futile proceeding.<sup>10</sup>

A water improvement district is entitled to a decree directing the cancellation of a note which was issued by the district for the purchase of machinery where such note is unenforceable because it was issued contrary to constitutional and statutory provisions requiring voters' approval of the note,<sup>11</sup> but the seller of the machinery in such case is entitled to the possession of the machinery and he is also entitled to recover the reasonable rental value thereof for the period within the statute of limitations.<sup>12</sup>

The rules applicable in civil actions generally apply in actions by or against an irrigation district with respect to the pleadings,<sup>13</sup> as well as with

#### Want of power or illegality

Where water improvement district had issued note for purchase price of machinery contrary to constitutional and statutory provisions requiring taxpayers' approval, or sale or exchange of bonds, seller's complete performance of contract did not prevent district, in suit upon note, from setting up defense of want of power to enter into contract or illegality of its terms, and seller could not recover on note from improvement district upon basis of a quantum meruit.

US—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, supra.

#### Laches

Rights of claimants, who rendered services to irrigation district between nineteen and thirty years prior to commencement of the action, and who made no previous efforts to collect for the services rendered, will not be enforced without considering the effect such enforcement will have in promoting justice, and where decrees quieting tax deed titles to more than half the land in the irrigation district had been entered, plaintiffs could not enforce their claims against the land in the irrigation district.

Colo—In re Bent County, Colo Irr Dist, 272 P 2d 995.

#### Defense not available

Where lease of airport by irrigation district to individual for rental of \$1 a year was void ab initio, passage of time did not validate the lease, and hence statute of limitation was not available as defense to action to cancel lease.

Cal—Allen v Hussey, 225 P 2d 674, 101 Cal App 2d 457.

3. Idaho—Jensen v Boise-Kuna Irr Dist, 269 P 2d 755, 75 Idaho 133.

4. Colo—Antero & Lost Park Reservoir Co v Lowe, 194 P 945, 69 Colo 409.

5. Colo—Antero & Lost Park Reservoir Co v Lowe, supra, 67 C J p 1324 note 77.

6. Ariz—Post v Wright, 289 P 979, 37 Ariz 105.

7. Or—Young v Gard, 277 P 1005, 129 Or 534.

8. Cal—Danley v. Merced Irr Dist, 226 P 847, 854, 66 Cal App 97.

9. US—Nev-Cal Electric Securities Co v Imperial Irr Dist, CCA Cal, 85 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 871.

10. US—Nev-Cal Electric Securities Co v Imperial Irr Dist, supra.

#### Minimum wage scale

Performance of contract for construction and election of Diesel engine for irrigation district would not be enjoined on ground that failure to contain minimum wage scale and maximum hour provision violated state statute, where foundation work and other construction had already been substantially completed.

US—Nev-Cal Electric Securities Co v Imperial Irr Dist, supra.

11. US—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, CCA Tex, 93 F 2d 373.

#### Express or implied contract

Where issuance of note by water improvement district for purchase price of machinery had not been authorized by an election, as required by Constitution, seller could not recover purchase price upon express contract, since contract had been entered into in violation of positive rule of law, and no recovery there-

of can be had on an implied contract, since parties should not be allowed to do indirectly what they are prohibited from doing directly.

#### Exchange or sale of bonds

Where bonds voted by water improvement district were neither exchanged for machinery purchased by district nor sold and proceeds used in purchasing machinery, voting of bonds including an item for "engine pumps, etc.," did not entitle seller to recover on note issued by district for purchase money, in absence of any election authorizing issuance of note.

US—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, supra.

12. US—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, supra.

13. Colo—Zimmerman v Hinderlider, 97 P 2d 443, 105 Colo 340, 67 C J p 1325 note 81.

#### Complaint or petition held insufficient

(1) Petition in proceeding by bondholders' committee to compel officers of irrigation district to obtain deeds to lands in district allegedly sold for failure to pay assessments, which failed to state facts relative to assessment, sale, and other proceedings pertaining to property involved, but merely alleged general compliance with Irrigation District Act, was insufficient.

Cal—Noble v Provident Irr Dist, 51 P 2d 896, 10 Cal App 2d 284.

(2) Under statute providing that any "claim" against irrigation district must be presented to district board for allowance or rejection, "claim" includes a claim against dis-

respect to the parties to the actions,<sup>14</sup> and evidence.<sup>15</sup> Also such rules apply with respect to trial,<sup>16</sup> instructions,<sup>17</sup> verdict,<sup>18</sup> judgment,<sup>19</sup> and

tract on asserted tort liability and, in absence of such allegation, complaint was insufficient and it could not be presumed that any evidence with respect to such fact was admitted at trial

Wash—Hamilton v Kiona-Benton Irr Dist, 276 P 2d 583, 45 Wash 2d 544

#### Cause of action stated

(1) In action by owner of storage reservoir for alleged unlawful acts of defendant officials in connection with reservoir and water rights decreed thereto, allegation that officials refused to deliver water to plaintiff's reservoir when water was available to her under her decree after all prior appropriations were supplied stated a cause of action

Colo—Zimmerman v Hinderlider, 97 P 2d 443, 105 Colo 340

(2) In action by owner of storage reservoir for alleged unlawful acts of defendant officials in connection with her reservoir and water rights decreed thereto, allegation that defendant officials opened headgates of plaintiff's reservoir and emptied reservoir of water lawfully accumulated therein stated cause of action

Colo—Zimmerman v. Hinderlider, supra.

(3) Petition of reclamation district alleging that directors of district, and officers of defendant counties, were uncertain as to their rights, powers, and duties under Reclamation Act, and that defendants and others who owned property within district claimed that act was unconstitutional, and that district was not legally organized, and that county officers would not collect taxes levied or perform other duties required of them by act until their rights had been judicially determined, stated a cause of action under Declaratory Judgments Act and also under Reclamation Act

Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb 410

#### Cause of action not stated

(1) Complaint which alleged that Directors and Treasurer of Irrigation District had purchased and paid for three large electrical transformers without advertising for bids, but failed to allege that the equipment purchased came within definition of word "works" as defined in the statute requiring advertisement for bids, failed to state a cause of action

Cal—Andrews v Board of Directors & Treasurer of Modesto Irr Dist 248 P 2d 971, 113 Cal App 2d 780

(2) A cause of action for failure of defendant officials to compile for plaintiff the exchange and storage records kept by defendants, and for failure of defendants to permit plaintiff to have access to such records, failed to state a cause of action, where it was not charged that defendants refused to permit plaintiff access to any records, the keeping of which was required by law, and it was not alleged that any legal duty rested upon defendants to furnish plaintiff with compilations requested

Colo—Zimmerman v Hinderlider, 97 P 2d 443, 105 Colo 340

#### Proof

(1) Under statute providing that any claim against irrigation district must be presented to district court for allowance or rejection, claim must be presented to board before action thereon is commenced against district, and fact of filing of such claim must be alleged and proved

Wash—Hamilton v Kiona-Benton Irr Dist, 276 P 2d 583, 45 Wash 2d 544

(2) In action to recover for merchandise sold to water improvement district, pleadings, disclosing that merchandise was sold for purpose of operating irrigation system and to defray ordinary maintenance and operation expenses, and that merchandise consisted of temporary installments "in a vain attempt" to make certain of lands within district irrigable, entitled seller to introduce proof that obligation incurred by district was for maintenance of irrigation system installed in district and not for installment or extension of system

Tex—Western Metal Mfg Co of Texas v Cameron County Water Imp Dist No 8, Civ App, 105 S W 2d 700, error dismissed

14. Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb 410

#### Service on property owners

In action by reclamation district in which many thousands of residents and property owners were located, for an adjudication that the Reclamation Act was constitutional, and for judicial confirmation of organization of district, and acts of district, and for determination of rights, status, and duties of district, it was not necessary for district to make all property owners defendants and serve them personally with process

Neb—Nebraska Mid-State Reclamation Dist. v Hall County, supra

15. Tex—Brady v. Hidalgo County Water Control & Improvement

Dist No 12, Com App, 91 S W 2d 1058, 127 Tex 123  
67 C J p 1325 note 82

#### Weight and sufficiency

(1) In employee's action to recover salary from water control and improvement district evidence was held sufficient to support finding that district, acting through its board of directors, lawfully incurred obligations, entitling employee to recovery.

Tex—Brady v. Hidalgo County Water Control & Improvement Dist No 12, Com App, 91 S W 2d 1058, 127 Tex 123

(2) Evidence that defendant water improvement district refused, or threatened to refuse, to sign a commitment of bonds of plaintiff district which defendants controlled unless plaintiff district executed a contract, and that directors of plaintiff district under fear of losing an R F C loan, signed contract, was insufficient to show "duress" so as to justify setting aside the contract  
Tex—Cameron County Water Imp Dist No 1 v Cameron County Water Imp Dist No 15, Civ App, 134 S W 2d 491

(3) Other evidence see 67 C J p 1325 note 82 [b]

16. Idaho—Eldridge v Black Canyon Irr Dist, 43 P 2d 1052, 55 Idaho 443

#### Questions for jury

Whether irrigation district superintendent who struck farm employee during altercation over waste water being emptied into irrigation ditch was acting within scope of employment so as to render district liable for injuries, and whether he acted in self-defense

Idaho—Eldridge v. Black Canyon Irr Dist, supra

17. Tex—Peyton Creek Irr Dist v White, Civ App, 230 S W 1060  
67 C J p 1325 note 83

18. Tex—Peyton Creek Irr Dist v White, supra  
67 C J p 1325 note 84.

19. Tex—Peyton Creek Irr. Dist v White, supra.  
67 C J p 1325 note 85

#### Decree not judgment for money

Decree of district court listing plaintiffs as creditors of irrigation district and approving a proposed bond issue to be issued by the district, which decree was not recorded until approximately 18 years later, did not amount to a judgment for payment of money in favor of plaintiffs who had rendered services to the irrigation district prior to entry of the decree

Colo—In re Bent County, Colo Irr Dist, 272 P 2d 995.



with respect to subsequent review by an appellate tribunal<sup>20</sup>

### § 322. Bonds and Other Obligations

Particular questions relating to bonds and other obligations of irrigation districts are discussed *infra* §§ 323-331

Examine Pocket Parts for later cases

### § 323. — Preliminary Proceedings

Preliminary proceedings necessary to an election, and issuance of bonds by an irrigation district depend on applicable statutory provisions.

The proceedings that must be taken preliminary to an election and issuance of bonds by an irrigation district depend on the statutory provisions relative thereto<sup>21</sup> Under the various statutory provisions in the different jurisdictions, it has been held that the officers of an irrigation district as a

preliminary to the issuance of bonds, or an election thereon, must formulate a general plan for the proposed construction,<sup>22</sup> make an estimate of the amount of money which will be required, based on some definite plan for the construction of works or for the acquisition and distribution of a water supply,<sup>23</sup> declare the necessity of funds therefor,<sup>24</sup> and file a map and list of tracts of land in the district<sup>25</sup> Suits to validate the securities issued by a water improvement district are in the nature of proceedings *in rem*, and the judgments entered therein are binding on all property within the district and on all persons owning property therein<sup>26</sup>

*Election* While the legislature, having plenary power over irrigation districts, may permit them to issue bonds without any election,<sup>27</sup> the statutes generally provide for an election and the details connected therewith<sup>28</sup> Thus, in calling an election

20 ND—In re Heart River Irr Dist, 47 NW 2d 126, 77 ND 827

#### **Trial de novo**

The statute authorizing appeal to district court from any order, act, or decision of board of irrigation district and providing that appeal shall be heard *de novo* is mandatory that the cause be tried *de novo* in the district court, and district court should not determine questions submitted for its decision on record made before the board, but on the evidence actually produced at its own hearing

ND—In re Heart River Irr Dist, *supra*

21. Cal—Montecito County Water Dist v Doulton, 224 P. 747, 193 Cal 398

67 CJ p 1325 note 86

22. Idaho—Gem Irr Dist v Johnson, 115 P 924, 20 Idaho 29.

67 CJ p 1325 note 87

23. Wash—Board of Directors of Horse Heaven Irr Dist v Mineah, 192 P 997, 112 Wash 325

67 CJ p 1325 note 88

24. Or—Board of Directors of Payette-Oregon Slope Irr Dist v Peterson, 149 P 1051, 76 Or 630

67 CJ p 1326 note 89

25. Ariz—Day v Buckeye Water Conservation & Drainage Dist, 237 P 636, 28 Ariz 466

67 CJ p 1326 note 90

26. Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, 153 SW 2d 463, 137 Tex 338

27. Cal—El Dorado Irr Dist v Browne, 13 P 2d 921, 216 Cal 269

#### **Current revenues**

(1) Under Texas law, if a water control improvement district issues an obligation to be paid out of current revenues or out of revenues not

derived from special taxes on the property in the district, the proposal to create indebtedness is not required to be submitted to the voters for approval

US—Texas Agr Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist No 1, CCA Tex, 125 F 2d 829, certiorari denied 63 S Ct 35, 317 US 643, 87 L Ed 518, rehearing denied 63 S Ct 199, 317 US 709, 87 L Ed 565

(2) Under statute creating conservation and reclamation district, directors of district could issue bonds of district secured only by current revenues thereof for any of purposes named in statute, without approval thereof by voters of district

Tex—San Jacinto River Conservation and Reclamation Dist v Sellers, 184 SW 2d 920, 143 Tex 328

#### **Statute not applicable**

The statute authorizing irrigation district board to contract with United States for construction, operation and maintenance of irrigation work necessary under Federal Reclamation Act after submitting contract to district electors for approval does not apply to contract for purchase of district's bonds and grant of money to district by federal government

Wyo—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479, followed in Brewer v Greybull Valley Irr. Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479

28. US—Northport Irr Dist v Henry Wilcox & Son, CCA Neb, 131 F 2d 113

#### **Indebtedness**

(1) Under constitutional provision relating to water improvement districts, the word "indebtedness" as

used in provisions empowering legislature to authorize such indebtedness, but requiring approval of voters of a district, has no technical or special meaning attributable to the word "debts" as used in constitutional provision pertaining to cities and towns, but has a broad significance as covering all enforceable obligations which may be incurred regardless of the conditions of their payment or time in which they may be payable and all debts or obligations created for improvements or maintenance

Tex—Brown County Water Improvement Dist No 1 v Austin Mill & Grain Co, 138 SW 2d 523, 135 Tex 140

(2) Where water improvement district voted bonds for construction of dam but did not vote on tax to pay current and maintenance expenses of district, such maintenance tax which under Constitution was a lien on property assessed for payment thereof was void under constitutional provision requiring authorization by qualified property taxpayers voters of district for the incurring of any "indebtedness" against a reclamation district

Tex—Brown County Water Improvement Dist No. 1 v Austin Mill & Grain Co, *supra*.

(3) One of the dominant purposes of the constitutional provision prohibiting Legislature from authorizing issuance of any bonds or providing for any indebtedness against any reclamation district, except with the approving vote of the qualified property tax paying voters of such district was to prevent the burdening of property with tax liens, except with the approval of the taxpayers themselves, formally ex-



the directors or officers must specify in a general way the purpose for which the bonds are to be sold,<sup>29</sup> and the question of the proposed bond issue must be submitted to the electors at a special elec-

tion, held on such notice as the statute requires,<sup>30</sup> and conducted in the manner prescribed by law<sup>31</sup> The officers of the district must then canvass the result of the election,<sup>32</sup> and if the required major-

pressed in an election for that purpose

Tex—Brown County Water Improvement Dist No 1 v Austin Mill & Grain Co, supra.

#### Interim bonds

(1) Interim bonds of water improvement district create no additional indebtedness against the district so as to require a vote of the taxpayers under the Constitution, but are incidental to construction bonds so that authorization of construction bonds by voters is also authorization of interim bonds to extent provided by statute

Tex—State ex rel Abney v. Miller, 128 SW2d 1134, 122 Tex. 498

(2) Interim bonds issued by water control and improvement district pursuant to statute without proposition upon which bonds were to be issued having been first submitted to voters of the district as required by the constitution are void

Tex—Miller v State ex rel Abney, Civ App, 155 SW2d 1012, error refused

(3) That voters of water control and improvement district approved indebtedness to be evidenced by five million five hundred thousand dollars construction bonds and issuance of five hundred fifty thousand dollars interim bonds under then existing law did not authorize issuance of one million one hundred fifty thousand dollars interim bonds under statute subsequently enacted

Tex—Miller v State ex rel Abney, supra.

#### Maintenance tax

Where water improvement district voted bonds for construction of dam but did not vote on maintenance tax, such maintenance tax and the statutes on which it was based were void under constitutional provision requiring authorization by voters of all indebtedness which was to be paid out of taxes

Tex—Austin Mill & Grain Co v Brown County Water Improvement Dist. No 1, Civ App, 128 SW2d 829, affirmed Brown County Water Improvement Dist. No 1 v Austin Mill & Grain Co, 138 SW2d 523, 135 Tex 140

29. Or—Board of Directors of Medford Irr Dist v Hill, 190 P 957, 96 Or 649

67 C.J. p 1326 note 93

30. Cal—Modesto Irr. Dist v Tregae, 26 P 237, 88 Cal 334, error dismissed 17 SCt 52, 164 US 179, 41 L Ed 395

67 C.J. p 1326 note 94.

#### Propositions voted on

(1) The constitutional provision that legislature shall not authorize issuance of any bonds or provide for any indebtedness against any reclamation district unless first submitted to and adopted by taxpaying voters of such district, not only inhibits any provision for indebtedness against any such district, but also prevents authorization for issuance of any bonds unless the proposition upon which the bonds are to be issued is first adopted by the voters

Tex—Miller v State ex rel Abney, Civ App, 155 SW2d 1012, error refused

(2) The act requiring provision for levy of ad valorem taxes sufficient to pay water control and improvement district bonds before issuance of such bonds, and authorizing such districts to levy and collect special assessments against lands benefited by improvements, may be considered as part of proposition voted on at district election to authorize issuance of bonds

Tex—Moore v Maverick County Water Control and Improvement Dist No 1, Civ App, 162 SW2d 1009, error refused, certiorari denied 63 SCt. 993, 318 US 790, 87 L Ed 1156

(3) A deed of trust executed by Texas Water Power Control District to secure indebtedness was not invalid on ground that election held did not authorize the trust deed where proposition submitted to voters was comprised in one question which included execution of the mortgage, and majority voted in favor of issuance of bonds "in conformity with the question submitted"

US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F2d 698

#### Surrender of bonds

Where holders of bonds of Texas water control improvement district, who refused to accept plan for refinancing obligations of district through Reconstruction Finance Corporation which involved scaling down of district's obligations, entered into agreement to surrender bonds for cash together with note of district, and, with knowledge of bondholders, district obtained money to make the cash payment from Reconstruction Finance Corporation and gave original bonds as collateral for loan, the note was invalid on ground that it created an "indebtedness" against

district without vote of the people as required by Texas constitution

US—Texas Agr Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist No 1, CCA Tex, 125 F2d 829, certiorari denied 63 SCt 35, 317 US 643, 87 L Ed 518, rehearing denied 63 SCt 199, 317 US 709, 87 L Ed 565

#### Bonds payable out of taxes

(1) The constitution authorizing creation of conservation districts requires an election by voters to authorize bonds payable out of taxes, but not if the bonds are payable solely out of property revenues

US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F2d 698

(2) If an obligation is issued by a Texas water and improvement district to be paid out of taxes to be levied in the future, the proposition requires approval of voters in conformity with Texas constitution

US—Texas Agr Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist, No 1, CCA Tex, 125 F2d 829, reversing 36 F Supp 314, certiorari denied 63 SCt 35, 317 US 643, 87 L Ed 518, rehearing denied 63 SCt 199, 317 US 709, 87 L Ed 565

Tex—Austin Mill & Grain Co v Brown County Water Improvement Dist, Civ App, 128 SW2d 829

#### Liquidation of bonds

A water control improvement district, organized under Texas law for purpose of aiding farmers in the district by supplying water and other improvements, has right to issue bonds and levy taxes on the property in the district for purpose of paying interest and creating sinking fund for ultimate liquidation of bonds, provided the proposition is submitted to and approved by taxpayers of district in an election held for that purpose

US—Texas Agr Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist No 1, CCA Tex, 125 F2d 829, certiorari denied 63 SCt 35, 317 US 643, 87 L Ed 518, rehearing denied 63 SCt 199, 317 US 709, 87 L Ed 565.

31. Neb—Baltes v Farmers' Irr. Dist, 83 NW. 83, 60 Neb 310

67 C.J. p 1326 note 95.

32. NM—Davy v McNeill, 240 P. 482, 31 NM 7

67 C.J. p 1326 note 96.

ity<sup>33</sup> of the qualified electors<sup>34</sup> validly vote<sup>35</sup> the issuance of the bonds, the directors or officers of the district are required to prepare and issue them as discussed in § 325.

An agricultural improvement district cannot issue refunding bonds without a vote by the electors of the district authorizing such action, although the amount of the indebtedness is not increased, where by statute such vote is required<sup>36</sup>

## § 324. — Form, Requisites, and Validity

- a. In general
- b. Validity
- c. Warrants

### a. In General

The statutes creating and regulating irrigation districts generally provide for the issuance, form, and execu-

tion of bonds. Refunding bonds need not be made payable serially because the original bonds were so payable.

Statutes creating and regulating irrigation districts generally provide for the issuance, form, and execution of bonds,<sup>37</sup> and the power to issue bonds may be necessarily implied in the power to borrow money and pledge security bonds for that purpose,<sup>38</sup> provided, always, that the general credit of the state is not pledged<sup>39</sup> The laws in force when bonds are issued become a part of the bonds, just as much as if they were incorporated in them,<sup>40</sup> but this does not limit the legislature's power to provide for a subsequent method of payment not impairing the bondholder's existing rights,<sup>41</sup> and to authorize the district and bondholder to enter into a subsequent agreement relative to the bonds.<sup>42</sup> The construction given such statutes by the courts measures the obligations of irrigation districts and of the property owners therein<sup>43</sup>

33 N.M.—Davy v McNeill, supra.  
67 C.J. p 1326 note 97

34 Tex.—Roberts v Epperson, Civ App, 288 S.W. 595  
67 C.J. p 1327 note 98

35 Tex.—Roberts v Epperson, supra.  
67 C.J. p 1327 note 99

36 Ariz.—Reichenberger v Salt River Project Agr Improvement & Power Dist., 150 P.2d 758, 61 Ariz. 465.

37 U.S.—Divide Creek Irr. Dist. v Hollingsworth, C.C.A. Colo., 72 F.2d 859, 96 A.L.R. 937  
67 C.J. p 1327 note 2

### Constitutional requirement

(1) A statute creating and validating a water control and improvement district and validating a bond issue recited therein was sufficient to meet constitutional requirement with reference to issuance by district of land purchase notes sued upon, provided that it were shown that property was purchased and debt incurred under authorization of bond election referred to in statute  
Tex.—Willacy County Water Control and Improvement Dist. No. 1 v Nelson, Civ. App., 108 S.W.2d 271

(2) Water control and improvement district bonds, as well as contracts providing for use of funds derived from district's sale of water for purpose of retiring its bonded indebtedness, were held valid and binding, in absence of constitutional provision prohibiting such use of funds

Tex.—Moore v Maverick County Water Control and Improvement Dist. No. 1, Civ. App., 162 S.W.2d 1009, error refused, certiorari denied 63 S.Ct. 993, 318 U.S. 790, 87 L.Ed. 1156.

### Statute held not unconstitutional

Statute authorizing director of conservation and development to issue collateral trust bonds for purpose of borrowing money, to select security for bonds, to hypothecate and pledge security so selected, and to borrow money on such terms and rate of interest and over such period of time as he may see fit, was held not unconstitutional  
Wash.—State ex rel Banker v Yelle, 48 P.2d 573, 183 Wash. 380

38. Wash.—State ex rel Banker v Yelle, supra.

39. Wash.—State ex rel Banker v Yelle, supra.

40. Cal.—May v Board of Directors of El Camino Irr. Dist., 208 P.2d 661, 34 Cal.2d 125—Moody v Provident Irr. Dist., 85 P.2d 128, 12 Cal.2d 389

Mont.—State ex rel Malott v Cascade County, 22 P.2d 811, 94 Mont. 394

67 C.J. p 1327 note 3

### Reclamation districts

(1) The law in force under which reclamation district bonds are issued enters into and becomes a part of the contract between the district and the bondholders

Cal.—Sutter Basin Corp. v. Brown, 253 P.2d 649, 40 Cal.2d 325, certiorari denied Brown v Sutter Basin Corp., 74 S.Ct. 71, 346 U.S. 855, 98 L.Ed. 369—Rand v Bossen, 162 P.2d 457, 27 Cal.2d 61

Reclamation Dist. No. 108 v Gibson, 147 P.2d 80, 63 Cal.App.2d 311—Copeland v Raub, 97 P.2d 859, 36 Cal.App.2d 441—Kentfield v Reclamation Board, 31 P.2d 431, 137 Cal.App. 675—Hershey v. Cole, 20 P.2d 972, 130 Cal.App. 683

N.Y.—McCormack v Houston, 191 P.2d 569, 84 Cal.App.2d 665, cer-

tiorari denied 69 S.Ct. 138, 335 U.S. 868, 93 L.Ed. 412

(2) So the rights of reclamation district bondholders are measured by the statute or other law by virtue of which the bonds are issued  
Cal.—McCormack v Houston, 191 P.2d 569, 84 Cal.App.2d 665, certiorari denied 69 S.Ct. 138, 335 U.S. 868, 93 L.Ed. 412

### Interim bonds

Where construction and interim bonds of water improvement district were approved by voters at time when statute authorized interim bonds up to ten per cent of unsold construction bonds and to mature within five years, interim bonds for a greater amount and for longer term were invalid notwithstanding they were within an amendment to the statute which became effective before the bonds were issued, such amendment being applicable only to bonds voted after its effective date  
Tex.—State ex rel Abney v Miller, 128 S.W.2d 1134, 133 Tex. 498

41. Cal.—Moody v Provident Irr. Dist., 85 P.2d 128, 12 Cal.2d 389

42. Cal.—Moody v. Provident Irr. Dist., supra

43. U.S.—Divide Creek Irr. Dist. v Hollingsworth, C.C.A. Colo., 72 F.2d 859, 96 A.L.R. 937

### Tax remission

That part of statute authorizing San Jacinto River Conservation and Reclamation District to use taxes remitted to counties within district for purpose of paying debts of district only upon approval of commissioners' courts of such counties had reference to general tax remission act by which legislature attempted to remit to all counties of state a portion of state ad valorem tax, and

The provisions of the statutes as to the form, execution, etc., of such bonds must be substantially complied with,<sup>44</sup> such as provisions relating to voters' approval,<sup>45</sup> signatures,<sup>46</sup> date of issue,<sup>47</sup> certification or registration,<sup>48</sup> time of validation,<sup>49</sup> and time of maturity.<sup>50</sup> Under some statutes the officers of an irrigation district are authorized to make binding recitals in the bonds to the effect that they have been regularly issued,<sup>51</sup> and bonds or other obligations of an irrigation district may contain a provision that the collection of principal

and interest shall be made by the county officers, and when such condition is indorsed on the obligation, it is irrevocable until such indebtedness is paid.<sup>52</sup>

*Contract for sale of bonds* Where district irrigation officers possessed interest in the district's contract for sale of bonds, such interest invalidated the entire sale of bonds under the contract, and not merely the bonds which the district officers acquired under such sale,<sup>53</sup> and this is so whether or not the

did not intend that district should secure approval of commissioners' courts of counties before funds donated directly to district by state could be pledged to secure payment of bonds issued by district.  
Tex—San Jacinto River Conservation and Reclamation Dist v Sellers, 184 S W 2d 920, 143 Tex 328

44. Cal—Stowell v. Rialto Irr Dist, 100 P 248, 155 Cal 215 67 C J p 1327 note 4.

#### Contract to purchase bonds

(1) Irrigation district commissioners' contract for purchase of district's bonds and grant of money to district by federal government was not ultra vires, in view of commissioners' statutory power to borrow money and issue bonds, contract provision that bonds should be payable from and secured by exclusive first pledge of district's assessments, which are inferior to general taxes under statute, and provisions declaring conditions precedent to such purchase and grant not being contrary to statute nor unfair as matter of law.

Wyo—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479, followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo. 479

(2) Provisions of contract for purchase of irrigation district's bonds and grant of money to district by federal government that district should convey certain numbers of acre-feet of storage capacity in its reservoir to named person for use on place outside district's boundaries were not illegal.

Wyo—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479 followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479

(3) A provision of contract for purchase of irrigation district's bonds and grant of money to district by federal government that district agreed to rotation of water including exchange of stored for stream flow, for any irrigation season requested by landowners, was

not in derogation of state law requiring permits for such rotation.  
Wyo—In re Greybull Valley Irr Dist, 76 P 2d 339, 52 Wyo 479 followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479

(4) Statute amending laws governing irrigation district bond elections and carrying emergency clause was held not repealed by general statute enacted at same session of legislature, and hence mandamus to compel state conservation and development director to accept and pay for bonds issued in conformity with former but not latter statute would be granted.

Wash—State ex rel Wenatchee Heights Reclamation Dist of Chelan County v Banker, 37 P 2d 1115, 179 Wash 343

45. U.S.—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, CCA Tex, 93 F 2d 373

#### Note

Where note issued by water improvement district for purchase of machinery was unenforceable because it was issued contrary to constitutional and statutory provisions requiring voters' approval for issuance of bonds, and machinery purchased had been tendered to seller, improvement district and indorser of note were entitled to decree directing cancellation of note and surrender of bonds of district pledged to secure indorsement.

U.S.—Cameron County Water Imp Dist No 8 v De La Vergne Engine Co, supra

46. U.S.—Wright v. East Riverside Irr Dist, Cal, 138 F 313, 70 C C A 603, certiorari denied 26 S Ct 756, 200 U.S. 619, 50 L Ed 623 67 C J p 1327 note 5

47. Idaho—Turner v Roseberry Irr Dist, 198 P 465, 33 Idaho 746 67 C J p 1327 note 6

48. Ariz—In re Verde River Irrigation and Power Dist Bonds, 296 P 804, 37 Ariz 580 67 C J p 1328 note 7.

49. Ariz—In re Verde River Irrigation and Power Dist Bonds, supra 67 C J p 1328 note 8

50. Cal—Stowell v Rialto Irr Dist, 100 P 248, 155 Cal 215 67 C J p 1328 note 9

#### Note invalid

If provision is not made for payment on note executed by water and improvement district at the time the note is given, the note is "ultra vires," and invalid.

U.S.—Texas Agr Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist No 1, CCA Tex, 125 F 2d 829

51. U.S.—Shelton v Gas Securities Co, Colo, 239 F 653, 152 CCA 487, certiorari denied 37 S Ct 652, 244 U.S. 654, 61 L Ed 1373

Recital of regularity of issue as estopping district from asserting invalidity see infra subdivision b of this section

52. Idaho—American Falls Reservoir Dist v Thrall, 228 P 236, 39 Idaho 105

53. Cal—City of Los Angeles v Watterson, 48 P 2d 87, 8 Cal App 2d 331

**Competent majority** of board of directors of irrigation district did not accept bid for purchase of district bonds, where director who cast deciding affirmative vote had interest in bid.

Cal—City of Los Angeles v Watterson, supra

#### Acquisition of bonds

Irrigation district officers who agreed with parties submitting bids that officers should have portion of bonds at price paid by bidders, and who actually acquired some of bonds, had interest in district's contract awarding sale of bonds to bidders, so that sale was void.

Cal—City of Los Angeles v Watterson, supra

#### Return of purchase money

Where sale of irrigation bonds was void because district officers were parties to agreement for submission of bid for bonds and so had an interest in district's contract accepting bid, and money paid on purchase was never received by district, but

officers derived any benefit from the sale.<sup>54</sup>

**Refunding bonds** The right or power of an irrigation district to refund outstanding bonds is unqualified, save only that it shall be exercised in the manner provided by statute.<sup>55</sup> The issuance of refunding bonds by a water control improvement district does not create a new indebtedness within the constitutional provision requiring submission to voters of question concerning the creation of an indebtedness.<sup>56</sup> Where the power is thus exercised, the result is binding on all persons, it being a proceeding in rem, provided the proceedings are followed or supplemented by a judicial order of approval and confirmation.<sup>57</sup> Extending the due date of refunding bonds issued by an irrigation district without a vote of the qualified electors of the district does not render them invalid as violative of a constitutional requirement that the indebtedness of any subdivision of the state must be retired within a lesser period.<sup>58</sup> Where refunding bonds are authorized and issued by an irrigation district, it has been held that they need not be made payable serially because the original bonds were so payable,<sup>59</sup> and refunding bonds made a charge on the entire irrigation district have been held not invalid because authorized to be sold to repay only part of the outstanding bonds of a former levee district,<sup>60</sup> or because land which was not a part of the levee

district will be liable to assessment for the payment of the refunding bonds, where such land will be benefited by the levee protection work already constructed as expressly found by the legislature.<sup>61</sup>

A provision in interest coupons, detached from an irrigation district's refunding bonds, for contingent interest in addition to fixed interest, with an express recital that the bondholder assents to all provisions of the refunding plan, constitutes an integral part of the coupon holder's contract, although he disclaims any right to contingent interest.<sup>62</sup>

#### b. Validity

The validity of bonds of an irrigation district, as far as the action of the electors is concerned, depends on the situation as it existed at that time, and such district may be estopped to question the validity of the bonds.

The validity of bonds of an irrigation district, as far as the action of the electors is concerned, depends on the situation as it existed at that time,<sup>63</sup> and where owners of land in the district at the time the bonds were issued did not question the validity of the bonds within the time provided by statute, such bond issue was regarded as valid.<sup>64</sup> While an innocent purchaser of water control and improvement district bonds holds them free of consequences of defects not apparent on the face of the record, he takes them with all their disclosed imperfections.<sup>65</sup>

was misappropriated by officers, maxim that he who seeks equity must do equity, did not require district to return money paid on purchase price as condition to recovery on bonds

Cal—City of Los Angeles v Watterson, supra

54. Cal—City of Los Angeles v Watterson, supra.

55. Wash—In re Petition of Board of Directors of Columbia Irr Dist, 48 P 2d 648, 183 Wash 425

#### Assessments contrary to contracts

That bond refunding proceedings by irrigation district contemplated levying of assessment on land contrary to outstanding contracts, which were unauthorized by law, whereby landowners might pay indebtedness on their separate and individual lands, and free themselves from bonded indebtedness, could not qualify right of district to issue refunding bonds, since such right was unqualified except as to necessary procedural steps

Wash—In re Petition of Board of Directors of Columbia Irr Dist, supra.

#### Lien

Where agricultural improvement district issued refunding bonds to replace a portion of bonds included

in first of three prior bond issues, refunding bonds were properly placed on a parity with unrefunded bonds of first bond issue by making them a first lien on district's property, and provision giving them such status, which was prior to lien of second and third bond issues, did not violate statute providing that lien for bonds of any issue should be a preferred lien to that of any subsequent issue

Ariz—Reichenberger v Salt River Project Agr Improvement & Power Dist, 150 P 2d 758, 61 Ariz 465

56. US—Texas Agr Ass'n of Edinburg v Hidalgo County Water Control & Improvement Dist No 1, CCA Tex, 125 F 2d 829, certiorari denied 63 S Ct 35, 317 US 643, 87 L Ed 518, rehearing denied 63 S Ct 199, 317 US 709, 87 L Ed 565

57. Wash—In re Petition of Board of Directors of Columbia Irr Dist, 48 P 2d 648, 183 Wash 425

58. Idaho—Marsing v Gem Irr Dist, 48 P 2d 1099, 56 Idaho 29

59. Cal—Mulcahy v. Baldwin, 15 P 2d 738, 216 Cal 517

60. Cal—Palo Verde Irr Dist v Seeley, 245 P 1092, 198 Cal. 477.

61. Cal—Palo Verde Irr Dist v. Seeley, supra.

67 C J p 1328 note 14

62. US—Getz v Nevada Irr. Dist, CCA Cal, 112 F 2d 495.

63. Ariz—In re Verde River Irrigation and Power Dist Bonds, 296 P 804, 37 Ariz 580.

#### Bonds held valid

Tex—Moore v Maverick County Water Control and Improvement Dist No 1, Civ App, 162 SW 2d 1009, error refused, certiorari denied 63 S Ct 993, 318 US 790, 87 L Ed 1156

64. Mont—Krueger v Morris, 107 P 2d 142, 110 Mont 559

#### Exemption from lien of bonds

Where owners of land in irrigation district at time bonds of district were issued did not question validity of bonds within time provided by statute, and took no proceedings to assert exemption of lands in district purchased at delinquent tax sale from lien of the bonds, bond issues would be regarded as valid

Mont—Krueger v Morris, supra.

65. US—Holderman v Hidalgo County Water Control and Improvement Dist No. 12, CCA Tex, 142 F 2d 792.

The exclusion of certain lands from the district after an election authorizing bonds has been held not to affect their validity<sup>66</sup> So, too, the agreement of district officers reducing a bond issue under a revised estimate below the amount authorized has been held not to render the remaining bonds invalid,<sup>67</sup> and the validity of bonds is not affected by the failure of the treasurer of the bond fund to make a valid sale of lands against which delinquent payments are chargeable<sup>68</sup> The fact that bonds, by reason of a provision inserted therein, are payable at a place outside of the state has been held not to render them invalid<sup>69</sup>

**Estoppel to assert invalidity** While an irrigation district has been held not estopped to question the proceeding by which its bonds were issued by recitals in the bond that such proceedings were regular, unless the officers executing the bonds had lawful authority to make the recitals and to make them conclusive,<sup>70</sup> where the officers have such authority the district is estopped to question the validity of the proceedings,<sup>71</sup> especially as against an innocent purchaser for value<sup>72</sup> Also, where the bonds issued were regular in form, duly authorized, and negotiable, the district is estopped to deny that the bonds represented valid charges against the district although the act of the district board in accepting a conditional bid for the bonds was *ultra vires* and although the purchasers of the bonds were charged with notice of the limitation of the power

of the board<sup>73</sup> An irrigation district, however, by paying interest on void bonds has been held not to estop itself to assert that the bonds are illegal<sup>74</sup>

**Validating statutes.** In some jurisdictions validating statutes have been enacted with respect to bonds of irrigation districts<sup>75</sup> Such statutes are most frequently applied where there has been an entire failure to follow the procedure specified in a statute,<sup>76</sup> or where there has been an irregular or defective compliance with such procedure,<sup>77</sup> or where proceedings have been taken in the absence of any legislative authority.<sup>78</sup> Thus, such statutes have been held to cure the invalidity of bonds because of issuance at a place not authorized,<sup>79</sup> or in the absence of a proper petition,<sup>80</sup> or because the judgment confirming the bonds was never entered in the minutes of the court,<sup>81</sup> or the meetings of the irrigation commissioners were not held within the district,<sup>82</sup> or the bonds were sold for less than is required,<sup>83</sup> and the curative effect of such validating statutes has been held not removed by the repeal of such validating statutes where the repealing statute expressly provided that it should not operate on, or in any manner impair, irrigation districts which had been organized and incurred indebtedness pursuant to the previous statutes<sup>84</sup>

The comprehensive language of validating statutes, however, does not cure a fraud perpetrated in the sale of bonds,<sup>85</sup> so that such statutes although

#### Approval of voters

The principle of scaling of bonds applies to bonds whose only defect is that in issuing them debt limits have been exceeded and the principle operates to cure that defect by scaling the bonds back to the allowed amount, but the principle is not available to holder of water control and improvement district bonds which were legal and valid only if authorized by vote, but which were issued without a vote

US—Holderman v Hidalgo County Water Control and Improvement Dist No 12, *supra*

66. Ariz.—In re Verde River Irrigation and Power Dist Bonds, 296 P 804, 37 Ariz 580

67. Ariz.—Mitchell v Power, 255 P 481, 32 Ariz 1

68. Cal.—Balding v. Eich, 7 P 2d 1073, 120 Cal App 491

69. Nev.—In re Lovelock Irr Dist, 273 P 983, 51 Nev 215

67 C J p 1328 note 20

70. US—Shelton v Gas Securities Co, Colo, 239 F 653, 152 CCA 487, certiorari denied 37 S Ct 652, 244 US 654, 61 L Ed 1373

71. US—Divide Creek Irr Dist v

Hollingsworth, CCA Colo, 72 F 2d 859, 96 A L R 937

67 C J p 1329 note 23

72. US—Divide Creek Irr Dist v Hollingsworth, *supra*.

#### Defenses not available

Where irrigation district bonds, in conventional form, contained promise, for value received, to pay bearer face thereof with interest, referred to statute authorizing issuance and recited performance of all conditions precedent to lawful issue, district could not assert against innocent purchaser for value that bonds were issued improvidently or for unauthorized purpose or that contractor to whom they were issued failed to perform his agreement

US—Divide Creek Irr Dist v Hollingsworth, *supra*.

73. Cal.—Meyerfeld v South San Joaquin Irr Dist, 45 P 2d 321, 3 Cal 2d 409

74. Neb.—Paxton Irr Dist v Conway, 142 NW 797, 94 Neb 205

#### 75. Statutes held constitutional

State laws validating irrigation district bonds, as construed by the state supreme court, have been held constitutional

US—Judith Basin Land Co v Fergus County, CCA Mont, 50 F 2d 792, followed in Welch v Fergus County, 50 F 2d 795

76. Cal.—City of Los Angeles v. Watterson, 48 P 2d 87, 8 Cal App. 2d 331

77. Cal.—City of Los Angeles v. Watterson, *supra*.

78. Cal.—City of Los Angeles v. Watterson, *supra*

79. US—Judith Basin Land Co v. Fergus County, CCA Mont, 50 F 2d 792, followed in Welch v. Fergus County, 50 F 2d 795

80. Mont.—State v. Board of Com'rs of Fergus County, 285 P 932, 86 Mont 595

81. Mont.—State v Board of Com'rs of Fergus County, *supra*

82. Mont.—State v Board of Com'rs of Fergus County, *supra*

83. Mont.—State v Board of Com'rs of Fergus County, *supra*

84. Mont.—State v Board of Com'rs of Fergus County, *supra*

85. Cal.—City of Los Angeles v. Watterson, 48 P 2d 87, 8 Cal App. 2d 331.

legalizing, ratifying, confirming, and validating proceedings leading up to the sale of irrigation district bonds and making bonds binding obligations of the district were held not to validate the district's sale of bonds under a contract in which the district officers had an interest and which was void under a statute providing a penalty in case district officers were interested in contracts awarded by the board<sup>86</sup>

### c. Warrants

An irrigation district, although a de facto body, may be liable on valid warrants issued by it.

An irrigation district, organized after the county board was induced to believe that the law was complied with, has been held a body corporate de facto and liable on valid warrants issued by it;<sup>87</sup> but an irrigation district is not liable on warrants which are void, such as warrants for a lump sum, based on a single demand, only part of which the officers were authorized to allow,<sup>88</sup> warrants issued in payment of salaries to its members where the officers had no right to employ such members for the work for which compensation is claimed,<sup>89</sup> warrants issued for services of an attorney in defending the right of officers to their office,<sup>90</sup> or warrants issued by the officers prior to a levy and at a time when no funds existed against which a levy could be made.<sup>91</sup> Where, however, warrants of an irrigation district are issued in payment of obligations for which the district is liable, they have been held valid in the hands of an innocent holder, although the motive for issuing them was wrongful.<sup>92</sup> Interest-bearing war-

rants to defray organization expense have been held notes and bonds within a statute which authorized irrigation commissioners to borrow money for the payment of any indebtedness they may have lawfully incurred, and to secure it by notes or bonds.<sup>93</sup> However, the issuance of such warrants to defray expenses of preliminary work and attorney fees in the organization of an irrigation district, before an assessment for the district had been levied, may be unauthorized.<sup>94</sup>

### § 325. — Issuance, Disposition, and Proceeds

In issuing its obligations, an irrigation district must proceed according to the statutes relative thereto, and in some jurisdictions statutes have been enacted authorizing irrigation districts to refund their bonded indebtedness.

In issuing its obligations, an irrigation district must proceed according to the statutes relative thereto.<sup>95</sup> Unless a statute specifies the time for the issuance of the bonds,<sup>96</sup> the time of issuance rests in the sound discretion of the officers of the district,<sup>97</sup> and it has been held that the directors of an irrigation district may sell bonds in such quantities as may seem desirable,<sup>98</sup> delay in acting not nullifying the action of the electors in authorizing the bond issue<sup>99</sup> or depriving them of authority to issue the bonds,<sup>1</sup> and if the amount raised proves to be insufficient, there may be a further bond issue for the completion of the works.<sup>2</sup> Under some statutes, authority for the sale of bonds must be found in both the resolution of the officers of the district and the vote of the district.<sup>3</sup>

86. Cal.—City of Los Angeles v Watterson, *supra*

87. U.S.—Draver v Greenshields & Everest Co., CCA Neb., 29 F2d 552  
Negotiability of warrants see *infra* § 329

88. Cal.—Ser-Vis v Victor Valley Irr Dist., 214 P 223, 190 Cal 732

89. Colo.—Interstate Trust Co v Steele, 173 P 873, 65 Colo 99

90. Colo.—Ellis v. Moses, 230 P 802, 76 Colo 214.

91. Neb.—Elliott v Calamus Irr Dist., 235 NW 95, 120 Neb 714  
67 C J p 1329 note 38

92. Colo.—Interstate Trust Co v Steele, 173 P 873, 65 Colo 99

93. Wyo.—In re Bear River Irr Dist., 65 P2d 686, 51 Wyo 343

94. Wyo.—In re Bear River Irr Dist., *supra*

95. Or.—Redmond Realty Co. v Central Oregon Irr. Dist., 12 P2d 1097, 140 Or 282—Carico v Crystal Dist Improvement Co., 250 P 745, 119 Or 629.

#### Construed as whole

State statutes providing for issuing of bonds by irrigation district must be construed as a whole  
U.S.—In re Imperial Irr Dist., DC Cal., 10 FSupp 832, reversed on other grounds, CCA, Southern Sierras Power Co v Imperial Irr Dist., 85 F2d 1019, rehearing denied 87 F2d 355

#### Unequivocal method

Where at time of authorization, sale, and issuance of bonds of irrigation district, statute provided a complete and unequivocal method of incurring an indebtedness by issue of bonds and of raising money in payment thereof, such method was a measure of power of district board  
Cal.—Meyerfeld v South San Joaquin Irr Dist., 45 P2d 321, 3 Cal 2d 409

96. Neb.—Baltes v Farmers' Irr Dist., 83 NW 83, 60 Neb 310

97. Ariz.—In re Verde River Irrigation and Power Dist Bonds, 296 P 804, 37 Ariz. 580.  
67 C J p 1329 note 42.

98. Idaho—Turner v Roseberry Irr Dist., 198 P 465, 33 Idaho 746

#### As work progresses

Bonds authorized for purpose of constructing large irrigation project which it will require several years to complete need not be issued all at one time, but may be issued as demands for work may require  
Tex.—Baugham v Willacy County Water Control & Improvement Dist No 1, Civ App., 112 SW2d 318, error refused

99. Idaho—Turner v Roseberry Irr Dist., 198 P 465, 33 Idaho 746

1. Idaho.—Turner v. Roseberry Irr. Dist., *supra*

2. Idaho—Pioneer Irr Dist v. Campbell, 77 P 328, 10 Idaho 159.  
Or.—Hall v Hood River Irr Dist., 110 P 405, 57 Or 69

3. U.S.—Madera Irr Dist v. Miller & Lux, CCA Cal., 47 F2d 61.  
67 C J. p 1329 note 47

Where, after a confirmatory judgment, supervisors reduced the number of directors to conform to the petition for organization, the remaining directors have been held authorized to sell such bonds,<sup>4</sup> and it has been held that bonds already executed by officers of a district may be negotiated by their successors in office without reexecution.<sup>5</sup> The bonds must be sold in the manner directed by the statutes,<sup>6</sup> as, for instance, after publication of notice,<sup>7</sup> on sealed bids,<sup>8</sup> for cash,<sup>9</sup> at par,<sup>10</sup> or for full value,<sup>11</sup> and an irrigation district has been held without authority to employ a broker to sell the bonds,<sup>12</sup> or to grant an option for the sale of the bonds,<sup>13</sup> but in other jurisdictions as to water control and improvement districts the rule is otherwise.<sup>14</sup>

Under the statutes in some jurisdictions, the bonds themselves may be used, instead of the proceeds of their sale, in acquiring property<sup>15</sup> or in constructing the works of the district,<sup>16</sup> although under other statutes it has been held that bonds may not be issued for construction work.<sup>17</sup> The proceeds from the sale of bonds can be used in acquiring property or constructing the system of works,<sup>18</sup> and for the collection of drainage waters and seepage water and storing it for the irrigation of land,<sup>19</sup> but not for salaries or expenses of management,<sup>20</sup> or for certificates of another irrigation district entitling the holders to a certain amount of water,<sup>21</sup> and after an election authorizing the issuance and sale

of bonds for one purpose, the board of directors of an irrigation district cannot abandon the purpose stated in the order calling the election and sell the bonds to finance a totally different purpose.<sup>22</sup> The fact, however, that the proceeds from the sale of bonds were used for an unauthorized purpose has been held not to affect the rights of the bondholders.<sup>23</sup> Bonds and interest coupons issued by an irrigation district are not general obligations of the irrigation district, but they are special obligations for local improvements payable out of moneys produced by special assessments against the lands within the district benefited,<sup>24</sup> and such bonds are subject to a statutory provision that in no case should any land be taxed for irrigation purposes which from any natural cause cannot be cultivated.<sup>25</sup>

*Destruction of bonds.* Where part of the bonds voted was used for the construction of a system and the plans became impractical, whereupon the district acquired another system, it has been held that the remainder of such bonds may be destroyed,<sup>26</sup> and the finding of the officers of the district that it was not necessary to sell the remaining bonds need not be in writing unless required by statute,<sup>27</sup> and where all the electors voted unanimously in favor of destroying the bonds, it has been held that no substantial rights of the district or property owners or electors therein were affected by irregularities in the calling or holding of the election, or in destroying the bonds.<sup>28</sup>

4. Ariz—*Mitchell v Power*, 255 P 481, 32 Ariz 1

5. Mont—*O'Neill v Yellowstone Irr Dist*, 121 P 283, 44 Mont 492

6. Cal—*Hughson v. Crane*, 47 P 120, 115 Cal 404

7. Or—*Hughson v. Crane*, supra—Board of Directors of Payette-Oregon Slope Irr Dist v Peterson, 149 P 1051, 76 Or 630  
67 C J p 1330 note 51.

8. Cal—*Hughson v. Crane*, 47 P 120, 115 Cal 404  
Utah—*Booneville Irr Dist v Ririe*, 195 P 204, 57 Utah 306

9. Wash—*Kinkade v Witherop*, 69 P 399, 29 Wash 10

10. Tex—*White v Fahring*, Civ App, 212 SW 193  
67 C J p 1330 note 54

11. U.S.—*American Surety Co of New York v Cove Irr Dist*, CC A Mont, 24 F 2d 18, certiorari denied 49 S Ct. 10, 278 U.S. 602, 73 L Ed 531  
67 C J p 1330 note 55.

12. Idaho—*Hartert v Snake River Valley Irr. Dist.*, 277 P. 429, 47 Idaho 535.

13. Or—*Young v Gard*, 277 P 1005, 129 Or 534  
67 C J p 1330 note 57

14. Tex—*Camp Maverick County Water Control and Improvement Dist No 1*, Civ App, 107 SW 2d 1014, error dismissed

Where buyer waived option to buy bonds of water improvement district and later purchased bonds of district under another arrangement, assignee of person who would have been entitled to commission if option contract had been exercised, could not recover commission where no fraud or collusion between buyer and district was shown and finding of jury that option was waived was not attacked

Tex—*Camp Maverick County Water Control and Improvement Dist No 1*, supra

15. Cal—*Stowell v Rialto Irr Dist*, 100 P 248, 155 Cal 215  
67 C J p 1330 note 59

16. Neb—*Baltes v Farmers' Irr Dist*, 83 NW 83, 60 Neb 310  
67 C J p 1330 note 60

17. U.S.—*Rialto Irr Dist v Cheelis*, Cal, 246 F 308, 159 CCA 38—*Rialto Irr Dist v Stowell*, Cal, 246 F 294, 159 CCA 24

18. Cal—*Hughson v. Crane*, 47 P 120, 115 Cal 404  
67 C J p 1330 note 62

19. Idaho—*Bissett v Pioneer Irr Dist*, 120 P 461, 21 Idaho 98

20. Cal—*Hughson v. Crane*, 47 P 120, 115 Cal 404  
67 C J p 1330 note 64

21. Cal—*Stimson v Alessandro Irr Dist*, 67 P 496, 1034, 135 Cal 389

22. Or—*Board of Directors of Medford Irr Dist v. Hull*, 190 P 957, 96 Or 649  
67 C J p 1331 note 66

23. Colo—*Carter v Badger Irr Dist*, 235 P 376, 77 Colo 101

24. U.S.—*Denver-Greeley Valley Irr Dist v McNeil*, CCA Colo, 106 F 2d 288

25. U.S.—*Denver-Greeley Valley Irr Dist v McNeil*, supra

26. Cal—*La Mesa, Lemon Grove & Spring Valley Irr Dist v Halley*, 239 P 719, 197 Cal 50

27. Cal—*La Mesa, Lemon Grove & Spring Valley Irr Dist v Halley*, supra

28. Cal—*La Mesa, Lemon Grove & Spring Valley Irr Dist v Halley*, supra



**Reclamation district** Reclamation district bonds constitute a contract between the property owners of the district and the bondholders.<sup>29</sup> Money in a reclamation district bond fund is not property of the state or district but it is part of a trust fund held for the benefit of the bondholders.<sup>30</sup>

**Refunding bonds** In some jurisdictions statutes have been enacted authorizing irrigation districts to refund their bonded indebtedness, including the total debt arising from the original bond issue,<sup>31</sup> and it has been held that the legislature may constitutionally<sup>32</sup> provide a plan for the authorization and issuance of refunding bonds different from that provided for the issuance of other bonds of an irrigation district.<sup>33</sup> The holders of irrigation district bonds who approved a refunding plan and who exchanged their bonds for refunding bonds, reciting that they were issued under, and subject to the refunding plan, were bound by all the provisions of the plan and by the modification of the interest rate effected pursuant thereto, and such holders could

not object that the modification and approvals thereof were unauthorized.<sup>34</sup> An irrigation district, caused to be organized by a water users association under statute, was authorized to issue bonds to refinance association by paying off bonds which the association had issued to finance structures actually engaged in, and necessary to, proper irrigation of the lands of the district.<sup>35</sup>

**Warrants.** Under some statutes it has been held that the officers of an irrigation district, in the absence of a levy, are without authority to issue warrants for any purpose.<sup>36</sup>

## § 326. — Security

Under statutes in some jurisdictions the holders of bonds of irrigation districts have a continuing, general lien on lands or property within the district, but not on the irrigation system or its physical property.

In some jurisdictions, under the statutes relating to irrigation districts, the holders of bonds of an irrigation district have been held to have a continuing,<sup>37</sup> general<sup>38</sup> lien<sup>39</sup> on the lands or prop-

29. Cal—Sutter Basin Corp v Brown, 253 P 2d 649, 40 Cal 2d 235, certiorari denied Brown v Sutter Basin Corp, 74 S Ct 71, 346 US 855, 98 L Ed 369

30. Cal—Sutter Basin Corp v Brown, 253 P 2d 649, 40 Cal 2d 235, certiorari denied Brown v Sutter Basin Corp, 74 S Ct 71, 346 US 855, 98 L Ed 369.

31. Idaho—Emmett Irr Dist v McNish, 220 P 409, 38 Idaho 241, 67 C J p 1331 note 72

**Agricultural improvement district** Ariz—Reichenberger v Salt River Project Agr Improvement & Power Dist, 150 P 2d 758, 61 Ariz 465

### Reclamation district

(1) Where refunding bonds issued by reclamation district expressed no right to have reserve funds set up, but such reserves were thereafter set up in order to secure loan represented by the bonds from Reconstruction Finance Corporation pursuant to a subsequent statute authorizing their establishment, reserve funds as to persons who thereafter acquired the refunding bonds from corporation were a gratuity, and they could not complain that withdrawal of funds from such reserves by district constituted impairment of obligation of the bond contract. Cal—McCormack v. Houston, 191 P 2d 569, 84 Cal App 2d 665, certiorari denied 69 S Ct 138, 335 U.S. 868, 93 L Ed. 412.

(2) Also although reserves were thereafter set up in order to secure the loan pursuant to a subsequent statute authorizing their establishment, subsequent curative acts could

not have effect of adding to bond contract the requirement of setting up reserves

Cal—McCormack v Houston, supra

(3) Where statutory provision under which holders of refunding bonds issued by reclamation district relied upon to establish their right to require district to create reserve funds contained no provision as to any specific amount which district was required to retain in reserve funds, even if statute required creation of reserve funds, a proposed transfer of approximately fifteen thousand dollars from reserve funds to regular bond funds, leaving in the reserve fund approximately fifty-three thousand dollars, would not infringe rights of bondholders

Cal—McCormack v Houston, supra

(4) One of purposes of statute authorizing issuance of refunding bonds by a reclamation district was to provide for payment of post maturity interest on all bonds by a regular and systematic scheme which may well be advantageous to the governmental agency

Cal—Irvine v Reclamation Dist No 108, 150 P 2d 428, 24 Cal 2d 468

32. Cal—Mulcahy v Baldwin, 15 P 2d 738, 216 Cal 517

33. Cal—Mulcahy v. Baldwin, supra, 67 C J p 1331 note 74

34. Cal—In re Livingston, 76 P 2d 1192, 10 Cal 2d 730.

### Statute construed

(1) The statute providing for issuance of irrigation district refunding bonds and approval of modifications

of refunding plans manifests intent to clarify former statutes by clearly authorizing modification of refunding plans, and became effective when signed by governor on May 4, 1937, under emergency clause, and hence validated modification which was submitted to bondholders Jan 1, 1937, approved by securities commission June 22, and approved by special election August 11

Cal—In re Livingston, supra.

(2) Where irrigation district bonds originally bore five and one-half per cent interest and refunding bonds bore four per cent fixed interest and one and one-half per cent contingent interest, further change reducing fixed interest to three per cent and increasing contingent interest to two and one-half per cent was a "modification" of refunding plan, as authorized by such refunding plan, and was valid

Cal—In re Livingston, supra

35. Ariz—Reichenberger v Salt River Project Agr Improvement and Power Dist, 70 P 2d 452, 50 Ariz 144.

36. Neb—Elliott v Calamus Irr Dist, 235 NW 95, 120 Neb 714, 67 C J p 1331 note 75

37. U.S.—Beck v Otero Irr Dist, D C Colo, 50 F 2d 951.

38. Idaho—American Falls Reservoir Dist v Thrall, 228 P 236, 39 Idaho 105

67 C J p 1331 note 78.

39. Mont—State v. Marshall, 52 P. 268, 20 Mont. 510, 67 C J p 1331 note 79.

### Time lien arises

Irrigation district bonds are gener-



erty within the district,<sup>40</sup> but not on the irrigation system or the physical property of the district.<sup>41</sup> Such lien has been held not defeasible by the transfer of the irrigation system<sup>42</sup> on the dissolution of the district,<sup>43</sup> or by the foreclosure of certificates of delinquency in some cases,<sup>44</sup> nor is the lien affected by the failure of the bond fund treasurer to enforce payment or to make a valid sale of lands delinquent in payments.<sup>45</sup> Elsewhere, it has been stated that the statute governing irrigation districts manifests an intent to secure the bonds by the proceeds of the land in the district,<sup>46</sup> although the bonds themselves are not a lien on the land.<sup>47</sup>

Statutory provisions making an irrigation district bonds a first and prior lien on all lands within the district become a part of the bondholders'

contract with the district as if such provisions were incorporated in the bonds.<sup>48</sup>

**Mortgage** Where the statutes so provide, the bonds of an irrigation district may be secured by a mortgage on the lands of the district.<sup>49</sup> A mortgage executed by a water power control district to secure a loan from a government agency may make available the security for the debt, but any provisions that go beyond that, especially in dispossessing the district's directors of their functions should be invalidated, and if ambiguous, should be enforced only in a manner to preserve and apply the security.<sup>50</sup>

**Taking away security.** County commissioners have been held powerless to deprive irrigation district bondholders of their security, either by a resolution abating taxes, or by excluding lands from

al obligations of district, payable out of special assessments to be levied upon property in district, so that when such assessments are regularly levied in accordance with statutory provisions, they become a lien against the specific real property against which they are assessed from and after October 1 in the year in which they are assessed

Neb—Garden County v Schaaf, 17 N W 2d 874, 145 Neb 676

#### Statutes held constitutional

Statutes authorizing water power control districts to execute a lien on property of district to secure bonds in addition to taxes laid for their payment are constitutional

US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F 2d 698

#### "Special assessment liens"

Irrigation district bond, bond interest and warrant liens are "special assessment liens" and not "blanket liens"

Colo—Alpha Corporation v Denver-Greeley Valley Irr Dist, 132 P 2d 448, 110 Colo 179

40. Colo—Sumers v Board of Com'rs of Garfield County, 184 P 2d 144, 117 Colo 57

Mont—Krueger v Morris, 107 P 2d 142, 110 Mont 559  
67 C J p 1331 note 80

#### General obligation of district

Where statute authorized formation of irrigation districts and issuance of bonds by them, but provided no method for apportionment of the debt on lands within the district, bonds purporting to be obligation of district, unenforceable against any particular land or property, although a lien against all lands in the district, expressly providing for annual levy of tax on all lands, with specified exceptions, to pay principal and interest of all bonds, were held gen-

eral obligation of district and not merely a lien on lands in the district  
US—Judith Basin Irr Dist v Malott, CCA Mont, 73 F 2d 142, 97 A L R 504

**Lien on entire property of district**  
Mont—Krueger v Morris, 107 P 2d 142, 110 Mont 559

#### Constitutional provision

Under provision empowering legislature to authorize conservation districts to incur indebtedness which shall be a lien on "property assessed for the payment thereof" quoted phrase means property within district belonging to individuals against which taxes are assessed to pay the indebtedness

US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F 2d 698

41. Mont—State v Board of Com'rs of Cascade County, 296 P 1, 18, 89 Mont 37

67 C J p 1331 note 81

42. US—Beck v Otero Irr Dist, D C Colo, 50 F 2d 951

43. US—Beck v Otero Irr Dist, supra

44. Or—State v McClain, 298 P 211, 136 Or 53

67 C J p 1331 note 84

45. Cal—Balding v Eich, 7 P 2d 1073, 120 Cal App 491

46. Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corporation v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

47. US—Kiles v Trinchera Irr Dist, CCA Colo, 136 F 2d 894

In re Imperial Irr. Dist, D C Cal, 38 F Supp 770, affirmed, CCA, Wells Fargo Bank & Union Trust Co v Imperial Irr Dist, 136 F 2d 539, certiorari denied 64 S.Ct. 784,

321 US 787, 88 L Ed 1078, rehearing denied 64 S Ct 940, 322 US 767, 88 L Ed 1593

Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corporation v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

**No lien or resulting trust** arises from the purchase of irrigation district bonds, notwithstanding statute providing that land acquired by district shall be held in trust for purposes of the statute, and statute providing for trust in favor of person by or for whom consideration is paid for transfer of land

Cal—Clough v Compton Delevan Irr. Dist, 85 P 2d 126, 12 Cal 2d 385

48. Mont—Toole County Irr Dist v State, 67 P 2d 989, 104 Mont 420

49. Cal—Merchants' Nat Bank v Escondido Irr Dist, 77 P 937, 144 Cal 329

67 C J p 1331 note 87

#### Statutes held constitutional

Statutes authorizing water power control districts to execute a mortgage on property of district to secure bonds in addition to taxes laid for their payment are constitutional  
US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F 2d 698

50. US—Borron v El Paso Nat. Bank of El Paso, supra

#### Approval by attorney general

Where statute requiring proceedings of organization of water power control district to be approved by attorney general did not clearly apply to mortgage to be executed by district, attorney general's approval of bonds could not be considered as disapproval of mortgage

US—Borron v El Paso Nat Bank of El Paso, supra

the district, or by any other action they might take,<sup>51</sup> and holders in due course of bonds and interest coupons issued by an irrigation district have the right to levies covering the acreage to be benefited as it existed at the time the obligations were issued, and the acreage cannot be thereafter reduced to their injury.<sup>52</sup>

### § 327. — Cancellation or Return of Bonds

The void bonds of an irrigation district may be canceled without requiring the district to pay the holders of the bonds

It has been held that void bonds of an irrigation district, issued to pay for excavating a canal, may be canceled without requiring the district to pay the holders of the bonds a reasonable value of the work, where the contract was in violation of statute and resulted in no benefit to the district.<sup>53</sup> Where bonds are delivered on a condition which was not fulfilled, it has been held that the bonds must be returned to the district.<sup>54</sup>

### § 328. — Confirmation Proceedings

In some states statutes provide for a special proceeding in which all questions relating to the issue and sale of

bonds of an irrigation district may be judicially examined and confirmed, and the order of the court in such proceedings, unless an appeal is taken, is res judicata as to matters actually and necessarily decided.

In some states the statutes provide for a special proceeding, to be instituted by the board of directors of an irrigation district, in which all questions relating to the organization of the district and the proceedings of the board with respect to the issue and sale of the bonds may be judicially examined, approved, and confirmed,<sup>55</sup> and such a proceeding has been held to be one in rem,<sup>56</sup> the object of which is to determine the validity of prior proceedings for the issuance of bonds.<sup>57</sup> Such proceeding may be commenced as soon as any resolution for the issue of bonds has been adopted,<sup>58</sup> and the jurisdiction of the court is founded on the filing of a petition in the prescribed form,<sup>59</sup> and the publication of a notice of the time and place of hearing,<sup>60</sup> fixed by a judge of the proper court<sup>61</sup> and signed by the clerk.<sup>62</sup>

The petition must comply with statutory provisions as to its form and contents,<sup>63</sup> such as the provisions relating to the description of the boundaries of the district<sup>64</sup> and the establishment of elec-

51. U S—Denver-Greeley Valley Irr Dist v McNeil, C C A Colo, 106 F 2d 288

Colo—Carter v Badger Irr. Dist, 235 P 376, 77 Colo 101.

52. U S—Denver-Greeley Valley Irr Dist v McNeil, C C A Colo, 106 F 2d 288

53. Neb—Paxton Irr Dist v Conway, 142 NW 797, 94 Neb 205

#### Illegal issue

In action to cancel interim bonds issued by Hidalgo County Water Control and Improvement District No 12, evidence sustained findings that bonds were illegally issued pursuant to a fraudulent conspiracy and that holders thereof were not holders in due course

Tex—Miller v State ex rel Abney, Civ App, 155 SW 2d 1012, error refused

54. Colo—Henry L Doherty & Co v Steele, 204 P 77, 71 Colo 33 67 C J p 1332 note 91

55. Mont—Midland Development Co v Cove Irr Dist, 58 P 2d 1001, 102 Mont 479 67 C J p 1332 note 92

#### Proceedings held valid

Decree confirming bond proceedings of irrigation district was held not void for want of jurisdiction, where court had jurisdiction over parties and general subject-matter, on ground that levies and appurtenant reserve fund provided for were not authorized by statute, and decree

could not be set aside in independent action absent showing of excuse for failure to appeal

Mont—Midland Development Co v Cove Irr Dist, supra

#### Judgment held not res judicata

A judgment that district was a duly and legally established, organized and existing water improvement district, and that the refunding bonds thereof were authorized in accordance with law, was not res judicata as to rights of landowner to question in subsequent action the validity of order, annexing his lands to district, which was entered by district board of directors prior to entry of such judgment, where landowner was not a party to proceeding to establish validity of creation of district and of its securities, and matters involved in question of validity of annexing order were not determined in such prior proceeding

Tex—Zavala-Dimmit Counties Water Imp Dist No 1 v Hays, 153 SW 2d 463, 137 Tex 338

56. Neb—Board of Directors of Alfalfa Irr Dist v Collins, 64 NW 1086, 46 Neb 411. 67 C J p 1332 note 93.

#### Refunding bonds

In proceedings in rem to obtain court's confirmation of proceedings authorizing issue of refunding bonds by irrigation district, trial court properly passed upon validity of contracts between irrigation district, bondholders, and landowners which

contracts were part of former readjustment plan, where their validity was necessary in determining validity of proceedings by district for issuance of refunding bonds

Wash—In re Petition of Board of Directors of Columbia Irr Dist, 48 P 2d 648, 183 Wash 425

57. Wash—Kinkade v. Witherop, 69 P 399, 29 Wash 10

58. Cal—Modesto Irr Dist v Tregea, 26 P 237, 88 Cal 334, error dismissed 17 S Ct 52, 164 US 179, 41 L Ed 395

Idaho—Nampa, etc, Irr Dist v Brose, 83 P 499, 11 Idaho 474.

59. Cal—Modesto Irr Dist v Tregea, 26 P 237, 88 Cal 334, error dismissed 17 S Ct 52, 164 US 179, 41 L Ed 395

Or—Harney Valley Irr Dist v Bolton, 221 P 171, 109 Or 486

60. Cal—Modesto Irr Dist v Tregea, 26 P 237, 88 Cal 334, error dismissed 17 S Ct 52, 164 US 179, 41 L Ed 395

67 C J p 1332 note 97.

61. Or—Harney Valley Irr Dist v Bolton, 221 P. 171, 109 Or 486

62. Or—Harney Valley Irr Dist v Bolton, supra

63. Idaho—Emmett Irr Dist v. Shane, 113 P 444, 19 Idaho 332 67 C J p 1332 note 1.

64. Wash—Board of Directors of Quincy Valley Irr Dist v Scott, 140 P 391, 79 Wash 434. 67 C J. p 1333 note 2

tion districts,<sup>65</sup> and persons contesting the validity of the bond election must plead and prove facts which would require the court to vacate the election or declare the result to have been otherwise.<sup>66</sup> Proceedings, however, for a bond election are not open to attack on the theory that the question of expending funds to be raised by a bond issue was submitted in violation of the statute, where it appeared that the project of so issuing the bonds was abandoned.<sup>67</sup> The district has the burden of proving<sup>68</sup> by competent evidence<sup>69</sup> the validity of the various steps in the proceedings for the bond issue.

The court has power in such proceedings to pass on any question affecting the legality of the bonds,<sup>70</sup> but confirmation of the bond issue cannot be denied on the theory that the directors of the district would make illegal expenditures, as this is not a question for determination in such proceedings.<sup>71</sup> Where bonds have been sold before the institution of confirmation proceedings, and a judgment rendered confirming the legality of the organization of the district is reversed on appeal, the questions touching the regularity of the sale will be left to be determined in an action by the bondholders against the district.<sup>72</sup> The court should find on all material issues,<sup>73</sup> but where no issue is joined on material allegations, a general finding has been held sufficient to support a judgment of confirmation.<sup>74</sup>

Where it is shown that all the landowners in the district were advised of the proceedings taken and acquiesced therein, a judgment confirming the bond issue is proper,<sup>75</sup> but under statutes authorizing proceedings to confirm an order of sale

or sale of bonds, it has been held that the court is without jurisdiction to confirm an exchange of bonds for property.<sup>76</sup> So, too, it has been held that the court is without power to include a provision in its judgment precluding and debarring all persons interested from disputing, denying, or disclaiming anything which could have been contested in the proceeding.<sup>77</sup>

*Appeal.* An appeal can be taken only within the time allowed by statute.<sup>78</sup>

*Conclusiveness.* While an order confirming preliminary steps in the issuance of bonds does not affect or validate a subsequent unlawful negotiation or transfer of the bonds,<sup>79</sup> in the absence of fraud,<sup>80</sup> or unless an appeal is taken within the time specified,<sup>81</sup> the judgment is *res judicata* as to matters actually and necessarily decided,<sup>82</sup> and is binding on all persons where there has been a proper publication of notice,<sup>83</sup> and hence it cannot be collaterally attacked,<sup>84</sup> and bonds issued after a decree confirming the proceedings in the issuance of the bonds may be held valid in the hands of a bona fide holder and enforceable by the levy of assessments to pay interest notwithstanding a later judgment has declared the issuance of the bonds to have been void.<sup>85</sup> Where an order attempting to annex certain lands to a water improvement district was void for want of jurisdiction of the district board of directors to enter such order, the owner of such lands could not on the basis of the void order be held to have been a party to a proceeding subsequently instituted by the district to validate the bonds of the district so as to be bound by the judgment rendered therein.<sup>86</sup>

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|---|---|--|
| 65. Wash—Board of Directors of Quincy Valley Irr Dist v Scott, <i>supra</i><br>67 C J p 1333 note 3   | 72. Cal—In re Cential Irr Dist, 49 P 354, 117 Cal 382   | 80. Mont—O'Neill v Yellowstone Irr Dist, 121 P 283, 44 Mont 492  |
| 66. Or—In re Riggs, 210 P 217, 105 Or 531   | 73. Idaho—Black Canyon Irr Dist v Fallon, 122 P 850, 21 Idaho 537   | 81. US—Tomich v Union Trust Co, CCA Mont, 31 F 2d 515<br>Mont—O'Neill v Yellowstone Irr Dist, 121 P 283, 44 Mont 492 |
| 67. Wash—In re Peshastin Irr Dist, 200 P 88, 116 Wash 440   | 74. Idaho—Black Canyon Irr Dist v Fallon, <i>supra</i> .  | 82. Ariz—Mitchell v Power, 255 P 481, 32 Ariz 1<br>Idaho—Eberhard v. Purcell, 296 P 593, 50 Idaho 393.               |
| 68. Cal—Fallbrook Irr Dist v Abila, 39 P 793, 106 Cal 365—In re Bonds of Madera Irr Dist, 28 P 272, 675, 92 Cal 296, 27 Am SR 106, 14 L R A 755 | 75. Ariz—In re Beardsley-Agua Fria Water Conservation Dist, 239 P 504, 29 Ariz 81                                 | 83. US—Tomich v Union Trust Co, CCA Mont, 31 F 2d 515.<br>67 C J p 1333 note 21.                                     |
| 69. Colo—Wilder v Board of Directors of South Side Irrigation District, 135 P 461, 55 Colo 363<br>67 C J. p 1333 note 7.                        | 76. Cal—Stimson v Alessandro Irr Dist, 67 P 496, 1034, 135 Cal 389<br>Neb—Wyman v Searle, 128 N W. 801, 88 Neb 26 | 84. Ariz—Mitchell v Power, 255 P 481, 32 Ariz 1<br>Idaho—Eberhard v. Purcell, 296 P 593, 50 Idaho 393.               |
| 70. Idaho—Nampa, etc, Irr Dist v Brose, 83 P 499, 11 Idaho 474<br>67 C J p 1333 note 8.   | 77. Cal—In re Bonds of Madera Irr Dist, 28 P 272, 675, 92 Cal 296, 27 Am SR 106, 14 L R A 755                     | 85. Cal—Haese v. Heitzeg, 114 P 816, 159 Cal. 569.   |
| 71. Wash—In re Peshastin Irr Dist, 200 P 88, 116 Wash 440   | 78. Cal—Palmdale Irr Dist v Rathke, 27 P 783, 91 Cal 538.<br>67 C J p 1333 note 16                                | 86. Tex—Zavala-Dummit Counties Water Imp Dist No 1 v Hays, 153 S W 2d 463, 137 Tex. 338.                             |
|   | 79. Neb—Paxton Irr. Dist v Conway, 142 N W 797, 94 Neb 205  |  |

## § 329. — Negotiability

In some jurisdictions, the bonds of an irrigation district must be negotiable in form and are negotiable instruments

In some jurisdictions, sometimes by reason of express statutory provisions, the bonds of an irrigation district must be negotiable in form and are negotiable instruments,<sup>87</sup> subject to the same rules as other negotiable instruments,<sup>88</sup> and a provision in the bonds that installments of principal should be payable only on surrender of the coupons covering such installment,<sup>89</sup> or that an assessment be levied and collected by the board of directors sufficient to meet the annual and maturing obligations,<sup>90</sup> or that they are payable from a certain fund,<sup>91</sup> has been held not to destroy the negotiability of the bonds. A person, however, purchasing irrigation district bonds subject to the interest of a third person has been held not entitled to the bonds as against such third person.<sup>92</sup> Where the bonds are negotiable, defects and irregularities in the organization of the district or in the proceedings for the issue and sale of the bonds cannot be set up against a bona fide holder for value and without notice,<sup>93</sup> but it is otherwise as to one who had actual knowledge of the illegality or defect.<sup>94</sup>

*Interest coupons*, providing for payment of stated sums to bearer by an irrigation district on certain dates, unless refunding bonds, from which

such coupons were detached, were called for previous redemption and payment duly provided for, were not negotiable instruments, although such condition did not occur and promise to pay interest became absolute.<sup>95</sup> Thus, one acquiring such coupons stood in no better position than the holder of the bonds and, not being a holder in due course, he could not recover interest at the rate stated therein after modification of the refunding plan by reducing the rate, as authorized thereby, although such coupons contained no language suggesting that the obligation to pay the stated interest was subject to modification.<sup>96</sup>

*Warrants* issued by an irrigation district, although negotiable in form, have been held not negotiable in the sense of the law merchant.<sup>97</sup>

## § 330. — Payment and Collection

The funds or property which may be subjected to the payment of principal and interest of outstanding bonds of an irrigation district and the priority of payment of such bonds depend on the statutes in the particular jurisdiction

The funds or property which may be subjected to the payment of principal and interest of outstanding bonds of an irrigation district depend on the statutes in the particular jurisdiction,<sup>98</sup> which are a constituent part of the contract for the payment of the bonds.<sup>99</sup> So, too, the question of priority of payment depends on statutory provisions,<sup>1</sup> and

87. U.S.—*Rialto Irr. Dist. v. Stowell*, Cal., 246 F. 294, 159 C.C.A. 24, 67 C.J. p. 1333 note 25.

88. U.S.—*Shelton v. Gas Securities Co.*, Colo., 239 F. 653, 152 C.C.A. 487, certiorari denied 37 S.Ct. 652, 244 U.S. 654, 61 L.Ed. 1373.

89. Cal.—*Stowell v. Rialto Irr. Dist.*, 100 P. 248, 155 Cal. 215.

90. Cal.—*Farwell v. San Jacinto & Pleasant Valley Irr. Dist.*, 192 P. 1034, 49 Cal. App. 167.

91. Wash.—*Kinkade v. Witherop*, 69 P. 399, 29 Wash. 10.

92. Utah.—*Thompson v. Bown Live Stock Co.*, 276 F. 651, 74 Utah 1.

93. Neb.—*Wyman v. Searle*, 128 N.W. 801, 88 Neb. 26, 67 C.J. p. 1334 note 31.

94. Cal.—*Leeman v. Ferris Irr. Dist.*, 74 P. 24, 140 Cal. 540, 67 C.J. p. 1334 note 32.

95. U.S.—*Getz v. Nevada Irr. Dist.*, C.C.A. Cal., 112 F. 2d 495.

96. U.S.—*Getz v. Nevada Irr. Dist.*, supra.

97. Cal.—*Ser-Vis v. Victor Valley Irr. Dist.*, 214 P. 223, 190 Cal. 732, 67 C.J. p. 1334 note 33.

98. U.S.—*Denver-Greeley Valley Irr.*

*Dist. v. McNell*, C.C.A. Colo., 80 F. 2d 929.

Cal.—*Sutter Basin Corp. v. Brown*, 253 P. 2d 649, 40 Cal. 2d 235, certiorari denied *Brown v. Sutter Basin Corp.*, 74 S.Ct. 71, 346 U.S. 855, 98 L.Ed. 360—*Irvine v. Bossen*, 155 P. 2d 9, 25 Cal. 2d 652—*Provident Land Corp. v. Zumwalt*, 85 P. 2d 116, 12 Cal. 2d 365, followed in *Provident Land Corp. v. Provident Irr. Dist.*, 85 P. 2d 122, 12 Cal. 2d 791 and *Provident Land Corp. v. Benoit*, 85 P. 2d 122, 12 Cal. 2d 790.

*Selby v. Oakdale Irr. Dist.*, 35 P. 2d 125, 140 Cal. App. 171—*Kentfield v. Reclamation Board*, 31 P. 2d 431, 137 Cal. App. 675.

Colo.—*Alpha Corp. v. Denver-Greeley Valley Irr. Dist.*, 132 P. 2d 448, 110 Colo. 179.

Neb.—*Garden County v. Schaaf*, 17 N.W. 2d 874, 145 Neb. 676.

Or.—*Warm Springs Irr. Dist. v. Holman*, 29 P. 2d 825, 146 Or. 110.

Tex.—*Moore v. Maverick County Water Control and Improvement Dist. No. 1*, Civ. App., 162 S.W. 2d 1009 error refused, certiorari denied 63 S.Ct. 993, 318 U.S. 790, 87 L.Ed. 1156.

Wash.—*In re Horse Heaven Irr. Dist.*, 118 P. 2d 972, 11 Wash. 2d 218.

67 C.J. p. 1334 note 35.

Under the "last faithful acre doctrine" a bond of an irrigation district is a general obligation and each acre of land within the district remains bound until the debt is paid, the obligations being both primary and secondary, primary in that each must pay its proportionate part based upon its benefit, and secondary in that each acre must pay or help pay the deficiencies which result from failure of other acres to pay.

Wash.—*In re Horse Heaven Irr. Dist.*, supra.

99. Cal.—*Selby v. Oakdale Irr. Dist.*, 35 P. 2d 125, 140 Cal. App. 171.

Utah.—*Salter v. Nelson*, 39 P. 2d 1061, 83 Utah 460.

**Time and method of payment of reclamation district bonds as well as nature of security given bondholders are integral parts of contract between property owners and bondholders.** Cal.—*Sutter Basin Corp. v. Brown*, 253 P. 2d 649, 40 Cal. 2d 235, certiorari denied *Brown v. Sutter Basin Corp.*, 74 S.Ct. 71, 346 U.S. 855, 98 L.Ed. 369.

1. U.S.—*In re Imperial Irr. Dist.*, D.C. Cal., 10 F. Supp. 832, reversed on other grounds, C.C.A., *Southern Sierras Power Co. v. Imperial Irr.*

under some statutes it has been held that the order of presentation does not create any priority as between different bond issues,<sup>2</sup> and that the bonds are payable in the order of their issuance,<sup>3</sup> while under other statutes it has been held that there is no priority given to any bonds issued,<sup>4</sup> and that the bonds are payable in the order of their registration where payment is not made in the order prescribed,<sup>5</sup> or in the order of their presentation<sup>6</sup> where there are insufficient funds to pay all the bonds,<sup>7</sup> and the

Dist., 85 F 2d 1019, rehearing denied 87 F 2d 355

#### **Straight maturity bonds**

Where irrigation district bonds were not serial bonds but were straight maturity bonds, and they were merely numbered for convenience in handling and for purpose of identification, they were redeemable pro rata, and those of lower numerical order were not entitled to preference

Mont—State ex rel Central Auxiliary Corp v Rorabeck, 108 P 2d 601, 111 Mont 320

**Repeal of statute** which was enacted after issuance of irrigation district bonds, and which placed such bonds on equality, did not show a legislative intent to affect status of the bonds as to equality, where the statute simply declared the law as it already existed

Mont—State ex rel Central Auxiliary Corp v Rorabeck, supra.

#### **Preferred liens**

In proceeding to determine rights of holder of matured bonds and refunded bonds of irrigation district to moneys on hand for payment of legal obligations of irrigation district, statute making liens of bonds of any issue preferred liens to those of any subsequent issue, which was later amended by dropping reference to preferred liens, had no application, where matured bonds were acquired prior to amendment, and most of refunded bonds were converted bonds of issues preceding amendment

Cal—Selby v Oakdale Irr Dist, 35 P 2d 125, 140 Cal App. 171

#### **Preference void**

(1) Under statute directing board of directors of irrigation district to levy tax covering all interest coupons falling due, preference created by levying tax covering only interest coupons on refunded bonds was void, and proceeds of levy would be applied to payment of matured bonds and matured interest coupons, irrespective of date of issue

Cal—Selby v Oakdale Irr Dist, supra

(2) Amendment to Irrigation District Act permitting landowners holding defaulted matured bonds or interest coupons to apply them in payment of assessments, was held unconstitutional as preferring landowning bondholders

Cal—Shouse v Quinley, 45 P 2d 701, 3 Cal 2d 357.

#### **Proceeds of lease**

Where wholesale delinquencies in

irrigation district assessments and wholesale bond defaults resulted in pyramiding of assessments on more valuable land and in the district's acquiring large tracts which it could not sell, district could not give preference to holders of unmatured bonds by leasing such land and buying unmatured bonds with proceeds of the leases, as against contention that assessments only were pledged to payment of matured bonds

Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

#### **Allocation of revenues**

Cal—Meyerfeld v South San Joaquin Irr Dist, 45 P 2d 321, 3 Cal 2d 409

2. Wash—State v Forsyth, 15 P 2d 268, 170 Wash 71.

3. Wash—State v Forsyth, supra.

4. US—In re Imperial Irr Dist, D C Cal, 10 F Supp 832, reversed on other grounds, CCA, Southern Sierras Power Co v Imperial Irr Dist, 85 F 2d 1019, rehearing denied 87 F 2d 355

Cal—Meyerfeld v South San Joaquin Irr Dist, 45 P 2d 321, 3 Cal 2d 409

Selby v Oakdale Irr Dist, 35 P. 2d 125, 140 Cal App 171—Bates v McHenry, 10 P 2d 1038, 123 Cal App 81

5. Cal—Selby v Oakdale Irr Dist, 35 P 2d 125, 140 Cal App 171.

#### **Surplus**

Where directors of irrigation district declare that a surplus exists in money derived from land acquired by the district because of delinquency in assessments over and above the district's operating needs, such surplus should not be given to junior bondholders in preference to those with prior claims, but should be paid on past due bonds and coupons in the order of their registration

Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal. 2d 790

#### **Unjustified preference**

Permitting holders of irrigation district bonds not prior in registration to obtain payment by the proceeds of execution sales of the district's lands under judgments on the

bonds constitutes an unjustified preference

Cal—El Camino Irr Dist v El Camino Land Corp, 85 P 2d 123, 12 Cal 2d 378

**Holders of reclamation district bonds** should present them to county treasurer for registration within four years after maturity thereof to be entitled to preferential payment of bonds from first money received applicable to their payment under registration statute

Cal—Irvine v Bossen, 155 P 2d 9, 25 Cal 2d 652.

6. Cal—Bates v McHenry, 10 P 2d 1038, 123 Cal App 81.

#### **Refinancing bonds**

Neb—State ex rel Brown v Taylor, 249 NW 586, 125 Neb 228

#### **Record of defaulted obligations**

The California statute providing for presentation of obligations to irrigation districts and, on their inability to pay, for indorsement of presentation thereon, intends only to provide plan for orderly record of owners of defaulted obligations and for their notification when fund permits payment, and does not intend to give preference to registered bondholders

US—West Coast Life Ins Co v Merced Irr Dist, CCA Cal, 114 F 2d 654, certiorari denied Pacific Nat Bank of San Francisco v. Merced Irr Dist, 61 S Ct 441, 311 US 718, 85 L Ed 467, rehearing denied 61 S Ct 620, 312 US 714, 85 L Ed 1144

#### **Warrant not required**

Holder of past-due interest coupons on bonds of water conservation district was held entitled to payment on presentation of coupons without necessity of obtaining and presenting warrant for past-due interest evidenced by coupons.

Ariz—Maloney v. Moore, 52 P 2d 467, 46 Ariz 452

7. Cal—Bates v. McHenry, 10 P 2d 1038, 123 Cal App 81

#### **Equitable means of payment**

California statute for presentation of obligations to irrigation districts and on their inability to pay, for indorsement of presentation thereon, merely provides equitable means of ordinary payment when funds are not available for complete payment to all obligees of like debts but instead of giving preference to registered bond owners, is intended to preserve equality between all bond owners

US—In re James Irr Dist., D C Cal, 25 F Supp. 974, affirmed, C.C.A.,

treasurer of the district must either pay a matured bond or interest coupon when presented or, if the funds are insufficient, he must register them<sup>8</sup> and pay them as soon as sufficient money is available.<sup>9</sup> Where the irrigation district is insolvent and large amounts of matured bonds are unpaid, the bonds should not be paid in the order of their registration so as to create a preference over subsequently registered bonds, but available funds should be apportioned pro rata among the holders of all valid claims, notwithstanding the rule allowing preference in order of payment where it will be possible to pay all bonds<sup>10</sup>

In other jurisdictions it has been held that, where the fund for the payment of bonds was insufficient to pay all, it was to be allotted to all who presented their claims within a reasonable time after they became due<sup>11</sup> Where, however, there is a means through which all the creditors may be paid in full, the reason for directing a pro rata payment does not exist<sup>12</sup> Although an irrigation district's fund is not sufficient to pay its bonds in full, the holder of interest coupons may be entitled to have such coupons paid in full, at least where all other

interest coupons have been paid in full to other bondholders<sup>13</sup> The fact that the bonded indebtedness of a district and the low price of farm products indicate that both bondholders and property owners are suffering, and probably will suffer, excessive losses should not enter into or determine the rights of the respective bondholders as to what moneys there may be on hand for making payment of the legal obligations of the district.<sup>14</sup> Also, the equities of the holders of bonds who supplied money to complete the irrigation works to furnish water to the bondholders, without which productivity of the lands in the district would be lessened, would not be considered in determining rights of the matured bondholders to moneys on hand for payment of the legal obligations of the district, where the matured bondholders' rights rested on statute.<sup>15</sup>

The interest on an irrigation district bond has been held to become part of the bond where the statutes provide a single fund for payment of bond and interest,<sup>16</sup> and the bondholders have been held not estopped to collect principal and interest because of a failure to collect coupons for a pe-

Moody v James Irr Dist, 114 F 2d 685, certiorari denied 61 S Ct 712, 312 US 693, 85 L Ed 1129

#### Lien

The presentation for payment by creditors of California irrigation district of bonds, coupons and warrants and on district's inability to pay, indorsement of presentation of such obligations did not create a lien

US—In re James Irr Dist, D C Cal, 25 F Supp 974, affirmed, CCA, Moody v James Irr Dist, 114 F 2d 685, certiorari denied 61 S Ct 712, 312 US 693, 85 L Ed 1129

8. Cal—Bates v McHenry, 10 P 2d 1038, 123 Cal App 81

9. Cal—Bates v McHenry, *supra*

No constitutional prohibition exists against enactment of statute providing for agreement between irrigation district and holder of irrigation district bonds specifying that bonds and coupons shall be paid as soon as money is available therefor and promising to pay bondholder rate of interest which would be payable on money judgment

Cal—Moody v Provident Irr Dist, 85 P 2d 128, 12 Cal 2d 389

#### Reclamation district

Cal.—Irvine v Bossen, 155 P 2d 9, 25 Cal 2d 652

10. Cal—Clough v Baber, 100 P 2d 519, 38 Cal App 2d 50

#### No priority

(1) Statute providing for registra-

tion of matured bonds and coupons when funds are not available for their payment, and providing for interest thereon until they can be paid in order of registration, does not give a right to priority of payment or to interest in cases of insolvency of a district where rights of all creditors must be determined

US—Wells Fargo Bank & Union Trust Co v Imperial Irr Dist, CCA Cal, 136 F 2d 539, certiorari denied 64 S Ct 784, 321 US 787, 88 L Ed 1078, rehearing denied 64 S Ct 940, 322 US 767, 88 L Ed 1593

(2) The proviso clause of amendment of act stating that provisions of section relating to exemption from taxation of improvements upon lands or town lots should not apply to any district then organized unless approved by vote of landholders is valid as a proper classification of irrigation districts organized before adoption of amendment and those organized subsequently, and no preferential treatment, based on theory that proviso was invalid, could be given in composition plan to holders of irrigation district bonds issued subsequent to such amendment, and prior to another amendment

US—In re Imperial Irr Dist, D C Cal, 38 F Supp 770, affirmed, CCA, Wells Fargo Bank & Union Trust Co v Imperial Irr Dist, 136 F 2d 539, certiorari denied 64 S Ct 784, 321 US 787, 88 L Ed 1078, rehearing denied 64 S Ct 940, 322 US 767, 88 L Ed 1593

11. Colo—Thomas v Patterson, 159 P 34, 61 Colo 547  
67 C J p 1334 note 44

#### Forfeiting payment

Ariz—Maloney v Moore, 52 P 2d 467, 46 Ariz 452.

Mont—State ex rel Central Auxiliary Corp v Rorabeck, 108 P 2d 601, 111 Mont 320

12. Tex—Donna Irr Dist, Hidalgo County No 1 v West Coast Life Ins Co, Civ App, 103 S W 2d 1091.

#### Matured interest

That there were other outstanding bondholders of irrigation district bonds which had matured and interest coupons thereon which were in default, and that sinking fund maintained by district arose from a levy of taxes made for purpose of servicing all of outstanding bonds of district, held not to require that holder of bonds with matured interest coupons thereon be paid only pro rata with all other creditors of the district within the same class.

Tex—Donna Irr Dist, Hidalgo County No 1 v West Coast Life Ins Co, *supra*

13. Mont—State ex rel Central Auxiliary Corp v Rorabeck, 108 P 2d 601, 111 Mont 320

14. Cal—Selby v Oakdale Irr. Dist, 35 P 2d 125, 140 Cal App 171

15. Cal—Selby v Oakdale Irr Dist, *supra*

16. Wash—State v Forsyth, 15 P 2d 268, 170 Wash 71.

riod of years, where the bonds had not matured, they being privileged to postpone collection of interest during that period<sup>17</sup> The owners of irrigation district matured bonds have been held entitled to principal and interest to maturity, and not to interest on the bonds and attached coupons after their respective maturities<sup>18</sup> Under statutes relating to reclamation district bonds which provide that bonds shall bear interest until paid, interest is recoverable on the bonds after maturity,<sup>19</sup> but post maturity interest is not recoverable on interest coupons attached to the bonds<sup>20</sup> Where an irrigation district has made a levy to pay the bonds and coupons, but insufficient money was realized therefor, it has been held that the bondholder was not entitled to interest on the coupons since he could procure payment by taking up interest-bearing tax certificates<sup>21</sup> The debts created by the issuance of bonds, coupons, and warrants of an irrigation district are not extinguished although the method provided for realizing funds to discharge them has proved abortive<sup>22</sup>

*Payment on dissolution of irrigation district* Where an irrigation district was dissolved by a decree of court and a water company and land company organized, and the lands, which had been taken over by the irrigation district for nonpayment of assessments were given to the land company to sell and pay the unpaid warrants and bond coupons of the irrigation district, the decree of distribution constituted the measure of the land company's powers, and any attempted execution of pow-

ers in contravention thereof, by one having full knowledge of the circumstances would be absolutely void<sup>23</sup>

*Agreement of bondholders* Where the bondholders of an irrigation district agreed to release a portion of the bonds and to accept a lower rate of interest on the last of the bonds, on condition that the United States should take over the operation of the system and should procure from the secretary of the interior the approval of the United States for the terms of payments of the remaining bonds of the district, it has been held that the district was properly charged with interest on all its bonds prior to the time it procured the approval of the secretary of the interior, although before that date it had performed the condition of securing a contract for the operation and maintenance of its system by the United States<sup>24</sup>

*Promissory notes* A water improvement district, reduced in acreage and validated by the court and legislature, has been held liable on notes issued by the district before the exclusion of certain land from the district<sup>25</sup>

*Warrants* Statutes in some jurisdictions relating to the fiscal management of irrigation districts have been held to contemplate that such management be by distinct years,<sup>26</sup> and that the district should operate on a cash basis,<sup>27</sup> and that the annual revenue of a district must be applied to the discharge of its expenses during the year in which the revenue was raised,<sup>28</sup> and the officers of a dis-

17 Colo—Carter v Badger Irr Dist, 235 P. 376, 77 Colo 101

18. Colo—North Denver Municipal Irr Dist v. Heath, 13 P 2d 1116, 91 Colo 210—In re Green City Irr Dist, 13 P.2d 1113, 91 Colo 202

19. Cal—Irvine v Reclamation Dist No 108, 150 P 2d 423, 24 Cal 2d 468

#### Statute construed

That statute relating to bonds of reclamation districts contained no provision for realizing funds for payment of interest after maturity, or for payment thereof, did not evince a legislative intent that none should be payable in view of clear implication in statute that bonds do bear interest after maturity, and even if supplemental assessments may not be made until all bonds of reclamation district mature and all steps for enforcement of assessment have been taken, and may be made only when the supplemental assessment will not exceed value of benefits to landowner from project, that does not preclude running of interest on bonds after maturity.

Cal—Irvine v. Reclamation Dist No 108, supra

20. Cal—Irvine v Reclamation Dist No 108, supra

#### Legislative intent otherwise

Cal—Irvine v Reclamation Dist No 108, supra.

21. Colo—Thomas v Henrylyn Irr Dist, 247 P 1059, 79 Colo 636

22. US—Kiles v. Trinchera Irr Dist, CCA Colo, 136 F 2d 894

#### Noncollection of taxes

Insufficiency of funds to pay bonds, interest coupons and warrants of Colorado irrigation district as they matured due to noncollection of taxes assessed against certain lands, did not extinguish indebtedness represented by such unpaid instruments, though special taxes in sufficient amount to pay liabilities as they matured were levied by district as required by statute, and there was no authority to make additional or cumulative levies

US—Kiles v Trinchera Irr Dist, supra

23. Cal—Olinda Irrigated Lands Co

v Yank, 80 P 2d 170, 27 Cal App 2d 56

Dissolution of irrigation district generally see infra § 338

#### Exchange in place of sale

Land company, if it wished to exchange lands for certificates of indebtedness, should have applied to the court for modification of the decree of dissolution and an enlargement of its powers

Cal—Olinda Irrigated Lands Co v Yank, supra

24. US—New York Trust Co v Farmers' Irr Dist, CCA Neb, 280 F 785

25. Tex—La Salle County Water Improvement Dist No 1 v Guinn, Civ App, 40 SW 2d 892

26. Colo—Eberhart v. Canon, 157 P 189, 61 Colo 340

27. Wash—Burbank Irr Dist No 4 v Douglass, 255 P 360, 259 P 881, 143 Wash 385

28. Colo—Eberhart v. Canon, 157 P 189, 61 Colo 340

Wash—Burbank Irr Dist No 4 v Douglass, 255 P. 360, 259 P 881, 143 Wash 385

tract have been held to be without power to make an agreement for payment of warrants for labor and materials dependent on the time funds were provided therefor.<sup>29</sup> Under some statutes, the only source for the payment of warrants issued by an irrigation district for operation and maintenance is the annual assessments levied and assessed by the officers.<sup>30</sup> The fact that the tax levy of an irrigation district is valid notwithstanding the issuance of illegal warrants does not necessarily authorize the payment of all warrants issued.<sup>31</sup> Warrants of a water conservation district are payable only at the office of the treasurer of the district, and they are not payable at any time certain.<sup>32</sup>

### § 331. — Actions

- a In general
- b Parties
- c Pleading
- d Evidence
- e Trial, judgment, and relief

#### a. In General

One holding bonds of an irrigation district may bring an action thereon at law, or where the remedy at law is inadequate he may seek equitable relief.

In the absence of a statute excluding such right,<sup>33</sup> or limiting it,<sup>34</sup> one holding bonds or warrants of an irrigation district may bring an action there-

on<sup>35</sup> without the necessity of a previous formal demand,<sup>36</sup> and the title and right to enforce payment of bonds in the hands of a bona fide holder cannot be impaired by restrictions placed on his power of disposal.<sup>37</sup> Provided he has no adequate remedy at law<sup>38</sup> a bondholder may seek equitable relief,<sup>39</sup> notwithstanding the dissolution of the irrigation district under a decree not providing for the liquidation of its indebtedness,<sup>40</sup> and it has been held that he is not precluded from such relief because the bonds and interest are payable from assessments,<sup>41</sup> and where a levy on lands in an irrigation district has failed to produce funds sufficient to liquidate the indebtedness, it has been held that the bondholders, although failing to take the lands at a tax sale, are entitled to enforce additional levies.<sup>42</sup>

One who bids for bonds on condition that they be legal and valid can question any proceeding which was so defective as to invalidate the bonds.<sup>43</sup> In some jurisdictions no action will lie to recover a money judgment on irrigation district bonds, coupons or warrants, the only remedy available for enforcement thereof being mandamus to compel tax levies provided by statute, or the application of funds derived from such levies to the discharge of such indebtedness.<sup>44</sup> Irregularities in connection with elections for the issuance of bonds of a water control and improvement district may properly

29. Idaho—Little v Emmett Irr Dist, 263 P 40, 45 Idaho 485, 56 A L R 822

30. Or—Redmond Realty Co v Central Oregon Irr Dist, 12 P 2d 1097, 140 Or 282

31. Cal—Wilbur v Board of Directors of Tia Juana River Irr Dist, 271 P 514, 94 Cal App 511

32. Ariz—Malonev v Moore, 52 P 2d 467, 46 Ariz 452.

33. Colo—Henrylyn Irr Dist v Thomas, 173 P 541, 64 Colo 413 67 C J p 1335 note 58

34. Percentage of outstanding bonds  
Statute limiting right of bondholders to bring proceeding against board of directors of an irrigation district unless holders of ten per cent or more of outstanding and unpaid bonds of the district joined in such action was held unconstitutional Cal—Selby v Oakdale Irr Dist, 35 P 2d 125, 140 Cal App 171

35. Idaho—Tingwall v King Hill Irr Dist, 155 P 2d 605, 66 Idaho 76 67 C J p 1335 note 59

**Remedy part of contract**

Remedy of holders of bonds issued

by irrigation district, in case of default on bonds, is a part of contract Cal—May v Board of Directors of El Camino Irr Dist, 208 P 2d 661, 34 Cal 2d 125

#### Changing or limiting remedy

Amendment to Irrigation District Act if merely changing or limiting bondholders' remedy under original statute would not be unconstitutional but if effect of amendment was to take away all remedies for, or seriously interfered with, enforcement of obligations of bonds, amendment would be unconstitutional, notwithstanding it might act solely on the remedy Utah—Salter v Nelson, 39 P 2d 1061, 85 Utah 460

#### Condition precedent

Tex—Jessen v Le Van, Civ App, 161 S W 2d 585

36 US—Shepard v Tulare Irr Dist, C C Cal, 94 F 1, affirmed 22 S Ct 531, 185 US 1, 46 L Ed 773

#### Immediately after issuance

Action to reduce to judgment claims, represented by irrigation district warrants which are general obligations of the district payable out of its general funds, may be insti-

tuted immediately after issuance thereof

Or—Buell v Jefferson County Court, 152 P 2d 578, 175 Or 402, 155 A L R 1135, rehearing denied 154 P 2d 188, 175 Or 402, 155 A L R 1135

37. Cal—Ham v Grapeland Irr Dist, 158 P 207, 172 Cal 611

38. US—Beck v Otero Irr Dist, D C Colo, 50 F 2d 951—Beck v Otero Irr Dist, D C Colo, 38 F 2d 275

39. US—Beck v Otero Irr Dist, D C Colo, 50 F 2d 951—Beck v Otero Irr Dist, D C Colo, 38 F 2d 275

#### Cancellation of void bonds

To prevent a multiplicity of suits against an irrigation district, a court of equity may acquire jurisdiction to cancel void district bonds in the hands of many different holders Neb—Paxton Irr Dist v Conway, 142 N W 797, 94 Neb 205

40. US—Beck v Otero Irr Dist, D C Colo, 50 F 2d 951

41. US—Beck v Otero Irr Dist, D C Colo, 38 F 2d 275

42. US—Beck v Otero Irr Dist, D C Colo, 50 F 2d 951

43. Cal—Metcalfe v Merritt, 111 P 505, 14 Cal App 244

44. US—Kiles v Trinchera Irr. Dist., C C A Colo, 136 F 2d 894



be raised only in an election contest brought in the form and manner provided by statute, and not in a suit by the holders of other bonds to enjoin the sale<sup>45</sup>

*By taxpayers or landowners.* While it has been held that a taxpayer cannot maintain a suit to cancel the bonds of an irrigation district unless the officers of the district have refused to institute such suit,<sup>46</sup> a suit by taxpayers and landowners to compel the return of bonds will not be dismissed because sufficient notice was not given the directors before suit was brought to enable them to exercise their discretion, where the district was a party from the beginning and never made any objection, but asked for the same relief,<sup>47</sup> and it has also been held that the taxpayers of the district may maintain an action, in behalf of themselves and other taxpayers, for the cancellation of bonds claimed to have been illegally issued and to enjoin the further issuance of such bonds, without showing a demand on the district to bring such suit<sup>48</sup> So, too, landowners can maintain a suit to recover the value of bonds unlawfully issued by the officers of the district,<sup>49</sup> without the necessity of litigating the bonds in the hands of an innocent holder.<sup>50</sup>

The fact, however, that some owners of land included in an irrigation district did not have an opportunity to object to an order relating to the issuance of bonds has been held not ground for complaint by an owner of other land seeking to enjoin the sale of bonds where such owners made no complaint<sup>51</sup> The state through the attorney general, on his own motion or on the motion of any person affected by the existence of the bonds of a water control and improvement district may have the validity of such bonds judicially determined<sup>52</sup>

*Limitations and laches* Actions by or on behalf of an irrigation district, or against such district, cannot be maintained where barred by limitations or laches<sup>53</sup> Thus, it has been held that a taxpayer or landowner cannot maintain a suit challenging the validity of bonds where a long period of years has elapsed,<sup>54</sup> or where he has waited until the final step is being taken to divest him of his title for the nonpayment of a special assessment against his land,<sup>55</sup> but in a suit to require the return of bonds delivered on a condition, which was not fulfilled, it has been held immaterial that the contractor was permitted to go on after the time for completion of the work had passed and after a legal modification of the contract had been executed<sup>56</sup>

*Defenses.* Fact that an irrigation district is not liable on bonds issued on a condition that was not complied with is a reason for ordering their return, and not a ground for objecting to a decree ordering defendant to return them or to repay their value to the district,<sup>57</sup> and the fact that property conveyed to an irrigation district was not sufficient consideration for bonds has been held no defense to an action on interest coupons<sup>58</sup> Where a statute provides that the want of consideration will not exonerate the maker of a negotiable instrument from liability to a bona fide holder, it has been held that an irrigation district could not invoke as a defense, to an action on its bonds by a holder in good faith and for a consideration, the alleged fact that it made a bad bargain in purchasing the property taken in exchange for the bonds, there being nothing illegal in the consideration originally paid therefor<sup>59</sup> In an action to recover irrigation district bonds on the ground that the sale was void because of the interest of district officers in the district's contract accepting the bid for bonds, a contention

45. Tex—*Miller v State ex rel Abney*, Civ App, 115 SW 2d 1027, reversed on other grounds *State ex rel Abney v Miller*, 128 SW 2d 1134, 133 Tex 498

46. Tex—*White v Fahring*, Civ App, 212 SW 193

47. Colo—*Henry L Doherty & Co v Steele*, 204 P 77, 71 Colo 33

48. US—*Miller v Perris Irr Dist*, CC Cal, 92 F 263

Cal—*Sechrist v Rialto Irr Dist*, 62 P 261, 129 Cal 640

49. Or—*Young v Gard*, 277 P. 1005, 129 Or 534

50. Or—*Young v Gard*, *supra*

51. Mont—*Walden v Bitter Root Irr Dist*, 217 P 646, 68 Mont 281

52. Tex—*Miller v State ex rel Abney*, Civ App, 155 SW 2d 1012, error refused

#### Legal existence of district

Under provision of statute which first referred to certain previous sections relating to the creation of water improvement districts and then provided that attorney general could maintain suit to judicially determine all such matters as the legality of the creation of a district, the validity of bonds of a district or the validity of a contract of the district with the United States, attorney general could maintain suit to challenge validity of bonds issued by the district regardless of whether the legal existence of the district was also challenged

Tex—*State ex rel Abney v Miller*, 128 SW 2d 1134, 133 Tex 498.

53. US—*Beck v Otero Irr Dist*, D Colo, 38 F 2d 275  
67 CJ p 1336 note 77

54. US—*Rodgers v Thomas*, Neb, 193 F 952, 113 CCA 580  
67 CJ p 1336 note 78

55. US—*Judith Basin Land Co v Fergus County*, CCA Mont, 50 F 2d 792, followed in *Welch v Fergus County*, 50 F 2d 795

56. Colo—*Henry L Doherty & Co v Youngblut*, 204 P 85, 71 Colo 30

57. Colo—*Henry L Doherty & Co v Steele*, 204 P 77, 71 Colo 33

58. Cal—*Stowell v Rialto Irr Dist*, 259 P 740, 202 Cal 193

59. Cal—*Ham v Grapeland Irr Dist*, 158 P 207, 172 Cal 611.

that the holder of the bonds was a bona fide purchaser is untenable where he knew from the face of the bonds that a party to the agreement for submission of the bid was president of the irrigation district.<sup>60</sup>

#### b. Parties

In a suit to cancel the bonds of an irrigation district, it is not necessary that all bondholders should be made parties. A bondholder may intervene and defend an action to enjoin taxation for the payment of bonds.

In a suit to cancel the bonds of an irrigation district, it has been held not necessary that all the bondholders should be made parties and that relief can be had against all who are joined as defendants,<sup>61</sup> and in an action to recover the value of bonds unlawfully issued, it has been held that the officers of the district and the district were properly made parties defendant.<sup>62</sup> Several nonresident bondholders, having acquired judgments against an irrigation district, can sue jointly for equitable relief after the dissolution of an irrigation district,<sup>63</sup> and they are not required to join subsequent bondholders and landowners.<sup>64</sup>

**Intervention** In an action on the bonds of an irrigation district, it has been held proper for a taxpayer to intervene and attack the cause of action and to claim that his property is exempt from the payment of any liabilities of the district,<sup>65</sup> and, similarly, it has been held that a bondholder may intervene and defend an action to enjoin taxation for the payment of the bonds,<sup>66</sup> although in such a case he cannot obtain affirmative relief to which defendant would not be entitled.<sup>67</sup> The owners of a certain issue of bonds, who were entitled to have the revenue under a certain contract allocated to such issue in the same manner as other general

bonds of the district, had a sufficient interest in such revenues under the contract to entitle them to intervene in a proceeding to compel payment of other bonds.<sup>68</sup>

#### c. Pleading

The rules governing civil actions generally apply in actions on the bonds of an irrigation district with respect to the pleadings.

In the absence of a specific statute applicable thereto,<sup>69</sup> general rules with respect to pleadings in civil actions apply in actions relating to bonds of an irrigation district.<sup>70</sup> In an action by a taxpayer or landowner to compel the cancellation or return of bonds, as the taxpayer or landowner could not restore the status quo, the failure to offer in the pleadings to do equity has been held immaterial,<sup>71</sup> especially where the court has treated the matter as if equity had been offered and required the irrigation district to do equity.<sup>72</sup> In an action by a bondholder to recover on the bonds, the irrigation district, if ready, able, and willing to pay them on presentment and surrender, should plead such facts by way of a defense not to a recovery on the bonds, but in defense of the obligation to pay costs, interest, or damage for delay in payment.<sup>73</sup>

#### d. Evidence

In an action on the bonds of an irrigation district, the general rules as to admissibility, weight, etc., of the evidence applies.

In an action on negotiable promissory vendor's lien notes executed by a water control and improvement district, the burden is on the payee to show that such district complied with constitutional prerequisites to issuance of the notes sued on.<sup>74</sup> The general rules as to admissibility,<sup>75</sup> and weight

60. Cal—City of Los Angeles v Watterson, 48 P 2d 87, 8 Cal App 2d 331

61. Cal—Sechrist v Rialto Irr Dist, 62 P 261, 129 Cal 640

62. Or—Young v. Gard, 277 P 1005, 129 Or 534

63. US—Beck v Otero Irr Dist, D C Colo, 38 F 2d 275

64. US—Beck v. Otero Irr Dist, supra

65. Cal—Nevada Nat Bank v Poso Irr Dist, 73 P 1056, 140 Cal 344

66. Cal—Boskowitz v Thompson, 78 P 290, 144 Cal 724—Baxter v Dickinson, 68 P. 601, 136 Cal 185

67. Cal—Boskowitz v. Thompson, 78 P 290, 144 Cal 724.

68. Cal—Meyerfeld v. South San Joaquin Irr. Dist, 45 P.2d 321, 3 Cal 2d 409.

69. General statute applicable

Action for legal and equitable relief consequent on void sale of valid irrigation district bonds, in respect of place of trial and time within which trial must have been commenced, was governed by general provisions of Code of Civil Procedure, and not by provision of Irrigation District Act

Cal—City of Los Angeles v Watterson, 48 P 2d 87, 8 Cal App 2d 331

70. Complaint held sufficient

Cal—McKag v Moutrey, 90 P 2d 108, 32 Cal App 2d 537—Jordan v Williams Irr Dist, 57 P 2d 566, 13 Cal App 2d 465

Petition held defective

In action on notes allegedly evidencing an obligation of a water control and improvement district, a petition which failed to allege compliance with constitutional prerequisites

to creation of debt was fatally defective, even against general demurrer  
Tex—Willacy County Water Control and Improvement Dist No 1 v Nelson, Civ App, 108 S W 2d 271

71. Cal—Sechrist v Rialto Irr Dist, 62 P 261, 129 Cal 640  
67 C J p 1337 note 93

72. Colo—Henry L Doherty & Co v Steele, 204 P 77, 71 Colo 33

73. Cal—Ham v Grapeland Irr Dist, 158 P 207, 172 Cal 611

74. Tex—Willacy County Water Control and Improvement Dist No 1 v. Nelson, Civ App, 108 S W 2d 271

75. US—Divide Creek Irr Dist v. Hollingsworth, C C A Colo, 72 F 2d 859, 96 A L R 937

Evidence held properly excluded

In action by innocent purchaser for value, on irrigation district bonds

and sufficiency of evidence<sup>76</sup> apply in actions on bonds by, or on behalf of, or against, irrigation districts. On an application for prohibition to prevent the directors of an irrigation district from disposing of bonds, the court must assume that all land within the district is similarly situated and will be capable of irrigation and improvement by the system owned by the district,<sup>77</sup> and in an action on the bonds of an irrigation district sold for an illegal consideration, the burden of proof is on plaintiff to show that he was without notice of such infirmity.<sup>78</sup>

#### e. Trial, Judgment, and Relief

In an action relating to bonds of an irrigation district the relief granted must not be too broad and must be authorized by the pleadings.

In an action relating to bonds, the relief granted must not be too broad,<sup>79</sup> and must be authorized by the pleadings.<sup>80</sup> A recovery may not be had against the district in an action on irrigation district bonds on the ground that the bonds had become a general obligation by reason of an agreement, where the action was not based on the agreement, and the agreement, in so far as it purported to make the bonds general obligations of the district, was void.<sup>81</sup> Whether a district is liable on bonds may not be determined in an action by a bondholder for a money judgment.<sup>82</sup>

The holder of matured bonds is not entitled to

recover a money judgment where it would not give him any additional remedies in seeking to enforce payment.<sup>83</sup> A provision in the judgment that the plaintiff have execution is error, where a judgment creditor must look for payment to revenue provided by statute, and he would not be entitled to execution except to reach moneys collected on assessments in accordance with such statute.<sup>84</sup> Also, since an irrigation district is a quasi-public corporation, a holder of irrigation bonds is not entitled to execution against such district for the property of public corporations, and quasi-public corporations, is not subject to execution.<sup>85</sup> While a suit to cancel irrigation district bonds may be dismissible as against defendants answering and showing no interest, plaintiff in such a suit has been held entitled to a decree against defaulting defendants.<sup>86</sup>

In an action to recover irrigation district bonds, the court may find that money paid on the purchase price was never received by the district but was instead misappropriated by such officers, notwithstanding a statute providing that in an action to contest the validity of irrigation district bonds all findings of fact or conclusions of the board of directors should be conclusive, and a resolution was adopted by the board of directors stating that such money was received by the district.<sup>87</sup> Where an interlocutory judgment was entered ordering delivery of the bonds and coupons to the clerk of

reciting lawful issuance, evidence that bonds were issued for water rights on which no construction work was ever done, reservoir incumbered beyond its value, and stock in ditch company subject to forfeiture for unpaid assessments, held properly excluded.

US—Divide Creek Irr Dist v Hollingsworth, CCA Colo, 72 F 2d 859, 96 ALR 937

76 US—Shelton v Gas Securities Co, Colo, 239 F 653, 152 CCA 487, certiorari denied 37 S Ct 652, 244 US 654, 61 L Ed 1373.  
67 C J p 1337 note 1

#### Evidence held sufficient

Cal—City of Los Angeles v Watter-son, 48 P 2d 87, 8 Cal App 2d 331  
67 C J p 1337 note 1 [b]

77. Utah—Lundberg v Green River Irrigation Dist, 119 P 1039, 40 Utah 83

78. Cal—Ham v Grapeland Irr Dist, 158 P. 207, 172 Cal 611

79. US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F 2d 698

#### Legal interest rate

Where complaint in suit for

amount unpaid on coupons for accrued interest on irrigation bonds alleged respective dates when each coupon was presented for payment and dates when each coupon matured, irrigation district held liable for legal interest rate on matured obligations from and after date of presentation for payment.

Cal—Jordan v. Williams Irr Dist, 57 P 2d 566, 13 Cal App 2d 465

#### 80. Injunction

Petition which alleged that interim bonds of water improvement district were issued in excess of amount and for longer term than authorized by law at time they were voted on by taxpayers sufficiently put validity of the bonds in question to warrant a temporary injunction restraining sale or disposition of the bonds pending trial on merits.

Tex—State ex rel Abney v Miller, 128 SW 2d 1134, 133 Tex 498

81. US—Toole County Irr Dist v Moody, CCA Mont, 125 F 2d 498, certiorari denied Moody v Toole County Irr Dist, 62 S Ct 1281, 316 US 690, 86 L Ed 1762, rehearing denied 63 S Ct 24, 317 US 704, 87 L Ed 562

82. Cal—Carpenter v Glenn-Colusa Irr Dist, 94 P 2d 345, 14 Cal 2d 338

83. Cal—Carpenter v Glenn-Colusa Irr Dist, supra.

#### Registry and indorsement

The holder of matured bonds and interest coupons of irrigation district was not entitled to judgment on bond and coupons where, upon presentation thereof, treasurer of district had registered bonds and indorsed agreement thereon that they should bear interest until funds were available for their payment, since holder was put in same position by indorsement as he would have been by obtaining a money judgment.

Cal—Moody v Provident Irr Dist, 85 P 2d 128, 12 Cal 2d 389

84. US—Divide Creek Irr Dist v Hollingsworth, CCA Colo, 72 F. 2d 859, 96 ALR 937.

85. Idaho—Sudler, Wegener & Co v Hillsdale Irr Dist, 123 P 2d 420, 63 Idaho 546.

86. Or—Carico v Crystal Dist Improvement Co, 250 P. 745, 119 Or 629

87. Cal—City of Los Angeles v Watterson, 48 P 2d 87, 8 Cal App 2d 331

court within a stipulated time, and on default thereof plaintiff was to have judgment for the amount of the bonds and coupons, the court had jurisdiction to enter a second judgment for the amount of the coupons which defendants failed to turn over to plaintiffs.<sup>88</sup> In an action to compel the return of bonds of an irrigation district which were delivered on a condition which was not fulfilled, a decree requiring the parties to return the bonds or their par value is not erroneous because of requiring payment of par value instead of market value, on the claim that the district could purchase the bonds on the market for less than their par value, as this course was likewise open to defendants,<sup>89</sup> and a decree requiring the district to return the incomplete system received for the bonds has been held sufficiently to require the district to do equity although it was worthless, it being likewise worthless to the district.<sup>90</sup>

In a suit to test the validity of bonds proposed to be issued by an irrigation district, the trial court has no authority to determine that the bonds, when issued, would be tax exempt, since only the validity of the bonds may be considered in such a suit, and the state, which has a greater interest in the question of exemption than any individual citizen, cannot be made a party to such suit.<sup>91</sup> It has been held that no relief will be granted to one seeking to invalidate warrants of an irrigation district where he makes no tender of what may be found to be lawfully due from him.<sup>92</sup>

In a suit by bondholders holding a judgment against a dissolved irrigation district, it has been held that equity could, so far as possible, restore the system to its original condition pending liquidation of its indebtedness,<sup>93</sup> and could appoint commissioners to administer the system and affairs of

the district for the benefit of such bondholders whose claims had not been liquidated at the time of the district's dissolution,<sup>94</sup> and have the commissioners appointed make levies.<sup>95</sup>

The fact that other bonds of an irrigation district were outstanding and were included in an order directing the sale of lands which had been sold to the county for unpaid taxes does not impair the court's power to enforce the rights of petitioning bondholders who had obtained a judgment against the district.<sup>96</sup>

A judgment rendered in a prior action in which interveners were not parties is not *res judicata* as to their rights in a subsequent action.<sup>97</sup>

### § 332. Assessments and Taxes

Matters pertaining to assessments and taxes by irrigation districts are considered *infra* §§ 333-337

Examine Pocket Parts for later cases

### § 333 — Power and Duty to Assess and Levy

- a In general
- b Character or nature of tax
- c Purposes of levy or assessment
- d Property liable
- e. Benefit to property

#### a. In General

Irrigation districts have the power, and also the duty, to levy such taxes and assessments as the legislature has authorized by statute

The courts have upheld the validity of statutes authorizing irrigation districts, and other districts organized for the same purpose, to levy taxes and assessments,<sup>98</sup> and such statutes do not fall within

88. Cal—City of Los Angeles v Watterson, *supra*

89. Colo—Henry L. Doherty & Co v Steele, 204 P 77, 71 Colo 33

90. Colo—Henry L. Doherty & Co v Steele, 204 P 77, 71 Colo 33

91. Ariz—Reichenberger v Salt River Project Agr Improvement and Power Dist, 70 P2d 452, 50 Ariz 144

92. Or—Northern Pac Ry Co v John Day Irr Dist, 211 P 781, 106 Or 140

93. US—Beck v. Otero Irr Dist, D C Colo, 50 F 2d 951

94. US—Beck v. Otero Irr Dist, *supra*

#### Discretion

Where Water Power Control District was in default under deed of

trust securing indebtedness, whether situation could be handled under possession of district's property by trustee, or required interposition of receiver as prayed by district's directors was within trial judge's discretion

US—Borron v El Paso Nat Bank of El Paso, CCA Tex, 133 F 2d 698

95. US—Beck v. Otero Irr Dist, D C Colo, 50 F 2d 951

96. US—Judith Basin Irr Dist v Malott, CCA Mont, 73 F 2d 142, 97 A LR 504

97. Cal—Olinda Irrigated Lands Co v Yank, 80 P 2d 170, 27 Cal App 2d 56

98. US—Hydrocarbon Production Co v Valley Acres Water Dist, C A Tex, 204 F 2d 212, certiorari

denied 74 S Ct 44, 346 US 825, 98 L Ed 350

Colo—People ex rel Rogers v. Letford, 79 P 2d 274, 102 Colo 284

Kan—Mizer v. Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546

Neb—Nebraska Mid-State Reclamation Dist. v Hall County, 41 N W 2d 397, 152 Neb 410

Nev—In re Lovelock Irr Dist, 273 P 983, 51 Nev 215

Tex—Moore v Maverick County Water Control and Improvement Dist No 1, Civ App, 162 SW 2d 1009, error refused, certiorari denied 63 S Ct 993, 318 US 790, 87 L Ed 1156

constitutional provisions regulating assessment and collection of taxes for general state purposes.<sup>99</sup> Within the limitations of authorizing statutes, irrigation districts have the power to levy assessments or taxes in the nature of assessments<sup>1</sup> for the purpose of raising revenue to irrigate arid lands,<sup>2</sup> but as a rule may not levy general taxes.<sup>3</sup> It is within the power of the state however to promote and support public improvements of this nature by general taxation<sup>4</sup> and it is optional with the legislature to provide for the redemption of district bonds either through assessments based on benefits or through the exercise of its general taxing power,<sup>5</sup> and consequently within its power to provide that on consolidation or merger of a levee district with a subsequently organized irrigation district the former levee district bonds shall be redeemed through the issuance of refunding irrigation district bonds to be paid by general taxes.<sup>6</sup> Authority to issue irrigation bonds implies an authority to levy a tax to pay them.<sup>7</sup>

*Impairment of obligations* Statutes relating to the assessment, levy, and collection of taxes have

been held invalid where they impair the obligation of the bonds of the district,<sup>8</sup> or other contractual obligations.<sup>9</sup>

*Delegation of taxing power to United States* by a district is not shown by a contract for the operation of an irrigation system by the United States.<sup>10</sup>

*Duty to assess* A district is under a duty to assess and levy such taxes as may be required to meet its obligations,<sup>11</sup> and delinquent assessments levied by an irrigation district are not available as assets so as to excuse a failure to make annual assessments required by statute.<sup>12</sup>

#### b. Character or Nature of Tax

District taxes are generally special taxes for local improvements, and do not constitute taxes in a technical sense.

Ordinarily, district taxes or assessments are not general taxes, but are special taxes for local improvements,<sup>13</sup> or special assessments not constituting "taxes" in a technical sense,<sup>14</sup> and are to be distinguished from taxes levied by a municipality for waterworks,<sup>15</sup> and taxes levied for the maintenance

Utah—Patterson v. Carbon Water Conservancy Dist., 145 P 2d 503, 106 Utah 55

67 C J p 1337 note 10

#### Trust fund

An assessment to pay bond principal and interest of irrigation district levied on land in district became property of district to be held in trust for its bondholders when levied, and directors of district became trustees for district and its bondholders from such time

Cal—McKag v. Moutrey, 90 P 2d 108, 32 Cal App 2d 537

99. Mont—Walden v. Bitter Root Irr Dist., 217 P 646, 68 Mont 281

67 C J p 1338 note 11

1. US—Northport Irr Dist v. Henry Wilcox & Son, CCA Neb., 131 F 2d 113

NM—In re Arch Hurley Conservancy Dist., Hudson Irr. Extension, 191 P 2d 338, 52 NM 34

67 C J p 1338 note 12

The source of authority for making special assessments on land in a conservancy district is the power to tax

NM—Durand v. Middle Rio Grande Conservancy Dist., 123 P 2d 389, 46 NM 138

2. Neb—Flansburg v. Shumway, 219 NW 956, 117 Neb 125

3. Mont—Cosman v. Chestnut Valley Irr Dist., 238 P 879, 881, 74 Mont 111, 40 ALR 1344

67 C J p 1338 note 14

4. Tex—Texas & P Ry Co v. Ward County Irr Dist No 1, 251 SW 212, 112 Tex 593.

Utah—Patterson v. Carbon Water Conservancy Dist., 145 P 2d 503, 106 Utah 55

#### Equal dignity

The Legislature has the power to make irrigation district assessments of equal dignity with general taxes

Wyo—Board of Com'rs of Big Horn County v. Bench Canal Drainage Dist., 108 P 2d 590, 56 Wyo 260

5. Cal—Palo Verde Irr Dist v. Seeley, 245 P 1092, 198 Cal 477

6. Cal—Palo Verde Irr Dist v. Seeley, supra

7. US—Judith Basin Irr Dist v. Malott, CCA Mont., 73 F 2d 142, 97 ALR 504

8. US—Moore v. Gas Securities Co., CCA Colo., 278 F 111.

67 C J p 1338 note 18

9. US—People of Puerto Rico v. Russell & Co., Puerto Rico, 62 S Ct 784, 315 US 610, 86 L Ed 1062, rehearing denied 62 S Ct 1030, 316 US 708, 86 L Ed 1775

10. US—New York Trust Co v. Farmers' Irr Dist, CCA Neb., 280 F 785

67 C J p 1338 note 19

11. Or—State v. McClain, 298 P 211, 136 Or 53

67 C J p 1338 note 20

Mandatory duty  
Board of directors of an irrigation district has mandatory duty to levy assessment to pay its bonds and interest thereon.

Cal—May v. Board of Directors of El Camino Irr Dist., 208 P 2d 661, 34 Cal 2d 125

After issuance of deed to county for unpaid state, county, and irrigation district taxes, subsequent irrigation district taxes should be levied from year to year pending sale by county of the lands so acquired

US—Judith Basin Irr Dist v. Malott, CCA Mont., 73 F 2d 142, 97 ALR 504

12. Or—Kollock v. Barnard, 242 P 847, 116 Or 694

13. Colo—Logan Irr Dist v. Holt, 133 P 2d 530, 110 Colo 253.

67 C J p 1338 note 22

14. Colo—Logan Irr Dist. v. Holt, supra

Neb—Drainage Dist No 1 of Lincoln County v. Kirkpatrick-Pettis Co., 300 NW 582, 140 Neb 530

67 C J p 1338 note 23

15. Colo—Interstate Trust Co v. Montezuma Valley Irr Dist., 181 P 123, 66 Colo 219

Water conservancy district  
A water conservancy district, organized under Water Conservancy Act, is a "quasi-municipal corporation" formed for a public state purpose, and the mill levy tax authorized by the act is an "ad valorem tax" based on the same valuations as all general taxes for a public purpose and not as "assessment for benefits," with respect to contention that tax was in reality a special assessment to which rule that such assessments cannot exceed benefits conferred applied, and owners of realty within limits of incorporated cities and towns lying within water conservancy district, owners of

nance of schools,<sup>16</sup> because in the case of municipal waterworks and school maintenance taxes there is a direct public benefit general in character, whereas in the case of irrigation district taxes the benefit is not directly public in character, the direct benefit being to the particular landowners whose land is supplied with water. Where the legislature has delegated the creation of water improvement districts to commissioners' courts and provided for the levy and assessment of taxes by a board of directors of the district thus created, acting through the assessor appointed by them within the boundaries of the district, on all property alike, it has been held that the tax is not a special assessment but a general tax<sup>17</sup>

### c. Purposes of Levy or Assessment

Subject to constitutional restrictions, the statute conferring the power to levy or assess determines the purposes for which levies or assessments may be made

The purposes for which irrigation assessments may be made by the authorities vested with the power to levy them are determined by the statute conferring such power, subject to constitutional restrictions, and if an assessment is not for a purpose authorized by law it is invalid.<sup>18</sup>

"Construction," as used in statutes providing that the cost of construction of an irrigation system shall be charged against the land within the irrigable limits, is not necessarily limited to building,<sup>19</sup> but may include the preservation, maintenance, and operation of what has been built.<sup>20</sup>

*Meeting warrants.* An assessment levied for the purpose of meeting outstanding warrants of the irrigation district issued in accordance with the provi-

sions of the governing act is not void as not shown to have been made for a purpose for which the irrigation district can make an assessment,<sup>21</sup> and, if the board is required to state the purposes of an assessment, its statement that the assessment is made to raise money for purposes of meeting such outstanding warrants is a sufficient statement of purposes<sup>22</sup>

*Repairs and improvements* Assessments may be made to keep irrigation systems in repair.<sup>23</sup> Under statutes authorizing the directors of irrigation districts to fix rates of tolls and charges for water against persons using its canals, or to levy assessments for the purpose of defraying expenses of the operation, repair, and improvement of such portion of its canal and works as are complete and in use, the laying of a pipe necessitated by the lawful removal of a ditch by municipal authorities is a repair or improvement, funds for which may be included in a maintenance assessment or in increased toll rates charged for water,<sup>24</sup> and is not a new construction which must be defrayed by a special assessment or bond issue under other sections requiring assent of the voters of the district<sup>25</sup>

*Terms "operation" and "maintenance,"* as used in statutes or contracts authorizing assessments for the operation and maintenance of an irrigation system, while of elastic import not susceptible of precise and comprehensive definition,<sup>26</sup> are nevertheless well understood<sup>27</sup> and include within their scope the cost of preserving the system and its lands,<sup>28</sup> although it has been held that, under the item of maintenance and operation, there may not be included the cost of research and investigation with a

lands not susceptible of irrigation, owners of lands already having an adequate water supply, and owners of personalty were subject to general ad valorem tax of district by reason of the situs of their property, and as to such tax the due process clauses of state and federal constitutions had no application  
 Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

16. Colo—Interstate Trust Co v Montezuma Valley Irr Dist, 181 P 123, 66 Colo 219

17. US—Hydrocarbon Production Co v Valley Acres Water Dist, CA Tex, 204 F 2d 212, certiorari denied 74 S Ct 44, 346 US 825, 98 L Ed 350  
 67 C J p 1339 note 26

18. Wash—Laycock v Lake Chelan Reclamation Dist, 214 P. 1054, 124 Wash 544  
 67 C J. p 1339 note 29.

### Operation and maintenance assessments

An item, "operation and maintenance rate \$0.18 per acre," in official budget of irrigation district and local improvement district therein, did not establish that irrigation district board's assessment on lands in improvement district was operation and maintenance assessment, which such board had power to levy, in view of contrary testimony and resolutions of district board and state board of irrigation district bond commissioners  
 Nev—Penrose v Whitacre, 147 P 2d 887, 62 Nev 239

19. US—Swigart v Baker, Wash, 33 S Ct 645, 229 US 187, 57 L Ed 1143

20. US—Swigart v. Baker, supra 67 C J p 1339 note 31

21. Cal—Miller & Lux v Secara, 227 P 171, 193 Cal 755.

22. Cal—Miller & Lux v Secara, supra

23. Mont—State v Board of Com'rs of Cascade County, 296 P 1, 89 Mont 37  
 67 C J p 1339 note 34

24. Idaho—City of Nampa v Nampa & Meridian Irr Dist, 115 P 979, 19 Idaho 779, error dismissed 35 S Ct 602, 238 US 643, 59 L Ed 1502

25. Idaho—City of Nampa v Nampa & Meridian Irr Dist, supra.

26. US—Nampa & Meridian Irr Dist v Bond, D C Idaho, 283 F 569, affirmed, CCA, 288 F 541, affirmed 45 S Ct 383, 268 US 50, 69 L Ed 843

27. US—Nampa & Meridian Irr Dist v Bond, supra

28. US—Nampa & Meridian Irr. Dist v Bond, supra  
 67 C J. p 1339 note 41.

view to the development of hydroelectric power<sup>29</sup> or the cost of "defense of water supply."<sup>30</sup>

#### d. Property Liabile

- (1) In general
- (2) Location
- (3) Property of municipalities
- (4) Property of United States

##### (1) In General

Constitutional and statutory provisions determine what property is subject to assessment for irrigation purposes.

The property subject to assessment for irrigation purposes is determined by provisions of the constitution and statutes, and, generally speaking, the tax is to be assessed on all the real property of the district not exempt by law<sup>31</sup>. Under a statute providing for assessment of all real property within an irrigation district, personal property is not subject to assessment<sup>32</sup>. Where, however, the statute expressly provides for an assessment of all taxable property in the district, real, personal, and mixed, personal property is subject to tax for irrigation purposes<sup>33</sup>.

**Exemptions** It is within the legislative discretion to exempt from assessment for irrigation district purposes urban land within the district occupied and used exclusively for other than agricultural purposes,<sup>34</sup> and, in the absence of violation of constitutional provisions,<sup>35</sup> the exclusion or inclusion of such urban property from irrigation tax is a matter for final determination by the legislature<sup>36</sup>.

A proviso in a statute for the organization of an irrigation district that, where ditches, canals, or reservoirs have been constructed prior to passage of such statute, they and the lands watered thereby shall be exempt under such statute unless the district was formed to acquire such ditches, etc., operates to exempt land so watered under the circumstances specified in the proviso,<sup>37</sup> and other statutory provisions to the effect that an irrigation district shall be conclusively deemed to be legally and regularly organized unless the legality of its organization shall have been attacked by quo warranto proceedings within a specified period do not affect the rights of a landowner under such proviso<sup>38</sup>. An order of county commissioners, defining and establishing the boundaries of a district, construed as a determination that all land within the district would be benefited, has been held not to preclude exemption of land under statutes providing for exemption<sup>39</sup>. Where the primary duty of determining what land is subject to levy and assessment and of passing on claims of exemption is vested in the board of directors, an attempt by the assessor-collector to place land on the tax rolls before the board has made its determination is invalid.<sup>40</sup>

*Neglect of district officials to assess owner for past years does not render his property nonassessable in the future*<sup>41</sup>.

*Patented lands not included in federal reclamation project unit, if irrigable lands and within the district, are subject to assessment for the cost of irrigation works constructed by the United States*

29. NM—Sperry v Elephant Butte Irr Dist of New Mexico, 270 P 889, 33 NM 482

30. NM—Sperry v Elephant Butte Irr Dist of New Mexico, supra

31. Idaho—Gedney v Snake River Irr Dist, 104 P2d 909, 61 Idaho 605

Neb—Garden County v Schaaf, 17 NW2d 874, 145 Neb 676  
67 CJ p 1339 note 46

Almost any character of land may be placed within a conservation and reclamation district and the district may tax almost any character of property that has a situs within its boundaries, regardless of whether such property receives any benefit from district's activities

US—Hydrocarbon Production Co v Valley Acres Water Dist, CA Tex, 204 F2d 212, certiorari denied 74 S Ct 44, 346 US 825, 98 L Ed 350

#### State owned lands

(1) Under some statutory provisions state-owned lands included within an irrigation district are sub-

ject to assessment, even though state lands cannot be sold to satisfy the lien of assessment

Mont—Toole County Irr Dist v State, 67 P2d 989, 104 Mont 420

(2) Under other provisions such lands are not subject to assessment  
Idaho—Florer v Wood River Valley Irr Dist, 51 P2d 700, 56 Idaho 176

32. Cal—Western Union Tel Co v Modesto Irr Co, 87 P 190, 149 Cal 662, 9 Ann Cas 1190  
67 CJ p 1339 note 47

33. Tex—Western Union Telegraph Co v Wichita County Water Improvement Dist No 1, Com App, 30 SW2d 301

**Owner of a mineral estate and personal property situated within an irrigation district created by special act of legislature holds property subject to legislature's exercise of constitutional power to prescribe taxation ad valorem**

US—Hydrocarbon Production Co v Valley Acres Water Dist, CA Tex, 204 F2d 212, certiorari de-

denied 74 S Ct 44, 346 US 825, 98 L Ed 350

34. Neb—Erickson v Nine Mile Irr Dist, 190 NW. 573, 109 Neb 189

67 CJ p 1340 note 50

35. Neb—Erickson v Nine Mile Irr Dist, supra

67 CJ p 1340 note 51

36. Neb—Erickson v Nine Mile Irr Dist, supra

37. Utah—Horn v Shaffer, 151 P 555, 47 Utah 55

38. Utah—Horn v Shaffer, supra  
67 CJ p 1340 note 55.

39. US—Atchison, T & S F Ry Co v Elephant Butte Irr Dist of New Mexico, CCA NM, 110 F2d 767

40. US—Atchison, T & S. F Ry Co v Elephant Butte Irr Dist of New Mexico, supra

41. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, 102 P. 904, 16 Idaho 578  
67 CJ. p 1340 note 56.

under a contract with the district<sup>42</sup> in so far as they are not covered by a paid-up water right contract with the United States<sup>43</sup>

*Land acquired by an irrigation district*, because of delinquency in assessments, is again liable for assessments on coming back into private ownership<sup>44</sup>

## (2) Location

Generally, all lands within an irrigation district, and only such lands, are subject to assessment

Generally speaking, all lands within an irrigation district are subject to assessment according to the benefits received,<sup>45</sup> and property without the district may not be assessed<sup>46</sup> Any particular tract of land shown on the plat made by the proper authorities and referred to in the list of water allotments is subject to assessment as within the district where it can be definitely identified and located by reference to either or both the plat and the list,<sup>47</sup> and if the listing of the lands is inadequate or incorrect in description it may be aided by reference to the plat<sup>48</sup> Where, however, there is no description of the land assessed sufficient to identify it, it will not be held within the district so as to be subject to tax<sup>49</sup>

## (3) Property of Municipalities

Municipal property may be subject to assessment by an irrigation district.

Under constitutional provisions exempting property owned by municipalities from taxation, an assessment by an irrigation district is not a tax,<sup>50</sup> and pueblo lands of a municipality are subject to assessment for purposes of irrigation<sup>51</sup> Under statutes not expressly exempting property of a municipality from assessment by an irrigation district, there may exist an implied exemption of such municipal property as is devoted to a public use<sup>52</sup> The fact that municipal property is used for both private and public uses will not deprive it of the right to exemption as devoted to a public use,<sup>53</sup> and even though it were conceded that particular portions devoted to both private and public use were not entitled to exemption this would not deprive other and separable portions of such property, used exclusively for public purposes, of the right to exemption<sup>54</sup>

## (4) Property of United States

Property of the United States is not subject to assessment except as congress otherwise provides.

Except as otherwise provided by congress, property of the United States is not subject to assessment by an irrigation district,<sup>55</sup> and lands which are not within the provisions of an act of congress permitting taxation of public lands of the United States within irrigation districts are not subject to assessment<sup>56</sup> It has been held that property sold by the United States to a private person is in his

42. Mont—In re Ft Shaw Irr Dist, 261 P 962, 81 Mont 170

43. Mont—In re Ft Shaw Irr Dist, supra

44. Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791, and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

45. Or—State v McClain, 298 P 211, 136 Or 53  
67 C J p 1340 note 59

46. Tex—Grand Lodge of Order of Sons of Hermann in Texas v Curry, Civ App, 108 SW 2d 574, error refused  
67 C J p 1340 note 60

### Excluded land

(1) Water improvement district directors cannot levy a tax on land which has been excluded from the district

Tex—La Salle County Water Improvement Dist No 1 v Guinn, Civ App, 40 SW 2d 892

(2) The date of filing petition for exclusion of lands from irrigation district, and not the date of order of exclusion, determines whether ex-

cluded lands could be released from obligation to pay district's bonds  
US—Pueblo Trading Co v Baxter Creek Irr Dist, D Cal, 61 F Supp 586

(3) Signature of patentee whose land was not part of irrigation district to agreement to pay district taxes was without consideration, in view of the statutory provision that district water must be apportioned among owners of property forming part of district, and his signing of agreement waiving objections to formation of irrigation district, and issuance of bonds, and pledging payment of taxes and assessments did not estop patentee's successors to attack assessment of their land to pay district bonds and subsequent sale thereof under assessment, where patentee's land was never part of district and agreement related only to property forming part of district  
Cal—Woody v Security Trust & Savings Bank, 29 P 2d 898, 137 Cal App 29

47. Utah—Argyle v. Bonneville Irr Dist, 280 P 722, 74 Utah 480

48. Utah—Argyle v. Bonneville Irr. Dist, supra

49. Utah—Bettilyon Home Builders v Bonneville Irr Dist, 260 P 269, 70 Utah 328  
67 C J p 1340 note 63

50. Cal—San Diego v Linda Vista Irr Dist, 41 P 291, 108 Cal 189, 35 L R A 33.

51. Cal—San Diego v Linda Vista Irr Dist, supra  
Faust v City of San Diego, 1 P 2d 543, 115 Cal App 277

52. Cal—City of Fresno v Fresno Irr Dist, 237 P 772, 72 Cal App 503

53. Cal—City of Fresno v. Fresno Irr Dist, supra.  
67 C J p 1341 note 68.

54. Cal—City of Fresno v. Fresno Irr Dist, supra  
67 C J p 1341 note 69

55. Cal—Nevada Nat Bank v Poso Irr Dist, 73 P 1056, 140 Cal 344  
Bishop v Jordan, 285 P 1096, 104 Cal App 319

56. Or—Buell v Jefferson County Court, 152 P 2d 578, 175 Or. 402, 155 A L R 1135, rehearing denied  
154 P 2d 188, 175 Or. 402, 155 A L R 1135



hands free from any preëxisting liability for such assessments not created or assented to by the government or its grantee,<sup>57</sup> although there is also authority to the effect that an irrigation assessment on land of an individual formerly owned by the United States is valid and effectual.<sup>58</sup>

#### e. Benefit to Property

- (1) Necessity
- (2) What constitute benefits in general
- (3) Benefit as affected by irrigable character of land
- (4) Benefit to excess holdings under Federal Reclamation Statutes
- (5) Drainage necessitated by irrigation

##### (1) Necessity

As a general rule, the justification and authority for a levy or assessment by an irrigation district are derived from the benefits which will accrue to the owners of the land within the district.

While it has been broadly stated that the benefit to the land is not the source of the power to tax it for irrigation purposes,<sup>59</sup> generally speaking, the justification and authority for the levying of assessments or taxes in the nature of assessments by an irrigation or similar district are derived from the benefits which the expenditure of the tax or assessment confers on the owners of land within the district,<sup>60</sup>

and a tax or assessment without supporting benefit,<sup>61</sup> or out of all proportion to the benefits conferred,<sup>62</sup> as where the assessment is based on an acreage in excess of that owned,<sup>63</sup> cannot be sustained, although the fact that there is no benefit sufficient to support the whole assessment will not relieve the landowner from the duty to pay such portion of the assessment as is supported by a benefit.<sup>64</sup>

##### (2) What Constitute Benefits in General

Generally, it must appear that there is in existence or in reasonable contemplation an irrigation system capable of delivering water, and that there has been an allotment of water rights to the land in question.

The mere location of land within an irrigation district does not necessarily constitute a benefit,<sup>65</sup> or show conclusively that it is capable of receiving benefit from the district's irrigation system,<sup>66</sup> in the sense of becoming liable to contribute toward the maintenance thereof. Ordinarily, it must appear that there is in existence or in reasonable contemplation an irrigation system capable of delivering water<sup>67</sup> and that there has been an allotment of water rights to the land in question.<sup>68</sup> However, the landowner's failure to use available irrigation waters does not preclude his being benefited in the sense essential to subject him to liability for assessment,<sup>69</sup> nor will his agreement not to use the water

57. Cal—Bishop v Jordan, 285 P 1096, 104 Cal App 319  
67 CJ p 1341 note 71

58. Or—Cannon v Hood River Irr Dist, 154 P 397, 79 Or 71  
67 CJ p 1341 note 72

59. Cal—In re Madera Irr Dist, 28 P 272, 675, 92 Cal 296, 27 Am SR 106, 14 LRA 755

#### Tax without regard to benefit

The legislature, in carrying out constitutional mandate to conserve and use water for irrigation of arid lands by creating by special act an irrigation district, may authorize the district to impose ad valorem taxes upon all property within the district without regard to benefit, and owner of mineral interests which have been severed from the surface estate in land within such district has no constitutional right to a hearing on the question of benefits. US—Hydrocarbon Production Co v Valley Acres Water Dist, CA Tex, 204 F2d 212, certiorari denied 74 S Ct 44, 346 US 825, 98 L Ed 350

60. Colo—People ex rel Rogers v Letford, 79 P2d 274, 102 Colo 284.

Idaho—Gedney v. Snake River Irr Dist, 104 P2d 909, 61 Idaho 605

Or—Corpus Juris cited in Smith v

Enterprise Irr Dist, 85 P2d 1021, 1024, 160 Or 372  
67 CJ p 1341 note 75

#### Classification of property in units

Principle that assessment for local improvements to be valid must correspond to benefits resulting to land assessed does not require that every portion of property subjected to assessments should be directly benefited by improvement, but property assessed may be divided into units for purpose of estimating benefits, and unless classification is arbitrary or unreasonable, landowner may not defeat assessment by showing that some particular part of unit assessed is not directly benefited. Wash—Lesamiz v Whitestone Reclamation Dist, 61 P2d 1305, 183 Wash 145

If legal subdivision is included as a whole in irrigation project, it should be assessed as one unit or tract according to benefits accruing based on number of irrigable acres thereon which are served by district. Wash—Lesamiz v Whitestone Reclamation Dist, supra

61. Or—Corpus Juris cited in Smith v Enterprise Irr Dist, 85 P2d 1021, 1024, 160 Or 372  
67 CJ p 1341 note 76

62. Mont—Cosman v Chestnut Val-

ley Irr Dist, 238 P 879, 74 Mont 111, 40 ALR 1344  
67 CJ p 1341 note 77

63. Utah—Madsen v Bonneville Irr Dist, 239 P 781, 65 Utah 571  
67 CJ p 1341 note 78

64. Utah—Madsen v. Bonneville Irr Dist, supra  
67 CJ p 1342 note 79

65. Wash—Northern Pac R. Co v Walla Walla County, 200 P 585, 116 Wash 684  
67 CJ p 1342 note 81.

66. Wash—Northern Pac Ry Co v Walla Walla County, supra

67. Or—Corpus Juris cited in Klamath Irr Dist v Carlson, 157 P2d 514, 516, 176 Or 336—Smith v Enterprise Irr Dist, 85 P2d 1021, 160 Or 372  
67 CJ p 1342 note 84

68. Or—Corpus Juris cited in Klamath Irr Dist v Carlson, 157 P2d 514, 516, 176 Or 336—Corpus Juris cited in Smith v Enterprise Irr Dist, 85 P2d 1021, 1024, 160 Or 372  
67 CJ p 1342 note 85.

69. Wash—Otis Orchards Co v. Otis Orchards Irr Dist No. 1, 215 P 23, 25, 124 Wash. 510.  
67 CJ p 1342 note 86.

for a certain season excuse him from liability to assessment for such season,<sup>70</sup> nor may he complain of insufficient water where he failed to make due application for the amount needed, and there is nothing to show that the water would not have been furnished on demand,<sup>71</sup> as the test for determining whether a benefit has been received is not the extent to which the property owner may take advantage of his water rights,<sup>72</sup> but is the value of the water right conferred or added.<sup>73</sup>

### (3) Benefit as Affected by Irrigable Character of Land

While nonirrigable land may be benefited by an irrigation system so that it may be taxable, generally land should be irrigable in order to be benefited and subject to assessment.

Nonirrigable land may be so far benefited by an irrigation system that it should bear its due proportion of the burden of taxation,<sup>74</sup> and statutes permitting taxation of nonirrigable land for irrigation purposes are not invalid,<sup>75</sup> so that where the governing statute does not make the irrigable character of the land assessed essential to the levy of a tax against it, and where the landowner has not made timely objection to the inclusion of his nonirrigable land within the district, he may not escape liability in a suit for delinquent taxes on the ground that his land is nonirrigable.<sup>76</sup>

The general rule, however, is that land should be irrigable in order to be benefited and subject to assessment,<sup>77</sup> and by statute in some jurisdictions it is expressly provided that only irrigable land shall be subject to assessment for irrigation purposes.<sup>78</sup> It has been held that a portion of land, nonirrigable because of natural causes, is improperly included in the district, and should not be taxed,<sup>79</sup> even though it is being irrigated by pump,<sup>80</sup> but the fact that a tract of irrigable land contains comparatively small nonirrigable portions will not exclude it from liability to tax,<sup>81</sup> and when such a tract is taxed it should be assessed as a whole,<sup>82</sup> and nonirrigable lands have been held subject to tax to raise funds to retire irrigation district bonds issued before such lands were declared nonirrigable.<sup>83</sup>

*Railroad right of way* has been held subject to assessment for support of an irrigation district as against the contention that it was not benefited.<sup>84</sup> Other authorities hold it not subject to assessment for the maintenance and operation of an irrigation system because not directly benefited thereby,<sup>85</sup> although stating that there may be some ground for argument that a railroad right of way is subject to assessment for construction of the system.<sup>86</sup>

*Where assessment is for drainage necessitated by irrigation* the irrigable character of land so assessed by an irrigation district is immaterial.<sup>87</sup>

70. Wash—Otis Orchards Co v Otis Orchards Irr Dist No 1, *supra*

67 C.J. p 1342 note 87

71. Tex—Phillips v Cameron County Water Improvement Dist No 2, Civ App, 5 S.W.2d 557

67 C.J. p 1342 note 88

72. Wash—Otis Orchards Co v Otis Orchards Irr Dist No 1, 215 P 23, 124 Wash 510

73. Wash—Otis Orchards Co v Otis Orchards Irr Dist No 1, *supra*

74. Cal—In re Madera Irr Dist, 28 P 272, 92 Cal 296, 14 L.R.A. 755, 27 Am.S.R. 106—Bd of Directors of Modesto Irr Dist v Tregoe, 26 P 237, 88 Cal 334, appeal dismissed 17 S.Ct. 52, 164 U.S. 179, 41 L.Ed. 395

75. Cal—Bliss v Hamilton, 152 P 303, 171 Cal 123

67 C.J. p 1342 note 92

76. Tex—Wheat v Ward County Water Improvement Dist No 2, Civ App, 217 S.W. 713

67 C.J. p 1343 note 93

77. Neb—Smith v. Frenchman-Cambridge Irr. Dist, 51 N.W.2d 376, 155 Neb 270—Birdwood Irr. Dist v. Brodbeck, 29 N.W.2d 621, 148 Neb 824.

Or—*Corpus Juris* cited in Smith v Enterprise Irr Dist, 85 P.2d 1021, 1024, 160 Or 372

67 C.J. p 1343 note 94

#### Assessments held valid

In suit by irrigation district to foreclose for delinquent assessments, where testimony indicated that defendant's lands by reason of their level relevant to irrigation works could have water carried over them by gravity, and having regard to character of soil and climate, could be rendered more productive by means of irrigation properly applied, assessments were valid as levied against "irrigable land"

Or—Klamath Irr Dist v Carlson, 157 P.2d 514, 176 Or 336

#### When determination made

Generally, the determination of the lands which are susceptible of irrigation and which will be benefited in irrigation district must be made at the time the district is organized or before bonds are issued, and lands once included in that classification cannot be excluded from assessment and levy by direct or indirect means while the bonds and coupons remain outstanding

U.S.—Denver-Greeley Valley Irr Dist v McNeil, C.C.A. Colo., 106 F.2d 288.

78. Neb—Smith v Frenchman-Cambridge Irr Dist, 51 N.W.2d 376, 155 Neb 270—Birdwood Irr Dist v Brodbeck, 29 N.W.2d 621, 148 Neb 824

67 C.J. p 1343 note 95

79. Neb—Smith v Frenchman-Cambridge Irr Dist, 51 N.W.2d 376, 155 Neb 270

80. Neb—Smith v Frenchman-Cambridge Irr Dist, *supra*

81. Neb—Wight v McGuigan, 143 N.W. 232, 94 Neb 358

67 C.J. p 1343 note 96

82. Neb—Wight v McGuigan, *supra*

83. Mont—Drake v Schoregge, 277 P 627, 85 Mont 94

84. Tex—Texas & P Ry Co v Ward County Irr Dist No 1, 251 S.W. 212, 112 Tex 593

85. Idaho—Oregon Short Line R Co v. Minidoka Irr Dist, 283 P 614, 48 Idaho 584

67 C.J. p 1343 note 1

86. Wash—Northern Pac R Co v Walla Walla County, 200 P 585, 116 Wash 684

87. Nev—McLean v. Truckee-Carson Irr. Dist, 245 P. 285, 49 Nev. 278.

Where water is supplied to urban property for purposes other than irrigation, such water coming from the system of an irrigation district, an urban property owner using such water may not object to taxation by the district on the ground that he is not benefited<sup>88</sup>

*Question of whether land is susceptible of irrigation is one of fact.*<sup>89</sup>

#### (4) Benefit to Excess Holdings under Federal Reclamation Statutes

Lands benefited may be assessed even though they come within the provisions of the Federal Reclamation Act.

It has been said that the basis of irrigation assessment is property benefit independent of ownership,<sup>90</sup> and, although the Federal Reclamation Act limits the right to use of water to any one owner to an area of a specified acreage, lands of one owner in excess of such acreage are subject to assessment in so far as they are irrigable.<sup>91</sup> A landowner consenting to dispose of holdings in excess of the area permitted to any one owner under Federal Reclamation Statutes may not, after the construction of works making water available for irrigation, be heard to object to assessment on the ground that such excess lands retained by him were not benefited.<sup>92</sup> Assessing a landowner's whole acreage, although restricting his water rights to a limited number of acres less than the whole, is not an invasion of constitutional rights.<sup>93</sup> One holding a large tract of land, in excess of the acreage allowed any one owner for water rights, for purposes of speculation, may not escape liability for irrigation assessments on the plea that his excess holdings are

not benefited because not entitled to water while owned by him,<sup>94</sup> since he receives a benefit through the enhancement in the sale value of his arid lands resulting from the construction of the irrigation system.<sup>95</sup>

#### (5) Drainage Necessitated by Irrigation

Where irrigation of some lands necessitates drainage of others, the irrigated lands may be required to contribute to the cost of drainage.

The legislature may properly provide that lands which by reason of artificial irrigation contribute by seepage and saturation to the swampy condition of lowlands shall contribute their just proportion of the cost of construction of drainage works for the reclamation of such lower lands,<sup>96</sup> and the highlands are benefited in that the irrigation of the highlands contributes water which must be carried off from the lowland of the district.<sup>97</sup> Where the assessment is for the drainage project, it must be based on the benefits derived from such project and not on the benefits derived from irrigation, according to certain authorities,<sup>98</sup> although there is authority holding that the cost of drainage to protect particular land should be charged against all lands benefited by the irrigation system,<sup>99</sup> and not against the protected land alone.<sup>1</sup> In any event the drainage assessment must be based on benefits in accordance with the controlling provisions of the irrigation law.<sup>2</sup> The benefit on which the drainage assessment is based should be an actual benefit,<sup>3</sup> although there may be an actual benefit without increase in the value of the land,<sup>4</sup> and the benefits should be such as immediately accrue, or clearly will accrue, from construction of the drainage system.<sup>5</sup>

88. Tex.—Hester & Roberts v Donna Irr Dist Hidalgo County No 1, Civ App, 239 SW 992, error refused  
67 CJ p 1343 note 5

89. Nev.—McLean v Truckee-Carson Irr Dist, 245 P 285, 49 Nev 278

Whether or not a particular tract of land cannot be irrigated because of natural causes is a question which may be raised at any time in a proper case, including action to foreclose tax sale certificate issued for delinquent irrigation taxes  
Neb.—Birdwood Irr Dist v Brodbeck, 29 NW 2d 621, 148 Neb 824

90. US—Shoshone Irr Dist v Lincoln Land Co, DC Wyo, 51 F 2d 128

91. US—Shoshone Irr Dist v. Lincoln Land Co, supra

92. Wyo.—In re Goshen Irr Dist, 293 P 373, 42 Wyo 229.

93. Ariz.—Saylor v Gray, 20 P 2d 441, 41 Ariz 558  
67 CJ p 1344 note 10

94. Or.—Klamath County v Colonial Realty Co, 7 P 2d 976, 139 Or 311

95. Or.—Klamath County v. Colonial Realty Co, supra  
67 CJ p 1344 note 12

96. Idaho.—Burt v Farmers' Co-op Irr Co, 168 P 1078, 30 Idaho 752  
67 CJ p 1344 note 14

97. Nev.—McLean v Truckee-Carson Irr Dist, 245 P 285, 49 Nev 278

98. Idaho.—Nampa & Meridian Irr Dist v Petrie, 223 P 531, 534, 37 Idaho 45

Nev.—McLean v Truckee-Carson Irr Dist, 245 P 285, 49 Nev 278  
67 CJ p 1344 note 16

99. US—Nampa & Meridian Irr Dist v Bond, DC Idaho, 283 F 569, affirmed, CCA, 288 F 541, affirmed 45 S Ct 383, 268 US 50, 69 L Ed 843

1. US—Nampa & Meridian Irr Dist v Bond, supra

2. Idaho—Nampa & Meridian Irr Dist v Petrie, 223 P. 531, 533, 534, 37 Idaho 45  
67 CJ p 1344 note 19

3. Idaho—Nampa & Meridian Irr Dist v Petrie, supra.

4. Idaho—Nampa & Meridian Irr Dist v Petrie, supra  
67 CJ p 1344 note 21

5. Nev.—McLean v Truckee-Carson Irr Dist, 245 P. 285, 49 Nev. 278

## § 334. — Levy and Assessment

- a By whom made or authorized
- b Time
- c Mode
- d Determination of benefits
- e Rate and amount of assessments
- f Assessment rolls and records, and form and contents of assessment
- g Notice and opportunity for hearing
- h Drainage assessments of irrigation district

## a. By Whom Made or Authorized

- (1) In general
- (2) Authorization by electors of district

## (1) In General

A levy or assessment is to be made by the authority designated by statute.

Irrigation taxes and assessments should be levied by the authorities designated by statute, and, in accordance with statutory provisions, it has been held that if the district board neglects to levy a tax for costs of organization and payment of outstanding bonds the county board may levy such tax on the general assessment,<sup>6</sup> although the district board alone can levy a tax for the general purposes of the district and a tax levied by the county board for such general purposes would be void.<sup>7</sup> Statutory provisions granting irrigation district directors general power to do such acts as may be necessary to carry out the provisions of the statute under which the district is organized do not give them authority

to make an assessment not otherwise authorized,<sup>8</sup> and provisions of an irrigation district act have been held not to apply to an improvement district within the irrigation district.<sup>9</sup>

## (2) Authorization by Electors of District

When so required by statute a levy or assessment must be authorized by the electors of the district.

Where the governing statutes require an election to authorize a special assessment,<sup>10</sup> such as a special assessment for the construction of an irrigation system,<sup>11</sup> or a general tax on all tangible property in the district,<sup>12</sup> such an assessment made without an election is invalid, and an assessment made partly for construction and partly for other purposes for which assessment is permitted without prior authorization by election is invalid in whole if there is no way of segregating the proper from the improper charges.<sup>13</sup> The fact that the statute provides that under certain circumstances a special assessment shall not be levied without an election relating thereto does not of itself cast on the directors the duty of calling an election if there is no assessment made.<sup>14</sup> Assessments which are not taxes within a statute requiring authorization by property taxpaying voters have been held valid, although not authorized by such voters.<sup>15</sup>

## b. Time

Statutory provisions generally regulate the time for making a levy and assessment.

Generally speaking, the time for making an irrigation levy and assessment is regulated by statute, and

6. Mont—State ex rel Blenkner v Stillwater County, 66 P 2d 788, 104 Mont 387

67 C J p 1344 note 24.

7. Neb—Wight v McGuigan, 143 N W 232, 94 Neb 358

**Assessment to pay judgment**

County board of equalization had no authority under statute to assess and levy taxes against landowners and school land leasehold owners within an irrigation district to pay judgments obtained against such public corporation and such taxes were void and not a lien on land or leasehold interests in the district. Neb—Loup County v Rumbaugh, 38 NW 2d 745, 151 Neb 563

8. Wash—Laycock v Lake Chelan Reclamation Dist, 214 P 1054, 124 Wash 544

67 C J p 1345 note 27.

9. Nev—Penrose v Whitacre, 147 P 2d 887, 62 Nev 239

10. Cal—Imperial Land Co v Imperial Irr Dist, 161 P. 116, 173 Cal 668

67 C J p 1345 note 28.

**Maintenance tax**

Where water improvement district voted bonds for construction of dam but did not vote on tax to pay current and maintenance expenses of district, such maintenance tax which under constitution was a lien on property assessed for payment thereof was void under constitutional provision requiring authorization by qualified property taxpaying voters of district for the incurring of any "indebtedness" against a reclamation district

Tex—Brown County Water Improvement Dist No 1 v Austin Mill & Grain Co, 138 SW 2d 523, 135 Tex 140

11. Wash—Beecher v Peshastin Irr Dist, 234 P 4, 133 Wash 561

67 C J p 1345 note 29

12. Neb—Nebraska Mid-State Reclamation Dist v Hall County, 41 NW 2d 397, 152 Neb 410

13. Nev—Penrose v Whitacre, 147 P 2d 887, 62 Nev 239

Wash—Beecher v Peshastin Irr Dist, 234 P 4, 133 Wash 561.

Opportunity of improvement district to have drainage canal constructed by civilian conservation corps through Federal Reclamation Bureau did not either by itself or taken in connection with waterlogged condition of land in improvement district, create a legal "emergency" justifying assessment of all land in the improvement district without first holding a special election, even though part of the assessment was for operation and maintenance for which no election was necessary

Nev—Penrose v Whitacre, 132 P 2d 609, 61 Nev 440, opinion adhered to 147 P 2d 887, 62 Nev 239

14. Cal—Imperial Land Co v Imperial Irr Dist, 147 P 593, 26 Cal App 529

67 C J p 1345 note 31

15. Tex—Moore v Maverick County Water Control and Improvement Dist No 1, Civ App, 162 SW 2d 1009, error refused, certiorari denied 63 S Ct 993, 318 US 790, 87 L Ed 1156

statutes providing that whenever bonds shall have been voted the directors of the district shall levy a tax sufficient to pay them do not authorize a levy before the bonds have been voted,<sup>16</sup> and, where other provisions of the statutes provide that all expenses of organization shall be paid out of the proceeds of the sale of the bonds, there is no implication that a tax may be levied in advance of the voting of the bonds to pay such expenses<sup>17</sup>

*Costs of operation and maintenance* may be levied in advance of the time for payment<sup>18</sup>

### c. Mode

- (1) In general
- (2) Resolution or motion
- (3) Credit for outstanding water rights
- (4) Methods of apportionment

#### (1) In General

The mode of assessment is generally prescribed by statute.

Statutory sections regulating the mode of assessment should be construed in the light of the whole act governing irrigation districts,<sup>19</sup> and where the legislature has prescribed the method and manner of levying assessments no other manner or method may be used,<sup>20</sup> and, where the evident purpose of the whole act is to authorize levying of assessments on all lands of the district supplied with water considered as a whole, the courts will deny the contention that assessments should be apportioned locally within the district<sup>21</sup> While a slight omission of land from assessment will not invalidate the assessment unless the omission results in sub-

stantial injury,<sup>22</sup> an owner of land in the district has the right to assume that all irrigable land not exempt by law is assessed for the same amount as every acre of irrigable land owned by him in the district<sup>23</sup> An irrigation district is an indivisible unit in the sense that the burden of constructing and maintaining it should be apportioned ratably to all lands receiving water therefrom,<sup>24</sup> and a water user may not divide a system into its component parts and decline to pay his share of the cost of constructing, maintaining, or operating those portions from which he receives no direct benefit<sup>25</sup> Thus, the district's bond obligation is so far general in character that a landowner may not segregate his share thereof<sup>26</sup>

*Contiguous lots owned by one person and used together*, and on which there is a building covering a part of each lot, are properly assessed together as one parcel<sup>27</sup>

*Plan and estimate.* Apportionment of irrigation taxes or assessments should be based on the plan and estimates finally adopted.<sup>28</sup>

*What law governs* The law in force when an assessment was levied ordinarily governs as to the method of levying taxes for the payment of irrigation district bonds.<sup>29</sup>

#### (2) Resolution or Motion

Unless required by statute, a resolution is not required to authorize the levy of an assessment.

Where the statute does not expressly require that the levying of an assessment be by, or in the form of, a resolution, an assessment is not invalid because

16. Tex—Creager v Hidalgo County Water Improvement Dist No 4, Com App, 283 SW 151.

17. Tex—Creager v Hidalgo County Water Improvement Dist No 4, supra.  
67 C J p 1345 note 34

18. NM—Sperry v Elephant Butte Irr Dist of New Mexico, 270 P 889, 33 NM 482  
67 C J p 1345 note 35

19. Idaho—Colburn v Wilson, 132 P 579, 24 Idaho 94

#### Intention of legislature

The legislature in enacting irrigation district laws did not intend to create two methods of raising money for maintenance and operation of the completed irrigation system in an irrigation district, one by assessment required to be uniform according to benefits received and the other by tolls, not required to be uniform or based on benefits received, but based only on cost of delivery of water

Idaho—Gedney v Snake River Irr Dist, 104 P 2d 909, 61 Idaho 605

20. Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458

21. Idaho—Gedney v Snake River Irr Dist, 104 P 2d 909, 61 Idaho 605—Colburn v Wilson, 132 P 579, 24 Idaho 94

22. Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458

23. Or—Payette-Oregon Slope Irr Dist v Coughanour, supra.

#### Lands of district and county

About one thousand acres of land within the Payette-Oregon Slope Irrigation District which district and county had acquired through foreclosure of assessment and tax liens and which were not thereafter devoted to a public use but were leased on a crop-share basis, were not exempt from assessment, and assessments which did not include the land owned by the district and county were void.

Or—Payette-Oregon Slope Irr Dist v Coughanour, supra.

24. US—Nampa & Meridian Irr Dist v Bond, DC Idaho, 283 F 569, affirmed, CCA, 288 F 541, affirmed 45 S Ct 383, 268 US 50, 69 L Ed 843

Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458

25. US—Nampa & Meridian Irr Dist v Bond, supra.  
Idaho—Colburn v Wilson, 132 P 579, 581, 24 Idaho 94

26. Wash—Roberts v. Richland Irr Dist, 13 P 2d 437, 439, 169 Wash 156, affirmed 53 S Ct. 519, 289 US. 71, 77 L Ed 1038

27. Cal—Cooper v. Miller, 45 P 325, 113 Cal 238

28. Cal—Reclamation Dist. No 108 v. Ash, 208 P 394, 58 Cal App 238

29. Wash—State v Columbia Irr Dist of Stevens County, 208 P. 27, 121 Wash. 79.

the board did not previously pass a resolution authorizing it,<sup>30</sup> and it is immaterial whether the board proceeded by resolution or by mere motion, as long as the levying of the assessment constituted the action of the board<sup>31</sup> and was duly preserved in its records as required by statute<sup>32</sup>

### (3) Credit for Outstanding Water Rights

Where statutes so require, in making an assessment, credit must be given lands for any partial or full water rights which they may already possess.

Under statutes requiring that any lands in an irrigation district shall be given "equitable credit" for any partial or full water rights they may already have, an assessment made without giving such credit is erroneous,<sup>33</sup> even though the owner of the land signed the petition inducing the inclusion of his land in the district,<sup>34</sup> although landowners who have previously conveyed their water rights to the district without any provision or limitation are not entitled to credit<sup>35</sup>

Where irrigation district has bought system of existing irrigation company, subject to the outstanding contracts of the latter, the district may not assess lands of one having a contractual water right from such company and receiving no benefit, in addition to that guaranteed by such contract, in a sum in excess of that which the holder of the water right agreed to pay such company as water rental<sup>36</sup> until the district either purchases or condemns his water rights under his contract,<sup>37</sup> but may assess him a sum not in excess of such agreed water

rental,<sup>38</sup> although if the holder of the water rights receives some benefit in addition to that conferred by the water right, his land is subject to assessment,<sup>39</sup> and, where the board of directors has determined that such owner's land was benefited, and where he or his predecessor in interest has failed to raise timely objection, he may not thereafter attack the validity of the assessment in a collateral proceeding,<sup>40</sup> it being conclusively presumed that he did receive a distinct benefit sufficient to support an assessment in excess of the agreed water rental<sup>41</sup>

### (4) Methods of Apportionment

- (a) In general
- (b) According to benefits
- (c) Value of property
- (d) Area and frontage

#### (a) In General

Subject to constitutional provisions the method of apportionment of irrigation taxes and assessments rests in the discretion of the legislature

If the fact of benefit to all lands sufficiently appears, the method of apportionment of irrigation taxes and assessments rests in the discretion of the legislature<sup>42</sup> Under a constitutional provision that taxes must be equitably distributed, either a tax on an ad valorem basis or a special assessment on a benefit basis is permissible<sup>43</sup> State laws control with respect to assessment of land according to benefits, although the land in the irrigation district is also included in a federal reclamation project.<sup>44</sup>

30. Cal—Corson v Crocker, 161 P 287, 31 Cal App 626

31. Cal—Corson v Crocker, supra

32. Cal—Corson v Crocker, supra. 67 C J p 1346 note 47

33. Wash—Beecher v Peshastin Irr Dist, 234 P 4, 133 Wash 561

Where water rights were appurtenant to land taken into irrigation district and supplied land with water needs, and land received no service whatever from district's irrigation plant, land was not subject to tax for retirement of bonded indebtedness of district and payment of interest thereon

Or—Down v Miller, 26 P 2d 781, 145 Or 55

34. Or—Down v Miller, supra.

35. Wash—Laycock v Lake Chelan Reclamation Dist, 214 P 1054, 124 Wash 544

67 C J p 1346 note 50

36. Idaho—Knowles v New Sweden Irr Dist, 101 P 81, 16 Idaho 217, reversed on other grounds 101 P 87, 16 Idaho 235.

94 C J S —22

37. Idaho—Knowles v New Sweden Irr Dist, supra

38. Idaho—Knowles v New Sweden Irr Dist, supra.

39. Idaho—Knowles v New Sweden Irr Dist, 101 P 87, 89, 16 Idaho 235

40. Idaho—Knowles v New Sweden Irr Dist, supra

41. Idaho—Knowles v New Sweden Irr Dist, supra

42. NM—Durand v Middle Rio Grande Conservancy Dist, 123 P 2d 389, 46 NM 138  
67 C J p 1346 note 58

Statutes held valid

NM—In re Arch Hurley Conservancy Dist, Hudson Irr Extension, 191 P 2d 338, 52 NM 34

43. Tex—Moore v Maverick County Water Control and Improvement Dist No 1, Civ App, 162 SW 2d 1009, error refused, certiorari denied 63 S Ct 993, 318 US 790, 87 L Ed 1156

Levy of special land assessments on benefit basis by water control

and improvement district for bond retirement purposes in compliance with statutory procedure was not unconstitutional as placing more onerous burden on lands within district, but outside certain city therein, than they would bear under ad valorem tax assessments  
Tex—Moore v Maverick County Water Control and Improvement Dist. No 1, supra

44. Idaho—Nampa & Meridian Irr Dist v Petrie, 153 P 425, 28 Idaho 227, error dismissed 39 S Ct 25, 248 US 154, 63 L Ed 178  
67 C J p 1346 note 59

Internal affair of district

Apportionment of assessments to pay cost of construction of irrigation works under contract, approved by district court between irrigation district and United States pursuant to federal reclamation laws, among various tracts of land in district is matter of district's internal affairs and cannot be settled finally at trial on landowners' petition to confirm or approve contract, in view of fed-

## (b) According to Benefits

Where required by statute, apportionment must be according to benefits received.

Where the irrigation statute in terms provides for apportionment according to benefits, such provision is mandatory,<sup>45</sup> and an assessment made on any other basis is invalid,<sup>46</sup> although it is sufficient if the apportionment is substantially in accordance with benefits.<sup>47</sup> It has been held that the directors of a district may properly levy assessment for maintenance and operation not according to the original benefits, but according to the benefit received from maintenance and operation during each year.<sup>48</sup> Where examination of the statute shows that a contention that it authorizes assessment in excess of benefits,<sup>49</sup> or that it exempts benefited lands,<sup>50</sup> is unfounded, the statute will, of course, be held valid as far as such contention is concerned.

*Factors considered.* Broadly speaking, the word "benefits," as used in a statutory provision requiring assessments to be proportionate to benefits received, will be construed as meaning such benefits as promote the prosperity of the district and add to property values.<sup>51</sup> Generally speaking, the theory of assessment for benefits is that the landowner has received by reason of the irrigation system an increase in the market value of his property,<sup>52</sup> and that increase marks the extent of the benefit,<sup>53</sup> although there is authority holding that the market value of

lands within an irrigation district is not conclusive on the question of benefits equaling assessments,<sup>54</sup> and that there may be an actual benefit without proof of a corresponding increase in market value.<sup>55</sup> The distance of the main irrigating canal from the lands assessed,<sup>56</sup> or the relative heights of lands,<sup>57</sup> is not alone determinative of relative benefits.

While the supply of needed water is one of the benefits for consideration,<sup>58</sup> it is not necessarily the exclusive benefit,<sup>59</sup> and there may be other benefits that accrue.<sup>60</sup> It has been held that an assessment apportioned solely on the basis of the amount of water furnished or made available, and without regard to enhancement of market value, is invalid.<sup>61</sup>

In determining enhancement in market value all factors bearing thereon should be considered.<sup>62</sup>

*Assessment of subdivision.* An assessment may be laid against a legal subdivision so as to include fractional parts thereof where all parts are benefited equally,<sup>63</sup> but not otherwise.<sup>64</sup>

Cost of improvements in a local assessment irrigation district should be apportioned in some just mode,<sup>65</sup> according to the benefits received by the several portions of the district.<sup>66</sup>

## (c) Value of Property

Under statutes so providing, assessment may be on an ad valorem basis.

A statute providing for assessment on an ad

eral statutory provisions, embodied in contract, for reclassification of lands within district on request, and contract provision for apportionment of estimated cost of construction among lands  
*Kan—Mizer v Kansas Bostwick Irr Dist No 2, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed 1355*

45. *Idaho—Hale v McCammon Ditch Co, 244 P 2d 151, 72 Idaho 478*

67 C J p 1347 note 60

**Assessments held invalid**

*Wyo—In re Greybull Valley Irr Dist, 54 P 2d 808, 49 Wyo 395*

**Reassessment**

A number of years elapsing since original assessment of benefits to lands in irrigation district and admitted change in conditions apparently requiring reduction of some assessments have been held to render it advisable that proceedings after reversal of order for such reduction include general reassessment, to be reported to court for confirmation after proper notice

*Wyo—In re Greybull Valley Irr Dist, supra.*

46. *Wash—Union Trust Co v Carnhope Irr Dist, 232 P 341, 342, 234 P 277, 132 Wash 538*  
67 C J p 1347 note 61

47. *Neb—Erickson v Nine Mile Irr Dist, 190 NW 573, 109 Neb 189*

48. *Idaho—Brown v Shupe, 233 P 59, 40 Idaho 252*

49. *Nev—In re Lovelock Irr Dist, 273 P 983, 51 Nev 215*

50. *Cal—Barber v Galloway, 231 P 34, 195 Cal 1*  
67 C J p 1347 note 65

51. *Idaho—Colburn v Wilson, 132 P 579, 24 Idaho 94*

52. *Wash—Union Trust Co v Carnhope Irr Dist, 232 P 341, 234 P 277, 132 Wash 538*  
67 C J p 1347 note 67

53. *Wash—Union Trust Co v Carnhope Irr Dist, supra*

54. *Wyo—In re Goshen Irr Dist, 293 P 373, 42 Wyo 229*  
67 C J p 1347 note 69

55. *Wyo—In re Goshen Irr Dist, supra*

56. *Cal—Hershey v Reclamation Dist No 108, 254 P 542, 200 Cal 550*

57. *Cal—Hershey v Reclamation Dist No 108, supra*  
67 C J p 1347 note 72

58. *Idaho—Brown v Shupe, 233 P 59, 40 Idaho 252—Colburn v Wilson, 132 P 579, 24 Idaho 94*

59. *Idaho—Brown v Shupe, 233 P 59, 40 Idaho 252*

60. *Idaho—Brown v Shupe, supra*  
67 C J p 1347 note 75

61. *Wash—Union Trust Co v Carnhope Irr Dist, 232 P 341, 234 P 277, 132 Wash 538*  
67 C J p 1347 note 76

62. *Wash—Union Trust Co v Carnhope Irr Dist, supra*  
67 C J p 1348 note 77

63. *Idaho—Oregon Short Line R Co v Pioneer Irr Dist, 102 P. 904, 16 Idaho 578*

64. *Idaho—Oregon Short Line R Co v Pioneer Irr Dist, supra*

65. *US—Norris v Montezuma Valley Irr Dist, Colo, 248 F 369, 160 CCA 379, certiorari denied 39 S Ct 10, 248 US 569, 63 L Ed 425*

66. *US—Norris v Montezuma Valley Irr. Dist., supra.*

valorem basis has been held valid,<sup>67</sup> and, unless resulting in manifest injustice or inequality, the fact that assessments are made according to value will not disprove consideration of benefits.<sup>68</sup>

Whether assessments are out of proportion to value of the land assessed should be determined as of the time of assessment,<sup>69</sup> and not after the assessments have become delinquent.<sup>70</sup>

#### (d) Area and Frontage

Where the statutes so provide or permit, assessment may be on the basis of acreage or frontage.

Statutes providing for assessment according to area,<sup>71</sup> as on the basis of the irrigable acre,<sup>72</sup> or on the basis of the proportion of irrigable land in each tract of a stated acreage to the total irrigable area in the district,<sup>73</sup> are valid. While it has been said that if the legislature prescribes an assessment in proportion to benefits it is not within the power of the assessing body to assess according to area<sup>74</sup> or frontage,<sup>75</sup> other authority is to the effect that, in the absence of manifest injustice or inequality, an assessment does not show failure to consider benefits because it is made according to area<sup>76</sup> or frontage.<sup>77</sup>

Change from acre to lot as basis of assessments for maintenance and operation has been held proper.<sup>78</sup>

#### d. Determination of Benefits

The determination of benefits is generally a matter for the district officials.

Subject to the taxpayer's right to a judicial review, discussed *infra* § 335, the directors of an irrigation district are empowered to determine the benefits received by particular property,<sup>79</sup> and their determination as to the fact of benefit is not subject to collateral attack.<sup>80</sup> In other words, the question of benefits is one of fact to be determined in the first place by district officials,<sup>81</sup> and finally by the trial court.<sup>82</sup> It will be conclusively presumed from a due adjudication of the organization of an irrigation district that the total benefits to lands therein were then finally adjudicated.<sup>83</sup> From a finding that all lands within an irrigation district can be irrigated and made productive by application of the water that will be obtained from a system built with the proceeds of irrigation bonds, it will be assumed that the lands will be benefited at least to the extent of the assessment.<sup>84</sup>

#### e. Rate and Amount of Assessments

- (1) In general
- (2) Constitutional or statutory limitations on amount
- (3) Computation and estimate
- (4) Assessing amount sufficient to cover delinquencies of others

##### (1) In General

The amount of a levy or assessment is generally a matter for the discretion of the district officials, subject to statutory limitations.

67. U.S.—Fallbrook Irr. Dist. v. Bradley, Cal., 17 S.Ct. 56, 164 U.S. 112, 41 L.Ed. 369

67 C.J. p. 1348 note 82

68. Wyo.—In re Goshen Irr. Dist., 293 P. 373, 42 Wyo. 229

69. U.S.—Judith Basin Land Co. v. Fergus County, CCA Mont., 50 F.2d 792, followed in Welch v. Fergus County, 50 F.2d 795

70. U.S.—Judith Basin Land Co. v. Fergus County, CCA Mont., 50 F.2d 792, followed in Welch v. Fergus County, 50 F.2d 795

71. N.M.—Davy v. McNeill, 240 P. 482, 31 N.M. 7

72. U.S.—Northwestern Improvement Co. v. John Day Irr. Dist., D.Or., 286 F. 294, 296

Wyo.—In re Goshen Irr. Dist., 293 P. 373, 42 Wyo. 229

67 C.J. p. 1348 note 87

73. Mont.—Walden v. Bitter Root Irr. Dist., 217 P. 646, 68 Mont. 281

Utah—Hatch v. Edwards, 269 P. 138, 72 Utah 113.

67 C.J. p. 1348 note 88

74. Wash.—Union Trust Co. v. Carnhope Irr. Dist., 232 P. 341, 234 P. 277, 132 Wash. 538.

75. Wash.—Union Trust Co. v. Carnhope Irr. Dist., *supra*

76. Utah—Madsen v. Bonneville Irr. Dist., 239 P. 781, 65 Utah 571

Wyo.—In re Goshen Irr. Dist., 293 P. 373, 42 Wyo. 229

67 C.J. p. 1348 note 91

77. Wyo.—In re Goshen Irr. Dist., *supra*

78. Idaho—Lundy v. Pioneer Irr. Dist., 19 P.2d 624

67 C.J. p. 1348 note 93

79. Idaho—Brown v. Shupe, 233 P. 59, 63, 40 Idaho 252

67 C.J. p. 1349 note 95

#### Quasi-judicial authority

Tex.—Anchor v. Wichita County Water Improvement Dist. No. 2, 66 S.W.2d 657, 123 Tex. 105, 103 S.W.2d 135, 129 Tex. 385, 112 A.L.R. 70.

80. Idaho—Knowles v. New Sweden Irr. Dist., 101 P. 81, 16 Idaho 217, 235

67 C.J. p. 1349 note 96

81. Cal.—Browning v. Reclamation Dist. No. 108, 254 P. 551, 200 Cal. 799—Hershey v. Reclamation Dist. No. 108, 254 P. 542, 200 Cal. 550

82. Cal.—Browning v. Reclamation Dist. No. 108, 254 P. 551, 200 Cal.

799—Hershey v. Reclamation Dist. No. 108, 254 P. 542, 200 Cal. 550

#### Questions for court

Where contract between irrigation district and United States provided that benefits from irrigation be assessed by dividing land into three classes, according to size, topography, etc., and varying charges accordingly, and exhibit attached to petition for confirmation of contract gave number of acres in each class belonging to each affected landowner, court was required to determine whether such formula was manifestly disproportionate as to any tract with respect to which a question had been properly raised, and, if not, to approve schedule of proposed assessments; and such inquiry would be limited to a consideration of whether the formula was followed. Kan.—Kansas-Bostwick Irr. Dist. No. 2 v. Mizer, 270 P.2d 261, 176 Kan. 354

83. Wash.—Roberts v. Richland Irr. Dist., 13 P.2d 437, 169 Wash. 156, affirmed 53 S.Ct. 519, 289 U.S. 71, 77 L.Ed. 1033—State v. Hartung, 274 P. 181, 150 Wash. 590

84. Utah—Stevens v. Melville, 175 P. 602, 52 Utah 524



Within statutory limitations the amount of a levy or assessment to be made for irrigation rests in the discretion of the district's board of directors.<sup>85</sup> As to the annual assessment, the directors cannot lawfully levy a sum in excess of what is required for the specified purposes;<sup>86</sup> but they have a reasonable discretion in determining the amount required, and will not be interfered with by the courts unless this discretion is shown to have been abused, and even then the courts will not undertake to decide what amount should be raised.<sup>87</sup> Where the benefits are the same the rate should be the same,<sup>88</sup> but where they differ a flat rate is not justified.<sup>89</sup>

Irrigation district's exercise of its statutory power to issue bonds imposes on the district the obligation to levy a tax sufficient to pay such bonds as they fall due,<sup>90</sup> unless the constitution or statutes of the state forbid.<sup>91</sup> Where uncollected taxes are sufficient to pay district bonds it has been held that the irrigation district may not be compelled to levy taxes for the full amount of matured bonds,<sup>92</sup> and it has been held that a bondholder compelling a levy by an irrigation district which does not produce sufficient cash is not entitled to enforce another levy where the levy did produce sale of lands of delinquent taxpayers sufficient to satisfy claims.<sup>93</sup>

*Cash turned over to irrigation district for improvement of a river may not be deemed a source of revenue in preparing an item of the budget for current and miscellaneous expenses.*<sup>94</sup>

## (2) Constitutional or Statutory Limitations on Amount

The amount which may be levied is limited to that fixed by constitutional or statutory provisions

Statutes empowering the directors of an irrigation district to levy as an annual assessment for payment of principal and interest on district bonds only such amount as, in the judgment of a commission, it will be possible for the landowners of the district to pay have been construed as applying only to such districts as have been declared insolvent,<sup>95</sup> and as inapplicable to bonds issued under a different statutory provision.<sup>96</sup> Under statutes limiting the amount of indebtedness that an irrigation district may incur for preliminary expenses, the mere issuance of warrants for payment of illegal claims does not invalidate proceedings instituted for the tax levy,<sup>97</sup> and the tax levy made after issuance of such illegal warrants is valid and binding.<sup>98</sup>

Constitutional restrictions on rate or amount of revenue to be raised by general taxation for the support of the government are not applicable to irrigation district assessments.<sup>99</sup>

## (3) Computation and Estimate

Computation or estimate of the amount of assessments must be in accordance with existing law.

The law in force at the time of final determination governs computation as to annual assessments.<sup>1</sup> Statutes requiring the board of directors of irrigation districts, at the time of making the annual levy, to estimate the amount of assessments to be made against lands owned by the district, including local improvement assessments, and to levy an amount sufficient to pay said assessments, are valid<sup>2</sup> and mandatory.<sup>3</sup> Under a statute permitting, but not requiring, the directors of an irrigation district to make their estimate of the amount of tax necessary with the advice of a competent engineer, an estimate

85. Cal—Escondido High School Dist of San Diego County v Escondido Seminary of University of Southern California, 62 P 401, 130 Cal 128

67 C J p 1349 note 4

86. Cal—Quint v Hoffman, 37 P 514, 777, 103 Cal 506.

### Additional levies

Under statutes governing issuance of bonds and interest coupons by irrigation districts and providing for method of their payment by annual levies on lands in district to be benefited, after annual levy has been regularly made and completed for payment of bonds and coupons maturing in year of levy, no authority exists for the making of additional or cumulative levies for that purpose  
US—Kiles v. Trinchera Irr Dist, C C A Colo, 136 F 2d 894—Denver-Greeley Valley Irr Dist v McNeil, C C A Colo, 106 F 2d 288

87. Cal—Boskowitz v. Thompson,

78 P 290, 144 Cal 724—Escondido High School Dist of San Diego County v Escondido Seminary of University of Southern California, 62 P 401, 130 Cal 128

88. Idaho—Nampa & Meridian Irr Dist v. Petrie, 223 P 531, 37 Idaho 45—Colburn v. Wilson, 132 P 579, 24 Idaho 94

89. Idaho—Nampa & Meridian Irr Dist v Petrie, 223 P 531, 37 Idaho 45

90. US—Norris v. Montezuma Valley Irr Dist, Colo, 248 F 369, 160 C C A 379, certiorari denied 39 S Ct 10, 248 US 569, 63 L Ed 425

91. US—Norris v. Montezuma Valley Irr Dist, supra

92. Colo—Board of Com'rs of Adams County v Heath, 246 P. 794, 79 Colo 429

67 C J p 1349 note 11

93. Colo—Thomas v. Henrylyn Irr Dist, 247 P 1059, 79 Colo. 636.

94. NM—Sperry v Elephant Butte Irr Dist of New Mexico, 270 P 889, 33 NM 482

95. Cal—Mulcahy v Baldwin, 15 P 2d 738, 216 Cal 517

96. Cal—Mulcahy v Baldwin, supra

97. Cal—Wilbur v. Board of Directors of Tia Juana River Irr Dist., 271 P. 514, 94 Cal App 511.

98. Cal—Wilbur v Board of Directors of Tia Juana River Irr Dist, supra

99. Or—Northern Pac Ry. Co v John Day Irr Dist, 211 P. 781, 106 Or 140  
67 C J p 1350 note 20

1. Or—Noble v Yancey, 241 P 335, 116 Or 356, 42 A L R. 1178  
67 C J p 1350 note 22.

2. Wash—State v. Hartung, 274 P. 181, 150 Wash. 590

3. Wash—State v. Hartung, supra

made in good faith without the advice of an engineer is valid <sup>4</sup>

#### (4) Assessing Amount Sufficient to Cover Delinquencies of Others

Under some statutory provisions, landowners may be assessed in amounts sufficient to cover the delinquencies arising from nonpayment of assessments by other owners

The courts have upheld the validity of statutes authorizing assessment of the property of paying landholders in amounts sufficient to cover anticipated deficiencies arising by reason of nonpayment of assessments on the property of others,<sup>5</sup> and a re-assessment to cover past delinquencies does not violate requirements of uniformity.<sup>6</sup> Where the statute so permits, an irrigation district may levy assessments to meet deficiencies,<sup>7</sup> and the annual assessment should be large enough to take care of actual and contemplated delinquencies in prior assessments,<sup>8</sup> nor may landowners question the validity of assessments to cover deficiencies on the theory that they have already paid assessments equaling the amount of their benefits,<sup>9</sup> or that to make them pay for delinquencies of others would be to make them pay for benefits to others,<sup>10</sup> although landowners may not be assessed for delinquencies of others in excess of the amount, if any, limited by statute.

*Particular statutory provisions* A statute authorizing the levy of "such additional amounts as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred" has been construed as referring only to prior general expenses,<sup>11</sup> and as not conferring on the district power to levy a cumulative tax for this purpose.<sup>12</sup> Under a statute making it the duty of irrigation au-

thorities to fix the rate of levy necessary to meet the maintenance, operating, and current expenses for the ensuing year, and the rate necessary to pay interest and principal of maturing coupons and bonds, and the rate necessary for any other purposes provided in the act, and then directing that the rate of levy necessary to raise the required amount of money on the assessed valuation of the property of the district shall be increased fifteen per cent to cover delinquencies, and other statutory provisions permitting a landowner to pay his taxes with bonds and coupons at par, it has been held that there may be a delinquency assessment to cover delinquencies as to maintenance, operating, current, and other expenses of the district,<sup>13</sup> but not to cover delinquencies as to bonds <sup>14</sup>

#### f. Assessment Rolls and Records, and Form and Contents of Assessment

- (1) In general
- (2) Listing and description of property

##### (1) In General

Assessment rolls and records must be made and kept in substantial compliance with statutory provisions.

It is sufficient if an assessment roll is made up in substantial compliance with statutory provisions.<sup>15</sup> A statutory provision that the total valuation as finally equalized by the board shall be extended into columns and added by the secretary within a specified time does not require the assessment book to show that such extension and addition were made within the specified time.<sup>16</sup> In the absence of specific statutory requirement a special assessment need not be separately entered and segregated on the assessment roll.<sup>17</sup> Statutes requiring an as-

4. Wash—Board of Directors of Quincy Valley Irr Dist v Scott, 140 P 391, 79 Wash 434

5. Mont—Cosman v Chestnut Valley Irr. Dist, 238 P 879, 74 Mont 111, 40 A L R 1344  
67 C J p 1350 note 26

6. U S—Norris v Montezuma Valley Irr Dist, Colo, 248 F 369, 160 CCA 379, certiorari denied 39 S Ct 10, 248 U S. 569, 63 L Ed 425

#### Cumulative levy invalid

Where annual levies were made for purpose of producing money with which to pay the principal on bonds of irrigation district at maturity, and like levies were made for the purpose of satisfying in full at maturity the interest coupons, and money arising from such levies would have been sufficient in amount for respective purposes if all taxes had been paid, failure in payment

of taxes was not enough to warrant imposition of cumulative levies for the purpose of paying the deficit in revenues thus brought about

U S—Denver-Greeley Valley Irr Dist v McNeil, C.C.A Colo, 106 F 2d 288

7. Mont—Cosman v Chestnut Valley Irr Dist, 238 P 879, 74 Mont 111, 40 A L R 1344

8. Or—Noble v Yancey, 241 P 335, 116 Or 356, 42 A L R 1178  
67 C J p 1350 note 29

9. Wash—Roberts v Richland Irr Dist, 13 P 2d 437, 169 Wash 156, affirmed 53 S Ct 519, 289 U S 71, 77 L Ed 1038—State v Hartung, 274 P 181, 185, 150 Wash 590

10. Or—Noble v Yancey, 241 P 335, 116 Or. 356, 42 A L R 1178  
67 C J p 1350 note 31

Utah—Nelson v Board of Com'rs of

Davis County, 218 P 952, 62 Utah 218

67 C J p 1350 note 32

11. Colo—Interstate Trust Co v. Montezuma Valley Irr Dist, 181 P 123, 66 Colo 219

67 C J p 1351 note 33

12. Colo—Interstate Trust Co v Montezuma Valley Irr Dist, supra

13. Colo—Board of Com'rs of Adams County v Heath, 286 P 107, 87 Colo 204

14. Colo—Board of Com'rs of Adams County v Heath, supra

15. Cal—Imperial Land Co v Imperial Irr Dist, 161 P. 116, 173 Cal 668

67 C J p 1351 note 39.

16. Cal—Imperial Land Co v Imperial Irr Dist, supra.

67 C J p 1351 note 40

17. Cal—McDonough v Cooper, 177 P 153, 179 Cal 384.

essor to enter on his assessment roll the amount of special benefits assessed against each tract of land within any local improvement district situate in the irrigation district, as the same is shown on the equalized benefit assessment roll of said improvement district, have been construed as applicable to assessments for local improvement districts within an irrigation district<sup>18</sup> and as inapplicable to assessments for the general purposes of an irrigation district as a whole.<sup>19</sup>

*Recital of amount in directors' resolution* is sufficient to show that the directors passed on and determined the amount required<sup>20</sup>

*Certification of assessment roll* In the absence of statutory provision so requiring, it is not necessary to the validity of the assessment, and a subsequent sale of the land for failure to pay the same, that the assessment roll<sup>21</sup> and delinquent list<sup>22</sup> be certified.

## (2) Listing and Description of Property

Property assessed must be listed and described as required by statute.

The description of the property assessed must be such as to afford the owner means of identification<sup>23</sup> A description of property on the assessment books and delinquent assessment books is sufficient if it is in substantial compliance with statutory requirements and is sufficiently clear and definite to permit ready identification and location of the land by means of the tax deed,<sup>24</sup> and is therefore sufficient to apprise the owner that an assessment lien subsists on the property and so enable him to discharge such lien<sup>25</sup> The designation of benefits

by the district board need not include a specific description of each particular tract according to ownership where the benefits accruing to all tracts within the legal subdivision are the same,<sup>26</sup> although any particular tract benefited differently from the rest should be particularly designated<sup>27</sup> Failure of a district board to list lands according to each separate ownership does not show lack of intention to assess benefits to all lands within a subdivision<sup>28</sup>

Railroad right of way is sufficiently designated by reference to the legal subdivisions across which it runs,<sup>29</sup> at least as far as necessary to preserve the description from collateral attack<sup>30</sup>

## g. Notice and Opportunity for Hearing

Depending on the terms of the statute, landowners may be entitled to notice and an opportunity to be heard before assessments against their property become fixed.

Where the irrigation statute itself defines the boundaries of the district and declares what properties are deemed to be benefited, it is not invalid because providing for the levying of assessments without giving the property holders an opportunity to be heard on such questions<sup>31</sup> When the determination of the benefits, if any, to lands within a proposed irrigation district, or any question involving an assessment against property for benefits, is intrusted to a court or board, the inquiry is judicial in character,<sup>32</sup> and owners are entitled to reasonable notice<sup>33</sup> and an opportunity to be heard,<sup>34</sup> before a charge against their property for such benefits becomes irrevocably fixed Where the statute provides for a regular board of equalization affording taxpayers an opportunity to have their as-

18. Utah—Hatch v Edwards, 269 P 138, 72 Utah 113

19. Utah—Hatch v Edwards, supra

20. Cal—Imperial Land Co v Imperial Irr Dist, 161 P 116, 173 Cal 668

21. Cal—Corson v Crocker, 161 P 287, 31 Cal App 626  
67 C J p 1352 note 54

22. Cal—Corson v Crocker, supra

23. Cal—Trezona v Tickell, 49 P 2d 825, 4 Cal 2d 432

24. Cal—Corson v Crocker, 161 P 287, 31 Cal App 626  
67 C J p 1351 note 46

**Description held adequate**

Cal—Trezona v Tickell, 49 P 2d 825, 4 Cal 2d 432

25. Cal—Corson v Crocker, 161 P 287, 31 Cal App 626

26. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, 102 P 904, 16 Idaho 578  
67 C J p 1351 note 48.

27. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, supra  
67 C J p 1351 note 49

28. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, supra.  
67 C J p 1352 note 50

29. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, supra  
67 C J p 1352 note 51.

30. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, supra  
67 C J p 1352 note 52

31. US—Fallbrook Irr. Dist v Bradley, Cal, 17 S Ct 56, 164 US 112, 41 L Ed 369  
67 C J p 1352 note 56

**Statute not invalid**

The provisions of a statute authorizing flat-rate assessments and water charges by reclamation district are not unconstitutional as denying due process of law because of lack of provision for hearing on

charges, in view of hearing afforded when rates or charges are sought to be enforced by suit

US—Hidalgo and Cameron Counties Water Control and Improvement Dist No 9 v American Rio Grande Land & Irrigation Co, C C A Tex, 103 F 2d 509, certiorari denied American Rio Grande Land & Irrigation Co v Hidalgo & Cameron County Water Control & Improvement Dist No 9, 60 S Ct 88, 308 US 573, 84 L Ed 481

32. Or—In re Harper Irr Dist, 216 P 1020, 108 Or 595

33. Or—In re Harper Irr Dist, supra

Tex—San Saba County Water Control & Improvement Dist No 1 v Sutton, Civ App, 12 S W.2d 134, 70 A L R 1255  
67 C J p 1352 note 58

34. Or—In re Harper Irr. Dist, 216 P 1020, 108 Or 598.  
67 C J. p 1352 note 59.

assessments equalized, it is not open to attack on the ground that there is no provision affording a taxpayer opportunity to be heard as to the apportionment of the tax levied<sup>35</sup>

Where the statute provides for a general tax, as distinguished from a special assessment based on benefits, it is not necessary to provide for a hearing on the benefits to be derived by the taxpayer<sup>36</sup>

#### **h. Drainage Assessments of Irrigation District**

Assessments for drainage of an irrigation district must be made in accordance with statutory provisions

Where the assessment for drainage of an irrigation district is based on a flat rate, and not on actual benefits accruing to the land, it is invalid,<sup>37</sup> although where the benefits derived by drainage are equal the assessments may be the same<sup>38</sup> In the case of an assessment for construction of the drainage system the benefits from drainage are ordinarily different, and therefore a flat rate per acre will generally be improper,<sup>39</sup> although in the case of maintenance and operation the benefits are ordinarily equal and a flat rate justified<sup>40</sup>

### **§ 335. — Objections to Assessments, and Review**

- a Grounds of objection
- b. Review by board
- c Review by court

#### **a. Grounds of Objection**

Substantial defects affecting the jurisdiction of the proceedings will invalidate irrigation district assessments

Where there has been a substantial compliance

with the law, an irrigation district levy and assessment will not be set aside or its enforcement refused for slight errors or mere irregularities in the proceedings on which the assessment is based,<sup>41</sup> but substantial defects affecting the jurisdiction of the proceedings will invalidate the assessment,<sup>42</sup> as in the case of an attempted assessment of exempt property,<sup>43</sup> or where the description of the property has been insufficient to permit identification,<sup>44</sup> or where there has been an arbitrary and gross overvaluation of property by an equalization board.<sup>45</sup>

Where notice of the meeting of the board of equalization has been duly published, but it is not shown that there was due filing of proof of publication with the board, the latter defect is not jurisdictional in character,<sup>46</sup> nor is the assessment subject to collateral attack for such defect.<sup>47</sup>

Under provision of Federal Reclamation Law to the effect that water shall not be furnished to any one landowner in excess of an amount sufficient to irrigate a stated number of acres, an assessment levied for an amount of water in excess of that permitted is so far invalid as to prevent foreclosure of a delinquency certificate in equity if defendant landowner did not in fact receive and use the excess water,<sup>48</sup> although if defendant did use the excess water he may not escape liability to pay therefor<sup>49</sup>

*Waiver and estoppel.* Landowners may, by acts indicating acquiescence in irrigation assessments, estop themselves to object thereto on the ground of irregularities,<sup>50</sup> or may waive the right to object by failure to present their objections at the time and in the manner required by law,<sup>51</sup> or by affirmative

35. Or—Smith v Hurlburg, 217 P 1093, 108 Or 690

36. Tex—Western Union Telegraph Co v Wichita County Water Improvement Dist No 1, Civ App, 19 SW 2d 186, affirmed, Com App, 30 SW 2d 301  
67 C J p 1352 note 62

37. Nev—McLean v Truckee-Carson Irr Dist, 245 P 285, 49 Nev 278

38. Nev—McLean v Truckee-Carson Irr Dist, supra

39. Idaho—Nampa & Meridian Irr Dist v. Petrie, 223 P 531, 37 Idaho 45  
67 C J. p 1352 note 66

40. Idaho—Nampa & Meridian Irr Dist v Petrie, supra

41. Cal—Trezona v. Tickell, 49 P 2d 825, 4 Cal 2d 432  
67 C J. p 1353 note 68

42. Cal.—City of Fresno v. Fresno

Irr Dist, 237 P 772, 72 Cal App 503

67 C J p 1353 note 69

43. Cal—City of Fresno v Fresno Irr Dist, supra

**Property of landowner having paid-up water right or right analogous thereto**

Or—Jordan Valley Irr Dist v. Title & Trust Co, 58 P 2d 606, 154 Or 76

44. Neb—Baker v Central Irr Dist, 140 NW 765, 93 Neb 460

Utah—Madsen v Bonneville Irr Dist, 239 P 781, 65 Utah 571

45. Tex—J J Wheat v Ward County Water Improvement Dist No 2, Com App, 279 SW 1116—Ogburn v Ward County Irr Dist No 1, Civ App, 267 SW 316

46. Or—Northern Pac R Co v John Day Irr Dist, 211 P. 781, 106 Or 140

67 C J. p 1353 note 73.

47. Or—Northern Pac R Co v John Day Irr Dist, supra

48. Or—Enterprise Irr Dist v Enterprise Land & Investment Co, 300 P 507, 137 Or 468  
67 C J p 1353 note 76

49. Or—Klamath County v Colonial Realty Co, 7 P 2d 976, 139 Or 311  
67 C J p 1353 note 77

50. Idaho—In re King Hill Irr Dist, 221 P 839, 37 Idaho 89  
67 C J p 1353 note 78

**Grounds for estoppel not shown**  
US—Pueblo Trading Co. v Baxter Creek Irr Dist, D C Cal, 61 F Supp 586

Nev—Penrose v Whitacre, 132 P 2d 609, 61 Nev 440, opinion adhered to 147 P 2d 887, 62 Nev. 239  
67 C J p 1353 note 78 [b]

51. US—Atchison, T & S. F Ry Co v Elephant Butte Irr Dist of New Mexico, C.C.A.N.M., 110 F. 2d 767.

conduct inconsistent with the right to claim invalidity of the assessments,<sup>52</sup> although the doctrine of waiver does not apply if the defect complained of was jurisdictional in character<sup>53</sup>

Where the statutes provide that a landowner feeling himself aggrieved by an assessment may appeal to the board of equalization, a landowner failing to take such appeal may not thereafter attack his assessment on the ground that his land received no benefit<sup>54</sup>

### b. Review by Board

As provided by statutes, assessments may be corrected on review by a board authorized to do so

The board of correction of an irrigation district is analogous to the board of equalization of a county as far as correcting assessments is concerned,<sup>55</sup> and one failing to present objections to assessments to the board will be deemed to have waived such objections<sup>56</sup> In hearing appeals from irrigation assessments a board of correction or review acts in a judicial or quasi-judicial capacity,<sup>57</sup> and, in the absence of a showing that it disregarded benefits<sup>58</sup> or proof of fraud,<sup>59</sup> or of intentional and systematic discrimination,<sup>60</sup> its determination as to the method of assessment is final and conclusive The actions and conclusions of a board of directors of an irrigation district, sitting as a board of equalization, in equalizing property values may not be reviewed by the courts in the absence of fraud or manifest abuse of its powers.<sup>61</sup>

*Proceedings* In the absence of statute so requiring, a board of directors of an irrigation district, meeting as a board of equalization and vested with broad statutory powers to hear objections and to change valuations of property as may be just, may proceed without filing or presentation before it of formal complaints in writing,<sup>62</sup> and may exercise its equalizing powers and functions without presentation of the testimony of sworn witnesses<sup>63</sup>

### c. Review by Court

- (1) In general
- (2) Review by board as affecting review by court
- (3) Proceedings to confirm assessment
- (4) Proceedings to cancel, set aside, or enjoin levy or enforcement of assessment

#### (1) In General

A landowner may, in a proper case, apply to the courts for relief against an irrigation district assessment.

In a proper case, and by timely proceedings, an aggrieved landowner may apply to the courts for relief against an irrigation district assessment<sup>64</sup> A landowner's action to quiet title as against the lien of an irrigation district for an assessment is a collateral attack on the validity of such assessment.<sup>65</sup>

Curative statutes may preclude judicial attack on an assessment for irregularities other than in the

Mont—*Krueger v Morris*, 107 P 2d 142, 110 Mont 559  
67 CJ p 1353 note 79

52 Wash—*Title & Trust Co v Columbia Basin Land Co*, 238 P 992, 136 Wash 63  
67 CJ p 1353 note 80

53. Nev—*Corpus Juris* cited in *Penrose v Whitacre*, 147 P 2d 887, 890, 62 Nev 239

Or—*Corpus Juris* cited in *Payette-Oregon Slope Irr Dist v Coughanour*, 91 P 2d 526, 528, 162 Or 458

67 CJ p 1354 note 81

54. Idaho—*Knowles v New Sweden Irr Dist*, 101 P. 81, 16 Idaho 217, 235

67 CJ p 1354 note 83

55. Idaho—*Brown v Shupe*, 233 P 59, 40 Idaho 252

56. Idaho—*Brown v Shupe*, supra

57. Cal—*Reclamation Dist No 108 v Ash*, 208 P 394, 58 Cal App 238

67 CJ p 1354 note 86.

58. Idaho—*Lundy v Pioneer Irr Dist*, 19 P 2d 624, 52 Idaho 683

67 CJ p 1354 note 87.

59 Idaho—*Lundy v. Pioneer Irr Dist*, supra.

60 Idaho—*Lundy v. Pioneer Irr Dist*, supra.

61. Cal—*Wores v. Imperial Irr Dist*, 227 P 181, 193 Cal 609  
67 CJ p 1354 note 91

62. Cal—*Wores v Imperial Irr Dist*, supra

63. Cal—*Wores v. Imperial Irr Dist*, supra

64 Utah—*Lundberg v Green River Irr Dist*, 119 P 1039, 40 Utah 83

67 CJ p 1354 note 94

#### Bond on appeal

Section of the Reclamation Act requiring a party appealing to file a cross-bond with clerk of district court in an amount not to exceed a specified amount, and imposing liability on such party for costs if finding of court is not more favorable to him than finding of board, does not violate due process

Neb—*Nebraska Mid-State Reclamation Dist v Hall County*, 41 N W 2d 397, 152 Neb 410

#### Power limited

The statutory provisions for challenging assessments on particular lands in irrigation district, organized under statute authorizing contract between district and United States pursuant to federal reclamation laws, as too high, erroneously computed, or not uniform in proportion to other tracts district, must be construed in connection with provision that district court shall hear evidence concerning correctness and uniformity of assessments and may modify schedule of assessments proposed by district board of directors, but court's power is limited by further provision that it shall not disturb board's findings and assessments, unless assessments are manifestly disproportionate

Kan—*Mizer v Kansas Bostwick Irr Dist No 2*, 239 P 2d 370, 172 Kan 157, appeal dismissed 72 S Ct 1053, 343 US 954, 96 L Ed. 1355

65. Cal—*Miller & Lux v Secara*, 227 P. 171, 193 Cal. 755.

way and at the time specified by the statute,<sup>66</sup> although such statutes do not preclude subsequent attack on an assessment for violation of a landowner's constitutional rights<sup>67</sup>

A statute prescribing a limitation on actions attacking the validity of irrigation district assessments is invalid if it does not allow a reasonable time<sup>68</sup>

## (2) Review by Board as Affecting Review by Court

Under some statutes relief may not be sought in the courts before application for relief has been made to a reviewing board.

Where the statutes make no provision for correction of an error with respect to assessment by a board or officers of an irrigation district, an aggrieved landowner may secure relief from the courts<sup>69</sup> Where the statutes provide for the hearing of objections to assessments by a board of review or correction, and the taxpayer fails to make due and timely application for relief to such board, and where the objection is not jurisdictional in character, he may not thereafter secure relief from the courts,<sup>70</sup> although where the objection to the assessment is jurisdictional in character the taxpayer's failure to apply to the board will not preclude his subsequent resort to the courts<sup>71</sup> Where a taxpayer has obtained relief through the board, he may not thereafter complain as to such matters on appeal from a judgment denying him injunctive relief.<sup>72</sup>

## (3) Proceedings to Confirm Assessment

Statutory provisions determine the necessity for, and the operation and effect of, confirmation by the courts of irrigation assessments.

Under some statutes provision is made for judicial confirmation of the apportionment of benefits,<sup>73</sup> and ordinarily an apportionment of benefits duly made by an irrigation district board becomes final on confirmation by the court<sup>74</sup> An assessment of benefits by the board of directors of an irrigation district, duly confirmed by the court, is not subject to collateral attack where the board and court had jurisdiction,<sup>75</sup> and in all collateral proceedings benefits assessed against land are conclusively presumed to have been received<sup>76</sup> Confirmation of the apportionment of benefits is essential to the levy and assessment of irrigation district assessments where made so by statute,<sup>77</sup> but not otherwise<sup>78</sup>

The legality of prior proceedings is open to review on petition to confirm an irrigation assessment.<sup>79</sup> An appeal is timely taken when perfected within the time prescribed by statute.<sup>80</sup>

## (4) Proceedings to Cancel, Set Aside, or Enjoin Levy or Enforcement of Assessment

In a proper case a taxpayer may resort to the courts to cancel or set aside an assessment, or enjoin the levy or enforcement of the assessment.

If the levy is shown to be illegal, the assessment or collection of the tax may be enjoined by the courts,<sup>81</sup> as where an injunction is granted against

66. Cal—Imperial Land Co v Imperial Irr Dist, 161 P 113, 173 Cal 660

67 C J p 1354 note 97

67. Cal—Imperial Land Co v Imperial Irr Dist, supra.

67 C J p 1354 note 98

68. Cal—Miller & Lux v. Secara, 227 P 171, 193 Cal 755.

67 C J p 1355 note 99

69. Utah—Madsen v Bonneville Irr Dist, 239 P 781, 65 Utah 571

67 C J p 1355 note 2

70. Idaho—Lundy v Pioneer Irr Dist, 19 P 2d 624, 52 Idaho 683

67 C J p 1355 note 3

71. Tex—Ogburn v Ward County Irr Dist No 1, Com App, 280 S W 169

67 C J p 1355 note 4

72. Idaho—Lundy v Pioneer Irr Dist, 19 P 2d 624, 52 Idaho 683

67 C J p 1355 note 5

73. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, 102 P 904, 16 Idaho 578

Review

Wyo—In re Greybull Valley Irr.

Dist, 76 P 2d 339, 52 Wyo 479, followed in Brewer v Greybull Valley Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied 77 P 2d 617, 52 Wyo 479

74. Idaho—Lundy v Pioneer Irr Dist, 19 P 2d 624, 52 Idaho 683

67 C J p 1355 note 7

75. Idaho—Knowles v New Sweden Irr Dist, 101 P 81, 16 Idaho 217, 235

76. Idaho—Knowles v New Sweden Irr Dist, supra.

77. Idaho—Haga v Nampa & Meridian Irr Dist, 221 P 147, 38 Idaho 333

67 C J p 1355 note 10

78. Idaho—Haga v Nampa & Meridian Irr Dist, supra

67 C J p 1355 note 11

79. Idaho—Oregon Short Line R Co v Pioneer Irr Dist, 102 P 904, 16 Idaho 578

67 C J p 1355 note 12

80. Wyo—In re Greybull Valley Irr Dist, 52 P 2d 410, 48 Wyo 523

81. US—Miller v Perris Irr Dist, C C Cal, 92 F 263

Cal—Hughson v Crane, 47 P. 120, 115 Cal 404

### Proper remedy

Where owners of land in improvement district sought to prevent enforcement of assessment which board of directors was without any authority to levy, "injunction" was the proper remedy since statute providing for correction of special assessment and statute providing for payment of assessment under protest and authorizing suit to recover money so paid did not provide "adequate remedies," and owners of lands are entitled to invoke aid of equity without first applying for relief to board of correction, which has no power under statute to decide whether assessment is void

Nev—Penrose v Whitacre, 147 P 2d 887, 62 Nev 239

It must appear that enforcement of tax or assessment would lead to multiplicity of suits, produce irreparable injury or throw cloud on title to realty, or fraud must be alleged, before equity court's aid can

sale to collect an assessment,<sup>82</sup> or a proper person may sue to have the assessment canceled and declared void,<sup>83</sup> although an injunction will be denied where there is no adequate ground therefor<sup>84</sup>

Holders of water rights entitled to equitable credit therefor, under statute, in the apportionment of assessments, are not entitled to an injunction restraining the levy of irrigation district assessments unless and until there has been a violation, or threatened violation, of the statute entitling them to equitable credit for their water rights<sup>85</sup>

**Prerequisites to suit** Before bringing a suit to enjoin collection of illegal or excessive irrigation assessments, the landowner should exhaust his remedies before the board of review or correction,<sup>86</sup> unless the relief sought could not be obtained by appeal to such board,<sup>87</sup> and should pay so much of the assessment as may be legal and valid.<sup>88</sup> A taxpayer seeking to reduce assessments, but not tendering that which may be lawfully due from him, is not entitled to relief.<sup>89</sup> A suit to enjoin the levy of a special assessment is premature when brought before the election on the assessment is held, where the board could not levy the assessment until authorized by the electors<sup>90</sup>

**Limitations.** In determining whether a suit for injunction against the enforcement and levy of assessments is barred by limitations it has been held

that the cause of action accrued as of the date of threatened enforcement and levy<sup>91</sup> and not as of the date of the issuance and sale of bonds to raise money for which the assessment was made<sup>92</sup>

**Parties** Where a suit for cancellation is based on the theory that the water district assessing the same has not been legally incorporated, the district is a necessary party to the suit<sup>93</sup> In a suit to enjoin enforcement of an irrigation tax on the ground that it has been illegally levied, it has been held that holders of irrigation district bonds are entitled to intervene<sup>94</sup>

**Pleading.** A complaint seeking to enjoin or restrain the collection of an irrigation district tax or assessment should set forth facts showing a cause of action of equitable cognizance<sup>95</sup> and the invalidity of the tax or assessment levied<sup>96</sup> On demurrer to a complaint seeking to enjoin the levy and collection of irrigation district assessments, it will be presumed that the proceedings for organization of the district were regular except as to defects alleged in the complaint<sup>97</sup> Word "description," as used in a complaint seeking to enjoin the levy and enforcement of an irrigation district assessment for failure to include plaintiff's land in the district because of defective description, will be construed in its ordinary sense<sup>98</sup>

be invoked to enjoin collection of tax or assessment  
Nev—Penrose v Whitacre, supra

#### No adequate remedy at law

Injunction will lie to prevent collection of illegal irrigation district assessments on lands in improvement district, in absence of adequate remedy at law, though cloud on titles to such lands would not justify injunctive relief  
Nev—Penrose v Whitacre, supra.

82. Cal—Woodruff v. Perry, 37 P 526, 103 Cal 611.  
67 C J p 1355 note 14

83. Or—Smith v Enterprise Irr Dist., 85 P 2d 1021, 160 Or 372  
67 C J p 1355 note 15

#### Where damages are sought

A suit by owners of land within irrigation district to enjoin district from assessing further charges against their land, and to cancel unpaid charges, because of district's failure to supply water to land, was based upon an equitable cause of suit, and fact that landowners also sought recovery of damages from district did not preclude them from maintaining suit  
Or—Smith v. Enterprise Irr Dist., supra

#### Measure of damages

In suit by owners of land within irrigation district to cancel unpaid assessments against land and to recover damages from district because of its failure to furnish water for land, measure of damages was the difference between value of use of land without irrigation thereon and value of use if it had been irrigated, to be computed under restriction that equity will not consider stale claims and for period ending at date of earliest assessment canceled  
Or—Smith v Enterprise Irr Dist., supra

84. Neb—Baker v Central Irr Dist., 140 NW 765, 93 Neb 460  
67 C J p 1355 note 16

85. Wash—Bleakley v Priest Rapids Irr Dist., 11 P 2d 597, 168 Wash 267

86. Idaho—Brown v Shupe, 233 P 59, 40 Idaho 252  
67 C J p 1356 note 19

87. Or—Smith v Enterprise Irr Dist., 85 P 2d 1021, 160 Or 372

88. Cal—Quint v Hoffman, 37 P 514, 777, 103 Cal 506.  
67 C J p 1356 note 20

89. Or—Northern Pac Ry Co v

John Day Irr Dist., 211 P 781, 106 Or 140

90. US—Nev-Cal Electric Securities Co v Imperial Irr Dist., C C A Cal., 85 F 2d 886, certiorari denied 57 S Ct 493, 300 US 662, 81 L Ed 871

91. US—Miller v Perris Irr Dist., C C Cal., 85 F 693

92. US—Miller v. Perris Irr Dist., supra  
67 C J p 1356 note 23

93. Or—Smith v Hurlburt, 217 P 1093, 108 Or 690  
67 C J p 1356 note 24

94. Cal—Baxter v Dickinson, 68 P 601, 136 Cal 185  
67 C J p 1356 note 25

95. Colo—Nile Irr Dist v English, 153 P 760, 60 Colo 406  
67 C J p 1356 note 26

96. Colo—Nile Irr Dist v. English, supra  
Or—Cannon v Hood River Irr Dist., 154 P 397, 79 Or 71  
67 C J p 1356 note 27

97. Utah—Argyle v Bonneville Irr Dist., 280 P 722, 74 Utah 480  
67 C J p 1356 note 28

98. Utah—Argyle v Bonneville Irr. Dist., supra  
67 C J p 1356 note 29.

*Evidence* In a suit to cancel or enjoin the levy or enforcement of an irrigation district tax or assessment, in the absence of contrary evidence it will be presumed that the district was legally organized,<sup>99</sup> and, where there has been a substantial compliance with statutory provisions relative to assessment by an irrigation district assessor and the district board has reviewed the assessment and a levy has been made, it will be presumed that the district board made the levy<sup>1</sup> and that the proceedings were regular.<sup>2</sup> The burden is on plaintiff to prove that the assessment was illegal.<sup>3</sup> Where a complaint seeking to enjoin the collection of a special irrigation district tax does not point out any irregularity, evidence will not be admitted to show that the tax was illegal because irregularly assessed.<sup>4</sup>

*Trial.* The right of land to exemption from an irrigation district assessment or tax has been held a question of mixed law and fact.<sup>5</sup>

### § 336. — Lien

- a. In general
- b. Priorities
- c. Foreclosure

99. Or—Cannon v Hood River Irr Dist, 154 P. 397, 79 Or 71

1. Neb—Wight v McGuigan, 143 N W 232, 94 Neb 358

2. Neb—Wight v. McGuigan, *supra*

3. Cal—Miller & Lux v Secara, 227 P 171, 193 Cal 755—Baxter v Dickinson, 68 P 601, 136 Cal 185

#### Excluded land

Where assessment is resisted on the ground land was excluded from the district, an affidavit of publication of notice of filing petitions for exclusion of lands from irrigation district was prima facie evidence of date of such filing, and recitals in order excluding lands from irrigation district, that petitions came on regularly for hearing, that notice was given for the time and in the manner required by law, and that no cause was shown why the prayer of such petitions should not be granted, should be regarded as true in absence of evidence to the contrary

US—Pueblo Trading Co v. Baxter Creek Irr Dist, D C Cal, 61 F Supp 586

4. Utah—Horn v. Shaffer, 151 P. 555, 47 Utah 55

5. Utah—Horn v Shaffer, *supra*. 67 C J p 1357 note 35

6. Neb—Garden County v Schaaf, 17 NW 2d 874, 145 Neb 676.

Wash—Outlook Irr Dist. v. Fels, 28 P 2d 996, 176 Wash 211. 67 C J. p 1357 note 36.

7. Utah—Parry v Bonneville Irr Dist, 263 P 751, 71 Utah 202

8. US—People of Puerto Rico, on Behalf of Isabela Irr Service v U S, CCA Puerto Rico, 134 F 2d 267, certiorari denied 64 S Ct 59, 320 US 753, 88 L Ed 448

U S v Anderson Cottonwood Irr Dist, D C Cal, 19 F Supp 740

Neb—Garden County v Schaaf, 17 NW 2d 874, 145 Neb 676

Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458

Tex—Hoge v. Garcia, Civ App, 296 S W 982

Where petition for exclusion of lands from irrigation district was filed before issuance of district's bonds, such lands were not subject to any lien of any assessment levied to pay such bonds

U.S.—Pueblo Trading Co v Baxter Creek Irr Dist, D C Cal, 61 F Supp 586.

#### Future assessments

Statutory provisions making assessments levied to pay principal and interest of irrigation district bonds a lien on lands within the district should not be liberally construed so as to give a lien for future assessments particularly where statute clearly provides that lien shall cover only annual assessments.

US—People of Puerto Rico, on Be-

### a. In General

Generally, a valid irrigation assessment constitutes a lien on the lands within the district

Generally speaking, a valid irrigation assessment on lands within the district constitutes a lien on such lands,<sup>6</sup> and it has been held that the lien is created although a commissioners' notice preceding such assessment and relative to the formation of the district and the allotment of water stated that no water had been allotted to such land.<sup>7</sup> No lien arises until a valid assessment has been made and the amount of taxes declared,<sup>8</sup> and, under a provision of law creating a lien for water districts to cover taxes of delinquents, no lien is created until the taxes become delinquent.<sup>9</sup>

A constitutional provision making annual assessments on landed property a lien does not by the term "annual assessment" refer to special taxes levied by a water district.<sup>10</sup> Under some constitutional provisions only an indebtedness against the district, and not an indebtedness to it, is protected by a lien.<sup>11</sup> Where the lien of assessments has become irrevocably fixed, subsequent statutes providing for reapportionment of assessments will not affect the lien so fixed for assessments levied prior

half of Isabela Irr Service v. U S, CCA Puerto Rico, 134 F 2d 267, certiorari denied 64 S Ct 59, 320 U. S 753, 88 L Ed 448.

9. Tex.—Hoge v. Garcia, Civ App, 296 S W. 982

10. Tex—Hoge v. Garcia, *supra*.

11. US—Hidalgo and Cameron Counties Water Control and Improvement Dist No 9 v American Rio Grande Land & Irrigation Co, CCA Tex, 103 F 2d 509, certiorari denied American Rio Grande Land & Irrigation Co v Hidalgo & Cameron County Water Control & Improvement Dist No 9, 60 S Ct 88, 308 US 573, 84 L Ed 481

Charges and assessments which reclamation district lays on landowners and lands within it do not have a lien or escape limitation as "taxes" within tax statutes, and operation charges for water furnished and service rendered and assessments against lands are not given a lien on lands assessed

US—Hidalgo and Cameron Counties Water Control and Improvement Dist No 9 v American Rio Grande Land & Irrigation Co, CCA Tex, 103 F 2d 509, certiorari denied American Rio Grande Land & Irrigation Co v Hidalgo & Cameron County Water Control & Improvement Dist No 9, 60 S Ct. 88, 308 U S. 573, 84 L Ed 481.



to the passage of such subsequent statutes<sup>12</sup> A water improvement district, carrying each separately rendered lot in acreage tracts on tax rolls for its own taxes, has been held not entitled to blanket liens on all lots in each tract.<sup>13</sup> An irrigation district assessment levied on land outside the district creates no lien thereon<sup>14</sup>

The legislature may legislate out of existence assessment liens for delinquent assessments.<sup>15</sup>

#### b. Priorities

The priority of a lien for irrigation assessments depends on statutory provisions, and the time of creation of the lien.

The validity of a statute given priority to irrigation assessments over prior mortgages and other liens has been upheld<sup>16</sup> Irrigation district assessments are taxes within the contemplation of a statute making general taxes a first lien on land,<sup>17</sup> and have been held prior to an existing mortgage lien<sup>18</sup> It has been held that an irrigation district tax lien is not entitled to priority over a mortgage, securing payment of common school funds, which was executed and recorded prior to organization of the irrigation district,<sup>19</sup> but the lien is superior to a subsequent mortgage<sup>20</sup>

#### c. Foreclosure

Foreclosure of a lien for irrigation assessments may be had in accordance with statutory provisions.

The legislature may authorize an irrigation district to enforce liens given to it to protect the dis-

trict in the collection of its taxes, assessments, tolls, and charges,<sup>21</sup> and under the practice prevailing in some jurisdictions irrigation taxes and assessments may be collected by judgment for the amount due and foreclosure of the tax lien<sup>22</sup> Under a statute providing for foreclosure of delinquent tax liens, and also expressly to the effect that it shall be inapplicable to taxes levied and collectable for the year preceding its enactment, a suit to foreclose the liens of delinquent assessments for irrigation district purposes for such excluded year may not be maintained.<sup>23</sup> Under a statute providing for the publication of the delinquent tax record, it has been held that proof of such publication is prerequisite to the right of a water district to foreclose its tax lien.<sup>24</sup>

*Judgment.* Under constitutional provisions permitting, but not requiring, the rendition of a personal judgment against a landowner, the lien for taxes may be foreclosed without rendition of any personal judgment against the landowner,<sup>25</sup> and it is not necessary for the judgment to find the amount due and impose a lien on each separate lot of subdivided tracts owned by the same person<sup>26</sup> The judgment is open to attack for jurisdictional errors<sup>27</sup>

### § 337. — Payment, Collection, and Disposition of Proceeds

- a In general
- b Interest and penalties
- c Recovery of assessments paid

12 Cal—Seale v Balsdon, 197 P 971, 51 Cal App 677  
67 C J p 1357 note 41

13. Tex—Holt v Wichita County Water Improvement Dist. No 2, Com App, 63 S W 2d 369

14. Utah—Parry v Bonneville Irr Dist, 263 P 751, 71 Utah 202

15. Wash—Kennewick Irr Dist v Benton County, 35 P 2d 1109, 179 Wash 1

16. Colo—People ex rel Rogers v Letford, 79 P 2d 274, 103 Colo 284  
Nev—In re Lovelock Irr Dist, 273 P 983, 51 Nev 215

17. Neb—Flansburg v. Shumway, 219 N W 956, 117 Neb 125

18. Neb—Flansburg v Shumway, supra  
67 C J p 1357 note 45

19. Or—Umatilla County v Bowman, 62 P 2d 266, 155 Or 49—Eagle Point Irr Dist v Cowden, 1 P 2d 605, 137 Or 121

20. Or—Umatilla County v. Bowman, 62 P 2d 266, 155 Or 49—State Land Board v Davidson, 34 P 2d 608, 147 Or 504

21. Nev—Magee v Whitacre, 106 P 2d 751, 60 Nev 202

#### Purpose of statute

The legislature, by enactment of statute providing lien for irrigation district assessments and making lien equal to general tax lien, intended to protect irrigation districts in collection of taxes, assessments, tolls, and charges and to require county to collect irrigation district assessments in the same way school and city taxes are collected

Nev—Magee v. Whitacre, supra

22. Or—Horsefly Irr Dist. v Hawkins, 254 P. 825, 121 Or 366

Tex—San Antonio Suburban Irrigating Farms v. Bexar-Medina-Atacosa Counties Water Improvement Dist No 1, Civ App, 49 S W 2d 511

#### Invalidity of district as defense

(1) Where property owner was defending property against alleged illegal tax levy and liens by water district alleged to be without authority to so act, property owner could attack validity of district, rule that only state can do so being inapplicable

Tex—Dallas County Fresh Water

Supply Dist No 7 v. Mercantile Securities Corporation, Civ App, 110 S W 2d 187, error dismissed

(2) Property owner could attack validity of district on ground that no description or boundaries were given which would include area claimed to constitute district in compliance with law authorizing creation of district  
Tex—Dallas County Fresh Water Supply Dist No 7 v Mercantile Securities Corporation, supra

23. Idaho—Grandview Irr. Dist. v. Brown, 179 P 952, 32 Idaho 187.

24. Tex—White v Hidalgo County Water Improvement Dist No 2, Civ App, 6 S W 2d 790—Ward County Irr Dist No 1 v. Carr, Civ App, 267 S W 315

25. Tex—Holt v. Wichita County Water Improvement Dist. No 2, Civ App, 48 S W 2d 527

26. Tex—Holt v Wichita County Water Improvement Dist No 2, supra.

27. Tex—White v Hidalgo County Water Improvement Dist. No. 2, Civ App, 6 S W 2d 790  
67 C J p 1357 note 54.

## d Collection and enforcement of assessments

## e Disposition of taxes and assessments

## a. In General

Payment of taxes and assessments must be made in the manner and at the time prescribed by statutory provisions.

Except as otherwise provided by statute, as a general rule, irrigation taxes and assessments are payable in money only<sup>28</sup> Under particular statutory provisions, as applied to the facts involved, it has been held that irrigation district taxes and assessments may<sup>29</sup> or may not<sup>30</sup> be paid in district bonds or coupons, or may<sup>31</sup> or may not<sup>32</sup> be paid by tax anticipation warrants, or may not be paid by shares of stock in an irrigation company<sup>33</sup>

Where the statute permits an irrigation district treasurer to accept warrants of any year left unpaid only in payment of the tax levied to meet the deficiency of that year, he is justified in refusing a tender of warrants of one year in payment of assessments for a different year,<sup>34</sup> and may properly refuse tender of warrants for different years made in a lump and including payments which could not lawfully be made by the warrants tendered,<sup>35</sup> and it has also been held that a taxpayer may not use coupons clipped from one issue of bonds to pay such portions of his taxes as were levied to pay interest on other issues<sup>36</sup> It has been held that a statutory right to pay taxes with coupons or warrants is not confined to one owing a tax in the technical sense,<sup>37</sup> but includes the holder of a tax

sale certificate<sup>38</sup>

*Time of payment or tender.* A tender of irrigation district taxes may, it has been held, properly be made in money<sup>39</sup> or in interest coupons<sup>40</sup> at any time before the land is sold for taxes, payment of such taxes in either medium being permissible before sale

## b Interest and Penalties

Whether interest and penalties may be collected on delinquent assessments and, if so, the rate and amount thereof are determined by statutory provisions, which may also govern the disposition of such interest or penalty.

In the absence of statutory provision authorizing collection of interest on delinquent irrigation district assessments prior to sale, none may be collected<sup>41</sup> Where an irrigation statute provides that if any assessment becomes delinquent the treasurer shall collect it with the penalties added, "as provided for delinquent county and state taxes," the intent of the irrigation statute is to adopt the general law on penalties as provided in the then existing statute, and all subsequent amendments thereof,<sup>42</sup> and the rate or amount of penalties due on subsequent delinquencies will be controlled by the general statute<sup>43</sup> A statute authorizing waiver or reduction in the discretion of a board of penalties and interest due an irrigation district has been held valid,<sup>44</sup> and, under a statute authorizing waiver or reduction of penalties and interest on delinquent taxes by a county board, it has been held that such board may waive or reduce penalties and interest accruing on a portion of taxes due an irrigation district.<sup>45</sup>

28. Ariz.—Roe v Roosevelt Water Conservation Dist, 16 P 2d 967, 41 Ariz 197  
67 C J p 1358 note 56

29. Cal.—Copeland v Raub, 97 P 2d 859, 36 Cal App 441  
Utah—Dalton v Redd, 39 P 2d 1068, 85 Utah 477—Salter v. Nelson, 39 P 2d 1061, 85 Utah 460  
67 C J p 1358 note 63

## Interest coupons

Where landowner of reclamation district was entitled under the statute to apply interest coupons in payment of an assessment fact that county treasurer might erroneously credit, on assessment, interest on coupons presented which had not accrued at time of tender, did not preclude landowner from applying coupons on assessment

Cal.—Copeland v Raub, 97 P 2d 859, 36 Cal App 2d 441

## Matured bonds and coupons

Amendment to Irrigation District Act limiting provision for payment of bond fund taxes in district bonds

to matured interest coupons and bonds and to proper proportion of each bond issue would not be invalid though original act provided for payment merely with bonds or interest coupons "maturing within the year," which included coupons or bonds which had matured or which should have matured within year in which taxes were payable  
Utah—Salter v Nelson, 39 P 2d 1061, 85 Utah 460

30. Neb.—Wyman v Searle, 128 N W 801, 88 Neb 26  
67 C J p 1358 note 64

31. Colo.—Tew v Phillips, 216 P 525, 73 Colo 408  
67 C J p 1358 note 65

32. Ariz.—Roe v Roosevelt Water Conservation Dist, 16 P 2d 967, 41 Ariz 197

33. Idaho—Holland v Avondale Irr Dist, 166 P 259, 30 Idaho 479

34. Colo.—Orchard Mesa Farms Co v Canon, 157 P. 192, 61 Colo 347  
—Eberhart v. Canon, 157 P. 189, 61 Colo 340

35. Colo.—Orchard Mesa Farms Co v Canon, 157 P 192, 61 Colo 347

36. Colo.—Poor v Wilson, 171 P. 357, 64 Colo 316

37. Colo.—Tew v Phillips, 216 P 525, 73 Colo 408

38. Colo.—Orchard Mesa Farms Co v Canon, 157 P 192, 61 Colo 347

39. Colo.—Orchard Mesa Farms Co v Canon, supra

40. Colo.—Orchard Mesa Farms Co v Canon, supra

41. Idaho—Nampa & Meridian Irr Dist v Barker, 223 P 529, 38 Idaho 529

42. Idaho—Nampa & Meridian Irr Dist v Barker, supra

43. Idaho—Nampa & Meridian Irr Dist v Barker, supra  
67 C J p 1358 note 73

44. Or.—Livesay v De Armond, 284 P 166, 131 Or 563, 68 A L R 422.

45. Or.—Livesay v De Armond, supra

Where no penalty or interest has been fixed by an irrigation district, none may be collected on foreclosure of delinquent tax certificates,<sup>46</sup> and a decree therein erroneously granting penalties and interest may be corrected on appeal.<sup>47</sup>

**Disposition of penalties** Under local statutory provisions it has been held that an irrigation district is entitled to penalties collected on delinquent assessments,<sup>48</sup> and that the county is not entitled thereto.<sup>49</sup>

### c. Recovery of Assessments Paid

One who pays an invalid assessment may recover it back on compliance with statutory provisions governing the right of recovery.

One required to pay an invalid irrigation assessment may recover it.<sup>50</sup> A cumulative statutory remedy providing for refund of taxes paid under protest is not excluded by other statutory provisions providing for the exclusion of lands from an irrigation district.<sup>51</sup>

**Necessity of protest** One paying irrigation taxes or assessments without protest may be denied the right to recover them.<sup>52</sup>

**Term "subirrigation,"** as used in a statute providing for a refund of taxes levied by an irrigation district, if paid under protest, where it is shown that the lands cannot be benefited by irrigation, by reason of "subirrigation," should be interpreted as referring to all lands not capable of benefit from irrigation<sup>53</sup> and is not confined to lands subirrigated to the extent that they become unfit for cultivation.<sup>54</sup>

### d. Collection and Enforcement of Assessments

- (1) In general
- (2) Officer authorized or obligated to collect
- (3) Suit for delinquent taxes or assessments
- (4) Certificate of delinquency and foreclosure
- (5) Sale of property
- (6) Redemption
- (7) Tax titles and deeds

#### (1) In General

Assessments for irrigation may be collected in the manner provided by statute.

Under local statutory provisions irrigation district taxes and assessments may be collected by judgment for the amount due and foreclosure of the lien, as discussed supra section 336 c, or by sale to enforce the lien, as discussed infra subdivision d (5), of this section. Ordinarily, reclamation or irrigation district assessments do not have the character of a tax so as to be collectable by execution or levy on the general property of the owner of the land against which the assessment is made,<sup>55</sup> and the district lacks the power to collect a delinquent assessment by an ordinary action for the recovery of a personal judgment for money,<sup>56</sup> although where the tax assessed by a water improvement district was general in character judgment for the district has been sustained in a suit to foreclose a lien against the personal properties of a delinquent,<sup>57</sup> and a contest of the validity of the taxes and the collection thereof may not be sustained unless the tax as levied is void.<sup>58</sup>

46. Or—Klamath County v Colonial Realty Co, 7 P 2d 976, 139 Or 311

47. Or—Klamath County v Colonial Realty Co, supra

48. Ariz—Maricopa County Municipal Water Conservation Dist No 1 v Ward, 281 P 465, 35 Ariz 541

49. Ariz—Maricopa County Municipal Water Conservation Dist No 1 v Ward, supra  
67 C J p 1358 note 81

50. Wash—Northern Pac R Co v. Walla Walla County, 200 P. 585, 116 Wash 684  
67 C J p 1359 note 82

#### Petition

Where, there was no allegation in petition as to when or how petitioner became successor in interest to one whose land had been decreed to be excluded from irrigation district or as to who had paid assessments wrongfully levied on such land and collected by irrigation district, the petition was insufficient in not stat-

ing a cause of action for recovery of assessments

Idaho—Nielson v Board of Directors of Big Lost River Irr Dist, 117 P 2d 472, 63 Idaho 108

#### Evidence

Evidence held insufficient to show that land was not subject to irrigation taxes as nonirrigable because of natural causes

Neb—Birdwood Irr Dist v Brodbeck, 29 NW 2d 621, 148 Neb 824

51. Neb—Morrow v Farmers' Irr Dist, 220 NW 680, 117 Neb 424

52. Idaho—Lundy v Pioneer Irr Dist, 19 P 2d 624, 52 Idaho 683  
67 C J p 1359 note 84

#### Proof of protest essential

In action to foreclose tax sale certificate issued for delinquent irrigation taxes, defendants' cross-petition for refund of irrigation taxes paid on their land in adjoining section on ground that land could not be irrigated because of natural causes, was properly dismissed, in absence of evi-

dence that defendants had filed affidavit required by law showing why tax paid under protest should be refunded

Neb—Birdwood Irr Dist v Brodbeck, 29 NW 2d 621, 148 Neb 824

53. Neb—Morrow v Farmers' Irr Dist, 220 NW 680, 117 Neb 424  
67 C J p 1359 note 86

54. Neb—Morrow v Farmers' Irr Dist, supra

55. Cal—Atchison, T & S F Ry Co v. Reclamation Dist No 404, 159 P 430, 173 Cal 91

56. Cal—Atchison, T & S F. Ry Co v Reclamation Dist No 404, supra

57. Tex—Western Union Telegraph Co v Wichita County Water Improvement Dist No 1, Civ App, 19 SW 2d 186, affirmed, Com App, 30 SW 2d 301

58. Tex—Western Union Telegraph Co. v Wichita County Water Improvement District No. 1, supra.

Special assessments should be collected in the manner provided for the collection of assessments for district bonds where no other method is specified by statute<sup>59</sup>

## (2) Officer Authorized or Obligated to Collect

Assessments are to be collected by the officer authorized or obligated by statute to collect them

Irrigation district assessments should be collected by the officers designated by statute; but the distinction between irrigation district taxes and general taxes for county and state purposes does not constitute such an inherent difference between the two as to prevent the collection of both in the same manner when directed by statute,<sup>60</sup> and, under a statutory provision requiring irrigation district taxes to be collected in the same manner and at the same time and on the same receipt as is required in the collection of taxes on real estate for county purposes, a county assessor must collect irrigation district taxes together with the general taxes<sup>61</sup>

In the absence of statutory authorization, a receiver may not be appointed for the collection of irrigation taxes or assessments<sup>62</sup>

## (3) Suit for Delinquent Taxes or Assessments

Suits for collection of delinquent taxes and assessments are governed by the general rules of procedure subject to particular statutory regulations.

The general rules of procedure control, subject to particular statutory regulations, with respect to suits to collect delinquent irrigation taxes and assessments<sup>63</sup> A judgment rendered in favor of a water improvement district against a nonresident for assessments is void if the citation does not comply with statutory provisions as to service on non-residents in such cases<sup>64</sup>

**Limitations** Where a statute providing that no period of limitation shall apply to water improvement taxes accruing after the formation of a water improvement district takes effect after such a tax has become delinquent, but before its collec-

59. Idaho—Holland v Avondale Irr Dist, 166 P 259, 30 Idaho 479

60. US—Moore v Gas Securities Co, CCA Colo, 278 F 111

61. US—Moore v. Gas Securities Co, supra  
67 C J p 1359 note 99

62. Tex—San Antonio Suburban Irrigated Farms v Bexar-Medina-Atascosa Counties Water Improvement Dist No 1, Civ App, 49 SW 2d 511, 513  
67 C J p 1359 note 1.

63. Tex—Wheat v Ward County Improvement Dist No 2, Civ App, 217 SW 713  
67 C J p 1359 note 2

### Notice of pendency of suit

County water control and improvement district suing to recover taxes against land, in absence of impleading the other taxing units in which land was situated, and to which taxes were due, was obligated by mandatory provisions of statute to notify such other taxing units of pendency of suit and hence suit was properly abated for district's failure to so notify

Tex—Willacy County Water Control and Improvement Dist No 1 v Lewis, Civ App, 119 SW 2d 159

### Burden of proof

Burden was on water improvement district, suing for delinquent taxes, to establish its right of recovery as to taxes, penalties, interest, and attorney's fees, as well as liens securing them

Tex—Holt v Wichita County Water Improvement Dist. No. 2, Com App, 63 SW 2d 369.

### Presumptions

A court must presume that board of directors of irrigation district gave notice of meeting for determination of lands subject to assessments and levies in conformity with statutory requirements, where the only evidence concerning notice was that public notice was given

US—Atchison, T & S F Ry Co v. Elephant Butte Irr Dist of New Mexico, CCANM, 110 F 2d 767

### Venue

Where main office and principal place of business of irrigation district was, at time of filing suit for flat rate water assessments, located in Hidalgo county, district's suit, made in conformity with provisions of statute, could be maintained in Hidalgo county

Tex—Dallas Joint Stock Land Bank of Dallas v Willacy County Water Control and Improvement Dist No 1, Civ App, 162 SW 2d 149, error dismissed

### Questions considered

Where taxpayer was not denied due process of law in arriving at judgment in water district's suit to collect taxes and in foreclosure of lien, supreme court was without power to inquire into question of benefits

Tex—Anchor v. Wichita County Water Imp Dist No 2, 103 SW 2d 135, 129 Tex 385, 112 ALR 70.

### Method of arriving at judgment

In water district's suit to collect taxes, judgment arrived at by calculating tax on irrigable acres of tract at one sum per acre and adding thereto amount accrued against nonirrigable acres at another sum per acre and

foreclosing lien against entire tract as a unit held not fundamentally erroneous, where only one tract was involved, and taxpayer had due notice of proposed classification at time it was made and did not protest  
Tex—Anchor v Wichita County Water Imp Dist No 2, supra

### Items recoverable

Water improvement district which sued for three items of taxes was entitled, there having been no legal tender of the taxes, to interest, penalties, and attorney's fees on two items admitted to be valid, notwithstanding one item was found to be illegal

Tex—Austin Mill & Grain Co v Brown County Water Improvement Dist No 1, Civ App, 128 SW 2d 829, affirmed Brown County Water Improvement Dist. No 1 v Austin Mill & Grain Co, 138 SW 2d 523, 135 Tex 140

### Review

Defendant filing general demurrer and general denial in water improvement district's suit for delinquent taxes, excepting to judgment for plaintiff and filing assignment of error in foreclosing blanket liens on acreage tracts for each lot therein, did not waive right to assign such error in application for writ of error to review judgment affirming that of trial court

Tex—Holt v Wichita County Water Improvement Dist. No 2, Com App, 63 SW 2d 369.

64. Tex—Lepp v Ward County Water Improvement Dist No. 2, Civ App, 257 SW 916.  
67 C J p 1360 note 3.

tion has been barred by limitations, limitations do not apply <sup>65</sup>

*Default judgment* is void if not based on evidence as required by statute.<sup>66</sup>

*Attorney's fees.* The judgment in favor of a district suing for irrigation taxes or assessments may properly tax attorney's fees in a reasonable amount <sup>67</sup>

#### (4) Certificate of Delinquency and Foreclosure

Under some statutes delinquent taxes and assessments may be collected by issuance of a certificate of delinquency and foreclosure thereof.

The purpose of statutes providing for the issuance of delinquency certificates<sup>68</sup> and foreclosure thereof<sup>69</sup> is to empower an irrigation district to enforce payment of taxes and assessments levied on property within the district. Under statutes of this character an individual is not entitled to a delin-

quency certificate unless he first pays the taxes due the district,<sup>70</sup> but the district is entitled to such certificate without prior payment of the taxes due itself <sup>71</sup> Where a sheriff is under a statutory duty to issue a delinquency certificate to a district the burden rests on him to show why he is justified in refusing to issue it in the particular case involved.<sup>72</sup> Where defendant seeks affirmative relief for alleged failure of the district to furnish him irrigation he must show a demand on the district for irrigation and a failure to comply therewith after a reasonable time <sup>73</sup>

If assessments were illegal the landowner should set up such illegality and have his title quieted in an irrigation district's suit to foreclose a delinquent tax certificate<sup>74</sup> Foreclosure of delinquent water tax certificates will not be refused on the ground of indefinite description of the property in the assessment roll and certificates where the descriptions are sufficient to identify the property.<sup>75</sup>

<sup>65.</sup> Tex.—Western Union Telegraph Co v Wichita County Water Improvement Dist No 1, Civ App, 19 S W 2d 186, 190, affirmed, Com App, 30 S W 2d 301

<sup>66.</sup> Tex.—Lepp v Ward County Water Improvement Dist No 2, Civ App, 257 S W 916  
<sup>67</sup> C J p 1360 note 5

<sup>67.</sup> Tex.—Austin Mill & Grain Co v Brown County Water Improvement Dist No 1, Civ App, 128 S W 2d 829, affirmed Brown County Water Improvement Dist No 1 v Austin Mill & Grain Co, 138 S W 2d 523, 135 Tex 140  
<sup>67</sup> C J p 1360 note 6

<sup>68.</sup> Or.—Horsefly Irr Dist v Hawkins, 254 P 825, 121 Or 366

<sup>69.</sup> Or.—Horsefly Irr Dist v Hawkins, supra.

#### Defenses

The owner of land in the Payette-Oregon Slope Irrigation District was not precluded from resisting foreclosure of certificates of delinquency representing invalid assessments, by fact that he had not tendered either amount of delinquent taxes admittedly due or amount of irrigation assessments payable had lands improperly omitted been included, or by his failure to institute mandamus proceeding to compel inclusion of land omitted by district from assessment Or—Payette-Oregon Slope Irr Dist v Coughanour, 91 P 2d 526, 162 Or 458.

Where irrigation assessments could be segregated from taxes included in delinquency certificates, the certificates could be foreclosed as to the tax liens, though the assessment liens were invalid and amounts stat-

ed in the certificates of delinquency were in a lump sum

Or—Payette-Oregon Slope Irr. Dist v Coughanour, supra

<sup>70.</sup> Or.—Horsefly Irr Dist v Hawkins, 254 P 825, 121 Or 366

<sup>71.</sup> Or.—Klamath County v Colonial Realty Co, 7 P 2d 976, 139 Or 311  
—Horsefly Irr Dist v Hawkins, 254 P 825, 121 Or 366

#### Option

Whether irrigation district acts under statute providing for certificate of delinquency for taxes on property within irrigation districts by paying general taxes, and takes certificate of delinquency for all taxes assessed or proceeds under statute providing for such certificates and foreclosure thereof, without paying general taxes levied by district, is optional Or—Daly v. Horsefly Irr Dist, 21 P 2d 787, 143 Or 441

<sup>72.</sup> Or.—Horsefly Irr Dist v Hawkins, 254 P 825, 121 Or 366

<sup>73.</sup> Or.—Klamath Irr Dist v Carlson, 157 P 2d 514, 176 Or 336

#### Negligence not imputed

Where alleged negligence of federal government, while in control of maintenance and operation of irrigation system, could not be imputed to irrigation district, defendant in suit by district to foreclose land for delinquent assessments could not maintain a claim for affirmative relief against district by way of recoupment, set-off or counterclaim based on such negligence Or—Klamath Irr. Dist v Carlson, supra

#### Necessity for demand not excused

The existence of a government con-

structed drain obstructing delivery of irrigation waters to owner's land within irrigation district did not excuse necessity for a demand by owner upon district for irrigation service and a showing of failure by district to comply with demand in order to authorize relief to owner for district's failure to furnish irrigation by way of recoupment, set-off or counterclaim in district's suit to foreclose delinquent irrigation taxes and assessments

Or—Klamath Irr. Dist. v. Carlson, supra

#### Evidence

In suit by irrigation district to foreclose for delinquent taxes and assessments, evidence adduced by defendant under claim for affirmative relief by way of recoupment, set-off or counterclaim was insufficient to sustain allegation that alleged federal control, which would defeat defendant's right to affirmative relief against district, was a subterfuge and fraud, in that district had paid major portion of cost of project, and irrigation district was not estopped to meet defendant's allegations by proof that aggregate payments were not sufficient to entitle plaintiff to take control of irrigation project, and that no subterfuge or fraud had been practiced

Or—Klamath Irr. Dist. v. Carlson, supra

<sup>74.</sup> Or.—Enterprise Irr Dist v. Enterprise Land & Investment Co., 300 P 507, 137 Or 468

<sup>75.</sup> Or.—Klamath County v. Colonial Realty Co, 7 P 2d 976, 139 Or 311.  
<sup>67</sup> C J p 1360 note 13.

In a suit to foreclose a lien, an answer attacking the delinquency certificates on the ground that by contract the landowner had "perpetual" water rights so that the land was not subject to assessments, has been held a direct rather than a collateral attack on the certificates.<sup>76</sup>

Payment of all state and county taxes by a landowner is no defense to a suit by the county to foreclose an irrigation district's delinquency certificates<sup>77</sup> and does not destroy its right to the issuance of a delinquency certificate.<sup>78</sup> An irrigation district not a party to proceedings in which land was foreclosed for county taxes is not barred from thereafter asserting its own tax or assessment claims,<sup>79</sup> and subsequent purchase of the property from the county by the original owner and issuance of a deed to him do not free the land from the claim of the irrigation district for its assessments,<sup>80</sup> the irrigation district may thereafter compel issuance of a delinquency certificate to it,<sup>81</sup> and irregularities in the foreclosure proceedings to which the district was not a party will not adversely affect its rights.<sup>82</sup>

#### (5) Sale of Property

Under some statutes land may be sold to collect delinquent irrigation taxes or assessments.

Under some statutory provisions land may be sold to collect delinquent irrigation taxes or assessments,<sup>83</sup> and where the steps taken in levying irrigation assessments are regular the right of sale follows a failure to pay the assessment,<sup>84</sup> and the proper authorities are under a duty to sell.<sup>85</sup> Al-

though the legislature may fail to provide any method of procedure under which irrigation districts may sell or otherwise dispose of property acquired by reason of delinquent taxes, there is no implied power vested in county commissioners to make such sale,<sup>86</sup> and, where the statutes expressly vest in the board of directors of an irrigation district authority to sell property acquired by it for delinquent taxes and not needed for the use of the district, the county clearly has no implied power to sell such property,<sup>87</sup> and its statutory functions with respect to delinquent irrigation district taxes have been held to terminate with the assignment to the district of the certificate of sale made before acquisition of title by the district.<sup>88</sup>

Generally speaking, the only property subject to sale for delinquent irrigation assessments is the land against which such assessments were levied.<sup>89</sup> Failure to sell for a delinquent assessment does not extinguish the assessment, but the sale thereunder is merely postponed and the assessment still exists until legally foreclosed and paid.<sup>90</sup>

**Publication of delinquent tax list** Under statutes providing for publication of the delinquent tax list and that sale must take place within a prescribed period after completion of publication, and limiting the right of redemption to a certain time after sale, it has been held that delay in such publication does not invalidate the sale<sup>91</sup> and deed based thereon.<sup>92</sup>

**Restraint sale** A landowner who does not offer to pay the amount legally due has no standing in court to restrain sale of his property because

76. Or—Jordan Valley Irr. Dist. v. Title & Trust Co., 58 P.2d 606, 154 Or 76.

77. Or—Klamath County v. Colonial Realty Co., 7 P.2d 976, 139 Or 311.

78. Or—Horsefly Irr. Dist. v. Hawkins, 271 P. 194, 127 Or 176.

79. Or—Horsefly Irr. Dist. v. Hawkins, supra.

80. Or—Horsefly Irr. Dist. v. Hawkins, supra.

81. Or—Horsefly Irr. Dist. v. Hawkins, supra.

82. Or—Horsefly Irr. Dist. v. Hawkins, supra.

83. Wash—Washington Nat. Inv. Co. v. Grandview Irr. Dist., 28 P.2d 114, 175 Wash 644.  
67 C.J. p. 1360 note 20.

**Statutes liberally construed**

Statute, providing for sale of land on foreclosure of liens for delinquent irrigation assessments and issuance of deeds to purchasers, should be lib-

erally construed as are tax sale statutes.

Wash—Lindsay Irr. Dist. v. Clallam County, 56 P.2d 996, 186 Wash 65.

84. Idaho—Holland v. Avondale Irr. Dist., 166 P. 259, 260, 30 Idaho 479.  
67 C.J. p. 1360 note 21.

85. Idaho—Holland v. Avondale Irr. Dist., supra.  
67 C.J. p. 1360 note 22.

86. Utah—News Advocate Pub. Co. v. Carbon County, 269 P. 129, 72 Utah 88.

87. Utah—News Advocate Pub. Co. v. Carbon County, supra.

88. Utah—News Advocate Pub. Co. v. Carbon County, supra.

89. Mont—State v. Nicholson, 240 P. 837, 74 Mont 346.  
67 C.J. p. 1361 note 26.

90. Cal—McKaig v. Moutrey, 90 P. 2d 108, 32 Cal App 2d 537.

91. Cal—Adams v. Slee, 268 P. 959, 92 Cal App 708.

**Publication held effective**

Irrigation district's "publication" of delinquent list and notice of sale of land for nonpayment of assessments once each week for three successive weeks, the last time being on August 3d, was effective "publication" within statute requiring that "publication" shall not be before 1st of July but must be made on or before 1st of August; and a statutory amendment requiring that the first publication of delinquent list by irrigation district must be made on or before the 1st day of August did not change meaning of prior provision that publication shall not be made before 1st of July but must be made on or before 1st of August, but was merely intended to remove any uncertainty due to obscurity in language.

Cal—Provident Land Corp. v. Provident Irr. Dist., App., 90 P.2d 133, reheard 94 P.2d 83.

92. Cal—Provident Land Corp. v. Provident Irr. Dist., supra—Adams v. Slee, 268 P. 959, 92 Cal App 708.

of irregularities;<sup>93</sup> where he has waived irregularities evidence thereof is inadmissible,<sup>94</sup> and exclusion of evidence as to the sufficiency of description of the property on the assessment book may not be raised for the first time on appeal<sup>95</sup>

*Mode of sale; price; payment* Where the statute governing the sale of land for delinquent assessments contains no requirement or authority for sale at public auction or to any purchaser other than the county, but specifically provides for sale to the county, a sale is not illegal or a tax deed given thereunder void because the county was a competitive bidder and voluntary purchaser at the sale,<sup>96</sup> and prior statutes requiring sale at public auction to the highest bidder are inapplicable,<sup>97</sup> although if the sale was in accordance with the statute, recitals in the certificate of sale as to proceedings based on the inapplicable statute will not invalidate the sale<sup>98</sup> In accordance with general rules, land should not be sold for less than the amount due for irrigation assessments<sup>99</sup> The land may be sold for an amount equal to the assessments foreclosed on and all other assessments chargeable to the land<sup>1</sup> Under statutes providing that any landowner of a reclamation district may deliver to the treasurer for cancellation any bonds payable out of an assessment covering his land and receive credit against such assessment to the amount of the principal and accrued interest of such bonds, and further providing that payment for lands sold to meet delinquent assessments may be made either in cash or in matured bonds and coupons issued on such assessment, or bonds to mature within a specified period, payment for the land sold may not be made in unmatured bonds which will not mature within the prescribed period<sup>2</sup>

*Certificate of sale.* A certificate of sale of land for delinquent irrigation assessments may not be issued unless there has been a sale<sup>3</sup> It is imperative that the certificate of sale set forth correctly the name of the owner of the property sold,<sup>4</sup> and that it contain an accurate description of the property sold,<sup>5</sup> although the certificate will not be invalidated by mere irregularities as to date,<sup>6</sup> and statutory provisions that a certificate of sale shall be dated on the day of sale have been construed as directory,<sup>7</sup> but not mandatory,<sup>8</sup> since the object of the statute is satisfied if the actual date of sale is recited so as to enable those concerned to know when the time for redemption expires<sup>9</sup>

Recitals in the certificate will not invalidate a sale where it sufficiently appears therefrom that the property was sold in accordance with law<sup>10</sup>

*Duplicate certificate.* A statute requiring bidders to pay a fixed fee for a duplicate certificate of sale, and redemptioners to repay the same, and excusing such payment when the district is the purchaser, has been held valid,<sup>11</sup> and, even if such statute were invalid, one who has neither redeemed nor attempted to redeem his property would not be affected thereby<sup>12</sup>

*Filing and recording* Statutory provisions requiring the recording of a certificate of sale are intended to give notice of its contents to the owner of the property sold and to subsequent purchasers<sup>13</sup> Statutory requirements that the treasurer of a county who, as ex officio treasurer of an irrigation district, makes a sale of district property located in another county shall file a duplicate certificate of sale with the auditor of the county in which the land is situated, have for their purpose the imparting of actual notice to the owner that

93. Cal—Imperial Land Co v Imperial Irr Dist, 161 P 113, 173 Cal 660  
67 C J p 1361 note 29
94. Cal—Imperial Land Co. v Imperial Irr Dist, supra  
67 C J p 1361 note 30
95. Cal—Imperial Land Co v. Imperial Irr Dist, supra.  
67 C J p 1361 note 31
96. Utah—Hatch v. Edwards, 269 P. 138, 72 Utah 113
97. Utah—Hatch v Edwards, supra  
67 C J p 1361 note 33
98. Utah—Hatch v. Edwards, supra
99. Cal—Corson v Crocker, 161 P 287, 31 Cal App 626  
67 C J p 1361 note 36
1. Wash—Washington Nat Inv Co v Grandview Irr Dist, 28 P 2d 114, 175 Wash 644.

- Irrigation district's sale of lands acquired for nonpayment of irrigation assessments** for amount of assessments foreclosed and all other assessments chargeable to land was not objectionable as prejudicing bondholders or other landowners because land sold remained subject to assessments to pay outstanding debts
- Wash—Washington Nat Inv Co v Grandview Irr Dist, supra
2. Cal—Balding v. Eich, 16 P 2d 805, 128 Cal App 122
3. Idaho—Eberhard v. Purcell, 296 P. 593, 50 Idaho 393
4. Cal—Bruschi v Cooper, 159 P 728, 734, 30 Cal App 682  
67 C J p 1361 note 39
5. Cal—Lewis v Tulare Reclamation Dist No 749, 204 P 421, 56 Cal App 52  
67 C J p 1362 note 40

6. Cal—Bruschi v Cooper, 159 P 728, 734, 30 Cal App 682.  
67 C J p 1362 note 41
7. Cal—Adams v Slee, 268 P. 959, 92 Cal App 708
8. Cal—Adams v Slee, supra.
9. Cal—Adams v Slee, supra.
10. Utah—Hatch v Edwards, 269 P 138, 72 Utah 113  
67 C J p 1362 note 45
- Recitals held not invalidating**
- Cal—Laist v Nichols, 33 P 2d 866, 139 Cal App 202
11. Cal—Adams v Slee, 268 P 959, 92 Cal App 708  
67 C J p 1362 note 46
12. Cal—Adams v Slee, supra
13. Cal—Lewis v Tulare Reclamation Dist No 749, 204 P 421, 56 Cal App 52  
67 C J p 1362 note 48.

his property has been sold and a certificate issued,<sup>14</sup> and failure to file the duplicate certificate as prescribed by statute invalidates the sale<sup>15</sup>

*Transfer of certificates* Statutory provisions for assignment or sale of tax sale certificates by irrigation districts are intended to simplify the procedure to be followed to the end that land sold for taxes might again be placed on the tax roll by making it less difficult to dispose of the tax certificates<sup>16</sup>

### (6) Redemption

The right of redemption from a sale for delinquent irrigation assessments exists only by virtue of constitutional or statutory provisions, and can be exercised only in the manner prescribed.

The right to redeem does not exist without being especially granted by statute or constitution,<sup>17</sup> and, where there is an express provision in the statutes governing irrigation taxes and assessments relative to the right of redemption, such right is controlled by such provisions<sup>18</sup> and provisions of law relative to redemption from tax sales generally are inapplicable<sup>19</sup> The right of redemption is fixed and controlled by the law in force at the time of the tax sale.<sup>20</sup> Under statutes providing that when land has been sold to an irrigation district for delinquent assessments, and the district has received a deed from the county treasurer, if, in the judgment of the board of directors of the district, the sale has resulted from unavoidable accident, inad-

vertency, or misfortune, and without intent on the part of the owner or person entitled to redeem to permit such assessments to become delinquent and the land to be sold, the board of directors "may" cause such land to be reconveyed to such person within a prescribed period after issuance of the deed to the district and on payment of all sums due, the right to redeem is not discretionary with the board<sup>21</sup> and, if it arbitrarily refuses to permit redemption on a proper showing, such refusal is subject to review by the courts<sup>22</sup>

The general rule that a mere stranger may not redeem property from a tax sale is not applicable to redemption from an irrigation district assessment by an association of landowners acting for the benefit of the owner of the particular property redeemed,<sup>23</sup> and where the owner subsequently ratifies the redemption by the association it is valid and effectual<sup>24</sup> Redemption of lands by irrigation district bondholders does not give them title to the land<sup>25</sup>

Where the law requires lawful money as the medium of payment an attempt to redeem property sold with matured bonds and coupons of the irrigation district does not constitute a valid redemption<sup>26</sup>

*Time for redemption.* Land sold for delinquent assessments may be redeemed within the period prescribed by statute on compliance with the provisions thereof,<sup>27</sup> and the right of redemption

14. Wash—Rothgeb v Cunningham, 203 P 956, 118 Wash 701—Birge v Cunningham, 203 P 954, 118 Wash 458

15. Wash—Rothgeb v Cunningham, 203 P 956, 118 Wash 701—Birge v Cunningham, 203 P 954, 118 Wash 458

16. Colo—District Landowners Trust v Adams County, 89 P 2d 251, 104 Colo 146

17. Tex—Alamo Land & Sugar Co v Hidalgo County Water Improvement Dist No 2, Civ App, 276 S W 949

18. Tex—Alamo Land & Sugar Co v Hidalgo County Water Improvement Dist No 2, supra

#### Right to rents, issues, and profits

Owner seeking to redeem land conveyed to irrigation district pursuant to foreclosure of delinquent assessments was not entitled to credits for rents, issues, and profits district received from lands after foreclosure proceeding

Wash—Horse Heaven Irr Dist v Jenkins, 48 P 2d 591, 183 Wash 49

19. Tex—Alamo Land & Sugar Co

v Hidalgo County Water Improvement Dist No 2, Civ App, 276 S W 949

67 C J p 1362 note 53

20. Cal—Adams v Slee, 268 P 959, 92 Cal App 708

21. Wash—Petitt v Riverside Irr Dist, 247 P 1030, 140 Wash. 6

67 C J p 1362 note 55

22. Wash—Petitt v Riverside Irr Dist, supra

23. Wash—Rothgeb v Cunningham, 203 P 956, 118 Wash 701—Birge v Cunningham, 203 P 954, 118 Wash 458

24. Wash—Rothgeb v Cunningham, 203 P 956, 118 Wash 701—Birge v Cunningham, 203 P 954, 118 Wash 458

67 C J p 1363 note 59

25. Mont—State ex rel Malott v Cascade County, 22 P 2d 811, 94 Mont 394

26. Cal—Provident Land Corp v Provident Irr. Dist, 90 P 2d 138, reheard 94 P 2d 83

#### Effect of attempted redemption

Where two directors of irrigation district and secretary, assessor, and collector thereof made purported re-

demptions of property sold for nonpayment of irrigation district's assessments with matured bonds and coupons of the district after statutes permitting such redemption was held unconstitutional but while the matter was pending upon rehearing, district's officers did not act in good faith as respects right of purchaser to collector's deed

Cal—Provident Land Corp v Provident Irr Dist, App, 94 P 2d 83

27. Cal—Pacific Coast Joint Stock Land Bank of San Francisco v Roberts, 108 P 2d 439, 16 Cal 2d 800

*Act extending time for redemption* of land conveyed to irrigation district for nonpayment of district assessments extended right of redemption to owner of land conveyed to district prior to effective date of act, since district stood in same position as state or municipality

Wash—Horse Heaven Irr Dist v Jenkins, 48 P 2d 591, 183 Wash 49

#### Conflicting statutes

Fact that statute giving irrigation district holding county treasurer's irrigation assessment deed right to quiet title to lands by summary pro-



is lost by failure to redeem within the time prescribed by statute<sup>28</sup> A mortgagee of land sold to an irrigation district for delinquent assessments is not an "owner" within special emergency statutes enacted to defer dispossession of land-owners by extending the time for redemption<sup>29</sup>

*Redemption before issuance of deed* may be permitted on substantial compliance with applicable statutory provisions<sup>30</sup>

(7) Tax Titles and Deeds

- (a) In general
- (b) Tax deed
- (c) District or county as purchaser; resale
- (d) Actions concerning tax title

(a) In General

Tax deeds must be issued in conformity with statutes pertinent thereto.

Where there has been no sale of land for delinquent irrigation assessments pursuant to statute, tax deeds issued to the purchaser of a delinquency certificate are invalid.<sup>31</sup> Failure to comply with statutory regulations relative to sale, entry thereof, and timely issuance and filing of certificates of sale of delinquent property prejudices the owner thereof<sup>32</sup> and renders invalid tax deeds issued without compliance with such statutory requirements<sup>33</sup>

Failure to serve personal notice of purchase on occupant of land purchased for delinquent irrigation assessments, as required by statute, vitiates the tax deed<sup>34</sup>

(b) Tax Deed

There must be compliance with statutory provisions governing the form and contents of tax deeds The effect of a tax deed as evidence depends on statutory provisions.

While the making of a deed to the purchaser of land, sold on foreclosure of irrigation assessment liens, after expiration of the redemption period has been held a purely ministerial act,<sup>35</sup> delivery of a valid deed after expiration of the period of redemption finally terminates such period<sup>36</sup> If a defective deed is issued, the issuing officer should, ordinarily, deliver a correct deed<sup>37</sup>

Under some statutory provisions the deed must recite substantially the matters contained in the sale certificate,<sup>38</sup> but such a deed may be sufficient although it does not include all of such matters<sup>39</sup> The property sold and deeded should be properly described in the tax deed<sup>40</sup> It has been held that a tax deed is invalid where it fails to set forth correctly the name of the party assessed and whose property is sold,<sup>41</sup> although a minor error in the name as recited does not invalidate the deed<sup>42</sup> Under some provisions a deed has been held sufficient although not including the name of the person to whom the land was assessed, and the amount and year of the assessment, as recited in the sale certificate<sup>43</sup>

Statutory provisions making a tax deed conclusive evidence of the regularity of prior proceedings do not cure defects in the deed itself,<sup>44</sup> and extend only to such matters as are not covered by other statutory provisions declaring the effect of the deed as prima facie evidence<sup>45</sup> Statutory provisions

ceeding provided that owner could redeem land up to time of judgment in conflict with provision of earlier statute which gave owner one year from issuance of such deed to redeem, did not affect validity of latter statute, since conflicting provision of earlier statute was repealed by implication

Wash—Outlook Irr Dist v Fels, 28 P 2d 996, 176 Wash 211

23. US—Fallbrook Public Utility Dist v Cowan, CCA Cal, 131 F 2d 513, certiorari denied 64 S Ct 33, 320 US 735, 88 L Ed 435

29. Cal—Pacific Coast Joint Stock Land Bank of San Francisco v Roberts, 108 P 2d 439, 16 Cal 2d 800

30. Wash—Title & Trust Co v Columbia Basin Land Co, 238 P 992, 136 Wash 68  
67 C J p 1363 note 60.

31. Idaho—Eberhard v Purcell, 296 P 593, 50 Idaho 393

32. Idaho—Eberhard v Purcell, supra.

33. Idaho—Eberhard v Purcell, supra.

34. Wyo—Clinton v Elder, 277 P 968, 280 P 889, 40 Wyo 350  
67 C J p 1363 note 64

35. Wash—Lindsay Irr Dist v Clallam County, 56 P 2d 996, 186 Wash 65

36. Wash—Lindsay Irr. Dist v Clallam County, supra

37. Wash—Lindsay Irr Dist v. Clallam County, supra

38. Wash—Lindsay Irr Dist v. Clallam County, supra

**Statutes construed together**

Statute requiring county treasurer to make deed, reciting substantially matters contained in sale certificate, to purchaser of land sold on foreclosure of liens for irrigation assessments, if property is not redeemed within year after sale, and earlier statute declaring such deed, duly acknowledged or proved, prima facie evidence of certain things, must be construed together and later act giv-

en greater weight so far as two acts are in conflict

Wash—Lindsay Irr Dist v Clallam County, supra

39. Wash—Lindsay Irr. Dist v Clallam County, supra

40. Cal—Adams v Slee, 268 P 959, 92 Cal App 708

67 C J p 1363 note 65

41. Cal—Bruschi v Cooper, 159 P 728, 30 Cal App 682, rehearing denied 159 P 734, 30 Cal App 682

42. Cal—Escondido High School Dist v Escondido Seminary, 62 P. 401, 130 Cal 128

43. Wash—Lindsay Irr Dist v Clallam County, 56 P 2d 996, 186 Wash 65

44. Cal—Bruschi v Cooper, 159 P. 734, 30 Cal App 682  
67 C J p 1363 note 68

45. Cal—McDonough v. Cooper, 177 P 153, 179 Cal 384

67 C J p 1363 note 69.

making a tax deed conclusive evidence of the regularity of prior proceedings, when construed in connection with other provisions making the deed prima facie evidence that the property was sold as prescribed by law, do not preclude one from showing that a duplicate sale certificate was not filed as required by statute<sup>46</sup> Under such statutes, however, formal irregularities in the prior proceedings are cured by issuance of the deed<sup>47</sup>

**Proof of sale** While tax deeds are prima facie evidence that the land represented thereby has been duly sold,<sup>48</sup> positive and undisputed evidence may properly be admitted to show that there was no sale<sup>49</sup>

**Filing in Land Office.** Rules and regulations of the federal secretary of the interior requiring the filing of deeds in the United States Land Office are intended for the benefit of the United States and its land officer,<sup>50</sup> and the failure to comply with such regulations may not be used by another as the basis of a collateral attack on the tax title<sup>51</sup>

### (c) District or County as Purchaser, Resale

The district or county may become the purchaser, and the effect of such purchase may be to extinguish other tax liens Lands so purchased may, and should, be resold where possible.

Where a statute authorizing issuance of a certificate of delinquency is valid, personal service

of summons in a foreclosure suit on the certificate was had, and the court had jurisdiction of the parties and the subject matter, a purchase by the irrigation district on foreclosure is valid<sup>52</sup> The deeding of land to an irrigation district for delinquent assessments, following a tax sale, does not necessarily destroy existing tax liens in favor of other state agencies,<sup>53</sup> or merge them into the tax deed,<sup>54</sup> and such other liens are extinguished or merged only when necessary to protect property impressed with a public use,<sup>55</sup> or when the statute so provides<sup>56</sup> The deeding of land to the district does not extinguish the lien of bonds issued pursuant to a statute making them a lien on the land<sup>57</sup> Under some statutes, however, the striking off of land to the district for lack of bidders at the tax sale extinguishes the lien of the bonds<sup>58</sup> Where property was assessed before machinery and equipment were placed thereon, and proceedings foreclosing the lien did not purport to convey to the district title to such machinery and equipment, the district did not become the owner, entitled to possession, by its purchase at the foreclosure sale<sup>59</sup>

**Lands taken in trust** Under a statute providing that property acquired by the district shall be held in trust for the uses and purposes of the statute, land taken for delinquent assessments is impressed with a public use and trust<sup>60</sup> Under statutory provisions authorizing the lease or sale of land by the

46. Wash—Rothgeb v Cunningham, 203 P 956, 118 Wash 701—Birge v Cunningham, 203 P 954, 118 Wash 458

67 C J p 1363 note 70

47. Cal—McDonough v Cooper, 177 P 153, 179 Cal 384

67 C J p 1363 note 72

48. Idaho—Eberhard v Purcell, 296 P 593, 50 Idaho 393

49. Idaho—Eberhard v Purcell, supra

50. Wyo—Clinton v Elder, 277 P 968, 280 P 889, 40 Wyo 350

51. Wyo—Clinton v Elder, supra.

67 C J p 1364 note 76

52. Or—Daly v Horsefly Irr Dist, 21 P 2d 787, 143 Or 441

53. Cal—Oroville-Wyandotte Irr Dist v Ford, 118 P 2d 340, 47 Cal App 2d 531

67 C J p 1364 note 77

54. Cal—Palo Verde Irr Dist v Jamison, 17 P 2d 147, 216 Cal App 740—La Mesa, Lemon Grove & Spring Valley Irr Dist v Hornbeck, 17 P 2d 143, 216 Cal 730

55. Cal—Palo Verde Irr Dist v Jamison, 17 P 2d 147, 216 Cal App 740—La Mesa, Lemon Grove & Spring Valley Irr Dist v Hornbeck, 17 P 2d 143, 216 Cal 730.

56. Wash—Yakima County v Stephens, 33 P 2d 93, 177 Wash 601, followed in Grandview Irr Dist v Yakima County, 33 P 2d 94, 177 Wash 703—North Spokane Irr Dist No 8 v Spokane County, 22 P 2d 990, 173 Wash 281

#### Rights of district

Irrigation district which acquired deed to land by foreclosure of delinquent district assessments was entitled to cancellation of records of general taxes against property which were liens thereon at time of issuance of deed, and to cancellation of assessments past due and to become due, but was not entitled to judgment depriving holders of district bonds of right to pursue remedy against land or to deprive county commissioners of right to levy supplemental assessment for payment of bonds as against land

Wash—Kiona Irr Dist v Benton County, 39 P 2d 394, 180 Wash 197

57. Cal—Imperial Irr Dist v Varney, 196 P 2d 820, 87 Cal App 2d 264.

58. Colo—Sumers v Board of Com'rs of Garfield County, 184 P.2d 144, 117 Colo 57

59. Cal—Oroville-Wyandotte Irr.

Dist v Ford, 118 P 2d 340, 47 Cal App 2d 531

60. Cal—Clough v Compton-Delevan Irr Dist, 85 P 2d 126, 12 Cal 2d 385

West Coast Life Ins Co v Glenn-Colusa Irr Dist, 122 P 2d 595, 50 Cal App 2d 204

#### Land and proceeds therefrom

Land acquired by irrigation district because of delinquencies in assessments is trust property, held for the uses and purposes of the statute governing irrigation districts, and proceeds of lease thereof have the same character

Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

**Repayment of irrigation district's bondholders** is only one among several purposes of the statute governing irrigation districts, for which the proceeds of land acquired by district because of delinquency in assessments are held in trust

Cal—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corp

district, land may be leased for oil and gas purposes<sup>61</sup> A county acquiring lands through tax sale for irrigation district assessments holds title as trustee<sup>62</sup> Under a statute requiring the issuance of debentures for an irrigation district's assessments to the district by the county when it becomes the purchaser of the district's land, the district or its vendee owns an interest in the land which is never divested until the land is redeemed or sold<sup>63</sup>

**Resale of land** Land coming into possession of the county or district because of delinquency in assessments should be sold again, if possible<sup>64</sup> When an offer to sell land to which the district has acquired tax title is made to a class, one not within the class has no right to purchase<sup>65</sup> Where an offer of sale is conditionally made and requires an acceptance approved by the district trustees, no

contract is created where plaintiff's application to purchase is rejected by the trustees<sup>66</sup> Unless required by statute, directors of an irrigation district need not give notice of a proposed sale of land acquired by the district because of delinquency in assessments<sup>67</sup>

A contract for the sale of land will not be set aside where the consideration therefor was fair, reasonable, and adequate<sup>68</sup> Where lands in an irrigation district have been deeded to the county and the county board of commissioners has fixed their market value on an erroneous basis, the board may be required to redetermine the market value on a correct basis<sup>69</sup> Where land, having been sold to the district for delinquent assessments, is sold by it, the deed does not vest an absolute title free and clear of all encumbrances, as provided by statute, if actual fraud is present.<sup>70</sup>

v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791 and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

**Benefit of landowners paying assessments**

Where owner of land in district refuses to pay assessment and land goes to district or where owner of land in district pays one or more assessments and then abandons land to district, the district accumulates what would be termed in the case of an ordinary corporation an undivided surplus, and that surplus is held by the district for the benefit of those landowners who have continued to pay their assessments and in addition to their own assessments have paid the assessment which should have been paid by the abandoned land, and the benefit can be realized when the land is sold or leased or in any manner produces district revenue

Wash.—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

61. Cal.—Reclamation Dist No 108 v Gibson, 147 P 2d 80, 63 Cal App 2d 311—Reclamation Dist No 1500 v Raub, 137 P 2d 45, 58 Cal App 2d 491

62. Mont.—State v Board of Com'rs of Cascade County, 296 P 1, 19, 89 Mont 37

**Assignment by county treasurer**

Where county treasurer without authority pretended to assign county's right to irrigation district lands, it was county's duty to return money received to assignee

Mont.—State ex rel Malott v Cascade County, 22 P 2d 811, 94 Mont 394

63. Mont.—State ex rel Malott v Cascade County, supra.

**After county issues debenture certificates** to irrigation district for amount of such irrigation district assessment, county can only receive money paid upon redemption and distribute same, or obtain deed and sell same and distribute money received upon sale

Mont.—State ex rel Malott v Cascade County, supra.

**It was duty of county commissioners** to apply for tax deeds to irrigation district lands to enable county to sell lands and apply proceeds as directed by law

Mont.—State ex rel Malott v Cascade County, supra

64. Cal.—Provident Land Corp v Zumwalt, 85 P 2d 116, 12 Cal 2d 365, followed in Provident Land Corp v Provident Irr Dist, 85 P 2d 122, 12 Cal 2d 791, and Provident Land Corp v Benoit, 85 P 2d 122, 12 Cal 2d 790

**Bonds of irrigation district constituted encumbrance** against lands within district which was extinguished by issuance of tax deed to the county which created new title in nature of independent grant from sovereignty extinguishing all former titles and liens not expressly exempted from its operation, so that purchaser of land in irrigation district on sale by the county was not liable for taxes or assessments for interest on district's bonds issued prior to tax sale

Mont.—Rosebud Land & Improvement Co v Carterville Irr Dist, 58 P 2d 765, 102 Mont 465

35. Cal.—Plummer v Ehlers, 122 P 2d 939, 50 Cal App 2d 352

**Former owner or his assigns**

Where offer by an irrigation district to sell land to which district had acquired tax title because of

delinquent district assessments was made to the former owner or his assigns, and rehabilitation plan under which land was offered for sale defined "former owner" as meaning owner of land when it was deeded to district, and plaintiff obtained a quitclaim deed from predecessor of one who owned land when it was conveyed to district, plaintiff was not an "assignee of the former owner" within meaning of plan and could not purchase land

Cal.—Plummer v Ehlers, supra.

66. Cal.—Plummer v Ehlers, supra.

67. Cal.—West Coast Life Ins Co v Glenn-Colusa Irr Dist, 122 P 2d 595, 50 Cal App 2d 204

68. Cal.—West Coast Life Ins Co v Glenn-Colusa Irr Dist, supra

**Consideration held sufficient**

Cal.—Baber v. Compton-Delevan Irr Dist, 156 P 2d 35, 68 Cal App 2d 131

69. U.S.—Judith Basin Irr Dist v Malott, CCA Mont, 73 F 2d 142, 97 A L R 504

70. Cal.—Dowd v Glenn, 129 P 2d 964, 54 Cal App 2d 748

**Fraud as to beneficiary of trust deed**

Owner of realty may not sever rights of a beneficiary under a trust deed by allowing irrigation assessments to become delinquent and then, through connivance of a third person, reacquire title to the detriment of the beneficiary under the trust deed, since a beneficiary under a trust deed and trustees had no duty to pay delinquent assessment by irrigation district on realty covered by the trust deed and failure to do so was not a "waiver" by the trustees and the beneficiary of his interest as against purchaser of property on sale for delinquent assessments.

Cal.—Dowd v. Glenn, supra.

## (d) Actions Concerning Tax Title

Actions concerning tax titles, such as suits to quiet title, or to cancel and set aside a tax deed, are subject to the general rules applicable in other actions of the same character.

Where plaintiff, suing to quiet his title, supports his claim of ownership by proof of a tax deed containing all matters recited in the certificate of sale, as required by statute, and duly acknowledged, he thereby presents a *prima facie* case,<sup>71</sup> and the burden devolves on defendant to establish his title to the property by a preponderance of the evidence.<sup>72</sup> In the absence of a contrary showing by pleading or proof, in an action to quiet a tax title, it will be presumed that plaintiff is a qualified assignee of the certificates of sale.<sup>73</sup> It has been held that a landowner may not, in an action brought by the holder of the tax title to quiet the same, raise the objection that all the land sold for delinquent irrigation taxes was not included in the deed.<sup>74</sup> The owner of land improperly assessed, and sold for nonpayment of the assessments, may maintain an action to quiet title against the holder of the tax deed.<sup>75</sup> An action to quiet title also may be maintained against the holder of the tax deed where the land had been redeemed before the sale.<sup>76</sup>

In a suit to quiet a tax title, an allegation of as-

essment is a sufficient allegation of the regularity thereof.<sup>77</sup>

**Cancellation of tax deed** The general rules of evidence apply in suits to set aside a deed issued pursuant to a sale of property for delinquent irrigation district assessments.<sup>78</sup> The owner of land within federal irrigation district may bring an action under the state law and in the state courts for cancellation of a tax deed.<sup>79</sup>

## e. Disposition of Taxes and Assessments

Constitutional and statutory provisions govern the disposition of funds raised by irrigation taxes and assessments.

The disposition to be made of funds raised by irrigation taxes and assessments is governed by constitutional and statutory provisions, and, in accordance with such provisions, it has been held that collections made on account of assessments for operation and maintenance should be paid to the irrigation district treasurer,<sup>80</sup> and that collections made on account of assessments for interest or principal of bonds,<sup>81</sup> or contracts with the United States,<sup>82</sup> must be paid to the state treasurer, who acts as custodian for district funds, and that moneys derived from the sale of such lands are trust funds.<sup>83</sup> Where a district was reorganized, and land not benefited was eliminated and bene-

71. Cal—Corson v Crocker, 161 P 287, 31 Cal App 626

72. Cal—Corson v. Crocker, supra 67 C J p 1364 note 82

73. Utah—Hatch v Edwards, 269 P 138, 72 Utah 113

74. Utah—Hatch v Edwards, supra

75. Cal—Woody v. Security Trust & Savings Bank, 29 P 2d 898, 137 Cal App 29

**Statute providing for cancellation of assessments on public lands** was held not applicable, so that failure to remove assessment by statutory method did not preclude attack upon assessment and sale thereunder Cal—Woody v Security Trust & Savings Bank, supra.

**Repayment of assessment**

Statute providing for repayment of amount of assessment in event of judgment quieting title against tax deed was limited to tax sales had under Political Code sections, and not applicable as respects proceedings under Wright Act and Irrigation District Act governing proceedings in irrigation districts, and in an action, by successors of patentee of land not forming part of irrigation district, to quiet title against purchaser at sale under district assessment, plaintiffs were not required to repay purchaser's expenditure,

where land was never liable for district assessment

Cal—Woody v Security Trust & Savings Bank, supra

**76. Presumption of sufficiency of payment**

Cal—Laist v Nichols, 33 P 2d 866, 139 Cal App 202

**Prima facie evidence**

In action to quiet title to land sold for nonpayment of irrigation district assessment, production of redemption receipt, under presumption that regular course of business had been followed, was *prima facie* showing that application had been made to collector to redeem property and that collector had furnished figure on basis of which payment was made Cal—Laist v Nichols, supra

77. Utah—Hatch v Edwards, 269 P 138, 72 Utah 113

**78. Burden of proof**

Plaintiff has the burden of proving fraudulent conspiracy as alleged Wash—Federal Land Bank of Spokane v McMinimee, 75 P 2d 138, 193 Wash 321

**Weight and sufficiency of evidence**

Evidence relating to son's purchase, at delinquent irrigation assessment sale, of property previously purchased by his father under land purchase contract, was insufficient to justify setting aside deed

issued to son on ground that son and his father had entered into fraudulent conspiracy to deprive vendor under land purchase contract of its title, where it appeared that son furnished money to pay for delinquent certificates, that he attended sale and that father did not, and that neither knew that land covered by contract had been included in son's purchases at delinquent assessment sale until after deed had been issued. Wash—Federal Land Bank of Spokane v McMinimee, supra

79. Wyo—Clinton v Elder, 277 P 968, 280 P 839, 40 Wyo 350

80. Idaho—Hurlebaus v American Falls Reservoir Dist, 286 P 598, 49 Idaho 158

**Public funds**

Assessments collected by an irrigation district are public funds and not private property of the district Cal—Allen v Hussey, 225 P 2d 674, 101 Cal App 3d 457.

81. Idaho—Hurlebaus v American Falls Reservoir Dist, 286 P 598, 49 Idaho 158

82. Idaho—Hurlebaus v American Falls Reservoir Dist, supra

83. Mont—State v Board of Com'rs of Cascade County, 296 P. 1, 19, 89 Mont 37

67 C J p 1364 note 91.

fits were reassessed, refunding of assessments within the diminished district to reimburse owners of the eliminated lands for bond interest paid by them was authorized, as against the contention that assessments were not assessments to meet general indebtedness.<sup>84</sup>

Constitutional provisions prohibiting the state or any subdivision thereof from becoming stockholder in any corporation have been construed as not prohibiting an irrigation district from using its taxes or assessments to purchase stock in a water reservoir company.<sup>85</sup>

### § 338. Dissolution or Other Termination of District

- a. In general
- b. Payment of indebtedness
- c. Abandonment and nonuser of franchise
- d. Proceedings for dissolution
- e. Effect of dissolution and disposition of property

#### a. In General

An irrigation district generally may be dissolved only in accordance with statutory provisions

Dissolution of an irrigation district can be made only in accordance with statutory provisions.<sup>86</sup> In the absence of statutory authorization to the contrary, an irrigation district may not be dis-

solved at the suit of an individual,<sup>87</sup> or by the appointment of a receiver,<sup>88</sup> but may be dissolved only at the suit of the state from which it derived its powers,<sup>89</sup> and the directors of an irrigation district may not make a valid contract for dissolution of the district.<sup>90</sup> Publication by the attorney general of notice of intention to commence action to dissolve a district places the district in process of dissolution.<sup>91</sup>

*De facto dissolution.* Condemnation of all lands in an irrigation district by the United States in the exercise of its war powers for military purposes dissolves the district de facto.<sup>92</sup>

#### b. Payment of Indebtedness

Payment of debts may not be avoided by dissolution, and where statutes so provide, a district may not validly be dissolved prior to payment of its debts

An irrigation or reclamation district may not avoid payment of its debts by dissolution,<sup>93</sup> and where the statutes require payment of indebtedness prior to dissolution, or adequate provision therefor, there can be no valid dissolution without a precedent payment of all just indebtedness of the district,<sup>94</sup> or the furnishing of adequate security,<sup>95</sup> although an owner of irrigation bonds who has been tendered the full face value of his bonds with interest thereon to maturity is not in a position to question the validity of a dissolution decree in which all other creditors of the dis-

84. Wash—Lesamiz v Whitestone Reclamation Dist., 61 P 2d 1305, 188 Wash 145

85. Mont—Thaanum v Bynum Irr Dist., 232 P 528, 72 Mont 221 67 C J p 1364 note 92

86. Cal—Bottoms v Madera Irr Dist., 242 P 100, 74 Cal App 681 67 C J p 1364 note 93

**Statutory notice of proceedings** for dissolution of irrigation district by publication for thirty days in designated newspaper was sufficient to give court jurisdiction of lands therein so as to authorize decree confirming proceedings and imposing charges for water delivered after date thereof

Cal—Happy Valley Water Co v Thornton, 34 P 2d 991, 1 Cal 2d 325

#### Effect to be given statute

The statute providing for the dissolution of irrigation district should have effect according to the purpose and intent of the lawmakers

Wash—In re Horse Heaven Irr Dist., 118 P 2d 972, 11 Wash 3d 218

#### Where litigation pending

Where water control and improve-

ment district desires to effect its dissolution as speedily as possible under statute prohibiting it from doing so until all litigation pending against it on effective date of statute is disposed of by final judgment, it is duty of court of civil appeals, in exercise of sound judicial discretion, to relieve state, district, and directors thereof from burden of unauthorized litigation pending against them when statute became effective

Tex—State v. Miller, Civ App., 183 S W 2d 278

87. Tex—Barnhart v Hidalgo County Water Improvement Dist No 4, Civ App., 278 S W 499

88. Tex—J C Engleman Land Co v Donna Irr Dist No 1, Civ App., 209 S W. 428, error refused

89. Tex—Barnhart v. Hidalgo County Water Improvement Dist No 4, Civ App., 278 S W 499—J C Engleman Land Co v Donna Irr Dist No 1, Civ App., 209 S W 428, error refused

90. Cal—Bottoms v. Madera Irr Dist., 242 P 100, 74 Cal App 681

91. Cal—3-H Securities Co v. Kibby, 26 P 2d 893, 135 Cal App 173.

92. Wash—In re Priest Rapids Irr Dist., 225 P 2d 202, 37 Wash 2d 623

93. Wash—Beasley v Assets Conservation Co., 230 P 411, 131 Wash 438

94. Colo—In re Green City Irr Dist., 13 P 2d 1113, 91 Colo 202. 67 C J p 1365 note 99

#### Composition of debts in bankruptcy

Where irrigation district had no authority under law to make additional or cumulative levies to pay past due bonds, interest coupons and warrants unpaid because of failure to collect taxes assessed against certain land in district, a composition of its debts under Bankruptcy Act was necessary before district could be dissolved in view of statute making payment or security of all debts of district a prerequisite to dissolution

US—Kiles v Trinchera Irr Dist., CCA Colo., 136 F 2d 894

95. Colo—Michigan Trust Co. v. Otero Irr Dist., 232 P. 919, 76 Colo 441

67 C J p 1365 note 1.

trict who were parties to the proceeding have acquiesced <sup>96</sup>

### c. Abandonment and Nonuser of Franchise

Unless so provided by statute, abandonment or nonuser of its franchise does not dissolve a district

In the absence of statutory provision therefor, an irrigation district will not automatically lose its legal existence by reason of nonuser of its powers,<sup>97</sup> nor may the courts dissolve an irrigation district on the ground of nonuser of its franchises<sup>98</sup>

Under a statute providing for automatic dissolution of a district if it does not begin to function within a prescribed period after formation, where the facts show that the district proceeded with due diligence to carry out the purposes of its organization it does not forfeit its legal existence<sup>99</sup>

### d. Proceedings for Dissolution

The nature of proceedings for dissolution of a district is determined by the statutes providing therefor.

Under a statute providing for the dissolution of irrigation districts, and specifically designating the proceeding for dissolution as one in rem but not contemplating any seizure of the property of the district, the proceeding for dissolution is not one in rem despite its statutory designation as such,<sup>1</sup> but in its final analysis the whole proceeding is merely one to determine the indebtedness of a quasi-public irrigation district having substantially the same status as a municipality and then authorizing the representatives of the district to sell

or exchange its property,<sup>2</sup> and the statute authorizes the court to grant a sale or exchange of district assets when the proposed transfer provides adequate security for the ultimate payment or complete liquidation of all the indebtedness of the district,<sup>3</sup> and a judgment rendered in such a proceeding without custody of the property does not bar unpaid bondholders who were not parties to the dissolution proceeding from thereafter securing relief.<sup>4</sup>

*Petition for dissolution.* Under some statutory provisions, two types of petitions are provided, the one being for use where the district is a going concern with assets and liabilities, and the other for use when the district has no assets or liabilities and has ceased to be a going concern<sup>5</sup> In order to establish regularity of a proceeding for voluntary dissolution it is essential that there be a sufficient petition<sup>6</sup>

*Setting aside default of creditor in dissolution proceeding* Where the trial court abuses its discretion in refusing to set aside the default of a creditor in a dissolution proceeding, its action is subject to review<sup>7</sup>

### e. Effect of Dissolution and Disposition of Property

The effect of dissolution of a district and the disposition thereafter of its property depend on statutory provisions and the circumstances of the particular case.

A judgment dissolving an irrigation district as a

96. Colo.—In re Green City Irr Dist, 13 P2d 1113, 91 Colo 202 67 C.J. p 1365 note 2

97. Or.—Greig v Owyhee Irr Dist, 202 P 222, 102 Or 265 67 C.J. p 1365 note 4.

98. Cal.—People v Selma Irr Dist, 32 P 1047, 98 Cal 206

99. Tex.—White v Farring, Civ App, 212 S.W. 193, error refused

1. U.S.—Beck v Otero Irr Dist, D.C. Colo, 50 F2d 951.

2. U.S.—Beck v. Otero Irr Dist, supra

3. U.S.—Beck v Otero Irr Dist, supra

4. U.S.—Beck v Otero Irr Dist, supra

5. Cal.—In re Shafter-Wasco Irr Dist, 134 P2d 46, 57 Cal App2d 90

#### Form and contents of petition

The section of the act relating to voluntary dissolution of irrigation districts which waives necessity of any plan of dissolution being set forth in petition for dissolution or being adopted by board of direc-

tors of district applies only to a petition filed pursuant to section of the act relating to proceedings when district has no assets or liabilities and has ceased to be a going concern

Cal.—In re Shafter-Wasco Irr Dist, supra

#### Petition held invalid

Petition for voluntary dissolution of irrigation district was invalid under section of the act relating to dissolution of irrigation district when district has no assets or liabilities and has ceased to be a going concern, where petition failed to contain signatures of two-thirds of qualified voters residing in district as required by the act, and especially where petitions showed that there were assets to be distributed

Cal.—In re Shafter-Wasco Irr Dist, supra

6. Cal.—In re Shafter-Wasco Irr Dist, supra

#### Substantial compliance necessary

Trial court did not abuse its discretion in determining that there was not a substantial compliance

with the act relating to voluntary dissolution of an irrigation district when district is a going concern with assets and liabilities, where it appeared that petition for dissolution failed to comply with the act in several respects, and that such errors and omissions were in violation of substantial rights of electors and landowners of the district

Cal.—In re Shafter-Wasco Irr. Dist, supra

**The burden of establishing regularity of proceedings** for voluntary dissolution of irrigation district and proper performance of all various requirements laid down in the act was upon party asserting regularity of the proceedings and relying upon them as basis for a request for affirmative relief, since proceeding was "in rem" and jurisdiction of all persons affected was obtained by publication of a notice.

Cal.—In re Shafter-Wasco Irr Dist, supra

7. Colo.—Dalton v Otero Irr Dist, 232 P 922, 76 Colo 438.

67 C.J. p 1365 note 11

de jure corporation does not preclude its subsequent existence as a de facto district exercising the same powers.<sup>8</sup> On dissolution of a de facto irrigation district its property, paid for during its existence as a de facto public corporation, does not revert to the original owner,<sup>9</sup> and its dissolution does not bring to life any rights in favor of third parties which could not have been asserted against its property during the period of its existence.<sup>10</sup> Where the United States, on de facto dissolution of an irrigation district by condemnation of all the lands therein, did not acquire the interests of the land-

owners in nonirrigation properties of the district, it acquired no exclusive right to the district's net assets consisting of money paid for such properties.<sup>11</sup> Under a statute so providing, when the district is in the process of dissolution the directors may dispose of its property at a private sale,<sup>12</sup> and the legislature may by statute ratify a private sale.<sup>13</sup>

Disposition of assets must be in accordance with the provisions of the statutes,<sup>14</sup> and may be by contract between the district bondholders and the landowners of the district.<sup>15</sup>

## C. IRRIGATION AND DITCH COMPANIES

### § 339. In General

Irrigation and ditch companies include private corporations, either quasi-public in their nature, or restricting their service to their own stockholders, in proportion to their respective stock interests.

Irrigation and ditch companies include private corporations, either quasi-public in their nature,<sup>16</sup>

or restricting their service to their own stockholders,<sup>17</sup> in proportion to their respective stock interests.<sup>18</sup> In some cases, the water rights may be owned by the corporation,<sup>19</sup> in others, by the stockholders,<sup>20</sup> the corporation owning the canal or ditch,<sup>21</sup> and the corporation being under con-

8. Cal—Byington v Sacramento Valley West Side Canal Co, 148 P 791, 170 Cal 124

9. Colo—Fisher v Pioneer Const Co, 163 P 851, 62 Colo 538

10. Colo—Fisher v. Pioneer Const Co, supra  
67 C J p 1365 note 15

11. Wash—In re Priest Rapids Irr Dist, 225 P 2d 202, 37 Wash 2d 623

12. Cal—3-H Securities Co v Kibby, 26 P 2d 893, 135 Cal App 173

Assignee of purchaser of land from river storage district which had been transferred to district for delinquent taxes was not precluded from compelling county treasurer to issue deed for land, though statute provided that purchaser was entitled to deed, since by statute any property might be transferred

Cal—3-H Securities Co v Kibby, supra

13. Cal—3-H Securities Co v Kibby, supra

14. Wash—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

#### Persons entitled

Wash—In re Horse Heaven Irr Dist, 141 P 2d 400, 19 Wash 2d 89—In re Horse Heaven Irr Dist, 118 P 2d 972, 11 Wash 2d 218

15. Cal—Happy Valley Water Co v. Thornton, 34 P 2d 991, 1 Cal 2d 325

#### Consideration

Agreement between irrigation district bondholders and landowners for

dissolution of district, transfer of its assets to bondholders, imposition of water charges against lands to liquidate its obligations, organization of water company, and division of its stock between parties, and dedication of water rights by such company to landowners agreeing to pay therefor at stated rate, rested on sufficient consideration, being supported by mutual covenants

Cal—Happy Valley Water Co v Thornton, supra

Water charges by water company organized under act providing for dissolution of irrigation districts pursuant to agreement between district bondholders and landowners were proper as result of express or implied contract and binding either on express consent or by acquiescence, regardless of decree confirming dissolution proceedings

Cal—Happy Valley Water Co v Thornton, supra

16. US—San Diego Flume Co v Souther, Cal, 90 F 164, 32 CCA 548, affirmed 104 F 706, 44 CCA 143

67 C J p 1366 note 17  
Unincorporated mutual associations see infra § 340

17. US—McComb v Farmers Reservoir & Irr Co, CCA Colo, 167 F 2d 911, affirmed 69 S Ct 1274 337 US 755, 93 L Ed 1672, rehearing denied 70 S Ct 31, 338 US 839 94 L Ed 513, and 70 S Ct 32, 338 US 839, 94 L Ed 513

Ariz—Prina v Union Canal & Irr Co, 163 P 2d 683, 63 Ariz 473.

Colo—Billings Ditch Co v Indus-

trial Commission, 253 P 2d 1058, 127 Colo 69—Comstock v Olney Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

67 C J p 1366 note 18

18. US—McComb v Farmers Reservoir & Irr Co, CCA Colo, 167 F 2d 911, affirmed 69 S Ct 1274, 337 US 755, 93 L Ed 1672, rehearing denied 70 S Ct 31, 338 US 839, 94 L Ed 513, and 70 S Ct 32, 338 U. S 839, 94 L Ed 513

Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69—Comstock v Olney Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

Utah—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P.2d 790, 96 Utah 104

19. Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69

67 C J. p 1366 note 19

20. Cal—Hildreth v. Montecito Creek Water Co, 72 P. 395, 398, 139 Cal 22

67 C J p 1366 note 20

21. Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69

67 C J p 1366 note 21

Water users' association does not own the water which it furnishes to the lands of its shareholders for irrigation purposes, but is merely the carrier of water for its shareholders  
Ariz—Adams v. Salt River Valley Water Users' Ass'n, 89 P 2d 1060, 53 Ariz. 374.

tractual obligation to carry,<sup>22</sup> or to supply,<sup>23</sup> water to the stockholders, as the case may be, although in some cases where water rights and the canal or ditch are owned by the corporation, the stockholders are said to be equitable owners entitled to proportionate distribution of such waters as the corporation acquires by appropriation<sup>24</sup>

A *community irrigation ditch* being only a carrier, the rights of ownership in the ditch are rights separate and apart from the rights of ownership of water that the ditch conveys<sup>25</sup> A property right in a community irrigation ditch may be obtained by initial joinder in construction of the ditch by contribution of cash or labor, or by consent of the owners of shares in a ditch company and payment to the ditch company of a price proportionate to the primary cost of the ditch, based on the amount of water to be carried<sup>26</sup>

### § 340. Unincorporated Mutual Associations and Joint Stock Companies

Mutual ditch companies are unincorporated associations, the property of which is held by the members as tenants in common, and each is entitled to sell his interest without the consent of the others, his certificate of membership being considered as constituting a muniment of title to an interest in the property of the association

Mutual ditch companies are unincorporated associations, the property of which is held by the members as tenants in common, and each is entitled to sell his interest without the consent of the others,<sup>27</sup> his certificate of membership being considered as constituting a muniment of title to an interest in the property of the association,<sup>28</sup> and as evidencing the amount and extent of the appropriation of water which each holder possessed,

where the evidence shows that the certificates were so regarded by the members<sup>29</sup> A change in the location of the ditch which will be injurious to some of the members cannot be made by the others, although they constitute a majority, at their mere will or without the consent of those who will be affected, and they may be enjoined if they attempt it,<sup>30</sup> and the rule is still effective after the original community ditch has been succeeded by a corporation with limited powers which do not include a power in the majority to change at will the main ditch<sup>31</sup> There is, however, an implied agreement between members of the original community association, and under the corporation which succeeded it, that if a change in the original course of the ditch should become necessary to the continued existence of the enterprise, a change to the extent sufficient to avoid the insuperable obstacle may be made<sup>32</sup> In some states, if the persons interested in a partnership ditch cannot agree on the distribution of the water, either of them may apply to the court to appoint a suitable person to make the distribution<sup>33</sup> Where the owners of a ditch form a joint stock company for the specific purpose of maintaining a ditch for a fixed period of years, the individual members cannot withdraw from such association before the expiration of that period without an amendment of the by-laws<sup>34</sup>

Under statute giving the power to fix maintenance charges, and declaring the duties of the water master or manager, but omitting provision as to his salary, the members of an unincorporated water-users' association may fix the charges for maintenance,<sup>35</sup> and, under an implied power, may fix the manager's salary,<sup>36</sup> and a member is liable for

22. Cal—Stratton v Railroad Com'rs, 198 P 1051, 186 Cal 119 67 C J p 1366 note 22

#### Single appropriator for statutory purpose

An irrigation company, for purpose of statute requiring state engineer's approval for change of point of diversion or use of water, stands as a single appropriator of all water to which its stockholders are entitled

Utah—Syrett v Tropic & East Fork Irr Co, 89 P 2d 474, 97 Utah 56

23. Mont—Brady Irr Co v Teeton County, 85 P 2d 350, 107 Mont 330

67 C J p 1366 note 23

#### Stockholders held not equitable owners

Mont—Brady Irr Co v Teeton County, 85 P 2d 350, 107 Mont. 330

24. Cal—Consolidated Peoples Ditch Co v Foothill Ditch Co, 269 P. 915, 205 Cal. 54

Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69—Comstock v Olney Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

Idaho—Application of Johnston, 204 P 2d 434, 69 Idaho 139

25. N M—Holmberg v Bradford, 244 P 2d 785, 56 N M 401

#### Easement

Owner of community irrigation ditch had in effect an easement for purpose of transporting water

N M—Holmberg v Bradford, supra

26. N M—Holmberg v Bradford, supra.

New land owner, or land owner with additional acreage to be irrigated from the community irrigation ditch, has no right to ownership or additional interest in the ditch until he secures the consent of the majority of the owners of the ditch and arranges to pay for additional carrier space in the ditch

N M—Holmberg v Bradford, supra

27. Ariz—Biggs v Utah Irr Ditch Co, 64 P 494, 7 Ariz 331

28. Ariz—Biggs v Utah Irr Ditch Co, supra

29. Ariz—Biggs v Utah Irr Ditch Co, supra

30. N M—Candelaria v. Vallejos, 81 P 589, 13 N M 146

31. N M—Candelaria v. Vallejos, supra

32. N M—Candelaria v Vallejos, supra

33. Wyo—Mau v. Stoner, 83 P 218, 14 Wyo 183

34. Colo—Strang v Osborne, 94 P 320, 42 Colo 187

35. Idaho—Carter v. Niday, 269 P. 91, 46 Idaho 505

36. Idaho—Carter v. Niday, supra



his share thereof on ground of his membership,<sup>37</sup> and also in quantum meruit where he accepted the service and acquiesced in action of members fixing the manager's salary<sup>38</sup> Nor can he set up by way of counterclaim the damage and expenses incurred resulting from a failure in the service, where the claim had been liquidated in another suit.<sup>39</sup>

### § 341. Private Corporations in General

Irrigation corporations owned and controlled by private persons are private corporations, and a mutual irrigation corporation has the usual rights pertaining to corporations with reference to handling of its affairs and in dealing with its stockholders.

Irrigation corporations owned and controlled by private persons are private corporations,<sup>40</sup> existing at the will of the legislature<sup>41</sup> Although a stockholder in a mutual irrigation corporation has a right peculiar to such corporations, in that he may have distributed to him and use his proportionate share of the waters belonging to, or distributed by, the corporation, as is discussed infra § 353, such a corporation has the usual rights pertaining to corporations with reference to handling of its affairs and in dealing with its stockholders<sup>42</sup>

### § 342. — Incorporation and Organization

Irrigation companies may be incorporated under an act providing for corporations generally, where a statute enacted subsequently to the general law expressly so provides, and a general law relating to corporations for construction of canals and supplying water is not repealed by a general law with respect to corporations generally.

The general rule stated in Corporations § 41, that a corporation cannot be formed under a general law except as expressly authorized thereby, applies to irrigation companies, and permits the incorporation of irrigation companies under an act providing for corporations generally, where a statute enacted subsequently to the general law expressly so provides<sup>43</sup> Following the general rule stated

in Statutes § 288, that repeal of statutes by implication is not favored, a general law relating to corporations for construction of canals and supplying water is not repealed by a general law with respect to corporations generally,<sup>44</sup> or to corporations organized primarily for purposes other than irrigation<sup>45</sup> Where the general law incorporates every community ditch in the state then or thereafter existing, and regulates elections of their officers, every community ditch is a corporation by virtue of its existence, and without initiating any procedure to become such, but inasmuch as it cannot act, or sue or be sued, except through its officers, and as the law regulates their election, an election of officers, in conformity to statutory requirements, must be had before the corporation may act as such<sup>46</sup> The statutory requirement of a sworn statement, properly recorded, showing the purpose of the irrigation company, and the number of acres to be irrigated, is met by an affidavit to the required facts made by the president of the company, and recorded<sup>47</sup> If there is a law under which an irrigation company may be incorporated, a bona fide attempt to organize thereunder, and an actual use of corporate powers, the legality of its existence cannot be attacked collaterally<sup>48</sup> as, for example, in a contest between rival corporations involving priority of water rights<sup>49</sup>

*Water-users' association of laterals* A statute may provide for the organization of a water-users' association by parties who take water from the same canal, at the same point, to be conveyed to their respective premises for any distance through a lateral or distributing ditch<sup>50</sup>

*What law governs* When a mutual irrigation company, receives from the state an extension of its corporate life, which would have otherwise expired, it in effect obtains a new charter, and hence the laws in force at the time of such extension form

37. Idaho—Carter v Niday, supra

38. Idaho—Carter v Niday, supra

39. Idaho—Carter v Niday, supra

40. Neb—Thirty Mile Canal Co v Carskadon, 70 NW 2d 432, 160 Neb 496

14 C J p 75 note 31

41. Neb—Thirty Mile Canal Co v Carskadon, supra

42. Idaho—Application of Johnston, 204 P 2d 434, 69 Idaho 139

43. Cal—Traber v. Railroad Commission, 191 P 366, 183 Cal 304

44. Cal—Traber v Railroad Commission, supra

45. Tex—Westbrook v. Missouri-

Texas Land & Irrigation Co, Civ App, 195 SW 1154

46. NM—State v Tularosa Community Ditch, 143 P 207, 19 NM 352

67 C J p 1367 note 47

47. Tex—Bay City Irr Co v Sweeney, Civ App, 81 SW 545

48. Or—Alder Slope Ditch Co v Moonshine Ditch Co, 176 P 593, 90 Or 385

De facto corporations in general see Corporations §§ 93-98

49. Or—Alder Slope Ditch Co v Moonshine Ditch Co, supra

50. Idaho—Hale v. McCammon Ditch Co, 244 P.2d 151, 72 Idaho 478

#### Intention to organize disclosed

Unilateral agreement providing that stockholders of ditch company who received water from ditch company's main canal into certain lateral owned by stockholders do authorize board of directors of ditch company as managers of lateral with all power to do each and everything necessary and requisite for orderly distribution of water through lateral and for maintenance and repair of lateral, agreeing to pay pro rata share for work and labor done and materials, was an agreement for management of lateral, upkeep, and distribution of water and attempt to organize as water users  
Idaho—Hale v. McCammon Ditch Co, supra

part of the contract between the corporation and its stockholders<sup>51</sup>

**Amendment of charters** Where a proposed amendment to the articles of incorporation does not constitute a fundamental change, but is merely an extension of corporate activity, a unanimous consent of all outstanding stock is not necessary<sup>52</sup> Where the original charter itself provides that statutes altering the charter powers may be accepted by a designated number of stockholders voting at a general or special election, statutory amendments are effective if the required number of stockholders act thereunder, even though the amendment has not been formally accepted.<sup>53</sup>

**Bylaws**, where properly acted on by the stockholders, and not in violation of law, charter, or vested rights, are binding as between corporation and stockholders and as between the stockholders themselves<sup>54</sup> An irrigation corporation may adopt bylaws providing that stock shall be issued only to landowners entitled to water and should be transferable only with land,<sup>55</sup> or regulating the use of the water by its stockholders in turn, requiring each to contribute his proportionate share to a maintenance fund, and making payment a condition of the right of the stockholder to receive water,<sup>56</sup> or restricting the levy of assessments for revenue against

shares of stock appurtenant to land for which water is available,<sup>57</sup> or prohibiting transfer of water from one tract to another except on orders of board of directors<sup>58</sup>

### § 343. — Capital, Stock, and Members or Stockholders

- a. Stock and stock certificates
- b. Stock subscriptions and purchase of stock from corporation
- c. Sale and transfer of stock
- d. Members and stockholders

#### a. Stock and Stock Certificates

Generally, shares of stock in a mutual irrigation company are considered as being mere muniments of title to rights in available water and to proportionate interests in the irrigation system operated by the company as agent of the shareholders

Although the shares of stock in a mutual non-profit irrigation company have been held to constitute vested property rights,<sup>59</sup> the view has been taken that they are mere muniments of title to rights in available water and to proportionate interests in the irrigation system operated by the company as agent of the shareholders,<sup>60</sup> and if appurtenant to land any shares of stock remaining after all water appropriated has been applied to beneficial

51. Utah—Fower v Provo Bench Canal & Irrigation Co, 101 P 2d 375, 99 Utah 267, certiorari denied 61 S Ct 841, 313 US 564, 85 L Ed 1523

52. Utah—Fower v Provo Bench Canal & Irrigation Co, supra

**Amendment held proper** as a natural extension of corporate activity rather than a fundamental change Utah—Fower v Provo Bench Canal & Irrigation Co, supra

53. Ariz—Citrus Growers' Development Ass'n v Salt River Valley Water Users' Ass'n, 268 P 773, 34 Ariz 105

54. Colo—Knowles v Clear Creek, etc, Mill, etc, Co, 32 P 279, 18 Colo 209  
67 C J p 1367 note 58

#### Requirements held not waived

Where water corporation's by-laws enabled stockholders to withdraw from corporation by surrendering stock, endorsed, to corporation's secretary and notifying corporation in writing of intent to withdraw at least thirty days before end of any calendar year, telephone conversation informing corporation's engineer of such intent and requesting information on procedure to be followed, and engineer's advice to wait until following January, did not constitute

waiver by corporation of by-laws requirements

Cal—Grasslands Water Ass'n v Lucky Leven Land & Cattle Co, 247 P 2d 380, 112 Cal App 2d 776

#### Adoption of by-law held arbitrary and unreasonable

Mutual ditch company directors' adoption of by-law, prohibiting transfer of water from one tract of land to another without directors' approval, and refusal to permit transfer of water, represented by company's stock previously purchased by another such company, to latter's use

Colo—Costilla Ditch Co v Excelsior Ditch Co, 68 P 2d 448, 100 Colo 433

55. Cal—Riverside Land Co v Jarvis, 163 P 54, 174 Cal 316

Colo—Comstock v Olney Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

56. Neb—Swanger v Porter, 128 N W 516, 87 Neb 764

57. Or—Griffith v Klamath Water Users' Ass'n, 137 P 226, 68 Or 402

67 C J p 1368 note 61.

58. Colo—Model Land & Irrigation Co v Madsen, 285 P 1100, 87 Colo 166

59. NM—Holmberg v Bradford, 244 P 2d 785, 56 NM 401.

#### Readjustment of shares

Where plaintiff shareholders in community irrigation ditch owned 38.87 percent of irrigated acreage, but only 30 percent of shares in ditch company, plaintiffs were not entitled to have their shares in ditch company readjusted to be in proportion to their shares of water rights or of irrigated acreage, since doing so would constitute destruction of vested property rights and creation of new property rights  
NM—Holmberg v Bradford, supra.

60. US—Pacific States Savings & Loan Corp v Schmitt, CCA Nev, 103 F 2d 1002

Twin Falls Land & Water Co. v. Twin Falls Canal Co, D C Idaho, 7 F Supp 238, affirmed, CCA, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69—Beaty v Board of Com'rs of Otero County, 73 P 2d 982, 101 Colo 346—Comstock v Olney Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

Utah—East River Bottom Water Co v Boyce, 128 P 2d 277, 102 Utah 149—Genola Town v Santaquin City, 80 P 2d 930, 96 Utah 88, rehearing denied 85 P 2d 790, 96 Utah 104.

use have no value, actual or potential, except for nuisance purposes.<sup>61</sup>

In arid states, shares of stock are usually deemed appurtenant to the land of the shareholder irrigated through the system.<sup>62</sup> The shares of stock of an irrigation company issued in place of a vested water right for lands in an irrigation district are appurtenant unless they have been transferred and put to beneficial use on other lands.<sup>63</sup> Under a statute so providing, no stock is appurtenant to land unless the corporation adopts and records in the county recorder's office a bylaw declaring it to be appurtenant to land.<sup>64</sup> A bylaw declaring that stock shall be located only on land of the purchaser and that water shall be distributed only on lands on which stock is located, does not make such stock appurtenant to the land,<sup>65</sup> but a bylaw providing that the stockholder shall be entitled to water only for land described in the certificate makes the stock appurtenant,<sup>66</sup> and the stock is also appurtenant to the land where a bylaw provides that the stock is transferable only with land,<sup>67</sup> or where the articles of incorporation, bylaws, and certificate of stock so provide.<sup>68</sup>

Stock, not appurtenant to land, is personal property,<sup>69</sup> and shares of stock in irrigation corporations organized for profit are personal property,<sup>70</sup>

but stock appurtenant to land constitutes a species of real property.<sup>71</sup>

The provisions of the articles of incorporation must be strictly complied with in the issue of certificates of stock,<sup>72</sup> and where a water company was organized to maintain an irrigation system on the basis of one share of stock to each acre of land irrigated, capital stock, issued in excess of one share to one acre, must be reduced to the charter basis.<sup>73</sup> Any duplicate shares of stock issued inadvertently is without consideration and of no effect in conferring any additional water rights.<sup>74</sup> A holder of a certificate of stock in a mutual irrigation company, regular on its face, and issued by officers having an apparent authority to do so, is not burdened with a duty of inquiry with respect to the regularity of its issuance merely because the certificate may have been issued to one of the officers of the company who signed the certificate,<sup>75</sup> and the fact that one may have learned of such irregularity prior to obtaining an assignment of the certificate does not preclude him under the doctrine of merger from maintaining an action to recover from the company for any loss sustained, on the ground that the certificate, although regular on its face, was void because it represented an overissue procured through fraud.<sup>76</sup>

61. US—Twin Falls Land & Water Co v Twin Falls Canal Co, D C Idaho, 7 F Supp 238, affirmed, C CA, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

62. US—Pacific States Savings & Loan Corp v Schmitt, C CA Nev, 103 F 2d 1002

63. Utah—Milford State Bank v West Field Canal & Irr Co, 162 P 2d 101, 108 Utah 528

64. Cal—Palo Verde Land & Water Co v Edwards, 254 P 922, 82 Cal App 52

65. Cal—Palo Verde Land & Water Co v Edwards, supra

66. Wash—Berg v Yakima Valley Canal Co, 145 P 619, 83 Wash 451, L RA 1915D 292

67. Cal—Locke v Yorba Irr Co, 217 P 2d 425, 35 Cal 2d 205—Riverside Land Co v Jarvis, 163 P 54, 174 Cal 316

68. Cal—Riverside Land Co v Jarvis, supra

69. Cal—Palo Verde Land & Water Co v Edwards, 254 P 922, 82 Cal App 52

70. Colo—Denver Joint Stock Land Bank v Markham, 107 P 2d 813, 106 Colo 509

70. Colo—Comstock v. Olney

Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

71. Cal—Stesel v Santa Ana River Water Co, 94 P 2d 1052, 35 Cal App 2d 117

**Shares incidental to ownership of water rights** which are appurtenant to the land on which the water is used represent interests in separate parcels of real estate

Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69—Beatty v Board of Com'rs of Otero County, 73 P 2d 982, 101 Colo 346—Comstock v Olney Springs Drainage Dist, 50 P 2d 531, 97 Colo 416

72. Utah—Continental National Bank of Salt Lake City v Minersville Reservoir & Irrigation Co, 273 P 502, 73 Utah 243

67 C J p 1368 note 69

73. Or—In re Waters of Willow Creek, 236 P 487, 119 Or 487, modified on other grounds 236 P 763, 119 Or 155, rehearing denied 237 P 682, and modified on other grounds 239 P 123

74. Utah—Milford State Bank v West Field Canal & Irr Co, 162 P 2d 101, 108 Utah 528—East River Bottom Water Co v Boyce, 128 P 2d 277, 102 Utah 149

**Over issuance not shown**

Where assignment by owner of

stock in irrigation company indicated that only two hundred twenty-three shares were intended, but two hundred eighty-five shares of stock were issued to assignee by irrigation company holding rights, and thereafter certificate covering shares was broken into two certificates for one hundred sixty and one hundred twenty-five shares, respectively, which were treated by original owner as his property, issue of two hundred eighty-five shares by irrigation company could not be deemed an over issue

Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499

75. Utah—Commercial Bank of Spanish Fork v Spanish Fork South Irr Co, 153 P 2d 547, 107 Utah 279

76. Utah—Commercial Bank of Spanish Fork v Spanish Fork South Irr Co, supra

**Recovery for loss sustained through overissue held not barred:**

(1) On ground that water represented by the certificate was not used for more than five years and hence was abandoned by such nonuser, since holder was never entitled to any water rights

Utah—Commercial Bank of Spanish Fork v Spanish Fork South Irr Co, supra

### b. Stock Subscriptions and Purchase of Stock from Corporation

Although the subscription for stock in a reclamation project has been closed, it may be reopened in a proper case, provided the rights of existing shareholders are not impaired; but where stock is sold on the theory that water users buying such rights are to have a reasonably dependable supply of water, the company may not dilute such rights by selling more shares of stock when water actually available is barely sufficient for present holders of water rights.

The fact that a reclamation project had been completed and the area to which water might lawfully be supplied had been fixed, and the subscription for stock closed, does not prevent a subsequent reopening of the subscription, where the system has been substantially enlarged, provided the company is able to fulfill its contract with the new subscribers, and the rights of existing shareholders are not impaired.<sup>77</sup> Where stock with water rights in a canal is sold on the theory that water users buying such rights are to have a reasonably dependable supply of water, the company may not dilute such rights by selling more shares of stock when water actually available is barely sufficient for present holders of water rights.<sup>78</sup> Water users by subscribing for stock in an irrigation company and signing a non-interference agreement are not estopped to object to change in point of diversion of water by the company, where the subscription for stock is made and the agreement signed with the understanding that prior appropriations by water users will not be jeopardized by a change in diversion or transfer of water rights purchased by the irrigation company.<sup>79</sup>

In suit to foreclose lien given in connection with subscription to capital stock of plaintiff corporation, the complaint must show authority, in powers granted, to maintain the suit, and the defendant's ownership of land against which the lien is being enforced.<sup>80</sup> The amount paid under a contract of sale of all the stock of a canal company is the purchase price fixed by the contract minus the credits allowed the purchaser under its terms.<sup>81</sup> Where the corporation assigns a contract for sale of its shares,

with consent of the purchaser who agrees to pay the assignee for the shares, the right to sue on the purchase money notes is in the assignee, not in the corporation,<sup>82</sup> nor can the purchaser escape liability to the assignee thereon on grounds applicable only to the superseded contract between himself and the corporation.<sup>83</sup>

A purchaser may rescind a fraudulent sale of stock to him,<sup>84</sup> and his right to rescind is not affected by his payment of an assessment for maintenance charges after giving notice of rescission, made to prevent foreclosure of the assessment lien.<sup>85</sup> A stock subscription contract although not properly signed by an agent on behalf of the company may, under circumstances showing ratification by the company, be valid and not subject to repudiation by the subscriber.<sup>86</sup>

*Contribution and accounting.* Where purchasers of water rights from the state organized an irrigation company to which they assigned their shares of water in exchange for corporate stock, and thereafter the state assigned its right to collect money on such water contracts to the corporation in exchange for corporate bonds, thereby releasing the individual purchasers from liability to the state on their water purchase contracts and leaving them only with the obligation of paying for their stock subscriptions, a subscriber who has paid his subscription in full and received his corporate stock has no right to an accounting from the corporation or contribution from individual stockholders who did not complete payment of stock subscriptions.<sup>87</sup>

### c. Sale and Transfer of Stock

Stock not appurtenant to the land does not pass with the land on a conveyance of the land, but where the stock is appurtenant to the land, the stock will usually pass with the land, although the owner is entitled to convey part of the land without the stock as long as he retains land to which the stock can be appurtenant.

Since shares of stock in an irrigation corporation, which shares have not been made appurtenant to land, are personal property,<sup>88</sup> a deed conveying

(2) By laches although action was not commenced until more than fourteen years after certificate had been issued, where there was no showing that delay was due to any fault of plaintiff, or that it prejudiced defendant's rights. *Utah—Commercial Bank of Spanish Fork v Spanish Fork South Irr Co*, supra.

**77.** *Ariz—Bethune v Salt River Valley Water Users' Ass'n*, 227 P 989, 26 Ariz 525.

**78.** *Wyo—Laramie Rivers Co v Watson*, 241 P 2d 1080, 69 Wyo. 333.

**79.** *Idaho—Beecher v Cassia Creek Irr Co*, 154 P 2d 507, 66 Idaho 1.

**80.** *Or—Klamath Water Users' Ass'n v. Martin*, 178 P. 356, 91 Or 53.

**81.** *Wyo—Aldrich v. Burnham*, 228 P 578, 32 Wyo 3.  
67 C.J. p 1368 note 74.

**82.** *Wyo—Hanover Canal Co v Wilson*, 143 P 345, 22 Wyo 427.

**83.** *Wyo—Hanover Canal Co v Wilson*, supra.

**84.** *Cal—Delta Land & Water Co v Perry*, 207 P. 393, 57 Cal App. 314.

**85.** *Cal—Delta Land & Water Co v Perry*, supra.

**86.** *Idaho—Michaelson v Miller*, 26 P 2d 378, 53 Idaho 617.

**87.** *Utah—Frandsen v Piute Reservoir & Irrigation Co*, 148 P 2d 804, 106 Utah 378.

**88.** *Cal—Wheat v Thomas*, 287 P. 102 209 Cal 306.

*Smith v Hallwood Irr. Co*, 228 P 373, 67 Cal App 777.  
Transfer of stock as effecting transfer of right to supply of water see *infra* § 357 a.

land,<sup>89</sup> or land and water rights pertaining thereto,<sup>90</sup> will not operate to transfer stock which is not appurtenant to the land conveyed. Where the stock is appurtenant to the land, however, the stock passes with a conveyance of the land,<sup>91</sup> regardless of the transfer of the stock on the books of the company,<sup>92</sup> at least in the absence of reservation of water rights or stock,<sup>93</sup> or unless the intention of the grantor is otherwise.<sup>94</sup>

Although stock is appurtenant to the land, an owner is entitled to convey part of the land without the stock as long as he retains land to which the stock can be appurtenant.<sup>95</sup> In the absence of evidence that shares of stock in a water company represented water rights appurtenant to lands, or that the corporation was a mutual company, a purchaser at an execution sale in good faith and without notice that the outstanding certificate belongs to some one other than the judgment debtor is entitled to a transfer of the stock to himself on the books of the company,<sup>96</sup> and the record of a deed by the debtor conveying his land and capital stock appurtenant thereto is not constructive notice of a transfer of his stock in the water company.<sup>97</sup> A transfer of a riparian water right by an owner of land to which it is appurtenant to a mutual irrigation company, organized to take over the distribution of water, and the issuance of stock by the company representing the quantum of right is nothing more than a change

in the formal evidence of title, since water rights and stock are one and the same, the latter being merely the representation of the former.<sup>98</sup> A contract to convey land with an appurtenant water right does not convey any additional shares of water right other than those which are appurtenant to the land.<sup>99</sup> One intending to buy land and only appurtenant water rights is not an innocent purchaser of a designated number of shares of stock represented by a certificate which has been issued by mistake, and such purchaser has no greater rights than his vendor.<sup>1</sup>

*Duty of inquiry.* Purchasers of water stock may rely on the stock record unless they have actual knowledge that stock has been mortgaged, pledged, or disposed of, or unless there is some other circumstance which would charge them with notice other than mere knowledge that some previous owner declared water to be appurtenant.<sup>2</sup> If one buying water stock actually knows that a former certificate stated that water represented by the certificate belonged to a certain tract of land, and knows that no water is being used on that land, it does not charge him with the duty of searching the chain of title to the land to see whether instruments on the county recorder's record dealt with such water.<sup>3</sup>

*A pledgee of stock in a ditch company as security for payment of a note can be made to account, if to his profit he obtained use of the water to which*

89. SD—Butte County v Lovinger, 266 NW 127, 64 SD 200  
67 C J p 1400 note 60

**Stock not appurtenant under articles**  
Where articles of irrigation association provided that stock might be sold or transferred to any one without regard to land ownership and stockholders uniformly treated their stock as something apart from land, stock was not appurtenant to land, and did not pass therewith on foreclosure of mortgage covering land  
SD—Butte County v Lovinger, supra

90. Colo—First Nat Bank of Longmont v Hastings, 42 P 691, 7  
Colo App 129

91. US—Pacific States Savings & Loan Corp v Schmitt, CCA Nev, 103 F2d 1002

Cal—Locke v Yorba Irr Co, 217 P 2d 425, 35 Cal 2d 205

Colo—Billings Ditch Co v Industrial Commission, 253 P2d 1058, 127 Colo 69

Utah—Brimm v Cache Val Banking Co, 269 P2d 859, 2 Utah 2d 93

67 C J p 1400 notes 62–63

Stock appurtenant to land generally see supra subdivision a of this section.

**Sale of land on foreclosure vests in the grantee an equitable title to the stock**

Cal—Riverside Land Co v Jarvis, 163 P 54, 174 Cal 316

92. Colo—Billings Ditch Co v Industrial Commission, 253 P2d 1058, 127 Colo 69

93. Cal—Locke v Yorba Irr Co., 217 P2d 425, 35 Cal 2d 205

94. Colo—Denver Joint Stock Land Bank of Denver v Markham, 107 P2d 313, 106 Colo 509

**Intention not to convey shown**

A trust deed, conveying described land with any and all water rights thereunto belonging and all shares of stock in any ditch company which entitled grantors of such land to water for irrigation or domestic purposes thereon, including seventy-two shares of named mutual ditch company's capital stock evidencing stated quantity of water derived from another company's canal, was held not to convey like number of shares of such ditch company's stock not specifically described therein

Colo—Denver Joint Stock Land Bank of Denver v Markham, supra

95. Cal—Locke v Yorba Irr Co, 217 P2d 425, 35 Cal 2d 205

**Reservation held valid**

Where stock in irrigation company was mere evidence of ownership of water rights, the fact that owner in deed conveying part of land to which water right was appurtenant reserved water right without mentioning the stock would not affect validity of reservation  
Cal—Locke v Yorba Irr Co, supra

96. Cal—Security Commercial & Savings Bank of El Centro v Imperial Water Co No 1, 192 P. 22, 183 Cal 488

97. Cal—Security Commercial & Savings Bank of El Centro v Imperial Water Co, supra

98. Cal—Locke v Yorba Irr Co, 217 P2d 425, 35 Cal 2d 205

99. Utah—Milford State Bank v West Field Canal & Irr Co, 162 P2d 101, 108 Utah 528.

1. Utah—Milford State Bank v West Field Canal & Irr Co, supra

2. Utah—Woolley v. Dowse, 41 P2d 709, 86 Utah 221

3. Utah—Woolley v. Dowse, supra.

the shares entitled the holder thereof<sup>4</sup> Where shares of stock in a canal company are conditionally delivered to a bank as security for a note, but the bargain falls through because of the refusal of the wife of the maker to sign the note, the bank should return the stock<sup>5</sup>

*An action to set aside an assignment of water stock certificates may be maintained on grounds of mental incapacity of the grantor at the time of the transfer.*<sup>6</sup>

#### d Members and Stockholders

- (1) In general
- (2) Meetings
- (3) Assessments for construction and maintenance

##### (1) In General

Membership in an irrigation corporation depends on the provisions of the statute, and where a statute makes all community ditches in existence corporations and restricts membership to water users, but makes no provisions as to the nature of their rights in the ditch and in the water, their rights are the same after incorporation as before.

Membership in an irrigation corporation depends on the provisions of the statute,<sup>7</sup> and where a statute makes all community ditches in existence corporations and restricts membership to water users, but makes no provision as to the nature of their rights in the ditch and in the water, their rights are the same after incorporation as before<sup>8</sup> Where a water user joins with other water users to form an irrigation company and acts as one of the incorporators, but continues thereafter to use the water as prior to the formation of the company, he is not estopped to contend that he did not convey his water rights to the irrigation company<sup>9</sup>

Members are chargeable with notice of the provisions of the articles of incorporation,<sup>10</sup> and are bound by action of the corporation,<sup>11</sup> or of the stockholders and directors in accordance therewith,<sup>12</sup> even though the terms of a contract between the member and organizer of the corporation are thereby violated<sup>13</sup> A constitutional provision that if there has been a sale, rental, or distribution of water for use on lands there is a dedication of water to the lands, and the owner or distributor of waters cannot thereafter refuse to distribute water to the lands on tender of proper charges therefor, does not give to the owner of stock in a mutual irrigation corporation the right to make a wrongful diversion of water at an unauthorized place, even though the stockholder has paid maintenance charges to the corporation, where the wrongful diversion is made without the consent of the corporation<sup>14</sup>

*Ownership of controlling stock by a river company of a canal company and election of the directors of the river company as directors of the canal company do not make the river company liable for the acts or obligations of the directors of the canal company*<sup>15</sup>

*Withdrawal of membership.* Where a statute authorizes a company to purchase its own stock on a requisite number of votes of the outstanding stock exclusive of the stock to be purchased, a member may be permitted to withdraw as the result of such a purchase of its stock, and the company may not thereafter collect charges on account of the stock from the withdrawing owner<sup>16</sup>

*An action by minority stockholders of a canal company, to compel the company to exact higher charges for carriage of water through its canal so that profits will be earned and dividends paid, cannot*

4. Utah—Hoyt v Upper Marion Ditch Co, 76 P 2d 234, 94 Utah 134

5. Utah—Stoker v Barnes Banking Co, 134 P 2d 698, 103 Utah 215

6. Utah—Burgess v Colby, 71 P 2d 185, 93 Utah 103

**Complaint held not defective** in pleading instruments sought to be canceled in their general effect and in not setting them out in haec verba

Utah—Burgess v Colby, supra

**Evidence held sufficient** to establish that grantor was mentally competent to dispose of his property at time of making the conveyances

Utah—Burgess v Colby, supra

7. N M—State v Tularosa Community Ditch, 143 P. 207, 19 N M 352

67 C J p 1369 note 86.

Right to supply of water see infra § 352

**Equitable title**

Where husband and wife conveyed water rights to an irrigation company and irrigation company issued stock certificates in the name of the husband, wife was equitable owner of stock certificate

Utah—Brumm v Cache Val Banking Co, 269 P 2d 859, 2 Utah 2d 93

8. N M—Snow v Abalos, 140 P 1044, 18 N M 681

67 C J p 1369 note 87

9. Utah—Mitchell v Spanish Fork West Field Irr Co, 265 P 2d 1016, 1 Utah 2d 313.

10. Ariz—Greene & Griffin Real Estate & Investment Co v Salt River Valley Water Users' Ass'n, 217 P 945, 25 Ariz 354

67 C J p 1369 note 88

11. Ariz—Greene & Griffin Real Estate & Investment Co v Salt River Valley Water Users' Ass'n, supra

67 C J p 1369 note 89

12. Cal—Graham v Pasadena Land & Water Co, 93 P 498, 152 Cal 596

67 C J p 1369 note 90

13. Idaho—Hobbs v Twin Falls Canal Co, 133 P 899, 24 Idaho 380

14. Idaho—Application of Johnston, 204 P 2d 434, 69 Idaho 139

15. Wyo—Laramie Rivers Co v. Watson, 241 P 2d 1080, 69 Wyo. 333

16. Colo—Guadalupe Main Ditch Co v Manassa Land & Irrigation Co, 91 P 2d 497, 104 Colo 380.

be maintained in the absence of any fraud on the part of the majority stockholders and officers of the company<sup>17</sup>

## (2) Meetings

The common-law rule as to what constitutes a quorum at a stockholders' meeting sufficient for the transaction of business is applicable, unless abrogated by statute, and a notice which clearly states the nature of the propositions to be voted is sufficient. Statutory and charter provisions governing stockholders' meetings apply, as with respect to who may vote.

The rule of the common law that any number of stockholders present at a meeting properly called constitute a quorum sufficient for transaction of business may, as shown in Corporations § 546, be abrogated by statutes requiring a designated proportion of members or representation of a designated amount of stock, and where a statute applicable to water users' associations requires a majority of stock to be represented at stockholders' meetings, but further provides that if the association actually owns or controls an irrigation system, members present shall constitute a quorum, ownership, or control of an irrigation system must be established before the benefit of the common-law rule can be claimed<sup>18</sup> In the absence of statutory requirements, a notice of a stockholders' meeting which states clearly the nature of each proposition to be voted and that a copy of the proposition could be seen at the office of the secretary, is sufficient.<sup>19</sup>

In giving notice of an election to be held on a stated proposition, the election is in effect a meeting of the stockholders, and requirements governing stockholders' meetings apply<sup>20</sup> A charter provision that voting shall be by ballot cast "at the polls in person," has been construed as excluding corporations, and persons holding lands in a fiduciary

capacity,<sup>21</sup> nor may owners of land, disqualified from voting, convey their land and shares to dummy owners solely for the purpose of voting for officers<sup>22</sup> Where assessments which are levied by a mutual water company are void because the special meetings at which the assessments are levied are not duly convened, an attempt of corporate officers to sell or cancel shares under the purported assessments is void, and a stockholders' meeting which is subsequently held for the purpose of electing directors without advance notice having been given to the holders of shares which the officers had attempted to sell or cancel is not duly assembled<sup>23</sup>

*Action to determine directors.* In an action brought to determine the duly elected directors, the court may determine the person entitled to the office of director or may order a new election and direct such other relief as may be just and proper<sup>24</sup>

## (3) Assessments for Construction and Maintenance

- (a) In general
- (b) Liens and priority
- (c) Payment and enforcement of lien

### (a) In General

Stockholders must contribute, as required by statute, either by their labor, or by money payments assessed against them, toward the cost of construction and maintenance of the company's irrigation system, properly incurred, and toward the mortgage and other indebtedness of the company, when necessary, even though their shares are fully paid up. The amount and manner of the levy of an assessment or the liability to be assessed, may, however, be controlled by agreement or statute.

Stockholders must contribute, as required by statute, either by their labor,<sup>25</sup> or by money payments

17. US—Robbins v. Winters Creek Canal Co, CCA Neb, 109 F 2d 849

**Evidence sustained finding** that failure of the canal company to earn profits for payment of dividends was not caused by fraud in conduct of the company affairs

US—Robbins v Winters Creek Canal Co, supra

### **Evidence held insufficient**

(1) To sustain contention that majority stockholders who elected the officers of the company had interests as landowners which were opposed to the interests of the company

US—Robbins v. Winters Creek Canal Co, supra

(2) To sustain contention of minority stockholders that sugar company which was parent company of one of the majority stockholders who elected the officers of the com-

pany, was interested adversely to the canal company

US—Robbins v Winters Creek Canal Co, supra

18. Idaho—Knoor v Reineke, 224 P 84, 38 Idaho 658  
67 CJ p 1369 note 94

19. Ariz—Citrus Growers' Development Ass'n v Salt River Valley Water Users' Ass'n, 268 P 773, 34 Ariz 105

20. Ariz—Citrus Growers' Development Ass'n v Salt River Valley Water Users' Ass'n, supra

21. Ariz—Saylor v. Gray, 20 P 2d 441, 41 Ariz 558

22. Ariz—Saylor v Gray, supra.

23. Cal—Boswell v Mount Jupiter Mut Water Co, 217 P 2d 980, 97 Cal App 2d 437

24. Cal—Boswell v Mount Jupiter Mut Water Co, supra.

### **Order held valid**

An order that board of mutual water company should call a meeting of stockholders for purpose of electing a board of directors within thirty days from notice of entry of judgment, and that board do every act necessary so that meeting should be valid, was not objectionable because it was designated "judgment" or on the ground that it required the directors to do indefinite acts

Cal—Boswell v Mount Jupiter Mut Water Co, supra

25. NM—State v Aztec Ditch Co, 185 P 549, 25 NM 590  
67 CJ p 1369 note 2

Power of directors to levy assessments see infra § 344

Power to make by-laws authorizing see supra § 342.

assessed against them,<sup>26</sup> towards the cost of construction and maintenance of the company's irrigation system, properly incurred,<sup>27</sup> and, when necessary, towards the mortgage<sup>28</sup> and other indebtedness of the company,<sup>29</sup> even though their shares are fully paid up, the statutory exemption from assessment on such stock referring to assessments on account of purchase price<sup>30</sup> Owners or purchasers of water shares are charged with knowledge that the water corporation, unless prohibited by its articles or bylaws, may levy assessment on the shares, either to pay costs of operation and maintenance directly or to repay money borrowed for such purposes<sup>31</sup>

Stockholders are exempt from assessment if, and to the extent that, it is so provided by the terms of their agreement made at the time they purchased the stock<sup>32</sup> or as consideration for the sale of property rights in the canal,<sup>33</sup> and owners of water rights are under obligation to contribute only their proportionate share of maintenance cost which would have been necessary had the canal not been enlarged beyond the limits contemplated at the time their water rights were purchased,<sup>34</sup> and may recover back any excess unjustly exacted under the compulsion of extreme and immediate necessity of water to save their crops<sup>35</sup> Where they voluntarily pay the assessments, however, they cannot later object to their validity<sup>36</sup> Where a part owner of a ditch with contract rights to the service at a guaranteed maximum charge refuses to become a stockholder in the ditch company organized to take over the ditch and operate it, and the company ratifies the owner's contract, and delivers water thereunder

for a number of years, it is bound thereby and may not recover for the service at the rate charged to strangers,<sup>37</sup> and where landowners constructed a ditch, and by custom, prior to incorporation, contributed to cost of maintenance above, but not below the point of diversion, the corporation cannot compel a coowner of the ditch, who refuses to join the corporation, to contribute on any other basis<sup>38</sup> Owners of water rights agreeing to become shareholders on a stated contingency may not be assessed where the contingency has not happened,<sup>39</sup> and they are not estopped to deny the happening of the contingency by attending a meeting, not as stockholders but as protesting owners of water rights<sup>40</sup> Assessments for maintenance of an irrigation system may be made on unsold water rights which, under its contract with the state, the construction company elected to retain when it turned over the property to the settlers' operating company.<sup>41</sup>

The statutory requirements as to amount and manner of the levy of an assessment must be complied with<sup>42</sup> Where stockholders of a water users' association continue to enjoy benefits of stock subscription contracts for years after formation of irrigation districts, they are not entitled to assert that such formation and other circumstances discharge them from liability for assessments subsequently levied by the court for payment of the association's debts<sup>43</sup> Under contracts whereby an irrigation company subscribes to a water users' association stock and mortgages property to the association and the United States, pursuant to an agreement between the association and the United States whereunder the United States builds an irrigation project, the

26. U.S.—Brown v Portneuf-Marsh Valley Irr Co, D C Idaho, 299 F 338, modified on other grounds, C C A, 5 F 2d 895, certiorari denied 46 S Ct 204, 270 U S 637, 70 L Ed 773, affirmed 47 S Ct 692, 274 U S 630, 71 L Ed 1243.  
67 C J p 1369 note 3

27. Wyo.—Laramie Rivers Co v Watson, 241 P 2d 1080, 69 Wyo 333  
67 C J p 1369 note 4

**Authority dependent on availability of water**

Statutory authority of canal companies to levy and collect reasonable and necessary assessments for cost of maintenance contemplates that parties subject to assessments have water available for their use  
Wyo.—Laramie Rivers Co v Watson, supra

28. Ariz.—Orme v Salt River Valley Water Users' Ass'n, 217 P 935, 25 Ariz 324

Idaho.—Hobbs v Twin Falls Canal Co, 133 P. 899, 24 Idaho 380

29. Ariz.—Orme v Salt River Valley Water Users' Ass'n, 217 P 935, 25 Ariz 324  
67 C J p 1369 note 6

30. U.S.—Brown v Portneuf-Marsh Valley Irr Co, D C Idaho, 299 F 338, modified on other grounds, C C A, 5 F 2d 895, certiorari denied 46 S Ct 204, 270 U S 637, 70 L Ed 773, affirmed 47 S Ct 692, 274 U S 630, 71 L Ed 1243.

Ariz.—Greene & Griffin Real Estate & Investment Co v Salt River Valley Water Users' Ass'n, 217 P 945, 25 Ariz 354

31. Cal.—Stevens v. Curtis, 264 P 2d 606, 122 Cal App 2d 30—Watson v Santa Carmelita Mut Water Co, 137 P 2d 757, 58 Cal App 2d 709

32. Colo.—Farmers' Pawnee Canal Co v. Henderson, 102 P 1063, 46 Colo 37  
67 C J p 1370 note 8

33. Neb.—Fenton v Tri-State Land Co, 131 NW 1038

34. Idaho—Gess v Nampa & Meridian Irr Dist, 192 P 474, 33 Idaho 189

35. Idaho—Gess v Nampa & Meridian Irr Dist, supra

36. Idaho—Hansen v Woods, 290 P 379, 49 Idaho 656

37. Colo.—Wanamaker Ditch Co v Pettit, 8 P 2d 295, 89 Colo 344

38. Cal.—Arroyo Ditch Co v Bequette, 87 P 10, 149 Cal 543

39. Colo.—Riverside Reservoir & Land Co v Green City Irr Dist, 151 P. 443, 59 Colo 514

40. Colo.—Riverside Reservoir & Land Co v. Green City Irr Dist, supra

41. Wyo.—Bench Canal Co v Sullivan, 271 P 221, 39 Wyo 345

42. Idaho—Smith v. Dickerson, 297 P 402, 50 Idaho 477  
67 C J p 1370 note 18

43. Idaho—Michaelson v Miller, 26 P 2d 378, 53 Idaho 617.



stock held by the company is properly assessed at the same rate as stock held by others, irrespective of whether the company receives equal benefits from the project<sup>44</sup> Where the controlling shares of a river company in a canal company have no water rights annexed thereto, and only the holders of stock with water rights receive benefits of assessments for maintenance of the canal, the river company cannot be required to pay such assessments, as a requirement to the contrary would be the equivalent of cancelling the river company's shares of stock which may have some potential value<sup>45</sup> Where an irrigation ditch company's stock is divided into different classes, entitled to different uses, and hence varying in benefits from ditch maintenance, a statutory mandate that assessments thereon be levied pro rata requires only equitable apportionment of cost between classes and the same assessment on each share in a given class<sup>46</sup>

The test of the validity of acts of a mutual water company directors in levying assessments is whether the levy was authorized by law and was necessary for the maintenance of the company, which decision as to the need for an assessment is to be made only by the directors<sup>47</sup> Where a statute forbids a distinction between classes of shares, and the articles of a mutual water company provide for assessability of its stock, a promise by the company to the stock purchaser that the stock will be nonassessable does not constitute an actionable fraud<sup>48</sup> Purchasers

of mutual water company's stock, claiming that representations were made that stock would be non-assessable, cannot rescind part of the contract and retain the benefits,<sup>49</sup> nor may a claim of fraud be made where there has been a ratification of the purchase contract<sup>50</sup> Where some stockholders in a ditch company which owns the main canal authorize the company to maintain and repair lateral canals owned by the stockholders, and agree to pay for work, labor, and materials, assessments made against the stockholders using water from the lateral canals in an amount greater than other stockholders and not prorated among all stockholders are illegal,<sup>51</sup> and assessments against the stockholders in pro rata proportion for the number of shares owned can be made only for the maintenance of the irrigation system, owned by the company, and may not include special benefits conferred on the lateral water users for extra work done because of the agreement<sup>52</sup> The conformance by a mutual water company with a statute relating to contents of certificates for shares is irrelevant in determining the liability of a shareholder for an assessment, who is not a transferee<sup>53</sup>

An assignee of a water right on which past assessments are due is not personally liable for such past assessments, unless expressly assumed,<sup>54</sup> and is under no duty to collect delinquent assessments so as to become personally liable<sup>55</sup> A river company obtaining an assignment of stock in a canal company

44. Utah—South Cache Water Users Ass'n v Stockholders of South Cache Water Users Ass'n, 272 P 2d 591, 2 Utah 2d 300

45. Wyo—Laramie Rivers Co v Watson, 241 P 2d 1080, 69 Wyo 333

46. Colo—Robinson v Booth-Orchard Grove Ditch Co, 31 P 2d 187, 94 Colo 515

**Method of assessment held proper**

Amendment of irrigation ditch company's articles of incorporation to permit assessment of three classes of stock based on water priority dates, according to benefits, was not violation of statute requiring pro rata assessments

Colo—Robinson v. Booth-Orchard Grove Ditch Co, supra

47. Cal—Watson v Santa Carmelita Mut Water Co, 137 P 2d 757, 58 Cal App 2d 709

**Intent to advance selfish interest irrelevant**

In determining validity of assessment it is irrelevant that the persons causing such levy might have intended to advance their selfish interests, where the assessments are

levied in accordance with statute and for a proper purpose

Cal—Watson v Santa Carmelita Mut Water Co, supra

48. Cal—Watson v Santa Carmelita Mut Water Co, supra

49. Cal—Watson v Santa Carmelita Mut Water Co, supra

50. Cal—Watson v Santa Carmelita Mut Water Co, supra

**Contract held ratified**

The reimbursement by purchasers of mutual water company's stock of assessments paid by the irrigation company, after knowledge of an alleged fraud, constitutes a ratification of the purchase contract, as against a contention that the reimbursement was an involuntary payment, because of threat of suit by the irrigation company

Cal—Watson v Santa Carmelita Mut Water Co, supra

51. Idaho—Hale v McCammon Ditch Co, 244 P 2d 151, 72 Idaho 478

**Proof of ownership of lateral canals**

(1) In action by some stockholders of ditch company to enjoin sale of stock for failure to pay unequal as-

sessments against them as lateral canal water users, wherein issue presented was ownership of laterals by which water was distributed to lands of stockholders, and corresponding duty of upkeep, stockholders had burden to prove company's ownership of laterals

Idaho—Hale v. McCammon Ditch Co, supra

(2) Documentary evidence including minutes of a stockholders' meeting, mortgages, a deed, and other documents did not support finding that lateral canal owners had transferred title to the lateral canals to the ditch company

Idaho—Hale v McCammon Ditch Co, supra

52. Idaho—Hale v. McCammon Ditch Co, supra

53. Cal—Watson v Santa Carmelita Mut Water Co, 137 P 2d 757, 58 Cal App 2d 709

54. Wyo—Laramie Rivers Co v. Watson, 241 P 2d 1080, 69 Wyo 333

55. Wyo—Laramie Rivers Co. v. Watson, supra

is not estopped to question the validity of a prior assessment on the stock by the fact that the holders of water rights paid such assessment, in so far as its duties are concerned <sup>56</sup>

*Refund of assessment* A provision in the articles of incorporation of a water users' association that every transfer of title to lands, to which shares of association's stock are appurtenant, shall operate as a transfer of all rights incident to ownership of such stock, does not affect the right of a stockholder, selling portions of land held thereby, to a refund of the amount of stock assessment previously paid by the holder <sup>57</sup>

*Water right applications to federal government* Where the federal government undertakes to provide irrigation works for the settlers on lands in an arid region, and establishes a reclamation project, and a water users' association is incorporated by the settlers to provide a centralized agency to represent them, a refusal of some stockholders of the association to execute water right applications to the federal government as required by a court decree entered by stipulation of the association and the United States does not release such stockholders from liability, under stock subscriptions and bylaws, to pay the association's debts, <sup>58</sup> nor does it terminate the stockholders' relation as stockholders, with respect to the right to make and enforce assessments against them <sup>59</sup> The government's release of obligations of, and liens against, stockholders of water users' association, created under water right applications, does not affect the stockholders' obligations to the association for payment of the association's debts other than those to the government <sup>60</sup>

*Enjoining collection of assessments.* A representative suit to enjoin collection of assessments by a mutual water company, for fraudulent misrepresentations made separately to plaintiff and other investors is not maintainable where there is lack of

privity of estate and no common ground between the parties <sup>61</sup> A complaint to enjoin collection of assessments by a mutual water company, on the ground of misrepresentations that the water stock would pay large dividends and would be nonassessable, fails to allege an actionable fraud, in the absence of a declaration that defendants had no intention of performing their promises. <sup>62</sup>

#### (b) Liens and Priority

Assessments do not become liens on anything until the assessments are actually made, and when made they become liens on the water stock itself rather than on the land, but an assessment for maintenance has been held to be a lien on the land where the stock is appurtenant to the land.

Assessments do not become liens on anything until the assessments are actually made, <sup>63</sup> and when made it has been held that the assessments become liens on the water stock itself rather than on the land, <sup>64</sup> although there is authority for the view that an assessment for maintenance is a lien on the land where stock is appurtenant to the land, <sup>65</sup> and is superior to the lien of a mortgage on the land. <sup>66</sup> The fact that, at the time a stock subscription contract for stock of a water users' association is signed by the stockholder, he holds land under a state land sale certificate and title is in the state, does not prevent the stockholder from providing for an assessment lien in such contract <sup>67</sup> A lien for the debts of a water users' association provided for in a stock subscription contract in favor of the association is not dependent on the validity of a lien created by such contract in favor of the federal government, or on the lien created by water right applications to the federal government <sup>68</sup>

*Community property.* Where wives of stockholders of a water users' association fail to join in the execution and acknowledgment of stock subscription contracts, it does not prevent community prop-

56 Wyo—Laramie Rivers Co v Watson, *supra*

57 Ariz—Valley Nat Bank v Salt River Valley Water Users' Ass'n, 94 P 2d 647, 54 Ariz 199

#### Agreement for refund

The payment of a special assessment by a stockholder with the understanding and stipulation, that a refund of such amount should be made to the holder regardless of who owned the lands, to which the shares are appurtenant, at the time of refund, entitles the holder to a refund made after the sale of such lands to others

Ariz—Valley Nat. Bank v Salt River Valley Water Users' Ass'n, *supra*.

58 Idaho—Michaelson v Miller, 26 P 2d 378, 53 Idaho 617

59 Idaho—Michaelson v. Miller, *supra*

#### Continuation to receive benefits

Stockholders of water users' association, who, although refusing to execute new water right applications required by federal court decree, continued to enjoy benefits of stockholders, were estopped to assert that directors terminated defendants' relation as stockholders Idaho—Michaelson v Miller, *supra*.

60. Idaho—Michaelson v Miller, *supra*

61. Cal—Watson v. Santa Carmelita Mut Water Co., 137 P 2d 757, 58 Cal.App 2d 709

62 Cal—Watson v Santa Carmelita Mut Water Co., *supra*

63. Cal—Stevens v Curtis, 264 P 2d 606, 122 Cal App 2d 30

64. Cal—Stevens v Curtis, *supra*

65. Ariz—Greene & Griffin Real Estate & Investment Co v Salt River Valley Water Users' Ass'n, 217 P 945, 25 Ariz. 354

66. Idaho—Federal Land Bank of Spokane v Bissonnette, 4 P 2d 364, 51 Idaho 219

67. Idaho—Michaelson v Miller, 26 P 2d 378, 53 Idaho 617

68. Idaho—Michaelson v. Miller, *supra*

erty from being impressed with a lien for assessments to pay the association's debts <sup>69</sup>

*Priority as between construction and maintenance liens.* Under the terms of some statutes, it has been held that the construction lien held by the construction company on the water right and on the land on which the water is used is superior to a maintenance lien of the operating company <sup>70</sup>

### (c) Payment and Enforcement of Lien

A corporation may sue a stockholder to recover the amount of unpaid assessments, but under the terms of some statutes, foreclosure of the assessment lien has been held to be an exclusive remedy, and the existence of unpaid prior assessments, unenforced, a bar to the recovery of subsequent assessments against others.

A corporation may sue a stockholder to recover the amount of unpaid assessments,<sup>71</sup> but under the terms of some statutes, foreclosure of the assessment lien has been held to be an exclusive remedy,<sup>72</sup> and the existence of unpaid prior assessments, unenforced, a bar to the recovery of subsequent assessments against others <sup>73</sup> Where the liability to contribute is contractual, a stockholder in default is not entitled to demand and receive water until he has paid his share in full.<sup>74</sup> Where the construction costs incurred by a construction company are met by the sale of water rights, the company, to enforce the lien for payments due thereon, must show that its work conforms to statutory requirements.<sup>75</sup> An agreement by the company not to enforce payment of assessments on plaintiff's stock and a sale in breach of the agreement is ground for an action by the stockholder against the company,<sup>76</sup> and a stockholder may enjoin the company's enforcement of an assessment lien on the ground of nonperform-

ance of a condition on which the liability rested <sup>77</sup> Where the consumer assents to the terms of the contract between the state and the company, he cannot later question the cost of constructing the irrigation works as estimated in the state's contract.<sup>78</sup> An innocent purchaser from a water company of stock in a canal company without knowledge of the indebtedness due from the water company to the canal company on past assessments on stock would be free from any lien on his stock, and the majority of directors of the canal company which are elected by the purchaser who owns the controlling stock in the canal company would not be required to attempt collection of the assessment <sup>79</sup>

### § 344. — Officers and Agents

The offices, nature of duties, and manner of election thereto, must follow statutory requirements, and where the statute places the management of the corporation in the board of directors, and the articles and bylaws give the requisite authority, the board of directors may borrow money, execute mortgages, and perform other corporate functions without the vote of the stockholders, nor will the court substitute its judgment for that of the directors.

The offices, nature of duties, and manner of election thereto, must follow statutory requirements <sup>80</sup> Where the statute places the management of the corporation in the board of directors, and the articles and bylaws give the requisite authority, the board of directors may borrow money and execute mortgages without vote of the stockholders,<sup>81</sup> accept transfer of the irrigation system,<sup>82</sup> prohibit transfer of water from one tract to another,<sup>83</sup> vote stock held by the company in another irrigation company,<sup>84</sup> and levy assessments for maintenance of the irrigation system <sup>85</sup> A court will not sub-

69. Idaho—Michaelson v. Miller, supra

70. U.S.—Portneuf-Marsh Valley Canal Co v Brown, Idaho, 47 S Ct 692, 274 U.S. 630, 71 L Ed 1243

71. Or.—Big Creek Ditch Co v Hoffman, 280 P 495, 130 Or 408—Big Creek Ditch Co v Hulick, 280 P 492, 130 Or 401

72. Idaho—Payette-Boise Water Users' Ass'n v. Fairchild, 205 P 258, 35 Idaho 97.  
Neb.—Thirty Mile Canal Co v Carskadon, 70 NW 2d 432, 160 Neb 496

**Liability for deficiency after sale**  
Stockholders of a water users' association may be liable under contract for the deficiency remaining after foreclosure sale of land to enforce the assessment lien for payment of the association's debts  
Idaho—Michaelson v Miller, 26 P 2d 378, 53 Idaho 617

73. Idaho—Payette-Boise Water Users' Ass'n v Miller, 259 P 286, 44 Idaho 325

74. Neb.—Swanger v Porter, 128 NW 516, 87 Neb 764

75. Idaho—Idaho Irr Co v. Pew, 141 P 1099, 26 Idaho 272  
67 C.J. p 1370 note 28

76. Colo.—Newland v Frost, 263 P 715, 83 Colo. 207

77. Colo.—Riverside Reservoir & Land Co v Green City Irr. Dist., 151 P 443, 59 Colo. 514  
67 C.J. p 1370 note 30

78. Idaho—Idaho Irr Co v. Pew, 141 P 1099, 26 Idaho 272

79. Wyo.—Laramie Rivers Co v Watson, 241 P 2d 1080, 69 Wyo 333

80. N.M.—State v Tularosa Community Ditch, 143 P 207, 19 NM 352

81. Idaho—Hubbs v. Twin Falls

Canal Co., 133 P 899, 24 Idaho 380

82. Or.—Sears v Orchards Water Co, 236 P 502, 115 Or 291

83. Colo.—Model Land & Irr Co v Madsen, 285 P 1100, 87 Colo 166

84. Utah—Fower v Provo Bench Canal & Irrigation Co, 101 P 2d 375, 99 Utah 267, certiorari denied 61 S Ct 841, 313 U.S. 564, 85 L Ed 1523

**Not controlled by vote of other stockholders**

The board of directors need not vote such stock in the same proportion as individual stockholders voted on the question

Utah—Fower v Provo Bench Canal & Irrigation Co, supra.

85. Or.—Sears v Orchards Water Co, 236 P 502, 115 Or 291

Assessments for construction and maintenance see supra § 343 d (3)

stitute its judgment for that of the directors, but will interfere only where directors act without authority or fraudulently.<sup>86</sup> Under statutes granting power to directors to sell the entire property of the company if authorized by majority of stockholders in general or special meeting, a stockholders' meeting has been held not necessary where the majority have granted authority as a matter of fact.<sup>87</sup> Directors may not sell water rights on terms unfair to the corporation,<sup>88</sup> but their action may be ratified by the stockholders.<sup>89</sup> Nor may they change the ancient course of a canal against the consent of owners who would be injuriously affected thereby,<sup>90</sup> or construct a reservoir out of corporate funds for the exclusive use of a few stockholders only.<sup>91</sup>

Officers in charge of a canal company which is required to render its services to all holders of water rights at the same rate have the duty in fixing rates to seek to obtain profit for the company's services to the full extent compatible with the company's best interests.<sup>92</sup>

*Issuance of certificates.* An officer of a ditch company handling the transaction for issuance and reissuance of a certificate representing stock in the ditch company, is not required to take notice of writings contained on the certificate extraneous to the contents of certificates, which are necessary for him to know in order to perform his duties.<sup>93</sup> The issuance of a certificate by an officer lacking authority to sign such certificate, although it may constitute a defect, is cured by a subsequent reissuance by the proper officer to the purchaser's vendee.<sup>94</sup>

*Ratification.* Failure of the company's board of directors to question its president's authority to enter into a contract which is necessary for the proper maintenance and protection of the company's lands, when such contract is brought to its attention, constitutes an affirmation of the president's action.<sup>95</sup>

*Repudiation.* A water users' association, wishing to take advantage of its agent's lack of authority to

make a stipulation for the refund of cash, received by him in payment of a special stock assessment, must return the amount of the assessment to the one paying such assessment.<sup>96</sup>

*Resignation.* Resignation as secretary and treasurer of a mutual water company is not tantamount to or effective as a resignation as director where the resignation is never accepted and the officer actually continues to serve as director thereafter.<sup>97</sup>

*Meetings.* A valid special meeting of mutual water company's board of directors cannot be held unless a notice of the proposed meeting is given to each director or his waiver of notice is obtained and thereafter attached to the minutes of the meeting,<sup>98</sup> and in the absence of such notice to an absent director, a special meeting is not duly assembled, and its acts, including the levy of assessments, is not valid.<sup>99</sup>

*Disclosure of ballot.* In an action involving the question who was elected to an office, witnesses may be required to disclose for whom they voted, notwithstanding the charter requires a secret ballot.<sup>1</sup>

## § 345. — Corporate Powers and Liabilities

- a. In general
- b. Implied powers
- c. Ultra vires
- d. Contracts
- e. Conveyances
- f. Mortgages and bonds

### a. In General

Irrigation or ditch companies possess such powers as are conferred on them by statute, and may engage in such enterprises, and such only, as are set forth in the certificate of incorporation, and all other powers beyond those given are by implication excluded.

Irrigation or ditch companies possess such powers as are conferred on them by statute,<sup>2</sup> and may engage in such enterprises, and such only, as are

86. Utah—Yardley v. Long Canal Co., 177 P 2d 530, 111 Utah 247 67 C J p 1371 note 38

87. Ariz—Day v Buckeye Water Conservation & Drainage Dist., 237 P 636, 28 Ariz 466

88. Or—Paine v Milton, Freewater & Hudson Bay Irr. Co., 128 P 997, 63 Or 576

89. Or—Paine v Milton, Freewater & Hudson Bay Irr Co, supra

90. N M—Candelaria v Vallejos, 81 P 589, 13 N M. 146.

91. Cal—Atkins v. Hughes, 282 P. 787, 208 Cal. 508

92. U S.—Robbins v. Winters Creek

Canal Co., C C A Neb., 109 F 2d 849

93. Utah—Woolley v Dowse, 41 P 2d 709, 86 Utah 221

94. Utah—Woolley v Dowse, supra

95. Neb—Drainage Dist No 2 of Dawson County v Dawson County Irr Co, 2 N W 2d 321, 140 Neb 866

96. Ariz—Valley Nat Bank v Salt River Valley Water Users' Ass'n, 94 P 2d 647, 54 Ariz. 199.

97. Cal.—Boswell v. Mount Jupiter

Mut Water Co., 217 P 2d 980, 96 Cal App 2d 437

98. Cal—Boswell v. Mount Jupiter Mut Water Co., supra.

99. Cal—Boswell v Mount Jupiter Mut Water Co, supra

Assessments held void irrespective of fact that minutes were captioned "regular"

Cal—Boswell v. Mount Jupiter Mut Water Co, supra

1. Ariz—Saylor v. Gray, 20 P 2d 441, 41 Ariz 558

2. Neb—Thirty Mile Canal Co. v Carskadon, 70 N W 2d 432, 160 Neb. 496.

set forth in the certificate of incorporation,<sup>3</sup> and all other powers beyond those given are by implication excluded.<sup>4</sup> They may acquire land,<sup>5</sup> subject to rights of others therein,<sup>6</sup> and sell land,<sup>7</sup> or a part interest in a dam.<sup>8</sup> They may sell and transfer the irrigation system as a whole, provided the rights of users of water are recognized and protected in the transfer;<sup>9</sup> the proviso having no application to a case where the users have exchanged their water rights for stock in the grantee corporation, thereby surrendering all claim against the corporation under their original rights,<sup>10</sup> or to a case where the users base their rights on their stockholdings in the grantor corporation, alleged to be a mutual company with interests of stockholders in the nature of an easement appurtenant to the land, where it appears that the grantor corporation was formed to supply water to the public, and that its capital stock was commercially valued.<sup>11</sup> A corporation owning a water supply, not dedicated to a public use, and distributing it among users who have easement rights to the water, may, with consent of all having water rights, dedicate it to a public use in order to make the service and terms of delivery subject to regulations and control by public authority.<sup>12</sup>

An irrigation company may not, however, act to the prejudice of the water rights of any one of its stockholders,<sup>13</sup> and it may not control running water except by legal appropriation thereof,<sup>14</sup> nor has it a right to connect with the ditches of another, or

take water therefrom, without statutory authority or the consent of the proprietor,<sup>15</sup> or to transfer its property to individuals without charter authority.<sup>16</sup> It may not contract with a subordinate company for surrender of its capital stock to it without consideration.<sup>17</sup>

A mutual water corporation, with articles of incorporation broad enough to include a right to have a system of distribution of its culinary waters, is empowered to handle the system in accordance with prevailing custom, and if in its management, the stockholders are treated fairly and equitably and their water rights, under such system, are neither damaged or impaired, there is no justification for complaint.<sup>18</sup> Giving to a mutual irrigation corporation the power to control, manage, and distribute water does not constitute a conveyance separating a water right appurtenant to land from the land and does not vest title or right of use in the corporation.<sup>19</sup>

Although a water users' association may not own the water which it furnishes to the lands of the shareholders for irrigation purposes, but may be merely the carrier of water for its shareholders, as is discussed *supra* § 339, the power to determine the source from which each shareholder shall be entitled to have his irrigation water may be delegated to the company by the shareholders.<sup>20</sup> A water users' association, having a right to furnish member landowners with irrigation water consisting of

3. Utah—Zion's Sav Bank & Trust Co v Tropic & East Fork Irr Co, 126 P 2d 1053, 102 Utah 101 67 C J p 1371 note 45

4. Utah—Zion's Sav Bank & Trust Co v Tropic & East Fork Irr Co, *supra*

5. Tex—Westbrook v Missouri-Texas Land & Irrigation Co, Civ App, 195 SW 1154

6. Neb—Fenton v Tri-State Land Co, 131 NW 1038, 89 Neb 479

7. Tex—Dew v American Rio Grande Land & Irrigation Co, Civ App, 13 SW 2d 474, reversed on other grounds, Com App, 25 SW 2d 603

8. US—Twin Falls Canal Co v American Falls Reservoir Dist No 2, D C Idaho, 49 F 2d 632, affirmed, CCA, 59 F 2d 19, certiorari denied 53 S Ct 87, 287 US 638, 77 L Ed 552

9. Cal—Byington v Sacramento Valley West Side Canal Co, 148 P. 791, 170 Cal 124 67 C J p 1371 note 52

**Transfer of assets by failing corporation**

Where irrigation company was in

failing condition and in danger of losing its water filings and other rights it was not only within power of directors and majority stockholders to make arrangement with third person involving transfer of company's property to a corporation organized by him which would save something to the stockholders, but it was their duty to do so

Utah—Beggs v Myton Canal & Irrigation Co, 179 P 984, 54 Utah 120

10. Mont—Dyk v H S Buell Land Co, 227 P 71, 70 Mont 557

11. Mont—Canyon Creek Irr Dist v Martin, 159 P. 418, 52 Mont 339

12. Cal—Franscioni v Soledad Land & Water Co, 149 P. 161, 163, 170 Cal 221.

13. Colo—Stuart v Davis, 139 P 577, 25 Colo App 568 67 C J p 1371 note 55

14. Utah—Munroe v Ivie, 2 Utah 535

15. Neb—Paxton, etc, Irr Canal, etc, Co v Farmers', etc, Irr, etc, Co, 64 NW 343, 45 Neb 884, 50 Am SR 585, 29 L R A 853.

16. Tex—Arno Co-operative Irr Co v Pugh, Civ App, 177 SW 991, modified on other grounds, Com App, 212 SW 470

17. US—Imperial Water Co, No 5, v Holabird, Cal, 197 F 4, 116 CCA. 526

18. Utah—Big Cottonwood Tanner Ditch Co v Kay, 157 P 2d 795, 108 Utah 110

**Means of regulation held proper**

Corporation was authorized by proper action at stockholders' and directors' meeting to require its stockholders to pay for excess water at the cost to corporation and to compel stockholders to install meters at their own expense in order to check on water used by individual stockholder

Utah—Big Cottonwood Tanner Ditch Co v Kay, *supra*

19. Utah—East River Bottom Water Co v Boyce, 128 P 2d 277, 102 Utah 149

20. Ariz—Adams v Salt River Valley Water Users' Ass'n, 89 P 2d 1060, 53 Ariz 374.

commingled water appropriated from normal flow of stream, stored water, and pump water, may not be required to cease giving certain landowners pump water containing harmful salt where they are given pump water because of location of their lands, and use of larger amounts of pump water than river water would render salt harmless.<sup>21</sup> In the case of inequalities resulting from furnishing pump water to certain landowners, the courts should not interfere by suggesting steps to be taken or appointing a water commissioner to supervise delivery of water under supervision of the court, where the association is better qualified for the task and can deliver water more economically and efficiently.<sup>22</sup>

*Refusal to deliver* An irrigation company's articles of incorporation providing for the construction and maintenance of a canal for the conducting of water from a certain stream to a named town, and for the distribution of water to stockholders in proportion to stock ownership does not warrant a refusal to deliver to a stockholder his proportionate share of water on land along the canal system on the ground that the articles of incorporation limit delivery to land in the vicinity of the town,<sup>23</sup> especially where the water rights were conveyed to the corporation in return for stock certificates and there is a uniform conduct on the part of the corporation in distributing water to stockholders in accordance with such ownership.<sup>24</sup>

*Representation by officers and agents* An irrigation corporation is liable for acts of its officers and agents within the scope of their authority.<sup>25</sup>

*Right to petition for changing point of diversion* Under a statute authorizing a petition for changing the point of diversion to be brought by the person or corporation having the right to use the water, an incorporated mutual ditch company may petition, acting as trustee for its stockholders, where the right to use the water is in the stockholders and not in the corporation.<sup>26</sup>

### b. Implied Powers

In the absence of express restrictions, incorporated irrigation companies have the implied power to do acts that may be necessary to enable them to exercise the powers expressly conferred and to accomplish the objects for which they were created.

In accordance with the general rule, stated in Corporations § 945, that, in the absence of express restrictions, corporations have the implied power to do all acts that may be necessary to enable them to exercise the powers expressly conferred and to accomplish the objects for which they were created, irrigation companies, subject to charter restrictions, may borrow money to finance an authorized project,<sup>27</sup> or may guarantee bonds issued therefor.<sup>28</sup> A power to sell water rights is implied from an express power to construct and operate a ditch and to acquire and own water rights,<sup>29</sup> a power to carry water is implied from the power to construct canals,<sup>30</sup> a power to construct dams, from the power to construct power houses and transmission lines,<sup>31</sup> and a power to contract with another corporation for drainage of waste water and use outside of its own territory, from a power to make contracts that are necessary and proper to carry on the business.<sup>32</sup>

### c. Ultra Vires

The claim that an irrigation company has acted outside its powers can be set up only by the state and only in a direct proceeding for that purpose, and stockholders who may have received benefits from expenditures by the company with knowledge of the circumstances under which they were made, are estopped to contend that they were ultra vires. Whether or not a contract is ultra vires depends on whether in entering the contract the company acted within the reasonable scope of its powers.

The claim that an irrigation company has acted outside its powers can be set up only by the state and only in a direct proceeding for that purpose,<sup>33</sup> and stockholders who received benefits from expenditures by the company with knowledge of the circumstances under which they were made, are estopped to contend that they were ultra vires.<sup>34</sup>

21. Ariz—Adams v Salt River Valley Water Users' Ass'n, *supra*

22. Ariz—Adams v Salt River Valley Water Users' Ass'n, *supra*

23. Utah—Syrett v Tropic & East Fork Irr Co., 125 P 2d 955, 101 Utah 568

24. Utah—Syrett v Tropic & East Fork Irr Co., *supra*

25. Wyo—Seaman v Big Horn Canal Ass'n, 213 P. 938, 29 Wyo 391 67 C.J. p 1372 note 76

26. Colo—Monte Vista Canal Co

v Centennial Irrigating Ditch Co., 135 P 981, 24 Colo App 496

27. Ariz—Bethune v Salt River Valley Water Users' Ass'n, 227 P 989, 26 Ariz 525

28. Ariz—Bethune v Salt River Valley Water Users' Ass'n, *supra*. 67 C.J. p 1372 note 65

29. Or—Old Mill Ditch & Irrigation Co v Estell, 133 P. 90, 65 Or 586—Old Mill Ditch & Irrigation Co v Breeding, 133 P 89, 65 Or 581.

30. Cal—San Joaquin & Kings River Canal & Irrigation Co. v James

J Stevenson, 128 P 924, 164 Cal 221

31. Ariz—Bethune v Salt River Valley Water Users' Ass'n, 227 P 989, 26 Ariz 525—Orme v Salt River Valley Water Users' Ass'n, 217 P 935, 25 Ariz 324.

32. Ariz—Brewster v Salt River Valley Water Users' Ass'n, 229 P 929, 27 Ariz 23

33. Colo—Water Supply, etc, Co v Tenney, 51 P 505 24 Colo 344. 67 C.J. p 1372 note 72

34. Idaho—Hansen v Woods, 290 P. 379, 49 Idaho 656.

Whether or not a contract entered into by an irrigation company is ultra vires depends on whether in entering the contract it acted within the reasonable scope of its powers,<sup>35</sup> irrespective of the question of excessive indebtedness of the company at the time of entering into its contractual obligation.<sup>36</sup> An irrigation company's contract, made by its president, who has the sole management of its affairs, with the consent of its board of directors, for the protection and proper maintenance of the company's

lands, is not an ultra vires action on the part of the president.<sup>37</sup>

#### d. Contracts

A mutual irrigation corporation may properly enter into contracts which are reasonable and not beyond its corporate powers, and which are necessary or expedient in the protection, care, and management of its property.

A mutual irrigation corporation may properly enter into contracts which are reasonable and not beyond its corporate powers,<sup>38</sup> and which are necessary or expedient in the protection, care, and man-

#### Benefits received by irrigation company

Where protective association fully performed contract with reservoir company by withdrawing its protest, and reservoir company accepted the fruits thereof in that it was relieved from hazard of not obtaining approval of use of particular lake and secured approval without necessity of a hearing, reservoir company was estopped to set up any claim of ultra vires or invalidity of contract which restricted its use of lake for the protection of littoral owners. Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111.

35. Colo—Kurtz v Reorganized Catlin Canal Co, 41 P 2d 239, 96 Colo 227.

Contract held not ultra vires, in view of broad purposes of company as set forth in its articles. Colo—Kurtz v Reorganized Catlin Canal Co, supra.

#### Contract held ultra vires

Utah—Zion's Sav Bank & Trust Co v Tropic & East Fork Irr Co, 126 P 2d 1053, 102 Utah 101.

#### Estoppel

Where irrigation company entered into ultra vires contract for purchase of water rights and executed note therefor, and vendor executed quitclaim deed conveying his interest in the water, the company was estopped to set up defense of ultra vires in an action on purchase money note if the vendor had any interest in the water that he could convey, and the company by the conveyance received right to use the water, and was not so estopped if the vendor had no such interest. Utah—Zion's Sav Bank & Trust Co v Tropic & East Fork Irr Co, supra.

36. Neb—Drainage Dist No 2 of Dawson County v Dawson County Irr Co, 2 NW 2d 321, 140 Neb 866.

37. Neb—Drainage Dist No 2 of Dawson County v Dawson County Irr Co, supra.

38. Utah—Fower v. Provo Bench Canal & Irrigation Co, 101 P 2d

375, 99 Utah 267, certiorari denied 61 S Ct 841, 313 US 564, 85 L Ed 1523.

Contracts with users for supply of water see infra § 361.

Liabilities on contracts for supply of water see infra § 366.

Ultra vires contracts see supra subdivision c of this section.

#### Contract held reasonable

(1) A contract whereby mutual irrigation company agreed to buy stock in water users' association, to pay assessments on its stock to cover operation, maintenance, and any deficiency caused by other subscribers' defaults, and to deliver mortgage as security to guaranty performance. Utah—Fower v Provo Bench Canal & Irrigation Co, supra.

(2) Amendatory contract between water users association and United States, which provided that repayment of cost of irrigation project could be extended and which reduced assessments on water users association stock, the contract being authorized by stockholders and being ratified by directors after their qualification. Utah—South Cache Water Users Ass'n v. Stockholders of South Cache Water Users Ass'n, 272 P 2d 591, 2 Utah 2d 300.

(3) Contract between reservoir company and protective association relating to its restrictive use of a lake as a reservoir, particularly with reference to water levels. Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111.

#### Contract for merger

(1) A contract for merger entered into by two canal companies calling for diversion of water at source of first company because of prior destruction of diversion facilities of second, and expressly providing that the new stockholders in the first company, consisting of former stockholders in the second, should be given the same amount of water per acre in a given year as old stockholders, is not at variance with a prior decree of a federal court allotting annually to all parties not

to exceed six acre feet per acre, even though the new stockholders are charged with water loss because of extension of the canal, when the federal decree provides that a user should be charged with conveyance loss from the point of diversion. Ariz—Skinner v Graham Canal Co, 266 P 2d 392, 77 Ariz 5, 267 P 2d 1074, 77 Ariz 137.

(2) Where the contract expressly provides that the new stockholders shall be given the same amount of water per acre in a given year as the old stockholders, and expressly governs the distribution of water when water is on turns, it is binding on the parties if, when properly construed and enforced, it will accomplish reasonable equality, as intended by the parties. Ariz—Skinner v Graham Canal Co, supra.

(3) Such contract did not result in unequal distribution when construed as contemplating delivery to new stockholders after depletion by transmission loss a stream of equal size as that delivered to old stockholders before depletion but for one-minute less length of time. Ariz—Skinner v Graham Canal Co, supra.

#### Maintenance and repair of lateral canals

(1) Where some stockholders of a ditch company authorize the company by written agreement to maintain and repair their lateral canals connected with the company's main canal and agree to pay a pro rata share for work, labor, and materials, the company may recover on the contract. Idaho—Hale v McCammon Ditch Co, 244 P 2d 151, 72 Idaho 478.

(2) Such a contract would impose a duty on the company to turn into each of the laterals the total quantity of water to which the stockholders using water from that particular lateral are entitled, and although seepage and evaporation losses from the main canal owned by the ditch company is borne proportionately by all the stockholders, any seepage and loss of water by evaporation from the point at which

agement of its property,<sup>39</sup> and the fact that contracts of the corporation extend beyond the present legally authorized period of its existence in no way affects their validity<sup>40</sup> No liability attaches to an irrigation company under a contract making liability dependent on a contingency which never happened,<sup>41</sup> nor does an agreement by a construction company to turn over its property to a mutual company of settlers on a certain date operate as a transfer of title on that date where the mutual company had not then been formed<sup>42</sup>

A construction company, under contract with an irrigation district to construct a canal, may assign the contract to another without consent of the district, where the contract calls simply for a completed system and it is immaterial by whom it is completed.<sup>43</sup> Sufficiency of performance of a construction contract by an irrigation company is proved, where a substantial compliance,<sup>44</sup> or offer to comply,<sup>45</sup> with its terms is shown, and no liability attaches to the company for failure to carry the construction beyond the point stipulated in the contract,<sup>46</sup> or for failure to discharge a burden not assumed.<sup>47</sup>

Although the terms of a contract for the construction of a drainage canal are to be given effect,<sup>48</sup>

the making and approval for payment by the irrigation company's engineer of monthly estimates of work done in construction of the canal after terminus fixed by the contract is reached constitutes an approval and acceptance of the work done up to such terminus, notwithstanding a failure of the engineer to issue a final certificate of completion of the work as provided by the contract<sup>49</sup> An irrigation company, paying without question its engineer's monthly estimates for excavating a drainage canal beyond the terminus fixed by a written construction contract is estopped to deny its ratification of the engineer's oral contract for continuance of the work,<sup>50</sup> and in the absence of any specific limit as to where the work should stop, where the company informs the workmen employed by the contractor, that it would pay him no more money and that they continue the work at their risk, it is equivalent, in legal effect, to a notification to the contractor to stop work, so as to entitle him to recover for work theretofore done,<sup>51</sup> provided that he produces an engineer's certificate of completion of the additional work in accordance with the terms of the original written contract, or shows a capricious or arbitrary refusal thereof.<sup>52</sup> Failure of the one constructing the canal to furnish vouchers showing payment for all work and materials, as provided by the contract,

the water is turned into the laterals would have to be borne only by the individual users of the various laterals

Idaho—Hale v. McCammon Ditch Co, supra

39. Neb.—Drainage Dist No 2 of Dawson County v. Dawson County Irr Co, 2 NW 2d 321, 140 Neb 866

#### Contract held proper

(1) An irrigation company, authorized by its articles of incorporation to construct, use, operate, and maintain one or more ditches or canals, had power to enter into contract with drainage district for placing of pipe under company's main canal and drainage of its lands by district in order to remove accumulation of flood and seepage waters caused by company's ditch and avoid damage to its property and liability to others

Neb.—Drainage Dist No 2 of Dawson County v Dawson County Irr Co, supra

(2) Where water users association caused irrigation district to be organized under statute as its alter ego to issue bonds, turn proceeds over to association, and levy necessary taxes to pay bonds, so that association could pay off outstanding debt, and association agreed to collect from its members sum sufficient

to reimburse district for amount of taxes required to be levied, refinancing of association's debt was sufficient consideration for contract Ariz—Reichenberger v Salt River Project Agr Improvement and Power Dist, 70 P 2d 452, 50 Ariz 144

(3) Under statute providing for a hearing on water appropriator's application to make final proof and enjoining protests, forbearance by protective association, the membership of which was composed largely of littoral owners, by the withdrawal of association's protest was a good and valid consideration for contract by which reservoir company agreed to maintain lake to be used as reservoir between fixed levels and not to interfere with seasonal uses of lake by littoral owners

Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111

40. Ariz—Citrus Growers' Development Ass'n v Salt River Valley Water Users' Ass'n, 268 P 773, 34 Ariz 105  
67 C J p 1372 note 79

41. N M—Rio Mimbres Irr Co. v Ervein, 167 P 723, 23 N M 190  
67 C J p 1373 note 87

42. Colo—Antero & Lost Park Reservoir Co. v Lowe, 194 P. 945, 69 Colo 409

43. Colo—Antero & Lost Park Reservoir Co v Lowe, supra.

44. Idaho—Ricker v Twin Falls North Side Land & Water Co, 226 P 167, 39 Idaho 93  
67 C J p 1373 note 83

45. Wash—Pasco Reclamation Co v Rankert, 131 P 1143, 73 Wash 363  
67 C J. p 1373 note 84

46. Idaho—Ricker v Twin Falls North Side Land & Water Co, 226 P 167, 39 Idaho 93  
67 C J. p 1373 note 85

47. Cal—Moulton Irrigated Lands Co v Jones, 185 P 684, 43 Cal App 732  
67 C J p 1373 note 86

48. Ariz—Gillespie Land & Irrigation Co. v Hamilton, 29 P 2d 158, 43 Ariz 102

49. Ariz—Gillespie Land & Irrigation Co. v Hamilton, supra

50. Ariz—Gillespie Land & Irrigation Co v Hamilton, supra

**Evidence held sufficient to justify finding of oral contract**  
Ariz—Gillespie Land & Irrigation Co. v Hamilton, supra

51. Ariz—Gillespie Land & Irrigation Co. v Hamilton, supra

52. Ariz—Gillespie Land & Irrigation Co. v. Hamilton, supra



does not defeat his cause of action for the balance due him, where no liens therefor existed and the time for filing liens is past<sup>53</sup> One completing construction of a drainage canal, approved by an engineer as required by the contract, before flood partially filled canal with silt, leaving much of the bottom above grade, cannot be held responsible for such condition,<sup>54</sup> and one contracting to construct one cross section of a drainage canal and accepting partial payment on the basis of the engineer's estimates of the amount of excavation required therefor without objection until the work is finally terminated is not entitled to recover for any additional excavation exceeding that required by the contract.<sup>55</sup>

An incorporated water users' association, acting for its members, may contract with the United States for a supply of water to the district,<sup>56</sup> or one community ditch corporation may contract to enlarge the ditch of another community corporation, the two corporations to exercise a joint control and management of the enlarged portion thereafter<sup>57</sup> A contract between irrigation companies relating to distribution of water, after a decree of a court has been entered, does not lack consideration or rest on an illegal consideration, where the parties were engaged in litigation and made mutual concessions, and there is no showing that the companies disregarded the interest of their stockholders, and the contract is not attended with a public interest<sup>58</sup> Under a contract reserving to landowners becoming members of a mutual water users' association all of their vested rights to the use of water for irrigation, the source of supply of the water is immaterial as long as the water is fit and suitable for irrigation, and the landowners have no right to delivery of water from the same source or at the original point of diversion,<sup>59</sup> and the association has the right to furnish irrigation water consisting of commingled water appropriated from the normal

flow of the stream, stored water, and pump water.<sup>60</sup> Where a contract between a mutual water users' association and landowners becoming members thereof gives the association a right in its sound discretion, to pump underground water for irrigation and drainage purposes, the association may pump water from land without limiting itself to the quantity necessary for drainage, as long as no more water is pumped than is needed for irrigation purposes<sup>61</sup>

The terms of an irrigation company's agreement as to priority of water rights shall be given effect, and will not be modified by any recitals in the contract which would have the effect of nullifying the agreement,<sup>62</sup> nor will any distinction be made between seepage water and other water of a natural stream in determining the irrigation companies' rights under the contract<sup>63</sup> A contract reserving to landowners becoming members of a mutual water users association all of their vested right to the use of water for irrigation means the use of water which is equivalent to the river flow.<sup>64</sup> The right of a mutual water users' association to furnish its members irrigation water consisting of commingled water appropriated from normal flow of stream, stored water, and pump water, cannot be interfered with, where the association and its members had so construed the contract between them, for a long period of time as authorizing the commingling,<sup>65</sup> even though the contract requires the association to give them service equal to the like service furnished the lands of other members, where such water is uniformly furnished the other members<sup>66</sup>

*Approval by stockholders* Stockholders of an irrigation company cannot attack a contract entered into by the company with respect to distribution of water, where after execution of the contract attacked, they approve a contract which provides for the protection of rights under the original contract,<sup>67</sup> and where no action is taken for a long

53. Ariz—Gillespie Land & Irrigation Co v Hamilton, *supra*

54. Ariz—Gillespie Land & Irrigation Co v Hamilton, *supra*

55. Ariz—Gillespie Land & Irrigation Co v Hamilton, *supra*

56. Idaho—Pioneer Irr Dist v Stone, 130 P 382, 23 Idaho 344

57. N.M.—Halford Ditch Co v Independent Ditch Co, 159 P 860, 22 N.M. 169

58. Colo—Kurtz v Reorganized Catlin Canal Co, 41 P 2d 239, 96 Colo 227

59. Ariz—Adams v Salt River Valley Water Users' Ass'n, 89 P 2d 1060, 53 Ariz 374

60. Ariz—Adams v Salt River Valley Water Users' Ass'n, *supra*.

61. Ariz—Adams v Salt River Valley Water Users' Ass'n, *supra*.

62. Colo—Las Animas Consol Canal Co v Hinderlider, 68 P 2d 564, 100 Colo 508

#### Normal high water level

Where contract between protective association composed primarily of littoral owners, and reservoir company permitted reservoir company to maintain waters in lake to normal high water level the contract did not mean the highest level to which water naturally raised prior to contract for a sufficient length of time to make a mark but to the normal or

average height water reached at its highest stages during the years Idaho—Payette Lakes Protective Ass'n v Lake Reservoir Co, 189 P 2d 1009, 68 Idaho 111

63. Colo—Las Animas Consol Canal Co v Hinderlider, 68 P 2d 564, 100 Colo 508

64. Ariz—Adams v Salt River Valley Water Users' Ass'n, 89 P 2d 1060, 53 Ariz 374

65. Ariz—Adams v Salt River Valley Water Users' Ass'n, *supra*

66. Ariz—Adams v Salt River Valley Water Users' Ass'n, *supra*

67. Colo—Kurtz v Reorganized Catlin Canal Co, 41 P 2d 239, 96 Colo 227.

period of time after execution of the contract attacked they may be barred by laches <sup>68</sup>

### e. Conveyances

A purchaser of a water company with notice, actual or constructive, of prior contracts to furnish water is bound by such contracts, but an unacknowledged contract to furnish water is not record notice to the purchaser, although lateral ditches that can be seen constitute constructive notice.

A purchaser of a water company with notice, actual or constructive, of prior contracts to furnish water is bound by such contracts <sup>69</sup> An unacknowledged contract to furnish water is not record notice to the purchaser of its existence, even though filed in the registry, <sup>70</sup> but lateral ditches that can be seen constitute constructive notice, <sup>71</sup> and a corporation organized for the purpose of taking over an irrigation system is chargeable with knowledge of contracts for supply of water made by its predecessor <sup>72</sup> A deed from the construction company to the operating company, under the Carey Act, conveys title to the operating company, <sup>73</sup> and where the works as soon as completed had been turned over to the operating company prior to the conveyance by deed, the operating company was the equitable owner of the system as trustee for the settlers and landowners within the project <sup>74</sup>

### f. Mortgages and Bonds

An irrigation company may generally mortgage its property, but a construction company, under contract to deliver its property to purchasers of water rights after completion, can mortgage only subject to the contract, and the mortgagee takes no greater rights than the mortgagor can transfer.

An irrigation company may generally mortgage its property, <sup>75</sup> but a construction company, under contract to deliver its property to purchasers of

water rights after completion, can mortgage only subject to the contract, <sup>76</sup> and the mortgagee takes no greater rights than the mortgagor can transfer <sup>77</sup> The mortgagee takes title subject to declarations of trust therein by the mortgagor in favor of subsequent vendees of water rights, <sup>78</sup> and subject to existing contracts with owners of water rights, <sup>79</sup> but he does not thereby guarantee their performance <sup>80</sup> The mortgage, by its terms covering after-acquired property, covers lands sold by mortgagor and subsequently repurchased at foreclosure sale under the purchase money mortgage <sup>81</sup> A purchaser at foreclosure of a mortgage on property of an incorporated irrigation company acquires title to the property, subject to statutory reservations that the water still remains appurtenant to the lands of owners who had paid the water rates <sup>82</sup>

The fact that bonds of the corporation extend beyond the present legally authorized period of its existence in no way affects their validity <sup>83</sup> An irrigation district may not set up as a defense to liability on its bonds the nonperformance by the purchaser of the conditions on which they were bought where it appears that the district, with knowledge of facts, waived performance <sup>84</sup>

## § 346. — Insolvency and Receivers, Reorganization, and Dissolution

Irrigation and ditch companies may, when the circumstances of the case warrant, be subject to receivership, reorganization, and dissolution

It is not mismanagement justifying appointment of receiver for the managing officer of a corporation operating an irrigation system to fail to keep canals clean, where corporate funds for the purpose were not available and the canals, even in their present condition, were adequate, <sup>85</sup> or for him

68. Colo—Kurtz v. Reorganized Catlin Canal Co, *supra*

69. Cal—Henrici v. South Feather Land & Water Co, 170 P 1135, 177 Cal 442

#### Rights acquired

A water improvement district and city to which an irrigation company conveys its property take their respective rights subject to previously acquired water rights of landowners under contract, of which water rights the landowners cannot be deprived without reimbursement  
Tex—City of Wichita Falls v. Bruner, Civ App, 165 SW2d 480, error refused

70. Cal—Henrici v. South Feather Land & Water Co, 170 P 1135, 177 Cal 442

71. Cal—Henrici v. South Feather Land & Water Co, *supra*.

72. Or—In re Waters of Willow Creek, 236 P 487, 763, 119 Or 155, rehearing denied 237 P 682, 119 Or 155 and modified on other grounds 239 P 123, 119 Or 155

73. Idaho—Big Wood Canal Co v Chapman, 263 P 45, 45 Idaho 380

74. Idaho—Big Wood Canal Co v Chapman, *supra*

75. Colo—Oligarchy Ditch Co v Farm Inv. Co, 88 P 443, 40 Colo 291

67 CJ p 1373 note 97

76. Idaho—Childs v Neitzel, 141 P 77, 26 Idaho 116

77. Idaho—Childs v Neitzel, *supra* 67 CJ p 1373 note 99

78. US—Adamson v Black Rock Power & Irrigation Co, CCA Wash, 297 F 905, certiorari denied 45 S Ct. 196, 266 US 630, 69 L Ed 477, and appeal dismissed

45 S Ct 196, 266 US 592, 69 L Ed. 458

79. Tex—Dickinson v Dysart, Civ App, 237 SW 615

80. Idaho—Childs v Neitzel, 141 P. 77, 26 Idaho 116

81. US—First Trust & Savings Bank v Bitter Root Valley Irr Co, D C Mont, 251 F 320

82. Idaho—Hobbs v Twin Falls Canal Co, 133 P 899, 24 Idaho 380

83. Ariz—Citrus Growers' Development Ass'n v Salt River Valley Water Users' Ass'n, 268 P 773, 34 Ariz. 105

67 CJ p 1372 note 79

84. US—Emmett Irr Dist v Thompson, Idaho, 253 F 316, 165 CCA 98

85. US—Gila Water Co v Witbeck, CCA Ariz, 29 F 2d 175.

to fail to develop acreage in a time of severe agricultural depression,<sup>86</sup> or for him to fail to re-finance the project, in the absence of evidence of bad faith or unreasonableness in management<sup>87</sup> Title to water flowing in the canals, constituting real property of the canal company, vests in the receiver of such company<sup>88</sup> The receiver has no right to repudiate a contract which has been executed and under which rights have vested<sup>89</sup>

A water right appurtenant to land is not a claim against an insolvent irrigation company, within the meaning of a receivership statute requiring presentation of claims after published notice to all claimants,<sup>90</sup> or within the meaning of a notice, in a receivership proceeding ancillary to the foreclosure of a mortgage on an irrigation system, to all persons having claims of any character and ordering them to intervene<sup>91</sup> Nor will the owner of a water right, who is not a party to proceedings foreclosing a mortgage of the irrigation company's property and placing the same in hands of a receiver, for sale, be affected by the receiver's sale free of encumbrances and water rights<sup>92</sup> A petitioner for receivership of an irrigation company in the interest of minority stockholders, who alleges that a receivership would remedy the depreciation of his property, cannot in the same proceedings claim damages for a permanent depreciation of his land due to the company's failure to supply water<sup>93</sup>

*Reorganization.* Under laws allowing reorganization by purchasers at foreclosure sale of property of the old corporation, a foreclosure sale of property of an irrigation corporation, which conforms to statutory requirements, will not be set aside on charges of fraud, where the facts alleged are consistent with there being an entire absence of fraud,<sup>94</sup> it not being sufficient to allege inadequacy of price paid at the sale, in absence of allegations of facts showing the price paid to have been the result of fraud,<sup>95</sup> or

to allege that stockholders refusing to pay assessments, thereby causing foreclosure, were themselves bondholders requesting foreclosure and stockholders in the new corporation purchasing at foreclosure sale, in the absence of allegations denying that foreclosure was the act of a majority of bondholders acting in good faith<sup>96</sup>

*Dissolution* An irrigation company organized as a private corporation may, under a statute, be declared to be dissolved for failure to comply with statutory requirements as to filing of annual reports<sup>97</sup> On dissolution of a water company in which ownership of stock follows ownership of land, one who fails in suit to quiet title to the land has no right to the liquidating dividend paid on account of the stock<sup>98</sup>

## § 347. Quasi-Public Corporations

- a. Definition and status of corporation as quasi-public
- b. Rights, powers, and duties
- c. Forfeiture of charter

### a. Definition and Status of Corporation as Quasi-Public

For purposes of exercising its regulatory powers, the state may restrict the definition of quasi-public corporations to corporations organized for enumerated purposes, in which case an irrigation company, if outside the enumeration, is not a quasi-public corporation subject to regulation by public authority On the other hand, under various circumstances, irrigation companies have been held to be quasi-public corporations.

For purposes of exercising its regulatory powers, the state may restrict the definition of quasi-public corporations to corporations organized for enumerated purposes in which case an irrigation company, if outside the enumeration, is not a quasi-public corporation subject to regulation by public authority<sup>99</sup> A corporate status as quasi-public has been held to attach to a corporation which furnishes water to the public generally,<sup>1</sup> even though it

86 U.S.—Gila Water Co v Witbeck, supra.

87 U.S.—Gila Water Co v Witbeck, supra

88 Tex.—Mudge v Hughes, Civ App, 212 S W 819

89. Colo.—Dickson v Dick, 151 P 441, 59 Colo 583  
67 C J p 1374 note 17

90. Tex.—Edinburg Irr Co v Pashen, Civ App, 223 S W 329, 332, affirmed, Com App, 235 S W 1088  
67 C J p 1374 note 18

91. Tex.—Edinburg Irr Co v Ledbetter, Civ.App., 247 S W 335, modified on other grounds, Com App, 286 S W 185.

92. Tex.—Edinburg Irr Co v Pashen, Com App, 235 S W 1088  
67 C J p 1374 note 20

93 Tex.—Indiana Co-op Canal Co v Darling, Civ App, 185 S W 1039, 1040  
67 C J p 1374 note 21

94. Cal.—Jones v Sierra Verdugo Water Co, 218 P 454, 63 Cal App 254

95. Cal.—Jones v Sierra Verdugo Water Co, supra

96 Cal.—Jones v Sierra Verdugo Water Co, supra

97. N.M.—State v Sunset Ditch Co, 145 P 2d 219, 48 N.M. 17.

98. Cal.—Capron v Montgomery, 300 P 149, 114 Cal App 631.

99. La.—State ex rel Coco v Riverside Irr Co, 76 So 216, 142 La 10  
67 C J p 1375 note 33

**Possession of secondary franchise** by irrigation company to be corporation and to conduct business requiring no franchise from state does not make possessor a "public utility," or "public service corporation" or "quasi public corporation"  
La.—State ex rel Coco v Riverside Irr Co, supra

1. Cal.—Samuel Edwards Associates v. Railroad Commission of California, 235 P 647, 196 Cal 62  
67 C J p 1375 note 34

offers for public use only the surplus water in its ditches after supplying the needs of its stockholders,<sup>2</sup> or even though it limits the territory reached by its service,<sup>3</sup> and to corporations for promotion and construction of an irrigation system to be turned over to purchasers of water rights after its completion,<sup>4</sup> even though its primary object is to make profits for its organizers.<sup>5</sup> A canal company organized to carry and distribute irrigation water is of the nature of a public service corporation,<sup>6</sup> and a corporation organized to deliver water from a public stream to all landowners within a designated territory applying and paying therefor, but which does not own, by appropriation or otherwise, the water it carries, is regarded as a quasi-public corporation under public duty to carry and deliver water to users who have the water rights by appropriation,<sup>7</sup> regardless of the ownership of stock in the company,<sup>8</sup> and no liability on its part can exist on the theory that it is under the same obligation as a common carrier in respect to the water it undertakes to supply.<sup>9</sup> An irrigation company may be within the statutory definition of a public utility, even though it is privately owned,<sup>10</sup> and managed for profit,<sup>11</sup> has charged different rates to users,<sup>12</sup> and has never been regulated by the county boards,<sup>13</sup> or itself uses for its own pur-

poses most of the water which it furnishes,<sup>14</sup> or has never intended to hold itself out as a public utility, provided the nature of the business carried on is that of a public utility.<sup>15</sup> Nor does its status as a public utility depend on the validity of the title under which it holds its property.<sup>16</sup>

The fact that the irrigation company had purchased water rights from a private riparian owner does not exempt the company from regulation as a quasi-public corporation, where it had been organized under the irrigation statutes, and given the right of eminent domain.<sup>17</sup> Some courts hold that where the power of eminent domain is granted to the corporation, its status as a quasi-public corporation is fixed, regardless of whether it exercises the power or not.<sup>18</sup> In other jurisdictions it is held that the status of an irrigation corporation as quasi-public is not fixed by declarations of the original appropriators of the water as to the purposes of the appropriation,<sup>19</sup> or by the mere posting of notices of appropriation by the company,<sup>20</sup> or by the statement of purposes in the articles of incorporation of the corporation formed by them,<sup>21</sup> or by the mere grant of its chartered powers,<sup>22</sup> but that such status is established by organizing the corporation and proceeding to exercise the powers thus declared,<sup>23</sup> and not until then,<sup>24</sup> since, al-

2. Or—Baker City Mut Irr Co v Baker City, 113 P 9, 58 Or 306

3. Or—Eldridge v Mill Ditch Co, 177 P 939, 90 Or 590.

Wash—State v Department of Public Works, 291 P 346, 158 Wash 462

4. Neb—Fenton v Tri-State Land Co, 131 N.W. 1038, 89 Neb 479  
67 C.J. p 1375 note 37

5. U.S.—Brown v Portneuf-Marsh Valley Irr Co, D.C. Idaho, 299 F 338, modified on other grounds 5 F.2d 895, certiorari denied 46 S Ct 204, 270 U.S. 637, 70 L.Ed 773, and affirmed 47 S.Ct. 692, 274 U.S. 630, 71 L.Ed 1243

6. U.S.—U.S. v Tilley, C.C. Neb., 124 F.2d 850, certiorari denied Scott v U.S., 67 S.Ct. 1281, 316 U.S. 691, 86 L.Ed 1762

7. Ariz.—Olsen v Union Canal & Irrigation Co, 119 P.2d 569, 58 Ariz 306

Neb.—Faught v Platte Val Public Power & Irr Dist, 51 N.W.2d 253, 155 Neb 141.

Ariz.—Whiting v Lyman Water Co, 124 P.2d 316, 59 Ariz 121, affirmed 129 P.2d 995, 59 Ariz 458  
67 C.J. p 1375 note 39

**Held a quasi-public carrier**

Colo.—City and County of Denver v Brown, 138 P 44, 56 Colo 216  
67 C.J. p 1375 note 39 [a]—10 C.J. p 51 note 61 [a].

8. Ariz.—Whiting v Lyman Water Co, 124 P.2d 316, 59 Ariz 121, affirmed 129 P.2d 995, 59 Ariz 458  
—Olsen v Union Canal & Irrigation Co, 119 P.2d 569, 58 Ariz 306

9. Colo.—Wright v Platte Valley Irr Co, 61 P 603, 27 Colo 322.  
10 C.J. p 51 note 61.

10. Cal.—Baldwin v Railroad Commission of California, 275 P 425, 206 Cal 581

11. Mont.—Canyon Creek Irr Dist v Martin, 159 P 418, 52 Mont 339

**Payment of dividends**  
Out of its surplus profits dividends may be paid to its stockholders in the same manner as other public service corporations

Ariz.—Olsen v Union Canal & Irrigation Co, 119 P.2d 569, 58 Ariz. 306.

12. Wash.—State v Department of Public Works, 291 P. 346, 158 Wash 462

13. Cal.—Williamson v Railroad Commission, 222 P. 803, 193 Cal 22

14. Cal.—Williamson v Railroad Commission, supra.

15. Wash.—State v Department of Public Works, 291 P 346, 158 Wash. 462

16. Cal.—Williamson v. Railroad

Commission, 222 P 803, 193 Cal 22

17. Tex.—American Rio Grande Land & Irrigation Co v Mercedes Plantation Co, Civ App, 155 S.W. 286, modified on other grounds, Com App, 208 S.W. 904.  
67 C.J. p 1375 note 47

18. Tex.—American Rio Grande Land & Irr Co v Mercedes Plantation Co, Com App, 155 S.W. 286  
67 C.J. p 1375 note 48

19. Cal.—Brewer v Railroad Commission of California, 210 P 511, 190 Cal 60, error dismissed 45 S. Ct 124, 266 U.S. 641, 69 L.Ed 483

20. Cal.—Palmer v Railroad Commission of California, 138 P. 997, 167 Cal. 163.

21. Cal.—Palmer v Railroad Commission of California, supra.  
67 C.J. p 1376 note 51.

22. Cal.—Brewer v Railroad Commission of California, 210 P. 511, 190 Cal 60, error dismissed 45 S Ct 124, 266 U.S. 641, 69 L.Ed. 483

23. Cal.—Williamson v Railroad Commission, 222 P 803, 193 Cal 22.  
67 C.J. p 1376 note 53

24. Cal.—McCullagh v State Railroad Commission, 210 P 264, 190 Cal 13

67 C.J. p 1376 note 54.

though incorporated under the general laws as a public corporation, the stockholders of an irrigation ditch corporation may so limit operative policy as to convert their corporation into a private or mutual company.<sup>25</sup>

### b. Rights, Powers, and Duties

A quasi-public irrigation company is charged with certain duties to the public by reason of the powers and privileges conferred on it, and it must exercise its rights and privileges fairly, equitably, and impartially as between its patrons.

A quasi-public irrigation company is charged with certain duties to the public by reason of the powers and privileges conferred on it, and it must exercise its rights and privileges, fairly, equitably, and impartially as between its patrons.<sup>26</sup> Where a corporation serves the general public indiscriminately instead of confining its service to its own stockholders its property cannot be taken and sold on execution,<sup>27</sup> nor may the company transfer its property without the approval of the public authority designated by statute applicable thereto.<sup>28</sup> The rights and duties of a canal company of the nature of a public service corporation are modified by the nature of its functions, although it cannot serve the public generally, but only the occupiers of land lying under its ditch.<sup>29</sup>

*Conveyance of a particular tract of land* within a district of an improvement company organized to supply mutual water service vests in the purchaser, not only the title to the land, but also the right to use water appurtenant thereto, and to have it delivered to him by the company.<sup>30</sup>

*Issuance of bonds* Negotiable bonds, executed by a quasi-public district improvement company formed to supply mutual water service by landowners who unanimously adopt a resolution authoriz-

ing issuance of bonds, are not invalid because the landowners may have failed to employ an engineer to investigate the advisability and cost of the proposed construction as required by statute, prior to adoption of the resolution, since the landowners by their unanimous action waive any right to such protection,<sup>31</sup> and are estopped to deny the validity of the bonds which are purchased in good faith and without knowledge of any irregularity.<sup>32</sup> Negotiable bonds issued with a recital that the statutory provisions authorizing their issuance have been fully complied with renders them valid in the hands of a holder in due course, even though there may have been some irregularity in compliance with the statute.<sup>33</sup> Where the statute under which the company is organized, confers a right to a lien for any indebtedness of the company, even though a negotiable bond may be invalid due to an irregularity in its issuance, the lien of the holder of the negotiable bond would be affected only to the extent of the difference between what the holder paid for the bond and its face value.<sup>34</sup> Negotiable bonds of the company have priority over a subsequent mortgage, since the mortgagee takes with constructive notice of the records of the county wherein the land is located, which discloses the lien created by the bonds.<sup>35</sup> A tax sale of land within a district of an improvement company does not discharge the lands from liens of prior negotiable bonds issued by the company.<sup>36</sup>

### c. Forfeiture of Charter

Where a quasi-public water company has forfeited its charter, those who continue its management as trustees are trustees to continue the public use to which the waters had been dedicated, in the absence of evidence showing a revocation of the dedication with consent of all the beneficiaries of such use. A public service commis-

25. Colo—Billings Ditch Co v Industrial Commission, 253 P 2d 1058, 127 Colo 69

26. Tex—Garwood Irr Co v Williams, Civ App, 243 SW 2d 453, error refused no reversible error  
Supervision and regulation of Corporation generally see Corporations §§ 982-992  
Public utilities see Public Utilities §§ 10-12

#### Subject to regulation

Irrigation companies being quasi-public carriers are at all times subject to regulations prescribed by the legislature

Wash—Prescott Irr Co v Flathers, 55 P. 635, 20 Wash 454

27. Neb—Sherman County Irr, etc, Co v Drake, 91 N.W. 512, 65 Neb 699.

28. Cal—Baldwin v Railroad Commission of California, 275 P 425, 206 Cal 581

29. US—U S v Tilley, CCA Neb, 124 F 2d 850, certiorari denied Scott v U S, 67 SCt 1281, 316 US 691, 86 LEd 1762

30. Or—Nelson v McAllister District Improvement Co, 62 P 2d 950, 155 Or 95

31. Or—Nelson v McAllister District Improvement Co, supra

32. Or—Nelson v McAllister District Improvement Co, supra

33. Or—Nelson v McAllister District Improvement Co, supra

**Defense of irregularity not available**  
Negotiable bonds in hands of holder in due course who purchased before maturity were not subject to

defense that they were irregularly issued because landowners did not engage engineer to investigate advisability and cost of proposed construction before issuing bonds.

Or—Nelson v McAllister District Improvement Co, supra

**Recitals held equivalent to warranty** that everything necessary by law to make bonds legal and binding existed

Or—Nelson v. McAllister District Improvement Co, supra

34. Or—Nelson v McAllister District Improvement Co, supra

35. Or—Nelson v McAllister District Improvement Co, supra

36. Or—Nelson v McAllister District Improvement Co, supra

sion may cancel the franchise of a corporation of a public or quasi-public nature

Where a quasi-public water company has forfeited its charter, those who continue its management as trustees are trustees to continue the public use to which the waters had been dedicated, in the absence of evidence showing a revocation of the dedication with consent of all the beneficia-

ries of such use.<sup>37</sup> A public service commission having jurisdiction to cancel a franchise may do so where the franchise is terminable for breach of condition, notwithstanding that the franchise owner is not a public service corporation, where in the exercise of its functions it acts in a public or quasi-public nature<sup>38</sup>

#### D. IRRIGATION WORKS, AND RIGHTS APPURTENANT THERETO

##### § 348. Acquisition of Water Rights

- a By legislative grant
- b By appropriation
- c. By prescription, contract, or purchase

###### a. By Legislative Grant

A company or irrigation district may acquire water rights by legislative grant, but the rights acquired are subject to statutory provisions with respect to prior appropriations, and to the rights of riparian owners

Water or water rights required for the maintenance of an irrigation project may be acquired by the irrigation district or company by legislative grant;<sup>39</sup> but, under the act of congress recognizing and protecting prior appropriators under state laws, the grant, to be effective as against subsequent appropriators of the same water, must be followed by an actual appropriation and application of the waters to a beneficial use prior to the other appropriations.<sup>40</sup> Such grant, although operative to convey rights in streams on public lands, does not operate as a conveyance to the grantee of a right to control or manage waters anywhere within the jurisdiction in disregard of the rights of individual claimants,<sup>41</sup> and it does not, of itself, con-

vey any privately owned rights,<sup>42</sup> but such rights must still be acquired from the riparian proprietors by purchase or condemnation.<sup>43</sup>

###### b. By Appropriation

An irrigation district or company may acquire a water supply by appropriation under the same rules which govern appropriation by private persons, and may, under statutes, have rights appurtenant to particular land transferred to other lands, subject to constitutional and statutory limitations and outstanding rights.

An irrigation district or company may acquire a water supply for its purposes by a lawful appropriation of streams on the public domain, under the rules which govern appropriations by private persons,<sup>44</sup> and may, under the statute, have rights appurtenant to particular land transferred to other lands,<sup>45</sup> subject to constitutional and statutory limitations,<sup>46</sup> and to the existing rights of prior appropriators,<sup>47</sup> or other rights outstanding<sup>48</sup>

*Seepage waters from constructed works* Under a statute seepage water from "constructed works," for which public waters have been appropriated, is also subject to appropriation, in the first instance, by the owner of the works if he appropriates with-

37. Cal—Samuel Edwards Associates v Railroad Commission of California, 235 P 647, 196 Cal 62 Corporations generally see Corporations §§ 1694-1726  
Administration of corporation generally after dissolution by persons acting as trustees see Corporations §§ 1745-1747

38. U.S.—Public Service Commission of Puerto Rico v Havemeyer, Puerto Rico, 56 S Ct 360, 296 US 506, 80 L Ed 357, rehearing denied 56 S Ct 496, 297 US 727, 80 L Ed 1010

Cancellation of franchise held valid U.S.—Public Service Commission of Puerto Rico v Havemeyer, supra

Evidence held to support finding that owner of franchise for diversion of water from lake for purpose of irrigation knowingly permitted artificial dam to exist and raise level of lake, and to authorize public

service commission to institute proceedings against franchise owner

Havemeyer v Public Service Commission of Puerto Rico, CCA Puerto Rico, 74 F 2d 637, reversed on other grounds 56 S Ct 360, 296 US 506, 80 L Ed 357, rehearing denied 56 S Ct 496, 297 US 727, 80 L Ed 1010

39. Tex—Mud Creek Irr, etc, Co v Vivian, 11 SW 1078, 74 Tex 170

Condemnation see Eminent Domain § 47  
Appropriation of public waters generally see supra §§ 157-205.

40. Colo—Platte Water Co v Northern Colorado Irr Co, 21 P 711, 712, 12 Colo 525.  
67 C J. p 1376 note 63

41. Utah—Munroe v Ivie, 2 Utah 535

42. Tex—Mud Creek Irr, etc, Co v Vivian, 11 SW 1078, 74 Tex 170.

43. Tex—Mud Creek Irr, etc, Co. v Vivian, supra.

44. NM—Albuquerque Land, etc, Co v. Gutierrez, 61 P 357, 10 N M 177, affirmed 23 S Ct. 338, 188 US 545, 47 L Ed 588

67 C J p 1376 note 68  
Appropriation of waters on public lands generally see supra §§ 167-205.

45. Or—In re Willow Creek, 144 P 505, 146 P 475, 74 Or 592.  
67 C J. p 1377 note 69

46. NM—Young & Norton v Hinderlider, 110 P 1045, 15 NM 666  
67 C J p 1377 note 70

47. Colo—Colorado Land, etc, Co v Rocky Ford Canal, etc, Co, 34 P 580, 3 Colo App 545

48. Or—In re Waters of Willow Creek, 237 P 682, 236 P 487, 239 P 123, 119 Or 155  
67 C J p 1377 note 72.

in one year after completion of the works,<sup>49</sup> and, if not, then by anyone desiring to appropriate, on payment of charges for storage and carriage, provided the seepage water can be traced to the owner's works,<sup>50</sup> and reservoirs and ditches are "constructed works" within the meaning of this statutory rule.<sup>51</sup>

*Return waters* In accord with general principles with respect to return waters discussed supra § 185, and abandonment, discussed supra § 193, the owner of an irrigation project has an interest in appropriative rights to the extent of obtaining the fullest use for the project and may retain control over the water until abandonment,<sup>52</sup> but when return flows are abandoned, they become subject to appropriation downstream and are no longer subject to control for further use in the project.<sup>53</sup>

*Storage and direct irrigation, priorities* An appropriation may be for water storage or for direct irrigation,<sup>54</sup> statutes in some states providing for primary reservoir permits which do not include the right to divert and use the stored water,<sup>55</sup> and secondary permits for its use in direct irrigation.<sup>56</sup> Where the owners of the reservoir site are themselves the appropriators and utilize the site for the purpose of effecting the appropriation, they have dedicated it to that purpose and it be-

comes an integral part of the water right, and is included in a deed conveying land and water rights appurtenant thereto.<sup>57</sup> Rights as between conflicting claimants are determined by priority of appropriation,<sup>58</sup> and the appropriation of water by an irrigation corporation follows the same general rule as to the priority of right, as though the appropriation was made by an individual.<sup>59</sup> An owner who establishes an appropriation for direct irrigation prior in time to an appropriation for storage is entitled to direct irrigation to the extent of his appropriation without diversion for storage,<sup>60</sup> and one who seeks to enforce an alleged right to have the waters diverted to storage as against an appropriator for direct irrigation must establish the priority of his appropriation.<sup>61</sup> He cannot do so by showing a custom dividing the year into direct irrigation and storage seasons in conflict with statutory provisions,<sup>62</sup> or by proving an agreement of other appropriators for a division of the year in accordance with such alleged custom.<sup>63</sup> A subsequent appropriator may, however, store waters not used by the prior appropriator for direct irrigation.<sup>64</sup>

When the owners of upper and lower reservoirs are entitled to particular shares of the water of a stream, they may determine by agreement the methods of diversion to be used.<sup>65</sup>

49. NM—Vanderwork v Hewes, 110 P 567, 15 NM 439

50. NM—Vanderwork v Hewes, supra

51. NM—Vanderwork v Hewes, supra

52. US—State of Nebraska v State of Wyoming, Neb & Wyo, 65 S Ct 1332, 325 US 589, 89 LEd 1815

53. US—State of Nebraska v State of Wyoming, supra

54. Colo—Comstock v Larimer & Weld Reservoir Co, 145 P 700, 58 Colo 186, Ann Cas 1916A 416—South Platte Ditch Co v Larimer & Weld Reservoir Co, 145 P 707, 58 Colo 185.

55. Or—Cookinham v Lewis, 114 P 88, 115 P 342, 58 Or 484

56. Or—Cookinham v Lewis, supra.

57. US—Oscarson v Norton, CC A Mont, 39 F2d 610.

58. Colo—Comstock v Larimer & Weld Reservoir Co, 145 P 700, 58 Colo 186, Ann Cas 1916A 416—South Platte Ditch Co v Larimer & Weld Reservoir Co, 145 P 707, 58 Colo 185

**Rights of appropriator**

One constructing reservoir under state engineer's permit downstream

from point of diversion of water by holder of prior right to use thereof, was entitled to store in such reservoir annually only amount of water which could be put to beneficial use in irrigation of quantity of land for irrigation of which he had certificate of water storage right from state water board, less amount of land which he had abandoned right to irrigate by non-use of water, with sufficient margin to take care of normal storage and transportation losses, where flow of stream was sufficiently constant to obviate necessity for carrying over a reserve against a dry year, water impounded in reservoir, constructed under permit from state engineer for storage of quantity of water limited by state water board's water storage right certificate, must not be used on lands having only stream flow right, and any water so used must be charged against such right

Or—Tudor v Jaca, 164 P2d 680 178 Or 128, rehearing denied 165 P2d 770, 178 Or 126

59. Or—In re Hood River, 227 P 1065, 114 Or 112, error dismissed 47 S Ct 245, 273 US 647, 71 L Ed 821

60. Colo—Comstock v Larimer & Weld Reservoir Co, 145 P 700, 58

Colo 186, Ann Cas 1916A 416—South Platte Ditch Co v Larimer & Weld Reservoir Co, 145 P 707, 58 Colo 185

61. Colo—Comstock v Larimer & Weld Reservoir Co, 145 P 700, 58 Colo 186, Ann Cas 1916A 416—South Platte Ditch Co v Larimer & Weld Reservoir Co, 145 P 707, 58 Colo 185

62. Colo—Comstock v Larimer & Weld Reservoir Co, 145 P 700, 58 Colo 186, Ann Cas 1916A 416—South Platte Ditch Co v Larimer & Weld Reservoir Co, 145 P 707, 58 Colo 185

63. Colo—Comstock v Larimer & Weld Reservoir Co, 145 P 700, 58 Colo 186, Ann Cas 1916A 416—South Platte Ditch Co v Larimer & Weld Reservoir Co, 145 P 707, 58 Colo 185

64. Idaho—Knutson v Huggins, 115 P2d 421, 62 Idaho 662

**Flood and winter flow waters**

Idaho—Knutson v Huggins, supra

65. Utah—Watson v Deseret Irr Co, 169 P2d 793, 110 Utah 78

**Agreement construed**

Where agreement provided that river commissioners should after January 1st of each year release from upper storage reservoir for

When water has been diverted from a stream and stored in a reservoir it is no longer "public water" but is the property of the appropriator, impressed with a public trust to apply it to beneficial use.<sup>66</sup> If the reservoir owner owns land subject to irrigation from the reservoir, he may apply it to his own land, or sell it to others, or both, according to the priority of their applications,<sup>67</sup> but he may not waste water, or withhold it from persons who make application to rent it.<sup>68</sup>

*Proceedings to effect appropriation.* Under a statute providing for primary permits for storage of water in reservoirs and secondary permits for use of specified portions of the stored water of applicant's land, the use of water on particular lands, not its promiscuous sale, is the ultimate purpose,<sup>69</sup> and an appropriation of water for irrigation purposes cannot be made except under a permit for which application must be made.<sup>70</sup> A reservoir company may supply water to lands not originally included in the reservoir project provided the total of lands to be supplied does not exceed the total permitted by its permits.<sup>71</sup> Jurisdiction of the application and proceedings thereunder are regulated by statute, and must conform thereto.<sup>72</sup> The issue under such an application involves the public interest, and not merely the private interests of applicant.<sup>73</sup> The power of the governmental en-

gineer to reject an application as being contrary to the public interest is not limited to cases in which the project is shown to be a menace to the public health,<sup>74</sup> but consideration may and should be given to such questions as the soundness of the enterprise, the availability of unappropriated water and its sufficiency in volume to serve adequately the proposed district, the proposed cost of the service per acre, and the uses to which the water is to be put.<sup>75</sup> As between rival groups of applicants, the decision is therefore based, not on priority in the filing of applications, but on their comparative merit in view of these questions of public interest involved.<sup>76</sup> The fact that one group consists of the settlers who are to use the water should be given consideration, but it is not controlling if other circumstances favoring the public interest, exist,<sup>77</sup> the question being, where the application is for a primary reservoir permit, which group is the better able to carry out plans for the reclamation of desert lands, both public and private.<sup>78</sup>

### c. By Prescription, Contract, or Purchase

An irrigation company may acquire water rights by prescription, contract, or purchase

An irrigation district or company may acquire

transmission to lower reservoir so much of water accumulated from storage flings as was necessary to satisfy priority of lower reservoir awarded under prior decree without jeopardizing water allocated to upper reservoir under such decree, and that if more water reached lower reservoir than had been awarded it under decree, upper reservoir should receive credit therefor the following year, upper reservoir could not get credit for any of water which was stored in lower reservoir because upper reservoir was filled up to its allowable storage capacity at time of storage in lower reservoir  
Utah—Watson v Deseret Irr Co, supra

66. Idaho—Washington County Irr Dist v Talboy, 43 P 2d 943, 55 Idaho 382

67. Idaho—Washington County Irr Dist v Talboy, supra.

68. Idaho—Washington County Irr Dist v Talboy, supra.

69. Or—Cookinham v Lewis, 115 P 342, 114 P 88, 58 Or 484

70. Or—Cookinham v Lewis, supra

**Description of lands to be irrigated**  
(1) Under statute providing for permit for construction of reservoirs and storage of water, permit need

not incorporate description of land to be irrigated

Wyo—Anderson v Wyoming Development Co, 154 P 2d 318, 60 Wyo 417

(2) A reservoir is not a "distributing work" within statute requiring application for permit for construction of ditch, canal, or other distributing work to incorporate description of land to be irrigated  
Wyo—Anderson v Wyoming Development Co, supra

### Description of works

Land development company which was granted a permit to construct a reservoir in which to store water, was entitled to dig channels between basins in the reservoir so as to utilize all the water therein, whether such channels were shown on maps filed with application for permit or not

Wyo—Laramie Rivers Co v Le Vasseur, 202 P 2d 680, 65 Wyo 414

71. Wyo—Anderson v Wyoming Development Co, 154 P 2d 318, 60 Wyo 417

72. NM—Young & Norton v Hinderlider, 110 P 1045, 15 NM. 666 67 C J p 1378 note 89

### Notice of lapse of applications

Where no assignments or trans-

fers of irrigation district's applications to state engineer for appropriation of water from creek were filed in his office and district did not follow statutory procedure for its dissolution after its directors decided to discontinue business, state engineer properly mailed to district notices of time for filing proof of construction work and of lapse of applications for failure to file such proof, though county had notified him that county owned most of lands for which applications were made by virtue of tax sales and hence trial court erred in finding that engineer had failed to give legal notice of final proof and lapsing of applications

Utah—Duchesne County v Humphreys, 148 P 2d 338, 106 Utah 332

73. NM—Young & Norton v Hinderlider, 110 P 1045, 15 NM. 666

74. Or—Cookinham v Lewis, 114 P 88, 115 P 342, 58 Or 484 67 C J p 1378 note 91.

75. NM—Young & Norton v Hinderlider, 110 P 1045, 15 NM. 666

76. Or—Cookinham v Lewis, 115 P 342, 114 P 88, 58 Or 484

77. NM—Young & Norton v Hinderlider, 110 P 1045, 15 NM. 666

78. Or—Cookinham v Lewis, 115 P 342, 114 P 88, 58 Or. 484.



water rights by prescription,<sup>79</sup> in which case a taking under claim of right, not merely a taking, must be proved;<sup>80</sup> or it may acquire such rights by contract<sup>81</sup> or by purchase,<sup>82</sup> subject to constitutional or statutory limitations on the authority to purchase,<sup>83</sup> and to the terms of the deed,<sup>84</sup> and to rights already existing in others than the grantor or grantors.<sup>85</sup>

### § 349. Rights of Way

- a. Acquisition
- b. Title and rights acquired
- c. Forfeiture

#### a. Acquisition

- (1) Over public lands of the United States
- (2) Over lands of state and county
- (3) Over private lands

#### (1) Over Public Lands of the United States

Under an act of congress a right of way over public lands of the United States may be acquired for irrigation purposes, and the grant is operative against the United States and persons acquiring rights in, or title to, the land after a right of way has been taken.

Under an act of congress, and for uses enumerated in the act, irrigation and ditch companies may acquire a right of way through the public lands and reservations of the United States,<sup>86</sup> including Indian reservations, as considered in Indians § 33. This grant is operative against the United States

and persons acquiring rights in, or title to, land after a right of way has been taken,<sup>87</sup> especially in the case of a homestead entry made subject to such rights of way,<sup>88</sup> but a right of way cannot be acquired over land formerly a part of the public domain but which had passed into private ownership at the time of locating the proposed ditch, canal, or reservoir, and of the approval of the map therefor,<sup>89</sup> unless the act of congress under which private ownership was acquired reserved a right of way for ditches or canals constructed by the authority of the United States without reference to the time of such construction,<sup>90</sup> or unless the privately owned land is subsequently forfeited to the United States.<sup>91</sup> A right of way cannot be acquired under the act for a purpose not enumerated<sup>92</sup> or implied,<sup>93</sup> or for a purpose enumerated in the statute but fraudulently omitted from the application therefor,<sup>94</sup> nor is a person, under the law, entitled to an easement over any public lands for a reservoir, ditch, or canal, used in connection with water rights until he has first acquired a vested and accrued water right.<sup>95</sup>

*Statutory proceedings to acquire.* Proceedings before the land office to acquire a right of way for irrigation purposes must follow strictly the requirements of the act of congress,<sup>96</sup> although a canal company may acquire a right of way by complying with the statutory procedure after the actual construction of its canal.<sup>97</sup> An application must be made and filed,<sup>98</sup> and in his application applicant

79. Cal.—Arroyo Ditch & Water Co. v Baldwin, 100 P 874, 155 Cal 280

Right to have waters stored in a particular reservoir may be acquired by prescription

Colo.—Haines v Marshall, 185 P 651, 67 Colo 28

80. Tex.—Lakeside Irr Co v Kirby, Civ App, 166 SW 715.

81. Utah.—East Mill Creek Water Co v Salt Lake City, 159 P 2d 863, 108 Utah 315

67 C J p 1378 note 98

Contract construed as to amount of supply promised

Utah.—East Mill Creek Water Co v Salt Lake City, supra

82. Idaho.—Beecher v Cassia Creek Irr Co, 154 P 2d 507, 66 Idaho 1

67 C J p 1378 note 99

Exchange for stock

An irrigation company may acquire water rights in exchange for stock

Utah.—Frandsen v Piute Reservoir & Irrigation Co, 148 P 2d 804, 106 Utah 378

83. U.S.—Imperial Water Co. No. 5

v Holabird, Cal, 197 F. 4, 116 CCA 526.

67 C J p 1378 note 1

84. Colo.—Terrace Irr Dist v Braden, 19 P 2d 756, 92 Colo 292

67 C J p 1378 note 2

85. Idaho.—Nampa & Meridian Irr Dist v Briggs, 147 P. 75, 27 Idaho 84

67 C J p 1378 note 3

86. U.S.—Utah Power, etc Co v U S, Utah, 37 S Ct 387, 243 US 389, 67 L Ed 791

Rights of way for ditches, canals, or other works of appropriators of public waters generally see supra § 192

87. Colo.—Farmers' High Line Canal, etc, Co v. Moon, 45 P 437, 22 Colo 560

67 C J p 1378 note 8.

88. Idaho.—Uhrig v Crane Creek Irr Dist, 260 P. 428, 44 Idaho 779

89. Colo.—Nippel v Forker, 56 P 577, 26 Colo 74

67 C J p 1379 note 10

90. U.S.—U S v Van Horn, D C Colo, 197 F 611

67 C J p 1379 note 11.

91. U.S.—Maffet v. Quine, C C Or, 95 F 199

67 C J p 1379 note 12

92. U.S.—Kern River Co v U S, Cal, 42 S Ct 60, 257 US 147, 66 L Ed 175

67 C J p 1379 note 13

93. Idaho.—Crane Falls Power & Irrigation Co v Snake River Irrigation Co, 133 P 655, 24 Idaho 63

67 C J p 1379 note 14

94. U.S.—U S v Kern River Co, CCA Cal, 264 F 412, modified on other grounds 42 S Ct 60, 257 US 147, 66 L Ed 175

95. Utah.—Nielson v Sandberg, 141 P 2d 696, 105 Utah 93

67 C J p 1379 note 16

96. U.S.—U S v Kern River Co, CCA Cal, 264 F 412, modified on other grounds 42 S Ct 60, 257 US 147, 66 L Ed 175

N.M.—U S. v Lee, 110 P 607, 15 NM 382

97. Ariz.—Clausen v Salt River Valley Water Users' Ass'n, 123 P 2d 172, 59 Ariz 11.

98. U.S.—U S v. Kern River Co, CCA Cal, 264 F 412, modified on

must truthfully declare the purpose for which the right of way is to be used,<sup>99</sup> and, within twelve months after government survey of the land, must file maps of his location for the approval of the secretary of the interior.<sup>1</sup> However, the act contemplates the granting of rights of way over land not yet surveyed and for which maps, although filed, cannot be approved until after survey. The grant becomes fixed, so far as the right of way is concerned, on the construction of the ditch or canal, the approval of the secretary afterward being in the nature of a confirmation of the grant and a completion of the record title,<sup>2</sup> but the construction must be completed before title to the right of way vests,<sup>3</sup> and, where applicant is a corporation, the acts taken under the statute to conform therewith must be the acts of the corporation, not of the sole stockholder therein.<sup>4</sup> On approval by the secretary, the maps relate back, as against intervening claims, to the date of filing in the local land office.<sup>5</sup> The claim to right of way is defeated by withdrawal of land from entry before filing of application, or, in the case of unsurveyed lands, before construction is completed,<sup>6</sup> or, in the case of surveyed lands, by refusal of the secretary of the interior to approve.<sup>7</sup> Under other sections of the acts of congress, prior appropriators of water whose water rights have vested under local customs, laws, and decisions of court, and who have constructed ditches and canals to carry the water, are protected, and their right of way is acknowledged and confirmed,<sup>8</sup> even though their map on file at the land office has not been approved,<sup>9</sup> their title in such case being based, not on a grant from the federal government, but on recognition of a right vested and accrued under state laws,<sup>10</sup> but canals and

ditches must have been constructed and in use to give the owner protection under those sections of the act against a subsequent entryman.<sup>11</sup> The United States may maintain a suit to set aside a grantee's title on the ground of fraud in its procurement.<sup>12</sup>

*Effect of abandonment of proceedings.* Proceedings to acquire such right of way abandoned before final action taken by the land office thereon give applicant no rights enforceable against a homestead entryman who subsequently enters and occupies,<sup>13</sup> nor may such applicant claim a right under a grant by earlier homestead claimants who have since abandoned their entries, the land reverting to the United States;<sup>14</sup> but, if applicant, although failing to prosecute, actually appropriates and uses the water under a permit granted by the state, his interest in the right of way, confirmed under those circumstances by another provision of the act of congress, is paramount, and the rights of the homesteader under an entry subsequently made are junior and inferior.<sup>15</sup>

## (2) Over Lands of State and County

A right of way over state or county lands may be acquired by legislative grant.

A right of way for irrigation purposes may be acquired over public land belonging to, and granted by, a state, and such grant is operative as against the state and persons claiming rights subsequently acquired from the state,<sup>16</sup> and such grant may provide for rights of way for service ditches to lands of individual water users.<sup>17</sup> A right of way over county lands may be acquired by legislative grant where the legislature in giving the lands to the county reserved the right to regulate their sale.<sup>18</sup> Where irrigation ditches are constructed

other grounds 42 S Ct 60, 257 US 147, 66 L Ed 175

99. US—U S v. Kern River Co, supra.

1. US—U S. v. Kern River Co, supra.

NM—U S v. Lee, 110 P 607, 15 NM 382

2. NM—U S v. Lee, supra 67 C J p 1379 note 21

3. US—U S. v. Rickey Land, etc, Co, C C Cal, 164 F 496

4. Tex—Toyaho Creek Irr Co v Hutchins, 52 S W 101, 21 Tex Civ App 274

5. Wyo—Johnson Irr Co v. Ivory, 24 P 2d 1053, 46 Wyo. 221.

6. US—U S v. Rickey Land, etc, Co, C C Cal, 164 F. 496

7. US—U S. v. Rickey Land, etc, Co, supra.

"A right of way grant in prae-

senti does not vest until approval of the application by the secretary" DC—U S ex rel Sierra Land & Water Co v Ickes, 84 F 2d 228, 231, 65 App DC 375, certiorari denied 57 S Ct. 24, 299 US 562, 81 L Ed 414.

8. Ariz—Gila Water Co v Green, 232 P 1016, 27 Ariz 318, modified on other grounds on rehearing 241 P 307, 29 Ariz 304

Neb—Rasmussen v Blust, 122 NW 862, 85 Neb 198, 133 Am SR 650

9. Neb—Rasmussen v Blust, supra.

10. Neb—Rasmussen v Blust, supra.

11. Neb—Rasmussen v Blust, supra.

12. US—U S v. Kern River Co, C C Cal, 264 F. 412, modified on other grounds 42 S Ct. 60, 257 U. S 147, 66 L Ed 175

13. Neb.—Rasmussen v. Blust, 120

NW. 184, 83 Neb 678, reversed on other grounds 122 NW 862, 85 Neb 198, 133 Am SR 650

14. Neb—Rasmussen v Blust, supra.

15. Neb—Rasmussen v Blust, 122 NW 862, 85 Neb 198, 133 Am S R 650

16. Idaho—Idaho-Iowa Lateral & Reservoir Co v Fisher, 151 P. 998, 27 Idaho 695

Tex—Imperial Irr Co v Jayne, 138 S W 575, 104 Tex. 395, Ann Cas 1914B 322

17. Idaho—McElroy v Helmer, 222 P. 290, 38 Idaho 327.

Notice to purchaser of servient estate see Easements § 49 67 C J p 1380 note 35

18. Tex—Washington County v. Pendleton, Civ App, 178 S.W. 979. 67 C J p 1376 note 62 [a]

over state land without securing the right to do so, only the state may complain <sup>19</sup>

**Statutory grant to United States** It has been held that, under a state statute granting rights of way over all state lands for ditches constructed by and under the authority of the United States and providing for reservation of such rights in all conveyances by the state, the United States has a right of way across lands granted to private persons by the state by patents containing such a reservation, although the ditches are to be constructed subsequent to the conveyance to the private person.<sup>20</sup> It has been held, however, that in the absence of acceptance of the grant to the United States by act of congress or by construction of a ditch, prior to a conveyance by the state without reservation to a private person, the rights of the private person are not subject to a right of way of the United States <sup>21</sup> A statute granting such a right of way over the lands of a territory does not grant a right of way over lands which never belonged to the territory but which were granted directly to the state <sup>22</sup>

### (3) Over Private Lands

A right of way over private lands may be acquired by consent, by purchase, by prescription, or by eminent domain

Generally a right of way over private lands can be acquired only by the consent of the owner, by eminent domain, or by prescription <sup>23</sup> Such a right of way may be acquired by purchase,<sup>24</sup> subject to rights reserved to regulate the manner of its enjoyment,<sup>25</sup> and subject, in case of purchase from a consumer of the water, to the terms and conditions imposed in the deed as to the furnishing of water, as considered *infra* § 360 A right of way for irrigation purposes may be acquired by prescription, provided the essentials of a prescriptive title are proved,<sup>26</sup> or by long continued use under claim of right and expenditure of money with the acquiescence of the owner of land and other affirmative acts and conduct on the part of the owner amounting to estoppel,<sup>27</sup> or merely by taking possession without interference by the owner of the land where the one who takes possession has a right to take it by condemnation,<sup>28</sup> the fact that

19. Idaho—Swan v Sproat, 209 P 1070, 36 Idaho 75

20. US—U S v Ide, CCA Wyo., 277 F 373, affirmed Ide v. U S, 44 S Ct 182, 263 US 497, 68 L Ed 407

21. US—U S v. Pruden, C A Okl., 172 F 2d 503

22. US—U S v Pruden, *supra*

23. Utah—Nielson v Sandburg, 141 P 2d 696, 105 Utah 93

#### Arbitrary seizure

Generally, no one can arbitrarily seize and use another's ditch or interest in a ditch

Utah—Nielson v Sandberg, *supra*

24. Wash—Hayward v Mason, 104 P 139, 54 Wash 649.  
67 C J p 1380 note 39

#### Instrument insufficient as conveyance

Where alleged contract of sale of an easement was executed in name of landowner by his son who was his attorney and no power of attorney authorizing the son to bind landowner was shown and son was representing landowner only in capacity of an attorney at law and not as an attorney in fact with power to execute instruments of conveyance, instrument allegedly conveying easement to construct irrigation works to water district did not rise to dignity of a conveyance

Tex—Armstrong v Gaddis, 144 S W. 2d 539, 135 Tex 580

25. Idaho—City of Nampa v Nampa & Meridian Irr Dist, 115 P 979, 19 Idaho 779.

26. Cal—Board of Directors of Tur-

lock Irr Dist v Fair, 276 P 2d 109, 128 Cal App 2d 833—Board of Directors of Turlock Irr Dist v City of Ceres, 254 P 2d 907, 116 Cal App 2d 824

67 C J p 1380 note 42

#### Interruption of possession

Landowner's adverse possession of right of way over adjoining land for irrigation ditch was not interrupted by mere verbal protest of adjoining landowner, especially in view of statutory definitions of peaceable possession and adverse possession

Ariz—Conness v Pacific Coast Joint Stock Land Bank of San Francisco, 50 P 2d 888, 46 Ariz 338

#### Adverse user not shown

Where county widened, deepened and cleaned drainage ditches without asserting right to ditches or water therein or acting adversely to original owners of such ditches, county did not establish easement by prescription to such ditches

Tex—Guelker v Hidalgo County Water Imp Dist No 6, Civ App, 269 S W 2d 551, error refused no reversible error

#### Deviation in course of lateral ditch

Slight temporary deviations from year to year, in course of a lateral irrigation ditch across a field, do not affect an easement therein, where lateral has followed substantially the same course for more than statutory period of ten years

Neb—Clark v Meeker Ditch Co, 268 N W 344, 131 Neb 506

#### No right to prescription in drains appropriated to public use

Where irrigation district had

adapted natural drains to provide land within its boundaries with irrigation water and to maintain sufficient drainage channels to protect the land from injury from irrigation water, the drains had been appropriated to public use and upstream property owners whose irrigation waters were being discharged into drainage facilities could not, through the use of those facilities, obtain a prescriptive right to discharge irrigation waters into the drain without limitation—Provident Irr Dist v Cecil, 271 P 2d 157, 126 Cal App 2d 13

#### Surplus or waste irrigation waters

(1) An easement for drainage of waste waters from an irrigation ditch into a creek flowing through the land of another so as greatly to raise the natural level of such creek cannot be acquired until it has been freely exercised without material change under a claim of right for ten years

Neb—Hagadone v Dawson County Irr Co, 285 N W 600, 136 Neb 258

(2) Plaintiffs' right to right of way by prescription across defendant's land for carrying off surplus or waste irrigation water was held not established under evidence in particular case

Idaho—Loosli v Heseman, 162 P.2d 393, 66 Idaho 469

27. Ariz—Wedgworth v Wedgworth, 181 P 952, 20 Ariz 518

28. Tex—Guelker v Hidalgo County Water Imp Dist. No 6, Civ App., 269 S W 2d 551

67 C J p 1380 note 44.

the use of the irrigation works was intermittent not defeating the easement right in such cases<sup>29</sup> Further, such a right of way may be acquired by a partition decree, subject to a public easement existing on the land of the servient estate,<sup>30</sup> or by condemnation under the power of eminent domain, if that procedure is authorized by the statute, subject only to constitutional limitations that the taking shall be for a public use, and to statutory limitation existing in some states that no improved or occupied land shall, without the written consent of the owner, be subjected to the burden of two or more irrigating ditches where the same object can be practically attained by uniting them and conveying all the water in one ditch<sup>31</sup> A right of way may not be acquired by implication as a way of necessity if obtainable under the statute of eminent domain,<sup>32</sup> and the purchaser of part of a tract of land does not acquire an implied easement to maintain a ditch on the part purchased by another, when the ditch is not necessary to irrigate his land, other ditches being sufficient<sup>33</sup>

Use of another's land for irrigation purposes without his consent and without condemnation proceedings taken against him subjects the trespasser to liability in damages for the loss suffered,<sup>34</sup> but an injunction restraining the trespass does not prevent the trespasser from obtaining the right of way in the regular manner<sup>35</sup> Proceedings, under a statute, to acquire a right of way for a water ditch are special proceedings, and the statute must be strictly pursued,<sup>36</sup> and, where the evidence as to location of the right of way between defined termini is conflicting, the court may determine the location.<sup>37</sup>

A right of way for irrigation purposes consti-

tuting an easement on another's land is not lost on the ground of intermittent use where the right of eminent domain can be successfully invoked by the owner of the dominant estate,<sup>38</sup> the easement is not destroyed by destruction of the ditches by the owner of the servient estate,<sup>39</sup> and it is not revocable after construction of the ditch without compensation therefor, in the absence of agreement to the contrary<sup>40</sup> The owner of a right of way for an irrigation ditch cannot be compelled to surrender it because the owners of the servient tenement believe he can obtain water from another source with less burden to the servient tenement<sup>41</sup>

*Establishment of public ways.* Dedication for a public way of land burdened with an easement for an irrigation ditch does not destroy the easement,<sup>42</sup> but owners of property subject to a right of way for irrigation may establish streets or highways,<sup>43</sup> and the city<sup>44</sup> or county<sup>45</sup> may construct and maintain such public ways, as long as they do not interfere with the use of the easement Dedication of land subject to a right of way for a ditch makes the ditch subject to the easement of the public,<sup>46</sup> and a municipality may require the use of the easement to be changed by enclosing the ditch, where its charter authorizes it to regulate ditches in the streets<sup>47</sup>

#### b. Title and Rights Acquired

- (1) Way over public lands
- (2) Way over private lands

##### (1) Way over Public Lands

The statutory grant of a right of way over public lands of the United States gives the grantee a limited fee on an implied condition of reverter on failure to use the land for irrigation purposes. Under state laws a right of way over public land is an easement.

29. Colo—*Edwards v Roberts*, 144 P 856, 26 Colo App 538

30. Cal—*City of Santa Ana v Santa Ana Valley Irr Co*, 124 P 847, 163 Cal 211  
67 C J p 1381 note 48.

31. Neb—*Paxton, etc, Irr Canal, etc, Co v Farmers', etc, Irr, etc, Co*, 64 NW 343, 45 Neb 884, 50 Am SR 585, 29 L R A 853  
67 C J p 1380 note 47

Taking for irrigation purposes by eminent domain generally see Eminent Domain § 47.

32. Utah—*Nielson v Sandberg*, 141 P 2d 696, 105 Utah 93—*Alcorn v Reading*, 243 P 922, 66 Utah 509

33. NM—*Venegas v Luby*, 164 P 2d 584, 49 NM 381.

34. Colo—*Larimer & Weld Irr Co.*

*v. Landers*, 141 P. 517, 26 Colo App 1.

35. Or—*In re Willow Creek*, 144 P 505, 146 P 475, 74 Or 592

36. Cal—*Dalton v Azusa Tp Water Com'rs*, 49 Cal 222  
67 C J p 1381 note 52.

37. Mont—*Newton v Weiler*, 286 P. 133, 87 Mont 164

38. Colo—*Edwards v. Roberts*, 144 P 856, 26 Colo App 538

39. Idaho—*City of Nampa v Nampa & Meridian Irr Dist*, 115 P 979, 19 Idaho 779, error dismissed 35 S Ct 602, 238 US 643, 59 L Ed 1502

40. Tex—*Neches Canal Co v Dishman*, Com App, 44 S W 2d 955

41. Cal—*Furtado v Taylor*, 194 P 2d 770, 86 Cal App 2d 346

42. Ariz—*Stamatis v. Johnson*, 224 P 2d 201, 71 Ariz 134, modified on

other grounds 231 P 2d 956, 72 Ariz 158

43. Cal—*Board of Directors of Turlock Irr Dist v Fair*, 276 P 2d 109, 128 Cal App 2d 833.

44. Cal—*Board of Directors of Turlock Irr Dist v City of Ceres*, 254 P 2d 907, 116 Cal App 2d 824.

45. Cal—*Board of Directors of Turlock Irr Dist v Fair*, 276 P 2d 109, 128 Cal App 2d 833

46. Cal—*City of Santa Ana v Santa Ana Valley Irr Co*, 124 P 847, 163 Cal 211

47. Or—*Baker City Mut Irr Co v Baker City*, 110 P 392, 113 P 9, 53 Or 306

Regulation as nuisance see *infra* § 350 f

Duty to build bridges see *infra* § 350 b.

Under the terms of acts of congress providing rights of way over public lands for irrigation purposes, the right of way granted vests in the grantee neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter on failure to use the land for irrigation purposes,<sup>48</sup> nor is the title of the grantee in any way affected by a statute, subsequently enacted, referring solely to the granting of licenses to construct telegraph lines or canals over the public domain revocable at any time.<sup>49</sup> Under state laws, the right of way over public land is held to be an easement.<sup>50</sup> A state grant of an easement for a reservoir on school lands does not convey title but leaves the fee simple in the state,<sup>51</sup> nor can the rights of the grantee under the statute be enlarged by the phrasing of the document under which the irrigation company takes possession.<sup>52</sup>

One who has acquired a right of way with a defined location over public lands for a ditch has no right, as against one acquiring the land from the government subject to the easement, to change the location of the ditch onto other land of the same owner,<sup>53</sup> even though such other land be of

little or no value,<sup>54</sup> and he may not use the right of way for other purposes than those enumerated in the irrigation statute,<sup>55</sup> or change the mode of enjoyment or increase the burden of the easement without the consent of the patentees or their successors.<sup>56</sup> The owner of the land may enforce the restriction to statutory purposes and use the lands not occupied by water for agricultural purposes if such use does not interfere with the use of the right of way,<sup>57</sup> but where a limited fee to the irrigation company for a reservoir right of way was granted, he may not question the company's right to exclusive and continuous possession of the ground occupied by the reservoir.<sup>58</sup>

## (2) Way over Private Lands

The rights of the owner of an irrigation right of way over private lands depend on the terms of the grant, or, when the right of way was acquired by prescription, on what is reasonably necessary to the exercise of the right acquired, and the landowner may make any proper use of the ditch which would not unreasonably interfere with its use for the designated purpose.

The title and rights of the grantee of a right of way over private lands are fixed by the terms of the deed<sup>59</sup> or by conditions and provisions of

48. US—Kern River Co v U S. Cal., 42 S Ct. 60, 257 US 147, 66 L Ed 175

Verde River Irr & Power Dist v Salt River Valley Water Users' Ass'n, CCA Ariz., 94 F 2d 936

### Limited fee plus easement

(1) Statute authorizing grant of reservoir right of way through public lands to extent of ground occupied by water of reservoir and fifty feet on marginal limits thereof for use when necessary in construction or repair intended that grant of right of way should be of limited fee with easement in fifty-foot strip

Wyo—Johnson Irr Co v Ivory, 24 P 2d 1053, 46 Wyo 221

(2) Statute intended that boundary of right of way should be shore line where marginal limit of reservoir was natural ground shore, and not the surveyed meander line

Wyo—Johnson Irr Co. v Ivory, supra

49. US—U S v Portneuf-Marsh Valley Irr Co, Idaho, 213 F 601, 130 CCA 181

NM—U S v Lee, 110 P 607, 15 N M 382

50. Mont—Stetson v. Youngquist, 248 P 196, 76 Mont 600

67 C J p 1381 note 60

51. Idaho—Idaho-Iowa Lateral & Reservoir Co v Fisher, 151 P. 998, 27 Idaho 695

52. Tex—Rio Grande & E P R Co. v. Kinkal, Civ App., 158 S W. 214.

53. Cal—Vestal v. Young, 82 P 383, 147 Cal 721

54. Cal—Vestal v. Young, supra.

55. Utah—Whitmore v Pleasant Valley Coal Co, 75 P 748, 27 Utah 284

67 C J p 1381 note 65

"Canal or ditch" as used in statute providing that irrigation company should not occupy right of way through public lands except for purpose of "canal or ditch" meant whole project including reservoir, but irrigation company could not occupy right of way through public lands except for purpose of its reservoir and other purposes subsidiary to irrigation

Wyo—Johnson Irr Co v Ivory, 24 P 2d 1053, 46 Wyo 221.

56. Mont—Hansen v. Galiger, 208 P 2d 1049, 123 Mont 101

### Secondary easement

Secondary easement which accompanied principal easement in the form of right to maintain water ditch was no more than the right to make repairs and to do such things as were necessary to exercise of the primary right and to do them only when necessary and in such reasonable manner as not to increase the burden on the servient estate needlessly or to enlarge it by alteration in mode of operation

Cal—Smith v. Rock Creek Water Corp., 208 P 2d 705, 93 Cal App.2d 49.

57. Wyo—Johnson Irr Co v Ivory, 24 P 2d 1053, 46 Wyo 221

58. Wyo—Johnson Irr Co v Ivory, supra

59. Wash—Hayward v. Mason, 104 P 139, 54 Wash 649

### Effect of particular grants

(1) Original grant of right of way for irrigation canal giving irrigation district right to flow water over plaintiff's land by construction of canal without a north bank across draws and ravines did not give right to flood land beyond draws and ravines

Neb—Webb v Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61

(2) Where water control district had easement for drainage ditch but did not have an easement for maintenance of suction pipe across and into drainage ditch, plaintiff, deriving rights from such district, was not entitled to an easement for maintenance of a suction pipe for irrigation purposes

US—Vahlsing v Harrell, CA Tex., 178 F 2d 622, certiorari denied 71 S Ct 39, 340 US 812, 95 L Ed 597

(3) Other particular grants 67 C J p 1381 note 66 [a].

### Effect of grantor's right in ditch

Acquisition by defendants of a right in part of ditch maintained by irrigation district outside of defendants' land could not limit written grant by defendants to district of

contract between the parties,<sup>60</sup> but, if the right of way, and not the land itself, is the subject of the grant, the grantee has only an easement notwithstanding the contract or deed refers to the right conveyed as a right of "ownership."<sup>61</sup> No greater title or right to possession passes than is reasonably necessary to enable the grantee adequately and conveniently to make the intended use of his way if the right of way is acquired by prescription,<sup>62</sup> or if the grant is in general terms,<sup>63</sup> and the right cannot be extended beyond what is reasonably necessary in the absence of evidence constituting an estoppel.<sup>64</sup> If no definite bound is set as to width and location of the right of way, the practical construction placed on the grant by the parties to it fixes the limits of the burden imposed,<sup>65</sup> and the grantee's rights are measured by the initial use.<sup>66</sup>

Where an easement only is granted, the grantor may make any proper use of the ditch which would not materially impair or unreasonably interfere with its use by the grantee for the designated purposes,<sup>67</sup> but, as shown *infra* § 351, he cannot de-

stroy or make changes in the canal to the injury of the grantee without compensating him therefor. In accordance with the rule relating to easements generally, discussed in Easements § 84, it is held that in the absence of permissive statute the owner of the servient estate has no right to move a ditch.<sup>68</sup> Even in the absence of statute, however, the owner of the servient estate is sometimes permitted to change the location<sup>69</sup> or construction<sup>70</sup> of the ditch in a manner which does not interfere with the exercise of the easement; and where permitted by statute he may change the location of a lateral irrigation ditch on his land if the change does not impede the flow of water or injure the persons interested in or using the ditch.<sup>71</sup> When an irrigation district has improved natural drains crossing private lands, thus appropriating them to a public use, the property owner has no right to interfere with the drains by changing their location.<sup>72</sup> Landowners who consented to establishment of a drainage ditch across their land by an irrigation district have no right to use water from the ditch.<sup>73</sup>

easement to flow water through ditch to be constructed by district across defendants' land

Idaho—Reynolds Irr Dist v. Sproat, 206 P 2d 774, 69 Idaho 315

60. Idaho—Crane Falls Power & Irrigation Co v Snake River Irrigation Co, 133 P 655, 24 Idaho 63  
67 C J p 1381 note 67

**Compromise agreement** between plaintiffs and defendants giving plaintiffs right to flow drainage water down ditch, but providing that at no time should flow of drainage water exceed four cubic feet per second, and that no part of bottom of drainage ditches or structures therein should be raised or allowed to fill to greater height than that existing at, or previous to date of agreement, did not authorize defendants to maintain obstructions in ditch, though they may have existed at date of agreement, to prevent water from drainage through ditch

Cal—Morris v George, 135 P 2d 195, 57 Cal App 2d 665

61. Wash—Little-Wetzel Co v Lincoln, 172 P 746, 748, 101 Wash 435  
67 C J p 1381 note 68

62. Colo—Neville v Loudon Irrigating Canal & Reservoir Co, 242 P 1002, 78 Colo 548  
67 C J p 1382 note 69.

63. Idaho—Coulson v Aberdeen-Springfield Canal Co., 277 P 542, 47 Idaho 619  
67 C J p 1382 note 70.

64. Cal—Orange Cove Water Co v Sampson, 248 P. 526, 78 Cal App 334.

#### Efficient use

In Utah where an easement to convey irrigation water in ditches is obtained by prescription based on a lost grant, the presumption is that the parties contemplated more efficient use of limited water supply in the arid country by means of improved ditches which owner of easement was free to make in a reasonable manner and without unnecessarily burdening the servient estate, and in no event could the servient estate retain an interest in seepage water

Utah—Big Cottonwood Tanner Ditch Co v Moyle, 174 P 2d 148, 109 Utah 213, 172 A L R 175

65. Idaho—Reynolds Irr Dist v Sproat, 206 P 2d 774, 69 Idaho 315  
—Coulson v Aberdeen-Springfield Canal Co, 277 P 542, 47 Idaho 619

66. Idaho—Coulson v Aberdeen-Springfield Canal Co, *supra*.

67. Idaho—Reynolds Irr Dist v Sproat, 206 P 2d 774, 69 Idaho 315  
67 C J p 1382 note 74

68. Idaho—Simonson v. Moon, 237 P 2d 93, 72 Idaho 39

69. Colo—Brown v Bradbury, 135 P 2d 1013, 110 Colo 537

#### Maintenance of new ditch

Where an easement had been reserved for a ditch which ran through the middle of the servient tract the owner could close the old ditch and construct a new ditch of equal efficiency, but was required to maintain the new ditch

Colo.—Brown v. Bradbury, *supra*.

70. Ariz—Stamatis v Johnson, 231 P 2d 956, 72 Ariz 158

#### Covering ditch

Where plaintiffs owned prescriptive easement for open irrigation ditch on defendants' land, and to permit defendants to install covered tile installation would not unduly impinge on plaintiffs' easement or inconvenience plaintiffs in full enjoyment of use for which easement existed, and covered tile installation would benefit plaintiffs and the public, defendants would be permitted to tile ditch, and on completion of installation would be relieved of all obligation in connection therewith

Ariz—Stamatis v Johnson, *supra*.

71. Idaho—Simonson v. Moon, 237 P 2d 93, 72 Idaho 39  
67 C J p 1382 note 75

#### Compliance with statute

The change must comply fully with the statutory requirements and where owners of servient estate had changed location of water ditch so that it would more readily tend to clog with sediment, moss and weeds, and so that owners of dominant estates were required to rotate use of ditch, the change was such as to "impede the flow of water" and did "injure" the owners of the dominant estates within statute relating to the removal of location of water ditches

Idaho—Simonson v Moon, *supra*.

72. Cal—Provident Irr Dist v Cecil, 271 P 2d 157, 126 Cal App 2d 13.

73. Tex—Guelker v Hidalgo County Water Imp Dist, No. 6, Civ.App. 269 S W 2d 551.

The grantee's rights include the rights of repair, ingress, and egress,<sup>74</sup> occupying no more land along the banks of the canal than is necessary for its proper maintenance,<sup>75</sup> and it is his duty, not the grantor's to protect the ditch.<sup>76</sup> It has been held that the easement includes the right to make improvements in the interest of water conservation, and the right of entry to effect such improvements.<sup>77</sup> The grantee must use his easement, however, so as not materially to interfere with ordinary use of the land by the owner of the servient estate,<sup>78</sup> not imposing an additional burden on the servient estate without the grantor's consent,<sup>79</sup> as, for example, by admitting water into the ditch from new sources,<sup>80</sup> or by relocating canals and ditches,<sup>81</sup> but an additional burden may be imposed with the grantor's consent.<sup>82</sup>

### c. Forfeiture

A grant of a right of way over public lands of the United States may be declared forfeited for failure to use the land for irrigation purposes, for failure to complete works, or for abandonment

Since, as shown supra subdivision b (1) of this section, a grant of a right of way over public lands under act of congress on condition that it be used solely or primarily for irrigation purposes vests in the grantee a limited fee on an implied condition of reverter on failure to use the land for these purposes, a forfeiture may be declared on proof of failure to use for the stated purposes, in a suit in equity brought by the attorney-general in the name of the United States, even in the absence of a forfeiture clause in the statute, or of a forfeiture declared by congress.<sup>83</sup> A fortiori, a forfeiture may be declared where expressly provided for in a forfeiture clause in the statute under which the right of way was granted.<sup>84</sup> Where the ground for forfeiture is breach of a condition subsequent, the breach does not operate ipso facto to divest the grantee of title, but to be effectual must be followed by a declaration of forfeiture by some competent authority, either by act of congress or by the United States, in an action brought for the purpose.<sup>85</sup> The court has jurisdiction under the statute without further action by congress,<sup>86</sup> an act of congress

74. Colo—Neville v Loudon Irrigating Canal & Reservoir Co, 242 P 1002, 78 Colo 548  
67 C J p 1382 note 77

75. Idaho—Gorrie v Weiser Irr Dist, 153 P 561, 23 Idaho 248

76. Idaho—Pioneer Irr Dist v Smith, 285 P 474, 48 Idaho 734

77. Utah—Big Cottonwood Tanner Ditch Co v Moyle, 174 P 2d 148, 109 Utah 213, 172 A L R 175

#### Reasonableness of improvements

(1) What is a reasonable manner of improving ditch is a question of fact to be decided from a consideration of the location of the ditch, the type and use of the servient property, the amount of water ditch carries, the relative cost of the possible methods of improving, and other circumstances bearing on the question, but the company may not take more or different land from the servient estate than that used during the prescriptive period

Utah—Big Cottonwood Tanner Ditch Co v Moyle, supra

(2) The fact that the improvement would make the ditches more hazardous to children and would depreciate the value of the servient estates may be considered in determining the reasonableness of the improvements, but is not conclusive of the matter

Utah—Big Cottonwood Tanner Ditch Co v Moyle, supra

78. Idaho—Pioneer Irr Dist v Smith, 235 P 474, 48 Idaho 734

Utah—Nielson v Sandberg, 141 P 2d 696, 105 Utah 93.

#### Cutting trees

Owner of easement for irrigation canal was liable for cutting down peach trees which did not obstruct the flow of water

Cal—Paul A. Mosesian & Sons v Danielian, 126 P 2d 363, 52 Cal App 2d 387

79. Idaho—Coulson v Aberdeen-Springfield Canal Co, 277 P 542, 47 Idaho 619

Wash—Little-Wetzel Co v Lincoln, 172 P 746, 101 Wash 435

#### Changing use of easement

Owner of a prescriptive right to conduct water in an open ditch may not change location of the ditch, or lay a pipe line along the course of the ditch nor construct aprons for the passage of storm waters over ditch

Cal—Smith v Rock Creek Water Corp, 208 P 2d 705, 93 Cal App 2d 49

#### Extension of ditch

Owners of easement for maintenance of dam and ditch had no right to extend ditch by excavating in dry land of servient owner, whether regarded as dry bed of river or dry bank

Cal—Hannah v Pogue, 147 P 2d 572, 23 Cal 2d 849

#### Removal of incidental benefit

Where a previous irrigation ditch incidentally benefited land of the servient estate because seepage water therefrom enabled trees and plants to grow along the banks of the ditch, cutting off the seepage water by waterproofing ditch added no ad-

ditional burden to the servient estate, but merely took away an incidental benefit

Utah—Big Cottonwood Tanner Ditch Co v Moyle, 174 P 2d 148, 109 Utah 213, 172 A L R 175

80. Wash—Little-Wetzel Co v Lincoln, 172 P 746, 101 Wash 435

81. Cal—Woods Irr Co v Klein, 233 P 2d 48, 105 Cal App 2d 266

82. Cal—Board of Directors of Turlock Irr Dist v Fair, 276 P 2d 109, 128 Cal App 2d 833

67 C J p 1382 note 83

#### Pipeline

Where irrigation district had acquired right of way for ditch by prescription, and without objection replaced ditch by pipeline, district had easement for pipeline

Cal—Board of Directors of Turlock Irr Dist v Fair, supra—Board of Directors of Turlock Irr Dist v City of Ceres, 254 P 2d 907, 116 Cal App 2d 824

83. US—Kern River Co v U S, Cal, 42 S Ct 60, 257 US 147, 66 L Ed 175.

84. US—U S v. Whitney, CC Idaho, 176 F 593

67 C J p 1382 note 87

85. US—Verde River Irr & Power Dist v Salt River Valley Water Users' Ass'n, CCA Ariz, 94 F 2d 936

67 C J p 1382 note 88

86. US—U S v. Parsons, CCA Utah, 22 F 2d 978

67 C J p 1382 note 89.

containing a special grant to a specific grantee and construed to require that congress declare the forfeiture or give express authority to institute suit to recover the land having no application to jurisdiction of the court under a general law to declare a forfeiture<sup>87</sup> The general land office of the United States, the tribunal designated by congress to pass on questions arising out of the disposition of public lands, recognizes the jurisdiction of state courts to hear and determine questions of forfeiture of grants under act of congress, and the final decision of the state courts is equivalent to a declaration of forfeiture of all rights under the act<sup>88</sup>

When public land is granted by the United States subject to the right of way under the acts of congress, the right to have a forfeiture declared on statutory grounds vests in the patentee,<sup>89</sup> but, where the patentee takes title subject to a right of way after the completed works have been approved by the secretary of the interior, he cannot claim a forfeiture on grounds existing before approval where no fraud or imposition is charged<sup>90</sup> The patentee may not assert an abandonment where the grantee again took possession of the right of way before the patentee initiated any claim<sup>91</sup>

*Grounds of forfeiture.* Under acts of congress a forfeiture of right of way over public lands may be declared for failure to use solely or primarily for irrigation purposes,<sup>92</sup> for failure to complete works within five years,<sup>93</sup> or for abandonment<sup>94</sup> In determining whether the evidence of failure to complete works is sufficient to justify a forfeiture, the submission of a map by applicant and approval of details thereon by the secretary of the interior must be regarded as creating a binding contract with the map details as specifications, a material breach of which constitutes ground for forfeiture,<sup>95</sup> but the approval of a new application by the secretary of the interior operates as an extension of time in

which to complete the work under the original grant, where it is so regarded by the parties and no other rights have attached<sup>96</sup> An assignment by a canal company to a water district of rights appurtenant to its irrigation system, under statutes providing for such conveyances, does not constitute abandonment or ground for forfeiture<sup>97</sup>

*Extent of forfeiture.* A forfeiture for failure to complete within the stated period extends only to the uncompleted section or sections of the work,<sup>98</sup> a reservoir being considered as a section in a grant of right of way for reservoir and ditch<sup>99</sup> Where the project for which the right of way was granted included a natural lake as the reservoir site and artificial works raising the level of the lake, a failure to complete the artificial works within the statutory period is ground for forfeiture of the reservoir site.<sup>1</sup>

### § 350. Irrigation Works

- a In general
- b Bridges, conduits and flumes
- c Enlargement and extension
- d Costs of construction and maintenance
- e Easement and contract rights in canal or ditch
- f Irrigation works as nuisance

#### a. In General

An irrigation district or company may construct ditches or reservoirs or utilize natural channels. An irrigation ditch is property in the nature of real estate, and when constructed, repaired, and controlled by an individual or private company, it is private property.

An irrigation company or district may construct a dam and reservoir for irrigation purposes when authorized by statute,<sup>2</sup> and it may avail itself of the use of a natural channel or gulch as a portion of its system of ditches for conveyance of water<sup>3</sup> An irrigation ditch is property in the nature

87. U S—Union Land & Stock Co v U S, Cal, 257 F 635, 163 CCA 585

88. Colo—Baldridge v. Leon Lake Ditch Co, 80 P 477, 20 Colo App 518

89. Idaho—Hurst v. Idaho-Iowa Lateral & Reservoir Co, 202 P. 1068, 34 Idaho 342.

90. Idaho—Uhrig v. Crane Creek Irr Dist, 260 P 428, 44 Idaho 779—Hurst v Idaho-Iowa Lateral & Reservoir Co, 246 P 23, 42 Idaho 436

91. Idaho—Wagoner v Jeffery, 162 P 2d 400, 66 Idaho 455

92. U.S.—Kern River Co v. U S,

Cal, 42 S Ct 60, 257 US 147, 66 L Ed 175

93. U.S.—U S v Parsons, CCA Utah, 22 F2d 978  
67 C J p 1383 note 97.

94. Idaho—Hurst v. Idaho-Iowa Lateral & Reservoir Co, 202 P 1068, 34 Idaho 342  
Tex—Fairbanks v Hidalgo County Water Improvement Dist No 2, Civ App, 261 S W. 542

95. U.S.—U S v Tujunga Water & Power Co, CCA Cal, 48 F2d 689  
67 C J. p 1383 note 99

96. Colo—O'Reilly v Noxon, 113 P 486, 49 Colo 362.

97. Tex—Fairbanks v. Hidalgo

County Water Improvement Dist No 2, Civ App, 261 S W 542

98. U.S.—U. S v Big Horn Land & Cattle Co, CCA Colo, 17 F2d 357  
99. U.S.—U S v Big Horn Land & Cattle Co, supra.

1. U.S.—U S v Big Horn Land & Cattle Co, supra.

2. Ark—Nahay v. Arkansas Irr Co, 190 S W2d 965, 209 Ark 247  
Appropriation for water storage see supra § 348

Easement in public lands for reservoir see supra § 349

3. Or—Barker v. Sonner, 294 P. 1053, 135 Or 75

67 C J p 1383 note 3.



of real estate,<sup>4</sup> which can be transferred only by contract or deed of the owners, by adverse possession, by condemnation, or by operation of law,<sup>5</sup> and, where constructed, repaired, and controlled by an individual or by a private company, it is private, and not public, property.<sup>6</sup> It is the duty of an irrigation company, or of a district, or of a person diverting water to irrigate arid lands, so to construct the ditches that there will be the least possible waste,<sup>7</sup> and to enlarge and strengthen embankments to withstand floods, even though users are deprived thereby of waters for irrigation which otherwise they would have had.<sup>8</sup>

**Fencing.** The owner of an irrigation ditch has no duty to fence it under the common law unless an exceptionally dangerous condition exists,<sup>9</sup> and a statute requiring fencing of shafts, excavations, and holes does not apply to irrigation ditches.<sup>10</sup> The grant of a right of way for an irrigation canal may, however, impose on the grantee an obligation to maintain fences.<sup>11</sup>

#### b. Bridges, Conduits, and Flumes

- (1) Canals or ditches crossing highways
- (2) Canals or ditches across private lands

##### (1) Canals or Ditches Crossing Highways

Where a canal is constructed across an existing highway, the canal owner must build the necessary bridges;

but, in the absence of a statute to the contrary, where a highway is laid out over a canal already existing the public must build the bridge.

Where an irrigating canal or ditch crosses public highways, the highways must be restored to a condition of usefulness and safety equal to that existing before the construction of the ditch, and to that end the owners of the ditch will be required to build all necessary bridges,<sup>12</sup> removing them when the system is abandoned,<sup>13</sup> and, where a city grants to a canal company a right to run its canals in the city streets, it may subsequently, in the exercise of its power to change the grade of streets, order the company to run its canals through pipes underground.<sup>14</sup> In the absence of a statute to the contrary applying to irrigation ditches, the public and not the ditch company must build the bridge where a highway is laid out over a ditch or canal already existing,<sup>15</sup> or where a city or town is located and built on both sides of an already existing canal,<sup>16</sup> and ditches crossing public lands under authority of the Carey Act are governed by this rule,<sup>17</sup> but statutes governing railroads crossing highways on public lands,<sup>18</sup> or water companies furnishing water to cities and towns,<sup>19</sup> do not apply in such cases.

##### (2) Canals or Ditches Across Private Lands

An irrigation company may be required to construct bridges across its canals for the benefit of private land-

4. Cal—Cate v Sanford, 54 Cal 24 67 C J p 1383 note 9

Canals or ditches as property, in general see supra § 129

5. Idaho—Hale v McCammon Ditch Co, 244 P 2d 151, 72 Idaho 478

6. Cal—Cate v Sanford, 54 Cal 24

Right to require payment for use

Owner of irrigation ditch could deny to another its use until paid amount demanded as share of maintenance cost or until other party entered the ditch under eminent domain, and payment made to obtain delivery of water needed for crops, though made under protest, was not recoverable back as money paid under duress

Utah—Peterson v. Sevier Valley Canal Co, 151 P 2d 477, 107 Utah 45

**Interference with use**

Where use of water for irrigation, which gave rise to construction of irrigation ditch over plaintiffs' land and on to defendants' land, had been so long continued as to show that it was permanent, where ditch was in use when common owner caused separation of title by sale of different parts of land to predecessors of defendants, where easement was essential to beneficial enjoyment of land

by defendants, and where use of ditch had been uninterrupted since construction, plaintiffs' land was burdened with easement and plaintiffs could not eliminate or close ditch, and were estopped from depriving defendants from use of ditch over plaintiffs' land, even though a burden on plaintiffs' property

SD—Homes Development Co v Simmons, 70 NW 2d 527.

7. Idaho—Clark v. Hansen, 206 P 808, 35 Idaho 449

8. Tex—Donna Irr Dist No 1 v Piper, Civ App, 269 S W. 157

9. Nev—Orr Ditch & Water Co v Justice Court of Reno Tp, Washoe County, 178 P 2d 558, 64 Nev 138

10. Nev—Orr Ditch & Water Co v Justice Court of Reno Tp, Washoe County, supra.

11. La—Dufilho v Bordelon, 92 So 744, 152 La 88.

**Extinguishment of obligation**

(1) Under statute the obligation to fence a right of way for an irrigation canal and bridge the canal, created by the deed conveying the right of way, was extinguished, where the owner of the right of way afterwards bought the farm through which it extended

La—Dufilho v. Bordelon, supra.

(2) The obligation was not revived by the subsequent conveyance of the farm subject to a vendor's lien existing before the grant of the right of way

La—Dufilho v. Bordelon, supra.

12. Idaho—Gooding Highway Dist of Gooding County v Idaho Irr Co, 164 P 99, 30 Idaho 232 67 C J p 1383 note 13

13. Neb—Dawson County Irr Co v Dawson County, 173 NW. 696, 103 Neb 692 67 C J p 1383 note 15.

14. Idaho—City of Nampa v Nampa & Meridian Irr Dist, 115 P 979, 19 Idaho 779, error dismissed 35 S Ct 602, 238 US 643, 59 LEd 1502

15. Idaho—Gooding Highway Dist of Gooding County v Idaho Irr. Co, 164 P 99, 30 Idaho 232. 67 C J p 1384 note 17.

16. Idaho—Boise City v Boise City Canal Co, 115 P. 505, 19 Idaho 717

17. Idaho—City of Twin Falls v Harlan, 151 P 1191, 27 Idaho 769

18. Idaho—MacCammelly v Pioneer Irr Dist, 105 P. 1076, 17 Idaho 415

19. Idaho—MacCammelly v Pioneer Irr. Dist, supra.

owners. The owner of a ditch constructed across the existing ditch of another must construct a flume.

The grant of a right of way for an irrigation canal may impose on the grantee an obligation to maintain bridges,<sup>20</sup> and a state statute, laying the duty on irrigation corporations, to which it granted the power of eminent domain, to construct bridges over its canals for the benefit of adjacent landowners, does not violate the Fourteenth Amendment of the federal Constitution,<sup>21</sup> nor does it make any difference that the corporation was not obliged to exercise the power of eminent domain to obtain the particular right of way.<sup>22</sup> The purpose of such a statute is to restore in part the use of the land which the owner formerly had and to compensate him in part for the damage caused by the construction of the ditch.<sup>23</sup> An owner, who otherwise having no right to a bridge secures the irrigation company's consent and builds one, may keep it until the court has determined that it interferes with the flow of water in the ditch.<sup>24</sup> Where a ditch is constructed across an existing ditch, it is the duty of the owner of the new ditch to build and maintain a flume to carry the waters of the old ditch, in the absence of agreement to the contrary.<sup>25</sup>

### c. Enlargement and Extension

Rights relating to enlargement or extension of canals and ditches depend on the contract under which the enlargement or extension is made.

The rights of the parties growing out of the enlargement or extension of canals and ditches are fixed by the terms of the contract under which the enlargement was made,<sup>26</sup> and so is their liability to contribute to the cost of maintenance of enlarged canals and ditches and of the new portions,<sup>27</sup> the owners of the original ditch not being liable for the cost of maintaining the new portion, in the absence of agreement to the contrary.<sup>28</sup> Where, as considered supra § 349, the laws provide that no improved or occupied land shall, without the written consent of the owner, be subjected to the burden of two or more irrigating ditches where the same object can be practically attained by uniting and conveying all the water in one ditch, an irrigation company desiring to use a private ditch already in existence has the right to enlarge or extend and use it on payment of a reasonable proportion of the cost of construction,<sup>29</sup> the rule permitting enlargement or extension being applicable only to private ditches,<sup>30</sup> and only to ditches passing through the owner's land for the benefit of other landowners, and constituting a burden thereon.<sup>31</sup> A private ditch constructed by the owner of land to water his own land exclusively cannot be enlarged and extended by an irrigation company if there are other practicable routes for its own canals.<sup>32</sup> A petitioner in proceedings to enlarge an existing private ditch through the land of another must prove

20. La.—*Duflho v Bordelon*, 92 So 744, 152 La 88.

Obligation held extinguished and not revived where owner of right of way afterwards bought the farm through which it passed and subsequently conveyed the farm subject to a vendor's lien existing before the grant of the right of way  
La.—*Duflho v Bordelon*, supra.

21. Neb.—*State v Farmers' Irr Dist*, 152 NW 372, 98 Neb 239, L.R.A.1915E 687, affirmed 37 S Ct 630, 244 US 325, 61 L Ed 1168 67 C J p 1384 note 22.

22. Neb.—*State v Farmers' Irr Dist*, supra.

23. Neb.—*State ex rel Johnson v Central Nebraska Public Power & Irrigation Dist*, 300 NW. 379, 140 Neb 471

24. Colo.—*Northern Colorado Irr Co v Reuter*, 186 P 286, 67 Colo 483

25. Idaho.—*Mahaffey v Carlson*, 228 P 793, 39 Idaho 162.

26. Wyo.—*Mau v Stoner*, 87 P 434, 89 P 466, 15 Wyo 109

27. Utah.—*Peterson v. Sevier Canal Co*, 151 P 2d 477, 107 Utah 45 67 C J p 1384 note 27.

#### Particular contracts construed

(1) Contract between irrigation

companies for sharing cost of maintaining, operating, and enlarging canal which they owned jointly, applied only to main canal, and, though it provided that no further charge should be made against stockholders for turning out water, etc., it did not preclude assessment of maintenance charges against stockholders of one company for use of laterals owned exclusively by the other company  
Utah.—*Peterson v Sevier Valley Canal Co*, supra

(2) Where contract provided that mutual irrigation company should pay specified sum annually for maintenance of flume to be placed in canal "so long as" land company maintained flume and such part of canal in good repair, the phrase "so long as" were words of limitation which fixed the duration of irrigation company's obligation and such obligation ceased on the removal of the flume  
Utah.—*Hodges Irr Co v Swan Creek Canal Co*, 181 P 2d 217, 111 Utah 405.

#### Effect of statutes

(1) Where owner of irrigation ditch and user agreed on the amount to be paid for such use, such contract controls, though statute gives right to such use upon compensating own-

er by paying equitable proportion of cost of maintenance

Utah.—*Peterson v Sevier Valley Canal Co*, 151 P 2d 477, 107 Utah 45

(2) Where contract between mutual irrigation companies concerning the upkeep of canal was no longer in effect, the statute providing for contribution between joint owners of ditches or reservoirs applied

Utah.—*Hodges Irr Co v Swan Creek Canal Co*, 181 P 2d 217, 111 Utah 405

28. Colo.—*Patterson v Brown, etc, Ditch Co*, 34 P 769, 3 Colo App 511

Idaho.—*Nampa & Meridian Irr Dist v Manville*, 173 P 113, 31 Idaho 397.

29. Colo.—*Junction Creek, etc, Domestic, etc, Ditch Co v Durango*, 40 P. 356, 21 Colo 194 67 C J. p 1384 note 30

30. Colo.—*Junction Creek, etc, Domestic, etc, Ditch Co v Durango*, supra. 67 C J p 1384 note 31.

31. Colo.—*Downing v More*, 20 P. 766, 12 Colo. 316, 319.

32. Colo.—*Downing v. More*, supra.

his right to the water for which he seeks an enlargement of the ditch,<sup>33</sup> but proof of a pending application for appropriation is sufficient if it appears that the water may be applied to a beneficial use when it is diverted into, and conveyed through, the enlarged ditch<sup>34</sup>

#### d. Cost of Construction and Maintenance

Except as provided by contract the owner of irrigation works must bear the cost of construction or maintenance.

The owner of the property, whether individual, company, or district, must bear the cost of construction and maintenance,<sup>35</sup> except in so far as contracts with users of the water require them to contribute,<sup>36</sup> nor may he shift this obligation to the landowner through whose land the ditch runs, when the landowner in the exercise of his right changes the location of the ditch to another part of his land<sup>37</sup> If the reservoir,<sup>38</sup> or canals and ditches,<sup>39</sup> are owned in common, liability to contribute toward the initial cost and maintenance rests on all in proportion to the amount of water used or diverted by each Under authorizing statutes, cities and villages may care for and control laterals furnishing water to their inhabitants,<sup>40</sup> and, under a statute making it the duty of an irrigation district to furnish water to residents, it is the duty of the district to keep the laterals in repair, even though the landowners grant the right of way and, themselves, construct the laterals<sup>41</sup> So, also, wherever it is the duty of an irrigation company or district to construct bridges, it must pay the cost of their construction and repair<sup>42</sup> Where the public highway is built through land paralleling and

adjacent to a canal, and a natural surface channel to the canal is cut off, a flume built by the county and accepted by the landowner in place of the channel must be kept in repair by the landowner in performance of his duty to the owner of the canal, whatever may be the duty of repair as between landowner and county<sup>43</sup>

#### e. Easement and Contract Rights in Canal or Ditch

One may have an easement right in a ditch without owning the water right, and vice versa.

One may own a ditch right without owning the water right, and vice versa<sup>44</sup> Such an easement is created by a contract for the carriage of a stated amount of water perpetually in another's canal, the owner of the canal agreeing to maintain the canal and the flow of water therein permanently.<sup>45</sup> A grant to the equitable owner of a canal of a right to the water therein does not create an easement in the canal<sup>46</sup> Where owners of parallel ditches agree that for a consideration the water of both shall be carried in a single ditch and one ditch is abandoned in reliance thereon, the owner of the ditch not abandoned may not refuse to carry the water because of the other's breach of the agreement,<sup>47</sup> although he may refuse to carry without charges where the terms of the broken agreement provided for payment<sup>48</sup> A statute prescribing the ratio in which the interests of persons claiming an interest in a ditch shall be established, where no record of their relative ownership has been made, does not apply where the record has been made in an action in equity to quiet title to a fractional interest in the ditch.<sup>49</sup>

33. Utah—Tanner v Provo Bench Canal & Irrigation Co 121 P 584, 40 Utah 105, affirmed 36 S Ct 101, 239 US 223, 60 L Ed 307

34. Utah—Tanner v Provo Bench Canal & Irrigation Co, supra

35. Idaho—Niday v Barker, 101 P 254, 16 Idaho 73  
67 C J p 1385 note 37

36. Cal—Riverside Heights Water Co v Riverside Trust Co, 83 P 1003 148 Cal 457  
Utah—Perry Irr Co v Thomas, 278 P 535, 74 Utah 193

37. Idaho—Earhart v Wright, 295 P 630, 50 Idaho 269—Crawford v Inglin, 258 P 541, 44 Idaho 663  
Right of owner of servient estate to change location of ditch see supra § 349 b (2)

38. US—Twin Falls Canal Co v American Falls Reservoir Dist No 2, D C Idaho, 49 F 2d 632, affirmed, CCA, 59 F 2d 19, certiorari denied

53 S Ct 87, 287 US 638, 77 L Ed 552

67 C J p 1385 note 60

39. Idaho—Farmers' Land & Irrigation Co v Johnson, 228 P 311, 39 Idaho 255

40. Neb—Thornton v Kingrey, 164 NW 561, 101 Neb 631

41. Neb—State v Gering Irr Dist, 192 NW 212, 109 Neb 642

42. Neb—Dawson County Irr Co v Dawson County, 173 NW. 696, 103 Neb 692.

67 C J p 1385 note 45

43. Idaho—Settlers' Irr Dist v A R Cruzen Inv Co, 254 P 1052, 43 Idaho 736

44. Mont—McDonnell v Huffine, 120 P 792, 44 Mont 411.  
67 C J p 1385 note 48

**Water right held not to confer easement**

Plaint ff who had no easement for ditch over defendant's land and who

obtained right to non-consumptive use of waters which were flowing across the land in ditch of third parties was not entitled to easement right in the ditch without the consent and against the will of defendant and without compensation therefor

Utah—Nielson v Sandberg, 141 P 2d 696, 105 Utah 93

45. NM—Bolles v Pecos Irr Co, 167 P 280, 23 NM 32

46. Tex—Edinburg Irr Co v Ledbetter, Civ App, 247 S W 335, modified on other grounds, Com App, 286 S W. 185

47. Colo—Norcross v. Consolidated Hillsborough Ditch Co, 225 P 207, 75 Colo 158

48. Colo—Norcross v Consolidated Hillsborough Ditch Co, supra

49. Wyo—Bamforth v Ihmsen, 204 P 345, 28 Wyo 282, rehearing denied 205 P 1004, 28 Wyo. 282

A mutual water company may have the right to conduct its water through a public utility's ditch without affecting the public use of the ditch by the utility<sup>50</sup>

#### f. Irrigation Works as Nuisance

An irrigation canal is not a nuisance per se, but it may become a nuisance by reason of the manner in which it is maintained. An irrigation work which is a nuisance may be abated.

An irrigation canal has been held not to be a nuisance per se,<sup>51</sup> so an irrigation canal or ditch in or crossing a public highway, if it is constructed and operated in accordance with law, is not a nuisance, and can become such only by reason of the manner in which it is maintained,<sup>52</sup> as where a ditch has widened so as to occupy the sidewalk space in front of plaintiff's property, and where the water in it has overflowed onto plaintiff's property,<sup>53</sup> or where it appears that a reservoir dam and lack of diversion headgates constitute a source of imminent and great danger to the general public.<sup>54</sup> Where the nuisance is proved, and is of such character as to constitute a public menace, the conditions making it so are properly abated by order of court,<sup>55</sup> but, where the nuisance may be abated without ordering the discontinuance or destruction of the property, the court should order the

abatement in those terms.<sup>56</sup> When a ditch at the side of a highway has become a nuisance through the growth and development of the municipality, the municipality has the right under its police power to require that it be enclosed.<sup>57</sup>

### § 351. Injuries to Owners of Irrigation Works, and Actions Therefor

- a. Affecting water rights
- b. Affecting rights of way
- c. Affecting irrigation works

#### a. Affecting Water Rights

An action lies by an owner of irrigation works to recover damages for, or enjoin, unlawful diversion of water from its works.

The owner of irrigation works may bring an action to recover damages for the diversion of water from its works,<sup>58</sup> and an action lies to establish and protect the company's water rights or enjoin the unlawful diversion of its supply of water.<sup>59</sup> Such a suit may be brought by the company without joining its stockholders or consumers as parties.<sup>60</sup> In an action by an irrigation company to enjoin diversion of water from its ditch, it is not necessary that plaintiff should allege damage, or the amount thereof.<sup>61</sup>

50. Cal—Stratford Irr Dist v Empire Water Co., 137 P 2d 867, 58 Cal App 2d 616

51. Tex—Wichita County Water Improvement Dist No 1 v Pearce, Civ App., 59 S W 2d 183

52. Neb—City of Scottsbluff v Winters Creek Canal Co., 53 N.W 2d 543, 155 Neb 723  
67 C J p 1386 note 57

#### Reasons for rule

The users of water from either a natural or an artificial stream within a municipality have the right to have water kept within its banks, if they appropriated the water before the municipality was laid out, and therefore when a canal company keeps its canal in proper repair, the municipality has no more right to complain than if it were a natural watercourse. Neb—City of Scottsbluff v. Winters Creek Canal Co., supra.

#### Ordinance held invalid

A city ordinance, declaring open ditches and canals exceeding specified width and depth through city public nuisances and requiring owners thereof to fill them or construct pipes therein of sufficient size to carry all water permitted to flow through them was invalid as applied to irrigation corporation's ditch or canal constructed under statutory authority before organization of

city with territory including part of canal and its laterals  
Neb—City of Scottsbluff v. Winters Creek Canal Co., supra

53. Tex—Barstow Town Co v Carr, Civ App., 234 S W. 555

54. Colo—Seven Lakes Water Users' Ass'n v Fort Lyon Canal Co., 4 P 2d 1112, 89 Colo 515.

55. Colo—Seven Lakes Water Users' Ass'n v Fort Lyon Canal Co., supra

56. Cal—Fresno v Fresno Canal, etc., Co., 32 P 943, 98 Cal 179.  
67 C J p 1386 note 61

57. Cal—City of Santa Ana v Santa Ana Valley Irr. Co., 124 P 847, 163 Cal 211

58. Idaho—Washington County Irr Dist v Talboy, 43 P 2d 943, 55 Idaho 382

#### Defenses

Irrigation district was not precluded from recovering damages for diversion of stored water from reservoir on ground that district abandoned its water right, where water was actually diverted from natural stream and impounded in reservoir, and no other appropriator was contesting right of reservoir owners to divert and impound water.

Idaho—Washington County Irr Dist v Talboy, supra.

59. Neb—Corpus Juris quoted in

Robinson v Dawson County Irr Co., 8 N.W 2d 179, 183, 142 Neb 811.

67 C J p 1386 note 62.

Actions to establish and protect irrigation rights see supra § 317.

#### Ruling on demurrer

In suit to quiet title to and enjoin the use of water distribution system where it was alleged that consumers entered property contrary to the terms of their lease, broke gate and used water for mining purposes and threatened by forceful means to continue to do so unless restrained, and complaint showed that plaintiff owned dam and reservoir and that water was being taken from them forcibly by defendants, trial court had right to assume on demurrer that water contained in the reservoir and which was being wrongfully used was "real property" appurtenant to the reservoir subject to disposition under lease.

Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P 2d 582, 34 Cal App 2d 159

60. Neb—Corpus Juris quoted in Robinson v Dawson County Irr Co., 8 N.W 2d 179, 183, 142 Neb 811.

67 C J. p 1386 note 63

61. Cal—Last Chance Water Ditch Co v Emigrant Ditch Co., 61 P. 960, 129 Cal 277.

### b. Affecting Rights of Way

The owner of an easement for irrigation works may sue to prevent, or recover damages for, interference with his easement.

A suit for injunction on petition of an irrigation company lies against a defendant to prevent the disposal of waste waters into its canal, regardless of damage,<sup>62</sup> or to enjoin him from interfering with the making of improvements designed to conserve water.<sup>63</sup> Furthermore, an action lies by the owner of a right of way for an irrigation ditch across public lands to recover damages against a trespasser who willfully herds his animals thereon,<sup>64</sup> and a judgment for plaintiff will be sustained where pleadings and proof establish his ownership and possession of the ditch and the right of way, and the wrongful acts of defendant done without plaintiff's consent.<sup>65</sup> No action lies, however, where there is no willful herding of animals on the right of way, but merely a use of the land in the ordinary course of husbandry for grazing purposes.<sup>66</sup> Where the grantor of land reserved an easement for a ditch and the grantee closed the ditch, but constructed a new one of equal efficiency, an equity court may in its discretion approve the moving of the ditch and place on the grantee the burden of maintaining it.<sup>67</sup>

### c. Affecting Irrigation Works

The owner of irrigation works or an easement there-in may bring an action for injuries to the works

An action lies on behalf of the owner for any destruction of, or injury to, the physical structure of its canal or other works,<sup>68</sup> including injury to plaintiff's works resulting from negligent operation by another of other irrigation works belonging to him,<sup>69</sup> or for destruction of plaintiff's easement rights therein,<sup>70</sup> or to restrain a threatened destruction or injury thereto which would result in irreparable damage,<sup>71</sup> as, for example, the wrongful removal of a headgate,<sup>72</sup> or the choking or filling up of the canal with mining debris.<sup>73</sup> A city or county which constructs or maintains a highway across an easement for irrigation waters, although not required to maintain the existing works of the easement owner, is liable in damages for injuries to the works caused by improper construction and maintenance of its highway.<sup>74</sup>

**Defenses.** Abandonment of a ditch by its owner is a defense to his action brought to recover damages for its destruction.<sup>75</sup> It is a defense in an action to enjoin a city constructing its storm sewers to empty into plaintiff's ditch located within the city that the ditch was a natural drainage way into which the surface waters in the city natural-

Neb.—*Corpus Juris* cited in *Gering Irr Dist v Mitchell Irr. Dist*, 3 NW 2d 566, 571, 141 Neb 344

62. Idaho—*Farmers' Co-op Irr Co v Alsager*, 277 P 430, 431, 47 Idaho 555

67 C J p 1386 note 66

63. Utah—*Big Cottonwood Tanner Ditch Co v Moyle*, 174 P 2d 148, 109 Utah 213, 172 A L R 175.

#### Evidence held sufficient

(1) To show that improvement would render ditches more hazardous to children

Utah—*Big Cottonwood Tanner Ditch Co v Moyle*, supra.

(2) To show that only practicable method of improvement was used  
Utah—*Big Cottonwood Tanner Ditch Co v Moyle*, supra.

#### Evidence held insufficient

To show that proposed method of improvement was unreasonable or would unnecessarily damage owners of servient estates

Utah—*Big Cottonwood Tanner Ditch Co v Moyle*, supra.

#### Relief held improper

Where trial court erred in holding that irrigation company's proposal to improve its ditches would extend beyond its easement rights, the court also erred in restraining the company from improving its ditches as proposed and in retaining jurisdiction in

order to pass upon and approve plan for improving the ditches before the plan should be put into effect

Utah—*Big Cottonwood Tanner Ditch Co v Moyle*, supra.

64. Wyo—*Harmony Ditch Co v Sweeney*, 222 P 577, 31 Wyo 1

65. Wyo—*Harmony Ditch Co. v Sweeney*, supra.

66. Idaho—*Pioneer Irr Dist v Smith*, 285 P 474, 48 Idaho 734  
67 C J p 1386 note 69

67. Colo—*Brown v Bradbury*, 135 P 2d 1013, 110 Colo 537

68. Cal—*Joerger v Pacific Gas & Electric Co*, 276 P 1017, 207 Cal 8

69. Utah—*West Union Canal Co v Provo Bench Canal & Irr Co*, 208 P 2d 1119, 116 Utah 128

#### Allowing water to flow into ditch

Where defendant, with notice that excess water escaping from his ditch in the past had damaged plaintiff's canal, allowed water to flow into his ditch after unusually heavy rainfall, with result that water entered plaintiff's canal, filled it with debris, and caused a break in plaintiff's pipe line, plaintiff could recover damages for defendant's negligence

Utah—*West Union Canal Co v Provo Bench Canal & Irr Co*, supra.

70. Ariz—*Beville v. Allen*, 237 P 184, 28 Ariz 397.

Colo—*Stuart v Davis*, 139 P 577, 25 Colo App 568

#### Mandatory injunction

Where plaintiffs acquired prescriptive easement in irrigation ditch running through defendants' land, and defendants admitted existence of such easement, and without plaintiffs' consent constructed new enclosed ditch, defendants were guilty of arbitrary violation of property rights of plaintiffs and would be required to restore rights of plaintiffs

Ariz—*Stamatis v Johnson*, 224 P 2d 201, 71 Ariz 134, modified on other grounds 231 P 2d 956, 72 Ariz 158.

71. Ariz—*Beville v. Allen*, 237 P 184, 28 Ariz 397  
67 C J. p 1386 note 72.

72. Idaho—*Austin v Wilson Irr Co*, 199 P 375, 34 Idaho 87

73. Idaho—*Stocker v Kirtley*, 59 P 891, 6 Idaho 795

74. Cal—*Board of Directors of Turlock Irr Dist v Fair*, 276 P 2d 109, 128 Cal App 2d 833—*Board of Directors of Turlock Irr Dist v City of Ceres*, 254 P 2d 907, 116 Cal App 2d 824

75. Neb—*Dawson County Irr Co v Dawson County*, 183 NW. 655, 106 Neb. 367.

ly drained.<sup>76</sup> Failure of plaintiff to observe the terms of an agreement designed to prevent the damage complained of is a defense to his suit for an injunction.<sup>77</sup> It is no defense in an action for destruction of an irrigation ditch that its owner has failed to file a statement and a map of the ditch as required by statute,<sup>78</sup> nor in an action for destruction of easement rights in a ditch that another had offered plaintiff an option of securing water from another ditch.<sup>79</sup>

**Parties.** Where several companies are using a ditch, all must be made parties to a suit brought by one to enjoin its use by a city.<sup>80</sup>

**Pleadings.** The pleadings must be sufficient as to special damages.<sup>81</sup> In an action for destruction of the dam and headworks, in which defendant pleads the general issue, plaintiff must prove ownership of the property,<sup>82</sup> but, in an action for damages for wrongfully interfering with plaintiff's ditch, it is sufficient for plaintiff to show priority of possession and right to use the water where defendant claims no title.<sup>83</sup>

**Evidence.** Evidence of the cost of restoring a ditch wrongfully destroyed by defendant is admissible in an action to recover damages for the destruction, notwithstanding plaintiff was not entitled to all the waters he claimed.<sup>84</sup> General rules

have been applied in determining the weight and sufficiency of the evidence in actions based on injuries to irrigation works.<sup>85</sup> Thus, in an action to recover damages for destruction of a ditch, evidence of its permanent nature and of its continued use by plaintiff for a long period of years is sufficient to disprove allegations of the defense that the canal destroyed was not a part of plaintiff's irrigating system,<sup>86</sup> but evidence of the loss of two trees out of an orchard proved otherwise to be in good condition is not sufficient to establish a substantial loss from alleged destruction of a ditch.<sup>87</sup> In an action to enjoin destruction of an embankment by the owner of land through which plaintiff's ditch runs, evidence of ownership of the land is not of itself sufficient to support the defense of the right to use the water.<sup>88</sup>

**Trial and judgment.** Where there is sufficient evidence to take the case to the jury on an issue of compensatory damages, the court should not direct a verdict for nominal damages.<sup>89</sup> Instructions must be proper,<sup>90</sup> and the judgment must conform to the pleadings<sup>91</sup> and the evidence.<sup>92</sup>

**Damages.** The measure of damages for the permanent destruction of an irrigation ditch is the difference in the value of the land irrigated, with and without the ditch,<sup>93</sup> from which should be

76. Colo—City of Boulder v Boulder & White Rock Ditch & Reservoir Co, 216 P 553, 73 Colo 426, 36 A L R 1458.

77. Or—Provolt v Bailey, 121 P 961, 62 Or 58.

78. Colo—Denver, etc., R Co v Dotson, 38 P 322, 20 Colo 304.

79. Ariz—Beville v. Allen, 237 P 184, 28 Ariz 397.

80. Colo—City of Boulder v Boulder & White Rock Ditch & Reservoir Co, 216 P 553, 73 Colo 426, 36 A L R 1458.

81. **Pleadings held sufficient**

In action by farmer against railroad for damages arising from deprivation of use of water which resulted when railroad disconnected flume across its right of way as to which farmer had prescriptive right to include consideration of loss in lamb crop as result of removal of sheep to less favorable area.

US—Denver & R G W R Co v Himonas, CA Utah, 190 F 2d 1012.

82. Or—Smith v Smith, 135 P. 876, 67 Or 606.

67 C J p 1387 note 83.

83. Wyo—Chicago, B & Q R Co v McPhillamey, 118 P. 682, 19 Wyo 425, Ann Cas 1913E 101.

67 C.J. p 1387 note 84.

94 C J S.—26

84. Cal—Joerger v Pacific Gas & Electric Co, 276 P 1017, 207 Cal 8.

85. **Evidence held sufficient**

(1) To establish that during year for which damages were sought, there was water available which could have been conveyed through disconnected flume and that other waters were alone insufficient and unfit for irrigation and stock watering purposes.

US—Denver & R G W R Co v Himonas, CA Utah, 190 F 2d 1012.

(2) To sustain finding that the breaking of plaintiff's pipe line was proximately caused by water which entered plaintiff's irrigation canal having overflowed from defendant's irrigation ditch.

Utah—West Union Canal Co v Provo Bench Canal & Irr. Co, 208 P 2d 1119, 116 Utah 128.

(3) To show plaintiff entitled to injunction.

Cal—Muscoy Mut Water Co No 1 v Enloe, 213 P 2d 414, 95 Cal App 2d 566.

86. Tex—Neches Canal Co v Dishman, Com App, 44 S W 2d 955.

87. Or—Clasen v. Kennedy, 266 P 1073, 126 Or. 99.

88. Neb—Dundy County Irr Co v Morris, 185 N W. 350, 107 Neb 64.

89. Utah—Petrofesa v. Denver &

Rio Grande Western R. Co, 169 P 2d 808, 110 Utah 109.

90. **Instructions held erroneous**

Colo—City & County of Denver v Noble, 237 P 2d 637, 124 Colo 392.

91. Utah—Adamson v Brockbank, 185 P 2d 264, 112 Utah 52.

92. Utah—Adamson v Brockbank, supra.

**Judgment held supported by evidence**  
Colo—Leonard v. Buerger, 276 P 2d 886.

**Conclusion held erroneous**

In irrigation district's action for damages for diversion of water from reservoir, trial court's conclusion that, because of district's failure to make proof of application of water to beneficial use, it lost all rights acquired under water right locations except to extent of amount delivered was erroneous, where district's right to water stored was not being contested by any other appropriator or by state.

Idaho—Washington County Irr Dist v Talboy, 43 P 2d 943, 55 Idaho 382.

93. Colo—Denver, etc., R Co v Dotson, 38 P 322, 20 Colo 304.

Utah—Adamson v Brockbank, 185 P 2d 264, 112 Utah 52.

**Damages held excessive**

Colo—City & County of Denver v Noble, 237 P 2d 637, 124 Colo 392.

deducted the reasonable market value of the water stock owned by plaintiff.<sup>94</sup> For temporary damage to his irrigation ditch, the owner may recover the reasonable expense of restoration plus his loss of income for a reasonable time,<sup>95</sup> including the difference in rental value of the property with and without water for the period the ditch was not in operation,<sup>96</sup> loss of crops, measured by market value less expenses,<sup>97</sup> and the cost of replanting a field,<sup>98</sup> but the rental value of land used for growing crops the loss of which has been compensated by special damages should not be considered in computing the damages.<sup>99</sup> Special damages may include actual expenditures for seed for the year of destruction,<sup>1</sup> preparation of the land for cultivation,<sup>2</sup> loss of crops already in existence and not included in the value of the land before destruction of the ditch,<sup>3</sup> the cost of digging a well, if the wa-

ter in the ditch was usable for culinary purposes,<sup>4</sup> and interest on the amount awarded at the legal rate from the date of destruction,<sup>5</sup> but no damages should be awarded for the loss of profits on future crops which were not planted.<sup>6</sup> The damages recoverable for wrongful removal of an irrigation company's bridge is the value of the bridge, not the cost of erecting a new one, plus the reasonable cost of dirt removal necessitated thereby.<sup>7</sup> In proceedings for an injunction, defendants who had destroyed an old ditch and constructed a new one were properly required to pay the cost of a new headgate in the new ditch for plaintiff's use, where a headgate already constructed was not an adequate substitute for the original headgate used to divert water to plaintiff's land.<sup>8</sup>

Punitive damages may be awarded only if defendant acted in a willful or malicious manner.<sup>9</sup>

## E. DISTRIBUTION AND SUPPLY OF WATER FOR IRRIGATION

### § 352. Right to Supply of Water

- a. In general
- b. Nature of right
- c. Conditions precedent to right to supply
- d. Amount of water to which consumer entitled

#### a. In General

A distributor must supply water for irrigation to all

who are entitled thereto, within the ability of the distributor to do so in the exercise of reasonable diligence, and as long as it has any supply of water to distribute, and consumers cannot complain of any use which does not interfere with their rights.

It is the duty of a distributor of water for irrigation purposes to supply water to all persons who may be entitled thereto,<sup>10</sup> within the ability of the distributor to do so in the exercise of reasonable diligence,<sup>11</sup> and as long as it has any supply of water to distribute,<sup>12</sup> and, on the other hand, consum-

94. Colo—Crty & County of Denver v Noble, *supra*

95. Wash—Messenger v Frye, 28 P 2d 1023, 176 Wash. 291

96. US—Denver & R G W R Co v Himonas, C A Utah, 190 F 2d 1012

Utah—Adamson v Brockbank, 185 P 2d 264, 112 Utah 52

97. US—Denver & R G W R Co v Himonas, C A Utah, 190 F 2d 1012

98. US—Denver & R. G. W R Co v. Himonas, *supra*.

99. Utah—Adamson v Brockbank, 185 P 2d 264, 112 Utah 52

1. Utah—Adamson v. Brockbank, *supra*

2. Utah—Adamson v. Brockbank, *supra*.

3. Utah—Adamson v Brockbank, *supra*.

4. Utah—Adamson v. Brockbank, *supra*

5. Utah—Adamson v. Brockbank, *supra*.

6. Utah—Adamson v. Brockbank, *supra*.

7. Neb—Dawson County Irr Co v Dawson County, 173 NW 696, 103 Neb 692

8. Colo—Leonard v Buerger, 276 P 2d 986

9. Utah—Adamson v Brockbank, 185 P 2d 264, 112 Utah 52

10. US—U S v Tilley, CCA Nev., 124 F 2d 850, certiorari denied Scott v U S, 62 S Ct 1281, 316 U S 691, 86 L Ed 1762

Ariz—Whiting v Lyman Water Co., 124 P 2d 316, 59 Ariz 121, affirmed 129 P 2d 995, 59 Ariz 458

Nev—In re Reno Press Brick Co., 73 P 2d 503, 58 Nev 164, 67 C J p 1387 note 93

**Rights held dependent on right of appropriation**

Ariz—Whiting v Lyman Water Co., 124 P 2d 316, 59 Ariz 121, affirmed 129 P 2d 995, 59 Ariz 458

Wyo—State v Laramie Rivers Co., 136 P 2d 487, 59 Wyo. 9

**Stream flow rights**

Water impounded in reservoir, constructed under permit from state engineer for storage of quantity of water limited by state water board's water storage right certificate, must

not be used on lands having only stream flow right

Or—Tudor v Jaca, 164 P 2d 680, 178 Or 126, rehearing denied 165 P 2d 770, 178 Or 126

**Duty imposed by statute**

Neb—In re Applications Nos 2151, 2351, 2354, 2355, 2358, 2374 of Central Nebraska Public Power & Irr Dist., 268 NW 334, 131 Neb 356 Wyo—Sturgeon v Brooks, 281 P 2d 675

11. US—Ure v U S, D C Or, 93 F Supp 779, affirmed, C A, White v U S, 193 F 2d 505, and reversed on other grounds U S v. Ure, 225 F 2d 709

Tex—American Rio Grande Land & Irrigation Co v Mercedes Plantation Co, Com App, 208 S W 904

12. Ariz—Gould v Maricopa Canal Co., 76 P 598, 8 Ariz 429

67 C J p 1387 note 98

**Duty to use all available water**

All available water supply should be used as far as possible under irrigation law

Wyo—In re Greybull Valley Irr. Dist., 76 P 2d 339, 52 Wyo 479, followed in Brewer v. Greybull Valley

ers of water for irrigation purposes cannot complain of any use of the irrigation system or canal granted by its owner, or acquired by operation of law, which does not interfere with their rights<sup>13</sup> A consumer cannot acquire a right to a supply of water for irrigation in excess of the capacity of the canal or system supplying him<sup>14</sup>

Although not required to receive water for which he has no further use or pay therefor without using it,<sup>15</sup> one who has been receiving a supply of water from a distributor and applying it to the irrigation of his lands has a right to its continued use,<sup>16</sup> which right may be secured by statute,<sup>17</sup> and which exists unless the supply is diminished by a shortage of water for which the distributor is not responsible,<sup>18</sup> or by a shortage by reason of the increased demand of added consumers,<sup>19</sup> in which cases the duty of the distributor is to supply such water as it has, fairly apportioned among its consumers<sup>20</sup> A consumer cannot lawfully be deprived of any part of the supply of water to which he is entitled in order that the distributor may sell it to later comers<sup>21</sup> Where a consumer has a right to a supply of water from certain sources, the fact that he acquiesces in being supplied from one source will not amount to a waiver or abandonment of his right to be supplied from another source should the source used prove inadequate<sup>22</sup> Where a formal application and deposit of charge is required in order to entitle a landowner to demand water for irrigation, his right to demand water is controlled by conditions existing at the time of the filing of

such application and deposit of the required charge<sup>23</sup>

*From irrigation district* An irrigation district is created for the equal benefit and general welfare of all persons owning lands therein, and such district owes a duty to deliver water for each tract of irrigable land within its boundaries.<sup>24</sup> It holds the title to the waters and irrigation works in trust for the various water users who are entitled to share proportionately in the entire water supply available for irrigation purposes,<sup>25</sup> and such district cannot charge a landowner for maintenance of the irrigation system and arbitrarily refuse to deliver his proportionate share of water.<sup>26</sup> An irrigation district owes no duty to furnish water to a consumer until its system and facilities have been constructed, or until, by the use of ordinary care, it can extend its completed facilities to the consumer's land and have sufficient water in its canals to supply the consumer's legal demands in accordance with the statutes and the reasonable rules and regulations of the district<sup>27</sup> A water user in a particular irrigation district may look to officials of other districts to see that his rights are not interfered with, and he need not make a demand on any particular user therein for water<sup>28</sup>

*From irrigation or ditch company.* An irrigation company, the business of which is affected with a public interest, and which is not organized merely to furnish water to its own stockholders, has the duty of furnishing water, in the absence of contract, to the extent that the available supply has not already been contracted to other consumers,<sup>29</sup>

Irr Dist, 76 P 2d 351, 52 Wyo 513, rehearing denied In re Greybull Valley Irr Dist, 77 P 2d 617, 52 Wyo 479

#### Surplus water

If water district and irrigation district were not able to use all waters to which they were entitled, they could prevent waste of surplus water by selling it to any willing purchaser for beneficial purposes Cal—Stevenson Water Dist v Roduner, 223 P 2d 209, 36 Cal 2d 264

13. Colo—Hackett v Larimer, etc., Reservoir Co, 109 P 965, 48 Colo 178

14. DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v Park, 64 S Ct 204, 320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 US 792, 88 L Ed 477, 67 CJ p 1387 note 1.

15. Cal—Miller v Railroad Commission, 70 P 2d 164, 9 Cal 2d 190, 112 A L R 221.

16. Ariz—Whiting v Lyman Water Co, 124 P 2d 316, 59 Ariz 121 affirmed 129 P 2d 995, 59 Ariz 458 67 CJ p 1389 note 16

17. Neb—In re Birdwood Irr Dist Water Division No 1-A, 46 NW 2d 884, 154 Neb 52 67 CJ p 1389 note 17

18. Cal—Leavitt v Lassen Irr Co, 106 P 404, 157 Cal 82, 29 L R A, NS, 213.

19. Cal—Leavitt v Lassen Irr. Co, supra.

20. Cal—Leavitt v. Lassen Irr. Co, supra.

21. Cal—Hildreth v Montecito Creek Water Co, 72 P. 395, 139 Cal 22 67 CJ p 1389 note 21

22. Cal—Smith v. Cucamonga Water Co, 117 P 764, 160 Cal 611.

23. Tex—Hidalgo County Water Control & Improvement Dist No 1 v. Quick, Civ App, 13 SW 2d 209

24. Neb—In re Birdwood Irr. Dist,

Water Division No. 1-A, 46 NW 2d 884, 154 Neb 52

NM—Middle Rio Grande Water Users Ass'n v Middle Rio Grande Conservancy Dist, 258 P 2d 391, 57 NM 287—Middle Rio Grande Conservancy Dist v Chavez, 101 P 2d 190, 44 NM 240. 67 CJ p 1388 note 2

25. Idaho—Harsin v Pioneer Irr Dist, 263 P 988, 45 Idaho 369 Mont—Blaser v Clinton Irr Dist, 53 P 2d 1141, 100 Mont 459

26. Idaho—Harsin v Pioneer Irr Dist, 263 P 988, 45 Idaho 369

27. Tex—Hidalgo County Water Control & Improvement Dist No 1 v Quick, Civ App, 13 SW 2d 209. 67 CJ p 1388 note 5

28. US—Holbrook Irr Dist v Arkansas Valley Sugar Beet & Irrigated Land Co, D C Colo, 42 F. 2d 541

29. Ariz—Whiting v Lyman Water Co, 124 P 2d 316, 59 Ariz 121, affirmed 129 P 2d 995, 59 Ariz. 458.



provided the service which the consumer demands is the kind of service which the company was organized to render.<sup>30</sup> An irrigation company supplying water to the public may not arbitrarily discontinue its service in whole or in part.<sup>31</sup> A mutual irrigation company which receives its supply of water from another irrigation company supplying water to the public for irrigation purposes is a consumer of water with the same rights and subject to the same obligations as other consumers.<sup>32</sup>

**Necessity of application to beneficial use** A consumer has a right to a supply of water for irrigation only where he actually applies the water to a beneficial use,<sup>33</sup> without waste.<sup>34</sup> One who owns a water right but no land on which water can be put to a beneficial use has no right to a supply of water.<sup>35</sup>

**Abandonment of rights** Where the owners of water rights have abandoned such rights, another consumer may acquire the right to the use of the water so abandoned, either by appropriation or application to a beneficial use, or under contract with a distributor owning the paramount appropriations and water rights.<sup>36</sup> The fact that the owner of a water right represented by shares of stock in an irrigation company does not use the full quantity of water to which his shares entitle him, without an intention to waive any right, his cotenants and les-

sees using all the excess, does not work an abandonment of his rights.<sup>37</sup> A water right constituting an easement in a ditch cannot be lost by nonuser alone, short of the period for the limitation of actions to recover real property.<sup>38</sup>

**In absence of contract.** The right of a consumer to water exists, in the absence of contract, where the supplying of water for irrigation is a public use and water has been dedicated to certain lands.<sup>39</sup> Water may not be dedicated to land within a certain area in the absence of any contract between the water company and its stockholders to that effect and without compliance with any statutory provision.<sup>40</sup>

**Place of delivery.** Under a statute providing that it is the duty of a distributor of water for irrigation to deliver it at a point convenient to the consumer, it has been held that it must also be turned out at the point that will cause the least waste by seepage and evaporation.<sup>41</sup>

**Waste water.** The fact that water primarily belonging to one consumer becomes drain or waste water and is used by another consumer in turn does not establish a dedication of such water directly from the canal to the lands of the second user,<sup>42</sup> and the user cannot compel the distributor to maintain such waste water, although a rental is charged

Wash—Prescott Irr Co v Flathers, 55 P 635, 20 Wash 454  
67 C J p 1388 note 7—10 C J p 66 note 52 [b]

30. NM—Miller v Hagerman Irr Co, 151 P 763, 765, 20 NM 604  
67 C J p 1388 note 8

#### Estoppel

Irrigation companies were not estopped to deny use of water where there was no showing of fraud, deceit, or reliance on conduct of companies to detriment of users

Utah—Wellsville East Field Irr Co v Lindsay Land & Livestock Co, 137 P 2d 634, 104 Utah 448, rehearing denied 143 P 2d 278, 104 Utah 498

31. Ariz—Gould v Maricopa Canal Co, 76 P 598, 8 Ariz 429

32. Cal—Lumoneira Co v Railroad Commission of California, 162 P 1033, 174 Cal 232

33. US—Twin Falls Land & Water Co v Twin Falls Canal Co, DC Idaho, 7 F Supp 238, affirmed, CC A, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v Park, 64 S Ct 204,

320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 US 792, 88 L Ed 477

Neb—Faught v Platte Val Public Power & Irr Dist, 51 NW 2d 253, 155 Neb 141

NM—Holloway v Evans, 238 P 2d 457, 55 NM 601

Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9  
67 C J p 1389 note 15

**Mere judicial fiat insufficient to create right**

Wyo—State v Laramie Rivers Co, supra

#### Methods of irrigation required

A property right once acquired by beneficial use of water is not burdened by obligation of adopting methods of irrigation more expensive than those currently considered reasonably efficient in the locality.

DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v. Park, 64 S Ct 204, 320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 US 792, 88 L Ed 477

34. Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462

35. Colo—City & County of Denver v Brown, 138 P 44, 56 Colo 216

36. Idaho—Jackson v Indian Creek

Reservoir Ditch & Irrigation Co, 110 P 251, 18 Idaho 513

**Company held not entitled to urge abandonment by stockholders where company recognized right of stockholders to some water and all assessments had been fully paid and accepted by company**

Idaho—Erdoisa v. South Side Bruneau Canal Co, 130 P 2d 669, 64 Idaho 274

37. Colo—Cache La Poudre Irrigation Co v Larrimer & Weld Reservoir Co, 53 P 318, 25 Colo 144, 71 Am SR 123

38. Colo—People ex rel Standart v Farmers' High-Line Canal & Reservoir Co, 54 P 626, 25 Colo 202

39. US—U S v Tilley, CC A Neb, 124 F 2d 850, certiorari denied Scott v U S, 62 S Ct 1281, 316 US 691, 86 L Ed 1762  
67 C J p 1388 note 14

40. Cal—Crescent Canal Co v Kings County Development Co, 110 P 2d 1006, 43 Cal App 2d 370

41. Idaho—Niday v Barker, 101 P 254, 16 Idaho 73.

42. Idaho—Gerber v Nampa & Meridian Irr Dist, 116 P 104, 19 Idaho 765—Gerber v Nampa & Meridian Irr. Dist., 100 P. 80, 16 Idaho 1, 22.

therefor, for his right depends entirely on the water wasted from the lands of the first consumer<sup>43</sup>

**Offenses.** A statute making it a misdemeanor for a distributor of water for irrigation purposes to refuse to furnish and deliver water to a consumer after proper demand and tender of the lawful rate of compensation, when it can lawfully furnish water without infringement of prior rights, has been held to apply only to persons owning or possessing land under the ditch needing water.<sup>44</sup>

### b. Nature of Right

The right to a supply of water for irrigation is a right in real property and may be appurtenant to land.

The right to a supply of water for irrigation purposes is held to be a right in real property,<sup>45</sup> and has been said to be an incorporeal hereditament<sup>46</sup> and a covenant running with the land,<sup>47</sup> and may be a property right<sup>48</sup> or easement<sup>49</sup> appurtenant to land,<sup>50</sup> although subject to regulation<sup>51</sup> The right to a supply of water may be a servitude on the irrigation system,<sup>52</sup> binding on a successor in title of the irrigation system who has notice of the servitude, either actual or constructive<sup>53</sup> The fact that such an appurtenance may be transferred to other

lands does not render it less a complement to the land or make it an independent entity or chattel<sup>54</sup> On the other hand, it has been held that the exercise and enjoyment of a right to irrigation water does not create an easement in the property of the irrigation corporation or the consumer, but is simply a right of service,<sup>55</sup> and where the right to use water for irrigation is dependent on the ownership of shares of stock in an irrigation corporation, which shares do not represent rights to irrigate any particular land, such rights are not appurtenant to the land.<sup>56</sup>

Where water for irrigation has been dedicated to public use, the right of an individual to a supply is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated, and all who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it,<sup>57</sup> or whether they own stock in the distributing system<sup>58</sup> The actual delivery of water for irrigation purposes is an incident of the relation of distributor and consumer, which relation arises as soon as the distributor becomes ob-

43. Idaho—Gerber v Nampa & Meridian Irr Dist, supra.

44. Colo—Schneider v People, 71 P 369, 30 Colo 493

45. Cal—Rose v Mesmer, 75 P 905, 142 Cal 322

Valley View Mut Water Co v Browne, 230 P 2d 875, 104 Cal App 2d 177.

Idaho—Randall Canal Co v Randall, 50 P 2d 593, 56 Idaho 99

NJ—McCarter, Attorney General v Hudson County Water Co, 65 A 439, 70 NJ Eq 695, 14 L.R.A., N.S., 197, 118 Am SR 754, 10 Ann Cas 116

Tex—Mudge v. Hughes, Civ.App., 212 SW 819

Utah—Cortella v Salt Lake City, 72 P 2d 630, 93 Utah 236.

67 C J p 1390 note 31

Nature and ownership of water in general see supra § 1.

#### Water in use

Cal—Fawkes v Reynolds, 211 P 449, 190 Cal. 204.

#### Water stored in reservoir

Cal—Copeland v. Fairview Land, etc., Co., 131 P 119, 165 Cal 148

San Juan Gold Co v San Juan Ridge Mut. Water Ass'n, 93 P 2d 582, 34 Cal App 2d 159.

#### Water in canals

Tex—Mudge v. Hughes, Civ App, 212 SW 819.

46. Utah—Cortella v Salt Lake City, 72 P 2d 630, 93 Utah 236.

67 C J p 1390 note 32.

47. Tex—Reeves v Pecos County Water Improvement Dist No 1, Civ App, 293 SW 923, reversed on other grounds, Com App, 299 SW 224, and rehearing denied, Com App, 7 SW 2d 67

48. Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P 2d 582, 34 Cal App 2d 159

67 C J p 1390 note 34

49. Cal—Jones v Deardorff, 87 P 213, 4 Cal App 18

67 C J p 1390 note 35—19 C J p 866 note 44

50. Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P 2d 582, 34 Cal App 2d 159

67 C J p 1390 notes 34—35—31 C J p 392 note 24 [c]

#### Inapplicability of statute making rights appurtenant

Statute relating to rights of purchasers of land from corporation which furnishes water for irrigation of the land, to use of water for irrigating, was not applicable to canal company which did not sell the land for which it furnished water for irrigating purposes

Cal—Crescent Canal Co v Kings County Development Co, 110 P 2d 1006, 43 Cal App 2d 370.

51. Cal—Henderson v. Oroville-Wyandotte Irr. Dist, 277 P. 487, 207 Cal 215

52. Or—In re Water Rights of

Deschutes River and Tributaries, 286 P 563, 294 P 1049, 134 Or 623

67 C J p 1391 note 39

53. Cal—Chrisman v Southern California Edison Co, 256 P 618, 83 Cal App 249

67 C J p 1391 note 40

54. Idaho—Milner v Leland, 4 P 2d 665, 51 Idaho 214—Leland v Twin Falls Canal Co, 3 P 2d 1105, 51 Idaho 204

55. Neb—Faught v Platte Val Public Power & Irr Dist, 51 NW 2d 253, 155 Neb 141

#### Right subject to regulation

Neb—Faught v Platte Val Public Power & Irr Dist, supra.

56. US—Ackroyd v Winston Bros Co, CCA Mont, 113 F 2d 657.

67 C J p 1391 note 38

57. Cal—Miller v Railroad Commission, 70 P 2d 164, 9 Cal 2d 190, 112 A L R 221

Neb—Faught v. Platte Val. Public Power & Irr Dist, 51 NW 2d 253, 155 Neb. 141—Vonburg v Farmers' Irr Dist, 260 NW 383, 128 Neb 748

67 C J p 1391 note 43

Irrigation as public use in general see supra § 315

58. Ariz—Whiting v Lyman Water Co, 129 P 2d 995, 59 Ariz 458—Olsen v Union Canal & Irrigation Co, 119 P 2d 569, 58 Ariz 306

ligated to furnish water and the consumer becomes obligated to take it.<sup>59</sup>

*Distributor or Consumer as Appropriator* It is the rule in some jurisdictions that the irrigation company or district distributing water to its consumers is the appropriator of the water from the source of supply, the consumer having merely a right, contractual or otherwise, to a supply of water for irrigation purposes,<sup>60</sup> and it is not necessary that the irrigation company or district own or possess land in connection with its system in order to be such an appropriator.<sup>61</sup> In other jurisdictions, however, the rule has been established that an irrigation company or district which does not itself own or possess arable and irrigable land cannot be an appropriator of water from its source of supply, but the appropriation is completed only by the application of the water to a beneficial use by the consumer,<sup>62</sup> and, while the consumer under this rule is in a sense an appropriator, he does not occupy the exact status of an independent appropriator directly from a stream, since his rights are limited by the terms of his contract with the distributor, as well as by limitations imposed by law on the relations between distributor and consumer.<sup>63</sup> Under this rule, the distributor has the status of a carrier or agency, public or private, depending on whether its purpose or practice is to supply owners or possessors of land who are not stock or water right holders and to whom it has assumed no contractual obligation, or is merely to supply those owners or possessors of land with whom it has fixed contractual relations.<sup>64</sup> Where the right

to water of an appropriator thereof is merely inchoate, no water having yet been applied by him to a beneficial use, an irrigation district or landowners therein desiring a supply of the water so appropriated but not used are under no obligation to purchase from the appropriator, but may secure water independently of him from such sources as they choose.<sup>65</sup>

### c. Conditions Precedent to Right to Supply

A consumer must make application or demand for water for irrigation and tender payment therefor.

In order that a consumer may have a right to a supply of water for irrigation purposes, he must make such seasonable and proper application or demand therefor as may be required by statute or otherwise,<sup>66</sup> and pay or tender payment at the established rates or on a proper basis of compensation,<sup>67</sup> and the distributor may require the charges to be paid or secured in advance.<sup>68</sup> The tendering of maintenance fees is not a condition precedent to a right to water where no maintenance fees have been assessed by the distributor.<sup>69</sup> Where a distributor refuses to furnish water except at a higher rate than that at which a consumer is entitled to receive it, the distributor is not excused from its obligation to furnish water by the fact that the consumer did not make a demand for a specific amount and did not tender payment in advance at the contract rate.<sup>70</sup> Under provisions of constitution and statute securing to everyone who has rented water from an irrigation company the right to rent from year to year and making such rental a dedication, and providing for the tendering of rea-

59. Cal—Butte County Water Users' Ass'n v Railroad Commission of California, 196 P 265, 185 Cal 218.

60. Cal—Miller v Railroad Commission, 70 P 2d 164, 9 Cal 2d 190, 112 A L R 221.

Idaho—Nampa & Meridian Irr Dist v Barclay, 47 P 2d 916, 56 Idaho 13, 100 A L R 557.

Mont—State ex rel Mungas v District Court of Third Judicial District in and for Granite County, 59 P 2d 71, 102 Mont 533.

67 C J p 1391 note 46.

#### Rights among consumers

Consumers of water who acquire their rights through district which is appropriator and owner have no right which they can assert against other appropriators.

Idaho—Nampa & Meridian Irr Dist v Barclay, 47 P 2d 916, 56 Idaho 13, 100 A L R 557.

61. U S—Gutierrez v Albuquerque Land & Irrigation Co, N M, 23 S Ct 338, 188 U S 545, 47 L Ed 538. 67 C J p 1391 note 47.

62. U S—Reconstruction Finance Corp v Schmitt, D C Nev, 20 F Supp 816, reversed on other grounds, C C A, Pacific States Savings & Loan Corp v Schmitt, 103 F 2d 1002.

Wyo—Corpus Juris cited in State v Laramie Rivers Co, 136 P 2d 487, 498, 59 Wyo 9.

67 C J p 1391 note 48.

63. Wyo—Corpus Juris cited in State v Laramie Rivers Co, 136 P 2d 487, 498, 59 Wyo 9.

67 C J p 1392 note 49.

64. Ariz—Whiting v Lyman Water Co, 124 P 2d 316, 59 Ariz 121, affirmed 129 P 2d 995, 59 Ariz 458.

Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9.

67 C J p 1392 note 50.

65. U S—Griffiths v Cole, D C Idaho, 264 F 369.

66. La—Houston River Canal Co v Kopke, 31 So 156, 106 La 609. 67 C J p 1392 note 53.

67. Ariz—Whiting v Lyman Water Co, 124 P 2d 316, 59 Ariz 121, affirmed 129 P 2d 995, 59 Ariz 458.

Cal—Henck v Lake Hemet Water Co, 69 P 2d 849, 9 Cal 2d 136.

Wyo—McHale v Goshen Ditch Co, 52 P 2d 678, 49 Wyo. 100.

67 C J p 1392 note 54.

#### Lump sum purchase

A canal company has no right to refuse arbitrarily to permit use of surplus water, which it controls, by landowners in need thereof, because of their failure to purchase rights in company for lump sum.

Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9.

68. Idaho—Shelby v Farmers' Co-Operative Ditch Co, 80 P 222, 10 Idaho 723.

69. Idaho—Hanes v Idaho Irr Co, 122 P 859, 21 Idaho 512.

70. Cal—Henrick v South Feather Land & Water Co, 170 P. 1135, 177 Cal 442.

sonable compensation, or reasonable security for payment, the right of a user to water depends on his complying with the statute as to payment of compensation, or tender of security therefor.<sup>71</sup> Where an irrigation district has adopted a rule requiring landowners to keep their ditches and facilities for distributing water in good condition so that it can be used without undue loss or waste, a landowner cannot compel an irrigation district to furnish him the share to which he is entitled without showing that he is prepared to use the same.<sup>72</sup> where the irrigation company is organized to furnish water only to its own stockholders, a person is not entitled to a supply of water from such company until he acquires or establishes title to a water right.<sup>73</sup> While compliance by a consumer with conditions precedent to a right to a supply imposed by statute places a duty on the distributor to furnish water,<sup>74</sup> the compliance with such conditions has been held to be unnecessary where the distributor has expressly assumed the obligation of furnishing water.<sup>75</sup>

#### d. Amount of Water to Which Consumer Entitled

The amount of water to which a consumer is entitled is limited to that quantity which can be put to a beneficial use, and his right to any quantity of water to which he may be otherwise entitled depends on his necessities and ceases with them.

A consumer, claiming a right to water for irrigation under contract or otherwise, is entitled only to that quantity of water which he can reasonably and economically put to a beneficial use,<sup>76</sup> and his right to any quantity of water to which he may

be otherwise entitled depends on his necessities and ceases with them.<sup>77</sup> An irrigation company or district may not knowingly furnish water to a consumer in excess of his needs and beneficial use.<sup>78</sup> The fact that a consumer has a rental right for a fixed amount of water does not of itself entitle him to that amount of water, unless he can and will apply it to a beneficial use, and whenever he ceases to apply any part of it to such use, his right to have that amount turned out to him ceases for the time being, and the extra quantity becomes at once available for another user and consumer.<sup>79</sup>

The volume of water to which a consumer is entitled may be validly limited by contract,<sup>80</sup> or deed.<sup>81</sup> Where the right of a consumer to a certain quantity of water has been established by contract and usage, he may continue to have a right to the same amount in the absence of contract.<sup>82</sup> One who voluntarily transfers water rights to an irrigation company in return for its contract to furnish water in certain quantities cannot claim a greater quantity to which he was entitled under his former water rights.<sup>83</sup> Where a contract for the sale of water specifies the exact amount to which the consumer is entitled under the contract, he cannot claim a larger amount to the extent of the capacity of the pipes connecting the system with the consumer's land.<sup>84</sup> Under a statute providing that a consumer who has contracted for, and beneficially used, a specific volume of water for any particular year, without valid limitation as to future use, will be entitled to the same volume in succeeding years

71. Idaho—Bardsly v Boise Irrigation & Land Co., 67 P 428, 8 Idaho 155

72. Cal—Nelson v. Anderson-Cottonwood Irr Dist., 196 P 292, 51 Cal App 92

73. Neb—Dundy County Irr Co v Morris, 185 NW 350, 107 Neb 64. Rights of stockholders in irrigation company to supply in general see *infra* § 353

74. Tex—Barnhart v Hidalgo County Water Improvement Dist No 4, Civ App, 278 SW 499

75. Tex—Hudspeth County Conservation and Reclamation Dist No 1 v Spears & Co., Civ App, 39 SW 2d 94—Cameron County Water Improvement Dist No 1 v Daniels, Civ App, 269 SW 1066

76. Cal—Simon Newman Co. v Sanches, 159 P 2d 81, 69 Cal App 2d 432.

DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 U.S. 792, 88 L Ed 477, Ickes v. Park, 64 S Ct. 204,

320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 U S 792, 88 L Ed 477

Idaho—Rayl v Salmon River Canal Co., 157 P 2d 76, 66 Idaho 199. NM—Holloway v. Evans, 238 P 2d 457, 55 NM 601. 67 C J p 1393 note 63.

77. Idaho—Glavin v Salmon River Canal Co., 258 P 532, 44 Idaho 583. **Swampland**

In apportioning water of irrigation ditch among several landowners, swampland which required no irrigation and would not be benefited thereby should not be considered. Cal—Simon Newman Co v Sanches, 159 P 2d 81, 69 Cal App 2d 432

78. Idaho—Munn v Twin Falls Canal Co., 252 P 865, 43 Idaho 198

79. Idaho—Niday v Barker, 101 P 254, 16 Idaho 73

80. Colo—City and County of Denver v Brown, 138 P 44, 56 Colo 216

Right to contract as to volume generally see *infra* § 361.

#### Subsequent needs

Water rights established as sufficient when settlor acquired land obligated Carey Act construction company to deliver that amount and limited company's duty, but was not a limit on what settlor might later deed, use, or require, so as to preclude his acquiring additional water thereafter. Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462

81. Colo—Holbrook Irrigation Dist. v Adcock, 255 P 2d 384, 127 Colo. 192

82. Colo—Northern Colorado Irr Co v Pouppirt, 127 P 125, 22 Colo App 563. 67 C J p 1393 note 68

83. Or—In re Waters of Willow Creek, 236 P 487, 763, 237 P. 682, 239 P 123, 119 Or 155

84. Cal—San Diego Flume Co v. Chase, 25 P. 756, 26 P. 825, 87 Cal. 561.

67 C J. p 1393 note 71.

when needed for irrigation, on tender of lawful rates and compliance with reasonable rules of the distributor, it has been held that the amount of water to which the consumer may become entitled is limited by his contract, and he is not entitled to the amount which may have been actually applied to his land in preceding years, when in excess of the amount contracted for <sup>85</sup>

A person entitled to receive a certain amount of water for irrigation purposes may lose a part of such right by prescription by accepting for the statutory period a lesser quantity of water than that to which he was originally entitled <sup>86</sup> Where a consumer has the right to only so much water as is necessary to irrigate a certain tract of land, he cannot use water to irrigate such tract and an additional tract also <sup>87</sup> Where the quantity of water to which a user is entitled has been determined by court decree, such determination is controlling in later collateral proceedings <sup>88</sup>

The proper place of measurement of irrigation water is at the place of diversion from the main canals of the irrigation system. <sup>89</sup>

### § 353. — Rights of Particular Persons to Supply

- a. Stockholders or members of company or association
- b. Consumers not stockholders or members of company or association
- c. Consumers within area of irrigation system or district
- d. Consumers outside area of irrigation system or district

### a. Stockholders or Members of Company or Association

A stockholder in an irrigation company generally has the right to a share in the whole volume of water in proportion to his holdings therein, except as his right may be fixed by contract or the company may have resorted to another plan of distribution, but a stockholder has no right to receive the amount of water to which his share entitles him in any manner other than through the system of the irrigation company.

Where the service of an irrigation company, instead of being public or general, is limited to its own stockholders or members, each of them has the right to a share of the whole volume of water in proportion to his shares of stock or holdings in the company, <sup>90</sup> except as his right may be fixed by contract, <sup>91</sup> or the company may have resorted to another plan of distribution <sup>92</sup> A stockholder in an irrigation construction company under a reclamation project has also been held to have a contract right to the amount of water evidenced by his certificates of stock <sup>93</sup> Under some statutes, the rights of stockholders in mutual irrigation companies have been treated as analogous to those of tenants in common, <sup>94</sup> but there is authority holding that such stockholders are not tenants in common, but have a contract relation with the company <sup>95</sup> A stockholder has no right to receive the amount of water to which his shares entitle him in any manner other than through the system of the irrigation company. <sup>96</sup> The rights of a stockholder to the continued use of water may depend on the paying of assessments duly levied <sup>97</sup>

It is the duty of an irrigation company organized for the purpose of supplying water to its stockholders to exercise reasonable care and diligence in procuring and distributing water to its stockholders, <sup>98</sup> and where a stockholder's land

85. Colo—City and County of Denver v Brown, 138 P 44, 56 Colo 216

86. Mont—Verwolf v Low Line Irr Co., 227 P 68, 70 Mont 570

87. Colo—Wright v Platte Valley Irr Co., 61 P 603, 27 Colo 322 67 C J p 1394 note 72

88. Or—In re Waters of Willow Creek, 236 P 487, 763, 237 P 682, 239 P 123, 119 Or 155

89. Or—In re Waters of Willow Creek, supra.

90. Cal—Crescent Canal Co v Kings County Development Co., 110 P 2d 1006, 43 Cal App 2d 370 67 C J p 1394 note 78

#### Effect of custom and usage

A contractual right of a stockholder in a water company cannot be defeated by custom and usage, re-

gardless of whether the water rights are appurtenant to land

Cal—Crescent Canal Co v Kings County Development Co., supra

Where canal company had not complied with statute relating to mutual water companies, the statute was not applicable in determining right of purchaser of stock in the company to proportionate share of water for irrigating purposes

Cal—Crescent Canal Co v Kings County Development Co., supra.

91. US—Caldwell v Twin Falls Salmon River Land & Water Co., D C Idaho, 225 F 584.

67 C J p 1394 note 79

92. Colo—Mountain Supply Ditch Co v Lindekugel, 131 P. 789, 24 Colo App 100

67 C J p 1394 note 80

93. US—Twin Falls Oakley Land

& Water Co v Martens, C.C.A Idaho, 271 F 428, certiorari denied 42 S Ct 49, 257 US 637, 66 L Ed 410

94. Utah—Smith v North Canyon Water Co., 52 P 283, 16 Utah 194

95. US—Ackroyd v Winston Bros. Co., C.C.A Mont., 113 F 2d 657.

Mont—Hyink v Low Line Irr. Co., 205 P 236, 62 Mont 401

96. Cal—Duze v South Elsinore Mut Water Co., 188 P.2d 837, 83 Cal App 2d 333

67 C J p 1395 note 84.

97. Neb—Thirty Mile Canal Co v. Carskadon, 70 NW 2d 432, 160 Neb 496

67 C J p 1395 note 95.

98. Colo—Mountain Supply Ditch Co v. Lindekugel, 131 P. 789, 24 Colo App 100.

Mont—Hyink v Low Line Irr. Co., 205 P 236, 62 Mont. 401.

is so situated that it can be irrigated from certain reservoirs only, it is the duty of the company, if practicable, by the exercise of reasonable care and diligence, and without prejudice to the other stockholders, to retain a sufficient amount of water in such reservoirs to irrigate that land<sup>99</sup>

Stockholders in an irrigation company who are supplied with water from one source of supply, which supply fails, are not estopped by their acquiescence in being supplied from the first source to claim their proportionate share from another source of supply,<sup>1</sup> and it has been held that a shareholder in a mutual water company is not prohibited from acquiring shares in a different water company,<sup>2</sup> at least, where the right of the company to serve its stockholders is considered not an exclusive one.<sup>3</sup> Persons becoming stockholders in an association and thereby agreeing to be bound by rules and regulations for the use of water prescribed by governmental authority are estopped to use water contrary to such rules and regulations.<sup>4</sup>

*Irrigation district as stockholder.* Articles of incorporation of an irrigation company restricting the use of water to land owned or possessed by stockholders do not exclude owners of land in an irrigation district which district is a stockholder in the company.<sup>5</sup>

*Municipality as stockholder.* Where a municipality becomes a stockholder in a mutual irrigation company, the company does not assume the duty of supplying the city in accordance with its needs,<sup>6</sup> the city having the right only to that amount of water to which its stock entitles it,<sup>7</sup> and if the acquisition of such stock by the city was ultra vires and void, the company is under no compulsion to furnish the city with any water.<sup>8</sup>

*Directors* of an irrigation corporation, formed for the benefit, principally, of its promoters, cannot buy water rights from the corporation at a price

so low as to injure the interests of stockholders of the corporation.<sup>9</sup>

*Property in water.* Water delivered by an irrigation company into a stockholder's private pipe line becomes his personal property with complete right of disposal as long as the rights of others are not injured.<sup>10</sup>

*Waste water.* Any stockholder who needs waste water in the company's ditch has an equitable right to the use thereof, although it may exceed his technical allowance measured by his shares of stock.<sup>11</sup>

*Stockholder's right as appurtenant to land.* While a stockholder's right to water from an irrigation system becomes appurtenant to the land under some statutes,<sup>12</sup> it has been held that it is not essential to recognition of the right that it be appurtenant to any particular land.<sup>13</sup>

#### b. Consumers Not Stockholders or Members of Company or Association

An irrigation company need not furnish water acquired for its stockholders to users with no vested right therein, but a stockholder may not object to a sale of water if he is not prejudiced thereby.

In the absence of contractual liability, an irrigation company is not required to furnish to other users any of its own water acquired for its stockholders or for sale in case of a surplus over the amount required by its stockholders,<sup>14</sup> but a stockholder may not object to the sale of water outside the territorial limits for such sale provided in the charter of the irrigation company, where the stockholder is not prejudiced by the sale.<sup>15</sup> An irrigation company which has not issued all the shares of its authorized stock may reopen its subscription for shares and contract to sell additional water rights if it does not thereby impair the rights of its present stockholders.<sup>16</sup> Where an irrigation company, not being itself an appropriator of the water carried, supplies water to others than its

99. Colo.—Mountain Supply Ditch Co v Lindekugel, 131 P 789, 24 Colo App 100

1. Cal.—Richey v East Redlands Water Co, 74 P 754, 141 Cal 221  
Valley View Mut. Water Co v Browne, 230 P 2d 875, 104 Cal App. 2d 177

2. Cal.—Valley View Mut Water Co v Browne, supra.

**Held not a breach of contract**  
Cal.—Valley View Mut. Water Co. v. Browne, supra.

3. Cal.—Valley View Mut Water Co v. Browne, supra.

4. U S.—United States v. Bunting, D. C Or, 206 F 341.

5. Cal.—Lindsay-Strathmore Irr Dist v Wutchumna Water Co, 296 P 933, 111 Cal App 688

6. Cal.—Escondido Mutual Water Co v. City of Escondido, 147 P. 1172, 169 Cal 772

7. Cal.—Escondido Mutual Water Co v City of Escondido, supra

8. Cal.—Escondido Mutual Water Co v City of Escondido, supra

9. Or.—Paine v. Milton, Freewater & Hudson Bay Irr Co, 127 P 774, modified on other grounds 128 P 997, 63 Or. 576

10. Utah.—Baird v Upper Canal Irr Co, 257 P 1060, 70 Utah 57

11. Colo.—Stuart v. Davis, 139 P. 577, 25 Colo App 568.

12. Mont.—Brady Irr Co v Teton County, 85 P 2d 350, 107 Mont 330

13. Cal.—Bank of Visalia v. Smith, 81 P 542, 146 Cal 398  
Lindsay-Strathmore Irr Dist v. Wutchumna Water Co, 296 P 933, 111 Cal App 688

14. Cal.—Gordon v Coyuna Irr Co, 127 P. 646, 164 Cal 88

15. Or.—Paine v Milton, Freewater & Hudson Bay Irr Co, 127 P 774, 128 P 997, 63 Or. 576

16. Ariz.—Bethune v Salt River Valley Water Users' Ass'n, 227 P 989, 26 Ariz 525

67 C.J. p 1396 note 3.

water right holders, a nonwater right holder, on payment of the charge for similar service made to other nonwater right holders, is entitled to receive water sufficient for irrigation purposes in preference to other nonwater right holders whose appropriations are subsequent in time, although they claim under orders or leases from water right holders<sup>17</sup>

**c. Consumers Within Area of Irrigation System or District**

An irrigation district may be prevented from supplying water for use within the district to others than the persons under contract therefor

Owners of water rights within an irrigation district may prevent the district from supplying water to consumers for use on lands within the district other than those for which the water was contracted to be furnished, when the result of such action would be to deprive other lands within the district of water necessary for the proper irrigation thereof, even though the right to transfer the supply is given by statute enacted subsequent to the contract creating the right to a supply<sup>18</sup>

**d. Consumers Outside Area of Irrigation System or District**

A distributor supplying water is under no obligation to supply water to land outside the territory to be served, and the rights of consumers outside the area of the system or district are subordinate to the rights of consumers within such area; but a consumer entitled to water within the area may use the water outside the area if the rights of other consumers within the area are not injuriously affected thereby.

When there is no surplus of water over the amount required for the irrigation of lands within such territory, a distributor supplying water to the public and possessing a limited amount of water need supply no water to lands outside the territory to which the water has been dedicated,<sup>19</sup> or outside

the fixed limits of the territory to be served,<sup>20</sup> except as the right thereto may be gained in the manner provided by statute,<sup>21</sup> and the rights of consumers outside the area of the system or district must be subordinate to the rights of consumers within such area<sup>22</sup> Accordingly, an irrigation district is not required to furnish water to persons outside the district who have not acquired a vested right to the use of such water, when the water is required for the irrigation of lands within the district<sup>23</sup> A consumer entitled to water within the area of the system or district may use such water outside the area, however, if the rights of other consumers within the area are not injuriously affected by the change in place of use<sup>24</sup> Where water has become dedicated to the use of an outside community, it cannot later be treated as surplus water which an irrigation district may sell at its pleasure<sup>25</sup>

Where an irrigation district has in fact agreed to furnish water to a landowner outside the district, the district will not be relieved from liability for failure to furnish such water by the fact that the land was outside the district<sup>26</sup> A consumer within an irrigation district cannot complain of the unauthorized sale of water by the district for use on lands lying outside the district unless he is thereby deprived of water to which he was entitled<sup>27</sup> A reclamation district acquiring property by purchase in order to obtain a supply of water for its needs, and agreeing as a part of the consideration to furnish water to the vendors, cannot refuse to comply with the agreement, although the lands to be so furnished are outside the district.<sup>28</sup>

**§ 354. — Priority of Rights**

In the absence of statutes or contracts affecting priorities, consumers applying water to a beneficial use who are prior in time are generally superior in right.

17. Ariz.—Slosser v Salt River Valley Water Co., 65 P 332, 7 Ariz 376

18. Tex.—Reeves v Pecos County Water Improvement Dist No 1, Com App, 299 S.W. 224  
67 C.J. p 1396 note 5

19. Cal.—Copeland v Fairview Land & Water Co., 131 P 119, 165 Cal 148

Idaho—Jensen v. Boise-Kuna Irr Dist, 269 P 2d 755, 75 Idaho 133  
Wyo.—Corpus Juris cited in In re Greybull Valley Irr Dist., 76 P 2d 339, 349, 52 Wyo 479

**Water held not dedicated to particular area**

Where water supplied by canal company had always been used in a particular area, but there was nothing

in the articles and bylaws of the company, or in the stock certificates issued by it restricting the use of the water to such area, there was no dedication of the water to the particular area and a purchaser of stock in the company was entitled to use his proportionate share of the water for land located outside the particular area previously served  
Cal.—Crescent Canal Co v Kings County Development Co., 110 P 2d 1006, 43 Cal App 2d 370

20. Neb.—In re Birdwood Irr Dist, Water Division No. 1—A, 46 N.W. 2d 884, 154 Neb 52  
67 C.J. p 1396 note 7

21. Neb.—In re Birdwood Irr Dist, Water Division No 1—A, supra

22. Tex.—Edinburg Irr Co v Ledbetter, Com App, 286 S.W. 185

23. Idaho—Yaden v Gem Irr Dist, 216 P 250, 37 Idaho 300  
67 C.J. p 1395 note 99

24. Utah—Glover v Utah Oil Refining Co., 218 P 955, 62 Utah 174, 31 A.L.R. 900  
67 C.J. p 1396 note 9

25. Cal.—City of San Diego v La Mesa, Lemon Grove & Spring Valley Irr Dist, 292 P 1082, 109 Cal App 280

26. Tex.—Cameron County Water Improvement Dist No 1 v Daniels, Civ App, 269 S.W. 1066

27. Cal.—Nissen v Coult, 274 P. 603, 96 Cal App 611

28. Wash.—Talbot v Whitestone Reclamation Dist, 281 P. 11, 154 Wash 102

In the absence of statutes determining priorities, or of contracts providing for prorating in times of shortage of supply, or for other methods of distribution, it is the general rule in determining relative rights between consumers that users applying water to a beneficial use who are prior in time are superior in right,<sup>29</sup> and priorities between consumers are not based on the dates of their respective contracts<sup>30</sup> The retention by a consumer of a priority once acquired depends on his application of the water to a beneficial use<sup>31</sup> When all the waters of an irrigation canal have been applied to a beneficial use under a sale or rental, and, when not needed by the users entitled thereto, are furnished to a subsequent applicant, the applicant has only the right to use such water as is not required by the prior users,<sup>32</sup> and by using the water the subsequent applicant does not become vested with a right interfering with the rights of the prior users<sup>33</sup>

Already existent consumers are entitled to water in preference to the distributor itself, or its proprietary successors in interest,<sup>34</sup> and a distributor cannot make appurtenant to its own land water which it has already sold to consumers<sup>35</sup>

It has been held that the right to priority in the use of water for irrigation purposes must be determined as though all the provisions of the stat-

utes of the jurisdiction regulating the use of state waters had been written into the contract, and the rights of the parties must be determined by construction of the statutes rather than of the contract<sup>36</sup> Under some statutes, a landowner has no preferential rights<sup>37</sup> Thus, under statutes denying the right of priority as among the owners of lands adjoining or contiguous to the canals and laterals of an irrigation company, it has been held that all land so situated has equal right to the available water supply in case of a water shortage, without regard to when particular land was first put in cultivation or was first supplied with water from the canals of the irrigation company.<sup>38</sup> Under a statute giving effect to the customs of persons participating in the distribution of water for irrigation purposes, subject to prior vested rights, and prescribing the order of priority of right to distribution of water from an irrigation ditch or canal, portions of a canal have been held to be severable in determining the relative rights of consumers.<sup>39</sup>

*Priority of right to supply as affected by priority of appropriation.* Decrees determining the priorities and the amount of appropriations to the several ditches in an irrigation district are not intended to designate the persons entitled to the use of water thus appropriated to a particular ditch, or to de-

29. Ariz—Olsen v Union Canal & Irrigation Co., 119 P 2d 569, 58 Ariz 306

Idaho—Scott v Nampa Meridian Irr Dist., 45 P 2d 1062, 55 Idaho 672

Wyo—Corpus Juris cited in State v Laramie Rivers Co., 136 P 2d 487, 498, 59 Wyo 9

67 C J p 1396 note 17.

**Statutory provision against interference with vested rights**

Proposed restriction on Colorado's uses of water of North Platte River for irrigation purposes did not violate act which appropriated funds for federal reclamation project which provided that project should not interfere with present vested rights for all beneficial purposes in Colorado, since the act does not limit or restrict Nebraska's or Wyoming's claim for apportionment against Colorado, and the project under existing conditions could store no water without violating other priorities

US—State of Nebraska v State of Wyoming, 65 S Ct 1332, 325 US 589, 89 L Ed 1815

**Disputes as to priorities under Reclamation Act**

Under Reclamation Act, secretary of interior has no concern in disputes between various entrymen which concern their respective priorities, other than as a stakeholder

DC—Fox v. Iokes, 137 F.2d 30, 73

US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v Park 64 S Ct 204, 320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct. 204, 320 US 792, 88 L Ed 477

**Duty of water affects holders of different priorities and was not involved, where all rights under project were of same priority**

Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462

30. Or—In re Waters of Umatilla River, 172 P 97, 88 Or 376

31. Or—In re Waters of Umatilla River, supra

Right to supply of water as dependent on ability to put to beneficial use see supra § 352 a

**Method of establishing waste**

(1) Proper method of establishing waste by unit holder of water rights is to fix consumption use of particular plants which individual farmer was raising during particular year, and permissible, or unavoidable waste of reasonable method of farming particular plot, and loss in laterals between main canal and individual farm

US—Twin Falls Land & Water Co v Twin Falls Canal Co., DC Idaho, 7 F Supp 238, affirmed, CCA, 79 F 2d 431, certiorari denied 56 S.Ct 381, 296 US 654, 80 L Ed. 466.

(2) In determining waste in use of water from irrigation system, reasonable method of farming must prevail, and farmer is not required to use costly methods simply because some waste can be saved thereby

US—Twin Falls Land & Water Co v Twin Falls Canal Co., supra

32. Idaho—Gerber v Nampa & Meridian Irr Dist., 100 P. 80, 16 Idaho 1, 22

33. Idaho—Gerber v Nampa & Meridian Irr Dist., supra.

34. Or—In re Waters of Willow Creek, 236 P. 487, 237 P 682, 239 P 123, 119 Or 155—Sears v Orchards Water Co., 236 P 502, 115 Or 291

35. Or—In re Waters of Willow Creek, 236 P 487, 237 P 682, 239 P 123, 119 Or 155—Sears v Orchards Water Co., 236 P 502, 115 Or. 291

36. Tex—Willis v. Neches Canal Co., Civ App, 7 S W 2d 184, affirmed Com App, 16 S W 2d 266

37. Colo—Johnston v. Wanamaker Ditch Co., 38 P 2d 907, 95 Colo 551

38. US—Farris v Blaine County Inv. Co., DC Idaho, 3 F Supp. 381, 67 C J p 1397 note 25

39. Neb—Fenton v Tri-State Land Co., 131 NW. 1038, 89 Neb 479



termine the relative rights or priorities of consumers from any particular ditch, as between themselves<sup>40</sup> Where priorities of appropriation have been decreed in favor of a ditch through which a number of consumers are supplied, it has been held that all consumers taking water from the ditch have the right to be supplied from all the priorities decreed to the ditch through which they are supplied, when the rights of the consumers by virtue of prior use aggregate the volume of such decreed priorities, and in such circumstances stand on an equal plane.<sup>41</sup> It has been said, however, that in a case where the first appropriation decreed a ditch was designed for some particular purpose or enterprise, and later priorities awarded were to supply a different class or group of consumers from the first, the rights of the different classes of consumers would be distinct and would attach only to the respective priorities awarded for their respective use.<sup>42</sup> In jurisdictions where it is the rule that the appropriation of water for irrigation is not complete until it has been applied to a beneficial use by the consumer, it is also held that the appropriations of water by consumers who receive the same through an irrigation system do not necessarily relate back to the same time, but such consumers may have different priorities in respect of the water<sup>43</sup> An irrigation company cannot, by any provision of its bylaws, rules, or regulations, exempt itself or its stockholders from the operation of the laws in respect of priority of appropriation<sup>44</sup>

§ 355. — Discrimination

A distributor of water for irrigation purposes may not ordinarily discriminate between consumers, although a public service company may give a preference to its regular consumers as against consumers which the company has undertaken to serve only when it has a surplus of water over the needs of its regular consumers.

It is the general rule that neither an irrigation district<sup>45</sup> nor an irrigation company supplying water to the public,<sup>46</sup> or a municipality distributing water for irrigation,<sup>47</sup> may discriminate between consumers or give any consumer a preference over another. A public service company may, however, give a preference to its regular consumers as against consumers which the company has undertaken to serve only when it has a surplus of water over and above the needs of its regular consumers<sup>48</sup> An irrigation company which furnishes water to its stockholders only may not make arbitrary discriminations between different stockholders<sup>49</sup> Where water has been appropriated to a public use by a distributor for purposes of irrigation, it cannot later be converted lawfully into a private use so as to create a private preferential right there-to for the benefit of a specific parcel of land,<sup>50</sup> and such an appropriator cannot, on sale of the irrigation system, reserve any part of the waters so appropriated for the irrigation of its private land, unless a private appropriation has been made through the same system, in which case the reservation must be limited to such private appropriation<sup>51</sup>

40. Wyo.—Corpus Juris quoted in State v Laramie Rivers Co, 136 P 2d 487, 495, 59 Wyo 9. 67 C J p 1397 note 28

Effect of decree

(1) While water rights adjudication, mentioning appropriation of water as being carried through a ditch, may be prima facie evidence of right to divert water through such ditch, it is not binding when question of existence of the right comes directly in issue

Wyo.—State v Laramie Rivers Co, supra

(2) In decree apportioning rights in water of river and in reservoir created by United States government dam, provision that use by upper owners might disregard priority rights of United States below the dam merely meant that, to the extent that upper users were using the equivalent of water already impounded and thus available for use of the United States below the dam, such storage should be relied on by the United States to satisfy its priority rights to divert water from the natural flow before diversion by upper owners, and did not entirely subordi-

nate government's rights to rights of upper owners

US—Gila Valley Irr Dist v. U S, CCA Ariz, 118 F 2d 507

(3) Under decree apportioning rights in waters of river and in reservoir created by United States government dam, providing for annual apportionment to upper users of an amount from the "natural flow" of the river equal to that "stored" in the reservoir, the amount "stored" was not the entire amount of water flowing into the reservoir, notwithstanding that as a physical fact all water reaching the reservoir must be temporarily stored therein

US—Gila Valley Irr Dist v. U S, supra

41. Colo—City and County of Denver v Brown, 138 P. 44, 56 Colo. 216

42. Colo—City and County of Denver v. Brown, supra.

43. Colo—Farmers' High Line Canal, etc, Co v Southworth, 21 P 1028, 13 Colo. 111, 4 L.R.A. 767 Appropriation completed only by consumer's application of water to beneficial use generally see supra § 252 b

44. Colo—Combs v Agricultural Ditch Co, 28 P 966, 17 Colo 146, 31 Am S R 275

45. Wash—Barker v Sunnyside Valley Irr. Dist., 221 P 2d 827, 37 Wash 2d 115 67 C J p 1398 note 35 Discrimination as to rates see infra § 363 b

46. Cal—Butte County Water Users' Ass'n v Railroad Commission of California, 196 P 265, 185 Cal 218 67 C J p 1398 note 36

47. Utah—Holman v. Pleasant Grove City, 30 P 72, 8 Utah 78. 67 C J p 1398 note 37

48. Cal—Butte County Water Users' Ass'n v Railroad Commission of California, 196 P. 265, 185 Cal 218

49. Cal—Lindsay-Strathmore Irr Dist v Wutchumna Water Co., 296 P 933, 111 Cal App 688

50. Cal—Limoneira Co v Railroad Commission of California, 162 P 1033, 174 Cal 232 67 C J p 1398 note 40

51. Cal—Leavitt v Lassen Irr. Co., 106 P 404, 157 Cal. 82, 29 L.R.A., NS, 213.

### § 356. — Change in Manner or Place of Delivery

Where rights of a consumer, distributor, or third party may be injuriously affected, the manner or place of delivery of water for irrigation may not be changed

The manner or place of delivery of water to a consumer for irrigation may not be changed by the distributor if by such change the rights of the consumer or of third parties will be injuriously affected<sup>52</sup> Where a distributor of water has for a considerable time furnished a consumer with water and has allowed him to convey it to his lands in a certain manner for purposes of irrigation, the distributor is not justified in demanding that the consumer lower the level of his land at his own expense in order to permit the water to be furnished at a point other than where it has previously been delivered<sup>53</sup> Under a statute providing that an appropriator of water from a stream can change the point of diversion of water from the stream only after proper application to the state engineer, and after due notice and the hearing of such application, it is held that the transfer of the delivery of water from one ditch to another within an irrigation system is not a change in point of diversion within the provisions of the statute<sup>54</sup> In determining whether an irrigation company may change the manner or place of delivery of water to a stockholder, due consideration must be had both for the property rights of the user and the necessities of the company, since the company should be allowed to conduct its business in such a way as efficiently to serve all its stockholders, as far as this can be done without interfering with the user's legal rights.<sup>55</sup> Where a consumer has a right to a continued supply of water, a distributor may not deprive him

of his means of supply without making provision to supply him by other means without expense to the consumer.<sup>56</sup>

*Right of consumer to change.* In the absence of statutory prohibition,<sup>57</sup> a consumer of water for irrigation purposes has the right to a change in the manner or place of delivery of water to him by the distributor, where such change will not injuriously affect the rights of others.<sup>58</sup> A distributor which agrees to such a change may, in a proper case, be estopped to question it where the consumer has expended money and made improvements in reliance thereon.<sup>59</sup> A sale by a stockholder in an irrigation company of a part of his right to water will not work an abandonment of such right so as to preclude a change in the point of diversion of water from the irrigation system.<sup>60</sup>

*Change of supply to other land* A consumer may apply the water to which he is entitled for the irrigation of land other than that for which it was originally supplied, if such change of use will not injuriously affect the rights of others.<sup>61</sup> Where it is provided by statute that a change in the use of water must be approved by the state water board, it has been held that water made appurtenant to one tract of land cannot be lawfully used on a detached tract, even though owned by the same person, without the approval of such board.<sup>62</sup>

### § 357. — Transfer of Right to Supply

- a. Transfer of stock in irrigation company
- b. Severance from land of right to supply
- c. Conveyance or lease of land entitled to supply

52. Neb.—In re Applications Nos 2151, 2351, 2354, 2355, 2358, 2374 of Central Nebraska Public Power & Irr Dist, 268 NW 334, 131 Neb 356

67 C J p 1398 note 42.

53. Idaho—Harsin v Pioneer Irr Dist, 263 P 988, 45 Idaho 369

54. Utah—Arnold v Huntington Canal & Reservoir Ass'n, 231 P 622, 64 Utah 534

55. Idaho—Dukes v Canyon Hill Ditch Co, 224 P 85, 38 Idaho 656  
67 C J p 1399 note 46

56. Neb.—Thornton v Kingrey, 160 NW 871, 100 Neb 525, affirmed 164 NW 561, 101 Neb 631

57. Idaho—Application of Johnston, 204 P 2d 434, 69 Idaho 139

**Statute held not unconstitutional**  
Idaho—Application of Johnston, supra.

58. Idaho—Harsin v Pioneer Irr Dist, 263 P 988, 45 Idaho 369  
67 C J p 1399 note 48

#### **Injury precluding change**

On a change of place of use or transfer of water within a Carey Act system, the only injury which another user may set up is injury to his water right or the use thereof  
Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462

59. Idaho—Harsin v Pioneer Irr Dist, 263 P 988, 45 Idaho 369

60. Idaho—Twin Falls Canal Co v Shippen, 271 P 578, 46 Idaho 787

61. Idaho—In re Robinson, 103 P 2d 693, 61 Idaho 462  
Utah—Syrett v Tropic & East Fork Irr Co, 89 P 2d 474, 97 Utah 56.  
67 C J. p 1399 note 51

62. Or—Sears v Orchards Water Co, 236 P 502, 115 Or 291

#### **Change of "place of diversion or**

**use"** within statute requiring approval of state engineer therefor does not take place where a stockholder in an irrigation company seeks to change the point of delivery of the water to which he is entitled from the company's canal or lateral where no other independent appropriators than the irrigation company have an interest in the canal or water  
Utah—Syrett v Tropic & East Fork Irr Co, 89 P 2d 474, 97 Utah 56.

#### **On theory of assignment**

Plaintiff owning land both within and outside of district could not, as against other landowners within district, claim a right to use water on plaintiff's land outside of district on theory that plaintiff could assign any water apportioned to him and not required for use on land within district, since plaintiff had nothing to assign.  
Mont—Koch v Colvin, 105 P 2d 334, 110 Mont. 594.

**a. Transfer of Stock in Irrigation Company**

The rights to a supply of water of a stockholder in an irrigation company organized to supply water to its stockholders only will be lost to the stockholder on his legal transfer of such stock to another, and will pass with the transfer of the stock to the transferee thereof

The rights to a supply of water of a stockholder in an irrigation company organized to supply water to only its stockholders are dependent on, and evidenced by, his shares of stock in the company,<sup>63</sup> and will be lost to the stockholder on his legal transfer of such stock to another,<sup>64</sup> and will pass with the transfer of the stock to the transferee thereof,<sup>65</sup> but the transferee can acquire no greater or different right to water than his transferor had<sup>66</sup>

There is authority to the effect that a transfer of a certificate separate from the land described therein transfers the water right for use on other land,<sup>67</sup> and it has also been held that the resale by an irrigation company of stock already issued, for nonpayment of assessments, severs the connection between the stock and the land to which it was originally ascribed, so that a purchaser of such stock may be entitled to water for use on other land,<sup>68</sup> and if such purchaser shows that he is the owner of land of the quantity, location, and character prescribed in the charter or bylaws of the company, he is entitled to be furnished that amount of water represented by his stock<sup>69</sup>. On the other hand, it has been held that as long as a water right represented by shares of stock in an irrigation company is attached to a particular piece of land, it cannot be made to do duty to other land not owned or possessed by the water right holder by the assignment of such right to another,<sup>70</sup> and that a corporation, succeeding to the proprietary rights of an irrigation company, cannot issue stock of a company organized to hold title to the irriga-

tion system and distribute water, to other than actual bona fide purchasers of land under the project to which the water would become appurtenant<sup>71</sup>

*Rights not dependent on ownership of stock*  
Where the rights of a water user are not dependent on ownership of stock in the water company, he does not forfeit his rights because of the loss of his shares of stock to the state.<sup>72</sup>

**b. Severance from Land of Right to Supply**

Rights to water for irrigation are generally severable from the land and may be transferred apart therefrom, as long as such transfer does not interfere with the rights of others.

Rights to water for irrigation purposes, although they may be appurtenant to land, and pass therewith on conveyance of the land, are not inseparably annexed thereto unless it is so provided by statute, but are severable from the land, and may be transferred separate and apart therefrom, as long as such transfer does not interfere with the rights of others<sup>73</sup>. When the original owner of a water right appurtenant to land conveys the right to an irrigation company in which he receives stock, the conveyance does not sever such water right from the land but merely changes its form.<sup>74</sup>

**c. Conveyance or Lease of Land Entitled to Supply**

A conveyance of land operates to pass rights to water for irrigation which are appurtenant thereto, unless such rights are reserved or are not intended to be included in the conveyance; and water rights may also be transferred with a lease of land.

Water rights which are appurtenant to land will pass therewith on a conveyance of the land,<sup>75</sup> and a grantee of the land together with the water rights will succeed to the rights which the grantor had to water for irrigation<sup>76</sup>. A deed conveying land

63. Wash—Berg v. Yakima Valley Canal Co., 145 P 619, 83 Wash 451, L R A 1915D 292  
67 C J p 1399 note 54

64. Colo—Oppenlander v Left Hand Ditch Co., 31 P 854, 18 Colo 142  
Transfer of land as effecting transfer of stock see supra § 343 c

65. Wash—Berg v. Yakima Valley Canal Co., 145 P 619, 83 Wash 451, L R A 1915D 292  
67 C J p 1399 note 56

66. Cal—Consolidated Peoples Ditch Co v Foothill Ditch Co., 269 P. 915, 205 Cal 54  
67 C J p 1399 note 57.

67. Wash—Berg v Yakima Valley Canal Co., 145 P 619, 83 Wash 451, L R A 1915D 292

68. Cal—Spurgeon v. Santa Ana

Valley Irr Co., 53 P 140, 120 Cal 71, 39 L R A 701

69. Cal—Spurgeon v Santa Ana Valley Irr Co., supra

70. Ariz—Slosser v Salt River Valley Canal Co., 65 P 332, 7 Ariz 376.

67 C J p 1400 note 58

71. Or—In re Wateis of Willow Creek, 236 P 487, 763, 237 P 682, 239 P 123, 119 Or 155

72. Ariz—Whiting v Lyman Water Co., 129 P 2d 995, 59 Ariz 453

73. US—Reconstruction Finance Corp v Schmitt, D C Nev., 20 F Supp 816, reversed on other grounds, C C A., Pacific States Savings & Loan Corp v Schmitt, 103 F 2d 1002

Neb—Vonburg v Farmers Irr Dist., 270 N.W 835, 132 Neb 12

Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499  
67 C J p 1400 note 70

74. Cal—In re Thomas' Estate, 81 P 539, 147 Cal 236  
Turner v Lowell Ave Mut Water Co., 231 P 2d 115, 104 Cal App 2d 204

75. US—Pacific States Savings & Loan Corp v Schmitt, C C A Nev., 103 F 2d 1002  
67 C J p 1401 note 76

Conveyance of land as effecting transfer of corporate stock see supra § 343 c

76. US—Pacific States Savings & Loan Corp v Schmitt, supra  
Cal—Telander v Tujunga Water & Power Co., 185 P. 504, 43 Cal App 492 [cit Cyc].

together with appurtenances will transfer all water rights appurtenant thereto at the time of its execution,<sup>77</sup> unless it appears by the terms of the conveyance that the rights were reserved or unless it is clearly shown that both parties intended not to include such water rights in the conveyance.<sup>78</sup> Where a severance of the water rights from the land has taken place, as by a legal transfer of stock in an irrigation company apart from the land, a subsequent sale and conveyance of the land to which the water rights formerly attached will not pass the title to such water rights.<sup>79</sup> Water rights may be transferred with a lease of land.<sup>80</sup>

A division of a tract of land to which the right to water for irrigation is appurtenant, without segregating or reserving the water right, will work a division of the water right in proportion as the land is divided.<sup>81</sup> An owner of a water right who conveys his land and retains his water right has no right to a supply of water when he has no land on which the water can be put to a beneficial use.<sup>82</sup> Where a consumer sells his land and water right stock to another and later repurchases the land without the stock, and irrigates the land by renting other water rights, or shares of stock representing them, he has been held to have abandoned his original water rights.<sup>83</sup> Where an irrigation company contracts for the sale of a tract of

land with a water right appurtenant thereto, it cannot claim to be the owner of the tract or of the quantity of water appurtenant thereto as long as the purchaser is not in default under the contract, and cannot apply water to its own land before the purchasers are supplied with the quantity purchased.<sup>84</sup>

### § 358 — Conveyance or Transfer of Irrigation System

A purchaser or lessee of an irrigation system must ordinarily supply prior consumers in the same manner as did its transferor, and rules governing conveyances in general apply to such transfers.

In the absence of statutory provisions to the contrary, a purchaser<sup>85</sup> or lessee<sup>86</sup> of an irrigation system, succeeding to the rights of its transferor and claiming the benefits attendant on such rights, is under an obligation to serve consumers previously receiving water from the system in the same manner as did its transferor. A transferee of a distributor of water for irrigation can acquire no greater interest in the irrigation project or in the water right contracts connected therewith than the transferor had.<sup>87</sup> Rules governing conveyances in general apply to transfers of an irrigation system with reference to their construction,<sup>88</sup> validity,<sup>89</sup> and operation.<sup>90</sup> Where a consumer hav-

77. US—Reconstruction Finance Corp v Schmitt, DC Nev., 20 F Supp 816, reversed on other grounds, CCA, Pacific States Savings & Loan Corp v Schmitt, 103 F2d 1002  
67 C.J. p 1401 note 78

78. Cal—Locke v Yorba Irr. Co., 217 P2d 425, 35 Cal 2d 205  
Neb—Faught v Platte Val Public Power & Irr Dist., 51 NW 2d 253, 155 Neb 141  
Wash—Model Water & Light Co v Dickson, 24 P2d 422, 174 Wash 164, adhered to 28 P2d 1119, 174 Wash 164  
67 C.J. p 1401 note 78.

Liability of subsequent purchaser for payment of stipulated contract price or rental for use of water see infra § 363 c

79. Colo—Oppenlander v Left Hand Ditch Co., 31 P 854, 18 Colo 142

80. Wash—Berg v. Yakima Valley Canal Co., 145 P 619, 83 Wash 451, LRA 1915D 292  
67 C.J. p 1401 note 79

81. Idaho—Hunt v. Bremer, 276 P 964, 47 Idaho 490—Russell v. Irish, 118 P 501, 20 Idaho 194.

82. Colo—City & County of Denver v. Brown, 138 P 44, 56 Colo 216

83. Ariz—Brockman v Grand Canal Co., 76 P 602, 8 Ariz 451

84. Or—Sears v Orchards Water Co., 236 P 502, 115 Or 291—In re Waters of Willow Creek, 236 P 487, 763, 237 P 682, 239 P 123, 119 Or 155

85. Cal—City of San Diego v La Mesa, Lemon Grove & Spring Valley Irr Dist., 292 P 1082, 109 Cal App 280  
67 C.J. p 1401 note 86

86. Cal—Byington v. Sacramento Valley West Side Canal Co., 148 P 791, 170 Cal 124

87. Idaho—Childs v. Neitzel, 141 P 77, 26 Idaho 116

88. Cal—Fresno Irr Dist v Smith, 136 P2d 382, 58 Cal App 2d 48—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P2d 582, 34 Cal App 2d 159

89. Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, supra

#### Consideration

Written lease of portion of water distribution system for domestic and irrigation purposes was presumed to be supported by valid consideration Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, supra

90. Tex—Stevenson v City of Abi-

lene, Civ App., 67 S W 2d 645, error refused

#### Estoppel

(1) Where owner leased portion of water system to association of consumers who recognized the validity of the lease for the purpose of gaining possession and control over system, consumers were estopped to deny the relation of landlord and tenant in so far as it related to their actions and rights at that time

Cal—San Juan Gold Co v San Juan Ridge Mut Water Ass'n, 93 P2d 582, 34 Cal App 2d 159

(2) Where consumers in such case signed by-laws which constituted at least among themselves a contract for the operation of the property and recognized membership roll and owner recognized members of association as parties beneficially interested under the lease and permitted them to gain control and operate system, consumers were estopped to deny that they had no legal rights as members of association

Cal—San Juan Gold Co. v. San Juan Ridge Mut Water Ass'n, supra.

(3) Where owner leased water distribution system consumers were not estopped, however, to deny owner's title

Cal—San Juan Gold Co. v San Juan Ridge Mut Water Ass'n, supra.

ing a right to a supply of water is made a party to an action wherein the irrigation system is sold at judicial sale free from all easements or rights, a purchaser at the sale takes free from such consumer's right to water.<sup>91</sup> The owners of an irrigation canal may convey the canal to others, retaining in themselves perpetual rights to water.<sup>92</sup>

### § 359. Regulation of Supply and Use

A distributor may make reasonable rules and regulations with respect to the supply, control, and distribution of water, and contracts pursuant thereto are subject to regulation by public authority.

A distributor of water for irrigation purposes may make reasonable rules and regulations with respect to the supply, control, and distribution of water,<sup>93</sup> and may protect the supply against unfair invasion by individual users,<sup>94</sup> but it cannot impose arbitrary restrictions on the supply of water under the guise of regulations.<sup>95</sup> The rules and regulations adopted must conform to existing contracts<sup>96</sup> and court decrees.<sup>97</sup> Where the right to the use of a supply of water is held by tenants in common of such right, a majority of the tenants in

common who form a coöperative corporation have no right to control and regulate the distribution of the water without the consent of the tenants in common who do not become stockholders in the corporation.<sup>98</sup> Where it is provided by statute that users of water for irrigation shall be classified as to their respective rights to the use of water according to priorities in the ditch, canal, or reservoir delivering or distributing the water, under which priorities their lands were reclaimed, it is held that the owner of an irrigation system must make such a classification of its consumers, on such information as it may be able to obtain and in fairness and in accordance with the terms of the statute,<sup>99</sup> and it may not make a classification of its own which is not in accordance with the statute,<sup>1</sup> the ultimate determination of classification, however, remaining with the courts.<sup>2</sup>

*Regulation by public authority.* Contracts between distributor and consumer regulating the supply and use of water for irrigation are subject to the right of the state to control such supply and use under its police power.<sup>3</sup> Where supported by

91. Tex—McBride v United Irr Co, Civ App, 211 SW 498, motion for rehearing overruled, Civ App, 213 SW 988

92. Neb—Fenton v Tri-State Land Co, 131 NW 1038, 89 Neb 479

93. Cal—Gelhaus v Nevada Irr Dist, 278 P 2d 689, 43 Cal 2d 779  
 Colo—Putnam Ditch Co v Bijou Irr Co, 114 P 2d 284, 108 Colo 124  
 Idaho—Nampa & Meridian Irr. Dist v Barclay, 47 P 2d 916, 56 Idaho 13, 100 ALR 557

Mont—Koch v Colvin, 105 P 2d 334, 110 Mont 594

Tex—Honaker v Reeves County Water Improvement Dist No 1, Civ App, 152 SW 2d 454, error refused

Wash—Barker v Sunnyside Valley Irr Dist, 221 P 2d 827—Wenatchee Reclamation Dist v Titchenal, 27 P 2d 734, 175 Wash 398  
 67 C J p 1402 note 92.

94. Cal—Fuller v Azusa Irr Co., 71 P 98, 138 Cal 204

95. Wash—Shafford v White Bluffs Land & Irrigation Co, 114 P 839, 63 Wash 10, Ann Cas 1912D 133

#### Construction of rules held duty of courts

Construction of irrigation district's rules and bylaws for carrying out its contracts with water users is duty of courts, not state supervisor of hydraulics

Wash—Wenatchee Reclamation Dist v. Titchenal, 27 P 2d 734, 175 Wash 398

#### Regulations held discriminatory

Wash—Barker v. Sunnyside Valley

Irr Dist, 221 P 2d 827, 37 Wash 2d 115

#### Order held not unreasonable

Order directing that water for stock and domestic purposes be discontinued as a continuous flow, as subsequently amended to meet original intention whereby company tendered supply of water for stock and domestic purposes every twelve and one-half days, was not unreasonable and was enforceable by the distributor

Tex—Honaker v Reeves County Water Improvement Dist No 1, Civ App, 152 SW 2d 454, error refused

96. Wash—Barker v Sunnyside Valley Irr Dist, 221 P 2d 827, 37 Wash 2d 115

97. Wash—Barker v Sunnyside Valley Irr Dist, *supra*.

98. Utah—Bartholomew v. Fayette Irr Co, 86 P 481, 31 Utah 1, 120 Am SR. 912, affirmed 87 P 707, 31 Utah 220

99. Idaho—Brose v Board of Directors of Nampa & Meridian Irr. Dist, 132 P 799, 24 Idaho 116

67 C J p 1402 note 97

1. Idaho—Brose v Board of Directors of Nampa & Meridian Irr Dist, 118 P 504, 20 Idaho 281

2. Idaho—Brose v. Board of Directors of Nampa & Meridian Irr Dist, *supra*.

67 C J p 1403 note 99.

3. Neb—Faught v. Platte Val Public Power & Irr Dist, 51 NW 2d 253, 155 Neb 141—In re Birdwood Irr. Dist., Water Division No 1-A,

46 NW 2d 884, 154 Neb 52—Platte Valley Irr Dist. v Tulley, 5 NW 2d 252, 142 Neb 122

67 C J p 1403 note 1

#### Statute held not unconstitutional

Kan—State ex rel Emery v Knapp, 207 P 2d 440, 167 Kan 546

#### Factors considered in determining jurisdiction

The purpose for which water company was organized was a factor which might be considered in determining the character of the use to which water appropriated by the company was to be put, and whether commission had jurisdiction over rates and service

Cal—Lamb v California Water & Telephone Co., 129 P 2d 371, 21 Cal. 2d 33.

#### Reservation of private interest

Where water of river was appropriated by water company and dedicated to a public use, the company no longer had the right to reserve from its water supply any private interest so as to exclude the exercise of the public's regulatory power

Cal.—Lamb v California Water & Telephone Co, *supra*.

#### Determination of authority

With respect to whether appropriators of water rights were a public utility and hence subject to jurisdiction of public service commission, property may be shown to have been devoted to a public use without regard to statutory provisions.

Mont—Sherlock v Greaves, 76 P.2d 87, 106 Mont. 206.

substantial evidence, the findings of a public body will not be disturbed by the court.<sup>4</sup> In jurisdictions in which statutes place the control of water used for irrigation in a public board or commission, or in a state water engineer, it has been held that such public authority has the power to determine the amount of water necessary for the irrigation of specific lands,<sup>5</sup> but it has no control over irrigation waters which are privately owned and which have not been declared by statute to be public property.<sup>6</sup> Where a state water engineer is authorized by statute to enforce the rights of all water users, whenever and howsoever those rights may have been determined or adjudicated, such engineer has the power and authority to enforce rights which have been determined by court decree not as an enforcement of the decree, but as enforcing a right which the court has determined to exist.<sup>7</sup> It has been held, in the absence of statute to the contrary, where its supply of water justifies such action and no shortage of supply is anticipated, a public service irrigation company may take on new consumers on an equal basis with old consumers without, although not

against, an order of the commission or board regulating public utilities within the state.<sup>8</sup>

*Prorating of supply.* Subject to the general rule that consumers prior in time are superior in right, which rule applies in the absence of statute or contract to the contrary, as considered supra § 354, and in the absence of statutes providing other methods of distribution, a distributor of water for irrigation purposes may compel its consumers to prorate in times of drought or unusual shortage of supply,<sup>9</sup> either where a provision for prorating in times of drought or shortage of supply is included in the consumer's contract for water,<sup>10</sup> or where prorating is provided for by statute,<sup>11</sup> and where the distributor has followed the custom of prorating in times of shortage of supply, it may not deprive certain users on the basis of an arbitrary classification of consumers.<sup>12</sup> Where users who, under statute, have a prior right to the use of water for irrigation in times of scarcity have long acquiesced in the prorating of the supply at such times, and other users have made large expenditures relying on the belief that they have equal rights, such

**Consumers held not entitled to service in absence of commission certificate**

Cal—Kern County Land Co v Railroad Commission, 38 P 2d 401, 2 Cal 2d 29, modified on other grounds and rehearing denied Kern County Land Co v Railroad Commission of State of California, 39 P 2d 102  
Idaho—Reynolds Irr Dist v Sproat, 206 P 2d 774, 69 Idaho 315

**Policy of law is to compel an economical use of waters of natural streams**

Neb—In re Birdwood Irr Dist, Water Division No 1-A, 46 NW 2d 884, 154 Neb 52

**Extension of system into contiguous territory**

Cal—Kern County Land Co v Railroad Commission, 38 P 2d 401, 2 Cal 2d 29, modified on other grounds and rehearing denied Kern County Land Co v Railroad Commission of State of California, 39 P 2d 402

**Sufficiency of order**

Railroad commission's order that lands not requiring or served water by canal company for many years be excluded from company's service area, "except as may be subsequently authorized by the commission," was held sufficient to protect interests of company, as well as landowners.

Cal—Kern County Land Co v Railroad Commission, 38 P 2d 401, 2 Cal 2d 29, modified on other grounds and rehearing denied Kern County

Land Co v Railroad Commission of State of California, 39 P 2d 402

**Duty to enforce orders**

Bureau of irrigation has the duty, if its closing orders are not obeyed, to shut and lock the headgate of an offending appropriator of public waters

Neb—Platte Valley Irr Dist v Tilley, 5 NW 2d 252, 142 Neb 122

**Order issued pursuant to void writ held invalid**

Neb—Platte Valley Irr Dist v Tilley, supra

4. Cal—Kern County Land Co v Railroad Commission, 38 P 2d 401, 2 Cal 2d 29, modified on other grounds and rehearing denied Kern County Land Co v Railroad Commission of State of California, 39 P 2d 402

**Evidence held sufficient to sustain finding of commission**

Cal—Kern County Land Co v Railroad Commission, 38 P 2d 401, 2 Cal 2d 29, modified on other grounds and rehearing denied Kern County Land Co v Railroad Commission of State of California, 39 P 2d 402

5. Cal—Lamb v California Water & Telephone Co, 120 P 2d 371, 21 Cal 2d 33

67 C J p 1403 note 2

6. Colo—Cox v Olsen, 41 P 2d 296, 96 Colo 233

Neb—Plunkett v Parsons, 10 NW 2d 469, 143 Neb 535

Tex—Guelker v Hidalgo County Water Imp Dist No 6, Civ App, 269 SW 2d 551, error refused no re-

versible error—Knight v Oldham, Civ App, 210 SW 567

7. Wash—West Side Irrigating Co v Chase, 196 P 666, 115 Wash 146, error dismissed 43 S Ct 91, 260 U S 699, 67 L Ed 470  
67 C J p 1403 note 4

8. Cal—Butte County Water Users' Ass'n v Railroad Commission of California, 196 P 265, 185 Cal 218  
67 C J p 1403 note 5

9. Idaho—Jackson v Indian Creek Reservoir Ditch & Irrigation Co, 101 P 814, 16 Idaho 430  
67 C J p 1403 notes 7 [a], 8.

10. Colo—North Poudre Irr Co v Liggett, 164 P 1158, 63 Colo 180  
67 C J p 1403 note 9

11. Tex—Calhoun County Canal Co v Richman, Civ App, 264 SW 2d 738, refused no reversible error  
67 C J p 1404 note 10

**Statute inapplicable to owner of vested right**

Statutory provision for proration of irrigation waters was held not to require owners of prior vested water right in time of water scarcity to prorate water with users whose rights were subsequently obtained  
Neb—Vonburg v Farmers' Irr Dist, 260 NW 383, 128 Neb 748

**Due diligence required in prorating**  
Tex—Calhoun County Canal Co v Richman, Civ App, 264 SW 2d 738, refused no reversible error

12. Utah—Holman v Pleasant Grove City, 30 P 72, 8 Utah 78  
67 C J p 1404 note 11

users are estopped to claim their right of priority<sup>13</sup> A provision for prorating cannot be construed so as to authorize a distributor to sell water in excess of its supply,<sup>14</sup> and, since users are entitled to water in preference to the distributor or its successors in interest, as discussed supra § 354, it has been held that, in case of a shortage of supply, successors to the proprietary rights of a distributor are not entitled to prorate with purchasers of water from the distributor<sup>15</sup> Consumers contracting with an irrigation company or district after the enactment of a statute providing for the prorating of water in case of shortage of supply can have no greater right than permitted under the statute, and must prorate with subsequent contracting consumers<sup>16</sup>

### § 360. Sale of Water for Irrigation

Sale of water for irrigation is discussed infra §§ 361-363

Examine Pocket Parts for later cases

### § 361. — Contracts with Consumers

- a. In general
- b. Validity and legality

- c. Construction and operation
- d. Performance or breach

#### a. In General

Except in so far as limited by statute or considerations of public policy, the right to water for irrigation may be made the subject of contract.

Except in so far as limited by statute or considerations of public policy, the right to water for purposes of irrigation may be made the subject of contract,<sup>17</sup> and such contracts are governed by the ordinary rules applicable to contracts in general<sup>18</sup> A distributor may contract to deliver water to the limit of the supply of the system under its control,<sup>19</sup> and it cannot be compelled to furnish water to persons having no contract therefor when all available water, or the means of distributing the water, is necessary to meet the demands of those who have previously contracted for it,<sup>20</sup> although the distributor may have furnished water to noncontracting consumers as an accommodation when its contracting consumers did not require its entire supply<sup>21</sup>

The distributor and consumer may contract with respect to the volume, quantity, or measure of the water to be supplied,<sup>22</sup> the nature of the supply,<sup>23</sup> the manner or place of delivery,<sup>24</sup> the times or

13. Ariz—Biggs v Utah Irrigating Ditch Co, 64 P 494, 7 Ariz 331

14. Or—In re Waters of Willow Creek, 236 P 487, 763, 237 P 682, 239 P 123, 119 Or 155

15. Or—In re Waters of Willow Creek, supra  
67 C J p 1404 note 15

16. Cal—Butte County Water Users' Ass'n v Railroad Commission of California, 196 P 265, 185 Cal 218

17. US—Twin Falls Land & Water Co v Twin Falls Canal Co, D C Idaho, 7 F Supp 238, affirmed, C C A, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

Cal—Crescent Canal Co v Kings County Development Co, 110 P 2d 1006, 43 Cal App 2d 370

Neb—Faught v Platte Val Public Power & Irr Dist, 51 NW 2d 253, 155 Neb 141

Tex—Board of Water Engineers v Wilfert, Civ App, 274 SW 2d 881  
—City of Wichita Falls v Bruner, Civ App, 165 SW 2d 480, error refused

Utah—Brian v Fremont Irr Co, 186 P 2d 588, 112 Utah 220

Wyo—Laramie Rivers Co v Watson, 241 P 2d 1080, 69 Wyo 333—  
**Corpus Juris cited in** State v Laramie Rivers Co, 136 P 2d 487, 499, 59 Wyo 9

67 C J. p 1404 notes 18 [a], 20.

Deeds or conveyances of water rights see infra § 362

**Rights on failure to renew contract**  
When a landowner fails to renew his contract for conveyance of water, company may contract for use of water by another landowner in order that the right of appropriation may not be lost or diminished by abandonment with its consequent elimination or reduction of amount of water that company may receive compensation for carrying

Colo—Board of Com'rs of Jefferson County v Rocky Mountain Water Co, 79 P 2d 373, 102 Colo 351

18. Neb—**Corpus Juris cited in** Faught v Platte Val Public Power & Irr Dist, 51 NW 2d 253, 258, 155 Neb 141

67 C J p 1404 note 21

#### Consideration

(1) An irrigation company's permanent contract with landowner to furnish water to his lands was not wanting in consideration or mutuality of obligation because company was required by law to furnish water to such lands

Tex—Combs v. United Irr Co, Civ App, 110 SW 2d 1157, error dismissed

(2) Where rice farmers contracted to pay to water company fractional parts of gross proceeds of sales of rice, in some instances as water

rental, and in other instances as land, seed and water rental, provisions of the contracts that "gross proceeds" should include benefit payments received by the farmers for reducing crops under rules of Agricultural Adjustment Administration were void for want of "consideration."

Tex—Gulf Coast Water Co v Cartwright, Civ App, 160 SW 2d 269, error refused

19. US—Souther v San Diego Flume Co, Cal, 121 F 347, 57 C CA 561

20. Tex—Chapman v American Rio Grande Land & Irrigation Co, Civ App, 271 SW 392  
67 C J p 1405 note 23

21. Idaho—Gerber v. Nampa & Meridian Irr Dist, 100 P 80, 16 Idaho 1, 22.

22. US—Twin Falls Land & Water Co v Twin Falls Canal Co, D C Idaho, 7 F Supp 238, affirmed, C C A, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466  
67 C J p 1405 note 25

23. Cal—Chrisman v Southern California Edison Co, 256 P 618, 83 Cal App 249

24. US—People of Puerto Rico v Russell & Co, Puerto Rico, 62 S Ct 784, 315 US 610, 86 L Ed

seasons when it shall be furnished,<sup>25</sup> the necessity of a previous demand or notice that it is wanted,<sup>26</sup> the lands on which it shall be used for irrigation,<sup>27</sup> reasonable limitations and regulations in the use thereof,<sup>28</sup> and, as discussed *infra* § 363, the price or rate to be paid for its use. A distributor cannot require a consumer, in order to obtain a supply of water, to enter into a contract which is unreasonable<sup>29</sup> or which binds him to do things not required by law,<sup>30</sup> nor may it impose on a consumer any conditions not authorized by law.<sup>31</sup>

The right of a distributor to contract to supply consumers with water is subject to statutory restrictions designed to secure equal distribution in time of drought,<sup>32</sup> and to subordinate rights of owners of lands not adjoining or contiguous to rights of owners of adjoining or contiguous lands to receive an adequate supply of water.<sup>33</sup> The rights of a contracting consumer to a supply of water are fixed by the terms of his contract,<sup>34</sup> and the court cannot grant such a consumer relief although his contract stipulates for a supply which proves inadequate.<sup>35</sup> The rights of consumers to receive water under a contract cannot be affected by an agreement between other users to which they were not parties.<sup>36</sup> Consumers of water under contract with a distributor cannot complain of any use of the irrigation canal or system granted by its owner or acquired by operation of law, not interfering with their rights.<sup>37</sup> A contract consumer

from a public service irrigation company who has elected to avail himself of the status of a noncontract consumer may not return to his former status if the distributor protests.<sup>38</sup> The right to contract for a supply of water for irrigation is not confined to the owner of the land, but tenants may also contract therefor.<sup>39</sup>

*Implied contract based on continued use.* Where a consumer has obtained for several years a specified quantity of water from an irrigation company for irrigation for a reasonable compensation, there has been held to be an implied contract that the company will continue to deliver the water.<sup>40</sup>

*Limitation of contracts to capacity of system.* Contracts for the sale of rights to a supply of water for irrigation should be restricted to that amount of land which the system of the distributor can reasonably supply,<sup>41</sup> and where the applications for water exceed the capacity of the distributor's canal to furnish it, it is the duty of the distributor to limit the contracts to its capacity and to those users possessing the older rights of appropriation.<sup>42</sup>

Where, due to a mistake in estimating the available supply, contracts have been made to supply water in excess of such available supply, persons already receiving water under contract will not be deprived in order to supply later comers contracting with knowledge of the insufficiency of supply.<sup>43</sup> Where water rights in excess of the capacity of the system or canal are sold, the grants as to the

1062, rehearing denied 62 S Ct 1030, 316 US 708, 86 L Ed 1775 67 C J p 1405 note 27

25. Cal—Richter v Union Land, etc, Co, 62 P 39, 129 Cal 367

26. Cal—Hewitt v San Jacinto, etc, Irr Dist, 56 P 893, 124 Cal 186

La—Mathieu v. North American Land, etc, Co, 44 So 721, 119 La 896, 121 Am SR 548

27. Cal—Hewitt v San Jacinto, etc, Irr Dist, 56 P 893, 124 Cal 186

Colo—Wright v Platte Valley Irr Co, 61 P 603, 27 Colo 322

28. Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9

29. Tex—American Rio Grande Land & Irrigation Co v Mercedes Plantation Co, Com App., 208 S W 904

67 C J p 1405 note 32.

30. Idaho—Green v Byers, 101 P 79, 16 Idaho 178

31. Ariz—Gould v Maricopa Canal Co, 76 P 598, 8 Ariz 429 67 C J p 1405 note 34

32. Tex—Edinburg Irr Co v Ledbetter, Com App., 286 S W. 185.

33. Tex—Edinburg Irr Co. v Ledbetter, *supra*

34. US—Faris v Blaine County Inv Co, D C Idaho, 3 F Supp 381 Cal—Gelhaus v Nevada Irr Dist, 278 P 2d 689, 43 Cal 2d 779

Wash—Wenatchee Reclamation Dist v Titchenal, 27 P 2d 734, 175 Wash 398

Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9 67 C J p 1405 note 37

#### Contract deposited as security

That settlers' water right contracts were deposited by seller with trustee as security for seller's debts did not lessen settlers' rights under contracts

US—Faris v Blaine County Inv Co, D C Idaho, 3 F Supp 381

35. US—Caldwell v Twin Falls Salmon River Land & Water Co, D C Idaho, 225 F 584

Cal—Madera Canal & Irr Co v K Arakehan, Inc, 284 P. 971, 103 Cal App 592

36. Cal—Gordon v. Covina Irr Co, 127 P 646, 164 Cal 88

37. Colo—Hackett v. Larimer & Weld Reservoir Co, 109 P 965, 48 Colo 178

38. Cal—Sutter Butte Canal Co v Railroad Commission of California, 259 P 937, 202 Cal 179, affirmed 49 S Ct 325, 279 US 125, 73 L Ed 637

39. Tex—Dunbar v Texas Irr Co, Civ App., 195 SW 614 67 C J p 1406 note 42

40. Neb—Prosole v Steamboat Canal Co, 140 P 720, 144 P 744, 37 Nev 151

41. US—Twin Falls Land & Water Co v Twin Falls Canal Co, D C Idaho, 7 F Supp 238, affirmed, C CA, 79 F 2d 431, certiorari denied 56 S Ct 381, 296 US 654, 80 L Ed 466

Wyo—Corpus Juris quoted in State v Laramie Rivers Co, 136 P 2d 487, 498, 59 Wyo 9 67 C J p 1406 note 44

42. Ariz—Gould v Maricopa Canal Co, 76 P 598, 8 Ariz 429

Wyo—Corpus Juris quoted in State v Laramie Rivers Co, 136 P 2d 487, 498, 59 Wyo 9

43. Idaho—State v Twin Falls-Salmon River Land & Water Co, 166 P. 220, 30 Idaho 41.



excess may be canceled<sup>44</sup> or the distributor must relinquish to the purchasers water which it had retained for itself;<sup>45</sup> but when all the contracting consumers are not before the court, it can neither decree that all contracts executed after the full capacity of the system had been sold be canceled, nor can it scale down all the contracts proportionately both in the amount of the water right and the consideration to be paid therefor.<sup>46</sup>

Where an irrigation company has sold water rights in excess of the capacity of an irrigation ditch, and the irrigation system is later transferred to another company, the transferee company is not responsible for the obligations of the transferor which has sold such excess rights, where such obligations have not been assumed by the transferee, and the transferee is not estopped to deny the authority of the transferor to make such sales.<sup>47</sup>

### b. Validity and Legality

The validity and legality of contracts for the sale of water for irrigation are governed by general rules of contract, and contracts providing for the furnishing of a specified quantity of water regardless of its beneficial use are invalid, but an invalid provision will not render the entire contract void where the illegal part can be separated from the body of the agreement.

The rules governing the validity and legality of contracts in general are applicable to contracts for the sale of water for irrigation purposes.<sup>48</sup> Contracts providing for the furnishing of a specified quantity of water regardless of its beneficial use have been declared to be invalid.<sup>49</sup> Where the directors of an irrigation district are authorized by statute to fix rates for toll charges for water, a provision of a contract with a consumer waiving the right of the district to exact tolls is void.<sup>50</sup> An invalid provision will not render the entire contract void where the illegal clauses can be separated from the body of the agreement.<sup>51</sup>

### c. Construction and Operation

Contracts for the sale of water for irrigation are governed by general rules of construction, the measure of the rights and liabilities of the parties being found in the contract and applicable statutes.

Contracts for the sale of water for irrigation are to be construed according to the rules applicable to the construction of contracts in general.<sup>52</sup> The measure of the rights and liabilities of the distributor and consumer is to be found in the contract for water and in the applicable statutes, if any, and not in the rules of the irrigation company or district,<sup>53</sup> and, where there is a conflict between the

44. Colo—Blakely v Ft Lyon Canal Co, 73 P 249, 31 Colo 224

45. US—Faris v Blaine County Inv Co, D C Idaho, 3 F Supp 381

#### Claims of seller held subordinate

Claims of seller of water right contracts and trustees holding deed securing bonds issued by seller are subordinate to rights of holders of water right contracts, except as to uncollected balance on contracts, where water was inadequate to fulfill contracts.

US—Faris v. Blaine County Inv Co, supra

46. US—Caldwell v Twin Falls Salmon River Land & Water Co, D C Idaho, 225 F 584

47. Colo—Blakely v Ft Lyon Canal Co, 73 P 249, 31 Colo 224

48. Mont—State ex rel Normile v Cooney, 47 P 2d 637, 100 Mont 391  
Neb—Corpus Juris cited in Faught v Platte Valley Public Power & Irr Dist, 51 NW 2d 253, 258, 155 Neb 141—Vonburg v Farmers' Irr Dist, 260 NW 383, 128 Neb 748

67 C J p 1406 note 51

#### Contract held valid

Mont—State ex rel Normile v Cooney, 47 P 2d 637, 100 Mont 391  
Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9

#### Provisions held void as against public policy

(1) Provisions running counter to

declared policy of federal government in passing Agricultural Adjustment Act

Tex—Gulf Coast Water Co v Cartwright, Civ App, 160 SW 2d 269, error refused

(2) Provision that no water shall be delivered to the purchaser from irrigation system while any installment of principal or interest or any toll or assessment is due and unpaid from the purchaser to the company

Idaho—Reynolds v North Side Canal Co, 213 P. 344, 36 Idaho 622

49. US—North Fork Water Co v Medland, CCA Cal, 187 F 163

50. Cal—Danley v Merced Irr Dist, 226 P 847, 854, 66 Cal App 97

51. Tex—Raywood Rice Canal & Milling Co v Erp, 146 SW. 155, 105 Tex 161

52. Cal—Gelhaus v Nevada Irr Dist, 278 P 2d 689, 43 Cal 2d 779  
Neb—Corpus Juris cited in Faught v Platte Valley Public Power & Irr Dist, 51 NW 2d 253, 258, 155 Neb 141

Or—Jordan Valley Irr Dist v Title & Trust Co, 58 P 2d 606, 154 Or. 76

Wyo—Anderson v Wyoming Development Co, 154 P 2d 318, 60 Wyo 417

67 C J p 1407 note 58.

#### Substitution of distributor

The substitution of water company in place of electric water power company as direct seller to irrigation district of water taken from river by electric water power company, did not relieve electric water power company from the responsibility incumbent on it to see that water for irrigation district was supplied to irrigation district through the water company

Cal—Thermalito Irr Dist v California Water Service Co, 239 P 2d 109, 108 Cal App 2d 329

#### Temporary suspension of delivery

Where contracts provided that company should have the right to "suspend temporarily" the delivery of water, and that the making of repairs by company should be prosecuted as rapidly as may be practicable, and over period of years, company did not take canal out of service for repairs, company was not authorized to suspend delivery of water for four months while it made repairs

Cal—Thermalito Irr Dist v California Water Service Co, supra

53. Wyo—State v Laramie Rivers Co, 136 P 2d 487, 59 Wyo 9.  
67 C J p 1409 note 59

Statute construed not to authorize state supervisor to determine rights of parties to contract without both parties' consent.

terms of the contract and the applicable statutes, the rights of the parties must be determined by a construction of the statutes, rather than of the contract, the contract being treated as if all the provisions of the applicable statutes were written into it.<sup>54</sup> The subsequent purchase of an irrigation corporation by a public irrigation district does not of itself, without appropriate legislative action or consent of the consumer, make the statutes and laws under which it was authorized to organize and operate a part of the original contract made with the irrigation company.<sup>55</sup>

A distributor of water for irrigation in making a contract to furnish water to a consumer must be presumed to have known all the physical facts affecting the agreement and to have contracted accordingly.<sup>56</sup> When the contract gives the distributor the sole right to say when water shall be furnished, that does not give it the right to refuse to furnish any water at all.<sup>57</sup> A stipulation in a contract that water for irrigation is to be delivered in such quantities and at such times as the condition of the crops and the weather may determine has been held to pertain not to the measure of the consumer's water right, but to the method of giving such right its greatest efficiency.<sup>58</sup> A contract by an irrigation company conveying water rights is not executory simply because it provides that the grantee shall receive the water during the irrigation season in each year thereafter, but such contract passes a property right.<sup>59</sup> A consumer's long acquiescence in a practical construction of a contract for a supply of water for irrigation will estop such consumer to claim another construction, when a change would result in loss to parties relying on the original construction.<sup>60</sup>

#### d. Performance or Breach

The failure to perform a contract to furnish water

for irrigation purposes constitutes a breach of such contract.

The failure of a distributor of water for irrigation purposes to perform a contract to furnish water constitutes a breach of such contract,<sup>61</sup> and not a wrong independent of it.<sup>62</sup> The United States has no interest in the performance of contracts for water rights on federal lands, to which contracts it is not a party, the contracts being made between an irrigation company and settlers on such lands.<sup>63</sup>

Where a consumer has a right to water only on payment of the contract rate therefor, his refusal to pay for water and his insistence on his right to take and use it without charge amount to a breach and repudiation of his contract,<sup>64</sup> entitling the distributor to treat the contract as terminated,<sup>65</sup> and to sue for the legally established rate, or, where none has been established, for the reasonable value of the services rendered, as discussed *infra* § 363. A consumer's failure to execute period contracts provided for in the permanent contract has been held not to constitute a termination of the main contract.<sup>66</sup> A purchase by the consumer from a source other than the distributor is not a breach of contract with the latter where the contract is not exclusive,<sup>67</sup> but such a purchase is a breach of an exclusive contract.<sup>68</sup> A consumer's use of water to irrigate land other than that stipulated in his contract for water or deed of a water right constitutes a breach of contract.<sup>69</sup>

Where, by the terms of the contract, the distributor has the right to make regulations as to the consumer's place of taking water and as to the time and manner of its use, the failure of the distributor to furnish water on a reasonable demand therefor constitutes a breach of the contract in the absence of a showing that rules had been

Wash—Wenatchee Reclamation Dist v Titchenal, 27 P 2d 734, 175 Wash 398

54. Neb—Lauer v South Side Irr Co, 266 NW 428, 130 Neb 713

Tex—Gulf Coast Water Co v Cartwright, Civ App, 160 SW 2d 269, error refused

67 C J p 1409 note 60.

55. Neb—Faught v. Platte Val Public Power & Irr. Dist., 51 NW 2d 253, 155 Neb 141

56. Colo—Animas Consol Ditch Co v Smallwood, 125 P. 594, 22 Colo App 478

57. Cal—Richter v. Union Land, etc, Co, 62 P. 39, 129 Cal 367  
67 C J p 1409 note 62.

58. U.S.—Caldwell v. Twin Falls

Salmon River Land & Water Co, DC Idaho, 225 F 584

59. Colo—Dickson v Dick, 151 P 441, 59 Colo 583

60. Cal—Southern California Edison Co v Railroad Commission of California, 230 P 661, 194 Cal 757

67 C J p 1409 note 65

61. US—Owyhee Ditch Co v U S, D C Or, 126 F Supp 429

Utah—Cortella v Salt Lake City, 72 P 2d 630, 93 Utah 236

67 C J p 1409 note 66

Liability for failure to supply water, and remedies see *infra* §§ 366–367

62. Idaho—Hanes v Idaho Irr. Co, 122 P. 859, 21 Idaho 512.

63. Idaho—Idaho Irr Co v Dill, 139 P 714, 25 Idaho 711

64. Cal—Lassen Irr Co v Long, 106 P 409, 157 Cal 94—Leavitt v Lassen Irr Co, 106 P 404, 157 Cal 82, 29 L R A, NS, 213

65. Cal—Lassen Irr Co v Long, 106 P 409, 157 Cal 94.

66. Tex—Combs v United Irr Co, Civ App, 110 SW 2d 1157, error dismissed

67. Cal—Valley View Mut Water Co v Browne, 230 P 2d 875, 104 Cal App 2d 177

68. Cal—Anderson v La Rinconada Country Club, 40 P 2d 571, 4 Cal App 2d 197

69. Utah—Wintle v Utah-Idaho Sugar Co, 273 P. 312, 73 Utah 215.

promulgated by the distributor.<sup>70</sup> Where the duty is imposed by statute on a distributor to notify a consumer when water is ready for delivery, and the distributor gives such notice but fails to deliver water, such failure amounts to a breach of the contract to furnish water.<sup>71</sup> A contract binding a distributor to furnish water for the irrigation of land binds it to furnish the water whether the other party is cultivating the land himself or by tenants.<sup>72</sup>

*Excuse for nonperformance.* The rules governing excuses for nonperformance of contracts in general are applicable to contracts for the sale of water for irrigation.<sup>73</sup>

### § 362. — Conveyance of Water Rights

The right to a supply of water may be the subject of conveyance by a distributor, and a purchaser, successor, or mortgagee of the irrigation system with knowledge of the previous grant will be bound by the grantor's covenants.

A distributor of water for irrigation purposes may sell and convey to a consumer a water right, entitling him to receive a certain quantity of water from its system,<sup>74</sup> and a purchaser<sup>75</sup> successor,<sup>76</sup>

or mortgagee<sup>77</sup> of the irrigation system, or of the part thereof from which such consumer has the right to water, with knowledge of the previous grant, will be bound by the grantor's covenants. A conveyance of a permanent right to receive a certain quantity of water for irrigation may be made,<sup>78</sup> which conveyance amounts to the conveyance of an easement in the ditch or system furnishing the water,<sup>79</sup> and such water right becomes appurtenant to, and a part of, the land.<sup>80</sup>

*Assignment of deed conveying water rights.* An assignment of an irrigation company's deed conveying water rights does not constitute a transfer of the interest conveyed by the deed.<sup>81</sup>

### § 363. — Rates and Charges

- a Contracts
- b Regulation
- c Payment and collection

#### a. Contracts

Except in so far as limited or controlled by statute or public authority, a distributor may generally make its own contract with consumers in respect of rates and

70 Wash—Hotchkiss v Wenatchee Heights Orchard Co, 134 P 1055, 75 Wash 361

71 Idaho—Hanes v Idaho Irr Co, 122 P 859, 21 Idaho 512  
67 C J p 1410 note 76

72 Tex—Texas Irr Co v Moore, Bryan & Perry, Civ App, 153 S W 166

73 Cal—Madera Canal & Irr Co v K Arakelian, Inc, 284 P 971, 103 Cal App 592  
67 C J p 1410 note 79

Breach of covenant to supply water as not excusing nonpayment for water received see *infra* § 363 c (1)  
Right of distributor to refuse supply for nonpayment see *infra* § 363 c (2).

74 Tex—Guelker v Hidalgo County Water Imp Dist No 6, Civ App, 269 S W 2d 551, error refused no reversible error  
67 C J p 1410 note 81  
Contracts for supply of water for irrigation purposes generally see *supra* § 361

#### Forfeiture of right

The sale of water in Carey Act segregation is permitted and, whether held over or not, individual user by allowing portions of his lands to lie idle for a single or several seasons and selling, leasing, or using his water on other lands, in absence of intent to abandon does not lose or forfeit his right

Idaho—Rayl v Salmon River Canal Co, 157 P 2d 76, 66 Idaho 199

#### Sufficiency of interest

If only interest irrigation company had in waters accumulating in its canal was that of getting rid of the water, such interest alone would not be sufficient to sustain a conveyance

Utah—Smithfield West Bench Irr Co v Union Central Life Ins Co, 195 P 2d 249, 113 Utah 356

**Compensation held not inadequate**  
Wyo—Laramie Rivers Co v Watson, 241 P 2d 1080, 69 Wyo 333

75 Tex—City of Wichita Falls v Bruner, Civ App, 191 S W 2d 912  
67 C J p 1410 note 82

76 Tex—Honaker v Reeves County Water Improvement Dist No 1, Civ App, 152 S W 2d 454, error refused

77 Idaho—Hewitt v Great Western Beet Sugar Co, 118 P 296, 20 Idaho 235  
67 C J p 1410 note 83

78 Or—Jordan Valley Irr Dist v Title & Trust Co, 58 P 2d 606, 154 Or 76

Tex—City of Wichita Falls v Bruner, Civ App, 165 S W 2d 480, error refused

Wyo—Corpus Juris quoted in State v Laramie Rivers Co, 136 P 2d 487, 499, 59 Wyo 9  
67 C J p 1411 note 84

#### Failure to pay toll as forfeiture

Where conveyance by irrigation company of permanent water rights was fully executed, and there were no provisions for reversion of title for failure to pay toll charges to ir-

rigation company for conveying the water through canals, failure to pay toll charges would not forfeit title to water rights and reinvest it in irrigation company

Tex—City of Wichita Falls v Bruner, Civ App, 165 S W 2d 480, error refused

#### Water held not conveyed under deed

Utah—Whittaker v Spencer, 206 P 2d 612, 115 Utah 499

79. Tex—City of Wichita Falls v Bruner, Civ App, 165 S W 2d 480, error refused

Wyo—Corpus Juris quoted in State v Laramie Rivers Co, 136 P 2d 487, 499, 59 Wyo 9  
67 C J p 1411 note 85

80. Wyo—Corpus Juris quoted in State v Laramie Rivers Co, 136 P 2d 487, 499, 59 Wyo 9  
67 C J p 1411 note 86

#### Covenants running with the land

Where irrigation company created water reservoir and conveyed to trustee a permanent water right in lake to extent of two thousand acre feet of water per annum for irrigation purposes, and obligated itself to pass water through canal to be distributed upon lands by laterals and ditches, such permanent rights, privileges and easements were covenants that went with the land  
Tex—City of Wichita Falls v Bruner, Civ App, 191 S W 2d 912

81. Colo—Blakely v Ft Lyon Canal Co, 73 P 249, 31 Colo 224.

charges for a supply of water for irrigation, but the distributor may charge only for the water actually supplied.

Except in so far as limited or controlled by statute or public authority,<sup>82</sup> a distributor of water for irrigation purposes may make its own contracts with consumers in respect of rates and charges for a supply of water.<sup>83</sup> The distributor is generally permitted to charge only for the water actually supplied,<sup>84</sup> and it cannot exact a bonus or separate charge for the mere privilege of connecting with its system.<sup>85</sup> Where the rate to be charged by a public utility for water furnished for irrigation has not been fixed by public authority, it may be fixed by agreement between the parties on a basis which is reasonable and not prohibitive,<sup>86</sup> and such an agreement is valid and enforceable between the parties so long as not abrogated or modified by the body vested with the power of regulating the service,<sup>87</sup> but it is subject to the right of the state in the exercise of its police power to regulate and fix reasonable rates.<sup>88</sup> An irrigation company which becomes a public utility as to part of its service may, however, retain a part of its water supply for private sale, and the submission of the company to the jurisdiction of the public rate fixing body in such case will not affect the

rights of private contract holders which have already vested.<sup>89</sup>

A statute authorizing the distributor and consumer to fix by contract the amount to be paid for water furnished for irrigation has been held to authorize the parties to fix by contract an annual maintenance charge for the use of water.<sup>90</sup> Where a consumer receives more water during the irrigation season than he is entitled to receive for the irrigation of the lands described in his contract for water or deed of a water right, there is an implied contract that he will pay the reasonable value of the use of such excess water.<sup>91</sup> In jurisdictions where covenants will not run with land unless contained in a grant of the land or of some estate therein, it has been held that covenants to pay a specified charge for water for the irrigation of specific land are not covenants running with the land.<sup>92</sup> The position has been taken in other jurisdictions, however, that covenants to pay for a supply of water or for water rights appurtenant to specific land are covenants running with such land.<sup>93</sup>

#### b. Regulation

- (1) In general
- (2) Determination and regulation by public authority

**82. Tex—Gulf Coast Water Co v Cartwright**, Civ App, 160 SW 2d 269, error refused

**Right of contract held not limited by statute**

Wash—Caruthers v Sunnyside Val Irr Dist, 188 P 2d 136, 29 Wash 2d 530

**83. Wash—Caruthers v. Sunnyside Val Irr Dist**, supra  
67 C J p 1411 note 90

**84. Cal—Purser v Baker**, 62 P 190, 129 Cal 607

**Outside user held not liable for "stand-by" charge**

Cal—Rutherford v Oroville-Wyandotte Irr. Dist, 22 P 2d 505, 218 Cal 242

**Separate pumping charges held not authorized**

Idaho—Gedney v Snake River Irr Dist, 104 P 2d 909, 61 Idaho 605

**85. Colo—Northern Colorado Irr Co v Richards**, 45 P. 423, 22 Colo 450

67 C J p 1412 note 92.

**86. Cal—Merchants' Nat Bank of San Francisco v Carmichael**, 196 P 76, 50 Cal App 749  
67 C J p 1412 note 93

**87. Cal—Lamb v California Water & Tel Co**, 129 P 2d 371, 21 Cal 2d 33

67 C J p 1412 note 95.

**Contract rights not affected by subsequent conveyance**

Contract under which United States conveyed canal and appurtenances to irrigation district could not, without their consent, affect existing rights of landowners with respect to charges for water

Wash—Caruthers v Sunnyside Val Irr Dist, 188 P 2d 136, 29 Wash 2d 530

**Violation of contract no ground for action where rates superseded by commission**

Cal—Gillies v La Mesa Lemon Grove and Spring Valley Irr Dist, 129 P 2d 941, 54 Cal App 2d 756

**Provisions of contract held abrogated**

Tex—Gulf Coast Water Co v Cartwright, Civ App, 160 SW 2d 269, error refused

**88. U.S.—In re Cortaro Water Co**, D.C. Ariz, 3 F Supp 257

Neb—Laier v South Side Irr Co, 266 NW 428, 130 Neb 713

67 C J p 1412 note 96

**Knowledge of consumer held immaterial**

If water company was a public utility when it entered into contract granting lower riparian owner right to use water for irrigation at certain rate, and had dedicated the impounded water to a public use, the contract was subject to regulation

by the railroad commission, and question whether lower riparian owner personally knew that he was dealing with a public utility was immaterial

Cal—Lamb v California Water & Tel Co, 129 P 2d 371, 21 Cal 2d 33

**89. Cal—Allen v Railroad Commission of California**, 175 P 466, 179 Cal 68, 8 A L R 249, certiorari denied 39 S Ct 259, 249 US 601, 63 L Ed 797

**90. Ariz—Olsen v Union Canal & Irrigation Co**, 119 P 2d 569, 58 Ariz 306

Idaho—Jackson v Indian Creek Reservoir Ditch & Irrigation Co, 101 P 814, 16 Idaho 430

**91. Utah—Wintle v Utah-Idaho Sugar Co**, 273 P 312, 73 Utah 215

**92. Neb—Faught v Platte Val. Public Power & Irr Dist**, 51 N W 2d 253, 155 Neb 141—Farmers & Merchants Irrigation Co v Hill, 134 NW 929, 90 Neb 847, 39 L R A, N S, 798, Ann Cas 1913 A 524

Wyo—Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n, 297 P 385, 43 Wyo 41.

67 C J p 1412 note 2

**93. Tex—Combs v United Irr Co**, Civ App, 110 SW 2d 1157, error dismissed

67 C J p 1413 note 3.

- (3) Reasonableness of rates
- (4) Discrimination
- (5) Proceedings for relief against unreasonable rates

(1) In General

Unless restricted by contract or withdrawn or superseded by statute, the right to set up and regulate rates for the sale and distribution of water for irrigation belongs primarily to the distributor thereof.

Unless restricted by contract, or withdrawn or superseded by statute placing regulation and control of rates under public authority in the case of a business affected with a public interest,<sup>94</sup> the right to prescribe and regulate rates for the sale and distribution of water for irrigation purposes belongs primarily to the distributor thereof.<sup>95</sup> Where there is a duty imposed on a distributor to supply water for irrigation, such supply must be given on reasonable terms.<sup>96</sup> Although a court has no power to establish rates for the use of water for irrigation, since it has the power to prescribe conditions on which injunctive relief will be granted, it may prescribe the rate to be paid during the pendency of a suit involving the rates to be paid for irrigation water.<sup>97</sup>

(2) Determination and Regulation by Public Authority

The state has authority to regulate rates made for water supplied for the purpose of irrigation where affected with a public interest.

In pursuance of its general power to regulate the rates charged by public utilities, the state has authority to regulate the rates and charges made for water furnished for irrigation purposes where such service is affected with a public interest,<sup>98</sup> but rates for the sale and distribution of water under the sale of a private water right,<sup>99</sup> or to stockholders in an irrigation company organized for the purpose of supplying its stockholders only,<sup>1</sup> are not subject to regulation by public authority. The submission by a distributor to the authority of the public regulating body for the establishment of rates makes its service subject to regulation and control by public authority,<sup>2</sup> although as shown supra subdivision a of this section, such submission will not affect the rights of private contract holders which have already vested. The payment under compulsion by a contract consumer of increased rates as prescribed by the public rate fixing body does not amount to an acquiescence by the consumer in the claim of the distributor that it is a public utility.<sup>3</sup>

Where rates for the sale and distribution of water for irrigation are subject to regulation by public authority, the power to establish and regulate rates may be vested in any public body the legislature may designate, such as the public utilities commission,<sup>4</sup> the railroad commission,<sup>5</sup> the county commissioners,<sup>6</sup> a board of water commissioners

94. Colo—Northern Colorado Irr Co v Board of Com'rs of Arapahoe County, 38 P2d 889, 95 Colo 555

Determination and regulation of rates by public authority see infra subdivision b (2) of this section

95. Colo—Holbrook Irr Dist v Adcock, 255 P2d 384, 127 Colo 192—People ex rel Rogers v Letford, 79 P2d 274, 102 Colo 284 67 C J p 1413 note 6

96. Tex—American Rio Grande Land & Irrigation Co v Mercedes Plantation Co, Com App, 208 S W 904

97. U S—Trautwein v Moreno Mut Irr Co, CCA Cal, 22 F2d 374

98. Cal—Gillies v La Mesa Lemon Grove and Spring Valley Irr Dist, 129 P2d 941, 54 Cal App 2d 756 Neb—Laier v South Side Irr Co., 266 NW 428, 130 Neb 713 67 C J p 1413 note 11

**Regulations as part of contract**

Rate-fixing regulation of corporation commission over water corporation became part of contract for water, whether expressed therein or not.

U S—In re Cortaro Water Co, D C Ariz, 3 FSupp 257

**Authority unaffected by provision for termination of service**

Provisions of applications for water service allowing water service to be terminated at the request of either party after a specified period did not affect the public nature of the water company, and did not affect railroad commission's jurisdiction over rates and service

Cal—Lamb v California Water & Tel Co, 129 P2d 371, 21 Cal 2d 33

**Dedication to public use**

The filing of a condemnation action by a water company is evidence of an intention to dedicate impounded waters to a public use so as to give the railroad commission jurisdiction over rates and service Cal—Lamb v California Water & Tel Co, supra

99. Tex—Knight v. Oldham, Civ App, 210 SW 567 Wash—Ament v Bickford, 247 P 952, 139 Wash 494

1. Cal—McFadden v Los Angeles County, 16 P 397, 74 Cal 571. 67 C J p 1414 note 13

2. Colo.—Northern Colorado Irr. Co

v Board of Com'rs of Arapahoe County, 38 P2d 889, 95 Colo 555 67 C J p 1414 note 19

3. Cal—Nelson v Lake Hemet Water Co, 297 P 914, 212 Cal 94

4. Neb—McCook Irrigation & Water Power Co v Burtless, 152 N W 334, 98 Neb 141, L R A 1915D 1205

5. Cal—Lamb v California Water & Tel Co, 129 P2d 371, 21 Cal. 2d 33

Foothill Ditch Co v Wallace Ranch Water Co, 78 P2d 215, 25 Cal App 2d 555, appeal dismissed Wallace Ranch Water Co v Foothill Ditch Co, 59 S Ct 54, 305 U. S 664, 83 L Ed 431

Neb—Laier v South Side Irr. Co, 266 NW 428, 130 Neb 713

6. Colo—Johnston v Wanamaker Ditch Co, 38 P2d 907, 95 Colo 551 67 C J p 1414 note 16

**Power held not divisible**

Colo—Northern Colorado Irr. Co v Board of Com'rs of Arapahoe County, 38 P2d 889, 95 Colo 555.

**Condition precedent to invocation of authority**

A disagreement between board of directors of water conservancy dis-

or supervisors,<sup>7</sup> or in the board of directors of an irrigation district.<sup>8</sup>

The power of the public rate fixing body to make rules and regulations governing rates is discretionary, and a court cannot interfere with its refusal to make such rules and regulations in the absence of a showing of abuse of discretion.<sup>9</sup> Where landowners, intervening in a receivership proceeding against a public service irrigation company after a sale of the company's system by order of court, claim rights to water under contract with the former owner, such question cannot be passed on where the claimants have never applied to the public rate fixing body for the determination of rates for their use of water.<sup>10</sup>

### (3) Reasonableness of Rates

The rates for water furnished for irrigation must be reasonable as to distributor and consumer

The rates and charges for the sale of water for irrigation purposes by a distributor furnishing water to the public must be reasonable both as to the distributor and as to consumers.<sup>11</sup> In prescribing and regulating rates and charges for the sale and

distribution of water for irrigation where such service is affected with a public interest, there are to be applied the general principles applicable in the cases of other public utilities, as to the rate base, and the determination of the elements thereof,<sup>12</sup> so as to allow the distributor a fair return.<sup>13</sup> Where a rate which has been fixed for the supplying of water for irrigation has been vacated by the court as unreasonably low, the irrigation company must again go before the rate fixing body and have a reasonable rate established,<sup>14</sup> the old rate remaining in effect until a new rate is determined by the rate fixing body,<sup>15</sup> and the distributing company cannot charge a higher rate before such new rate has been determined.<sup>16</sup>

### (4) Discrimination

A discrimination in fixing rates based on reason and justice can properly exist, but the rate fixing body may act so as to remove any unfair discrimination.

While it is the general rule, as considered supra § 355, that a distributor of water for irrigation supplying water to the public may not discriminate against individual users of its water, a discrimination in fixing rates for water for irrigation based

trict and water users regarding charge to be made for sale or leasing of water is a condition precedent to invoking power of county commissioners to establish water rates, and the commissioners can act only on petition of an interested party, even if constitution giving county commissioners authority to establish rates is applicable to water conservancy district

Colo—People ex rel Rogers v Letford, 79 P 2d 274, 102 Colo 284

7. U.S.—Stanislaus County v San Joaquin & King's River Canal & Irrigation Co., Cal., 24 S Ct 241, 192 U.S. 201, 48 L Ed 406  
67 C J p 1414 note 17

8. Cal—Willard v Glenn-Colusa Irr Dist., 258 P 959, 201 Cal 726

9. Cal—Ashley v Railroad Commission of State of California, 204 P 825, 188 Cal 234.

10. Tex—McHenry v Bankers' Trust Co., Civ App., 206 SW 560, error dismissed 41 S Ct 321, 255 U.S. 559, 65 L Ed 785

11. Ariz—Olsen v Union Canal & Irrigation Co., 119 P 2d 569, 58 Ariz 306

Cal—Rutherford v. Oroville-Wyan-dotte Irr. Dist., 22 P 2d 505, 218 Cal. 242

Wyo—State v. Laramie Rivers Co., 136 P 2d 487, 59 Wyo 9  
67 C J. p 1414 note 24

**Rates held not unreasonable**

Cal.—Miller v. Railroad Commission,

70 P 2d 164, 9 Cal 2d 190, 112 A L R 221

#### Inability to pay immaterial

Neither courts nor railroad commission is authorized to fix or approve rates to be charged by utility for water for irrigation purposes which would confiscate property of utility, notwithstanding inability of user to pay reasonable rates

Cal—Miller v Railroad Commission, supra

12. Tex—Combs v United Irr Co., Civ App., 110 SW 2d 1157, error dismissed

67 C J p 1415 note 26

Rates and rate making generally see Public Utilities §§ 13–26

#### Elements of rate base

(1) In determining rate base for carrying charge for water conveyed to consumers by ditch company, finding of the present value of ditch company's investment in construction, physical property, and right of way was properly included

Colo—Board of Com'rs of Jefferson County v Rocky Mountain Water Co., 79 P 2d 373, 102 Colo 351  
67 C J p 1415 note 26 [a]

(2) The value of the water rights should not be included

Colo—Board of Com'rs of Jefferson County v Rocky Mountain Water Co., supra.

(3) Minimum maintenance and operating expenses which must be provided by the rate fixed in order that the rate be not confiscatory must be found.

Colo—Board of Com'rs of Jefferson County v Rocky Mountain Water Co., supra

(4) Other elements see 67 C J p 1415 note 26 [b]

13. Cal—Miller v Railroad Commission, 70 P 2d 164, 9 Cal 2d 190, 112 A L R 221

Colo—Board of Com'rs of Jefferson County v Rocky Mountain Water Co., 79 P 2d 373, 102 Colo 351  
67 C J p 1415 note 27

#### Rate held confiscatory

U.S.—Kern Island Canal Co v Railroad Commission of California, D C Cal., 12 F Supp. 848

#### Matters considered in determining reasonable return

In determining reasonable return on rate base for carrying charge for water conveyed to consumers by ditch company, the effect of the use of the water on the land and the value of the water rights was proper for the court's consideration, since ditch company was entitled to a rate of return that would make its securities valuable and as desirable to the investor in securities as the land is desirable for one who intends to engage in agricultural pursuits

Colo—Board of Com'rs of Jefferson County v Rocky Mountain Water Co., 79 P 2d 373, 102 Colo 351

14. Idaho—Green v Jones, 126 P 1051, 22 Idaho 560

15. Idaho—Green v Jones, supra.

16. Idaho—Green v Jones, supra.

on reason and justice can properly exist.<sup>17</sup> In fixing rates to be charged for water furnished for irrigation the public rate fixing body may act so as to remove any unfair discrimination which may exist as between contracting consumers and noncontracting consumers<sup>18</sup>

(5) Proceedings for Relief against Unreasonable Rates

An action may be maintained by either a consumer or a distributor to obtain relief from unreasonable rates or charges.

An action to obtain relief from unreasonable rates or charges may be brought by either a distributor or consumer of water supplied for irrigation, who is affected by such rate.<sup>19</sup> Under the rule obtaining in some jurisdictions that a party claiming rates fixed by a public rate fixing body to be unreasonable may apply to such body for a re-examination of such rates, it has been held that resort must be had to such means of securing relief from the enforcement of such rates before any determination as to their reasonableness can be made by a court.<sup>20</sup> A court may set aside such rates and order the regulatory body to fix rates which are reasonable and are allowed by law when a regulatory board or commission has arbitrarily and without the exercise of judgment fixed rates to be charged for water for irrigation,<sup>21</sup> or has fixed rates which are found to be unreasonable,<sup>22</sup> the court having the power to determine the reasonableness and justness of rates according to its own

independent judgment as to both law and facts,<sup>23</sup> but the court has no power to fix other rates itself.<sup>24</sup> The established rate is binding on all persons affected by it until annulled by some proper court on direct attack in an appropriate proceeding,<sup>25</sup> and it is not subject to collateral attack.<sup>26</sup> Failure of a distributor to offer evidence as to the value of its water rights before the public rate fixing body does not estop it to assert that the value of such rights was not taken into account in fixing the rate.<sup>27</sup>

The enforcement of unreasonable rates may be enjoined,<sup>28</sup> and a temporary injunction may be issued to restrain the enforcement of the established rates pending determination of the suit.<sup>29</sup> In an action by a consumer for a determination of the rate which he shall pay for water for irrigation, he is not entitled to an injunction pendente lite to restrain the shutting off of his water supply pending determination of the action, where the distributor is willing to furnish water at the rate established for service to the public generally, and the consumer's damage, if any, can be accurately measured by any overcharge which he may pay for water.<sup>30</sup>

Where a court has adjudged a rate fixed by a public rate fixing body to be unreasonable and void, such body cannot repudiate the order of the court by again establishing an identical rate, based on the same evidence,<sup>31</sup> but the rate fixing body may take into consideration in determining a rate evidence taken at former hearings before such body.<sup>32</sup>

17. Cal—Henderson v Oroville-Wyandotte Irr Dist, 2 P 2d 803, 213 Cal 514

67 C J p 1416 note 32

18. Cal—Sutter Butte Canal Co v Railroad Commission of California, 259 P 937, 202 Cal 179, affirmed 49 S Ct 325, 279 US 125, 73 L Ed 637

19. Tex—Kohler v United Irr Co, Civ App, 222 SW 337  
67 C J p 1416 note 34

20. US—Osborne v San Diego Land & Town Co, Cal, 20 S Ct 860, 178 US 22, 44 L Ed 961

Cal—San Joaquin & Kings River Canal & Irrigation Co v Stanislaus County, 99 P 365, 155 Cal 21

21. Cal—Spring Valley Water-Works v San Francisco, 22 P. 910, 1046, 82 Cal 286, 16 Am SR 116, 6 L R A 756

22. US—Kern Island Canal Co v Railroad Commission of California, D C Cal, 12 F Supp 848  
67 C J p 1416 note 39

23. Tex—American Rio Grande Land & Irrigation Co v Karle, Civ App, 237 S.W. 358

**Jurisdiction held solely in supreme court under statute**

Cal—Wallace Ranch Water Co v Foothill Ditch Co, 53 P 2d 929, 5 Cal 2d 103

Foothill Ditch Co v Wallace Ranch Water Co, 78 P 2d 215, 25 Cal App 2d 555, appeal dismissed  
Wallace Ranch Water Co v Foothill Ditch Co, 59 S Ct 54, 305 US 664, 83 L Ed 431

**Findings or adjudications held conclusive**

Cal—Foothill Ditch Co v Wallace Ranch Water Co, 78 P 2d 215, 25 Cal App 2d 555, appeal dismissed  
Wallace Ranch Water Co v Foothill Ditch Co, 59 S Ct 54, 305 US 664, 83 L Ed 431

Colo—Northern Colorado Irr Co v Board of Com'rs of Arapahoe County, 38 P 2d 889, 95 Colo 555

24. US—Kern Island Canal Co v Railroad Commission of California, D C Cal, 12 F Supp 848  
67 C J p 1417 note 41

25. Colo—McCracken v Montezuma Water & Land Co, 137 P 903, 25 Colo App 280

26. Colo—Northern Colorado Irr

Co v Pouppirt, 108 P 23, 47 Colo 490

McCracken v Montezuma Water & Land Co, 137 P 903, 25 Colo App 280

67 C J p 1417 note 43

27. US—San Joaquin & Kings River Canal & Irrigation Co v Stanislaus County, Cal, 34 S Ct 652, 233 US 454, 58 L Ed 1041

28. DC—Fox v Ickes, 137 F 2d 30, 78 US App DC 84, certiorari denied 64 S Ct 204, 320 US 792, 88 L Ed 477, Ickes v Park, 64 S Ct 204, 320 US 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 US 792, 88 L Ed 477.

29. Tex—American Rio Grande Land & Irrigation Co. v Karle, Civ App, 237 SW 358

30. Cal—Pellissier v Whittier Water Co, 209 P 593, 59 Cal App 1.

31. Colo—Montezuma Water & Land Co v McCracken, 163 P 286, 62 Colo 394

67 C J p 1417 note 46

32. Nev—Steamboat Canal Co v. Garson, 185 P. 801, 1119, 43 Nev. 298

67 C J p 1417 note 47.

*Review of orders of rate fixing body.* A court will not set aside orders of a public rate fixing body in matters over which it has jurisdiction because of errors in the admission or rejection of evidence, where the error does not amount to the entire exclusion of evidence otherwise admissible, touching a matter in issue<sup>33</sup> In a jurisdiction where the scope of the writ of certiorari extends only to review the judicial action of an inferior tribunal, board, or officer, done in excess of its jurisdiction, it has been held not to extend to review an order of a rate fixing body establishing a rate for water furnished for irrigation<sup>34</sup> Under some statutes the court has no authority to receive evidence on any issue but is required to hear the cause on the record of the commission as certified to it,<sup>35</sup> and where no claim is made that an implied finding of the commission is not supported by the record, the court must conclude that the commission regularly pursued its authority<sup>36</sup>

### c. Payment and Collection

- (1) In general
- (2) Right of distributor to refuse supply for nonpayment
- (3) Lien for rates and charges on land or crops
- (4) Actions to recover charges
- (5) Actions to recover excess charges paid

#### (1) In General

An owner or appropriator of an irrigation system may collect from a consumer for the supply of water and fees for the maintenance of the system as provided by statute or contract, and where no rate or charge has been determined, the distributor is entitled to be paid the reasonable value of the services rendered.

Generally, a consumer is not required to pay for water rights for lands not susceptible of irrigation from the distributor's system,<sup>37</sup> but where a consumer has contracted to pay a minimum sum for each acre of land owned by him, he cannot avoid payment in part because some of his land is not capable of being irrigated<sup>38</sup> An owner or operator of an irrigation system may collect maintenance fees from the consumers for the construction and maintenance of the irrigation system, as provided by statute<sup>39</sup> or contract between the parties<sup>40</sup> Where a distributor has accepted payment in advance for water to be furnished a consumer, the consumer has a right to receive the amount of water for which he has paid<sup>41</sup> It is generally held that a consumer is not liable to pay for irrigation water which he does not receive,<sup>42</sup> even though the contract for water provides that the distributor shall not be responsible for a deficiency of water due to specified causes<sup>43</sup> Where a contract for water rights provides for deferred payments on the fulfillment by the distributor of certain conditions, a receiver of the distributor cannot collect such deferred payments which have been paid into court until the terms of the contract are complied with,<sup>44</sup> and a contract holder who has paid any part of such deferred payments to a receiver of the distributor under order of court is entitled to a credit on his contract for the amount so paid<sup>45</sup>

A consumer cannot avoid liability to pay for water which has been supplied to him under contract by a sale of his land,<sup>46</sup> or by a failure to construct a ditch agreed to be constructed by him,<sup>47</sup> or by showing that the distributor's ditch has been negligently and unskillfully constructed<sup>48</sup> or that the land failed to produce as much revenue as the amount of the rate fixed by the contract,<sup>49</sup> nor

33. Cal—Brewer v Railroad Commission of California, 210 P 511, 190 Cal 60, error dismissed 45 S Ct 124, 266 US 641, 69 L Ed. 483 67 C J p 1417 note 49.

34. Nev—Degiovanni v. Public Service Commission of Nevada, 197 P 582, 49 Nev 74 67 C J p 1417 note 51

35. Cal—Miller v Railroad Commission, 70 P 2d 164, 9 Cal 2d 190, 112 A L R 221.

36. Cal—Miller v. Railroad Commission, supra

37. Idaho—Marysville Development Co v. Marotz, 258 P. 180, 44 Idaho 469

38. Tex—Chapman v American Rio Grande Land & Irrigation Co, Civ App, 271 S W 392 67 C J p 1418 note 55

39. Idaho—Gedney v Snake River

Irr Dist, 104 P 2d 909, 61 Idaho 605

Neb—Lair v South Side Irr Co, 266 N W 428, 130 Neb 713

#### Costs as proportionate to benefits

Where an irrigation system has been completed, the cost of maintenance and operation must be spread on all the lands of the irrigation district and must be proportionate to benefits received by such lands growing out of maintenance and operations of the irrigation system

Idaho—Gedney v Snake River Irr Dist, 104 P 2d 909, 61 Idaho 605

40. Utah—Big Cottonwood Tanner Ditch Co v Kay, 157 P 2d 795, 108 Utah 110

67 C J p 1418 note 57

41. Tex—Cameron County Water Improvement Dist No 1 v Daniels, Civ App, 269 S W 1066

67 C J p 1418 note 62

42. Wyo—McHale v Goshen Ditch Co, 52 P 2d 678, 49 Wyo 100 67 C J p 1418 note 63

43. Cal—Madera Canal & Irrigation Co v K Arakelian, Inc, 284 P 971, 103 Cal App 592

44. Idaho—Childs v Neitzel, 141 P 77, 26 Idaho 116

45. Idaho—Childs v Neitzel, supra

46. Tex—Bennett v. Rio Grande Canal Co, Civ App, 182 S W 713

47. Cal—Fresno Canal & Irrigation Co v. Dunbar, 22 P 275, 80 Cal 530

48. Cal—Fresno Canal & Irrigation Co v Dunbar, supra.

49. Tex—Combs v United Irr Co. Civ App, 110 S W 2d 1157, error dismissed



does breach of the distributor's covenant to furnish water excuse nonpayment for water received by the consumer.<sup>50</sup> Where no rate or charge has been determined for water supplied for irrigation purposes, either by public authority or by private contract, the distributor is entitled to be paid the reasonable value of the services rendered.<sup>51</sup> Where there is no contract for a supply of water, a landowner is not liable for water furnished without his knowledge or consent.<sup>52</sup> One who receives no supply of water for irrigation directly from a distributor, but who uses for the irrigation of his lands waste water flowing onto his lands from the lands of adjacent consumers, cannot be made to pay the distributor for the use of such water.<sup>53</sup> Landowners who are consumers of water furnished by an irrigation company and who are beneficiaries under a trust deed executed by the company do not abandon their rights by nonpayment of water charges.<sup>54</sup>

*Subsequent purchaser of land* A covenant in a contract for a supply of water or in a deed of a water right that the consumer will pay a stipulated contract price or rental for the use of such water, and which may provide that such agreement to pay shall bind the land, does not make a subsequent purchaser of the land personally liable for such payment,<sup>55</sup> although as shown infra subdivision c (3) of this section the rates or charges for water furnished may be made a lien on the land for the irrigation of which the water is furnished when so

provided in the contract for water.

## (2) Right of Distributor to Refuse Supply for Nonpayment

A consumer's supply of water may be withheld by the distributor for default in payment of current rates or charges, but the mere failure to pay in the amount and at the times stipulated does not work an abandonment of the consumer's water right.

A distributor may withhold a supply of water from a consumer until payment of current rates or charges has been made in accordance with the provisions of statute or contract,<sup>56</sup> or until reasonable security has been given for such payment,<sup>57</sup> and a consumer may be enjoined from using water until such payment is made,<sup>58</sup> but the mere failure to pay rates or charges in the amount and at the times stipulated has been held not to work an abandonment or forfeiture of a consumer's water right,<sup>59</sup> and where the covenants of the distributor to furnish water and of the consumer to pay for it are separate and independent, the breach by the consumer of his covenant does not excuse the distributor for a failure to furnish water.<sup>60</sup> So where a good faith controversy and protracted litigation existed as to the interpretation of the contract, it would be inequitable to require payment of past-due maintenance charges as a condition precedent to the delivery of water.<sup>61</sup> A distributor may withhold the delivery of water for nonpayment of charges past due, after giving due notice that the supply will be shut off unless arrears are paid up.<sup>62</sup> Where the

50. Cal—Kaupke v Lemoore Canal & Irrigation Co., 67 P 2d 407, 20 Cal App 2d 554  
67 C J p 1409 note 73

51. Cal—Foothill Ditch Co v Wallace Ranch Water Co., 78 P 2d 215, 25 Cal App 2d 555, appeal dismissed  
Wallace Ranch Water Co v Foothill Ditch Co., 59 S Ct 54, 305 US 664, 83 L Ed 431

67 C J p 1418 note 70

### Pro rata share of upkeep

Colo—Johnston v Wanamaker Ditch Co., 38 P 2d 907, 95 Colo 551

52. Tex—Beaumont Irrigating Co v Ellison, Civ App., 260 SW 245  
67 C J p 1418 note 71

53. Idaho—Milner Low Lift Irr Dist v Eagen, 286 P. 608, 49 Idaho 184

54. US—Adamson v Black Rock Power & Irrigation Co., CCA Wash., 297 F. 905, certiorari denied  
45 S Ct 196, 266 US 630, 69 L Ed 477, and appeal dismissed  
45 S Ct 196, 266 US 592, 69 L Ed 458  
67 C J p 1419 note 73

55. Neb—Faugt v Platte Val Public Power & Irr Dist., 51 NW 2d 253, 155 Neb 141.

Or—Cabell v Federal Land Bank of Spokane, 144 P 2d 297, 173 Or 11  
Wash—Model Water & Light Co v Dickson, 24 P 2d 422, 174 Wash 164, adhered to  
28 P 2d 1119, 174 Wash 164

Wyo—Lingle Water Users' Ass'n v Occidental Building & Loan Ass'n, 297 P 385, 43 Wyo 41  
67 C J p 1418 notes 58-61

Contract as one not running with the land see supra subdivision a of this section

56. Idaho—Reynolds v North Side Canal Co., 213 P 344, 36 Idaho 622  
Wash—State v Pasco Reclamation Co., 156 P 834, 90 Wash 606

57. Idaho—Reynolds v North Side Canal Co., 213 P 344, 36 Idaho 622

58. Neb—Dundy County Irr Co v Morris, 185 NW 350, 107 Neb 64

59. Cal—Henck v Lake Hemet Water Co., 69 P 2d 849, 9 Cal 2d 136  
67 C J p 1419 note 77

*Time held not of essence* under a water contract providing for the delivery of water for use on specified premises and for the payment of annual dues as a condition precedent to the right to receive water.

Cal—Henck v Lake Hemet Water Co., supra

*Nonpayment held excusable* when induced by the water company's conduct in giving notice of the amount due in preceding years and omitting it in the year in question

Cal—Henck v. Lake Hemet Water Co., supra

60. Cal—Fresno Canal & Irr Co v. Perrin, 149 P 805, 170 Cal 411

61. Neb—Lair v. South Side Irr. Co., 266 NW 428, 130 Neb 713

62. Pa—Pennsylvania Water Co v McDonald, 179 A 874, 119 Pa. Super 99  
67 C J p 1419 note 78

### Notice showing intent not to cancel contract

Notice sent out by water company to customer advising that water bill was past due, that thirty-day credit period had expired, but that credit period had been extended forty-eight hours after which water would be turned off and charge of one dollar made for turning it on again, indicated on its face that water company did not intend to cancel contract to furnish water.

consumer claims an absolute right to take water beyond the control of the distributor, and without making payment therefor, the distributor may cut off the supply.<sup>63</sup> A distributor may shut off the water for nonpayment even though he has another remedy to enforce payment,<sup>64</sup> but it has been held that, where a remedy is specifically provided by statute for the enforcement of payment, a distributor may not refuse to furnish water as a method of enforcement,<sup>65</sup> nor may he declare a forfeiture of the water contract and all payments theretofore made.<sup>66</sup> Under a statute imposing a criminal penalty for the taking of water by a consumer in default of payment and contrary to the orders of the distributor, it has been held that the distributor is confined to the remedy given by the statute.<sup>67</sup> Where a consumer has defaulted in payment of rental for water for irrigation, and the distributor delivers water and accepts payment for years subsequent to those during which the defaults occurred, such acts operate as a waiver of the distributor's right to insist on a forfeiture of the consumer's right to receive water.<sup>68</sup>

### (3) Lien for Rates and Charges on Land or Crops

Pursuant to contract or statute, rates for water may be made a lien on the land for the irrigation of which

such water is supplied which may be enforced against subsequent purchasers of the land with notice.

The rates or charges for water furnished by a distributor to a consumer for irrigation purposes may be made a lien on the land for the irrigation of which the water is furnished and delivered, or on the crops grown on such land, when so provided in the contract for water,<sup>69</sup> or under the provisions of statutes,<sup>70</sup> which lien may be enforced against subsequent purchasers of the land with notice thereof, either actual or constructive,<sup>71</sup> and, where the distributor has complied with its part of the contract, a lien may be enforced against such subsequent purchaser even though he does not use the water.<sup>72</sup> It has been held that a lien for rental of a water right of limited duration may be enforced against a tenant of the land supplied, who has contracted for such water right.<sup>73</sup>

Where it is provided by statute that a distributor shall have a preference lien on the crops for which the water is furnished, such lien has been held to be superior to the lien of a landlord for unpaid rent,<sup>74</sup> or to a mortgage lien on a crop.<sup>75</sup>

Where there is a contract for water, a lien for rates or charges cannot be enforced where water has not been delivered under the terms of the contract.<sup>76</sup> Where a statute allowing a lien is held to contemplate a contract, it has been held that no lien

Pa.—Pennsylvania Water Co v McDonald, *supra*

63. Cal.—Fuller v Azusa Irr Co, 71 P 98, 138 Cal 204

64. Wash.—State v Pasco Reclamation Co, 156 P 834, 90 Wash 606 67 C J p 1419 note 80

65. Idaho.—Reynolds v North Side Canal Co, 213 P 344, 36 Idaho 322 67 C J p 1419 note 81

66. Idaho.—Rogers v Thomas, 226 P 165, 38 Idaho 802

67. N M.—La Mesa Community Ditch v Appelzoeller, 140 P 1051, 19 N M 75

68. Colo.—Kimball v. Northern Colorado Irr Co, 94 P. 333, 42 Colo 412

69. Neb.—Corpus Juris cited in Union Cent Life Ins Co v Cover, 289 N W 331, 335, 137 Neb 260

Tex.—Combs v United Irr. Co, Civ App, 110 S W 2d 1157, error dismissed

67 C J p 1419 note 87

Language used must be definite and must by its terms be a direct declaration that such a lien is created in order to create a lien by contract

Neb.—Union Cent Life Ins Co v Cover, 289 N W 331, 137 Neb. 260

Land rendered unsuitable for irrigation

Where land previously subject to lien for water charges under contract for purchase of perpetual right to use water for irrigation became flooded and unsuitable for irrigation, partly due to seepage from irrigation ditch which made duck pond, that landowners derived revenue through leasing of pond for hunting purposes did not authorize subsequent enforcement of lien

Or.—Cabell v Federal Land Bank of Spokane, 144 P 2d 297, 173 Or 11.

Description held not sufficient to establish lien

Or.—Cabell v Federal Land Bank of Spokane, *supra*

70. U S.—Faris v Blaine County Inv Co, D C Idaho, 3 F Supp 381

Mont.—Orchard Homes Ditch Co v Snively, 159 P 2d 521, 117 Mont 484.

Neb.—Union Cent Life Ins Co v Cover, 289 N W 331, 137 Neb 260

Wyo.—Ohio Oil Co v Wyoming Agency, 179 P 2d 773, 63 Wyo 187 67 C J p 1420 note 88

Where mineral fee had been severed from surface estate, irrigation assessment against owner of surface estate did not attach to the mineral fee, and purchaser at sheriff's sale

pursuant to action to foreclose lien of irrigation assessment on surface estate acquired no title in the mineral fee

Wyo.—Ohio Oil Co v Wyoming Agency, *supra*

71. Mont.—Orchard Homes Ditch Co v Snively, 159 P 2d 521, 117 Mont 484

Or.—Corpus Juris cited in Cabell v Federal Land Bank of Spokane, 144 P 2d 297, 302, 173 Or 11

Tex.—Combs v. United Irr Co, Civ App, 110 S W 2d 1157, error dismissed

67 C J p 1420 note 89

72. Cal.—Fresno Canal & Irrigation Co v. Rowell, 22 P. 53, 80 Cal 114, 13 Am S R 112

73. Tex.—Dunbar v Texas Irr Co, Civ App, 195 S W 614.

67 C J p 1420 note 91

74. Tex.—Texas Bank & Trust Co of Beaumont v Smith, 192 S W 533, 108 Tex 265, 2 A L R 771

67 C J p 1420 note 92.

75. Tex.—Texas Bank & Trust Co of Beaumont v Smith, *supra*.

Texas Bank & Trust Co of Beaumont v Smith, Civ App, 195 S W 617

76. Wash.—Black v. Baker, 219 P. 59, 126 Wash 604

can be enforced where no such contract exists<sup>77</sup> Where the distributor has failed to perform its contract to furnish a specified quantity of water, but has furnished a substantial quantity of water, which has been accepted and used by the consumer, although such quantity was insufficient for the proper irrigation of the land, a lien may be enforced for the fraction of the contract price represented by the water furnished,<sup>78</sup> and where a foreclosure of a lien for less than the full contract price is allowed, the amount for which a lien is allowed will bear interest at the rate specified in the contract<sup>79</sup> It has been held, however, that a court of equity will not enforce a lien for water furnished for irrigating purposes, where the water furnished was of no benefit to the land, because the supply was inadequate<sup>80</sup>

*Lien under Carey Act Reclamation Project.* Where liens against land or water rights are authorized by federal statute to be created by a state for the actual cost of reclamation under an irrigation project, and are provided for by state statutes enacted in conjunction therewith, any company which has constructed an irrigation system and sold water rights,<sup>81</sup> or which is furnishing water for the irrigation of land, in accordance with the statutes,<sup>82</sup> has a lien on the land or water rights for the charges fixed for such service, it being for the state to determine the amounts for which such liens

will attach<sup>83</sup> Where it is provided by statute that the lien of the distributor of water for irrigation shall be prior to any other liens on the land, it has been held that the lien of an irrigation construction company for the expense of constructing the system is superior to a lien for assessments made by an operating company for the expense of maintaining and operating the system<sup>84</sup> Where deferred payments for water to be furnished through an irrigation system not completed at the time of the contract are made a lien on the land to be supplied, the lien does not attach until the water has been made permanently available for the irrigation of the land<sup>85</sup>

*Foreclosure of lien.* Actions to foreclose liens for rates or charges for water furnished for irrigation are governed by the usual rules applicable to other civil actions<sup>86</sup> Where a lien for rates and charges is provided by statute, it is held that the remedy provided by the statute for foreclosure of the lien for the payment of such charges is exclusive<sup>87</sup> In an action to foreclose a lien for water furnished a tract of land, plaintiff has a right to rely on the record title to the land<sup>88</sup>

#### (4) Actions to Recover Charges

A distributor may recover rents or charges for water either by common-law remedy or as provided by statute

Distributors of water for irrigation purposes may recover the rents or charges therefor either under an appropriate common-law remedy,<sup>89</sup> or under such

77 La—Haas v Ardoin, App, 145 So 388  
67 C J p 1420 note 95

#### Intent of contract

Where water service contract revealed intent that lien could only be imposed upon water-stocked land, and stock purchase contract which was only basis for water-stocking the land was void, lien for payment of irrigation water was properly denied Cal—Western Canal Co v McRae, 97 P 2d 1031, 36 Cal App 2d 419

78. US—Twin Falls Oakley Land & Water Co v Martens, CCA Idaho, 271 F 428, certiorari denied 42 S Ct 49, 257 US 637, 66 L Ed 410

79. US—Glavin v Commonwealth Trust Co of Pittsburgh, CCA Idaho, 295 F 103, appeal dismissed 46 S Ct 204, 270 US 664, 70 L Ed 788

80. Wash—Pasco Fruit Lands Co v Timmermann, 152 P 675, 88 Wash 112

81. Idaho—Adams v Twin Falls-Oakley Land & Water Co, 161 P 322, 29 Idaho 357

82. Idaho—Idaho Irr Co v Lincoln County, 152 P 1058, 28 Idaho 98

83. Idaho—Idaho Irr Co v Pew, 141 P 1099, 26 Idaho 272

84 US—Brown v. Portneuf-Marsh Valley Irr Co, CCA Idaho, 5 F 2d 895, certiorari denied 46 S Ct 204, 270 US 637, 70 L Ed 773, affirmed 47 S Ct 692, 274 US 630, 71 L Ed 1243

85 Idaho—Childs v Neitzel, 141 P 77, 26 Idaho 116

86. Cal—Consolidated Irr Dist v Crawshaw, 20 P 2d 119, 130 Cal App 455, followed in 20 P 2d 122, 130 Cal App 463  
67 C J p 1420 note 8

#### Jurisdiction

Court in which water company brought suit for delinquent water charges and foreclosure of liens therefor against landowners, not protesting against nor repudiating or disputing bills for such charges or seeking relief from railroad commission, acquired jurisdiction of defendants' persons

Cal—Happy Valley Water Co v Thornton, 34 P 2d 991, 1 Cal 2d 325

#### Evidence held sufficient

To establish that land was no longer subject to lien

Or—Cabell v Federal Land Bank of Spokane, 144 P 2d 297, 173 Or 11

#### Judgment

Declaration in judgment that lien

was prior to rights and interests of all defendants and that purchaser would acquire all rights and interests of defendants meant only that defendants had no right or interest in the land subject to the lien that was being foreclosed

Wyo—Ohio Oil Co v Wyoming Agency, 179 P 2d 773, 63 Wyo 187

87. Idaho—Rogers v. Thomas, 226 P 165, 38 Idaho 802  
67 C J p 1421 note 9

88. Tex—Ball v Rio Grande Canal Co, Civ App, 256 SW 678  
67 C J p 1421 note 10

89. Tex—South Tex Water Co v Bieri, Civ App, 247 SW 2d 268, error refused no reversible error  
67 C J p 1421 note 12

#### Waiver

A ditch company's waiver, if any, of rights under earlier orders of the railroad commission, was not controlling in action to recover from consumer for services rendered in diverting water on basis of a later order fixing rates to be charged by company

Cal—Foothill Ditch Co v Wallace Ranch Water Co, 78 P 2d 215, 25 Cal App 2d 555, appeal dismissed

Wallace Ranch Water Co. v. Foot-

remedy as may be provided by statute<sup>90</sup> A distributor of water for irrigation purposes, in order to recover the contract rental for such water, must show that the consumer entered into the contract sued on,<sup>91</sup> and that the distributor rendered the services under the contract for which it demands compensation,<sup>92</sup> and a pro tanto recovery cannot be had for a partial performance by the distributor, where the benefit of such performance to the consumer cannot be determined,<sup>93</sup> or where the contract to furnish a supply of water was entire and not severable,<sup>94</sup> but a pro tanto recovery can be had where the distributor has furnished a substantial quantity of water, which the consumer has accepted, although the amount furnished was less than the amount specified in the contract<sup>95</sup> The fact that a distributor has disabled itself from performing its

contract to furnish water by a sale of its irrigation system does not prevent a recovery pro tanto in equity for services performed up to the time of the sale<sup>96</sup>

*Defenses* to actions to recover rates and charges for water furnished for irrigation are governed by the usual rules applicable to other civil actions<sup>97</sup>

#### (5) Actions to Recover Excess Charges Paid

A consumer may recover excess charges paid in a proper case

A consumer of water for irrigation purposes who pays excess charges under duress,<sup>98</sup> or under protest or other circumstances not amounting to acquiescence,<sup>99</sup> may recover such payments to the extent that they exceed the amount rightfully due the distributor.

### F LIABILITIES AND INJURIES INCIDENT TO SUPPLY AND USE

#### § 364. Civil Liability

In the absence of a statute imposing liability on them, distributors are not liable for injuries resulting from the negligent acts of their officers or agents, but they are not exempt from liability for their torts com-

mitted while performing the functions for which they have been organized.

On the theory that incorporated distributors of waters for irrigation purposes are public corpora-

hill Ditch Co., 59 S Ct 54, 305 U S 664, 83 L Ed 431

#### Burden of proof

Irrigation company asserting indebtedness of farmer for water furnished on theory either of quantum meruit or conversion had the burden of showing that it supplied the water in question, that farmer used such water, and the value of the water used.

Tex—South Tex Water Co v Bieri, Civ App, 247 S W 2d 268, error refused no reversible error

#### Evidence held sufficient

(1) To sustain judgment for plaintiff

Utah—Big Cottonwood Tanner Ditch Co v Kay, 157 P 2d 795, 108 Utah 110

(2) To show failure of consideration

Neb—Elmcreek Ditch Co v St John, 255 N W 16, 127 Neb 253.

#### Evidence held insufficient

(1) To present issue for jury  
Tex—South Tex Water Co v Bieri, Civ App, 247 S W 2d 268, error refused no reversible error

(2) To defeat judgment for plaintiff

Pa—Pennsylvania Water Co v McDonald, 179 A 874, 119 Pa Super 99

#### Finding held not in error

Utah—Big Cottonwood Tanner Ditch

Co v Kay, 157 P 2d 795, 108 Utah 110

90. Idaho—Blaine County Canal Co v Hansen, 292 P 240, 49 Idaho 649

67 C J p 1421 note 13

#### Parties

In action involving power of Secretary of Interior to charge plaintiff water users for such water as they might be entitled to receive without violating rights of other water users, issue of priority of water users with respect to each other could not be decided because other users were indispensable parties

D C—Fox v Ickes, 137 F 2d 30, 78 U S App D C 84, certiorari denied 64 S Ct 204, 320 U S 792, 88 L Ed 477, Ickes v Park, 64 S Ct 204, 320 U S 792, 88 L Ed 477, and Ickes v Eder, 64 S Ct 204, 320 U S 792, 88 L Ed 477

#### Effect of user's contract with third person

Grantor of water and water rights to grantee with reservation of first preference to use of seven thousand five hundred acre feet of water impounded in grantee's reservoir was liable to state engineer for assessments on water reserved, irrespective of any contract between grantor and grantee that grantee should pay assessments

Utah—Minersville Reservoir & Irrigation Co v Rocky Ford Irr Co, 61 P.2d 605, 90 Utah 283

91. La—Houston River Canal Co. v Kopke, 31 So 156, 106 La 609

92. Idaho—Marysville Development Co v Marotz, 289 P. 72, 49 Idaho 480

67 C J p 1422 note 15

#### Evidence held to show want of service

Tex—South Tex Water Co v Bieri, Civ App, 247 S W 2d 268, error refused no reversible error

93. La—Houston River Canal Co v Kopke, 31 So 156, 106 La 609.

94. La—Louisiana State Rice Milling Co v Gage, 7 La App 66

Tex—Markham Irr Co v Brown, Com App, 292 S W 863

95. U S—Twin Falls Oakley Land & Water Co v. Martens, C C A Idaho, 271 F 428, certiorari denied 42 S. Ct 49, 257 U S 637, 66 L Ed 410

96. Tex—Ball v Rio Grande Canal Co, Civ App, 256 S W 678

97. Cal—Imperial Water Co No 4 v Meserve, 217 P 548, 62 Cal App 593

67 C J p 1422 note 20

98. Idaho—Gess v. Nampa & Meridian Irr Dist, 192 P 474, 33 Idaho 189

67 C J p 1422 note 21.

99. Ariz—Salt River Valley Canal Co v Nelssen, 85 P. 117, 10 Ariz 9, 12 L R A, N S, 711, 16 Ann Cas. 796.

tions and in supplying waters for irrigation are performing a governmental function, it has been held that, in the absence of a statute specifically imposing liability on them, they are not liable for injuries resulting from the negligent acts of their officers or agents<sup>1</sup> On the other hand, there is authority to the effect that distributors are not exempt from liability for their torts committed while performing the functions for which they have been organized.<sup>2</sup> In any event such distributors may be liable for the torts of their agents committed while the distributors are engaged in a proprietary, rather than an irrigation, enterprise<sup>3</sup>

*Effect of statutes authorizing suits by or against distributor* Although liability for their negligence has been imposed on distributors of water for irrigation under a statute authorizing such distributors to sue or be sued,<sup>4</sup> there is authority for the proposition that such provisions in a statute do not affect the liability of the distributors.<sup>5</sup>

§ 365. — Liability for Injuries from Construction, Operation, and Maintenance of Works

- a. In general
- b. Exemption
- c. Proximate cause
- d. Persons liable

a. In General

The owner of an irrigating ditch or canal, being bound to exercise reasonable care and prudence in the construction and management thereof, is ordinarily liable in damages for injuries resulting from the breaking, leakage, or overflow of such canal or ditch when caused by the want of the required care.

The owner of an irrigating ditch or canal, being bound to exercise reasonable care and prudence in the construction and management thereof,<sup>6</sup> is ordinarily liable in damages for injuries resulting from the breaking, leakage, or overflow of such canal or ditch when caused by the want of the required care<sup>7</sup> What that duty may require, how-

1. Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160 67 C J p 1422 note 26

Character and status of irrigation districts generally see supra § 318 Exemption, limitation, and extent of liability for

Failure to supply water see infra § § 366-367

Injuries incident to construction, operation, or maintenance of system see infra § 365

Irrigation and ditch companies as quasi-public corporations generally see supra § 347

Liability of state for torts see States § § 129-131

**Want of statutory exemption**

Fact that there are no constitutional or statutory provisions granting municipalities or political subdivisions exemptions does not render the rule of the text inapplicable

Ariz—Taylor v Roosevelt Irr Dist, supra

2. Tex—Hidalgo County Water Control and Improvement Dist No 1 v Peter, Com App, 37 SW 2d 133 67 C J p 1422 note 27

3. Idaho—Eldridge v Black Canyon Irr Dist, 43 P 2d 1052, 55 Idaho 443 67 C J p 1423 note 28

**Distribution of water** when undertaken by irrigation district is a proprietary and not governmental function, and district is liable for its negligence in performing such function Ariz—Taylor v Roosevelt Irr Dist, 226 P 2d 154, 71 Ariz 254, opinion adhered to 232 P 2d 107, 72 Ariz 160

Mont—Newman v Bitter Root Irr Dist, 28 P 2d 195, 95 Mont. 521.

4. Cal—Tormey v Anderson-Cottonwood Irr Dist, 200 P. 814, 53 Cal App 559

5. Tex—Holderbaum v Hidalgo County Water Improvement Dist No 2, Civ App, 297 SW 865, affirmed, Com App, 11 SW 2d 506 67 C J p 1423 note 30

6. Ariz—Taylor v Roosevelt Irr Dist, 226 P 2d 154, 71 Ariz 254, opinion adhered to 232 P 2d 107, 72 Ariz 160—Salt River Valley Water Users' Ass'n v. Blake, 90 P 2d 1004, 53 Ariz 498—Salt River Valley Water Users' Ass'n v. Arthur, 74 P 2d 582, 51 Ariz 101—Salt River Valley Water Users' Ass'n v. Stewart, 34 P 2d 400, 44 Ariz 119 Cal—Ketcham v Modesto Irr Dist, 26 P 2d 876, 135 Cal App 180 Or—Kaylor v. Recla, 84 P 2d 495, 160 Or 254

Utah—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 780—Knight v. Utah Power & Light Co, 209 P 2d 221, 116 Utah 195 67 C J p 1423 note 31

Injunction to restrain injury see infra § 367 a.

**Seepage**

(1) Irrigation districts are not required to provide proper drainage of lands seeped by their projects, whether such land is embraced within their limits or otherwise

Neb—Halligan v Elander, 25 NW 2d 13, 147 Neb 709

(2) Irrigation districts ordinarily are bound by statute to provide drainage whenever necessary or proper, or beneficial to lands affected by the irrigation

Cal—Hume v Fresno Irr Dist, 69 P 2d 483, 21 Cal App 2d 348.

7. Ariz—Salt River Valley Water Users' Ass'n v Stewart, 34 P 2d 400, 44 Ariz 119

Cal—Corpus Juris cited in Massetti v Madera Canal & Irrigation Co, 68 P 2d 260, 263, 20 Cal App 2d 708 —Ketcham v Modesto Irr Dist, 26 P 2d 876, 135 Cal App 180

Mont—Butler v Paradise Val Irr Dist, 160 P 2d 481, 117 Mont 563 Neb—McKain v. Platte Valley Public Power & Irrigation Dist, 37 N W 2d 923, 151 Neb 497

NM—Holloway v Evans, 238 P 2d 457, 55 NM 601

Or—Kaylor v Recla, 84 P 2d 495, 160 Or 254

Utah—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 480 —West Union Canal Co v Provo Bench Canal & Irr Co, 208 P 2d 1119, 116 Utah 128

67 C J p 1423 note 33.

**Seepage**

A cause of action against irrigation district for damages caused by seepage of water arises where lands are visibly affected by the seepage

Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49

**No prescriptive right to be negligent** In action for damages resulting from flooding of premises by irrigation district, the district could not escape liability by reason of claimed prescriptive right

Neb—Webb v Platte Val Public Power & Irr Dist, 13 NW.2d 563, 146 Neb 61.

**Right to divert and appropriate water**

An irrigation ditch owner's constitutional right to divert and appropri-

ever, depends entirely on the circumstances of each particular case, as what would be reasonable care under one set of circumstances might be actionable negligence under another.<sup>8</sup> If it becomes apparent to those operating an irrigation canal that a dangerous condition has developed in its operation which is liable to cause injury, where a warning would be effective to prevent that injury, there is a duty to warn.<sup>9</sup> While there is authority to the effect that the canal or ditch owner may be liable for such injuries even in the absence of negligence,<sup>10</sup> generally the owner of an irrigation system is not liable as an insurer to persons suffering injury caused by the construction, operation, or maintenance of such system.<sup>11</sup> An irrigation district being under no legal duty to fence its irrigation canal,<sup>12</sup> there is no negligence in failing to fence it.<sup>13</sup> Nevertheless, a statute declaring that owners of reservoirs shall be liable for all damages arising from the leakage or overflow of the waters therefrom, or by flood caused by breaking of the embankments of such reservoirs has been held to place an absolute liability on the owners of irrigation reservoirs for injuries resulting from the escape of water therefrom.<sup>14</sup> An irrigation company's duty and liability ceases at the headgate where water is delivered from the main canal, owned and

controlled by the company, into a lateral ditch which is owned and controlled by the landowners receiving water from the lateral.<sup>15</sup>

The owner of an irrigation ditch or canal cannot escape liability for injuries resulting from such owner's negligence in the construction, operation, or maintenance of its ditch or canal, on the ground that the injured person should have gone on the property of the canal or ditch owner and should have performed thereon such acts as were necessary to prevent injury,<sup>16</sup> or that the injured person might at slight expense have prevented damage by digging a ditch on his own land,<sup>17</sup> or by enlarging an existing ditch thereon,<sup>18</sup> so as to carry off the water causing the injury.

An injured person may waive his right to damages,<sup>19</sup> although he is not estopped to assert a claim therefor simply because he was a director of an irrigation company at the time the damage occurred.<sup>20</sup>

*Right of way* A distributor of water for irrigation may be liable for damage to land resulting from the negligent operation of the irrigation system irrespective of any right of way across the injured land,<sup>21</sup> but, if damages for seepage could be re-

ate water does not free such owner from liability for damages resulting from negligence in constructing or maintaining ditch.

**Idaho**—Albrethson v Carey Val Reservoir Co, 186 P 2d 853, 67 Idaho 529.

**8** Ariz—Salt River Valley Water Users' Ass'n v Arthur, 74 P 2d 582, 51 Ariz 101.

#### Debris

Duty of a water users' association engaged in supplying irrigation water to exercise reasonable care to see that its irrigation ditches are kept free from debris consists in refraining from causing any debris to fall into the ditches and to remain there, to inspect ditches at reasonable intervals to see that none has gotten therein through fortuitous causes, and if it has notice that an undue amount has accumulated, to remove it promptly.

**Ariz**—Salt River Valley Water Users' Ass'n v Blake, 90 P 2d 1004, 53 Ariz 498.

**Standard of ordinary care** and freedom from negligence is predicated on construction and maintenance of water systems capable of handling more water than is produced by ordinary rain storm.

**Utah**—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 480.

**9.** Neb—Hilzer v Farmers Irr Dist, 56 NW 2d 457, 156 Neb 398.

**10.** Cal—Ketcham v Modesto Irr Dist, 26 P 2d 876, 135 Cal App 180. **Neb**—Halligan v Elander, 25 NW 2d 13, 147 Neb 709. 67 C J p 1424 note 34.

**11.** Ariz—Salt River Valley Water Users' Ass'n v Blake, 90 P 2d 1004, 53 Ariz 498.

**Cal**—Curci v Palo Verde Irr Dist, 159 P 2d 674, 69 Cal App 2d 583. **Utah**—West Union Canal Co v Provo Bench Canal & Irr Co, 208 P 2d 1119, 116 Utah 128. 67 C J p 1424 note 35.

**Carrying water in open ditch** for farming purposes does not constitute negligence.

**Ariz**—City of Glendale v Sutter, 95 P 2d 569, 54 Ariz 326.

**Irrigation company held not negligent** in delivering water with knowledge that user of lateral ditch had permitted weeds and vegetation to grow in lateral and that water would back up and flood plaintiff's land. **Ariz**—Salt River Valley Water Users' Ass'n v Delaney, 39 P 2d 625, 44 Ariz 544.

#### Storm

Where break in canal causing damage to adjoining land occurs during storm of such magnitude and severity as to be beyond realm of reasonable foreseeability and therefore be-

yond ken of traditional reasonably prudent man, negligence is nonexistent and no liability attaches.

**Utah**—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 480.

**12** Ariz—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz 160.

**13.** Ariz—Taylor v Roosevelt Irr Dist, supra.

**14.** Neb—Robinson v Central Neb Public Power & Irr Dist, 20 NW 2d 509, 146 Neb 534.

67 C J p 1425 note 36.

**15.** Ariz—Salt River Valley Water Users' Ass'n v Delaney, 39 P 2d 625, 44 Ariz 544.

**16** Tex—Barstow Irr Co v Black, 86 SW 1036, 39 Tex Civ App 80. 67 C J p 1425 note 37.

**17** Idaho—McCarty v Boise City Canal Co, 10 P 623, 2 Idaho 245.

**18.** Cal—Tormey v Anderson-Cottonwood Irr Dist, 200 P 814, 53 Cal App 559.

67 C J p 1426 note 39.

**19.** Wyo—Howell v Big Horn Basin Colonization Co, 81 P 785, 14 Wyo 14, 1 L R A, N S, 596.

67 C J p 1426 note 40.

**20.** Idaho—Stuart v Noble Ditch Co, 76 P 255, 9 Idaho 765.

67 C J p 1426 note 41.

**21.** Cal—Smith v Rock Creek Water Corp, 208 P 2d 705, 93 Cal App 2d 49.

covered in condemnation proceedings to acquire land for irrigation purposes, the owner of such land and of land contiguous thereto, having conveyed the right of way for such purposes, may not thereafter be entitled to recover damages for seepage resulting from the irrigation system<sup>22</sup> The granting of a right of way for an irrigation canal does not constitute a right on the part of the landowner to recover damages for mere harmless departures from the contemplated plan<sup>23</sup> A mere grant of right of way for a canal to an adjoining landowner does not give the adjoining landowner or his successors the right to flood their lands to the extent that seepage therefrom will cause irreparable injury to lands of the grantor of the easement or his successors<sup>24</sup>

*Trap.* Where due to the act or conduct of the owner of an irrigation system there exists a condition which constitutes a trap, such owner will be liable for personal injuries resulting from the concealed danger.<sup>25</sup>

*Instrumentalities not constituting part of irrigation works.* A distributor of water for irrigation purposes may be liable for injuries resulting from the construction and operation of structures which do not constitute an essential part of the irrigation works as such.<sup>26</sup>

*Deliberate trespass.* A distributor of water for irrigation may be liable for its deliberate trespasses<sup>27</sup> The act of furnishing water to a stockholder in a different company, at his request, is not a trespass where the other company had no exclusive right to furnish water to its stockholders.<sup>28</sup>

*Injuries to lands adjoining irrigated tract* The owner of land who irrigates it may be liable to adjoining owners for injuries to their lands which result as an incident to such irrigation,<sup>29</sup> and this is particularly so where the irrigation is performed in a negligent manner<sup>30</sup> A person who, by artificial means, raises the volume of water above its natural level and by percolation and overflow injures neighboring lands without license, prescription, or grant, when injury can be prevented by reasonable and not too expensive means, is liable for any injury<sup>31</sup> In directing and regulating irrigation of semi-arid lands, reasonable rules should be enforced and policy of live and let live should be applied, with respect to a landowner's liability for permitting irrigation waters to percolate and seep onto adjoining land,<sup>32</sup> and his failure to take reasonable care to prevent waste water from seeping and percolating onto the adjoining land is negligence, as much as though the application of water to the land had been made in a negligent manner<sup>33</sup> On the other hand, the owner of land is not ordinarily liable in damages for injuries incidentally resulting from his irrigating his own land in a lawful manner.<sup>34</sup> Where the owner of land after irrigating the same has the right to discharge waste water into a ditch over adjoining land, he is liable for injuries resulting from the overflow of such ditch when it is caused by the discharge of "live" water commingled with waste water.<sup>35</sup> Where a person in irrigating his own land floods land of a lower adjoining landowner, the irrigating owner cannot escape liability on the ground that the injured landowner might have gone on the irrigating owner's land and closed an opening in an

Neb—Webb v Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61  
67 C J p 1426 note 42.

22. Cal—Sutro Heights Land Co v Merced Irr Dist, 296 P 1088, 211 Cal 670  
67 C J p 1426 note 43

23. Cal—Groff v Reclamation Dist No 108, 274 P 993, 22 Cal App 97  
Utah—Big Cottonwood Tanner Ditch Co v Moyle, 174 P 2d 148, 109 Utah 213, 172 A L R 175

24. Cal—Fredericks v Fredericks, 238 P 2d 643, 108 Cal App 2d 242

25. Cal—Sanchez v East Contra Costa Irr Co, 271 P 1060, 205 Cal 515  
67 C J p 1426 note 44

26. Cal—Yolo v Modesto Irr Dist, 13 P 2d 908, 216 Cal 274  
67 C J. p 1426 note 45.

27. Ariz—Hargrave v Hall, 73 P 400, 3 Ariz 252  
67 C J p 1426 note 46

28. Cal—Valley View Mut Water Co v Browne, 230 P 2d 875, 104 Cal App 2d 177

29. Or—Kaylor v Recla, 84 P 2d 495, 160 Or 254  
67 C J p 1426 note 48

*Duty not to injure land adjacent to canal*  
Cal—Curci v Palo Verde Irr Dist, 159 P 2d 674, 69 Cal App 2d 583

30. Or—Kaylor v Recla, 84 P 2d 495, 160 Or 254  
67 C J p 1427 note 49

31. Or—Kaylor v Recla, supra.

32. Or—Kaylor v Recla, supra

33. Or—Kaylor v Recla, supra

*Soil naturally incapable of retaining water*

(1) The act of constructing irriga-

tion ditches through soil naturally incapable of retaining water without employing any means to prevent seepage or percolation onto adjoining lands is negligence  
Or—Kaylor v Recla, supra

(2) Where the ground traversed by an irrigation ditch is porous in character, it is the duty of owners of such ditch to adopt the common method of sealing it with concrete or some similar material which will prevent the seepage of water, and on failure to do so there is an assumption of the risk of damage to a neighboring landowner  
Cal—Nelson v Robinson, 118 P 2d 350, 47 Cal App 2d 520

34. Cal—Gibson v Puchta, 33 Cal 310  
67 C J p 1427 note 50.

35. Idaho—Crawford v Inglin, 258 P 541, 44 Idaho 663.  
67 C.J p 1427 note 51.

irrigating ditch opening from which the water flowed<sup>36</sup>

*Injuries to land adjoining natural stream.* An owner of land bordering a natural stream is subject only to natural, not man-made, hazards,<sup>37</sup> and although a natural stream may be used under certain conditions to conduct irrigation water,<sup>38</sup> any floods resulting by excessive amount of water forced into the natural stream by an irrigation company's reservoir will subject the company to liability for negligence<sup>39</sup>

*Nuisance* An irrigation ditch maintained in such manner as to infringe in an unwarranted manner on the use and enjoyment of the property of adjoining owners or occupants may constitute a nuisance,<sup>40</sup> subject to abatement,<sup>41</sup> but where because of the excessive slope of his ground it is necessary for an appropriator to divert for irrigation more water than the soil will absorb, such excess which flows off onto the land of another is not waste which may be abated as a public nuisance within the meaning of a statute.<sup>42</sup> Furthermore, it has been held that an improvement district is not liable under the theory of nuisance for the death of a child who drowned in an irrigation ditch<sup>43</sup>

*Contributory negligence* The owner of land through which an irrigation ditch runs has ordinarily the right to make any lawful use of his land that

he desires, and is not thereby guilty of contributory negligence so as to be barred from recovering for injuries sustained in such use because of the negligence of the ditch owner<sup>44</sup>

### b. Exemption

Although there is authority to the contrary, it has been held that distributors cannot exempt themselves from liability for their own negligence

Notwithstanding their public or quasi-public status, distributors of water for irrigation are not thereby exempt from liability for injuries resulting from the negligent construction, operation, or maintenance of the irrigation works.<sup>45</sup> Although there is authority to the contrary,<sup>46</sup> it has been held that such distributors cannot exempt themselves from liability for their own negligence<sup>47</sup>

### c. Proximate Cause

Where negligence is relied on to impose liability for injuries resulting from the operation of an irrigation system, such negligence must be the proximate cause of the injuries

Where negligence is relied on to impose liability for injuries resulting from the operation of an irrigation system, such negligence must be the proximate cause of the injuries<sup>48</sup> Hence, an irrigation canal or ditch owner is not liable for any damage which was caused by the injured person's

36. Tex—Cody v. Lowry, Civ App, 91 SW 1109  
67 C J p 1427 note 52

37. Colo—Twin Lakes Reservoir & Canal Co v Sill, 89 P 2d 1012, 104 Colo 215

38. Neb—Hagadone v Dawson County Irr Co, 285 NW 600, 136 Neb 258

39. Neb—Hagadone v. Dawson County Irr Co, supra.

#### Reservoir defined

A mutual water storage and canal company's dam, ditches, canals, and tunnel could be considered as a "reservoir" within statute authorizing owners of a reservoir to conduct water into natural streams, where company admitted dam was used for purpose of producing pressure to force water through a tunnel into a natural stream causing stream to flood lands of adjoining landowner  
Colo—Twin Lakes Reservoir & Canal Co v. Sill, 89 P 2d 1012, 104 Colo 215

#### Inlets to reservoir

Statutes concerning right of owners of a reservoir to conduct waters stored therein into natural streams were to be so construed as to include inlets to, as well as outlets from, reservoirs in connection with natural

streams whereby streams were used to carry abnormal amounts due to delivery therein of privately owned water

Colo—Twin Lakes Reservoir & Canal Co v Sill, supra

40. Tex—Barstow Town Co v. Carl, Civ App, 234 SW 555  
46 C J p 714 note 47

#### Public nuisance

Fact that irrigation district was formed under state laws and was by state and federal laws granted right to divert waters of river for irrigation purposes does not establish that its failure to maintain fish screen was not public nuisance

Cal—People v Glenn-Colusa Irr Dist, 15 P 2d 549, 127 Cal App 30

41. Cal—Nelson v Robinson, 118 P 2d 350, 47 Cal App 2d 520—People v Glenn-Colusa Irr Dist, 15 P 2d 549, 127 Cal App 30

42. Idaho—Beasley v Engstrom, 168 P. 1145, 31 Idaho 14

43. Tex—Bennett v Brown County Water Imp Dist No 1, 272 SW 2d 498

44. Idaho—Coulsen v. Aberdeen-Springfield Canal Co, 277 P 542, 47 Idaho 619

67 C J p 1428 note 57.

45. Idaho—Stephenson v Pioneer Irr Dist, 288 P 421, 49 Idaho 189, 69 A L R 1225

67 C J p 1437 note 54

Character and status of irrigation districts generally see supra § 318  
Irrigation and ditch companies as quasi-public corporations generally see supra § 347

46. Colo—Webster v North Poudre Irr Co, 223 P 36, 74 Colo 565  
67 C J p 1427 note 55

#### Waiver of damages from overflow

Covenants of irrigation company's grantee to maintain ditches and waive damages from overflow ran with land, and bound subgrantee assuming such covenants, even though deed to subgrantee was first executed

Tex—Beck v American Rio Grande Land & Irrigation Co, Civ App, 61 SW 2d 872, error refused

47. Wash—Evergreen Farm v Attalia Land Co, 157 P 487, 91 Wash 192

67 C J p 1427 note 56

48. Neb—Spurrier v Mitchell Irr Dist, 229 NW 273, 119 Neb 401, 74 A L R 884, appeal dismissed and certiorari denied 51 S Ct 484, 283 US 796, 75 L Ed 1420.

67 C J p 1428 note 59.



own act,<sup>49</sup> but if the negligence of the ditch owner contributes to the situation which causes the injury, the owner may be liable,<sup>50</sup> and, if the acts of several distributors concur in causing an injury, they may be jointly liable.<sup>51</sup> No recovery can be had for any seepage damage caused by water from another source and not from defendant's canal and reservoir.<sup>52</sup>

Although a rainfall may be more than ordinary, if it is such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again,<sup>53</sup> and therefore is not in law an act of God relieving an irrigation company from liability for subsequent damages to crops from impounded flood waters.<sup>54</sup> Where an extraordinary flood concurred with the negligent act of an irrigation canal or ditch owner to produce the injury complained of, it has been held that such owner is not excused from liability for such injury,<sup>55</sup> although the view has been taken that it can be held liable only for that part of the damage which resulted from its negligence.<sup>56</sup> On the other hand, where the injury complained of results from such flood without any concurrent negligence of a canal owner, it is not liable for the injury.<sup>57</sup>

#### d. Persons Liable

An irrigation district is liable for the negligent acts of its own officers and agents in the construction, operation, and maintenance of the system, although, in the absence of special circumstances whereby the act of one other than the owner of the irrigation works becomes its act, the owner is not liable for the injurious consequences of such act.

An irrigation district is ordinarily liable for the negligent acts of its own officers and agents in the construction, operation, and maintenance of

the system.<sup>58</sup> Otherwise, in the absence of special circumstances whereby the act of one other than the owner of the irrigation works becomes its act, the owner is not liable for the injurious consequences of such act.<sup>59</sup> Under particular circumstances, however, the owner of the irrigation system may be liable for the acts of persons other than its own officers.<sup>60</sup> An irrigation district is not liable for injuries resulting from a landowner's application of irrigation water to his own land.<sup>61</sup> Where he does not act maliciously and does not act on his own account, an officer of an irrigation district is not personally liable for damages resulting from the negligent maintenance and operation of the irrigation system.<sup>62</sup>

*Joint and several liability.* Liability may be joint or several, even though defendants may have acted independently in flooding plaintiff's land.<sup>63</sup> Where all the overflow and flooding of plaintiff's land comes directly through the overflow from the ditch of one irrigation company, but part of the water is furnished by another company for a few days out of the total number of days during which the overflow continues, the cause of action against both companies is joint and several, and liability may be imposed for the entire sum on the company through whose ditch the overflow came.<sup>64</sup> An irrigation company is not liable as a joint tortfeasor with a lower lateral user whose action in permitting weeds to obstruct the lateral caused flooding of plaintiff's land, where the company owns and controls only the main canal, and plaintiff and others whose lands receive water from the lateral ditch own and control the lateral.<sup>65</sup> Where there is a common plan among ditch companies

49. Tex.—Wichita County Water Improvement Dist No 1 v Pearce, Civ App, 59 SW 2d 183  
67 C J p 1428 note 60

50. Cal.—Masseti v Madera Canal & Irrigation Co, 68 P 2d 280, 20 Cal App 2d 708  
67 C J p 1428 note 61

51. Colo.—Larimer & Weld Irr Co v Walker, 176 P 282, 65 Colo 320.  
67 C J p 1428 note 62

52. Neb.—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb. 497

53. Neb.—Webb v Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61

54. Neb.—Faught v Dawson County Irr. Co, 19 NW 2d 358, 146 Neb 274

55. US.—The Salton Sea Cases, Cal, 172 F. 792, 97 CCA. 214,

certiorari denied 30 S Ct 405, 215 US 603, 54 L Ed 345  
67 C J p 1428 note 63

56. Neb.—Gable v Pathfinder Irr Dist, 68 NW 2d 500, 159 Neb 778

57. Utah.—Dall v. State, 134 P 632, 42 Utah 498  
67 C J p 1428 note 64

#### Act of God

A flood must have been so extraordinary and unprecedented a manifestation of nature as could not have been reasonably anticipated or foreseen to come within term "act of God"

Neb.—Webb v. Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61

58. Ariz.—Taylor v Roosevelt Irr Dist, 232 P 2d 107, 72 Ariz. 160  
67 C J. p 1428 note 65

59. Neb.—Lavanis v Northport Irr Dist, 238 NW 757, 121 Neb 777  
67 C J p 1429 note 66

60. Mont.—Billings Realty Co v Big Ditch Co, 115 P. 828, 43 Mont 251  
67 C J p 1429 note 67

61. Neb.—Omaha Life Ins Co v Gering & Ft Laramie Irr Dist, 244 NW 296, 123 Neb 761  
67 C J p 1429 note 68

62. Idaho.—Verheyen v. Dewey, 146 P 1116, 27 Idaho 1  
67 C J p 1429 note 69

63. Cal.—Miller v Highland Ditch Co, 25 P 550, 87 Cal. 430, 22 Am SR 254  
62 C J p 1135 note 80.

64. Neb.—Hagadone v. Dawson County Irr Co, 285 NW 600, 136 Neb 258

65. Ariz.—Salt River Valley Water Users' Ass'n v. Delaney, 39 P 2d 625, 44 Ariz 544.

for the disposal of excess and waste water by the use of a common waste basin, although separate waste ditches are used, there is a common duty not to dump an amount of water into a basin which will cause an overflow into adjacent lands, so that a failure of such duty subjects the companies to liability as joint tort-feasors <sup>66</sup>

*Directors of an irrigation district* are not liable for damages suffered by landowners by seepage and raising of a river level, where the evidence does not show that the damages were due to the directors' misfeasance or negligence, as they are not liable for nonfeasance <sup>67</sup>

### § 366. — Liability for Failure to Supply Water

- a. In general
- b. Exemption, limitation, and extent of liability
- c. Excuses for failure to supply
- d. Persons liable and to whom liable

#### a. In General

A distributor who is under a legal duty to furnish to a customer a given quantity or supply of water for irrigation may be answerable in damages for the loss or injury caused by its failure to do so

A distributor who is under a legal duty to furnish to a customer a given quantity or supply of water for irrigation may be answerable in damages for the loss or injury caused by its failure to do so,<sup>68</sup> and it is no defense that the customer had not joined in, or contributed to, the expense of litigation resorted to by the irrigation company against an irrigation district to maintain the irrigation company's appropriation rights.<sup>69</sup> Under statutes authorizing irrigation companies to distribute water, however, it has been held that, if they exercise ordinary care in operating the system, they are not liable for a mere failure to deliver water to the consumer without more.<sup>70</sup> In the exercise of ordinary care a distributor is not required to anticipate a break in the canal,<sup>71</sup> and in

the absence of any defects showing up in the canal over a long period of time, a charge of negligence for operation of the system cannot be based solely on defective construction, with respect to liability for failure to deliver water called for by water rights.<sup>72</sup>

*Anticipatory breach.* A conveyance by an irrigation company of water rights without protecting the interest of plaintiff under contract to furnish plaintiff with water for irrigation purposes constitutes an anticipatory breach, so as to authorize a suit for damages, where the conveyance renders the furnishing of water practically impossible.<sup>73</sup>

*Subsequent interference with supply.* Where a contempt proceeding based on an injunction previously obtained against interference with water rights is available, it does not preclude an action for damages based on a new injury caused by a subsequent interference.<sup>74</sup>

*Contributory negligence.* Although the rule is otherwise where the consumer's negligence does not contribute as a proximate cause to his loss,<sup>75</sup> the distributor may be excused from liability where the consumer's own negligence or mismanagement contributed to the injury to such an extent that the furnishing of water as agreed would not have saved him from loss.<sup>76</sup>

*Proximate cause.* A member of an irrigation district is not entitled to a recovery for damages for loss of crops, where the proximate cause of damage is his failure to construct a lateral from the canal for the reception of water, and not a failure of the district to perform any duty owing to him.<sup>77</sup>

#### b. Exemption, Limitation, and Extent of Liability

A distributor cannot completely exempt himself by contract from all liability for damages for a breach of his contract to furnish water, nor may a distributor furnishing water to the public limit its liability in that manner, but a distributor which is not undertaking the discharge of a public duty may so limit its liability.

<sup>66</sup> Idaho—*Macomb v Extension Ditch Co.*, 214 P 2d 464, 70 Idaho 202

<sup>67</sup> Or—*Patterson v Horsefly Irr Dist.*, 69 P 2d 282, 157 Or 1, rehearing denied 70 P 2d 36, 157 Or 1

<sup>68</sup> U.S.—*Farris v Blaine County Inv Co.*, D C Idaho, 3 F Supp 381, 67 C J p 1429 note 71

Liability for rates and other charges incident to supply and use of water see supra § 363

<sup>69</sup> Neb.—*Preston v. Farmers Irr Dist.*, 293 N.W. 343, 133 Neb 504

<sup>70</sup> U.S.—*Ure v U S*, D C Or, 93 F Supp 779, affirmed, C A, White v U S, 193 F 2d 505, and reversed on other grounds, U S v Ure, 225 F 2d 709

67 C J. p 1429 note 72

<sup>71</sup> U.S.—*Ure v U S*, D C Or, 93 F Supp 779, affirmed, C A, White v U S, 193 F 2d 505, and reversed on other grounds U S v Ure, 225 F 2d 709

<sup>72</sup> U.S.—*Ure v U S*, D C Or, 93 F Supp 779, affirmed, C A, White v U S, 193 F 2d 505, and reversed

on other grounds U S. v. Ure, 225 F 2d 709

<sup>73</sup> Cal—*Crane v East Side Canal & Irrigation Co.*, 44 P 2d 455, 6 Cal App 2d 361

<sup>74</sup> Cal—*Yates v Kuhl*, 279 P 2d 563, 130 Cal App 2d 536

<sup>75</sup> Nev—*O'Connor v North Truckee Ditch Co.*, 30 P 882, 17 Nev 245

<sup>76</sup> La—*Ford v Calcasieu River Irr Co.*, 35 So 256, 110 La 982—*Carr v Miller-Morris Canal, etc.*, Co, 29 So 715, 105 La 239

<sup>77</sup> Mont—*Blaser v Clinton Irr Dist.*, 53 P 2d 1141, 100 Mont 459

Although it has been held that a distributor of water for irrigation is exempt from liability for failure to supply water, on the ground that the distributor is a governmental agency,<sup>78</sup> exemption of the distributor on this ground has been denied.<sup>79</sup> A distributor cannot completely exempt himself by contract from all liability for damages for a breach of his contract to furnish water,<sup>80</sup> nor may a distributor furnishing water to the public limit its liability in that manner,<sup>81</sup> but a distributor which is not undertaking the discharge of a public duty may so limit its liability.<sup>82</sup> A contract provision that the distributor shall not be liable for failure to furnish water during a reasonable period of repair and construction of the irrigation system may operate to exempt the distributor from liability during that period.<sup>83</sup> For a statute exempting a distributor to be applicable the conditions contemplated by the statute must actually exist.<sup>84</sup> At all events a distributor cannot release itself of liability to furnish water by simply notifying the consumer that no more water will be supplied.<sup>85</sup>

Where an irrigation company leases land to a consumer and agrees to furnish water for the irrigation thereof, the liability of the company for a failure to furnish water as agreed is measured by the terms of the contract.<sup>86</sup> A distributor's liability for failure to supply water by failing to extend its system to the consumer's land may be measured by the care exercised by the distributor so to extend its system.<sup>87</sup> Under particular circumstances a contract limiting the liability of a distributor for failure to furnish water may not be available to another distributor who assumes the obligation of supplying the water.<sup>88</sup> Where

there is a provision in the rules of an irrigation district that a purchaser of water acquires no proprietary right therein and no right to use water for a purpose other than that for which the purchaser applies for water, it limits the risk assumed by an irrigation district to those flowing from a failure to supply water for the purpose stated in the application for water.<sup>89</sup>

### c. Excuses for Failure to Supply

Where the failure to deliver an adequate supply of water is due primarily to the act of the distributor, it may be held liable in damages for injuries resulting from such failure, however, it may be excused from responsibility where the failure to supply water is due to an inevitable accident or to causes beyond its control, and which could not have been foreseen and prevented by the exercise of due and proper care.

Where a consumer is under a duty to construct his own ditch before he is entitled to a supply of water, the distributor is not liable for damages resulting from a failure to supply water prior to the time the consumer constructs such ditch,<sup>90</sup> and the distributor may not be liable for damages for failing to complete the construction of its system so as to supply a consumer, where, by the terms of a contract existing between the parties, on the distributor's failure in this respect it was merely to refund the money and interest which had been paid by the proposed consumer,<sup>91</sup> but a distributor cannot avoid liability for a failure to furnish water on the theory that a consumer might have avoided the injury by performing an obligation of the contract which the contract places on the distributor.<sup>92</sup> Similarly, where the consumer is not obligated to pay for water until some time subsequent to its delivery, on failure to furnish water

78. Cal.—Nissen v Cordua, Irr Dist, 269 P 171, 204 Cal 542 67 C J p 1430 note 74

Limitation of liability by  
Carriers generally see Carriers §§ 88-118, 625-639, 874-878  
Carriers by water see Shipping §§ 131-138

Measure of damages for failure to supply see *infra* § 367

79. Tex.—Hidalgo County Water Control & Improvement Dist No 1 v Gannaway, Civ App, 13 SW 2d 204—Cameron County Water Improvement Dist No 1 v Hall, Civ App, 280 SW 838

80. Tex.—United Irr Co v Bryan, Com App, 280 SW 196, 197 67 C J p 1430 note 76

81. Tex.—Bryan v United Irr, Co, Civ App, 267 SW 298, affirmed, Com App, 280 SW 196 67 C J p 1430 note 77

82. Tex.—Granger v Kishi, Civ App, 139 SW 1002.

83. Tex.—Bennett v Rio Grande Canal Co, Civ App, 182 SW 713

84. Tex.—American Rio Grande Land & Irrigation Co v Mercedes Plantation Co, Civ App, 155 SW 285, modified on other grounds, Com App, 208 SW 904. 67 C J p 1430 note 80

85. Tex.—Old River Rice Irr Co v Stubbs, Civ App, 168 SW 28 67 C J p 1430 note 81

86. Tex.—Moore-Cortes Canal Co v Gyle, 82 SW 350, 36 Tex Civ App 442 67 C J p 1430 note 82

87. Tex.—Hidalgo County Water Control & Improvement Dist No 1 v Quick, Civ App, 13 SW 2d 209 67 C J p 1431 note 83

88. Tex.—Lakeside Irr Co v Bufington, Civ App, 168 SW 21 67 C J p 1431 note 84

89. Cal.—Gelhaus v Nevada Irr Dist, 278 P 2d 689, 43 Cal 2d 779

### Liability limited to specific use

Where written application requested water for purpose of irrigating land, irrigation district was under no duty to supply water for other than irrigation purposes and could not be held liable for damages resulting from failure to supply water necessary for operation of a fish hatchery, although district knew that applicant and others used water supplied by district primarily for such purpose  
Cal.—Gelhaus v. Nevada Irr. Dist, *supra*

90. Idaho—Collins v Twin Falls North Side Land & Water Co, 152 P 200, 28 Idaho 1

91. Wyo.—Hanover Canal Co v Wilson, 143 P 345, 22 Wyo 427.

92. Tex.—Cameron County Water Improvement Dist No 1 v Gregory, Civ App, 291 SW. 938 67 C J. p 1431 note 89.

the distributor cannot avoid liability on the ground that the water has not been paid for,<sup>93</sup> and an irrigation company which is bound by contract to furnish a sufficient supply of water cannot, on failing to furnish such supply, avail itself of the failure of injured consumers to appoint a water master as required by a statute requiring such appointment where two or more parties take water from an irrigation canal or ditch at the same point to be conveyed through the same lateral.<sup>94</sup> Although a refusal of a consumer to pay charges for water already delivered may justify a refusal to furnish more water,<sup>95</sup> the landowners' rights are not affected, where it is not shown that water was denied them on that account.<sup>96</sup>

Notwithstanding the occurrence of somewhat abnormal conditions, which affect the natural source of supply, where the failure to deliver an adequate supply of water is due primarily to the act of the distributor, it may be held liable in damages for injuries resulting from such failure.<sup>97</sup> The distributor, however, may be excused from responsibility where the failure to supply water was due to inevitable accident or to causes beyond its control and which could not have been foreseen and prevented by the exercise of due and proper care.<sup>98</sup> Thus, under a statute providing that in the event of a shortage of water from drought, accident, or other cause, the water to be distributed shall be divided among all consumers pro rata, a distributor does not become an insurer of consumers' right

to their pro rata share of water, but is only required to use due diligence to see that they receive such share of all available water,<sup>99</sup> and a failure by an irrigation company to furnish a consumer sufficient water to raise a full crop will not subject the company to damages when, due to a drought, to furnish the particular consumer with such a quantity of water would deprive other consumers of their right to a pro rata distribution.<sup>1</sup> There is authority, however, to the effect that, where an irrigation company enters into an unequalled contract to deliver a specified quantity of water to a consumer, the supervention of unusual conditions making it impossible to deliver the quantity contracted for does not excuse the company from liability,<sup>2</sup> and, even under a contract absolving the distributor from liability for failure to supply water when due to something over which the distributor has no control, it is not released from liability where it might have but failed to exercise indirect control.<sup>3</sup>

A mistaken belief on the part of the distributor as to the terms of a contract existing between the distributor and the consumer does not excuse a failure to deliver water.<sup>4</sup> A sale of more land than it has capacity to supply is no justification for a failure to supply water to a consumer having a contractual right thereto,<sup>5</sup> although a sale of other land capable of irrigation by the distributor is proper, even though at times it might produce a reduction of actual available water which

93. Wyo—Wyoming Cent Irr Co v Laporte, 182 P 485, 26 Wyo 249

67 C J p 1431 note 90

94. Idaho—Preis v Idaho Irr Co, 215 P 466, 37 Idaho 109

67 C J p 1431 note 91

95. U S—Bright v Virginia & Gold Hill Water Co, C C A Nev., 270 F 410

96. Tex—City of Wichita Falls v Bruner, Civ App, 191 SW 2d 912

97. Tex—American Rio Grande Land & Irrigation Co v. Mercedes Plantation Co, Civ App, 155 SW 285, modified on other grounds, Com App, 208 SW 904.

67 C J p 1431 note 93

98. U S—Ure v U S, D C Or, 93 F Supp 779, affirmed, C A, White v U S, 193 F 2d 505, and reversed on other grounds, U S v Ure, 225 F 2d 709

Neb—Preston v Farmers Irr Dist, 293 NW 343, 138 Neb 504.

67 C J p 1432 note 94

Impossibility of performance as excuse for nonperformance of contracts generally see Contracts §§ 459-477.

**Supervening impossibility**, excuses nonperformance of an irrigation company's obligation to furnish water, such as a natural failure of water supply, where the irrigation company is not in contributing fault, unless there is other controlling language in the contract

Neb—Preston v Farmers Irr Dist, supra

**Provision in contract** that irrigation company shall not be liable for failure to furnish water as result of named causes or any other cause than company's negligence does not relieve it from liability for willful failure to furnish water, but only for failure to do so for causes stated in contract, or other similar causes, under doctrine of ejusdem generis

Tex—Combs v United Irr Co, Civ App, 110 SW 2d 1157, error dismissed

99. Tex—Calhoun County Canal Co v Richman, Civ App, 264 SW 2d 738, refused no reversible error

Prorating of supply see supra § 359

**Under contractual provisions** that company was to supply water for irrigation and should not be liable

for damages resulting from shortage of water or from drouth, that water should be divided pro rata and that company should not be liable for injury to crops if it exercised reasonable diligence in furnishing water, company would not be liable unless it willfully or negligently failed to furnish customers their pro rata share of available water

Tex—Calhoun County Canal Co v Richman, supra

1. Tex—Raywood Rice Canal & Milling Co v Erp, 146 SW 155,

105 Tex 161

67 C J p 1432 note 96

2. Idaho—Tapper v Idaho Irr Co, 210 P 591, 36 Idaho 78

67 C J p 1432 note 97

3. Tex—Woodard v Emerson Bros

& Rogers, Civ App, 237 SW 653

67 C J p 1432 note 98

4. Tex—Cameron County Water Improvement Dist No 1 v Gregory, Civ App, 291 SW. 938

67 C J p 1432 note 99

5. Tex—Edinburg Irr Co v Paschen, Civ App, 223 SW 329, affirmed, Com App, 235 SW. 1088

67 C J p 1432 note 1.

owners having contractual rights are entitled to<sup>6</sup> The fact that a consumer's ditch for the taking of water from the ditch of the distributor may have been in part on its right of way constitutes no justification for a failure to supply water if the ditch was there with the distributor's consent and if its failure to furnish water is not based on that ground<sup>7</sup>

*Discretion of distributor* Notwithstanding that the manner of supplying water is left to the discretion of the distributor, it may be liable in damages for a failure to supply the required amount of water<sup>8</sup>

*Demand* Although a consumer's failure to make a required demand for water may limit the liability of the distributor,<sup>9</sup> failure to make a demand for water within a specified time as required by a rule of an irrigation company may not relieve it from liability for failure to deliver water where it appears that the company would not be able to deliver the water even though a seasonable demand were made<sup>10</sup>

#### d. Persons Liable and to Whom Liable

A distributor which is, consistently with an obligation to supply all of its consumers equitably, under a legal duty to supply water for irrigation on proper application therefor may not be liable for a failure to furnish water in exact compliance with promises made by its officers and employees Generally, the company under a duty to supply the water is liable for failure to do so

A distributor which is, consistently with an obligation to supply all of its consumers equitably, under a legal duty to supply water for irrigation on proper application therefor may not be liable for a failure to furnish water in exact compliance with promises made by its officers and employees<sup>11</sup> Where a company which constructs an irrigation system is also authorized to operate the system

prior to its being turned over to an operating company, it is the construction company rather than the operating company which is liable for injuries resulting from a failure to supply water prior to the time the system is transferred<sup>12</sup> On the other hand, one who acquires title to an irrigation system rather than the original owner is liable for injuries resulting from a failure to supply a sufficient quantity of water under a contract made between the consumer and the original owner, when such failure occurs subsequent to the transfer<sup>13</sup>

A ditch company is not, however, liable for injuries resulting from a failure to supply water directly to a landowner when the company is under no duty to supply water to him in that manner<sup>14</sup> Thus, where a carrying company is organized to distribute to various landowners water supplied by a ditch and reservoir company, the latter company is not liable for injuries resulting from a failure of the carrying company to supply such water<sup>15</sup> One contracting to furnish water to make a crop is not, however, liable for damages resulting from a destructive quality of the water when such quality is not attributable to the person who furnishes the water<sup>16</sup> A vendor of land may not be liable to purchasers for the failure of a distributor to furnish water<sup>17</sup>

*To whom liable* Under a statute requiring distributors to furnish water to a specified class of persons, the distributor is liable to a member of that class who is injured by a failure so to supply him<sup>18</sup> A contract to furnish water to irrigate certain land, between a distributor of water and the landowner, may by appropriate provisions in a contract for the leasing of such land be made to inure to the benefit of the lessee who may sue on the contract for failure to furnish a sufficient amount of water<sup>19</sup> Where a distributor recognizes the rights

6. Wyo—Anderson v Wyoming Development Co, 154 P2d 318, 60 Wyo 417

#### Perpetual right

Under contracts whereby purchasers of land acquired perpetual right in water impounded in reservoir, purchasers did not become owners of the reservoir

Wyo—Anderson v Wyoming Development Co, supra

7. Cal—Lowe v Yolo County Consol Water Co, 108 P 297, 157 Cal 503

8. Tex—Beaumont Irrigating Co v Gregory, Civ App, 136 SW 345 67 CJ p 1432 note 3

9. Tex—Gravity Canal Co v Sisk, 95 SW 724, 43 Tex Civ App 104 67 CJ p 1433 note 4.

10. Cal—Allen v Los Molinos Land Co, 143 P 253, 25 Cal App 206 67 CJ p 1433 note 5

11. Tex—Hidalgo County Water Control & Improvement Dist No 1 v Gannaway, Civ App, 13 SW 2d 204 67 CJ p 1433 note 6

12. Idaho—Hanes v Idaho Irr Co, 122 P 859, 21 Idaho 512 67 CJ p 1433 note 7

13. Ariz—Smith v Latourrette-Fiscal Co, 293 P 973, 37 Ariz 265 67 CJ p 1433 note 8

14. Colo—Hood v Burlington Ditch Reservoir & Land Co, 171 P 371, 64 Colo 318

15. Colo—Hood v Burlington Ditch Reservoir & Land Co, supra. 67 CJ p 1433 note 10.

Sufficiency of evidence to show agency between carrying company and reservoir company see infra § 367

16. La—Louisiana State Rice Milling Co v Baker 5 La App 751 67 CJ p 1433 note 11

17. Tex—Harper v Lott Town & Improvement Co, Com App, 228 SW 188 67 CJ p 1433 note 12

18. Tex—Lastinger v Toyah Valley Irr Co, Civ App, 167 SW 788 67 CJ p 1433 note 13

19. Tex—Louisiana, Rio Grande Canal Co v Elliott, Civ App, 193. SW 255 67 CJ p 1433 note 14.

of a purchaser of land to a supply of water, the distributor is liable to the lessee of the purchaser for a failure to supply water<sup>20</sup> A mutual irrigation company is liable to a stockholder injured by the company's neglect or failure properly to maintain the distribution system<sup>21</sup>

## § 367. — Remedies

- a. In general
- b. Who may sue or be sued; parties
- c Pleading
- d Evidence
- e Trial
- f Judgment
- g Damages

### a. In General

Where an injury results from the construction, operation, or maintenance of an irrigation system, the owner of such system may, in a proper case, be enjoined from permitting the situation causing the injury to continue, and similarly, the consumer of water for irrigation purposes may be enjoined from injuring adjoining land

Where injury results from the construction, operation, or maintenance of an irrigation system, the owner of such system may, in a proper case, be enjoined from permitting the situation causing the injury to continue,<sup>22</sup> and the owner of the system may be enjoined from deliberately destroying the equipment of a consumer<sup>23</sup> Similarly, the consumer of water for irrigation purposes may be enjoined from injuring adjoining land<sup>24</sup> An injunction against the owner of an irrigation system may be refused, however, where the owner of the works has done and is doing all that is legally required of it to prevent the injury complained of<sup>25</sup> An owner of land claiming a right to a ditch carrying

irrigation waste water from his land may, in a proper case, be entitled to an injunction to prevent another landowner from discharging his waste water into the same ditch.<sup>26</sup>

*Failure to supply water.* On failure or refusal to supply water for irrigation, the consumer should pursue the remedy which is most appropriate to the relief sought<sup>27</sup> Not only may a consumer be entitled to recover damages for a failure to furnish water, as discussed supra § 366, but the distributor may be constrained to supply it by a writ of mandamus, as shown in Mandamus § 231 g In a proper case an injunction may issue to compel a distributor to supply water for irrigation to a consumer,<sup>28</sup> to prevent the obstruction or diversion of water which is being supplied to the consumer,<sup>29</sup> or to restrain the supply of such water to other consumers<sup>30</sup> Injunctive relief is not available to a consumer who does not show that it is necessary to prevent injury,<sup>31</sup> and a consumer may not be entitled to compel the delivery of a greater quantity of water than is necessary for his actual needs.<sup>32</sup>

*Interference with waste waters* An irrigating landowner having title to certain waste waters may be entitled to an injunction to prevent unauthorized persons from interfering with a proper disposition of such waters<sup>33</sup>

*Conditions precedent.* In the absence of a statutory requirement, presentation of a claim need not be made prior to commencement of an action against an irrigation district,<sup>34</sup> however, where the provisions of a statute require the filing of a verified claim against the irrigation district for damages resulting from a defective condition of property thereof, within a certain period after the accident or injury has occurred prior to com-

20. Wash—Berg v Yakima Valley Canal Co, 145 P 619, 83 Wash 451, L R A 1915D 292

67 C J p 1434 note 15

21. Utah—Burtenshaw v Bountiful Irr Co, 61 P 2d 312, 90 Utah 196

22. Neb—Hagadone v Dawson County Irr Co, 285 NW 600, 136 Neb 258

67 C J p 1434 note 18

Liability for injuries from construction, operation, and maintenance of works generally see supra § 365

23. Ariz—Hargrave v Hall, 73 P 400, 3 Ariz 252

24. Cal—Nelson v. Robinson, 118 P 2d 350, 47 Cal App 2d 520.

Or—Kaylor v. Recla, 84 P 2d 495, 160 Or 254.

67 C J p 1434 note 20.

25. Cal.—Sutro Heights Land Co v

Merced Irr Dist, 296 P 1088, 211 Cal 670

67 C J p 1434 note 21

26. Or—Boulevard Drainage System v Gordon, 178 P. 796, 177 P 956, 91 Or 240

27. Tex—Cameron County Water Improvement Dist No 1 v Parkhurst, Civ App, 46 SW 2d 472

67 C J p 1434 note 24

28. U S—Trautwein v Moreno Mut Irr Co, C C A Cal, 22 F 2d 374

67 C J p 1435 note 31

29. Ariz—Salt River Valley Canal Co v Nelssen, 85 P 117, 10 Ariz 9, 12 L R A N S 711, 16 Ann Cas 796

67 C J p 1435 note 32

30. Cal—McDermont v. Anaheim Union Water Co, 56 P 779, 124 Cal 112

67 C J p 1435 note 33.

31. Cal—State Bank v Fresno Canal Co, 53 Cal 201

32. Cal—Hildreth v Montecito Creek Water Co, 72 P 395, 139 Cal 22

33. Nev—Bidleman v Short, 150 P 834, 38 Nev 467

67 C J p 1435 note 36

34. Mont—Newman v Bitter Root Irr Dist, 28 P 2d 195, 95 Mont 521

**Notice requirement held inapplicable**  
The statutory requirement for written notice to irrigation district of claim for damages for negligence in delivering, or failure to deliver, water to an irrigator entitled thereto, does not apply to damages caused by district's intentional invasion of irrigator's vested contract right to specific quantity of natural flow of water in river

Neb—Ledingham v Farmers Irr Dist, 281 NW 20, 135 Neb 276.

mencement of the action, compliance thereof is mandatory,<sup>35</sup> and may not be waived <sup>36</sup>

*Limitations* General rules govern questions as to the limitation of actions for injuries resulting from the construction, operation, or maintenance of an irrigation system,<sup>37</sup> as well as in actions for failure to deliver water,<sup>38</sup> and in actions to compel the delivery of water <sup>39</sup>

#### b. Who May Sue or Be Sued; Parties

Stockholders in a mutual irrigation company and persons holding under them may, in a proper case, sue for damages for the company's failure to supply water, and a grantee in a deed of land may sue a distributor so as to enforce the grantee's right to have the conveyed land irrigated

Stockholders in a mutual irrigation company and persons holding under such stockholders may, in a proper case, sue for damages for the company's failure to supply water <sup>40</sup> Moreover, the grantee in a deed of land may, in a proper case, sue a distributor so as to enforce the grantee's right to have the conveyed land irrigated <sup>41</sup> An irrigation district may be sued for its failure to furnish water <sup>42</sup>

*Parties* In a suit for an injunction against one of several owners of an irrigation system, to prevent the flooding of complainant's land, where defendant has sole control of the instrumentality causing the damage, the other owners are not necessary parties defendant <sup>43</sup> An action against a distributor for a failure to supply water may be maintained by the owner of the irrigated land, without joining a tenant to whom he has contracted to furnish water,<sup>44</sup> or by one holding a mortgage on the crops to be grown on the land <sup>45</sup> On the other hand, a landlord and a tenant may join as plaintiffs in an action for damages for a

failure to supply water <sup>46</sup> Under a statutory provision permitting tenants in common to sue together, there is not a misjoinder of parties plaintiff where tenants in common of land are joined as complainants in a suit to enjoin interference with their supply of water for irrigation,<sup>47</sup> but, under a statute providing that any person may be made a party who has or claims an interest adverse to plaintiff or is necessary to a complete determination of the question involved, landowners claiming a right to the prorating of water in times of scarcity are necessary parties to a suit by a landowner to restrain a diversion of waters to such persons <sup>48</sup> Landowners who obtained a judgment in a prior action against an irrigation district entitling them to have delivered waters of a certain lake for irrigation purposes are necessary parties to a suit to enjoin the district from using flumes, canals, and laterals under or on plaintiff's property for irrigation or other purposes, when grant of such injunctive relief would diminish or eliminate the irrigation water of the landowners <sup>49</sup>

#### c. Pleading

In an action for damages resulting from the negligent construction, operation, or maintenance of an irrigation system, the complaint must show that the plaintiff has suffered an actionable injury for which the owner of the system is responsible, and the answer must allege all facts necessary to establish the defense General rules govern questions of pleading in actions involving the supply of water, and questions of issue, proof, and variance.

In an action for damages resulting from the negligent construction, operation, or maintenance of an irrigation system, the complaint must show that plaintiff has suffered an actionable injury for which the owner of the system is responsible,<sup>50</sup>

35 Cal—Bradshaw v Glenn-Colusa Irr Dist, 198 P 2d 106, 87 Cal App 2d 882

*Filing of unverified claim* as in letter to district superintendent, is not substantial compliance with statutory requirement that verified claim for damages be filed to lay foundation for action therefor  
Cal—Bradshaw v Glenn-Colusa Irr. Dist, supra.

36 Cal—Bradshaw v. Glenn-Colusa Irr Dist, supra.

37 U.S.—Hooker v Farmers' Irr Dist, CCA Neb, 272 F 600  
67 C J p 1436 note 49

38. Neb—Cover v Platte Val Public Power & Irr Dist, 57 NW 2d 275, 156 Neb 644  
Action not barred by limitation  
Cal—Richter v Union Land Co, 62 P 39, 129 Cal 367

#### Action barred by limitation

Neb—Cover v Platte Val Public Power & Irr Dist, 57 NW 2d 275, 156 Neb 644

39. Action not barred by laches  
Colo—Consolidated Juchem Ditch & Reservoir Co v Old, 163 P 78, 62 Colo 470

40. Mont—Hyink v Low Line Irr. Co, 205 P 236, 62 Mont 401

41. Colo—Consolidated Juchem Ditch & Reservoir Co v. Old, 163 P 78, 62 Colo 470  
67 C J p 1435 note 38.

42. Wash—Peters v Union Gap Irr Dist, 167 P. 1085, 1086, 98 Wash 412  
67 C J p 1435 note 39

43. U.S.—The Salton Sea Cases, Cal, 172 F 792, 97 CCA 214, certiorari denied 30 S Ct 405, 215 U S 603, 54 L Ed 345  
67 C J p 1436 note 42

44. Tex—Barstow Irr Co v Cleg-hon, Civ App, 93 SW 1023

45. Colo—Equitable Securities Co v Montrose, etc, Canal Co, 79 P 747, 20 Colo App 465

46. Neb—Chalupa v. Tri-State Land Co, 138 NW 603, 92 Neb 477  
67 C J p 1436 note 45

47. Cal—Smith v Stearns Rancho Co, 61 P 662, 129 Cal 58

48. Colo—Brown v Farmers' High Line Canal, etc, Co, 56 P 183, 26 Colo 66

49. Tex—Meyer v Wichita County Water Imp Dist Nos 1 and 2, Civ App, 265 SW 2d 660, refused no reversible error

50. Utah—Brian v. Fremont Irr Co, 186 P 2d 588, 112 Utah 220  
67 C J p 1436 note 52

#### Complaint held sufficient

(1) To state cause of action for damages

and whether there is a sufficient charge of negligence must be determined from the facts alleged rather than from the conclusions of the pleader.<sup>51</sup> Moreover, in an action for injury to land, it must be adequately described.<sup>52</sup> The answer must allege all facts necessary to establish the defense.<sup>53</sup>

General rules govern questions of pleading in actions involving the supply of water for irrigation.<sup>54</sup>

*Issues, proof, and variance.* In actions for injuries incident to the supply and use of water for irrigation, general rules are applicable to questions of issues,<sup>55</sup> proof,<sup>56</sup> and variance.<sup>57</sup>

#### d. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility
- (3) Weight and sufficiency

##### (1) Presumptions and Burden of Proof

In actions involving injuries resulting from the construction, operation, and maintenance of an irrigation system, the plaintiff has the burden of showing that the injury complained of was attributable to the defendant's negligence, it being ordinarily presumed that the irrigation system has been properly constructed.

In actions involving injuries resulting from the construction, operation, and maintenance of an irrigation system, plaintiff has the burden of show-

Ariz—Taylor v Roosevelt Irr Dist, 232 P2d 107, 72 Ariz 160—Salt River Valley Water Users' Ass'n v Stewart, 34 P2d 400, 44 Ariz 119

Mont—Newman v Bitter Root Irr Dist, 28 P2d 195, 95 Mont 521  
Neb—Snyder v Platte Valley Public Power and Irrigation Dist, 13 N W2d 160, 144 Neb 308, 160 ALR 1154

Or—Patterson v Horsefly Irr Dist, 69 P2d 282, 157 Or 1, rehearing denied 70 P2d 36, 157 Or 1

Utah—Burtenshaw v Bountiful Irr Co, 61 P2d 312, 90 Utah 198  
67 CJ p 1436 note 52 [a]

(2) To allege negligence

US—Desert Beach Corp v U S, DCCal, 128 FSupp 581

(3) To allege special damages

Ariz—Salt River Valley Water Users' Ass'n v Arthur, 74 P2d 582, 51 Ariz 101

(4) To state cause of action for injunction

Or—Kaylor v Recla, 84 P2d 495, 160 Or 254

##### Complaint held insufficient

(1) In general

Cal—Curci v Palo Verde Irr Dist, 159 P2d 674, 69 Cal App2d 583  
—Osborne v Imperial Irr Dist, 47 P2d 798, 8 Cal App2d 622

Nev—Orr Ditch & Water Co v Silver State Lodge, 78 P2d 95, 58 Nev 292

Utah—Brian v Fremont Irr Co, 186 P2d 588, 112 Utah 220  
67 CJ p 1436 note 52 [b]

##### Complaint held subject to a motion to make more specific

Colo—Ft Lyon Canal Co v Bennett, 156 P 604, 61 Colo 111

51. Mont—Bray v Cove Irr Dist, 284 P. 539, 86 Mont. 562

52. Mont—Billings Realty Co v Big Ditch Co, 115 P 828, 43 Mont 251  
67 CJ p 1437 note 54

53. Or—Patterson v. Horsefly Irr Dist, 69 P2d 282, 157 Or. 1, re-

hearing denied 70 P2d 36, 157 Or 1

54. Utah—Cortella v Salt Lake City 72 P2d 630, 93 Utah 236  
67 CJ p 1437 note 56

##### Complaint held sufficient

(1) In general

Utah—Cortella v Salt Lake City, supra.

67 CJ p 1437 note 56 [a]

(2) As against general demurrer  
Utah—Cortella v Salt Lake City, supra.

(3) To show breach of contract  
Utah—Cortella v Salt Lake City, supra.

(4) To raise inference that water rights, to which tract of land was entitled for irrigation, were appurtenant to lands comprising tract  
Utah—Cortella v Salt Lake City, supra.

##### Complaint held insufficient

(1) To show defendant acted in proprietary capacity in supplying water

Cal—Jackson & Perkins Co v Byron-Bethany Irr Dist, 29 P2d 217, 136 Cal App 375, rehearing denied 30 P2d 516, 136 Cal App 375

(2) To show present ownership  
Utah—Cortella v Salt Lake City, 72 P2d 630, 93 Utah 236

(3) Other illustrations see 67 CJ p 1437 note 56 [b]

##### Plea or answer held insufficient

Colo—Twin Lakes Reservoir & Canal Co v Sill, 89 P2d 1012, 104 Colo 215

55 Colo—Pettit v Waline, 36 P2d 163, 95 Colo 360  
67 CJ p 1437 note 58

##### Points of discharge of waste water

Where plaintiff claimed ownership of lateral ditch, and alleged that lateral was sufficient to carry his water only and that defendants wrongfully discharged waste water from their land into lateral, and sought injunction restraining defendants from discharging waste water into lateral, determination of points of discharge

of waste water from defendants' land into lateral was within issues  
Colo—Pettit v Waline, supra.

56 Neb—Scherz v Platte Valley Public Power & Irr Dist, 37 NW 2d 721, 151 Neb 415  
67 CJ p 1437 note 59

##### Negligent construction, operation, or maintenance of system

(1) In action against irrigation district for damages to lands and crops caused by seepage waters from reservoir and canal, there must be proof establishing a causal connection between waters of district and the seeped condition of plaintiffs' lands

Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb 497—Scherz v Platte Valley Public Power & Irr Dist, 37 NW 2d 721, 151 Neb 415

(2) Other cases see 67 CJ p 1437 note 59 [a]

##### For failure to supply water

(1) In action by landowner to compel ditch corporation to deliver water without charge statutes expressly limited to coowners of unincorporated ditches are inapplicable to determine proof necessary under corporation's allegation that owner was liable for pro rata share of upkeep, where ditch in question was incorporated, and landowner was not shown to be coowner

Colo—Johnston v Wanamaker Ditch Co, 38 P2d 907, 95 Colo 551

(2) Other cases see 67 CJ p 1437 note 59 [b]

57 Ariz—Salt River Valley Water Users' Ass'n v Stewart, 34 P2d 400, 44 Ariz 119  
67 CJ p 1438 note 60

##### Variance held immaterial

Ariz—Salt River Valley Water Users' Ass'n v Stewart, supra.

##### Variance not shown

Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb 497—Scherz v Platte Valley Public Power & Irr Dist, 37 NW 2d 721, 151 Neb 415.



ing that the injury complained of was attributable to defendant's negligence,<sup>58</sup> and to no fault on the part of plaintiff,<sup>59</sup> it being ordinarily presumed that the irrigation system has been properly constructed.<sup>60</sup> The doctrine of *res ipsa loquitur* has, however, been held to apply to actions involving the breaking of an irrigation ditch.<sup>61</sup> Defendant has the burden of proving matters of defense.<sup>62</sup>

*In actions involving failure to supply water, and interference with supply*, the burden of proving a cause of action is on the party bringing the action,<sup>63</sup> and the burden of proving matters of defense is on defendant.<sup>64</sup> It has been held that the doctrine of *res ipsa loquitur* does not apply in an action by a landowner for failure to deliver water, due to the nature of the duty involved.<sup>65</sup> A landowner to maintain an action for breach of agree-

ment between the distributor and others to furnish water for irrigation is required to show that he was in privity with the agreement,<sup>66</sup> and if he fails to do so, no recovery can be had.<sup>67</sup> Since a district is a public corporation and agency of the state, as is discussed *supra* § 318, in the absence of allegations to the contrary, it is presumed that an irrigation district in furnishing water acts within its ordinary governmental capacity,<sup>68</sup> and its officers as public officers are presumed to have regularly performed their duties.<sup>69</sup> There is also an assumption in the absence of other allegations that water furnished by an irrigation district, whether it contains salt or otherwise, had been determined to be suitable for irrigation and beneficial to lands using it.<sup>70</sup>

58. Ariz.—Salt River Valley Water Users' Ass'n v Blake, 90 P 2d 1004, 53 Ariz 498

Idaho—City of Payette v Jacobsen, 66 P 2d 1013, 57 Idaho 524

Nev.—Montesa v Gelmstedt, 270 P 2d 688, 70 Nev 418

67 C J p 1438 note 62

#### Causal connection

(1) Where water from irrigation district's canal and reservoirs combine with water from another source, and combined water causes damage to land, landowner, in order to recover from district, must prove either that damage would have been done by water from canal and reservoirs without water from other source, or he must establish amount of damage done by water of district.

Neb.—McKain v Platte Valley Public Power & Irrigation Dist., 37 NW 2d 923, 151 Neb 497—Faught v Platte Val Public Power & Irr Dist., 25 NW 2d 889, 147 Neb 1032—Faught v Dawson County Irr Co., 19 NW 2d 358, 146 Neb 274

(2) In an action against irrigation district for damages to land as result of seepage of water from district's reservoir and canal, it is necessary to establish a causal relationship between the water in the canal and reservoir and the water causing the seeped condition on the damaged lands.

Neb.—Smith v Platte Valley Public Power & Irrigation Dist., 36 NW 2d 478, 151 Neb 49—Lincoln Joint Stock Land Bank v. Platte Valley Public Power & Irrigation Dist., 299 NW 485, 140 Neb 316

59. Cal.—Osborne v Imperial Irr Dist., 47 P 2d 798, 8 Cal App 2d 622

#### Due care on part of deceased

In action against officers of irrigation district for damages for death of plaintiffs' minor daughter alleged

to have been caused by dangerous condition of structure across canal, fact that the danger was not as obvious to child as to adult does not relieve plaintiffs of statutory burden to prove due care on part of deceased.

Cal.—Osborne v Imperial Irr Dist., *supra*.

60. Wash.—Longmire v Yelm Irr Dist., 195 P 1014, 114 Wash 619 67 C J p 1438 note 63

61. Wash.—Dalton v Selah Water Users' Ass'n, 122 P 4, 67 Wash 589 67 C J p 1438 note 64

62. Idaho—City of Payette v Jacobsen, 66 P 2d 1013, 57 Idaho 524 67 C J p 1438 note 65

#### Division of proceeds

In action against city which had acquired rights in canal from canal company, and against river company which owned controlling stock in canal company, for benefit of canal company, wherein plaintiffs contended that controlling and interlocking directors of the two companies unlawfully and unfairly diverted to river company part of consideration paid by city, river company and its directors who controlled canal company had burden of proving there was fair division of proceeds.

Wyo.—Laramie Rivers Co v. Watson, 241 P 2d 1080, 69 Wyo. 333

63. US—Ure v U S, D C Or., 93 F Supp. 779, affirmed, C A., White v U. S., 193 F 2d 505, and reversed on other grounds U S v Ure, 225 F 2d 709

Colo.—Johnston v Wanamaker Ditch Co., 38 P 2d 907, 95 Colo. 551 67 C J p 1438 note 66

*Prima facie* case held established by proving company's failure to deliver the quantity of water required by contract and the extent of the

damage to crops and land from the failure to receive such a supply.

Neb.—Preston v Farmers Irr Dist., 293 NW 343, 138 Neb 504

64. Neb.—*Corpus Juris* cited in Preston v Farmers Irr Dist., 293 NW 343, 138 Neb 504

67 C J p 1438 note 67

#### Supervening impossibility

An irrigation company which seeks, on ground of supervening impossibility, to excuse its failure to deliver water pursuant to the terms of its contract obligation has the burden of proving such supervening impossibility.

Neb.—Preston v Farmers Irr Dist., 293 NW. 343, 138 Neb 504

65. US—Ure v U S, D C Or., 93 F Supp 779, affirmed, C A., White v U. S., 193 F 2d 505, and reversed on other grounds U S v Ure, 225 F 2d 709

66. Utah—Cortella v Salt Lake City, 72 P 2d 630, 93 Utah 236

67. Utah—Cortella v. Salt Lake City, *supra*

68. Cal.—Jackson & Perkins Co v Byron-Bethany Irr Dist., 29 P 2d 217, 136 Cal App 375, hearing denied 30 P 2d 516, 136 Cal App 375.

69. Cal.—Jackson & Perkins Co v. Byron-Bethany Irr Dist., *supra*

70. Cal.—Jackson & Perkins Co v. Byron-Bethany Irr Dist., *supra*

#### Order of board of supervisors held conclusive

Order of board of supervisors authorizing formation of irrigation district, that water was suitable for irrigation, is conclusive in collateral attack by action against district for damage from furnishing of salt water for irrigation.

Cal.—Jackson & Perkins Co v Byron-Bethany Irr Dist., *supra*.

*Establishment of a prima facie case* does not require plaintiff to adapt his proof of damages to the factors of excuse or mitigation which may be relied on by the irrigation company, where the acceptance and effect of those factors are wholly matters for the jury's determination.<sup>71</sup>

### (2) Admissibility

The usual rules govern as to the admissibility of evidence in actions involving damages from the construction, operation, or maintenance of an irrigation system, as well as in actions for damages due to failure to supply water.

The usual rules on the subject govern as to the admissibility of evidence in actions involving damages from the construction, operation, or maintenance of an irrigation system,<sup>72</sup> as well as in actions for damages due to a failure to supply water,<sup>73</sup> and in actions for damages against third persons for interfering with a consumer's supply of water.<sup>74</sup> Thus, evidence as to the feasibility and cost of

averting the injury by the injured person is admissible on the question of damages in an action for injuries resulting from the construction, operation, or maintenance of irrigation works.<sup>75</sup> Evidence as to acts or conduct of other persons is inadmissible on the issue of negligence in an action to recover for injuries resulting from the negligent construction, operation, or maintenance of irrigation works.<sup>76</sup>

### (3) Weight and Sufficiency

General rules govern questions of the weight and sufficiency of evidence in actions based on the negligent construction, operation, and maintenance of irrigation works, and in actions for failure to supply water for irrigation, as well as in actions against third persons for interfering with a consumer's supply.

General rules govern questions of the weight and sufficiency of evidence in actions based on the negligent construction, operation, and maintenance of irrigation works,<sup>77</sup> and in actions for failure

**71** Neb—Preston v Farmers Irr Dist, 293 NW 343, 138 Neb 504

**72** Colo—Andrews v Costilla Ditch Co, 165 P 2d 188, 114 Colo 317  
67 C J p 1439 note 69

#### Relevancy

The present condition of soil proximately caused by damming of the water and all effects up to the present time would be relevant to determine value of land in measuring damage to land caused by seepage from reservoir of irrigation district  
Neb—Applegate v Platte Valley Public Power & Irrigation Dist, 285 NW 585, 136 Neb 280

#### Evidence held admissible

(1) As to matter of justification  
Nev—Montesa v Gelmstedt, 270 P 2d 668, 70 Nev 418

(2) To show stagnant and offensive condition of the water  
Ariz—Salt River Valley Water Users' Ass'n v Arthur, 74 P 2d 582, 51 Ariz 101.

(3) To show that canal was permitted to carry water in excess of its maximum capacity.

Cal—Masseti v Madera Canal & Irrigation Co, 68 P 2d 260, 20 Cal App 2d 708

(4) To show manner and extent to which lands have been affected by seepage of water from reservoir  
Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49

(5) To show extent and intensity of rain, extent and intensity of resultant flood, and extent of damage to the canal  
Neb—Hilzer v Farmers Irr Dist, 56 NW 2d 457, 156 Neb 398

(6) To establish oral contract relied on as defense.

Colo—Andrews v Costilla Ditch Co, 165 P 2d 188, 114 Colo 317

(7) Other illustrations see 67 C J p 1439 note 69 [a]

#### Evidence held inadmissible

Nev—Orr Ditch & Water Co v Silver State Lodge, 78 P 2d 95, 58 Nev 292

67 C J p 1439 note 69 [b]

**73.** Mont—Blaser v. Clinton Irr Dist, 53 P 2d 1141, 100 Mont 459  
67 C J p 1439 note 70

#### Evidence held admissible

(1) Evidence of facts and circumstances existing when the contracts were entered into for purpose of determining what the parties intended by phrase used in contract  
Cal—Thermalito Irr Dist v California Water Service Co, 239 P 2d 109, 108 Cal App 2d 329

(2) Parol evidence as to location of terminus of canal at time of creation of district held to dispel ambiguity with respect thereto  
Mont—Blaser v Clinton Irr Dist, 53 P 2d 1141, 100 Mont 459

(3) Other illustrations see 67 C J p 1439 note 70 [a]

**74.** Cal—Yates v Kuhl, 279 P 2d 563, 130 Cal App 2d 536.  
67 C J p 1439 note 71

#### Evidence held admissible

Cal—Yates v Kuhl, supra

**75.** Colo—Bijou Irr Dist v Cateran Land & Live Stock Co, 213 P 999, 73 Colo 93  
67 C J p 1439 note 73

**76.** Colo—Burke v South Boulder Canon Ditch Co, 203 P 1098, 71 Colo 58  
67 C J p 1440 note 74.

**77.** Mont—Butler v. Paradise Val

Irr Dist, 160 P 2d 481, 117 Mont. 563

67 C J p 1440 note 76

#### Evidence held sufficient

(1) To prove negligence of defendant

US—Garden City Co v Burden, C A Kan, 186 F 2d 651  
Mont—Butler v Paradise Val Irr Dist, 160 P 2d 481, 117 Mont 563  
Neb—Gable v Pathfinder Irr Dist, 68 NW 2d 500, 159 Neb 778—  
Faught v Dawson County Irr Co, 19 NW 2d 358, 146 Neb 274  
Utah—Tacea Tsouras v Brighton & North Point Irr Co, 227 P 2d 329, 119 Utah 354

67 C J p 1440 note 76 [a]

(2) To sustain findings

Cal—Motzer v Paoli, 242 P 2d 91, 110 Cal App 2d 141—Smith v Rock Creek Water Corp, 208 P 2d 705, 93 Cal App 2d 49—Paul A Mosesian & Sons v Danielian, 126 P 2d 363, 52 Cal App 2d 387  
Idaho—City of Payette v Jacobsen, 66 P 2d 1013, 57 Idaho 524  
Utah—Salt Lake City v J B & R E Walker, Inc, 253 P 2d 365—Tacea Tsouras v Brighton & North Point Irr Co, 227 P 2d 329, 119 Utah 354—Knight v Utah Power & Light Co, 209 P 2d 221, 116 Utah 195—West Union Canal Co v Provo Bench Canal & Irr Co, 208 P 2d 1119, 116 Utah 128

67 C J p 1440 note 76 [a]

(3) To support verdict or judgment for plaintiff

Cal—Masseti v. Madera Canal & Irrigation Co, 68 P 2d 260, 20 Cal App 2d 708  
Idaho—Macomb v Extension Ditch Co, 214 P 2d 464, 70 Idaho 202—Albrethson v Carey Val Reservoir Co, 186 P 2d 853, 67 Idaho 529

to supply water for irrigation,<sup>78</sup> as well as in actions against third persons for interfering with a consumer's supply.<sup>79</sup>

### e. Trial

In actions relating to injuries incident to the supply and use of water for irrigation, instructions must correctly state the law applicable to the case under consideration, and the verdict and findings must be sup-

ported by the evidence and be in conformity with the issues

Rules governing the trial of civil actions generally are applicable to actions relating to injuries incident to the supply and use of water for irrigation.<sup>80</sup> Thus, if the evidence is conflicting, questions of fact are for the jury,<sup>81</sup> instructions must correctly state the law applicable to the case

Neb—Webb v Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61

Nev—Orr Ditch & Water Co v Silver State Lodge, 78 P 2d 95, 58 Nev 292

67 C J p 1440 note 76 [a]

(4) To support verdict and judgment for defendant

Colo—Andrews v Costilla Ditch Co, 165 P 2d 188, 114 Colo 317.

Neb—Snyder v Farmers Irr Dist, 61 NW 2d 557, 157 Neb 771

(5) To show that injury was caused by acts of plaintiffs, so as to relieve defendants from liability

Cal—Rozewski v Simpson, 71 P 2d 72, 9 Cal 2d 515

Nev—Montesa v Gelmstedt, 270 P 2d 668, 70 Nev 418

(6) As to amount of damages  
Ariz—Salt River Valley Water Users' Ass'n v Blake, 90 P 2d 1004, 53 Ariz 498.

Neb—Faught v Platte Val Public Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032

Utah—Tacea Tsouras v Brighton & North Point Irr Co, 227 P 2d 329  
67 C J p 1440 note 76 [a]

(7) To show that plaintiff attempted to mitigate the damages to his land caused by overflow and seepages from irrigation canal

Utah—Tacea Tsouras v Brighton & North Point Irr Co, supra

(8) As to other matters  
Cal—Hume v Fresno Irr Dist, 69 P 2d 483, 21 Cal App 2d 348—Masseti v Madera Canal & Irrigation Co, 68 P 2d 260, 20 Cal App 2d 708

Neb—Faught v Platte Val Public Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032—Faught v Dawson County Irr Co, 19 NW 2d 358, 146 Neb 274—Webb v Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61

67 C J p 1440 note 76 [a]

#### Evidence held insufficient

(1) To sustain a verdict or judgment for plaintiff

Ariz—Salt River Valley Water Users' Ass'n v Blake, 90 P 2d 1004, 53 Ariz 498

Neb—Lincoln Joint Stock Land Bank v Platte Valley Public Power & Irrigation Dist, 299 NW 485, 140 Neb 316

(2) To authorize recovery of more than nominal damages.

Utah—Burtenshaw v Bountiful Irr Co, 61 P 2d 312, 90 Utah 196  
67 C J p 1440 note 76 [b]

(3) To establish that the damages suffered by plaintiffs were due to the misfeasance or negligence of defendant

Or—Patterson v Horsefly Irr Dist, 69 P 2d 282, 157 Or 1, rehearing denied 70 P 2d 36, 157 Or 1.  
67 C J p 1440 note 76 [b]

(4) To establish acquiescence of landowners in acts of ditch owners resulting in injury so as to constitute laches barring action

Cal—Nelson v Robinson, 118 P 2d 350, 47 Cal App 2d 520

(5) To establish that injury occurred as a direct result of dangerous condition and while structure was being used with due care  
Cal—Osborne v Imperial Irr Dist, 47 P 2d 798, 8 Cal App 2d 622

(6) To prove notice by officers of the dangerous condition  
Cal—Osborne v Imperial Irr Dist, supra

(7) As to damages  
Neb—Webb v Platte Val Public Power & Irr Dist, 18 NW 2d 563, 146 Neb 61

(8) Other illustrations see 67 C J p 1440 note 67 [b]

78. US—White v U S, C A Or, 193 F 2d 505

67 C J p 1441 note 77

#### Evidence held sufficient

(1) To establish water contract declared on.

Tex—Garwood Irr Co v Williams, Civ App, 243 S W 2d 453, error refused no reversible error

(2) To sustain finding that res ipsa loquitur doctrine was not applicable under state law

US—White v U S, C A Or, 193 F 2d 505

(3) To sustain finding that water company was under no obligation to deliver water to stockholder at highest point on his land  
Cal—Duze v South Elsinore Mut Water Co, 188 P 2d 837, 83 Cal App 2d 333

(4) To sustain finding that corporation had been guilty of discrimination

Tex—Garwood Irr Co v Williams, supra

(5) As to amount of damages  
Cal—Crane v East Side Canal & Ir-

rigation Co, 44 P 2d 455, 6 Cal App 2d 361

67 C J p 1446 note 16 [a]

(6) As to other matters

US—White v U S, C A Or, 193 F 2d 505

U S v Powers, D C Mont, 16 F Supp 155, modified on other grounds, CCA, 94 F 2d 783, affirmed 59 S Ct 344, 305 US 527, 83 L Ed 330

Colo—Johnston v Wanamaker Ditch Co, 38 P 2d 907, 95 Colo 551

Tex—City of Wichita Falls v Bruner, Civ App, 191 S W 2d 912

67 C J p 1441 note 77 [a]

#### Evidence held insufficient

(1) To establish that a break in irrigation canal was the result of negligence by the distributor

US—Ure v U S, D C Or, 93 F Supp 779, affirmed, C A, White v U S, 193 F 2d 505, and reversed on other grounds U. S v Ure, 225 F 2d 709

(2) To support finding that landowner had become entitled to use of water by allotment from those to whom defendant had granted water right

Utah—Cortella v Salt Lake City, 72 P 2d 630, 93 Utah 236

(3) As to other matters

Cal—Muscovy Mut Water Co No 1 v Enloe, 213 P 2d 414, 95 Cal App 2d 566

Idaho—Jensen v Boise-Kuna Irr Dist, 269 P 2d 755, 75 Idaho 133  
67 C J p 1441 note 77 [b]

79. Colo—Ft Lyon Canal Co v Bennett, 156 P 604, 61 Colo 111  
67 C J p 1441 note 78

80. Colo—Pettit v Waline, 36 P 2d 163, 95 Colo 360.

#### Venue

Where private landowner's action against a mutual water storage and canal company for damages and injunctive relief was tried in county where injury to real estate was alleged to have taken place, denying company's motion for change of venue was proper

Colo—Twin Lakes Reservoir & Canal Co. v Sill, 89 P 2d 1012, 104 Colo 215

81. Cal—Yates v. Kuhl, 279 P 2d 563, 130 Cal App 2d 536

Utah—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 480  
67 C J. p 1441 note 81.

under consideration,<sup>82</sup> and the verdict and findings must be supported by the evidence and be in conformity with the issues.<sup>83</sup>

#### f. Judgment

A judgment in actions for injuries incident to the supply and use of water for irrigation must conform to the pleadings, proof, and findings, and must be definite and certain.

As in other actions the judgment in actions for

injuries incident to the supply and use of water for irrigation must conform to the pleadings and proof,<sup>84</sup> and to the findings,<sup>85</sup> and must be definite and certain.<sup>86</sup> A judgment for failure to supply water may be construed to constitute a debt.<sup>87</sup>

*Injunction* The fact that a decree enjoining a mutual water storage and canal company from emptying water into a natural stream so as to flood lands of an adjoining landowner imposes some

#### Evidence held sufficient to raise jury question

Mont—Newman v Bitter Root Irr Dist, 28 P 2d 195, 95 Mont 521  
Utah—Burtenshaw v Bountiful Irr Co, 61 P 2d 312, 90 Utah 196  
67 C.J. p 1440 note 76 [a]

#### Evidence held insufficient to raise jury question

Cal—Williams v. Sutter-Butte Canal Co, 185 P 2d 664, 82 Cal App 2d 100  
67 C.J. p 1440 note 76 [b]

#### Held questions of fact

(1) Cause of damage  
Cal—Hume v Fresno Irr Dist, 69 P 2d 483, 21 Cal App 2d 348  
Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 N W 2d 923, 151 Neb 497—Smith v Platte Valley Public Power & Irrigation Dist, 36 N W 2d 478, 151 Neb 49  
67 C.J. p 1441 note 81 [a]

(2) Negligence of defendant  
Ariz—Taylor v Roosevelt Irr Dist, 226 P 2d 154, 71 Ariz 254, opinion adhered to 232 P 2d 107, 72 Ariz 160  
Neb—Hilzer v Farmers Irr Dist, 56 N W 2d 457, 156 Neb 398—Webb v Platte Val Public Power & Irr Dist, 18 N W 2d 563, 146 Neb 61—Snyder v. Platte Valley Public Power and Irrigation Dist, 13 N W 2d 160, 144 Neb. 308, 160 A L R 1154

(3) Other cases see 67 C.J. p 1441 note 81 [a], [b]

82. Ariz—Salt River Valley Water Users' Ass'n v Arthur, 74 P 2d 582, 51 Ariz 101  
67 C.J. p 1442 note 82

#### Instructions held properly to state law

(1) In general  
Cal—Hume v Fresno Irr Dist, 69 P 2d 483, 21 Cal App 2d 348—Crane v East Side Canal & Irrigation Co, 44 P 2d 455, 6 Cal App 2d 361  
Colo—Twin Lakes Reservoir & Canal Co v Sill, 89 P 2d 1012, 104 Colo 215  
Neb—Applegate v. Platte Valley Public Power & Irrigation Dist, 285 N W 585, 136 Neb 280  
67 C.J. p 1442 note 82 [a], [b]

(2) As to care required  
Ariz—Salt River Valley Water

Users' Ass'n v Arthur, 74 P 2d 582, 51 Ariz 101

(3) As to negligence  
US—Garden City Co v Burden, C A Kan, 186 F 2d 651  
Tex—Calhoun County Canal Co v Richman, Civ App, 264 S W 2d 738, refused no reversible error

(4) As to negligence, act of God, and proximate cause of damage were proper

Neb—Snyder v Farmers Irr Dist, 61 N W 2d 557, 157 Neb 771

(5) As to proximate cause or concurring causes

Neb—Hilzer v Farmers Irr Dist, 56 N W 2d 457, 156 Neb 398—McKain v Platte Valley Public Power & Irrigation Dist, 37 N W 2d 923, 151 Neb 497—Smith v Platte Valley Public Power & Irrigation Dist, 36 N W 2d 478, 151 Neb 49  
Tex—Calhoun County Canal Co v Richman, Civ App, 264 S W 2d 738, refused no reversible error  
Utah—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 480

(6) As to damages  
Neb—Gable v Pathfinder Irr Dist, 68 N W 2d 500, 159 Neb 778

#### Requested instructions held properly refused or improperly given

Cal—Crane v East Side Canal & Irrigation Co, 44 P 2d 455, 6 Cal App 2d 361

Colo—Twin Lakes Reservoir & Canal Co v Sill, 89 P 2d 1012, 104 Colo 215

Idaho—Albrethson v Carey Val Reservoir Co, 186 P 2d 853, 67 Idaho 529

Neb—Hilzer v Farmers Irr Dist, 56 N W 2d 457, 156 Neb 398—Webb v Platte Val Public Power & Irr Dist, 18 N W 2d 563, 146 Neb 61  
Or—Patterson v Horsefly Irr Dist, 69 P 2d 282, 157 Or 1, rehearing denied 70 P 2d 36, 157 Or 1  
Utah—Charvoz v Bonneville Irr Dist, 235 P 2d 780, 120 Utah 480—Burtenshaw v Bountiful Irr Co, 61 P 2d 312, 90 Utah 196.  
67 C.J. p 1442 note 82 [a].

83. Utah—Cortella v. Salt Lake City, 72 P 2d 630, 93 Utah 236  
67 C.J. p 1442 note 83.

#### Construction and effect of particular findings

(1) Findings that a tract of land

was entitled to and had used water for a number of years, and that water users were individuals rather than corporations, and did not derive their interests through ownership of corporate stock sufficiently raise inference that water rights, to which tract of land was entitled for irrigation, were appurtenant to lands comprising tract  
Utah—Cortella v. Salt Lake City, supra

(2) Other findings see 67 C.J. p 1442 note 83 [a]

84. Colo—Anderson v. Wise, 232 P. 666, 76 Colo 377  
67 C.J. p 1442 note 85.

85. Cal—Fredericks v. Fredericks, 238 P 2d 643, 108 Cal App 2d 242  
67 C.J. p 1443 note 86

#### Judgment or decree held to be supported by findings

Cal—Fredericks v Fredericks, supra  
—Duze v South Elsinore Mut Water Co, 188 P 2d 837, 83 Cal App 2d 333

N M—Holloway v. Evans, 238 P 2d 457, 55 N M 601  
67 C.J. p 1443 note 86 [a]

#### Judgment held not supported by findings

Tex—Calhoun County Canal Co v. Richman, Civ App, 264 S W.2d 738, refused no reversible error

#### Modification of decree

In suit to restrain discharge of waste water into lateral ditch, decree based on commissioner's recommendation as to six points of discharge which were ample as defendants' land was farmed "at present time" was held proper as far as it covered present conditions, but would be worded so as to provide for changed conditions  
Colo—Pettit v Waline, 36 P 2d 163, 95 Colo 360.

86. Utah—Salt Lake City v J B & R E Walker, Inc, 253 P 2d 365

#### Decree held sufficiently definite and certain.

Idaho—Harsin v Pioneer Irr. Dist, 263 P. 988, 45 Idaho 369

87. Wash—Huxtable v. Berg, 168 P. 187, 98 Wash 616.  
67 C.J. p 1443 note 87.

practical difficulties in the way of expense or inconvenience does not affect its validity<sup>88</sup>

**g. Damages**

- (1) Injuries resulting from construction, operation, and maintenance
- (2) Failure to supply water

**(1) Injuries Resulting from Construction, Operation, and Maintenance**

All the injuries and expenditures proximately resulting from the negligence of a distributor in its construction, operation, and maintenance of the irrigation works are compensable in damages, and the measure of damages for such injuries is usually the difference in the value of the injured property immediately before and immediately after the injury complained of, taking into consideration all uses to which the land was put and for which it was reasonably adaptable.

All the injuries and expenditures, proximately resulting from the negligence of a distributor in its construction, operation, and maintenance of the irrigation works, are compensable in damages,<sup>89</sup> but the injured person cannot recover damages for the distributor's delay in doing an act which would only aggravate the injury complained of<sup>90</sup> Where an irrigation district constructs a reservoir from which seepage appears on plaintiff's land, and no new act of the district is required to produce the

continuance of the injury except the use of its reservoir for the purpose for which it was constructed, the cause of damage to plaintiff's land is permanent<sup>91</sup>

**Measure of damages** The measure of damages for injuries resulting from the negligent construction, operation, and maintenance of an irrigation system is usually the difference in the value of the injured property immediately before and immediately after the injury complained of,<sup>92</sup> and not the cost of repairing or restoring the injured property to such a state or condition as existed immediately before the injury,<sup>93</sup> although it has been held that, where the injured property can be restored to its original condition, the difference in the value of the property immediately before and immediately after the injury is not the proper measure of damages<sup>94</sup> All uses to which the land was put and for which it was reasonably adaptable may be taken into consideration<sup>95</sup> The measure of damages has also been said to be the amount which will compensate for all the detriment proximately caused by the distributor's acts, and as in other tort actions in fixing such damages considerable discretion rests with the court or jury<sup>96</sup> In any event the amount of recovery should not exceed the loss

88 Colo—Twin Lakes Reservoir & Canal Co v Sill, 89 P 2d 1012, 104 Colo 215

**Decree held proper**

Decree enjoining company from emptying water into stream so as to flood lands of an adjoining landowner and containing provision that decree was stayed thirty days to permit company to institute eminent domain proceedings to acquire a right to flow water across plaintiff's land was not invalid as compelling company to condemn a right of way in a public stream for purpose of transporting its appropriated water where decree permitted alternative of dredging stream or institution of eminent domain proceedings, if company was so advised

Colo—Twin Lakes Reservoir & Canal Co v Sill, *supra*.

89. Cal—Griffith v Kerrigan, 241 P 2d 296, 109 Cal App 2d 637

Utah—Corpus Juris cited in Burtenshaw v Bountiful Irr Co, 61 P 2d 312, 90 Utah 196

67 C J p 1443 note 90

**Amount held not excessive**

(1) \$165 for damage caused to house by overflow of waste ditch, where contractor testified that house could be restored for \$150, but such estimate did not include loss of use of house while being repaired or cost

of cleaning up filth left by such overflow

Ariz—Salt River Valley Water Users' Ass'n v Arthur, 74 P 2d 582, 51 Ariz 101

(2) \$9,666 66 for permanent injuries to land, alleged to have been worth \$15,000 undamaged, from seepage from reservoir

Colo—Colorado Nat Bank of Denver v Irvine, 101 P 2d 30, 105 Colo 588

**Amount held not inadequate**

\$1000 for damages to lands used by duck club caused by flooding  
Cal—Skupen v Imperial Irr Dist, 91 P 2d 910, 33 Cal App 2d 392.

**Apportionment of damages held proper** where defendant flooded rice field adjoining plaintiff's orchard, thus contributing to water seepage from canals along or near other boundaries of plaintiff's property and damaging her trees by raising the water table

Cal—Griffith v Kerrigan, 241 P 2d 296, 109 Cal App 2d 637

90. Cal—Groff v Reclamation Dist No 108, 274 P 993, 97 Cal App 22 67 C J p 1443 note 91

91. Neb—Applegate v Platte Valley Public Power & Irrigation Dist, 285 NW 585, 136 Neb 280

92 Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36

NW 2d 478, 151 Neb 49—Applegate v Platte Valley Public Power & Irrigation Dist, 285 NW 585, 136 Neb 280

67 C J p 1443 note 92.

**Precise measure held impossible**

In action for discomfort suffered by overflow of stagnant water from waste ditch onto plaintiff's premises which caused noxious insects to breed, vegetation and animal matter to decay, and created offensive stench, no precise measure of damages could be given

Ariz—Salt River Valley Water Users' Ass'n v. Arthur, 74 P 2d 582, 51 Ariz 101.

93. Colo—North Sterling Irr Dist v Gehrig, 149 P 1193, 27 Colo App 551

67 C J p 1443 note 93

94. Tex—Wichita County Water Improvement Dist No 1 v. McGrath, Civ App, 31 SW 2d 457

67 C J p 1443 note 94.

95. Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb. 49—Applegate v Platte Valley Public Power & Irrigation Dist, 285 NW 585, 136 Neb 280.

96. Cal—Skupen v. Imperial Irr. Dist, 91 P 2d 910, 33 Cal.App.2d 392.

actually sustained,<sup>97</sup> nor should the damages be in such an amount as to represent compensation for injuries which are not properly attributable to the distributor<sup>98</sup>

Recovery may be had for damages to any annual crops growing on the damaged land,<sup>99</sup> and in such case the amount of damages may be measured by a comparison of the net value of the probable yield with the value of the crops if they had not been damaged.<sup>1</sup> The value of the loss of the use of land as to unmaturing annual crops can be based on the value of the crop which could have been raised on the land except for the flooding, provided the evidence discloses sufficient data to determine that question with reasonable certainty.<sup>2</sup>

## (2) Failure to Supply Water

The measure of damages for failure to supply water for irrigation purposes has been variously fixed at the value of the water for irrigation purposes, the difference in the market value of the land immediately before and immediately after the injury, the difference between the rental value of the land with and without the supply of water contracted for, and the legal rate of interest on the consumer's investment.

When, in breach of a legal duty to furnish water

to a consumer for irrigation, a distributor fails or refuses to do so, he is liable for whatever damage may be sustained as a consequence of such failure or refusal.<sup>3</sup> The measure of damages for failure to supply water for irrigation purposes has been variously fixed at the value of the water for irrigation purposes,<sup>4</sup> the difference in the market value of the land immediately before and immediately after the injury,<sup>5</sup> the difference between the rental value of the land with and without the supply of water contracted for,<sup>6</sup> and the legal rate of interest on the consumer's investment.<sup>7</sup> The consumer's right to damages cannot be based on the cost to him of a more valuable right to water.<sup>8</sup>

Where the failure to supply water results in loss of, or injury to, a growing crop, the value of the yield at maturity is the usual basis for measuring the damage sustained.<sup>9</sup> Accordingly, on failure to supply, damages may be awarded to the amount of the net value of the crop, when harvested, which would have been produced if the water had been supplied,<sup>10</sup> or, if there was not a total failure of the crop, the difference in value between the crop as actually marketed and as it would have been if

<sup>97</sup> Wash—Evergreen Farm v At-talia Land Co, 157 P. 487, 91 Wash 192

<sup>67</sup> C J p 1443 note 95

<sup>98</sup> Tex—Wichita County Water Improvement Dist No 1 v McGrath, Civ App, 31 S W 2d 457

<sup>67</sup> C J p 1443 note 96.

<sup>99</sup> Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49—Applegate v Platte Valley Public Power & Irrigation Dist, 285 NW 585, 136 Neb 280

1. Cal—Catlett v Bennett, 173 P 598, 37 Cal App 91  
<sup>67</sup> C J p 1444 note 97

2. Neb—Faught v Platte Val Public Power & Irr Dist, 25 NW 2d 589, 147 Neb 1032

3. US—Faris v Blaine County Inv Co, D C Idaho, 3 F Supp 381

Cal—Crane v East Side Canal & Irrigation Co, 44 P 2d 455, 6 Cal App 2d 361

Tex—City of Wichita Falls v Bruner, Civ App, 191 S W 2d 912  
<sup>67</sup> C J p 1444 note 99

### Damage to be anticipated

(1) In suit for damages for breach of contract permanently to furnish water for irrigation purposes during all future time, award of damages based on difference between market value of land with and without water right was proper as against objection that award of damages was too remote and uncertain because landowner had used land for twenty years for

grazing purposes without irrigation, and that it was too speculative to assume landowner or his successor in interest would desire to cultivate land, where land was adaptable for cultivation of alfalfa, barley, and rice

Cal—Crane v East Side Canal & Irrigation Co, 44 P 2d 455, 6 Cal App 2d 361

(2) Other illustrations see <sup>67</sup> C J p 1444 note 99 [b]

### Damages held not excessive

(1) In suit for damages for breach of contract permanently to furnish water for irrigation purposes during all future time, award of damages of fifteen dollars per acre, which was difference between market value of land with and without water right, was not excessive

Cal—Crane v East Side Canal & Irrigation Co, supra

(2) Other illustrations see <sup>67</sup> C J p 1446 note 16 [a]

4. Neb—Peden v. Platte Valley Farm & Cattle Co, 139 NW 1012, 93 Neb 141  
<sup>67</sup> C J p 1444 note 1

5. Cal—Crane v East Side Canal & Irrigation Co, 44 P 2d 455, 6 Cal App 2d 361  
<sup>67</sup> C J p 1444 note 2

### Value with and without water

Measure of damages for breach of contract permanently to furnish water for purpose of irrigation during all future time is difference between market value of land with and with-

out water to be supplied according to terms of contract

Cal—Crane v East Side Canal & Irrigation Co, supra

**Elements considered in ascertaining market value** include various practical purposes to which land was naturally adaptable

Cal—Crane v East Side Canal & Irrigation Co, supra

6. Cal—Crane v East Side Canal & Irrigation Co, supra  
<sup>67</sup> C J p 1444 note 3

### Breach of contract to furnish water for limited time

Measure of damages for breach of contract to furnish water for purpose of irrigation during specified limited period of time is difference in rental value of land with and without the water

Cal—Crane v East Side Canal & Irrigation Co, supra

7. Wash—Ulrich v. Pateros Water Ditch Co, 121 P 818, 67 Wash 328  
<sup>67</sup> C J p 1444 note 4

8. Wash—McDonald v Prosser Falls Land & Power Co, 188 P 462, 110 Wash 175  
<sup>67</sup> C J p 1446 note 14

9. Tex—American Rio Grande Land & Irrigation Co v Mercedes Plantation Co, Com App, 208 S W 901  
<sup>67</sup> C J p 1444 note 5

10. Tex—Louisiana, Rio Grande Canal Co v Elliott, Civ App, 193 S W 255  
<sup>67</sup> C J p 1445 note 6.

the water had been furnished as agreed<sup>11</sup> On the other hand, it has been held that the measure of damages for the entire loss of growing crops due to a failure to supply water is the value of the crops at the time and place of destruction<sup>12</sup> Thus, where the loss occurs before the maturity of the crop, damages are to be fixed as of that time rather than the time of maturity<sup>13</sup> Similarly, it has been held that the measure of damages for injury to growing fruit trees is the difference in the value of the trees immediately before and immediately after the injury<sup>14</sup> Where the injury to crops is due to the withholding of water over a period of time, damages cannot be measured by the difference in the value of the crops immediately before and immediately after the period during which the water is withheld,<sup>15</sup> nor may a tenant recover the value of that part of a crop which on maturity would have been payable as rent<sup>16</sup>

*Interference with consumer's supply of water*  
In an action for damages for interference with a consumer's supply of water, the damages must be computed on a satisfactory basis and the amount awarded should not be speculative<sup>17</sup>

*Exemplary damages* may, in a proper case, be awarded where the water company has been guilty of malice or oppression in failing or refusing to supply water for irrigation<sup>18</sup>

### § 368. Criminal Responsibility

By certain specified acts relating to the supply and use of water for irrigation are criminal offenses under the express provisions of some statutes

Certain specified acts relating to the supply and use of water for irrigation are criminal offenses under the express provisions of some statutes<sup>19</sup> Under a statute making it a criminal offense to open,

break, or tap any pipe, flume, ditch, or reservoir and remove therefrom or allow to be taken, removed, or to flow any water, the mere opening, breaking into, tapping, or connecting with an irrigation ditch does not constitute the offense condemned, since the taking or removing therefrom of water belonging to another or allowing the same to be taken is an essential element of the crime<sup>20</sup> It is no defense in a prosecution for interference with the head gate of an irrigation ditch, in violation of a statute condemning such act, that some other person had interfered with the head gate,<sup>21</sup> nor is it any defense, for one claiming to act in the exercise of a right to water, that he could not wait to exercise his right through the slow process of the law<sup>22</sup> Where a statute is, according to its title, enacted for the purpose of protecting persons using water for irrigation from contamination of such water and making it a misdemeanor to contaminate the water, a provision, requiring the owners and operators of certain reservoirs and tanks to indicate by posting to whom such reservoirs or tanks belong, has been held not to make the omission so to post a misdemeanor<sup>23</sup> An ordinance requiring an irrigation ditch to be covered is invalid when applied to a ditch which was lawfully constructed but thereafter became included in a city by the extension of its limits so that one of the city streets was so plotted as to include the ditch<sup>24</sup>

In prosecutions for offenses incident to the supply and use of water for irrigation, general rules govern questions relating to indictments and informations,<sup>25</sup> and evidence<sup>26</sup> In a prosecution for interference with the head gates of an irrigation ditch or canal, questions as to the right to divert water are not proper matters of consideration.<sup>27</sup>

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| <p>11. Cal—Hewitt v San Jacinto, etc., Irr Dist, 56 P 893, 124 Cal 186 67 C J p 1445 note 7</p> <p>12. Idaho—Collins v Twin Falls North Side Land &amp; Water Co., 152 P 200, 28 Idaho 1 67 C J p 1445 note 9.</p> <p>13. Idaho—Collins v Twin Falls North Side Land &amp; Water Co., supra 67 C J p 1445 note 10</p> <p>14. Tex—Hidalgo County Water Control &amp; Improvement Dist No 1 v Gannaway, Civ App, 13 SW 2d 204 67 C J p 1445 note 11</p> <p>15. Neb—Clague v Tri-State Land Co., 121 NW 570, 84 Neb 499, 133 AmSR 637 67 C J p 1445 note 12.</p> | <p>16. Tex—Lone Star Canal Co v Cannon, Civ App, 141 SW 799 67 C J p 1446 note 13</p> <p>17. Cal—Yates v Kuhl, 279 P 2d 563, 130 Cal App 2d 536<br/><b>Damages awarded held not speculative</b><br/>Cal—Yates v Kuhl, 279 P 2d 563, 130 Cal App 2d 536</p> <p>18. Cal—Lowe v Yolo County Consol Water Co., 108 P 297, 157 Cal. 503 67 C J p 1446 note 15</p> <p>19. Tex—Bush v State, 238 SW 664, 91 Tex Cr 296 67 C J p 1446 note 17</p> <p>20. Nev—Ex parte Schultz, 174 P 431, 42 Nev 254</p> <p>21. Colo—Lambert v People, 241 P 533, 78 Colo 313</p> | <p>22. Wash—State v Lawrence, 6 P 2d 363, 165 Wash 508</p> <p>23. La—State v Duson, 53 So 159, 130 La 488<br/>Pollution of watercourses generally see supra §§ 43-57</p> <p>24. Idaho—City of Twin Falls v Harlan, 151 P 1191, 27 Idaho 769 67 C J p 1446 note 22</p> <p>25. Colo—Lambert v People, 241 P 533, 78 Colo 313 67 C J p 1446 note 24</p> <p>26. Cal—People v Bosse, 68 P 2d 990, 21 Cal App 2d 276<br/><b>Evidence held sufficient to sustain conviction of breaking, injuring, and destroying a dam</b><br/>Cal—People v Bosse, supra.</p> <p>27. Colo—Lambert v People, 241 P 533, 78 Colo 313 67 C J p 1447 note 25</p> |
|---|---|--|

Moreover, the ownership of an irrigation system with reference to which an act is committed may be immaterial in a prosecution therefor.<sup>28</sup>

## XI. USE OF WATER FOR MECHANICAL AND MANUFACTURING PURPOSES

### A. RIGHT TO USE OF WATER

#### § 369. Natural Waters

The acquisition of water rights to natural water for mechanical and manufacturing purposes, the nature of such rights, and the extent of, and the restrictions on, the use thereof, are considered infra §§ 370-372.

Examine Pocket Parts for later cases.

#### § 370. — Acquisition of Water Rights

The right to use water of a stream for mechanical purposes may be acquired by contract, grant or patent, eminent domain proceedings, or prescription

The right to use the waters of a stream for mechanical purposes is sometimes conferred by contract,<sup>29</sup> or by special grant or patent,<sup>30</sup> or it may be obtained by eminent domain proceedings<sup>31</sup> or prescription<sup>32</sup>. In some instances the right to use water of a stream has been granted by act of the legislature,<sup>33</sup> but a legislative grant is not essential to permit the use of waters for the operation of machinery<sup>34</sup>. Grants of water rights by implication are not favored by the law,<sup>35</sup> but implied grants of water rights may arise from the necessity of the situation when granted property cannot be used without such rights<sup>36</sup>.

#### § 371. — Nature of Right in General

As a general rule, a riparian owner has the right to use the water of a stream or the power which it is capable of generating for mechanical and manufacturing purposes.

Although under the doctrine of natural flow, a riparian owner cannot withdraw water for the operation of a factory,<sup>37</sup> it is generally held that a riparian proprietor has the right to use the water of the stream or the power which it is capable of generating for mechanical and manufacturing purposes<sup>38</sup>. Such use is subject to the restriction that the water of the stream be not essentially diminished<sup>39</sup>. Ordinarily the water power to which a riparian owner is entitled consists of the fall in the stream when in its natural state as it passes through his land<sup>40</sup>. To make use of the water for the purposes aforesaid, the riparian owner may divert the water from its natural channel into an artificial channel with provision for the water's return to the stream, provided such diversion does not unduly injure others who have rights in the water<sup>41</sup>. A riparian owner, whose lands border on a stream, the bed of which is owned by the state, has no right to use the water power of the river at that point, where the only practicable method for using that power requires the construction of a

28. Wyo—Hamp v. State, 118 P 653, 19 Wyo 377  
67 C J p 1447 note 26

29. Ind—Elkhart Paper Co v Fulkerson, 75 NE 283, 36 Ind App 219  
Contracts for use of waters generally see supra §§ 220-223

30. US—Valdes v Larrinaga, Puerto Rico, 34 S Ct 750, 233 US 705, 58 L Ed 1163  
67 C J p 1447 note 31.

#### Grant by state

Okl—Grand Hydro v Grand River Dam Authority, 139 P 2d 798, 192 Okl 693, certiorari denied Grand River Dam Authority v Grand Hydro, 68 S Ct 263, 332 US 841, 92 L Ed 413, vacated 68 S Ct. 729, 333 US 852, 92 L Ed 1133

31. NC—Carolina Tennessee Power Co v Hiwassee River Power Co, 96 SE 99, 175 NC 668, error dismissed 40 S Ct 330, 252 US 341, 64 L Ed 601—Carolina Tennessee Power Co v Hiwassee River Power Co, 88 SE 341, 171 NC 248

Water rights as subject of eminent domain see Eminent Domain § 71

32. Cal—Moore v California Oregon Power Co, 140 P 2d 798, 22 Cal 2d 725

Acquisition of water rights by prescription generally see supra §§ 158-164

33. Me—Milo Electric Light & Power Co v Sebec Dam Co, 84 A 941, 109 Me 427

34. Ind—Lowe v Indiana Hydroelectric Power Co, 151 NE 220, 197 Ind 430

35. US—Holyoke Water Power Co v American Writing Paper Co, C CA Mass, 90 F 2d 509

Implied grant of easement of water rights generally see supra § 207

36. US—Holyoke Water Power Co v. American Writing Paper Co, supra

37. Ark—Harrell v City of Conway, 271 SW 2d 924

38. Ala—Elmore v Ingalls, 17 So 2d 674, 245 Ala. 481.

Cal—Crum v Mt Shasta Power Corporation, 30 P 2d 30, 220 Cal 295  
NC—Dunlap v Carolina Power & Light Co, 195 SE 43, 212 NC 814.  
67 C J p 1447 note 35

#### Water powers sui generis

At common law, water powers are regarded as sui generis

US—Holyoke Water Power Co v. American Writing Paper Co, C C. A Mass, 94 F 2d 933 certiorari denied 58 S Ct 1046, 304 US. 574, 82 L Ed 1538

39. Ala—Elmore v Ingalls, 17 So 2d 674, 245 Ala 481

Cal—Crum v Mt Shasta Power Corporation, 30 P 2d 30, 220 Cal 295  
Me—In re Opinions of the Justices, 106 A 865, 118 Me 503, 523

40. Tex—Rhodes v Whitehead, 27 Tex 304, 84 Am D 631.  
67 C J p 1447 note 41

41. Cal—Mentone Irr Co v. Redlands Electric Light & Power Co, 100 P 1082, 155 Cal 323, 22 L R A. N S, 382, 17 Ann Cas 1222.



dike or dam extending into the river on the state-owned lands.<sup>42</sup>

§ 372. — Extent of, and Restrictions on, Use

- a. In general
- b. As affected by rights of others
- c. Reasonableness
- d. Effect of prior appropriation

a. In General

The extent of the right to use water for mechanical and manufacturing purposes is determined by the terms of the instrument conferring such right where the right is conferred by grant or contract, and by the extent of the use which conferred the title where acquired by prescription.

Where the right to the use of water for manufacturing purposes has been obtained by legislative grant, the statute determines its extent.<sup>43</sup> Likewise, where the right to use the waters of a stream for mechanical purposes is conferred by contract, the extent of the use is regulated by the terms of the contract.<sup>44</sup> Where a riparian owner uses water for a nonriparian purpose, the prescriptive right acquired thereby is limited by the extent of the use which conferred the title and cannot be extended beyond such actual use.<sup>45</sup>

*Primary and secondary uses.* Since the right to use the waters of a stream for mechanical purposes is secondary to the right to use them for domestic purposes,<sup>46</sup> the use of the waters for artificial purposes is subject to the prior call on the waters of a stream for the satisfaction of the natural or primary needs of other owners on the

stream.<sup>47</sup> Hence, when the stream is small and does not supply more water than is sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the waters of the stream for artificial or secondary purposes.<sup>48</sup>

b. As Affected by Rights of Others

All the riparian proprietors on a stream have equal rights to use the waters of the stream for mechanical purposes, and each is restricted to such a use of the water as shall be reasonable, having regard to the relative rights of the others.

All the riparian proprietors on a stream have equal rights to use the water of the stream for mechanical purposes, and each is restricted to such a use of the water as shall be reasonable, having regard to the relative rights of the others.<sup>49</sup> The uses so made of the waters by riparian owners as among themselves must be, as nearly as possible, equal ones.<sup>50</sup> Hence, a riparian owner has no right to consume the entire stream or so great a proportion of its volume as to inflict material injury on lower owners,<sup>51</sup> and he must restore to the channel all the water which he does not actually consume.<sup>52</sup>

No one is entitled to use the water to such an extent as to destroy or materially impair the operation or utility of the other plants,<sup>53</sup> and if the stream is insufficient to give all the mills or factories as much water or power as they require, it is to be fairly and equitably divided among them.<sup>54</sup> While a reasonable use of a stream for manufacturing purposes is not an unlawful diversion,<sup>55</sup> the riparian owner is limited to the diversion of so much of

42. N.Y.—Watervliet Hydraulic Co v State, 197 N.Y.S. 348, 119 Misc. 743.

43. Me.—Milo Electric Light & Power Co v Sebec Dam Co., 84 A. 941, 109 Me. 427.  
67 C.J. p 1448 note 45.

**Incidental rights to unappropriated waters**

The granting of a water appropriation to power district by the state, including the right to construct a diversion dam in river, carried with it the incidental right to impound unappropriated waters behind the dam to facilitate the diversion of water under its appropriative right.  
Neb.—Platte Val Irr. Dist v Tilley, 5 N.W.2d 252, 142 Neb. 122.

**Limitations on another's right held not grant**

Limitations imposed on public power district's appropriative right to public waters by the state in adjudicating its rights and fixing its priority, were restrictions on that district,

and could not be treated as a grant to a public power and irrigation district.

Neb.—Loup River Public Power Dist v North Loup River Public Power & Irr. Dist, 5 N.W.2d 240, 142 Neb. 141, followed in Loup River Public Power Dist v Middle Loup Public Power & Irr. Dist, 5 N.W.2d 249, 142 Neb. 156.

44. Ind.—Elkhart Paper Co v Fulkerson, 75 N.E. 283, 36 Ind. App. 219.  
67 C.J. p 1448 note 47.

45. Cal.—Moore v California Oregon Power Co., 140 P.2d 798, 22 Cal.2d 725.

46. Pa.—Palmer Water Co v Lehighton Water Supply Co., 124 A. 747, 280 Pa. 492.  
67 C.J. p 1448 note 48.

47. Ill.—Evans v Merriweather, 4 Ill. 492, 38 Am. D. 108.

48. Me.—Evans v Merriweather, supra—Auburn v Union Water Pow-

er Co., 38 A. 561, 90 Me. 576, 38 L.R.A. 188.

49. Ind.—City of Elkhart v Christiana Hydraulics, 59 N.E.2d 353, 223 Ind. 242.

NC.—Dunlap v Carolina Power & Light Co., 195 S.E. 43, 212 N.C. 814.  
67 C.J. p 1448 note 52.

50. Conn.—Mason v Hoyle, 14 A. 786, 56 Conn. 255.

51. Ohio—Canton v Shock, 63 N.E. 600, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. S.R. 557.  
67 C.J. p 1448 note 54.

52. Or.—Weiss v Oregon Iron, etc., Co., 11 P. 255, 13 Or. 496.

53. Mass.—Springfield v. Harris, 4 Allen 491, 81 Am. D. 715.  
67 C.J. p 1449 note 56.

54. Ohio—Canton v Shock, 63 N.E. 600, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. S.R. 557.  
67 C.J. p 1449 note 57.

55. N.Y.—Bullard v. Saratoga Victory Mfg. Co., 77 N.Y. 525.

the water for this purpose as will not materially or sensibly diminish the volume of the stream as it flows down to the lower proprietors<sup>56</sup>

A riparian owner, having equipped a plant with machinery within the reasonable capacity of the stream, has a right to have the water flow continuously in its natural course and quantity without obstruction by an upstream owner<sup>57</sup> Where a riparian owner has constructed a plant which does not require a quantity of water beyond the normal flow of the stream, he is entitled to draw down his pond in periods of drought to operate his plant, and to close his water gates for such reasonable periods as is necessary to restore the requisite head<sup>58</sup> Such use of the stream must not be wanton, however, and must be for his needs and without unnecessary prejudice to the rights of other riparian owners<sup>59</sup>

Where the right to use a certain quantity of water exists, a change in the mode and objects of the use, without increasing the quantity of water used, is no violation of the rights of others,<sup>60</sup> nor is the removal of the plant being operated by the water such a violation if no greater quantity of the water is used than theretofore<sup>61</sup> Since the United States has no right as a riparian owner different from, or superior to, that of any private riparian owner,<sup>62</sup> subject to the right of condemnation, as considered in Eminent Domain § 71, it may not itself<sup>63</sup> or through a licensee<sup>64</sup> use the waters of a stream for power purposes in a manner declared by the law of the state in which the stream runs to be an improper use with respect to other riparian owners.

### c. Reasonableness

The right of a riparian owner to use the waters of a stream for mechanical and manufacturing purposes is subject to the restriction that it be a reasonable use, that is, a use adapted to the character and capacity of the stream.

The right of a riparian owner to use the waters of a stream for mechanical and manufacturing purposes is subject to the restriction that it be a reasonable use<sup>65</sup> What is a reasonable share of water for each riparian owner is a question of fact to be decided in each case according to its circumstances<sup>66</sup> A reasonable use of the waters of a stream for mechanical purposes is one adapted to the character and capacity of the stream,<sup>67</sup> and in determining the capacity of the stream its condition throughout the year is to be considered<sup>68</sup> The use of the waters of the stream not in excess of the ordinary flow is not an unreasonable use<sup>69</sup>

The fact that defendant had steam power, while not affecting his right to the use of the water, should properly be considered in determining whether he should be restrained from making an unreasonable and injurious use of it, when it appears that, by using the water in connection with the steam power, he could avoid the injuries complained of without serious inconvenience to himself<sup>70</sup>

### d. Effect of Prior Appropriation

Mere prior appropriation of the waters of a stream gives no rights superior to those of another riparian owner, except in those regions where priority of title can be acquired by prior appropriation of streams flowing through the public domain and not held in private ownership.

56 Mass—New England Cotton Yarn Co v Laurel Lake Mills, 76 NE 231, 190 Mass 48  
67 C J p 1449 note 59

Storage of water for power purposes is not a legitimate riparian use

US—U S v Walker River Irr Dist, DC Nev, 11 F Supp 158, stating California law, exceptions dismissed 14 F Supp 10, reversed on other grounds, CCA, 104 F 2d 334  
Cal—Moore v California Oregon Power Co, 140 P 2d 798, 22 Cal 2d 725—Colorado Power Co. v Pacific Gas & Electric Co, 24 P 2d 495, 218 Cal 559.

57 NY—Fulton County Gas & Electric Co v Rockwood Mfg Co, 200 NYS 225, 205 App Div 787, modified on other grounds 144 N. E 359, 238 NY 109

58. NY—Fulton County Gas & Electric Co. v Rockwood Mfg Co, supra.

NC—Dunlap v. Carolina Power &

Light Co, 195 SE 43, 212 NC 814

59 NY—Fulton County Gas & Electric Co v Rockwood Mfg Co, 200 NYS 225, 205 App Div 787, modified on other grounds 144 NE 359, 238 NY 109

60 NY—Mudge v Salisbury, 18 NE 249, 110 NY 413  
67 C J p 1449 note 63

61. NY—Mudge v Salisbury, supra.

62. Cal—Herminghaus v Southern California Edison Co, 252 P 607, 619, 200 Cal 81

63. US—U S v Central Stockholders' Corporation of Vallejo, D Cal, 43 F 2d 977, modified on other grounds, CCA, 52 F 2d 322

64. US—U S v. Central Stockholders' Corporation of Vallejo, supra.  
67 C J. p 1449 note 69

65. U.S.—Holyoke Water Power Co

v American Writing Paper Co, C CA Mass, 90 F 2d 509

Ala—Elmore v Ingalls, 17 So 2d 674, 245 Ala 481

Cal—Moore v California Oregon Power Co, 140 P 2d 798, 22 Cal. 2d 725

67 C J p 1449 note 71

66. Conn—Mason v Hoyle, 14 A. 786, 788, 56 Conn 255

67 C J p 1449 note 72

67. ND—McDonough v. Russell-Miller Milling Co, 165 NW 504, 38 ND 465

67 C J p 1450 note 73

68 Conn—Mason v Hoyle, 14 A. 786, 56 Conn 255

69 NY—Henderson Estate Co v Carroll Electric Co, 79 NYS 365, 113 App Div 775, affirmed 82 NE 1127, 189 NY 531

70. Conn—Mason v Hoyle, 14 A. 786, 56 Conn 255

67 C J. p 1450 note 76

Mere prior appropriation of the waters of a stream for mechanical or manufacturing purposes gives no rights superior to those of another riparian owner,<sup>71</sup> unless continued for such a length of time and under such circumstances as to found a title by prescription, as discussed supra §§ 158-166, and except in those regions where priority of title can be acquired by prior appropriation of streams flowing through the public domain and not held in private ownership,<sup>72</sup> and a person or corporation desiring to use more than his or its proportionate share of the stream for such purposes, or to use a stream on which he or it has no riparian rights, must proceed by purchase or by condemnation under the power of eminent domain.<sup>73</sup> In some jurisdictions, however, a riparian proprietor who is the first to appropriate and use the water power of the stream for the purpose of a mill or factory has the right to maintain his dam as against owners above and below, although it may prevent them from making a similar use of the stream, except as to any excess of power it may furnish over that actually appropriated by the first taker.<sup>74</sup> Where a riparian owner has appropriated water from a stream for power purposes prior to the time the legislature declared the waters in the streams of the state to be the property of the public, the water right so acquired by such riparian owner is by virtue of the common law.<sup>75</sup>

### § 373. Artificial Waters

The owners of land along an artificial watercourse privately owned by another have no right to use the waters of such a stream for mechanical or manufacturing purposes merely because of such ownership, but the right to use the water may be acquired by contract, deed, conveyance, or adverse user.

The owners of land along an artificial watercourse privately owned by another have no right to use the waters of the stream for mechanical or manufacturing purposes merely because of such ownership.<sup>76</sup> The right to the use of the water may be obtained by contract,<sup>77</sup> or by adverse user,<sup>78</sup> in which event the extent of the use is controlled by the contract,<sup>79</sup> or the extent of the adverse user.<sup>80</sup> The owners of property on a natural waterway mutually agreeing to change the course thereof over their lands and agreeing that each was entitled to a just and reasonable participation in the water power of the resulting artificial stream, have the same rights to the use of the water on their respective properties as between themselves as would exist if the artificial were the natural channel of the stream.<sup>81</sup>

On the severance of title to land which has enjoyed the use of a canal and the water therein for mechanical purposes, an easement of water rights for the benefit of the dominant estate may arise by implication.<sup>82</sup> In such a case, where a cheap supply of water is reasonably necessary

71. Mich—Preston v Clark, 214 N W 226, 238 Mich. 632, 53 A.L.R. 194

67 C.J. p 1450 note 78

72. US—Trade Dollar Consol. Min Co v Fraser, Idaho, 148 F 585, 79 CCA 37

73. Pa—Philadelphia, etc, R Co v Pottsville Water Co, 38 A 404, 182 Pa. 418

67 C.J. p 1450 note 81

74. Or—Parkersville Drainage Dist v Wattier, 86 P 775, 48 Or 332 67 C.J. p 1450 note 83

75. Neb—In re Southern Nebraska Power Co, 192 NW 317, 109 Neb 683

76. NY—Stebbins v Frisbie & Stansfield Knitting Co, 194 NYS 559, 201 App Div 447

67 C.J. p 1451 note 85

77. NY—Stebbins v Frisbie & Stansfield Knitting Co, supra

67 C.J. p 1451 note 86

78. US—Holyoke Water Power Co v American Writing Paper Co, D.C. Mass, 17 F Supp 879, vacated on other grounds 90 F2d 509

67 C.J. p 1451 note 87

**Preventing acquisition of easement**  
A prescriptive right to take water from artificial canal, maintained by

water power company on its own land, is easement therein within statute authorizing landowner to prevent acquisition of easement by giving public notice of such intention and causing service of copy thereof on person claiming easement, wrongful appropriation of water in water power company's canal would not lay foundation for prescriptive right, if such water is regarded as something supplied from moment to moment by such company's industry  
US—Holyoke Water Power Co v American Writing Paper Co, C C.A. Mass, 90 F2d 509

79. Ind—Elkhart Paper Co v Fulkerson, 75 NE 283, 36 Ind App 219

NY—Stebbins v Frisbie & Stansfield Knitting Co, 194 NYS 559, 201 App Div 477

80. Wis—Fox River Flour & Paper Co v Kelly, 35 NW 744, 70 Wis 287

81. NY—Townsend v McDonald, 12 NY 381, 64 Am D 508

82. Mass—Jasper v Worcester Spinning & Finishing Co, 64 NE 2d 89, 318 Mass 752

**Factors to be considered**

(1) In determining whether im-

plied easement was created when bankruptcy trustee sold two mills to separate purchasers, statements and plan contained in catalogue furnished to bidders as far as they pertained to physical characteristics of property and announcement made by auctioneer based on those statements were to be considered, and purchasers of mill seeking to establish implied easement were required to prove that purchasers of other lot at auction knew or were chargeable with knowledge of all pertinent facts relative to existence of canal and its necessity for use and enjoyment of the mill, since implied easement could not be created in absence of knowledge

Mass—Jasper v Worcester Spinning & Finishing Co, supra.

(2) Whether deed from trustee to dominant lot carried with it by implication an easement over servient lot did not depend entirely on construction of deed, but deed was to be construed with reference to all facts within knowledge of parties in reference to subject matter of grant to determine and effectuate the presumed intention of parties

Mass—Jasper v Worcester Spinning & Finishing Co, supra.

for the practical operation of the mill on the dominant lot, the easement to secure water does not cease merely because the water might be obtained from a street main of a water company.<sup>83</sup>

### § 374. Particular Uses

- a. Electricity
- b. Railroad uses
- c. Mills
- d. Mines

#### a. Electricity

The generation of hydroelectric power is a purpose for which the water of a stream may lawfully be used by a riparian owner, and the electrical energy may be conveyed for use on nonriparian lands

The generation of hydroelectric power is a purpose for which the water of a stream may be lawfully used by a riparian owner,<sup>84</sup> and the electrical energy may be conveyed for use on nonriparian lands<sup>85</sup> Where two companies have been authorized to acquire lands and water rights for the generating of electric power, in the absence of special statutory regulations to the contrary, the first to define and mark the location has the prior right of appropriation of the water rights<sup>86</sup> Where the diversion of the waters of a stream for the purpose of generating hydroelectric power has developed into a public use, lower riparian owners may not enjoin or otherwise prevent such diversion<sup>87</sup>

The use of water as a source of power to lift water to be used for irrigation purposes is a beneficial use so that the appropriator may be entitled to the amount necessary for that purpose,<sup>88</sup> but an appropriation for such power purpose must be reason-

able in amount as compared with the amount of water for irrigation for which the power is needed,<sup>89</sup> and the appropriator cannot properly claim five or six times the amount of water used for irrigation for the purpose of raising the water for irrigation from the stream onto the land of the appropriator<sup>90</sup>

#### b. Railroad Uses

A railroad company as a riparian owner may make a reasonable use of a stream for the operation of its railroad.

A railroad company as a riparian owner may make a reasonable use of a stream for the operation of its railroad,<sup>91</sup> as for the use of its locomotives,<sup>92</sup> provided such use does not materially reduce the volume of water in the stream<sup>93</sup> to the detriment of other riparian owners<sup>94</sup> In some jurisdictions it is held that the water must be used for purposes incident to the land itself<sup>95</sup>

#### c. Mills

The right to use the water of a stream for mill purposes is well established, but the use made by mill owners of a stream must, in its relation to others on the stream, be a reasonable one, and an appropriator for mill purposes is limited to the quantity of water reasonably necessary and actually used to operate the mill.

The right to the use of the waters of a stream for mill purposes is well established,<sup>96</sup> but the use made by mill owners of a stream must, in its relation to others on the stream, be a reasonable one<sup>97</sup> The use must be consistent with a like reasonable use by others above and below<sup>98</sup> The use of the waters of a stream for mill purposes not in excess of the ordinary flow is not an unreasonable use<sup>99</sup> Where the owner of a senior water power right of a stated force constructed his mill

<sup>83</sup> Mass—Jasper v Worcester Spinning & Finishing Co, supra.

<sup>84</sup> US—Holyoke Water Power Co v American Writing Paper Co, C CA Mass, 90 F2d 509

Cal—Moore v California Oregon Power Co, 140 P2d 798, 22 Cal2d 725

Ind—City of Elkhart v Christiana Hydraulics, 59 NE2d 353, 223 Ind 242

Or—State v Beaver Portland Cement Co, 124 P2d 524, 169 Or 1, rehearing denied State by Wilson v Beaver Portland Cement Co, 126 P2d 1094, 169 Or 1.  
67 CJ p 1451 note 91.

<sup>85</sup> Cal—Moore v California Oregon Power Co, 140 P2d 798, 22 Cal2d 725—Mentone Irr Co v Redlands Electric L & P Co, 100 P 1082, 155 Cal 323, 22 L.R.A.N.S. 382

<sup>86</sup> NC—Carolina-Tennessee Power Co. v. Hiwassee River Power Co,

96 SE 99, 175 NC. 668, error dismissed 40 S.Ct. 330, 252 US 341, 64 LEd 601

67 CJ p 1451 note 92

<sup>87</sup> Cal—Fall River Valley Irr Dist v Mt Shasta Power Corporation, 259 P. 444, 202 Cal 56, 56 ALR 264

<sup>88</sup> Or—In re Water Rights of Deschutes River and Tributaries, 286 P 563, 134 Or 623, modified on other grounds 294 P 1049, 134 Or 623

<sup>89</sup> US—Schodde v Twin Falls Land & Water Co, Idaho, 32 S Ct 470, 224 US 107, 56 LEd 686  
Or—In re Owyhee River Water Rights, 259 P 292, 124 Or 44, mandate recalled and corrected on other grounds 265 P. 1116, 125 Or 299

<sup>90</sup> Or—In re Owyhee River Water Rights, supra

<sup>91</sup> Kan—Atchison, T. & S. F. Ry.

Co v. Shriver, 166 P 519, 101 Kan 257

67 CJ p 1451 note 99.

<sup>92</sup> Kan—Atchison, T & S F Ry. Co v Shriver, supra.

67 CJ. p 1451 note 1

<sup>93</sup> Tex—Martin v. Burr, 228 SW 543, 111 Tex 57

<sup>94</sup> Tex—Martin v. Burr, supra.

<sup>95</sup> Pa.—Scranton Gas & Water Co v Delaware, L & W R Co, 88 A 24, 240 Pa. 604, 47 L.R.A.N.S. 710

67 CJ p 1452 note 4.

<sup>96</sup> Conn—Mason v. Hoyle, 14 A 786, 56 Conn 255

<sup>97</sup> Conn—Mason v. Hoyle, supra

<sup>98</sup> Mass—Pitts v. Lancaster Mills, 13 Metc 156

<sup>99</sup> NY—Henderson Estate Co v. Carroll Electric Co, 99 NYS 365, 113 AppDiv 775, affirmed 82 N.E. 1127, 189 NY 531.

with a view to the amount of water to which he was entitled, the owner of a junior power right appropriating so much of the water as to force the other's mill to close cannot defend an action for such appropriation on the ground that the mill could be reconstructed so as to enable it to run with a lesser water supply<sup>1</sup>

An appropriator for mill purposes is limited to the quantity of water reasonably necessary and actually used to operate the mill<sup>2</sup> If the mill has been run at different capacities during different seasons so that the amount used during one season is less than that used during other seasons the appropriator is limited during such season to the amount actually used during that time<sup>3</sup> As against intervening rights the appropriator is limited to the amount necessary to run the mill at its original capacity and he can claim no right to a larger amount because of a subsequent increase in the capacity of the mill<sup>4</sup> An owner of a mill may draw a larger quantity of water through his gates than he has been accustomed to use, if he has lawfully provided the surplus by means of a reservoir above and causes no injury thereby to others having rights in the waters of the stream<sup>5</sup> The mere nonuser of the water right alone does not show an abandonment thereof,<sup>6</sup> facts and circumstances showing an intention to abandon must appear<sup>7</sup>

A statutory right to the use of the waters of a stream for mill purposes, even to the extent of injury to other owners on the stream, may be lost by nonuser for an unreasonable length of time<sup>8</sup> or voluntary abandonment<sup>9</sup> Where mills lawfully existing are specially protected by statute from flowage, the mill, if existing, must be a bona fide mill to entitle the owner to the benefit of the act,<sup>10</sup> but a mill site, bought for the purpose of erecting a mill, is protected, although the mill is not yet built.<sup>11</sup> The statute does not provide a remedy

for damage to an unoccupied mill site<sup>12</sup>

#### d. Mines

The operator of a mine or quarry has the right to use water of a stream on the property in the operation of the mine

The locator of a placer mining claim and his grantees have the right to use the waters of a stream flowing through the claim in their operation of the claim<sup>13</sup> Such right is appurtenant to, and will pass with, a conveyance of the claim<sup>14</sup> On the other hand, when the waters of a stream have been diverted from their natural course, and carried through ditches or by other means and beneficially used in another place, the appropriator of the waters becomes the owner of property of a separate and specific kind<sup>15</sup> which is not necessarily appurtenant either to the mining claim on which the water is used<sup>16</sup> or through which the water runs<sup>17</sup> The right belongs to the owner of the ditch to the extent of the appropriation.<sup>18</sup>

An appropriator for mining purposes who has continuously used the water for the purpose of cleaning up and saving gold, which has been separated from the gravel in the process of placer mining, is entitled to all the water that is necessary for this purpose,<sup>19</sup> as well as the preservation of his flumes during the dry season of the year.<sup>20</sup> The owner of a mining claim, comprising the bed of a canyon, may, pursuant to a local custom, erect dams across the bed of the stream to enable him to work it,<sup>21</sup> and any damage to mining claims on the banks of a canyon belonging to others, which is caused by the flooding, is *damnum absque injuria*, if his is the oldest location<sup>22</sup> Under a statute giving a mine operator with an easement on adjoining land the right to maintain a flume, the mine operator has the right to change the location of the flume and the use to which the water was being put<sup>23</sup>

1. Ind.—Elkhart Paper Co v Fulkerson, 75 NE 283, 36 Ind App 219  
67 C J p 1452 note 10
2. Idaho—Union Grain & Elevator Co v McCammon Ditch Co, 240 P 443, 41 Idaho 216
3. Idaho—Union Grain & Elevator Co v McCammon Ditch Co, supra.
4. Idaho—Union Grain & Elevator Co v McCammon Ditch Co, supra.
5. NH—Whittier v Cochecho Mfg Co, 9 NH 454, 32 Am D 382
6. NY—In re Matter of Daly, 108 NYS 635, 123 App Div 709, affirmed 85 NE 1108, 192 NY 571  
67 C J p 1452 note 18
7. NY—In re Matter of Daly, supra.
8. Mass—French v Braintree Mfg Co, 23 Pick 216  
67 C J p 1452 note 16
9. Mass—French v Braintree Mfg Co, supra.  
67 C J p 1452 note 17
10. Conn—Occum Co v Sprague Mfg Co, 35 Conn 496  
67 C J p 1453 note 20
11. Conn—Elting Woolen Co v Williams, 36 Conn 310
12. Mass—Hatch v Dwight, 17 Mass 289, 9 Am D 145  
67 C J p 1453 note 22
13. Alaska—Anderson v Campbell, 4 Alaska 660
14. Alaska—Anderson v. Campbell, supra.
15. Alaska—Anderson v. Campbell, supra
16. Alaska—Anderson v. Campbell, supra
17. Alaska—Anderson v. Campbell, supra
18. Alaska—Anderson v. Campbell, supra
19. Or—In re Rogue River Adjudication, 251 P 898, 120 Or 237
20. Or—In re Rogue River Adjudication, supra.
21. Cal—Stone v. Bumpus, 46 Cal 218
22. Cal—Stone v. Bumpus, supra
23. Mont—Pioneer Mining Co v. Bannack Gold Mining Co, 198 P. 748, 60 Mont 254.

An upper riparian owner has the right to pump such water out of his quarries into a stream as is absolutely necessary for their beneficial use, provided he can do so without substantially injuring lower riparian owners<sup>24</sup>

### § 375. Injuries

One using the waters of a stream for mechanical or mining purposes in such a manner as to interfere with, or cause damage to, another's rights in the waters or property is liable therefor; and the improper use of the water may be enjoined.

One using the waters of a stream for mechanical<sup>25</sup> or mining<sup>26</sup> purposes in such manner as to interfere with, or cause damage to, another's rights in the waters or property is liable in damages therefor, unless the use of the waters in such manner has ripened into a prescriptive right,<sup>27</sup> and the improper use of the water may be enjoined<sup>28</sup>. The fact that a purchaser of a stated amount of water from a stream wastes a large part thereof does not justify the interference with use by another user of water from the stream

whose use is subject to the rights of the other.<sup>29</sup> The owner of a mill privilege, on which a mill has formerly stood, but on which no mill is actually standing, is entitled to an action against one, who, by erecting a dam below, renders the site useless for the purpose of erecting a mill,<sup>30</sup> unless the owner has abandoned it evidently with an intent to leave it unoccupied, in accordance with the principles, considered supra § 374 c. The right to such action, by a mortgagee, commences at the time he takes actual possession of the mortgaged premises.<sup>31</sup>

**Actions** General rules have been applied in the determination of questions relating to actions arising out of improper use of the waters of a stream for mechanical purposes,<sup>32</sup> such as questions relating to pleading,<sup>33</sup> evidence,<sup>34</sup> trial,<sup>35</sup> verdict, findings, judgment,<sup>36</sup> and damages.<sup>37</sup> If plaintiff is damaged in his use of the water power of the stream for running a mill or other machinery, the damages may be measured by the decreased capacity of the mill,<sup>38</sup> by the cost of supplying steam

24. Vt—Kasuba v Graves, 194 A 455, 109 Vt 191

25. Tex—San Antonio & A P Ry Co v Carpenter, Civ App, 13 S W 2d 929

67 C.J. p 1453 note 37

Pollution of stream by one using water for mechanical or mining purposes see supra §§ 47, 48

26. Cal—Pacific Gas & Electric Co v Scott, 75 P 2d 1054, 10 Cal 2d 581

Henderson v Western Precipitating Co, 51 P 2d 126, 10 Cal App 2d 18

Ky—Inland Steel Co v Isaacs, 143 SW 2d 503, 283 Ky 770

NC—McKinney v Deneen, 58 SE 2d 107, 231 NC 540

**Constitutional provision** that in organized mining districts those using water for mining purposes or milling purposes connected with mining shall have preference over those using the water for manufacturing or agricultural purposes does not authorize parties engaged in mining to fill up the natural channel of a public stream to the injury of another user of the stream

Idaho—Ravndal v Northfork Placers, 91 P 2d 368, 60 Idaho 305—Hill v Standard Mining Company, 85 P 907, 12 Idaho 223

27. Va—Kirk v Hoge, 97 SE 116, 123 Va 519.

67 C.J. p 1454 note 38.

28. Cal—Pacific Gas & Electric Co v Scott, 75 P 2d 1054, 10 Cal 2d 581.

67 C.J. p 1454 note 39.

#### Mandatory injunction

In action against power district, a mandatory injunction requiring defendant to increase carrying capacity of outlet provided under canal to an extent sufficient to carry off all waters flowing down the draw on plaintiff's land may be granted

Neb—Faught v Platte Val Public Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032

#### Not for slight interference

A court of equity should not interfere with mining industries merely because they cause slight inconvenience or occasional annoyances, or even some degree of interference, as long as no substantial damage is done

Idaho—Ravndal v Northfork Placers, 91 P 2d 368, 60 Idaho 305

29. Ind—Home Electric Light, etc., Co v Globe Tissue Paper Co, 45 NE 1108, 146 Ind 673

30. Mass—Hatch v Dwight, 17 Mass 289, 9 Am D 145

31. Mass—Hatch v Dwight, supra. Mich—Sheffield Car Co v Constantine Hydraulic Co, 137 NW 305, 171 Mich 423, Ann Cas 1914B 984 67 C.J. p 1454 note 43

32. Mich—Sheffield Car Co v Constantine Hydraulic Co, 137 NW 305, 171 Mich 423, Ann Cas 1914B 984 67 C.J. p 1454 note 46

33. Vt—Middlebury Electric Co v Murkland, 93 A 291, 89 Vt 10 67 C.J. p 1454 note 46 [b]

#### Complaint held to state cause of action

Ala—Tennessee Valley Sand & Grav-

el Co v Pilling, 47 So 2d 236, 35 Ala App 327, certiorari denied 47 So 2d 245, 254 Ala 10

34. Ala—Tennessee Valley Sand & Gravel Co v Pilling, supra 67 C.J. p 1454 note 46 [c], [d]

**Evidence held admissible** to show that animals pastured in plaintiff's pasture during year just prior to trial of action based on alleged negligence in permitting muck and filth to be deposited on pasture lands were in good condition when first put on the pasture and were in poor condition when they came back Ala—Tennessee Valley Sand & Gravel Co v Pilling, supra

35. Evidence held sufficient to go to jury

Ala—Tennessee Valley Sand & Gravel Co v Pilling, supra Cal—Moore v California Oregon Power Co, 140 P 2d 798, 22 Cal 2d 725

#### Instructions held proper

Ind—Elkhart Paper Co v. Fulkerson, 75 NE 283, 36 Ind App 219 67 C.J. p 1455 note 48

36. Mich—Sheffield Car Co v Constantine Hydraulic Co, 137 NW 305, 171 Mich 423, Ann Cas 1914B 984 67 C.J. p 1455 note 53

37. Ala—Tennessee Valley Sand & Gravel Co v Pilling, 47 So 2d 236, 35 Ala App 239, certiorari denied 47 So 2d 245, 254 Ala 10

38. Ky—King v Danville, 107 SW 1189, 128 Ky 321, 32 Ky L 1188 NY—Garwood v New York Cent, etc., R Co, 2 NY St 701, 41 Hun 637, affirmed 22 NE 396, 116 NY 649, 2 Silv A 409

or other power in lieu of that of which he has been deprived,<sup>39</sup> or by the annual rental value of the horse power abstracted by defendant.<sup>40</sup>

## B. WATER POWER COMPANIES

### § 376. Organization and Nature

Corporations formed for the purpose of distributing water power or electrical energy generated thereby may be organized under general or special laws, or the franchise may be granted by a particular board or commission, and in its organization, the company must comply with the statutory prerequisites.

Corporations formed for the purpose of controlling natural water powers and distributing them to customers, either in their original form or after conversion into electrical power, may be organized under the general laws of the state or under laws specially applicable to them,<sup>41</sup> in some jurisdictions the power to grant the franchise being vested in a particular board or commission.<sup>42</sup> In its organization the company must comply with the statutory prerequisites.<sup>43</sup> Such corporations have been regarded as quasi-public companies.<sup>44</sup>

*Consolidation.* Power companies, by accepting the statutory privilege of consolidating with one another and of improving their works, assume reciprocal statutory burdens.<sup>45</sup>

### § 377. Charges by State for Diversion of Water

Statutes may provide for a charge against companies diverting water for power in excess of a stated maximum.

Statutes authorizing water power companies to withdraw waters from a stream may provide for a charge against companies diverting waters in excess of a stated maximum.<sup>46</sup>

### § 378. Rights and Powers

Public power companies possess only such powers as are set forth in their basic organization documents, or are implied therefrom.

Public power companies possess only such powers as are set forth in the statutes or their certificate of incorporation<sup>47</sup> or are to be implied therefrom.<sup>48</sup> The right of a power company to manipulate the waters of a river for power purposes is not absolute but is qualified by the rights of other riparian owners.<sup>49</sup> The reasonableness of its

39. Wash.—Dement Bros Co v Walla Walla, 107 P 1038, 58 Wash 60

67 C J p 1455 note 50

40. NH—Lancaster & J Electric Light Co v Jones, 71 A 871, 75 NH 172

67 C J p 1455 note 51

41. NH—Sunapee Dam Corporation v Alexander, 181 A 120, 87 NH 397

67 C J p 1455 note 54

42. Ark—Ouachita Power Co v Donaghey, 152 S W 1012, 106 Ark 48, Ann Cas 1915A 447.

67 C J p 1455 note 55

43. Ark—Ouachita Power Co v Donaghey, supra

67 C J p 1456 note 56

#### Membership in dam corporation

(1) Conditions fixed by legislature for entrance into membership, or a loss of, or exit from, membership of dam corporation, could not be altered or abridged by bylaws, although bylaws might provide reasonable regulations of membership NH—Sunapee Dam Corporation v Alexander, 181 A 120, 87 NH 397

(2) Under terms of corporation's charter providing that original incorporators accepted memberships in corporation for themselves and for their successors, successor owners of power in river served by dam acquired membership by virtue of their succession as incident of their

ownership, so that membership was voluntary burden running with ownership of power

NH—Sunapee Dam Corporation v Alexander, supra

(3) Under such charter, owner of power in river which dams served, which was not a member because its predecessors in title had not been members and which had taken no action of its own to become member, are not liable for maintenance assessment

NH—Sunapee Dam Corporation v Alexander, supra

(4) In bill to determine assessment liability for maintenance of dam, finding of master that former owner of one of a company's mill privileges on river served by dam was probably member of dam corporation is a finding that he was a member

NH—Sunapee Dam Corporation v Alexander, supra

44. NJ—Society for Establishing Useful Manufactures v Butler, 12 N J Eq 498

Whether such companies are invested with the power of eminent domain see Eminent Domain §§ 24, 46

45. NY—Niagara Falls Power Co v Water Power and Control Commission, 262 N Y S 217, 237 App Div 216

46. NY—Niagara Falls Power Co

v Water Power and Control Commission, 262 N Y S 217, 237 App Div 216

67 C J p 1456 note 61

47. Mass—Phillips v Watuppa Reservoir Co, 68 NE 848, 184 Mass 404

67 C J p 1457 note 62

#### Obstruction of highways

Public power district could not obstruct country highways by its canal without building bridges across canal, where road had never been vacated by county board with consent of majority of rural voters or parts of highway taken been condemned

Neb—Wright v Loup River Public Power Dist, 277 N W 53, 133 Neb 715

48. Conn—S O & C Co v Ansonia Water Co, 78 A 432, 83 Conn 611

67 C J p 1457 note 63

Making of promissory notes for indebtedness contracted within sphere of charter is proper

Minn—Gebhard v. Eastman, 7 Minn 56

Acceptance of draft for debt contracted in legitimate business is proper

NY—Partridge v Badger, 25 Barb 146

49. Mich—Merkel v Consumers' Power Co, 189 N W 997, 220 Mich 128

acts is not measured alone by the demand for power from its customers<sup>50</sup>

*Issuance and sale of stock* Statutes may regulate the issuance and sale of shares of stock of water power companies<sup>51</sup>

### § 379. Construction of Plant

Boards or commissions are frequently given jurisdiction over the construction of plants and structures of water power companies, and there must be compliance with statutory or regulatory conditions imposed on the company in connection therewith.

Boards or commissions are frequently given jurisdiction over the construction of plants and structures of water power companies,<sup>52</sup> and there must be compliance with any statutory or regulatory conditions imposed on the company in connection with the construction of its plant.<sup>53</sup>

### § 380. Sale or Lease of Water or Power and Supply to Consumers

The company supplying water power and the customer may make their own terms as to the quantity of water or power to be delivered, and their contract in this respect will be controlling

The supplying company and the consumer may make their own terms as to the quantity of water

or power to be delivered, and their contract in this respect will be controlling<sup>54</sup> Although they may, if they see fit, restrict its use to a particular purpose,<sup>55</sup> the water power may be supplied without restrictions as to purpose<sup>56</sup> The owner of a power canal must have it of such size as to supply the amount of power therefrom which it has leased to various persons<sup>57</sup> The company is generally under the obligation to complete the delivery, and it is not incumbent on the consumer to put himself in a position to receive it<sup>58</sup> In the event of a failure of supply, the customer may be entitled to damages or to an abatement of rent, unless special circumstances excuse the default of the company<sup>59</sup>

On the other hand, a repudiation of the contract by the purchaser of water power gives the company a right to treat the contract as at an end and sue for damages<sup>60</sup> The company may recover, in such case, damages for water contracted for up to the date of trial, without showing its ability to furnish the water called for under the contract thereafter,<sup>61</sup> but there can be no recovery for damages on water to be furnished during the remainder of the contract period without such a showing<sup>62</sup>

50 Mich—Merkel v. Consumers' Power Co., *supra*

51. Neb—In re Southern Nebraska Power Co., 192 NW 317, 109 Neb 683

67 C J p 1457 note 66

52. Pa—Pennsylvania Power Co v Public Service Commission, 104 A. 605, 261 Pa 211

67 C J p 1457 note 67

#### Permit held valid

Under statutes relating to conservation commission powers, permit issued by conservation commission to corporation to develop water power was valid notwithstanding that judicial decree, determining rights of parties along stream to use of waters formerly required as a prerequisite to a permit issued by state engineer had not been entered.

Okl—Grand Hydro v Grand River Dam Authority, 139 P 2d 798, 192 Okl 693

53. Ark—State v. Railroad Commission of Arkansas, 158 S W. 1076, 109 Ark 100

67 C J p 1457 note 68.

#### Effect and construction of license

Where license issued by conservation commission to private corporation for development of water power limited time for completion of dam and appropriation of waters to beneficial use to total period of

eight years but contained nothing to indicate when license should terminate, purpose of license was to provide for a public service within eight years and amounted to a franchise for that purpose, and where corporation was, at time of creation of dam authority, behind construction schedule but still had four years to appropriate waters to beneficial use and was continuing work, license was not abandoned and had not expired

Okl—Grand Hydro v Grand River Dam Authority, 139 P 2d 798, 192 Okl 693, certiorari denied Grand River Dam Authority v Grand-Hydro, 68 S Ct 263, 332 US 841, 92 L Ed 413, vacated 68 S Ct 729, 333 US 852, 92 L Ed 1133

#### Limitation on amount of property

Legislature, in limiting in dam corporation's charter and amendment thereto amount of property which might be acquired and held by corporation, did not indicate any purpose to control expense of dam either in its erection or in its maintenance

NH—Sunapee Dam Corporation v Alexander, 181 A 120, 87 NH 397

54. US—South Utah Mines & Smelters v Utah Leasing Co., Utah, 260 F 149, 171 CCA 185

67 C J p 1457 note 69

55. Cal—Fresno Milling Co v

Fresno Canal, etc., Co, 36 P 412, 4 Cal Unrep Cas 592

#### Power purposes

Under grant of mill powers by water power company, grantee is entitled to use water piped from flume for use in suction devices for extrication of water from paper material in manufacturing process, such use being for "power purpose" within indentures granting mill powers

US—Holyoke Water Power Co v American Writing Paper Co, D C Mass, 17 F Supp 879, vacated on other grounds 90 F 2d 509

56. US—Holyoke Water Power Co v American Writing Paper Co, CCA Mass, 90 F 2d 509

57. NY—Stebbins v Frisbie & Stansfield Knitting Co, 194 NY S 559, 201 App Div 477.

58. Cal—Sierra Union Water, etc., Co v Baker, 8 P 305, 11 P 654, 70 Cal 572

59. NY—Witherbee v. Meyer, 50 N E. 53, 155 NY 446

67 C J p 1458 note 73

60. Tex—Reilly v Birmingham, Civ App, 53 SW 2d 825

61. Tex—Reilly v. Birmingham, *supra*.

62. Tex—Reilly v. Birmingham, *supra*.



An agreement by a water power company to supply the owner of mills with water for a specified period, at a certain annual rate, will not subject the owner to a personal liability for such supply after he has sold the mills<sup>63</sup> Where a water power company owes no duty to one as an individual distinct from the general public, such individual is not entitled to injunctive relief for the company's failure to recognize and protect equities existing between these dependent on it for their water supply<sup>64</sup> The use by the consumer of water power in excess of that fixed in the lease does not give rise to a prescriptive right to the excess where the water power company has no knowledge of the quantity actually being used, being obliged to rely on the integrity of the user<sup>65</sup>

*Assignment of lease of water power.* The rules governing assignments generally are applicable to involving assignments of water power leases.<sup>66</sup>

### § 381. Tolls and Other Charges

The consumer of water power is liable for payments, in the nature of rents or other charges, stipulated for in the contract, but the consumer may resist payment of an excessive charge

The consumer is liable for the payments, in the nature of rent or other charges, stipulated for in the contract,<sup>67</sup> and the parties may stipulate for a lien on the premises supplied to secure payment of the rents or charges,<sup>68</sup> but the consumer may resist the payment of an excessive charge and enjoin the company from cutting off his supply for its nonpayment<sup>69</sup> A municipality furnishing water power to a consumer at a specified rate, but under circumstances not amounting to a contract, will not be enjoined from raising the rate by ordinance<sup>70</sup>

*Regulation of rates.* In some jurisdictions the rates and charges of a water power company are subject to regulation by a board or commission<sup>71</sup> When rates have been fixed and filed with the commission the company has no right to grant rates to particular users below the fixed rates<sup>72</sup> One complaining to such commission about the unreasonableness of rates must have a substantial interest therein<sup>73</sup> Statutory authority to the officers of a county to fix the rates for water distributed by a water company to the general public for profit gives them no power to fix the rates for a company furnishing

63. Cal—Table Mountain, etc., Water Co v Chavanne, 11 P 678, 70 Cal 616

64. Pa—Spink v Philadelphia Hydro-Electric Co, 91 A 609, 245 Pa 143

65. N.Y.—Kavanaugh v Cohoes Power & Light Corporation, 187 N.Y.S. 216, 114 Misc 590

66. N.Y.—Kavanaugh v Cohoes Power & Light Corporation, supra 67 C.J. p 1458 note 81

67. Del—Consolidated Solubles Co v Consolidated Fisheries Co, Ch. 107 A.2d 639, affirmed in part and reversed in part on other grounds Consolidated Fisheries Co v Consolidated Solubles Co, 112 A.2d 30, reargument denied and opinion supplemented 113 A.2d 576 67 C.J. p 1458 note 82

#### Maintenance assessment on members

(1) Under provisions of dam corporation's charter, owner of developed power on river served by dam was liable for maintenance assessment where owner was also member of dam corporation, notwithstanding that power, although developed, was not used, since, while power remained developed, dam corporation furnished owner benefit by enhancing value of its property NH—Sunapee Dam Corporation v Alexander, 181 A 120, 87 NH 397

(2) Maintenance assessment voted to be apportioned according to

assessment schedule adopted by dam corporation, and paid, cannot be recovered even though schedule was illegal, because list of power owners assessed was not in correct conformity with membership

NH—Sunapee Dam Corporation v Alexander, supra

(3) Vote to assess for maintenance of dam corporation must adopt equitable and fairly proportionate basis of benefit received, but where rights of others are not impaired, members of corporation may provide for adjustment of assessment in special instances, and an assessment liability in dispute may be settled by ordinary process of negotiation and compromise

NH—Sunapee Dam Corporation v Alexander, supra

(4) Contributions to dam corporation in lieu of payment of assessments are to be credited as their equivalent where condition attached to them that claim of right to assess should be waived

NH—Sunapee Dam Corporation v Alexander, supra

#### Medium of payment

Perpetual lease of water power privilege requiring yearly rent of 260 ounces of silver of standard value and fineness of 1859 silver coinage, or its equivalent in gold, does not contemplate payment of rentals in silver coin, and rentals are

payable in silver bullion of fineness of coinage of 1859

US—Holyoke Water Power Co v American Writing Paper Co, CC A Mass. 68 F.2d 261

68. Ind—St Joseph Hydraulic Co v Wilson, 33 NE 113, 133 Ind 465 67 C.J. p 1458 note 83

69. La—Ernst v. New Orleans Water-Works Co, 2 So 415, 39 La Ann 550

#### Charge held improper

Del—Consolidated Solubles Co v Consolidated Fisheries Co, Ch. 107 A.2d 639, affirmed in part and reversed in part on other grounds Consolidated Fisheries Co v Consolidated Solubles Co, 112 A.2d 30, reargument denied and opinion supplemented 113 A.2d 576

70. Ga—John P. King Mfg Co v Council of City of Augusta, 138 S.E. 159, 164 Ga 306, affirmed 48 S.Ct. 489, 277 US 100, 72 L.Ed 801 67 C.J. p 1459 note 85

71. Ill—Public Utilities Comm v Marseilles Land & Water Power Co, 129 NE 113, 295 Ill 522

72. N.Y.—Kavanaugh v Cohoes Power & Light Corporation, 187 N.Y.S. 216, 114 Misc. 590 67 C.J. p 1459 note 87

73. Ill—Public Utilities Comm v. Marseilles Land & Water Power Co, 129 NE 113, 295 Ill 522. 67 C.J. p 1459 note 88.

water for hydraulic purposes to its stockholders only<sup>74</sup>

### § 382. Injuries Incident to Supply or Use, and Remedies Therefor

A water power company may be held responsible for injuries caused by the construction or operation of its works.

A water power company may be held responsible for injuries caused by the construction or operation of its works, as where it deprives another owner of the water or power to which he is entitled or materially injures him in respect to his use of the stream,<sup>75</sup> or where it diverts or abstracts a

greater portion of the stream than it is entitled to,<sup>76</sup> or causes the lands of adjoining owners to be flooded;<sup>77</sup> and, there being a plain, adequate, and speedy remedy at law, it has been held that injunctive relief is not available.<sup>78</sup> Conversely, the company may protect its property by actions against those who obstruct its canals or other works or divert or pollute the water.<sup>79</sup>

General rules have been applied in the determination of questions arising in actions to recover damages for injuries,<sup>80</sup> such as questions relating to the pleadings and proof,<sup>81</sup> evidence,<sup>82</sup> and trial.<sup>83</sup> The measure of damages to land from

74 Cal—McFadden v Los Angeles County, 16 P 397, 74 Cal 571

75 Wis—Evans v Bacon, 95 NW 375, 118 Wis 380  
67 C J p 1459 note 90

76 Me—Union Water Power Co v Lewiston, 65 A 67, 101 Me 564  
N J—Harper v Mountain Water Co, Sup, 43 A 984

77 Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb 497—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49—Halligan v Elander, 25 NW 2d 13, 147 Neb 709—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890

67 C J p 1459 note 92

78 Neb—Halligan v Elander, 25 NW 2d 13, 147 Neb 709

79 Mont—Power v Klein, 27 P 513, 11 Mont 159  
67 C J p 1459 note 93

80 Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb 497

**81. Allegation or proof of negligence held not required in action for loss of crops and permanent damage to plaintiff's farm because of seepage from defendant power district's reservoir, where defendant's liability for damages from seepage is absolute under statute**

Neb—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890

#### Causal connection

(1) In action against power district for damages to land as alleged result of seepage of water from district's reservoirs and canal, proof of causal connection between loss of water from district's canal or reservoirs and waterlogged condition of plaintiff's land was indispensable to recovery.

Neb—McKain v. Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb. 497—Scherz v. Platte Valley Public Power &

Irr Dist, 37 NW 2d 721, 151 Neb 415—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49

(2) Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable and the combined waters have caused the damage complained of, plaintiff must establish that his damages would have occurred from the waters for which the defendant is liable or the amount of damage that was caused by the waters for which the defendant is liable

Neb—Faught v Platte Val Public Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032

#### Variance held not shown

(1) In action for damages to lands and crops allegedly caused by seepage waters from reservoir and canal of public power district, issue was whether water escaping from defendant's reservoir and canal caused damage, or whether it was result of abnormally high rainfall and other natural causes, and contention that there was a fatal variance between pleading which alleged that waters escaping from defendant's reservoir and canal found their way to, and resulted in, waterlogging of plaintiff's lands and that evidence tended to show that escaped waters created a hydrostatic pressure which caused underground waters to rise and seep plaintiff's lands, could not be sustained

Neb—Scherz v Platte Valley Public Power & Irr Dist, 37 NW 2d 721, 151 Neb 415.

(2) There was no variance between allegation of petition alleging that use by district of its power works caused water to seep from canal and reservoirs and damage plaintiff's lands and that waters had seeped from canal and reservoirs and had traveled through subsoil and alkali deposits and allegation in reply that damage to land was caused by land becoming saturated with water

pushed in and under topsoil by leakage of water from power works  
Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb 497

#### 82. Evidence held admissible

(1) To show difference between market value of land taken before and after taking

Neb—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890

(2) To show manner and extent to which lands have been affected, and quantity and quality of crops produced thereon both before and after the seepage, up to the time of trial  
Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49

#### Evidence held sufficient

(1) To warrant recovery

Neb—Faught v Platte Val. Public Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032

Utah—Knight v Utah Power & Light Co, 209 P 2d 221, 116 Utah 195.

(2) To show amount of plaintiff's damage

Neb—Faught v Platte Val Public Power & Irr Dist, supra

**Evidence held insufficient to sustain jury's verdict**

Neb—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890

#### 83. Held question of fact for jury

(1) Whether damage was caused by combined water from district's canal and reservoirs and water from another source, and would not have occurred from water of district's canal and reservoirs alone

Neb—McKain v Platte Valley Public Power & Irrigation Dist, 37 NW 2d 923, 151 Neb 497—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49

(2) Whether damage was caused by water seeping from district's canal and reservoirs, or whether it

water which has seeped from a public power company's reservoir and canal is the difference in the fair market value of the land immediately before and immediately after the seepage, taking into consideration all uses to which the land was put and for which it was reasonably adaptable,<sup>84</sup> and in addition thereto recovery may be had for dam-

ages to any annual crops growing thereon at the time<sup>85</sup> The value of the loss of the use of the land as to unmatured annual crops can be based on the value of the crop which could have been raised on the land except for the flooding, provided the evidence discloses sufficient data to determine that question with reasonable certainty.<sup>86</sup>

## XII. ICE

### § 383. In General

- a. Ownership and property in ice
- b. Ice companies

#### a. Ownership and Property in Ice

Ice forming on water belongs to the owner of the soil beneath the water

Ice forming on water belongs to the owner of the soil beneath the water.<sup>87</sup> So, ice forming on one's land by reason of flowage caused by a mill dam belongs to the landowner and not to the owner of the mill dam<sup>88</sup> Ice forming on a state canal or the basins connected with it, constructed on and entirely surrounded by state land, belongs to the state<sup>89</sup>

*As between trespassers* The act of a trespasser in cleaning ice on a mill pond and otherwise preparing it for cutting is not such a legal appropriation of it as will entitle him to recover from another trespasser for its conversion.<sup>90</sup>

*Ice skating* Any member of the public may exercise a common-law right to skate on the public waters of the state<sup>91</sup>

#### b. Ice Companies

In so far as concerns its manufacture and sale, ice is considered a public utility, but an ice company is a private corporation, not a public or quasi-public corporation.

It has been said that, in so far as concerns its manufacture and sale, ice is considered a public utility<sup>92</sup> An ice company is a private corporation, not a public or quasi-public corporation,<sup>93</sup> in which the public has no regulatory interest<sup>94</sup>

### § 384. Right to Cut and Remove Ice

A riparian owner or the owner of land on which an artificial pond is raised has the right to cut and sell ice which forms over that portion of the bed of the stream or the land which he owns, provided he does not interfere with the rights of others

was caused by natural conditions resulting from unusual precipitation, evaporation, and transpiration  
Neb—McKain v Platte Valley Public Power & Irrigation Dist, supra

(3) Whether waters escaping from district's reservoir and canal caused seeped condition on damaged lands  
Neb—Smith v Platte Valley Public Power & Irrigation Dist, supra

#### Instruction held proper

Instruction that jury could not allow damages for seepage caused by rainfall or surface water accumulating in ponds on surface of plaintiff's lands or lands in vicinity, and that district could only be held liable for damages that would not have occurred except on account of leakage from its reservoir and canal

Neb—Smith v Platte Valley Public Power & Irrigation Dist, supra

#### Instruction held improper as permitting double recovery

Neb—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890

#### Failure to instruct on issue held error

Neb—McKain v Platte Valley Pub-

lic Power & Irrigation Dist, 37 N W 2d 923, 151 Neb 497

84. Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49

#### Separate items constituting part of permanent damages

In action for permanent damage to farm because of seepage from defendant power district's reservoir, where jury is instructed that plaintiff may recover difference between reasonable market value of land not taken before and after taking of other land, his claims of damage to poultry and cowyards, basement of residence, driveway thereto, and pasture, cornstalks, and stubble land may not be submitted as separate items of damage, if they all constitute part of permanent damages, as such submission would permit double recovery on such items

Neb—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890

85. Neb—Smith v Platte Valley Public Power & Irrigation Dist, 36 NW 2d 478, 151 Neb 49—Asche v Loup River Public Power Dist, 296 NW 439, 138 Neb 890.

Damages for overflowing lands generally see supra § 38

86. Neb—Faught v Platte Val Public Power & Irr Dist, 25 NW 2d 889, 147 Neb 1032

87. Iowa—Marsh v McNider, 55 N W 469, 88 Iowa 390, 45 AmSR 240, 20 LRA 333  
67 CJ p 1459 note 94

88. Mass—Taft v Bridgeton Worsted Co, 130 NE 48, 237 Mass 385, 13 ALR 928  
67 CJ p 1459 note 96

89. NY—Green Island Ice Co v Norton, 82 NE 1126, 189 NY 529

90. Wis—Abbott v Cremer, 95 N W 387, 118 Wis 377

91. NH—Whitcher v. State, 181 A 549, 87 NH 405

92. Tex—City of Denton v. Denton Home Ice Co, Com App, 18 SW 2d 606.

93. Tex—Van Valkenburgh v Ford, Civ App, 207 SW 405, affirmed, Ford v Van Valkenburgh, Com App, 228 SW 194

94. Tex—Van Valkenburgh v Ford, Civ App, 207 SW 405, affirmed, Ford v Van Valkenburgh, Com App, 228 SW 194.

A riparian proprietor as the owner of the ice which forms over that portion of the bed of the stream which he owns, has the right to cut and sell it,<sup>95</sup> provided he does not interfere with the rights of a lower proprietor.<sup>96</sup> As against an upper owner, however, his right to cut and remove the ice is exclusive.<sup>97</sup> Such riparian owner may also make a pond for ice on his own land and divert into it a reasonable quantity of the water of the stream and detain it until it freezes and take the ice, provided his operations are reasonable in extent and do not materially interfere with the beneficial enjoyment of the stream by lower proprietors.<sup>98</sup> This will not constitute an unlawful diversion of the stream.<sup>99</sup>

Since ice formed on an artificial pond raised by a mill owner on another's land belongs to the owner of the land, the latter may cut and remove it,<sup>1</sup> as he would have the right to sell or dispose of trees growing on the land,<sup>2</sup> provided he does not thereby appreciably diminish the head of water at the dam or otherwise interfere with the proper and legitimate use of water as power for the mill.<sup>3</sup> This is true, even though the mill dam owner who caused the water to flow on the land of the other has the right to flowage.<sup>4</sup>

**Public waters.** In at least one jurisdiction, any member of the public may exercise a common-law right to cut ice in and on public waters.<sup>5</sup> Since ice forming on a state canal or the basins connected with it, which is constructed on, and entirely surrounded by, state land, belongs to the state, an adjoining owner has no right to interfere with the operations of one who has obtained from the state a license to cut ice on such a basin.<sup>6</sup> A ri-

parian proprietor on a "great pond" in New England has, however, no exclusive right to cut the ice, but that right is free to all persons who either own lands adjacent to the pond or can obtain access to it without trespass, the only limitation being that the ice-cutting operations must not interfere with the reasonable use of the pond by others or with the public right.<sup>7</sup> The right to cut ice from a stream which is a public highway is conditioned on compliance with a statute amounting to an act of public safety.<sup>8</sup>

**Municipality** The legislature may not empower a municipality to take ice, even for domestic purposes, without paying just compensation therefor.<sup>9</sup>

### § 385. Conveyances, Licenses, and Contracts

The right to take ice from specified waters may be the subject of a grant, license, or contract, or may pass as an appurtenance to the grantee or lessee of the land over which the ice forms.

The right to take ice from specified waters may be the subject of a grant,<sup>10</sup> license,<sup>11</sup> or contract,<sup>12</sup> or may pass as an appurtenance to the grantee or lessee of the land over which the ice forms.<sup>13</sup> A provision of a lease, granting the exclusive right to cut ice, that the grant did not exclude the grantor from cutting ice, is a mere personal privilege<sup>14</sup> which does not pass as an appurtenance to the land of the lessor on a sale thereof.<sup>15</sup> The lessee of a right to cut ice from a pond is entitled to drain and repair an outlet dam when reasonably necessary to prevent the ultimate escape of water, although the purchasers of a farm prior to the lease were given the right to use all the water a pipe of a stated size would convey.<sup>16</sup> Such lessee, in re-

95. Me—Wright v Woodcock, 29 A 953, 86 Me 113, 25 LRA 499 67 CJ p 1460 note 2

Cutting of ice on navigable waters see Navigable Waters §§ 56, 57

96. Me—In re Opinions of Justices, 106 A 865, 118 Me 503 67 CJ p 1460 note 3

97. Conn—Lawton v Herrick, 76 A 986, 83 Conn 417

98. Iowa—Gehlen v Knorr, 70 N W 757, 101 Iowa 700, 63 AmSR 416, 36 LRA 697 67 CJ p 1460 note 5

99. Iowa—Gehlen v Knorr, supra

1. Mass—Taft v Bridgeton Worst-ed Co, 130 NE 48, 237 Mass 385, 13 ALR 928 67 CJ p 1460 note 8

2. NY—Myer v Whitaker, 5 Abb NCas 172, 55 HowPr 376.

3. Mass—Taft v. Bridgeton Worst-

ed Co, 130 NE 48, 237 Mass 385, 13 ALR 928

67 CJ p 1460 note 9

4. NY—Valentino v Schantz, 109 NE 866, 216 NY 1, LRA 1916B 1044

67 CJ p 1460 note 10

5. NH—Whitcher v State, 181 A 549, 87 NH 405

6. NY—Green Island Ice Co v Norton, 82 NE 1126, 189 NY 529

7. Me—Barrett v Rockport Ice Co, 24 A 802, 84 Me 155, 16 LRA 774

67 CJ p 1461 note 12

8. NY—Linzey v American Ice Co, 115 NYS 767, 131 AppDiv 333, affirmed 91 NE 1116, 197 NY 605

67 CJ p 1461 note 14.

9. Me—In re Opinions of Justices, 106 A 865, 118 Me 503—Auburn Ice Co v Lewiston, 84 A. 1004, 109 Me 489

10. Conn—Southern New England Ice Co v Town of West Hartford, 159 A 470, 114 Conn 496 67 CJ p 1461 note 16

11. NH—Balcom v. McQuestien, 17 A 638, 65 NH 81

12. Iowa—Chariton Ice Co v Spring Lake Ice Co, 105 NW 1014, 129 Iowa 523

NY—Hazelton v Webster, 46 NY S 922, 20 AppDiv 277, affirmed 55 NE 1096, 161 NY 628

13. Conn—Southern New England Ice Co v Town of West Hartford, 159 A 470, 114 Conn 496. 67 CJ p 1461 note 19

14. Neb—Algermissen v. Crete Mills, 223 NW. 461, 118 Neb 72

15. Neb—Algermissen v. Crete Mills, supra

16. Conn—Ogmo v Elm Farm Milk Co, 97 A. 308, 90 Conn 393

pairing the outlet dam, is under a duty to do so with reasonable skill and promptness, so as not to prolong the interruption of the other's use<sup>17</sup>

### § 386. Injuries and Remedies

The owner of land under a stream or pond may maintain an action for damages against one who wrongfully drains off the water, and thus destroys the ice or prevents its formation, and in a proper case injunctive relief may be had, and one who is entitled to cut or remove ice may maintain an action against another who obstructs his exercise of such right.

The owner of land under a stream or pond may maintain an action for damages against one who wrongfully drains off the water, and thus destroys the ice or prevents its formation,<sup>18</sup> and in a proper case injunctive relief may be had<sup>19</sup> Likewise, one who is entitled to cut or remove ice may maintain an action against another who obstructs his exercise of such right,<sup>20</sup> cuts and carries away the ice,<sup>21</sup> or wantonly or maliciously destroys it,<sup>22</sup> or pollutes the ice or the pond on which it forms<sup>23</sup> An injunction may sometimes be granted to restrain interference with the exercise of a right to take ice;<sup>24</sup> but as a general rule such relief

is refused because the injured party can be adequately compensated in an action at law<sup>25</sup>

Where the right to the ice is founded on a revocable license without consideration the licensee cannot maintain an action for injury to the ice,<sup>26</sup> damage to such a license not being recognized in law<sup>27</sup> As long as the dam of one having flowage rights on another's land is maintained it must be so controlled as not to interfere with the ice of the servient estate,<sup>28</sup> and he may not do anything capriciously or maliciously which will injure such ice rights of the owner of the servient estate<sup>29</sup>

The right to use the waters of a stream in such manner as to cause injury to the ice of another may be acquired by prescription,<sup>30</sup> but for such right to exist all the elements needed to give rise to a prescriptive right must be present<sup>31</sup> The lessee of a mill with water power and rights of flowage appurtenant thereto, not being a riparian owner on the mill pond, cannot sue for the removal of ice therefrom<sup>32</sup> For negligence in the manner of cutting and removing ice resulting in injury to others, the one cutting and removing the ice will be held liable<sup>33</sup>

**WATERSHED.** The whole region or area contributing to the supply of a river or lake; drainage area, catchment area or basin.<sup>1</sup>

**WATERSTONES.** A division of the Keuper in England<sup>2</sup>

It is stated in 14 C.J.S. p 1303 note 85 that there

is nothing in the dictionaries to indicate that "cobblestone" and "waterstone" are synonymous or interchangeable.

**WATERTIGHT.** Imperviousness to water<sup>3</sup> It has been compared with "waterproof" see 93 C.J.S. p 582 notes 47, 48

17. Conn—Ognio v Elm Farm Milk Co, supra

18. Mass—Taft v Bridgeton Worst-ed Co, 141 NE 119, 246 Mass 444, 29 ALR 1319  
67 CJ p 1461 note 24

19. Mass—Roach v Sturdy, 145 N E 429, 250 Mass 357  
67 CJ p 1462 note 25

20. Mich—Lorman v Benson, 8 Mich 18, 77 AmD 435

21. US—E G Beechwood Ice Co v American Ice Co, CCMc, 176 F 435  
67 CJ p 1462 note 27

22. US—Sandusky Portland Cement Co v Dixon Pure Ice Co, Ill, 251 F 506, 163 CCA 500  
67 CJ p 1462 note 28

23. NY—First Trust Co of Albany v Pepper Bros, Contractors, 256 NYS 752, 235 App Div. 750  
67 CJ p 1462 note 29.

24. NY—Green Island Ice Co v Norton, 86 NYS 613, 42 Misc 238, affirmed 94 NYS 1147, 105 App Div 331, affirmed 82 NE 1126, 189 NY 529  
67 CJ p 1462 note 30

25. Neb—Eldemiller Ice Co v Guthrie, 60 NW 717, 42 Neb 238, 28 LRA 581  
67 CJ p 1462 note 31.

26. Mass—Taft v Bridgeton Worst-ed Co, 141 NE 119, 246 Mass 444, 29 ALR 1319

27. Mass—Taft v Bridgeton Worst-ed Co, supra

28. Mich—Pere Marquette Ry Co v Siegle, 244 NW 239, 260 Mich 89  
67 CJ p 1462 note 35

29. Mass—Taft v Bridgeton Worst-ed Co, 130 NE 48, 50, 237 Mass 385, 13 ALR 928  
67 CJ p 1463 note 36

30. Conn—Southern New England

Ice Co v Town of West Hartford, 159 A 470, 114 Conn 496

31. Conn—Southern New England Ice Co v Town of West Hartford, supra

67 CJ p 1463 note 38  
Prescriptive rights to water see supra §§ 158-166

32. Wis—Abbott v Cremer, 95 NW 387, 118 Wis 377—Reysen v Roate, 66 NW 599, 92 Wis 543

33. Mass—Moore Spinning Co v Boston Ice Co, 97 NE 62, 210 Mass 364  
67 CJ p 1463 note 40

1. Webster New Int D

Phrases employing the word and of which more recent adjudications have not been found see 67 CJ p 1463 notes 2-4

2. NY—Doyle v. New York, 69 NYS 120, 122, 58 App Div. 588

3. US—Newark Fireproofing Sash & Door Co v U S, N.J., 69 F Supp 121, 123, 107 Ct Cl 606.

**WATERWAY.** A channel for water, either natural or artificial;<sup>4</sup> a well-defined channel which the force of a body of water sufficiently large, necessarily collected in a natural conformation after heavy rain or the melting of large bodies of snow, as to require an outlet to some common reservoir, has made for itself, and which is the accustomed channel through which it flows or has ever flowed,<sup>5</sup> a channel through which water flows.<sup>6</sup> It has been held to be synonymous with "watercourse" see 93 C.J.S. p 582 note 41.

**WATERWORKS.** A term which includes streams, springs, wells, pumps, engines and all machinery, lands, buildings, and things for supplying or used for supplying water;<sup>7</sup> the grounds, waters, and structures necessary to prepare water for domestic uses and carry and distribute it.<sup>8</sup>

Waterworks of municipalities are treated in various places throughout the title Municipal Corporations, and for specific references see the index to that title sub verbis Water and water supply.

**WATT.** Defined see Electricity § 1 b.

**WAVE RESPONSE DEVICE.** A term applied to a device used in wireless telegraphy, also called a

"detector," see Telegraphs, Telephones, Radio, and Television § 290

**WAX.** A general<sup>9</sup> and comprehensive<sup>10</sup> term, used to denote any substance capable of receiving and retaining an impression;<sup>11</sup> originally a fatty substance of animal origin, especially that secreted by bees; now, by extension, any one of various similar substances of animal, mineral, or vegetable origin;<sup>12</sup> one of the various substances and products resembling beeswax in appearance, consistency, plasticity, and the like, or used for like purposes.<sup>13</sup>

**WAY.** The word "way," which is derived from the Saxon,<sup>14</sup> is a broad and generic term,<sup>15</sup> and in one sense it means a right;<sup>16</sup> a right of use for passengers which may be private or public;<sup>17</sup> a right of passing over another man's ground,<sup>18</sup> a right of one person, or of the community at large, to pass over the land of another;<sup>19</sup> a privilege of going over another's land,<sup>20</sup> a right of way.<sup>21</sup> The word "way" imports, ex vi termini, the right of passage over the land of another along a particular line,<sup>22</sup> not the right to vary it at pleasure, and go in different directions.<sup>23</sup>

In a strictly legal sense,<sup>24</sup> a "way" is an easement,<sup>25</sup> a servitude imposed upon corporeal prop-

4. Or—Smith v Cameron, 262 P 946, 948, 123 Or 501  
67 C.J. p 1463 note 6

Phrases employing the word and of which more recent adjudications have not been found see 67 C.J. p 1463 note 11—p 1464 note 14

5. Okl—Burkett v Bayes, 187 P 214, 215, 78 Okl 8  
67 C.J. p 1463 note 7

6. Okl—Corpus Juris cited in Application of Oklahoma Planning and Resources Bd., 203 P2d 416, 418, 201 Okl 178  
67 C.J. p 1463 notes 6—8.

7. Pa—Public Supply of Water by Coal Companies, 10 Pa Dist & Co 570, 571  
Eng—West Surrey Water Co v Chertsey Union, [1894], 3 Ch 513, 518

Phrases employing the word and of which more recent adjudications have not been found see 67 C.J. p 1464 notes 19—21

8. N.Y.—People ex rel S J Groves & Sons Co v Hamilton, 238 N.Y.S. 81, 83, 227 App Div 356

9. Mo—Swink v Thompson, 31 Mo 336, 339

10. U.S.—Philip A. Hunt Co v Mallinckrodt Chemical Works, D.C. N.Y., 72 F Supp 865, 871

#### Carnauba wax

A vegetable wax

U.S.—U S v Charles Morningstar

& Co, N.Y., 168 F 541, 542, 94 C.A. 123

#### Carnauba wax substitute

An article compounded of carnauba wax and paraffin, and when completed is to all appearance a waxy substance, used for the same purposes as are other waxes, and containing no animal wax

U.S.—U S v Charles Morningstar & Co, supra

Other phrases employing the word "wax" and of which more recent adjudications have not been found see 67 C.J. p 1464 notes 33—36

11. Mo—Swink v Thompson, 31 Mo 336, 339  
67 C.J. p 1464 note 29

12. U.S.—U S v Coccato, 4 Ct Cust App 506, 507  
67 C.J. p 1464 note 30

#### Of animal, plant, or mineral origin

U.S.—Philip A. Hunt Co v Mallinckrodt Chemical Works, D.C. N.Y., 72 F Supp 865, 871

13. U.S.—P. Beiersdorf & Co Inc v U S, 31 C.C.P.A. (Customs) 158, 163

#### Composed of esters

"In general, waxes are distinguished as composed of esters of the higher alcohols and of free fatty acids" U.S.—Philip A. Hunt Co v Mallinckrodt Chemical Works, D.C. N.Y., 72 F Supp 865, 871

14. Ind—Wild v Deig, 43 Ind 455, 458, 13 Am R 399

15. Ill—Diller v St Louis, S & P R R, 136 NE 703, 704, 304 Ill. 373

16. Mo—Bunch v Wheeler, 109 S.W. 654, 655, 210 Mo 622

17. Ind—Wild v Deig, 43 Ind 455, 458, 13 Am R 399

18. Ga—Boyd v Hand, 65 Ga 468, 470

Ind—Lucas v Rhodes, 94 NE 914, 917, 48 Ind App 211  
67 C.J. p 1464 note 45

19. Nev—Chollar-Potosi Min Co v Kennedy, 3 Nev 361, 373, 93 Am D 409  
67 C.J. p 1464 note 44

20. Mo—Cox v Tipton, 18 Mo App 450, 451, 455

21. Mo—Cox v Tipton, supra

22. W.Va.—Crosier v Brown, 66 S.E. 326, 327, 66 W.Va. 273, 25 L.R.A. NS, 174  
67 C.J. p 1464 note 46

23. Utah—Lund v Wilcox, 97 P 33, 35, 34 Utah 205  
W.Va.—Crosier v Brown, 66 S.E. 326, 327, 66 W.Va. 273, 25 L.R.A. NS, 174

24. Nev—Chollar-Potosi Min Co v Kennedy, 3 Nev 361, 373, 93 Am D 409

25. Nev—Chollar-Potosi Min Co v Kennedy, supra.

erty;<sup>26</sup> and it is not a part of the corporeal property.<sup>27</sup>

However, the term "way" is sometimes used in the same sense as "road,"<sup>28</sup> and, when so used, "way" means a path, course, or track leading from one place to another or along which one goes; a road, street, passage, or channel;<sup>29</sup> and it has been said that technically and strictly a "way" is the passage over the land of another,<sup>30</sup> the right of use of such passage being known as a "right of way" as stated in 77 C J S. p 393 note 20.

Since a "way" is a means of passage from some place to some other place,<sup>31</sup> a roadway or path which leads to no place or object to which a person has an interest or right to go is not a "way."<sup>32</sup>

"Way" has been held to be synonymous with, or equivalent to, "lane" see 52 C J S. p 771 note 16, and "passageway" see 69 C J S. p 45 note 17, and has been compared with, or distinguished from, "boulevard" see 11 C J S. p 533 note 99, and "highway" see Highways § 1 a. It is also stated in Highways § 1 c that in its broadest sense "road" and "way" are deemed to be synonymous, although, strictly speaking, the terms are not synonymous.

The duty of a master to use ordinary care to furnish the servant with a reasonably safe place for his work extends to the exercise of ordinary care to see that the ways customarily used by the servant in passing from one part of the premises to another

in the course of his employment are reasonably safe, as stated in Master and Servant § 219 b.

*Phrases* employing the word "way" are set out in the note <sup>33</sup>

**WAYBILL.** See Carriers §§ 119, 122.

**WAYFARER.** A traveler; a guest; a transient comer to an inn for lodging or entertainment.<sup>34</sup>

**WAYGOING CROP.** See Landlord and Tenant § 349

**WAYLAY.** To lie in wait for in the way; to take steps to meet or encounter in the way, especially with a view of taking by surprise, seizing, robbing, or killing, to beset in ambush <sup>35</sup>

**WAYLEAVE.** An English term,<sup>36</sup> meaning a right of way <sup>37</sup> It is stated in 39 C J S. p 780 note 65 that in the United States the equivalent expression is "haulage royalty."

**W. D.** As an abbreviation for "western district" and "warranty deed" see 1 C J S. p 276 note 5.

**WE.** A pronoun,<sup>38</sup> the plural of "I,"<sup>39</sup> although it may be used in an editorial sense<sup>40</sup> for the first person singular <sup>41</sup>

Since there is no personal pronoun which is properly adapted for use by a corporation, "we" is fre-

26. Cal—San Francisco v Grote, 47 P 938, 939, 5 Cal Unrep Cas 612, 36 L R A 502  
87 C J p 1465 note 50

27. Cal—San Francisco v. Grote, supra  
47 C J p 1465 note 50

28. Nev—Chollar-Potosi Min Co v Kennedy, 3 Nev 361, 373, 93 Am D 409

Perhaps an improper use of term  
Nev—Chollar-Potosi Min Co v Kennedy, supra

29. Ill—Diller v St Louis, S & P R R, 136 NE 703, 704, 304 Ill 373

30. US—Postal Tel Cable Co v Southern R Co, CCNC, 90 F 30, 32

31. Mass—Dennis v Wilson, 107 Mass 591, 593

32. Mass—Dennis v Wilson, supra

33. *Phrases*

(1) "Escape way" see Mines and Minerals § 3 h

(2) "Horse way" compared with "bridle road" see 11 C J S. p 1138 note 6

(3) "Private way" see Private

Roads § 1, and distinguished from "cartway" see 13 C J S. p 1767 note 3

(4) "Way of necessity" see the index to the title Easements

(5) Other phrases employing the word "way" and of which more recent adjudications have not been found see 67 C J p 1465 notes 58-67

34. Tenn—Meacham v Galloway, 52 SW 859, 861, 102 Tenn 415, 73 Am SR 886, 46 L R A 319

**Members of armed forces**

Officers of the army and navy and soldiers and sailors who have no permanent residence which they can call home may be regarded as wayfarers when stopping at public inns or hotels

NY—Hancock v Rand, 94 NY. 1, 6, 46 Am R 112

35 Webster New Int D  
67 C J p 1465 notes 77, 78

36. Ark—Quality Excelsior Coal Co v Reeves, 177 SW 2d 728, 732, 206 Ark 713

37. Ga—Jones & Co v Venable, 47 SE 549, 551, 120 Ga 1, 1 Ann Cas 185

67 C J p 1465 note 79.

**Wayleave rent**

US—Speck v Cottonwood Coal Co, CCA Mont, 116 F 2d 489, 491

38. Ala—St Clair Springs Hotel Co v Balcomb, 108 So 858, 861, 215 Ala 12

Tenn—Edelen Transfer & Storage Co v Willis, 66 SW 2d 214, 216, 16 Tenn App 99

**Plural pronoun**

Nev—Mitchell v. O'Neale, 4 Nev 504, 518

**Phrases** employing the word "we" and of which more recent adjudications have not been found see 67 C J p 1466 notes 85-93

39. Tenn—Edelen Transfer & Storage Co v Willis, 66 SW 2d 214, 216, 16 Tenn App 99

**In a writing,** "we" includes the writer with another  
Tenn—Edelen Transfer & Storage Co v Willis, supra

40. NY—Smith v Maine, 260 NY. S 409, 419, 145 Misc 521

41. Nev—Mitchell v. O'Neale, 4 Nev. 504, 518.

quently used,<sup>42</sup> but the word is not indicative in any conclusive way either of partnership or employment.<sup>43</sup>

The construction placed upon the word "we" when used in a negotiable instrument to describe the original parties is treated in Bills and Notes § 32 b (5).

**WEAK.** Lacking in physical strength; lacking in bodily vigor, as from age, sickness, or fatigue; wanting in energy, activity, or vigor<sup>44</sup> It has been said to be a relative term having reference to the medium of the class to which it is applied.<sup>45</sup>

**WEALTH.** A relative,<sup>46</sup> indefinite, and general<sup>47</sup> term, in ordinary use, frequently employed to imply a great fortune or vast possessions<sup>48</sup>

**42** Ill—Williams v. Harris, 64 N E 988, 990, 198 Ill 501

**Aptly designates corporation**

Wyo—Kennedy & Parsons Co v Lander Dairy & Produce Co, 252 P 1036, 1038, 36 Wyo 58, 51 A LR 315

**Denotes corporation aggregate**

Ill—Scanlan v Keith, 102 Ill 634, 645, 40 Am R 624—New Market Sav Bank v Gillet, 100 Ill 254, 262, 39 Am R 39—Miers v Coates, 57 Ill App 216, 220

Mich—Wright v Drury Petroleum Corporation, 201 N.W. 484, 485, 229 Mich 542.

Mo—Reifeiss v Barnes, App, 166 SW 2d 225, 229

**Understood to mean the company**

NY—Anthony v American Glucose Co, 41 NE 23, 25, 146 NY 407

**43.** NY—Smith v Maine, 260 NY S 409, 419, 145 Misc 521

**44.** New Standard D

**Phrases**

(1) "Weak alkaline solution"

US—Lumber Anti-Stain Co v Nester, Mich, 178 F 927, 933, 102 C CA 299

(2) "Weak marks" as trade-marks which are merely suggestive or de-

scriptive see Trade-Marks, Trade-Names, and Unfair Competition § 7 c

(3) "Weak mind," "weak-minded," "weak-mindedness," and "weakness of mind" see Insane Persons § 2 d

**45.** NY—People v Crilley, 20 Barb 246, 248

**46.** Ga—Branham v. State, 22 SE 957, 96 Ga 307

67 C J p 1466 note 96

**47** Ill—Warner v. Warner, 85 NE 630, 637, 235 Ill 448

**48** Ga—Branham v. State, 22 SE 957, 96 Ga 307.



## WEAPONS

This Title includes the right to bear arms in self-defense or in defense of the state; regulation of manufacture, dealing in, and use of weapons, liabilities for injuries therefrom caused by negligence; and offenses of having or carrying weapons concealed or in any other manner prohibited, pointing or shooting firearms, etc, not constituting any other distinct offense.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

### *Analysis*

#### I. IN GENERAL, §§ 1-2

#### II. CRIMINAL RESPONSIBILITY, §§ 3-23

#### III. PENALTIES AND FORFEITURES, §§ 24-25

#### IV. CIVIL LIABILITY FOR NEGLIGENT OR ILLEGAL USE, SALE, GIFT, LOAN, OR MANUFACTURE, §§ 26-33

### *Sub-Analysis*

#### I. IN GENERAL—p 469

- § 1. Definitions—p 469
- 2 Right to bear arms; constitutional and statutory regulation—p 472

#### II. CRIMINAL RESPONSIBILITY—p 480

- § 3 Carrying or possession of weapons—p 480
- 4 — Elements of offenses in general—p 481
- 5 — Intent, purpose, or motive—p 482
- 6 — Weapons prohibited—p 487
- 7 — Places prohibited—p 490
- 8 — Manner of carrying, concealing, or possessing—p 491
- 9 — Persons, places, and occasions exempted or privileged—p 494
- 10 — Defenses in general—p 504
- 11 — Licenses or permits—p 504
- 12. — Indictment and information—p 506
- 13 — Evidence—p 508
- 14. — Trial and review—p 513
- 15 — Sentence and punishment—p 515
- 16 Pointing or exhibiting weapons—p 516
- 17. — Nature and elements of offenses, and defenses—p 517
- 18 — Prosecution and punishment—p 518
- 19. Shooting firearms—p 520
- 20 — Nature and elements of offenses, and defenses—p 520
- 21. — Prosecution and punishment—p 522
- 22 Sale, gift, or loan of weapons—p 523
- 23 Other offenses—p 524

#### III. PENALTIES AND FORFEITURES—p 524

- § 24. In general—p 524
- 25. Confiscation of weapon involved in offense—p 524

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See also descriptive word index in the back of this Volume

#### IV. CIVIL LIABILITY FOR NEGLIGENT OR ILLEGAL USE, SALE, GIFT, LOAN, OR MANUFACTURE—p 525

- § 26 In general—p 525
- 27 Use—p 525
- 28 — Liabilities—p 525
- 29 — Procedure—p 528
- 30 Sale, gift, or loan—p 531
- 31. — Liabilities—p 531
- 32. — Procedure—p 532
- 33. Manufacture—p 533

See also descriptive word index in the back of this Volume

### I. IN GENERAL

#### § 1. Definitions

A weapon is an instrument of offensive or defensive combat, and the word "arms" is especially applied to those things which are designed for fighting and recognized as such. Terms such as "firearm", "gun", "pistol", "revolver", "repeater", "rifle", "slungshot", "lethal weapon", "deadly weapon", and "bludgeon" have been defined by the courts

A weapon is an instrument of offensive or defensive combat,<sup>1</sup> or anything used, or designed to be used, in destroying, defeating, or injuring an enemy.<sup>2</sup> With respect to the particular offenses hereinafter dealt with such as the carrying, possessing, selling, or exhibiting, of weapons, or, in the case of firearms, the pointing, or shooting thereof, the word "weapon" is ordinarily used in a more restricted sense, by reason of the fact that statutes creating such offenses usually specifically name weapons intended to be brought within their scope, and hence are limited to the weapons named, or to others of a similar nature.<sup>3</sup>

*Arms* While in a loose sense, the term "arms" may be employed as including objects of any kind that may be used as weapons,<sup>4</sup> nevertheless as distinguished from "weapon," which, as already pointed out, may properly designate anything that can be wielded in fight, the word "arms" is especially applied to those things which are designed for fighting and recognized as such, and it includes means of defense as well as of offense,<sup>5</sup> but it does not include an imitation weapon incapable of such use.<sup>6</sup>

*Small arms* In military usage, all portable firearms are called "small arms" as distinguished from "guns," the latter term being reserved for pieces of ordnance.<sup>7</sup>

*Firearms* A "firearm" may be defined as a weapon which acts by the force of gunpowder,<sup>8</sup> or as any weapon from which a shot is discharged by force of an explosive.<sup>9</sup> The term is usually applied, however, only to small arms.<sup>10</sup> A revolver

1. US—Lunde Arms Corp v Stanford, D C Cal, 107 F Supp 450, 452.  
Ky—*Corpus Juris* quoted in Perry v Commonwealth, 151 S W 2d 377, 379, 286 Ky 587.  
NY—People v. Simons, 207 N Y S 56, 57, 124 Misc 28.  
68 C J p 4 note 2

2. US—Lunde Arms Corp v Stanford, D C Cal, 107 F Supp 450, 452.  
Ky—*Corpus Juris* quoted in Perry v Commonwealth, 151 S W 2d 377, 379, 286 Ky 587.  
68 C J p 4 note 3.

3. Ky—Perry v Commonwealth, 151 S W 2d 377, 286 Ky 587

4. Ark—State v Buzzard, 4 Ark 18, 21.

"Arms" as used in constitutional guaranties see infra § 2

"Armed" see 6 C J S p 341 note 30

5. NY—People ex rel Griffin v Hunt, 270 N Y S 248, 254, 150 Misc 163

6. NY—People ex rel Griffin v Hunt, supra

7. Webster New Int D

8. NY—People v. Anderson, 260 N Y S 329, 331, 236 App Div 586—People v Schmidt, 222 N Y S 647, 649, 221 App Div 77

People, on Complaint of Altomari, v. Evergood, 74 N Y S 2d 12, 14

68 C J p 4 note 17

To be a "firearm" an implement must be a "weapon"

US—Lunde Arms Corp v Stanford, D C Cal, 107 F Supp 450

9. NY—People v Anderson, 260 N Y S 329, 331, 236 App Div 586

*Corpus Juris* cited in People, on Complaint of Altomari v Evergood, 74 N Y S 2d 12, 14

68 C J p 4 note 18

#### Commonly accepted usage

A "firearm", by commonly accepted usage, necessarily connotes the action of a chemical explosive such as gunpowder, which action is in the nature of combustion of some sort in a weapon

DC—Tendler v District of Columbia, Mun App, 50 A 2d 263

10. Webster New Int D.

so out of repair that it cannot be fired is not a firearm<sup>11</sup>

**Gun** "Gun" is a generic term,<sup>12</sup> and in popular usage denotes any portable firearm,<sup>13</sup> or weapon that throws a projectile or missile to a distance,<sup>14</sup> but usually does not include a pistol,<sup>15</sup> although "pistol" and "gun" are sometimes used interchangeably<sup>16</sup> In military usage, however, only cannon or pieces of ordnance are called guns<sup>17</sup>

**Pistol.** A "pistol" has been defined as a gun,<sup>18</sup> a small firearm having a curved stock or butt to fit the hand and a short barrel or barrels,<sup>19</sup> a short,<sup>20</sup> small, light<sup>21</sup> firearm, and intended to be

aimed<sup>22</sup> and fired<sup>23</sup> from one hand Pistols are now usually either revolvers, or automatic, or semi-automatic, magazine pistols<sup>24</sup> The pistol is frequently the subject of statutory regulation<sup>25</sup>

A "pocket pistol" is such a pistol as a man ordinarily carries, or may conveniently carry, or actually carries on his person, in his pocket<sup>26</sup> A "belt pistol" is such a pistol as a man usually carries, or that may be conveniently carried, or that is actually carried on the person in a belt<sup>27</sup>

**Revolver** A revolver is a firearm<sup>28</sup> or gun,<sup>29</sup> especially a pistol,<sup>30</sup> having a breechloading chambered cylinder so arranged that the cocking of the

11. NY—People v Simons, 207 N Y S 56, 57, 124 Misc 28  
People v Boitano, 18 NYS 2d 644, 645

Unloaded or defective pistol as constituting weapon prohibited by statute see *infra* § 6

12. Mo—State v Barrington, 95 S W 235, 263, 198 Mo 23

## Shotgun compared

Fla—Henderson v State, 78 So 427, 428, 75 Fla 464

13. Webster New Int D

14. Wis—Harris v Cameron, 51 N W 437, 438, 81 Wis 239, 243, 244, 29 Am SR 981

## Other definitions

(1) A "gun" is a metal tube for firing projectiles by the force of gunpowder or other explosives, together with its stock, carriage, or other attachments

Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839

(2) A gun is a lengthy firearm shot from the shoulder

Ky—Campbell v Commonwealth, 174 S W 2d 778, 779, 295 Ky 511.

15. Webster New Int D

## Pistol distinguished

While both gun and pistol are commonly known as shooting weapons, the distinguishing characteristic is that a pistol is shorter in length than what is generally understood as a gun, and it is usually not fired from the shoulder when shooting  
Ky—Campbell v Commonwealth, *supra*

16. Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839

Ky—Campbell v Commonwealth, 174 S W 2d 778, 779, 295 Ky 511.  
68 CJ p 4 note 24

17. Webster New Int D

When mounted on a carriage a "gun" is called a cannon

Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839.

18. Iowa—State v. Christ, 177 NW 54, 57, 189 Iowa 474  
48 CJ p 1210 note 7

## History

(1) The name "pistol" is derived from Pistola, in Italy, where pistols were first made

Ark—Fife v State, 31 Ark 455, 461, 25 Am R 556

Tenn—Burks v State, 36 S W 2d 892, 893, 162 Tenn 406

(2) "The pistol earliest in use was a matchlock arm, and yet a fire-arm, the lock containing a match for firing it This was succeeded by the 'flint and steel' lock, and thus by the percussion lock The manner in which the weapon can be fired does not enter into its definition, however it may affect its value and utility"  
Ala—Atwood v. State, 53 Ala 508, 509

19. Ill—People v Borgeson, 166 NE 451, 455, 335 Ill 136

## Handgrip

A "pistol" is a small firearm, usually mounted on a handgrip

Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839

20. Ky—Campbell v. Commonwealth, 174 S W 2d 778, 779, 295 Ky 511

Mo—State v Barr, 102 S W 2d 629, 632, 340 Mo 738

21. Ala—Atwood v State, 53 Ala 508, 509

NY—People v Anderson, 260 NYS 329, 236 App Div 586

Tenn—Burks v State, 36 S W 2d 892, 893, 162 Tenn 406

22. Ky—Campbell v. Commonwealth, 174 S W 2d 778, 779, 295 Ky 511

Mo—State v Barr, 102 S W 2d 629, 632, 340 Mo 738

23. Ark—Fife v State, 31 Ark 455, 461, 25 Am R 556

Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839

Ky—Campbell v Commonwealth, 174 S W 2d 778, 779, 295 Ky 511.

Mo—State v Barr, 102 S W 2d 629, 632, 340 Mo 738

Neb—Bright v State, 252 NW 386, 387, 125 Neb 817

Tenn—Burks v State, 36 S W 2d 892, 893, 162 Tenn 406

24. Mo—State v Barr, 102 S W 2d 629, 632, 340 Mo 738

Neb—Bright v State, 252 NW 386, 125 Neb 817

"Pistol" includes derringers, revolvers, or automatic pistols

Ill—People v Borgeson, 166 NE 451, 455, 335 Ill 136

## Automatic pistol

A weapon was held to be an automatic pistol where the recoil from its discharge injected into chamber of weapon another cartridge from magazine inserted in handle

Neb—Bright v State, 252 NW 386, 387, 125 Neb 817

25. Ill—People v Borgeson, 166 NE 451, 335 Ill 136

Neb—Bright v State, 252 NW 386, 125 Neb 817

Ohio—Schraeder v State, 162 NE 647, 28 Ohio App 248

Tenn—Burks v State, 36 S W 2d 892, 162 Tenn 406

48 CJ p 1210 note 11.

26. Tenn—Porter v State, 7 Baxt 106, 108

## "Army pistol" contrasted

Tenn—Porter v State, *supra*

27. Tenn—Porter v State, *supra*.

## "Army pistol" contrasted

Tenn—Porter v State, *supra*.

28. Neb—Bright v. State, 252 NW 386, 387, 125 Neb 817

Ohio—Schraeder v State, 162 NE 647, 648, 28 Ohio App 248

Unloaded or defective pistol as constituting weapon prohibited by statute see *infra* § 6

29. Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839

30. Mo—State v Barr, 102 S W 2d 629, 632, 340 Mo 738

Neb—Bright v State, 252 N.W 386, 387, 125 Neb 817.

hammer or movement of the trigger in its return motion revolves it and brings the next cartridge in line for firing<sup>31</sup> Although the terms "pistol" and "revolver" are used in common parlance indiscriminately as applying to either class of weapons,<sup>32</sup> strictly speaking, a revolver must have a revolving cylinder, chambered for cartridges<sup>33</sup>

**Repeater** A repeater is a magazine gun,<sup>34</sup> a type of pistol which has been held to be a soldier's weapon,<sup>35</sup> a well-known army weapon<sup>36</sup>

**Rifle.** As a noun, the word "rifle" has a well defined meaning;<sup>37</sup> it is a firearm, of whatever size, having on the surface of its bore spiral grooves, called rifling, to impart rotary motion to the projectile, insuring greater accuracy of fire<sup>38</sup> A "gun" when it is mounted on a stock requiring the use of both hands is commonly called a rifle, musket, carbine, or fowling piece<sup>39</sup> A pistol differs from a

musket chiefly in size.<sup>40</sup>

**Bludgeon** A bludgeon is a short stick, with one end loaded, used as an offensive weapon<sup>41</sup>

**Slungshot.** A slungshot is a ball of shot or metal covered with leather, and a band of elastic or leather, attached to such ball, and made so that it can be attached to the wrist or arm of a person;<sup>42</sup> a metal ball of small size with a string attached, used for striking,<sup>43</sup> a small mass of metal or stone fixed on a flexible handle, strap, or the like, used as a weapon<sup>44</sup> The general term "sap" includes a "slungshot"<sup>45</sup> A "slungshot" is not to be confused with a "sling-shot," the latter being a boy's toy or catapult<sup>46</sup>

A "dangerous" or "deadly" weapon may be defined as one likely to produce death or great bodily harm by the use made of it,<sup>47</sup> but a weapon capable of

Ohio—Schraeder v State, 162 NE 647, 648, 28 Ohio App 248.  
54 C J p 773 note 69

#### Revolving pistols

Revolvers are often called "revolving pistols"  
Mo—State v Barr, 102 SW 2d 629, 632, 340 Mo 738

31 Ohio—Schraeder v State, 162 NE 647, 648, 28 Ohio App 248

#### Other definition

"Revolver" has a cylinder of several chambers or, formerly, several barrels so arranged as to revolve on an axis, and be discharged in succession by the same lock  
Neb—Bright v State, 252 NW 386, 387, 125 Neb 817.

**Rifle** is not included within the term

Wis—Taylor v Seil, 97 NW 498, 120 Wis 32

32. Mo—State v Barr, 102 SW 2d 629, 633, 340 Mo 738

Neb—Bright v State, 252 NW 386, 387, 125 Neb 817

33. Neb—Bright v. State, supra.

34. Century D

**Term held not applicable to revolver**  
Ark—Fife v State, 31 Ark 455, 461, 25 Am R 556

Tenn—Andrews v State, 3 Heisk 165, 187, 8 Am R 8

35. Tenn—Andrews v. State, supra  
54 C J p 402 note 55

36. Tenn—State v Wilburn, 7 Baxt 57, 60, 32 Am R 551

37. Miss—Johnson v Hazelhurst Hardware Co, 74 So 294, 295, 113 Miss 428

38. Webster New Int D.  
54 C J p 807 note 8

#### Shotgun distinguished

"The musket, rifle, and pistol, so far as we are aware, have always

shot a solid ball, while the weapon in question [shotgun] shoots a light load of small shot"

Tenn—Burks v State, 36 SW 2d 892, 893, 162 Tenn 406

**Flobert rifle** is a smooth bore rifle, no longer manufactured, which was commonly used in shooting galleries and for target practice of that kind  
Miss—Johnson v Hazelhurst Hardware Co, 74 So 294, 295, 113 Miss 428

**Target rifle** is a low power twenty-two caliber rifle, such as shoots twenty-two caliber short cartridges  
Miss—Johnson v Hazelhurst Hardware Co, supra

39. Ga—Muse v Interstate Life & Accident Co, 166 SE 219, 220, 45 Ga App 839

40. Ark—Fife v State, 31 Ark 455, 461, 25 Am R 556

Tenn—Burks v State, 36 SW 2d 892, 162 Tenn 406

41. N.C—State v Phillips, 10 SE 463, 464, 104 NC 786

#### Similar definition

A short club commonly loaded at one end, or bigger at one end than at the other, used as a weapon  
W Va—State v Lett, 60 SE 782, 783, 63 W Va 665

42. Tex—Corpus Juris quoted in Smith v State, 140 SW 2d 452, 454, 139 Tex Cr 355—Vargas v State, 79 SW 2d 860, 861, 128 Tex Cr 139  
58 C J p 773 note 60

#### Definition too broad

Court's definition of "slung shot" as weapon of offense or defense, and stating that it became a deadly weapon when manner of use was calculated to produce death or serious bodily injury was too broad

Tex—Smith v State, 140 SW 2d 452, 454, 139 Tex Cr. 355.

43. Tex—Corpus Juris quoted in Smith v State, 140 SW 2d 452, 454, 139 Tex Cr 355—Geary v State, 108 SW 379, 53 Tex Cr 38, 39

44. Cal—People v Mulherin, 35 P 2d 174, 175, 140 Cal App 212—People v Williams, 279 P 1040, 100 Cal App 149

Tex—Corpus Juris quoted in Smith v State, 140 SW 2d 452, 454, 139 Tex Cr 355

#### "Blackjack" distinguished

Cal—People v Williams, 279 P 1040, 100 Cal App 149

45. Cal—People v Mulherin, 35 P. 2d 174, 175, 140 Cal App 212

46. Cal—People v Mulherin, supra

47. Cal—People v Crowl, 82 P 2d 507, 511, 28 Cal App 2d 299

Ill—People v Dwyer, 155 NE 316, 324 Ill 363

Kan—Parman v Lemmon, 244 P 227, 119 Kan 323, 44 A L R 1500

Ky—Burgess v Commonwealth, 195 SW 445, 176 Ky 326

La—State v. Penton, 102 So 14, 157 La 68

Me—State v Quigley, 199 A 269, 271, 135 Me 435

Md—Crawford v State, 197 A 866, 867, 174 Md 175

Mich—People v Goolsby, 279 NW 867, 868, 284 Mich 375

Mo—State v Painter, 44 SW 2d 79, 83, 329 Mo 314

N M—State v Vargas, 74 P 2d 62, 65, 42 NM 1—State v Walden, 70 P 2d 149, 150, 41 NM 418

NC—State v Watkins, 158 SE 393, 394, 200 NC 692

Okl—Martin v State, 94 P 2d 270, 274, 67 Okl Cr 390—Cooke v State, 12 P 2d 244, 53 Okl Cr 348—Fairry v State, 213 P. 910, 912, 23 Okl Cr 215

Tenn—Higsaw v Creech, 69 SW 2d 249, 251, 17 Tenn App. 573.

producing death is not necessarily a weapon likely to produce death.<sup>48</sup> A deadly weapon is generally recognized and known to be an "offensive weapon"<sup>49</sup>

*Lethal weapon.* A weapon is lethal or not according to its capability to produce death or great bodily harm in the manner in which it is used<sup>50</sup>

## § 2. Right to Bear Arms; Constitutional and Statutory Regulation

- a Nature of right
- b "Arms" defined
- c Power to regulate
- d. Regulating carrying or possession

Tex—Scroggins v State, 45 S W 2d 983, 985, 119 Tex Cr 32—Newsom v State, 39 S W 2d 69, 118 Tex Cr 496—Price v State, 220 S W 89, 87 Tex Cr 163

Vt—State v Deso, 1 A 2d 710, 714, 110 Vt 1

W Va—State v Hedrick, 130 S E 295, 298, 99 W Va 529

Term defined in connection with particular offenses

Assault see Assault and Battery § 77

Homicide see Homicide § 25

Robbery see Robbery § 28

Carrying or possessing see *infra* § 6

**It is unnecessary that an injury be inflicted which is likely to produce death or give rise to apprehension before the weapon be deadly**  
Tex—Price v. State, 220 S W 89, 87 Tex Cr 163

### Held to be deadly weapons

(1) Billy club  
Okl—Cooke v State, 12 P 2d 244, 53 Okl Cr 348

(2) A club or stick of wood, three-feet long and two and one-half inches wide  
Mo—State v. Fletcher, 190 S W 317

(3) Heavy cuspidor  
Pa—Commonwealth v Le Grand, 9 A 2d 896, 899, 336 Pa 511.

(4) Metal knucks used for inflicting blows with fist  
Okl—Reardon v. State, 2 P 2d 100, 51 Okl Cr 407

(5) Pistol, shotgun, or revolver  
Cal—People v Freeman, 260 P 826, 86 Cal App 374—People v Shaffer, 254 P 666, 81 Cal App 752—People v Egan, 246 P 337, 77 Cal App 279

Ill—People v Emerling, 173 N E 474, 341 Ill 424

Or—Coghlan v Miller, 211 P 163, 106 Or 46

48. Okl—Martin v State, 94 P 2d 270, 274, 67 Okl Cr 390

**Claw hammer** cannot be said as a matter of law to be a dangerous weapon without reference to the manner of its use

Okl—Wilcox v State, 166 P 74, 13 Okl Cr 599

**Hands** are not considered a "deadly weapon per se"

Tex—Gipson v State, 181 S W 2d 76, 77, 147 Tex Cr 428

### Knives

(1) An ordinary pocket knife is not a "deadly weapon per se"  
Okl—Ponkilla v State, 99 P 2d 910, 912, 69 Okl Cr 31

(2) An ordinary penknife is not necessarily a "deadly weapon"  
Okl—Martin v State, 94 P 2d 270, 274, 67 Okl Cr 390—Clemons v State, 128 P 739, 741, 8 Okl Cr 452—Brown v State, 104 P. 78, 79, 3 Okl Cr 42

**Rock** is not necessarily a "deadly weapon"

Ga—Greenway v State, 1 S E 2d 217, 218, 59 Ga App 461

**Unloaded revolver** merely pointed at one, and not used to strike with, is not dangerous weapon

Wis—Luitze v State, 234 N W 382, 204 Wis 78, 74 A L R 1202

49. Ky—Reed v Commonwealth, 135 S W 2d 867, 870, 872, 281 Ky 189

50. Or—State v Godfrey, 20 P 625, 628, 17 Or 300, 11 Am S R 830  
36 C J p 991 note 60

**Weapons of this class** are guns, swords, knives, pistols, and the like, when used within striking distance from the victim

Or—State v. Godfrey, *supra*.

51. US—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct 1010, 324 US 889, 89 L Ed 1437

Cal—Ex parte Rameriz, 226 P. 914, 193 Cal 633

NY—Application of Cassidy, 51 N Y S 2d 202, 268 App Div. 282, reargu-

e. Regulating manufacture, sale, gift, loan, or use

f Purpose and construction of statutes

### a. Nature of Right

The right to keep and bear arms is safeguarded by the federal and state constitutions, and such right is a great general right.

While the right to keep and bear arms is not a right conferred on the people by the federal Constitution,<sup>51</sup> such right is safeguarded from infringement, by the federal Constitution,<sup>52</sup> and by state constitutions<sup>53</sup> This right is a great general right,<sup>54</sup> and is sometimes said, occasionally in the constitution itself, to be an inherent and inalienable right,<sup>55</sup>

ment denied 63 NYS 2d 840, 270 App Div 1046, affirmed 73 NE 2d 41, 296 N Y 926

**Right antedated federal Constitution**  
Second Amendment to United States Constitution created no right to bear arms, which right long antedated the adoption of the federal Constitution.

NY—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE 2d 439, 293 NY 846, motion granted 60 NE 2d 847, 294 N.Y. 699

52. US—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct 1010, 324 US 889, 89 L Ed 1437.  
5 C J. p 287 note 1½

### Militia

(1) The second amendment to the federal Constitution was designed to foster a well regulated militia as necessary to the security of a free state

US—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct 1010, 324 US 889, 89 L Ed 1437

(2) The constitutional provision referred only to militia and to the collective body, and not to individual rights, and did not grant to racketeers and desperadoes the privilege to carry weapons of the character dealt with in the National Firearms Act

US—U S v. Adams, D C Fla., 11 F. Supp 216

53. Mont—State v Nickerson, 247 P 2d 188, 126 Mont 157

54. Mass—In re Opinion of Justices, 14 Gray 614, 620

55. NY—People v Warden of City Prison, 139 NYS 277, 154 App. Div 413, 29 N Y Cr. 77.

68 C J. p 5 note 29.

existing independently of the various constitutional guaranties thereof<sup>56</sup> It has been said that the keeping and bearing of arms intended to be protected as a popular right, was not such as the common law condemned, but such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection<sup>57</sup>

The right guaranteed is not to bear arms on all occasions and in all places,<sup>58</sup> but to use them in a way that is usual, or to keep them for the ordinary purposes to which they are adapted,<sup>59</sup> as for the defense of a person, his property, and the state<sup>60</sup> Even at the early common law, the right to bear arms was not absolute, for the act of riding or going armed with dangerous or unusual weapons to the terror of the people was an indictable offense<sup>61</sup>

### b. "Arms" Defined

As used in constitutional guaranties relating to the bearing of arms, the word "arms" means the ordinary arms or military equipment needed and used by the militia, or those arms which are usually employed in warfare

As used in constitutional guaranties with respect

to the bearing of arms, the word "arms" means such weapons as are adapted to the efficiency of the citizen as a soldier,<sup>62</sup> and are carried openly,<sup>63</sup> the ordinary arms or military equipment needed and used by the militia, or those arms which are usually employed in warfare<sup>64</sup> or which were so employed when the constitutional provisions were adopted,<sup>65</sup> such as rifles, shotguns, or muskets,<sup>66</sup> and swords<sup>67</sup> except, it has been held, swords concealed in canes.<sup>68</sup> Such definitions have been formulated by courts which have been impressed with the historical background,<sup>69</sup> and have been influenced by references in a number of the constitutions to the necessity of a well regulated militia<sup>70</sup> or to the dangers inherent in the maintenance of standing armies.<sup>71</sup>

While it has been held that the word "arms," as used in the constitution, does not include pistols or revolvers,<sup>72</sup> especially where the pistol is a mere belt or pocket pistol, and not such as is used as a weapon of war,<sup>73</sup> it also has been held that a pistol may be included, if it be a large sized pistol of the kind used in the military or naval service,<sup>74</sup>

56. NY—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE2d 439, 293 NY 846, motion granted 60 NE2d 847, 294 NY 699  
68 CJ p 5 note 30.

Under English common law, incorporated in laws of New York by original constitution thereof, all citizens have general right to retain arms for their protection according to their condition

NY—People ex rel Ferris v Horton, 264 NYS 84, 147 Misc 506, affirmed 269 NYS 579, 239 App Div 610

57. WV—State v Workman, 14 S. E. 9, 35 WV 367, 14 LRA 600

58. Ala—State v Reid, 1 Ala 612

59. Tenn—Andrews v. State, 3 Heisk 165, 8 Am R 8  
68 CJ p 5 note 33.

60. Mich—People v Zerillo, 189 N W 927, 928, 219 Mich 635, 24 ALR 1115.

68 CJ p 5 note 34

61. Ky—Williams v Commonwealth, 261 SW2d 807.  
68 CJ p 5 note 35

62. Okl—Ex parte Thomas, 97 P. 260, 263, 21 Okl 770, 776, 20 LRA, NS, 1007, 17 Ann Cas 566  
5 CJ p 288 note 5

63. La—State v Smith, 11 La Ann 633, 634, 66 Am D 208  
5 CJ p 288 note 8

64. US—U S v Miller, Ark., 59 S Ct 816, 307 U.S. 174, 83 L Ed 1206

NY—Moore v Gallup, 45 NYS 2d 63, 267 App Div. 64, affirmed 59 NE2d

439, 293 NY 846, motion granted 60 NE2d 847, 294 NY 699  
68 CJ p 6 note 40—5 CJ p 287 note 2, p 288 notes 3, 4, 7

**Weapons constituting ordinary military equipment**

Okl—Ex parte Thomas, 97 P. 260, 262, 21 Okl 770, 776, 20 LRA, NS, 1007, 17 Ann Cas 566

Tenn—Aymette v State, 2 Humphr 154, 158

**Relationship of weapons to militia**

(1) The National Firearms Act defining term "firearm" as a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, capable of being concealed on the person, and regulating the transfer thereof in interstate commerce, does not violate constitutional provision that, in view of necessity for a well-regulated militia, right of people to keep and bear arms shall not be infringed, in absence of showing of any reasonable relationship between such weapons and a well-regulated militia.

US—U S v. Miller, Ark., 59 S Ct 816, 307 US 174, 83 L Ed 1206

(2) The constitutional amendment providing that the "right of the people to keep and bear Arms" should not be infringed could not be said to guarantee the right to keep an automatic pistol in absence of evidence tending to show that the possession of the pistol at time involved had some reasonable relationship to the preservation or efficiency of a well-regulated militia.

US—U S v Tot, CCANJ, 131 F 2d 261, reversed on other grounds

63 S Ct 1241, 319 US 463, 87 L Ed 1519

65. NC—State v Kerner, 107 SE 222, 224, 181 NC 574

68 CJ p 6 note 41

66. NY—Moore v Gallup, 45 NY S 2d 63, 267 App Div 64, affirmed 59 NE2d 439, 293 NY 846, motion granted 60 NE2d 847, 294 NY 699

68 CJ p 6 note 42

67. NC—State v Kerner, 107 SE 222, 225, 181 NC 574

68 CJ p 6 note 43

68. Ark—Fife v State, 31 Ark 455, 460, 25 Am R 556

69. Mich—People v Brown, 235 N W 245, 246, 253 Mich 537, 82 ALR 341

70. Tenn—Andrews v State, 3 Heisk 165, 8 Am R 8

68 CJ p 6 note 38

71. Kan—City of Salina v Blaksley, 83 P 619, 72 Kan 230, 3 LRA, NS, 168, 115 Am SR 196, 7 Ann Cas 925

Tenn—Andrews v. State, 3 Heisk 165, 176, 8 Am R 8

72. NY—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE2d 439, 293 NY 846, motion granted 60 NE2d 847, 294 NY 699

68 CJ p 6 note 45

73. Tenn—Andrews v State, 3 Heisk 165, 8 Am R 8

68 CJ p 6 note 46

74. Ark—Holland v. State, 33 Ark 560

68 CJ p 7 note 47.

such as a holster pistol<sup>75</sup> or a repeater,<sup>76</sup> and there is some authority for the view that a pistol of any kind is included,<sup>77</sup> at least where it is not adapted to being carried concealed,<sup>78</sup> or where the purpose of its possessor is the legitimate defense of himself and his property.<sup>79</sup> It has been held, further, that a provision in a bill of rights declaring that the people have the right to bear arms for their defense and security refers to the people as a collective body, and applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law,<sup>80</sup> but, on the other hand, it has been held that the meaning of the term "arms," especially when found in constitutional provisions guaranteeing to every person the right to bear arms for the defense of himself and the state, cannot properly be confined within the limits fixed by the historical and military test,<sup>81</sup> but must be deemed to include arms customarily kept by law-abiding citizens for their protection.<sup>82</sup>

### c. Power to Regulate

The provision of the federal Constitution guaranteeing the right of the people to keep and bear arms constitutes a limitation on the federal government alone, so that a state legislature in the absence of similar provisions in the organic law, is free to regulate the manner of bearing arms, although it may lack the power entirely to destroy the right.

While it is provided in general terms in the federal Constitution that the right of the people to keep and bear arms shall not be infringed, it has

long been held by the United States supreme court that these provisions of the Second Amendment, like those of the rest of the first ten amendments, constitute a limitation on the power of federal government alone,<sup>83</sup> and not that of the states,<sup>84</sup> although at one time a number of the state courts were of a contrary opinion.<sup>85</sup> Furthermore, it has been stated that the Second Amendment was not adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachment by the federal power.<sup>86</sup> A state or territorial legislature, therefore, in the absence of similar provisions in the organic law, is free to regulate the manner of bearing arms,<sup>87</sup> although it may lack the power entirely to destroy the right,<sup>88</sup> and must respect the power lodged in congress to provide for organizing, arming, and disciplining the militia and for calling forth the militia for certain purposes,<sup>89</sup> and to give or withhold its consent for a state to keep troops.<sup>90</sup>

Almost all the state constitutions, however, with variations in phraseology, contain a guaranty similar in substance or effect to that found in the United States Constitution, and legislation in such a state may not infringe the particular guaranty of its constitution.<sup>91</sup> Whatever may be the source or nature of the right to bear arms, or the precise character of those "arms" in connection with which the right is to be exercised, the manner of bearing arms is subject to regulation by the states or ter-

75. Tex.—English v State, 35 Tex 473, 476, 14 Am R 374  
68 CJ p 7 note 48

76. Tenn.—Andrews v State, 3 Heisk 165, 186, 8 Am R 8  
68 CJ p 7 note 49

77. Idaho.—In re Brickey, 70 P 609, 8 Idaho 597, 101 Am SR 215, 1 Ann Cas 55

78. Tex.—State v Duke, 42 Tex 455  
68 CJ p 7 note 51

79. Mich.—People v Zerillo, 189 N W 927, 928, 219 Mich. 635, 24 ALR 1115

80. Kan.—City of Salina v Blaksley, 83 P 619, 72 Kan 230, 3 L R A. N. S. 168, 115 Am SR 196, 7 Ann Cas. 925  
68 CJ p 7 note 53

81. Ky.—Bliss v Commonwealth, 2 Litt 90  
68 CJ p 7 note 54

82. Mich.—People v Brown, 235 N W 245, 247, 253 Mich 537  
68 CJ p 8 note 55

83. US.—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S

Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct 1010, 324 US 889, 89 L Ed 1437

NY.—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE 2d 439, 293 NY 846, motion granted 60 NE 2d 847, 294 NY 699

NC.—State v Kerner, 107 SE 222, 181 NC 574

Ohio.—McCullum v. City of Cincinnati, 199 NE 603, 51 Ohio App. 67.  
68 CJ p 8 note 59

84. NY.—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE 2d 439, 293 NY 846, motion granted 60 NE 2d 847, 294 NY 699  
Ohio.—McCullum v City of Cincinnati, 199 NE 603, 51 Ohio App 67

85. Ark.—State v. Buzzard, 4 Ark 18  
68 CJ p 8 note 60

86. US.—U. S v Tot, CCANJ, 131 F 2d 261, reversed on other grounds 63 S Ct. 1241, 319 US 463, 87 L Ed 1519

In interpreting and applying constitutional amendment that right of people to bear arms shall not be in-

fringed, purpose of amendment to assure continuation and render possible the effectiveness of the militia must be considered  
US.—U S v Miller, Ark, 59 S Ct 816, 307 US 174, 83 L Ed 1206

87. Cal.—Ex parte Rameriz, 226 P 914, 922, 193 Cal 633, 34 ALR 51  
68 CJ p 8 note 61

88. Tenn.—Glasscock v City of Chattanooga, 11 SW 2d 678, 157 Tenn 518  
68 CJ p 8 note 62

89. US.—Presser v Illinois, 6 S Ct 580, 116 US 252, 29 L Ed 615  
68 CJ p 8 note 63.

90. Ill.—Dunne v. People, 94 Ill 120, 34 Am R 213  
68 CJ p 8 note 65.

91. Fla.—Corpus Juris cited in Watson v Stone, 4 So 2d 700, 701, 148 Fla 516  
Idaho.—State v Hart, 157 P 2d 72, 66 Idaho 217—State v Woodward, 74 P 2d 92, 58 Idaho 385, 114 ALR 627  
68 CJ p 8 note 67.

ritories or their political subdivisions,<sup>92</sup> under their police power,<sup>93</sup> provided the regulation is reasonable<sup>94</sup>

#### d. Regulating Carrying or Possession

- (1) In general
- (2) By particular classes of persons

##### (1) In General

In the reasonable exercise of the police power, state legislatures may regulate the carrying or possession of weapons.

In the reasonable exercise of its police power,<sup>95</sup> and with a view to the prevention of crime,<sup>96</sup> irrespective of the existence or nonexistence of a constitutional provision expressly authorizing the legislature to regulate the exercise of the right to bear arms, a state legislature, or a municipality or county acting under a constitutional<sup>97</sup> or legislative<sup>98</sup> grant of police power and not acting in a manner inconsistent with the general law,<sup>99</sup> may prohibit the carrying of concealed weapons,<sup>1</sup> and

92. Ala.—*Jackson v State*, 68 So 2d 850, 37 Ala App 335, certiorari denied 68 So 2d 853, 260 Ala 698

Fla.—*Corpus Juris* cited in *Watson v Stone*, 4 So 2d 700, 701, 148 Fla 516

Idaho—*State v Hart*, 157 P 2d 72, 66 Idaho 217—*State v Woodward*, 74 P 2d 92, 58 Idaho 385, 114 A L R 627

N Y—*Moore v Gallup*, 45 N Y S 2d 63, 267 App Div 64, affirmed 59 N E 2d 439, 293 N Y 846, motion granted 60 N E 2d 847, 294 N Y 699

Wash—*State v Krantz*, 164 P 2d 453, 24 Wash 2d 350  
68 C J p 9 note 70

Validity of statutes regulating carrying or possession of weapons see *infra* subdivision d of this section

#### Forfeiture of hunting license

(1) Statute penalizing as a misdemeanor the act of hunting on inclosed land of another without consent of agent in charge and providing for forfeiture of hunting license for a year is not violative of constitutional provision protecting right to keep and bear arms, but rather is an exercise by the state of its power to regulate right to bear arms and hunt  
Tex—*Mowels v State*, 211 S W 2d 213, 152 Tex Cr 135

(2) Conviction under statute providing for forfeiture of hunting license for violation of game laws held not infringement of constitutional right to bear arms, since defendant was only prevented from employing such arms in hunting  
Tex—*Galloway v State*, 69 S W 2d 89, 125 Tex Cr 524

93. Ala.—*Jackson v State*, 68 So 2d 850, 37 Ala App 335, certiorari denied 68 So 2d 853, 260 Ala 698

Tex—*Mowels v State*, 211 S W 2d 213, 152 Tex Cr 135.

Wash—*State v Krantz*, 164 P 2d 453, 24 Wash 2d 350

#### Arbitrary exercise of power

Reasonable facilities, such as firearms, to effectuate citizen's right to defend himself from aggression in appropriate manner, should not be withheld in arbitrary exercise of police power.

N Y—*People ex rel Ferris v. Hor-*

ton, 264 N Y S 84, 147 Misc 506, affirmed 269 N Y S 579, 239 App Div 610

94. N Y—*People ex rel Ferris v Horton*, *supra*

Wash—*State v Krantz*, 164 P 2d 453, 24 Wash 2d 350  
68 C J p 9 note 71

95. Mo—*Town of Orrick v Akers*, 83 S W 549, 109 Mo App 662  
68 C J p 9 note 72

96. Cal—*Ex parte Cheney*, 90 Cal 617  
68 C J p 9 note 73

97. Fla.—*Corpus Juris* cited in *Watson v Stone*, 4 So 2d 700, 701, 148 Fla 516

Idaho—*Corpus Juris* cited in *State v Hart*, 157 P 2d 72, 73, 66 Idaho 217—*State v Woodward*, 74 P 2d 92, 58 Idaho 385, 114 A L R 627

68 C J p 9 note 75

98. Idaho—*Corpus Juris* cited in *State v. Hart*, Idaho, 157 P 2d 72, 73

Mo—*Town of Orrick v Akers*, 83 S W 549, 109 Mo App 662

99. Vt—*State v. Rosenthal*, 55 A 610, 75 Vt 295

68 C J p 9 note 77

#### State law as occupying whole field

State law relating to carrying concealed weapons was not intended to occupy whole field so as to make invalid a city ordinance prohibiting the carrying of dangerous weapons, since the state law contains no provision amounting to affirmative permission of acts not prohibited, and mere lack of prohibition of such acts cannot be construed as permission thereof—*People v Commons*, 148 P 2d 724, 64 Cal App 2d Supp 925

1. Fla.—*Corpus Juris* cited in *Watson v Stone*, 4 So 2d 700, 701, 148 Fla 516

Idaho—*Corpus Juris* cited in *State v Hart*, 157 P 2d 72, 73, 66 Idaho 217—*State v Woodward*, 74 P 2d 92, 58 Idaho 385, 114 A L R 627

Ill—*People v. Liss*, 94 N E 2d 320, 406 Ill 419

68 C J p 9 note 78—12 C J p 917 note 5

Forfeiture of weapon carried illegally see *infra* § 25

#### Statutes held not invalid

(1) Statute providing that no person shall carry a pistol without a license in any vehicle or conceal it about his person except in his place of abode or fixed place of business held not invalid

Wash—*State v Tully*, 89 P.2d 517, 198 Wash 605

(2) The provision of Dangerous Weapons' Control Law making possession of firearm whose marks of identification have been tampered with prima facie evidence that tampering was done by possessor is within police power of state and is not unconstitutional as violative of "due process of law"

Cal—*People v Scott*, 151 P 2d 517, 24 Cal 2d 774

#### In New York

(1) It is generally held that a statute providing that presence in automobile of certain weapons shall be presumptive evidence of illegal possession of such weapons by all persons found in the automobile at the time the weapon is found is constitutional

N Y—*People v Russo*, 103 N Y S 2d 603, 278 App Div 98, affirmed 102 N E 2d 834, 303 N Y 673—*People v Burt*, 16 N Y S 2d 211, 258 App Div 896, affirmed 28 N E 2d 968, 283 N Y 740

*People v Crenshaw*, 117 N Y S 2d 202, 202 Misc 179

(2) There is, however, some authority to the contrary

N Y—*People ex rel Dixon v Lewis*, 293 N Y S 191, 249 App Div 464, affirmed 12 N E 2d 603, 276 N Y 613

(3) Statute making presence of machine gun in any room presumptive evidence of its illegal possession by all persons occupying place where machine gun is found, has been held reasonable and valid

N Y—*People v Terra*, 102 N E 2d 576, 303 N Y 332, appeal dismissed 72 S Ct 561, 342 U.S. 938, 96 L Ed 698

*People v Woods*, 114 N Y S 2d 611, 202 Misc 562

(4) According to some authority, however, such statute violates the due process clause of the federal Constitution.



the legislature may consider degrees of evil.<sup>2</sup> A fortiori, such legislation is valid where the constitution declares that the practice of wearing or carrying concealed weapons may be prohibited, or that nothing contained therein is intended to justify such a practice.<sup>3</sup>

Constitutional guaranties of due process of law and equal protection of the laws, as discussed in Constitutional Law §§ 502-707, do not require the legislature to extend the statute to all cases which might possibly be brought within its scope,<sup>4</sup> but in determining on what basis a distinction may be made for the purpose of legislative classification between objects having resemblance, the legislature cannot exercise its power arbitrarily, and the distinction must have a reasonable basis.<sup>5</sup> Thus, statutes denouncing the carrying of concealed weapons, although they may be applicable even to peace officers, as discussed infra § 9, are not unconstitutional merely because they may be made inapplicable to police officers,<sup>6</sup> and to watchmen and special agents and policemen employed by railroads or by express companies while engaged in the discharge of the duties of their employment.<sup>7</sup> Nor are the statutes invalid because they may exempt other persons so engaged,<sup>8</sup> such as conductors, baggagemen, messengers, and drivers in the employ of railroads or express companies.<sup>9</sup>

Although statutes forbidding entirely the carrying or possession of certain weapons, whether openly or concealed, have occasionally been held to amount

to a deprivation of the right to keep and bear arms,<sup>10</sup> except in so far as the statutes may be deemed to apply to concealed weapons,<sup>11</sup> the modern tendency is to affirm the constitutionality of such statutes.<sup>12</sup>

*Arms or instruments.* A statute making it unlawful to carry any arm, or any instrument with which bodily injury may be caused has been held not to be unconstitutional as being vague, indefinite, and uncertain,<sup>13</sup> in view of the meaning to be given the words "arm" and "instrument," as discussed infra § 6.

*Pistols.* In some cases, depending largely on the meaning which the courts ascribe to the word "arms" within the purview of the constitutional guaranties, as discussed supra subdivision b of this section, the validity of statutes or ordinances making it unlawful to carry a pistol or revolver openly has been denied,<sup>14</sup> and in other cases upheld,<sup>15</sup> while in still other cases such statutes or ordinances are deemed valid only as to concealable, belt, or pocket pistols,<sup>16</sup> being held invalid as to pistols such as are used in the army or navy.<sup>17</sup>

*Weapons used unlawfully.* Some weapons are so commonly and notoriously used for criminal purposes that the mere unlicensed possession thereof may be made illegal, irrespective of any intent to use the weapons unlawfully.<sup>18</sup> This rule has been applied to a concealable pistol or revolver,<sup>19</sup> a black-jack<sup>20</sup> or sap,<sup>21</sup> a bludgeon,<sup>22</sup> a slungshot,<sup>23</sup> and

- U S—U S ex rel Murphy v Warden of Clinton Prison, DC N Y, 29 F Supp 486, affirmed U S ex rel Murphy v Murphy, 108 F 2d 861, certiorari denied Murphy v Warden of Clinton State Prison at Danne-mora, N Y, 60 S Ct 583, 309 US 661, 84 L Ed 1009, rehearing denied 60 S Ct 609, 309 US 696, 84 L Ed 1036.
2. Ill—People v Saltis, 160 NE 86, 328 Ill 494, appeal dismissed 48 S Ct 530, 277 US 575, 72 L Ed 995.
3. Mo—State v Keet, 190 SW 573, 269 Mo 206, L R A 1917C 60, 68 C J p 9 note 74.
4. Ill—People v Saltis, 160 NE 86, 328 Ill 494, appeal dismissed 48 S Ct 530, 277 US 575, 72 L Ed 995.
5. Ill—People v Saltis, supra.
6. Fla—Carlton v State, 58 So 486, 63 Fla 1, 68 C J p 10 note 87.
7. Ill—People v Saltis, 160 NE 86, 328 Ill 494, appeal dismissed 48 S Ct 530, 277 US 575, 72 L Ed 995.
8. Ill—People v. Saltis, supra.
9. Ill—People v. Saltis, supra.

10. Idaho—In re Brickey, 70 P 609, 8 Idaho 597, 68 C J p 10 note 91.
11. Ga—Nunn v State, 1 Ga 243, Idaho—In re Brickey, 70 P 609, 8 Idaho 597.
12. Kan—City of Salina v Blaks-ley, 83 P 619, 72 Kan 230, 115 Am SR 196, 3 L R A, NS, 168, 7 Ann Cas 925, 68 C J p 10 note 93.
- Hunting on Sunday**  
Statutes prohibiting hunting or shooting on Sunday are not in violation of constitutional right to bear arms.
- Conn—State v Gillette, 120 A 567, 98 Conn 702.
- Ohio—Walter v. State, 16 Ohio Cir Ct, NS, 523.
13. Puerto Rico—People v. Vadi, 34 Puerto Rico 441.
14. Ga—Nunn v State, 1 Ga 243.
15. Okl—Pierce v State, 275 P 393, 42 Okl Cr 272, 73 ALR 833, 68 C J p 11 note 4.
16. Ark—Fife v State, 31 Ark 455, 68 C J p 11 note 5.

17. Tenn—Glasscock v City of Chattanooga, 11 SW 2d 678, 157 Tenn 518, 68 C J p 11 note 6.
18. Ky—Corpus Juris quoted in Perry v Commonwealth, 151 SW 2d 376, 379, 286 Ky 587, 68 C J p 11 note 7.
19. Ky—Corpus Juris quoted in Perry v Commonwealth, 151 SW 2d 376, 379, 286 Ky 587, 68 C J p 12 note 8.
20. Ky—Corpus Juris quoted in Perry v Commonwealth, 151 SW 2d 376, 379, 286 Ky 587, 68 C J p 12 note 9.
21. Cal—People v Rogers, 297 P. 924, 112 Cal App 615.
- Ky—Corpus Juris quoted in Perry v Commonwealth, 151 SW 2d 376, 379, 286 Ky 587.
22. Ky—Corpus Juris quoted in Perry v Commonwealth, 151 SW 2d 376, 379, 286 Ky 587, 68 C J p 12 note 11.
23. Ky—Corpus Juris quoted in Perry v Commonwealth, 151 SW 2d 376, 379, 286 Ky 587.
- N Y—People v. Persce, 97 NE 877, 204 N Y. 397.

to metal knuckles <sup>24</sup>

*Licenses or permits* As a condition precedent to the purchase, carrying, or possession of a weapon, the lawmaking body may properly require the obtaining of a license or permit<sup>25</sup> as well as the posting of a bond,<sup>26</sup> provided the regulation is reasonable and not prohibitive,<sup>27</sup> and such requirement may be made applicable to particular classes of persons as considered *infra* subdivision d(2) of this section. However, a statute requiring that applicants for permits to carry pistols be fingerprinted and photographed has been held invalid as an unreasonable exercise of the police power<sup>28</sup>. An unrevoked pistol permit, unlimited as to time, is not destroyed by the enactment of an invalid statute<sup>29</sup>.

*Drilling or parading with arms.* At least within the confines of a city or town, the act of drilling or

parading with arms may be forbidden without thereby infringing the right to keep and bear arms,<sup>30</sup> or violating other constitutional provisions.<sup>31</sup>

*The Federal Firearms Act*, regulating the transporting, shipping, or receiving of firearms in interstate or foreign commerce, and prohibiting such acts by unlicensed persons generally, is valid<sup>32</sup>. The statute may be made applicable only to those who fall within a particular class, including among others, those convicted of certain crimes of violence in any state or territory, or fugitives from justice,<sup>33</sup> but a provision of the act that possession of a firearm by any person who has been convicted of a crime of violence or as a fugitive from justice shall be presumptive evidence of the shipment or transportation in interstate or foreign commerce prohibited by the act is void as lacking logical connection between the possession of such firearm and

24. Ky—*Corpus Juris* quoted in *Perry v. Commonwealth*, 151 SW 2d 376, 379, 286 Ky 587  
68 CJ p 12 note 13

25. NY—*People ex rel Ferris v Horton*, 264 NYS 84, 147 Misc 506, affirmed 269 NYS 579, 239 App Div 610  
68 CJ p 12 note 15

**By whom issued**

Statute requiring residents of New York City to apply to subordinate ministerial officers for pistol permits, while requiring issuance thereof to up-state residents by judges of courts of record, is not invalid, but provision authorizing issuance of pistol permits to residents of counties only by judges of courts of record residing therein is unconstitutional

NY—*People ex rel Ferris v Horton*, *supra*

26. Ga—*Strickland v State*, 72 SE 260, 137 Ga 1, 36 LRA, NS, 115, Ann Cas 1913B 323.  
68 CJ p 12 note 16

27. Ga—*Strickland v. State*, *supra*  
68 CJ p 12 note 18

28. NY—*People ex rel Ferris v Horton*, 264 NYS 84, 147 Misc 506, affirmed 269 NYS 579, 239 App Div. 610

29. NY—*People ex rel Ferris v Horton*, *supra*.

30. Mass—*Commonwealth v. Murphy*, 44 NE 138, 166 Mass 171, 32 LRA 606  
68 CJ p 14 note 43.

31. US—*Presser v Illinois*, 6 SCt 580, 116 US 252, 29 LEd 615

32. US—*Cases v. U S, CCA Puerto Rico*, 131 F2d 916, certiorari denied *Cases Velazquez v U S*, 63 SCt 1431, 319 US 770, 87 LEd 1718, rehearing denied 65

SCt 1010, 324 US 889, 89 LEd 1437—*U S v Tot*, CCANJ, 131 F2d 261, reversed on other grounds 63 SCt 1241, 319 US 463, 87 LEd 1519

*U S v Platt*, DCTex, 31 F Supp 788

Validity of National Firearms Act regulating sale of firearms and imposing tax thereon see *infra* subdivision e of this section

#### **Rights not affected**

The act does not affect either the rights of the states to maintain their militia or the rights of the people to keep and bear arms in a lawful manner within the states  
US—*U S v Tot*, DCNJ, 28 F Supp 900

#### **Application in Puerto Rico**

(1) The Federal Firearms Act applies in Puerto Rico

US—*Quinones v U S, CCA Puerto Rico*, 161 F2d 79, certiorari denied 67 SCt 1513, 331 US 833, 91 LEd 1846—*Velazquez v Hunter*, CCA Kan, 159 F2d 606, certiorari denied 67 SCt 1084, 330 US 846, 91 LEd 1291

(2) Defendant could be convicted of transporting pistol and ammunition in Puerto Rico in violation of Federal Firearms Act, regardless whether pistol and ammunition were brought into Puerto Rico in interstate commerce after the act became effective

US—*Rivera v U S, CCA Puerto Rico*, 151 F2d 47.

33. US—*U S v. Tot*, DCNJ, 28 F Supp 900

#### **Intent**

Under the act making it unlawful for any person convicted of a crime of violence or a fugitive from justice to receive any firearm or ammunition which has been shipped or

transported in interstate or foreign commerce, congress did not intend to infringe upon the constitutional right of people to bear arms, but intended to control interstate traffic in firearms upon the part of criminals and, in such respect, congress acted entirely within scope of its powers

US—*U S v Tot*, *supra*.

#### **Prior conviction**

The act is not unconstitutional as an "ex post facto law," as applied to one who had been convicted of aggravated assault and battery before the passage of the act, on ground that it imposed on him an additional penalty for such crime, since congress sought by the act to protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be trusted with such dangerous instrumentalities

US—*Cases v U S, CCA Puerto Rico*, 131 F2d 916, certiorari denied *Cases Velazquez v U S*, 63 SCt 1431, 319 US 770, 87 LEd 1718, rehearing denied 65 SCt 1010, 324 US 889, 89 LEd 1437

"Indictment" within provision of the act prohibiting the receipt and transportation of firearms and ammunition by persons under "indictment" for a crime of violence includes an information, and act applied to one charged in Puerto Rico by information only, particularly in view of fact that all charges of crime in the Insular Courts are by information filed by prosecuting attorney only

US—*Quinones v U S, CCA Puerto Rico*, 161 F2d 79, certiorari denied 67 SCt 1513, 331 US 833, 91 LEd 1846

presumption of shipment or transportation in interstate commerce.<sup>34</sup>

### (2) By Particular Classes of Persons

The legislature may license or prohibit the carrying or possession of weapons by particular classes of persons, such as aliens or felons.

The legislature may prohibit the carrying or possession of weapons by particular classes of persons,<sup>35</sup> including free negroes,<sup>36</sup> intoxicated persons,<sup>37</sup> minors,<sup>38</sup> slaves,<sup>39</sup> and tramps,<sup>40</sup> or it may impose the requirement of a license or permit for the carrying of arms by free negroes<sup>41</sup> or persons of color.<sup>42</sup>

*Aliens* The legislature may not only compel an alien to obtain a license or permit as a prerequisite to the rightful possession of firearms,<sup>43</sup> but may go further and prohibit entirely the ownership or possession of designated firearms by unnaturalized foreign-born persons, under its police power<sup>44</sup> Prohibitory legislation of this character has been upheld as applied to pistols<sup>45</sup> and other firearms capable of being concealed on the person.<sup>46</sup> On the ground that the legislature has power to prohibit the use of firearms by unnaturalized foreign-born residents for the

purpose of hunting, capturing, or killing any wild bird or animal, except in defense of person or property, the legislature may forbid the ownership or possession of shotguns, rifles, and similar firearms<sup>47</sup> On the other hand, while it is a valid exercise of the police power for a legislature to prohibit unnaturalized foreign-born residents from hunting or killing the wild game of the state, the legislature may not deny the right of unnaturalized foreign-born residents, as guaranteed by the state constitution, to keep and bear arms that may be used in defense of person or property<sup>48</sup>

*Felons* It is within the legislative power to interdict the ownership or possession of firearms by persons convicted of a felony,<sup>49</sup> or of a crime of violence<sup>50</sup> This classification is a reasonable one,<sup>51</sup> and a statute making such a classification may properly ignore the element of criminal intent as an ingredient of the offense<sup>52</sup>

### e. Regulating Manufacture, Sale, Gift, Loan, or Use

The constitutional guaranty of the right to bear arms does not operate to prevent the enactment of legislation regulating the manufacture, sale, gift, loan, or use of weapons

34. US—Tot v U S, Mich & N.J., 63 S Ct 1241, 319 US 463, 87 L Ed 1519—U S v Delia, Mich & N.J., 63 S Ct 1241, 319 US 463, 87 L Ed 1519, certiorari denied U S v Minski, 63 S Ct 1431, 319 US 775, 87 L Ed 1722

McMullen v Squier, CCA Wash, 144 F 2d 703, certiorari denied 65 S Ct 586, 324 US 842, 89 L Ed 1404—Minski v U S, CCA Mich, 131 F 2d 614, affirmed 63 S Ct 1241, 319 US 463, 87 L Ed 1519, certiorari denied 63 S Ct 1431, 319 US 775, 87 L Ed 1722

35. Ga—Glenn v State, 72 SE 927, 10 Ga App 128

36. NC—State v Chavers, 50 NC 11, 68 CJ p 14 note 37

37. Mo—State v Shelby, 2 SW 468, 90 Mo 302, 68 CJ p 14 note 38

38. Ga—Glenn v State, 72 SE 927, 10 Ga App 128, 68 CJ p 14 note 39

39. NC—State v Hannibal, 51 NC 57

40. Ohio—State v Hogan, 58 NE 572, 63 Ohio St 202, 81 Am SR 626, 52 LRA 863, 68 CJ p 14 note 41

41. NC—State v Harris, 51 NC 448, 68 CJ p 12 note 21.

42. N.C.—State v Lane, 30 N.C 256

43. NH—State v Rheume, 116 A 758, 80 NH 319, 68 CJ p 12 note 23

44. Cal—People v Cannizzaro, 31 P 2d 1066, 138 Cal App 28, 68 CJ p 12 note 24

45. Cal—Ex parte Rameriz, 226 P 914, 193 Cal 633, 34 ALR 51, 68 CJ p 13 note 25

46. Cal—Ex parte Rameriz, supra, 68 CJ p 13 note 26

47. US—Patsone v Pennsylvania, 34 S Ct 281, 232 US 138, 58 L Ed 539, 68 CJ p 13 note 27

48. Colo—People v Nakamura, 62 P 2d 246, 99 Colo 262

49. Cal—People v Garcia, 218 P 2d 837, 97 Cal App 2d 733, 68 CJ p 13 note 29

#### Statutes held not unconstitutional

(1) Statutes making it a misdemeanor for any person previously convicted of enumerated crimes to purchase, own, possess or control any of the enumerated weapons are not unconstitutional

N.J.—State v Wyckoff, 99 A.2d 365, 27 NJ Super 322

(2) The code provision prohibiting prisoners in state prisons from possessing or carrying designated weapons is a valid police regulation and is not violative of constitutional provisions guaranteeing right to acquire and possess property and prohibiting infringement of right of people to keep and bear arms

Cal—People v Wells, 156 P 2d 979, 68 Cal App 2d 476

50. Wash—Pettus v Cranor, 250 P 2d 542, 41 Wash 2d 567

Wash—State v Krantz, 164 P 2d 453, 24 Wash 2d 350—State v Tully, 89 P 2d 517, 198 Wash 605 Application of Federal Firearms Act to persons convicted of crimes of violence or fugitives from justice see supra subdivision d (1) of this section

#### Crimes within statute

(1) The classification of crimes of violence as contained in statute is reasonable, in that it includes crimes of violence commonly characterized as such at common law

Wash—State v Krantz, 164 P 2d 453, 24 Wash 2d 350

(2) Designating larceny as crime of violence within statute prohibiting one who has been convicted of such a crime from having possession, ownership, or control of pistol did not so violate requirement of reasonableness in classifications required of legislation enacted under police power as to invalidate the statute

Ala—Jackson v State, 68 So 2d 850, 37 Ala App 335, certiorari denied 68 So 2d 853, 260 Ala 698

51. Cal—People v Camperlingo, 231 P 601, 69 Cal App 466, 68 CJ p 13 note 30

52. Cal—People v Gonzales, 237 P. 812, 72 Cal App 626.

The constitutional guaranty of the right to bear arms does not operate to prevent the enactment of legislation regulating the manufacture, sale, gift, loan, or use of weapons<sup>53</sup> Under its police power, the state or a municipality has not only the power to regulate,<sup>54</sup> which includes the power to impose license fees and taxes,<sup>55</sup> but also the power, completely to prohibit the sale of ammunition, weapons, or toy pistols and the like,<sup>56</sup> without thereby infringing the right to keep or bear arms. The state or a municipality may likewise prohibit the public exhibiting and advertising of revolvers and other weapons for sale,<sup>57</sup> and may prohibit the sale thereof to any person who has not obtained a permit or complied with the statutory requirements<sup>58</sup> A statute making it unlawful to sell certain weapons does not abridge the constitutional right of citizens to keep and bear arms for the common defense,<sup>59</sup> nor does it contravene a provision in the state bill of rights declaring that no person shall be dispossessed of his estate, liberties, or privileges,<sup>60</sup> or be deprived

of his property except by the judgment of his peers or the law of the land.<sup>61</sup> A city ordinance regulating the sale of weapons must not be unreasonable, arbitrary, or discriminatory either in effect<sup>62</sup> or classification<sup>63</sup> The fact that a weapon cannot be lawfully sold or otherwise disposed of does not prevent it from being property susceptible of lawful ownership<sup>64</sup> An ordinance making the discharge of firearms unlawful is not violative of the constitutional guaranty of the right of the people to bear arms for their defense<sup>65</sup>

#### f. Purpose and Construction of Statutes

Statutes making it unlawful to have or carry weapons are designed to suppress the act or practice of going armed and to outlaw instruments ordinarily used for criminal and improper purposes; and such statutes should receive a reasonable construction.

Statutes making it unlawful to have or carry weapons are designed to suppress the act or practice of going armed and being ready for offense or defense in case of conflict with another,<sup>66</sup> and to out-

**53. National Firearms Act**, regulating the sale of firearms, and imposing a tax thereon, is not invalid, as being in excess of the powers of congress

U S—U S v Miller, Ark, 59 S Ct 816, 307 US 174, 83 L Ed 1206  
U S v Fleish, D C Mich, 90 F Supp 273—U S v Adams, D C Fla, 11 F Supp 216

**Validity of Federal Firearms Act** regulating the transporting, shipping, or receiving firearms in interstate or foreign commerce see supra subdivision d of this section

**54. Ill—Biffer v City of Chicago**, 116 NE 182, 278 Ill 562

**55. La—State v Winehill & Rosenthal**, 86 So 181, 184, 147 La 781

68 CJ p 14 note 52—37 CJ p 224 note 62

#### Pawnbroker as dealer

(1) Pawnbroker, who receives pistols in pledge, purchases pistols at pawnbroker's sale, and resells them, was not "dealer in pistols" within license statute

Ala—State v Levy Loan Co, 149 So 714, 25 Ala App 514  
Miss—Graham v State, 71 Miss 208, 210, 13 So 883

(2) Where a pawnbroker's license has been taken out by a pawnbroker who sells or offers for sale no pistols other than those which have been pledged with him and not redeemed, he need not procure also a license to engage in or carry on the business of a dealer in pistols  
Ala—Morningstar v. State, 33 So. 485, 135 Ala. 66

#### Reputable applicant

Under the Uniform Firearms Act, any reputable applicant for a li-

cense to sell firearms is entitled to receive it providing he complies with the terms of the act

Pa—Uptown Sales, Inc, v Oliver, 66 Pa Dist & Co 51

**56. Ill—Biffer v City of Chicago**, 116 NE 182, 278 Ill 562  
68 CJ p 15 note 53

#### Shipment to other states

Section of the Penal Law dealing with the making and disposing of dangerous weapons was applicable to dealer in firearms, who allegedly kept blackjacks and metal knuckles for shipment directly to dealers in other states

N Y—People v Mogul, 128 NYS 2d 667, 204 Misc 995

**57. Ill—Biffer v City of Chicago**, 116 NE 182, 278 Ill 562

**58. Ill—Biffer v City of Chicago**, supra

Iowa—State v Cochran, 162 NW 755, 179 Iowa 1304

#### Sale to minor

The statute prohibiting sale of firearms or ammunition to a child under fifteen years without written consent of parents strongly indicates that, in judgment of legislators, sale of firearms or ammunition to a minor should not be forbidden if minor is over fifteen years of age, or if his parent or guardian has consented

R I—Corey v Kaufman & Chernick, 36 A 2d 103, 70 R I 27

**59. Ark—Dabbs v. State**, 39 Ark 353, 43 Am R 275.  
68 CJ p 15 note 56.

**60. Ark—Dabbs v. State**, supra.

**61. Ark—Dabbs v. State**, supra.  
68 CJ p 15 note 58.

**62. Ill—Biffer v City of Chicago**, 116 NE 182, 278 Ill 562  
68 CJ p 15 note 60

**63. Ill—Biffer v. City of Chicago** supra  
68 CJ p 15 note 61

**64. Tenn—Heaton v State**, 169 S W 750, 130 Tenn 163

**65. Ohio—McCollum v City of Cincinnati**, 199 NE 603, 51 Ohio App 67

Criminal responsibility for shooting firearms see infra § 19

#### Intentional or negligent shooting

Statute authorizing action in tort by person injured by discharge of a firearm intentionally pointed toward such person did not apply to negligent acts of two boys, who while shooting rifle within city limits shot plaintiff's decedent, since such statute was repealed as to negligent shooting by a later statute  
Vt—Giguere v. Rosselot, 3 A 2d 538 110 Vt 173.

**66. Pa—Henry v Pechin**, 31 Pa Dist & Co 484, 27 Del Co 421  
68 CJ p 15 note 63

"The object of this statute is to prevent the carrying of concealed deadly weapons about the person, because persons becoming suddenly angered, and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person"  
Del—State v. Chippey, 33 A. 438, 14 Del 583  
Ky—Corpus Juris quoted in Williams v Commonwealth, 261 S W 2d 807, 808.

law instruments ordinarily used for criminal and improper purposes<sup>67</sup> In other words, the statutes are designed to minimize the danger to public safety arising from free access to firearms that can be used for crimes of violence,<sup>68</sup> and also to minimize accidental casualties<sup>69</sup> The statutes should receive a reasonable construction<sup>70</sup> in accord with the purpose of the legislature<sup>71</sup> and in the light of the evil to be remedied,<sup>72</sup> and they should be construed with the thought in mind that they are aimed at persons of criminal instincts and for the prevention of crime and not against the use of weapons in the protection of person or property<sup>73</sup>

The evil sought to be reached by statutes denouncing the offense of carrying weapons concealed is a serious one,<sup>74</sup> and they should be liberal-

ly construed,<sup>75</sup> in such manner as to effectuate their obvious and wholesome purpose,<sup>76</sup> so long as no injustice results,<sup>77</sup> and they should not be so liberally interpreted as to render ineffective the legislative intent<sup>78</sup> Nevertheless, from a somewhat different point of view, the right to bear arms is essential, and its exercise should not be frustrated by technicalities<sup>79</sup> Furthermore, applying the general rule discussed in Statutes § 389, penal statutes must be construed strictly against the state and favorably to the liberty of the citizen,<sup>80</sup> being construed not according to the letter, but according to their spirit<sup>81</sup> Manifestly, the rule of strict construction is satisfied where the thing in question falls within both the letter and the spirit of the prohibition<sup>82</sup>

## II. CRIMINAL RESPONSIBILITY

### § 3. Carrying or Possession of Weapons

The carrying or possession of a weapon is not in itself an offense against the law, and it becomes an offense only where it is prohibited by statute; the offense is continuous and transitory in nature.

The carrying or possession of a weapon is not in itself an offense against the law,<sup>83</sup> and it does not constitute a breach of the peace<sup>84</sup> It becomes an offense only because it is prohibited by statute,<sup>85</sup> and such statutes apply to all persons within their terms except those expressly excepted therefrom, as discussed infra § 9 The offense of carrying a weapon is continuous,<sup>86</sup> and transitory<sup>87</sup> in its nature.

If the prohibited act is the carrying of a concealed weapon, a second offense does not arise until the continuity of the first act is broken,<sup>88</sup> and the weapon, having been exposed to view elsewhere than on the person, is again concealed.<sup>89</sup>

Whether the offense of carrying or possessing concealed weapons constitutes a felony or misdemeanor depends on the terms of the statute,<sup>90</sup> and the offense has been held to be a felony where punishable by imprisonment in a penitentiary, although a lesser penalty could be imposed<sup>91</sup> Under some provisions, the offense is a mere misdemeanor,<sup>92</sup> and in such case, the carrying of a weapon is

67. Cal—People v Mulherin, 35 P 2d 174, 140 Cal App 212

68. Cal—People v Scott, 151 P 2d 517, 24 Cal 2d 774

69. Ark—Carroll v State, 28 Ark 99

W Va.—State v Underwood, 109 SE 609, 89 W Va 548

70. Ill—People v Liss, 94 NE 2d 320, 406 Ill 419  
68 CJ p 16 note 65

71. Ga—Harris v State, 85 SE 813, 15 Ga App 315  
68 CJ p 16 note 66

72. NC—State v Perry, 26 SE 915, 120 NC 580

73. Ill—People v Liss, 94 NE 2d 320, 406 Ill 419

74. NC—State v Reams, 27 SE 1004, 121 NC 556  
68 CJ p 16 note 69

75. Cal—People v Mulherin, 35 P 2d 174, 140 Cal App 212  
68 CJ p 16 note 70

76. DC—Brown v U S, 30 F 2d 474, 58 App DC 311

NC—State v McManus, 89 NC 555

77. Cal—People v Mulherin, 35 P 2d 174, 140 Cal App 212

78. Ga—Cheney v State, 73 SE 617, 10 Ga App 451

79. NC—State v Kerner, 107 SE 229, 181 NC 574.

80. DC—Brown v U S, Mun App, 66 A 2d 491  
68 CJ p 16 note 74.

81. Tenn—Haynes v State, 5 Humph 120

82. Pa—Com v. Switzer, 21 Pa. Dist 807

W Va.—State v Blazovitch, 107 SE 291, 88 W Va. 612

83. Fla—Roberson v State, 29 So 535, 43 Fla 156, 52 L R A 751  
68 CJ p 16 note 77.

84. Fla—Roberson v State, supra

85. Fla—Roberson v. State, supra.  
Pa—Commonwealth v Glasgow, Quar Sess, 21 Lehigh 80, 59 York Leg Rec 69

Tex—Lewis v State, 2 Tex App 26  
Purpose and construction of statutes generally see supra § 2 f.

86. Cal—People v Warren, 104 P 2d 1024, 16 Cal 2d 103

68 CJ p 16 note 81

87. Ga—Morgan v State, 47 SE 567, 119 Ga 964

88. Ala—Smith v. State, 79 Ala. 257

68 CJ p 16 note 83

89. Ga—Morgan v. State, 47 SE 567, 119 Ga 964

68 CJ p 16 note 84

90. Possession by felon

Offense of unlawful possession of firearms by a felon held a felony, notwithstanding that offense was punishable either by imprisonment in state prison or in county jail, and that statute made possession of firearms by ordinary individual a misdemeanor

Cal—Ex parte Rogers, 66 P 2d 1237, 20 Cal App 2d 397.

91. Neb—Bright v. State, 252 N W 386, 125 Neb 817

92. Wis—Anderson v State, 114 N. W 112, 133 Wis 601.

Mere possession

If tenant resisted unlawful entry on premises by exhibiting loaded re-

not an infamous crime<sup>93</sup> A conviction, therefore, imputes neither moral turpitude,<sup>94</sup> nor a lack of veracity,<sup>95</sup> and is not a bar on one's credibility as a witness<sup>96</sup>

*Federal Firearms Act.* Where a firearm is transported, shipped, or received in interstate commerce in violation of the Federal Firearms Act, the person who receives the firearm is not guilty of violating the act unless his reception is in some way connected with interstate commerce<sup>97</sup> Since a firearm unlawfully shipped in interstate commerce in violation of the Federal Firearms Act is contraband, a person who receives the firearm knowing it is contraband or under circumstances charging him with knowledge that it is contraband is guilty of unlawfully receiving the firearm, even though he does not directly receive it in interstate commerce.<sup>98</sup>

#### § 4. — Elements of Offenses in General

In order to constitute a violation of statutes denouncing the having or carrying of weapons, it is necessary that there exist all the elements prescribed by the statutes.

In order to constitute a violation of statutes denouncing the having or carrying of weapons, it is of course necessary that there exist all the elements

prescribed by the statutes,<sup>99</sup> as properly construed,<sup>1</sup> including the carrying or possession of a weapon<sup>2</sup> of the description contemplated by the statute, as discussed *infra* § 6, with the requisite intent, *infra* § 5, by a person not a member of a class specially privileged by the statute, *infra* § 9, at a place and in the manner prohibited, *infra* §§ 7, 8 So, where the statute prohibits the carrying of a weapon by a person convicted of a felony, it must appear that the accused was previously convicted of a felony, and not of a misdemeanor<sup>3</sup>

*A constructive carrying* rather than an actual carrying of a weapon may be sufficient to constitute the offense.<sup>4</sup>

*Concealment* is an essential element of the crime of carrying concealed weapons,<sup>5</sup> but not of other distinct crimes,<sup>6</sup> such as the carrying or possessing of weapons,<sup>7</sup> or having possession of a weapon while intoxicated<sup>8</sup>

*Any length of time*, no matter how short, is sufficient, broadly speaking, for an act of carrying<sup>9</sup> or of concealment<sup>10</sup> In order to constitute the offense of carrying weapons without a license, however, it seems that the possession of the weapon must continue for at least some appreciable time<sup>11</sup>

volver, not in necessary self-defense, without pointing it or attempting to shoot any one, offense at most was misdemeanor

Cal—Lorenz v Hunt, 264 P 336, 89 Cal App 6

93 Ala.—Smith v State, 29 So 699, 129 Ala 89, 87 Am SR 47

Wyo—Eads v State, 101 P 946, 17 Wyo 490

94. Wyo—Eads v State, *supra*.

95 Wyo—Eads v State, *supra*.

96. Tex—Bain v State, 44 SW 518, 38 Tex Cr 635

Wyo—Eads v State, 101 P 946, 17 Wyo 490

97. US—U S v Matsumoto, DC Fla, 45 F Supp 668

98. US—U S v Matsumoto, *supra*

99 NC—State v Williamson, 78 S E 2d 763, 238 NC 652

Pa—Commonwealth v Hart, O & T, 101 Pittsb Leg J 449 68 CJ p 17 note 90

#### Knowledge

Under statute providing that any one who sells, offers for sale, possesses, or knowingly transports any firearms of the kind known as machine gun is guilty of public offense, knowledge of fact that weapon is machine gun is not an essential element of offense of possession but knowledge of such fact is an essential ingredient only of offense of transporting

Cal—People v Daniels, 257 P 2d 1038, 118 Cal App 2d 340

#### Possession by alien

The essential elements of the offense of unlawful possession of a revolver by an alien, are, first, the ownership, or possession, or custody, or control of the weapon of the prohibited type, and the fact of foreign birth and unnaturalization of accused

Cal—People v Quarez, 238 P. 363, 196 Cal 404, followed in People v Garcia, 238 P 367, 196 Cal 784

**Rudely displaying a pistol held not to constitute an offense**

Tex—Bell v State, 256 SW 2d 108, 157 Tex Cr 393

1. W Va—State v Kinney, 114 SE 677, 92 W Va 272 68 CJ p 17 note 91

2. NC—State v Williamson, 78 S E 2d 763, 238 NC 652

Tex—Walker v State, 195 SW 2d 363, 149 Tex Cr 438 68 CJ p 17 note 92

#### 3. Prior offense held felony

Cal—People v Voss, 37 P 2d 846, 2 Cal App 2d 188

#### Time of conviction

The state forbidding persons convicted of a felony involving assault and like crimes from carrying firearms capable of being concealed on the person did not forbid consideration of felony committed in another

state seven years earlier, the statute being otherwise valid

US—U S v Farwell, DC Alaska, 76 F Supp 35

4 Ga—Vinson v State, 164 SE 209, 45 Ga App 220.

68 CJ p 17 note 98  
Constructive possession see *infra* § 8

5. Ill—People v Liss, 94 NE 2d 320, 406 Ill 419

People v Beason, 97 NE 2d 603, 342 Ill App 621

La—State v Davis, 39 So 2d 164, 214 La 885

NC—State v Williamson, 78 SE 2d 763, 238 NC 652

68 CJ p 17 note 1  
Manner of concealing see *infra* § 8

6. Ala—Little v State, 79 So 397, 16 Ala App 492

7. Tenn—Brooks v State, 215 SW. 2d 785, 187 Tenn 361

68 CJ p 17 note 3

8. Mo—State v Goldsmith, 300 S W 677

9. Ark—Thompson v City of Little Rock, 105 SW 2d 537, 194 Ark 78. 68 CJ p 17 note 6

10. Ga—Morton v State, 46 Ga. 292 68 CJ p 17 note 7

11. Ga—Jackson v State, 77 SE. 371, 12 Ga App 427.

*Ownership* of a weapon illegally carried is immaterial,<sup>12</sup> except in so far as the circumstances of ownership may tend to establish the guilt or innocence of the accused<sup>13</sup> Similarly, under statutes prohibiting the carrying of weapons by certain persons, such as a person who is in charge of, or a passenger in, a vehicle in which intoxicating liquor is being transported, ownership of the vehicle is immaterial<sup>14</sup>

*Wrongful use* of the weapon is not an element of the crime of carrying a concealed deadly weapon, although such use may be of evidentiary significance under certain circumstances<sup>15</sup>

*Federal Firearms Act.* Under the Federal Firearms Act in order to render the transportation of a firearm in interstate commerce unlawful, it is necessary that the person transporting the firearm have been convicted of a crime of violence as defined under the act<sup>16</sup> The enumeration in the act of the crimes, the conviction of which renders subsequent transportation of a firearm by the convicted person unlawful, is intended to be exclusive so that unless included therein, a crime may not be regarded as a crime of violence within the meaning of the act<sup>17</sup>

## § 5. — Intent, Purpose, or Motive

- a. In general
- b. Purpose or motive considered as material

### a. In General

While intent is an indispensable element of the crime of carrying or possessing a weapon, the intent deemed indispensable is merely the intent to do the prohibited act, rather than the intent to violate the law.

While intent is an indispensable element of the crime of carrying a weapon,<sup>18</sup> and of unlawful possession,<sup>19</sup> under some statutes, or in connection with particular weapons mentioned therein, the intent deemed indispensable is merely the intent to do the prohibited act, rather than the intent to violate the law,<sup>20</sup> with the result that it has been held that the intentional doing of the prohibited act constitutes in itself a complete criminal offense, irrespective of the purpose or motive of accused,<sup>21</sup> unless the purpose is of a kind permitted by the statute<sup>22</sup> This view finds expression in cases holding that it is an offense to have or carry a concealed or other prohibited weapon, even though the purpose in doing so was merely to exhibit it as a curiosity,<sup>23</sup> or with the hope of selling it,<sup>24</sup> to convey it to the buyer,<sup>25</sup> or to one's

12. Ill.—*People v Lass*, 88 NE2d 334, 338 Ill App 657, reversed on other grounds 94 NE2d 320, 406 Ill 419  
68 CJ p 17 note 10

*Possession* could be proved without proof of ownership, since, although ownership implies right to possess, possession may exist entirely apart from ownership  
Cal.—*People v McKinney*, 50 P 2d 827, 9 Cal App 2d 523

13. Ga.—*Gates v State*, 78 SE 270, 12 Ga App 706

14. Mo.—*State v Smith*, 56 SW 2d 39, 332 Mo 44

15. Cal.—*People v Syed Shah*, 205 P 2d 1081, 91 Cal App 2d 716

16. US.—*Nicholson v. U. S.*, CCA Cal., 141 F 2d 552

### Burglary

Where evidence sustained finding that defendant had transported firearms in interstate commerce and it was stipulated that defendant had been convicted of second-degree burglary, which was a felony in the jurisdiction where committed and a crime of violence under federal statute, the statute making it unlawful for any person convicted of a crime of violence to transport firearms in interstate commerce was violated  
US.—*McMullen v Squier*, CCA Wash., 144 F 2d 703, certiorari de-

med 65 S Ct 586, 324 US 842, 89 L Ed 1404

17. US.—*Nicholson v U S*, CCA Cal., 141 F 2d 552

*Assault with intent to rob*, although an essential element of completed offense of robbery, is a distinct crime punishable as such both at common law and under state penal code, so that conviction of first degree robbery as defined by state penal code did not render subsequent transportation of a firearm by convicted person unlawful under Federal Firearms Act, even though assault with intent to rob is included among crimes enumerated in Firearms Act

US.—*Nicholson v U S*, supra.

18. Tex.—*Boissean v. State*, App., 15 SW 118

### Intent to go armed

Act of defendant in pointing and snapping unloaded pistols at officers sufficiently evidenced an "intent to go armed" to justify conviction for carrying pistols with that intent  
Tenn.—*Brooks v State*, 215 SW 2d 785, 187 Tenn 361

19. NY.—*People v Adamkiewicz*, 81 NE 2d 76, 293 NY 176

20. Idaho.—*Corpus Juris* cited in *State v Hart*, 157 P 2d 72, 74, 66 Idaho 217

Tex.—*Privitt v State*, 208 SW 2d 635, 151 Tex Cr 423.  
68 CJ p 17 note 15

### Knowingly transporting weapon

Under statute making it a criminal offense to sell, offer for sale, possess, or "knowingly" transport a machine gun, quoted word signifies knowledge of existence of fact that firearm transported is a machine gun and is not to be confused with criminal intent or with knowledge that act is violation of law

Cal.—*People v Daniels*, 257 P 2d 1038, 118 Cal App 2d 340

21. Cal.—*People v Syed Shah*, 205 P 2d 1081, 91 Cal App 2d 716—*People v McKinney*, 50 P 2d 827, 9 Cal App 2d 523

NY.—*People v Terwilliger*, 14 NY S 2d 267, 172 Misc 70  
68 CJ p 18 note 16

22. Miss.—*Loggins v. State*, 136 So 922, 161 Miss 272  
68 CJ p 19 note 17

23. NY.—*People*, on Complaint of *Altomari, v Evergood*, 74 NYS 2d 12

### Six-barrel pistol

Ind.—*Walls v State*, 7 Blackf 572

24. NC.—*State v Dixon*, 19 SE 364, 114 NC 850, overruled *State v Harrison*, 93 NC 605

25. Ky.—*Cutsinger v Com*, 7 Bush 392

NC.—*State v Brown*, 34 SE 549, 125 NC 704.

home<sup>26</sup> to procure cartridges for it<sup>27</sup> for another's accommodation,<sup>28</sup> or to return the weapon to the owner after making repairs.<sup>29</sup> It may also constitute an offense to have or use the weapon in conducting a shooting gallery,<sup>30</sup> in hunting or butchering,<sup>31</sup> or in aiding a peace officer,<sup>32</sup> or to have it for the protection of property,<sup>33</sup> or of one's person,<sup>34</sup> in consequence of threats of violence. Persons exempted from the statutes cannot be prosecuted for exercising their legal right to have or carry weapons, whatever may have been their purpose or intent<sup>35</sup>

*Carrying concealed weapons* Where the prohibited act consists of carrying a weapon concealed, it is generally held that the weapon must not only be intentionally carried,<sup>36</sup> but also that it be intentionally concealed.<sup>37</sup> It has also been held, however, that the law is violated even when the weapon is carried concealed indifferently, carelessly, or thoughtlessly<sup>38</sup>

#### b. Purpose or Motive Considered as Material

- (1) In general
- (2) Carrying to owner or one entitled to possession
- (3) Carrying to public authorities
- (4) Other purposes or motives

##### (1) In General

Under some statutes prohibiting the carrying, or having possession, of weapons, the purpose or motive for doing the act may be material, and it is not unlawful

to have or carry a prohibited weapon with a harmless or legitimate purpose or motive.

The view taken by some courts in construing statutes prohibiting the carrying, or having possession, of weapons or certain kinds of weapons, is that the purpose or motive for doing the act may be material, and that it is not unlawful to have or carry a prohibited weapon with a harmless or legitimate purpose or motive.<sup>39</sup> It has been said that in applying the rule it would be difficult to enumerate all the instances in which a weapon might be carried innocently and without criminality.<sup>40</sup> The purpose being an innocent one, the carrying of a prohibited weapon as a mere incident of its transportation from one place to another is not an offense.<sup>41</sup> This rule of course does not apply if the purpose is one which the courts refuse to sanction,<sup>42</sup> as in cases where the weapon is carried with an unlawful purpose or intent to use it against another person.<sup>43</sup> Moreover, where the statute expressly requires a specific intent to use the weapon as such, the specific statutory intent becomes an essential ingredient of the offense.<sup>44</sup> If the conditions which sustain the right to carry a weapon cease, the right also ceases,<sup>45</sup> since, however innocent an intent might be originally, the intent may be changed instantly into an unlawful intent.<sup>46</sup> Although an unexplained possession of a weapon may constitute a violation, mere possession should not be considered a criminal act where there is a proper and convincing explanation of possession.<sup>47</sup>

26. Del—State v Menge, 97 A 588, 29 Del 174  
68 CJ p 19 note 21

27. La—State v Martin, 31 La Ann 849

28. Ky—Cutsinger v Commonwealth, 7 Bush 392  
La—State v Martin, 31 La Ann 849

29. Miss—Strahan v State, 8 So 844, 68 Miss 347

30. Pa—Commonwealth v Maloof, 49 Pa Super 581

31. Mo—State v Hovis, 116 SW 6, 135 Mo App 544  
68 CJ p 19 note 26

32. Mo—State v Julian, 25 Mo App 133  
68 CJ p 20 note 27.

33. NC—State v Hannibal, 51 NC 57

Okl—Pierce v State, 275 P 393, 42 Okl Cr 272, 73 ALR 833

34. Idaho—Corpus Juris cited in State v Hart, 157 P 2d 72, 74, 66 Idaho 217.  
68 CJ p 20 note 29

Statutory privilege of carrying weapon for defense see *infra* § 9.

35. Miss—McGuirk v State, 1 So 103, 64 Miss 209  
68 CJ p 20 note 30

36. Ga—James v State, 112 SE 899, 900, 153 Ga 556, answer to certified questions conformed to 113 SE 26, 28 Ga App 713  
68 CJ p 20 note 31

37. NC—State v Simmons, 56 SE 701, 143 NC 613  
68 CJ p 20 note 32

38. Ala—Fielding v State, 33 So 677, 135 Ala 56—Barker v. State, 28 So 589, 126 Ala 83

39. Pa—Commonwealth v Festa, 40 A 2d 112, 156 Pa Super 329  
68 CJ p 20 note 34

40. Tenn—Page v State, 3 Heisk 198

41. Tex—Maxwell v State, 38 Tex 170  
Grant v State, 13 SW 2d 889, 112 Tex Cr 120

42. Ga—Caldwell v State, 198 SE 793, 58 Ga App 408.  
68 CJ p 21 note 37

#### Meeting an emergency

Under statute, one is not authorized to carry a pistol on his person for the purpose of meeting any emergency that might arise or an emergency which he unlawfully intends to create by his own act without first procuring a license if such carriage is done outside of his home or place of business  
Ga—Caldwell v State, 198 SE 793, 58 Ga App 408

43. Pa—Commonwealth v Festa, 40 A 2d 112, 156 Pa Super 329  
Tex—Deuschle v State, 4 SW 2d 559, 109 Tex Cr 355

44. Ark—Wylie v State, 199 SW 905, 131 Ark 572  
68 CJ p 21 note 39

45. Tex—Deuschle v State, 4 SW 2d 559, 109 Tex Cr 355—Moore v State, 217 SW 1036, 86 Tex Cr 502

46. Tenn—McNew v State, 144 S W 2d 740, 176 Tenn 492

47. NY—People v Quintana, 20 N YS 2d 806, 260 App Div 13.



*Momentary possession.* Possession of a firearm or dangerous weapon, resulting temporarily and incidentally from the performance of some lawful act, is not forbidden by statute,<sup>48</sup> particularly when the act is designed to meet the social policy of the law.<sup>49</sup> Statutes directed against the possessing or carrying of weapons are said not to be violated where one has possession or control of a weapon only casually<sup>50</sup> or momentarily,<sup>51</sup> without any intention of violating the law,<sup>52</sup> or controlling the use of the weapon.<sup>53</sup> One reason for this rule is that the dominion of the real owner is not lost.<sup>54</sup> A temporary and incidental possession of this nature may occur when one person disarms another,<sup>55</sup> or seizes a weapon not owned by him for a moment's use in combat.<sup>56</sup> Some statutes, however, are held to forbid the use of a weapon in fight, even though it is used for only a moment and discarded immediately afterward.<sup>57</sup> A harmless temporary possession may also occur when a person picks up a weapon,<sup>58</sup> or hands it to another to examine,<sup>59</sup> or hold for a moment,<sup>60</sup> or to shoot<sup>61</sup> at some object.<sup>62</sup>

*Route of transportation, loitering and delay.* While the route taken for an innocent transportation of weapons within the rule should be a practicable route,<sup>63</sup> it is not necessary that it be the shortest or most practicable route.<sup>64</sup> There being a legitimate reason for taking a particular route,<sup>65</sup> the transportation must proceed without undue

delay or interruption,<sup>66</sup> or unnecessary or unreasonable deviation.<sup>67</sup> There should be no diversion of one's course or a turning aside, stopping by the wayside, or loitering for the pursuit of pleasure or other matters,<sup>68</sup> or to display<sup>69</sup> or fire<sup>70</sup> the weapon on the public street,<sup>71</sup> or on the premises of another person,<sup>72</sup> but a deviation, or a stopping, or turning aside for reasonable or necessary purposes may be permissible.<sup>73</sup>

*Possession* as used in connection with the penal provisions relating to weapons is a knowing and voluntary possession which places the weapon within the immediate control and reach of the accused, and where it is available for unlawful use if he so desires.<sup>74</sup>

## (2) Carrying to Owner or One Entitled to Possession

The mere act of carrying a weapon to its owner, or to any other person entitled to its possession, is not an offense, and an owner who finds himself in the possession of a weapon when away from home may properly carry it to his home if he acts in good faith or for a legitimate purpose.

Under the general rule stated, *supra* subdivision b(1) of this section, that it is not unlawful to carry or possess a prohibited weapon for a harmless or legitimate purpose or motive, it has been held that the mere act of carrying a weapon to its owner,<sup>75</sup> or to any other person entitled to its possession,

48. N.Y.—*People v La Pella*, 4 N E2d 943, 272 N.Y. 81.

*People v De Bernardo*, 106 N.Y. S2d 515, 199 Misc. 563, modified on other grounds 125 N.Y.S2d 641, 282 App. Div. 920.

Constructive or theoretical possession see *infra* § 8.

49. N.Y.—*People v La Pella*, 4 N E2d 943, 272 N.Y. 81.

50. Puerto Rico—*People v Moll*, 28 Puerto Rico 733.

51. Ga.—*Caldwell v State*, 198 S E 793, 58 Ga. App. 408, 68 C.J. p. 21 note 43.

### Time of emergency

Under statute one who suddenly on an emergency acquires manual possession of a pistol for the purpose of defending himself, his family, or his property, is not guilty of carrying a pistol without a license. Ga.—*Caldwell v State*, *supra*.

52. Tex.—*Davis v State*, 237 S.W. 925, 91 Tex. Cr. 156.

53. W. Va.—*State v Underwood*, 109 S.E. 609, 89 W. Va. 548, 68 C.J. p. 21 note 45.

54. Tex.—*Schuh v State*, 124 S.W. 908, 58 Tex. Cr. 165.

55. N.Y.—*People v Persce*, 97 N.E. 877, 204 N.Y. 397.

56. Tex.—*Pyka v State*, 192 S.W. 1066, 80 Tex. Cr. 645, 68 C.J. p. 21 note 48.

57. Ark.—*Henderson v State*, 91 Ark. 224.

58. Ala.—*Johnson v State*, 66 So. 875, 11 Ala. App. 301.

Tex.—*Henson v State*, 116 S.W. 2d 393, 134 Tex. Cr. 472.

59. Tex.—*Hicks v State*, 145 S.W. 938, 66 Tex. Cr. 176, 68 C.J. p. 22 note 51.

60. Tex.—*Wallace v State*, 200 S.W. 836, 82 Tex. Cr. 658, 68 C.J. p. 22 note 52.

61. Tex.—*Guy v State*, 170 S.W. 303, 74 Tex. Cr. 620, 68 C.J. p. 22 note 53.

62. Tex.—*Sanderson v State*, 5 S.W. 138, 23 Tex. App. 520, 68 C.J. p. 22 note 54.

63. Tex.—*Davis v State*, 122 S.W. 2d 635, 135 Tex. Cr. 659, 68 C.J. p. 22 note 55.

64. Tex.—*Dominguez v State*, 147 S.W. 2d 480, 141 Tex. Cr. 67—*Davis v State*, 122 S.W. 2d 635, 135 Tex. Cr. 659, 68 C.J. p. 22 note 56.

65. Tex.—*Brent v State*, 123 S.W. 593, 57 Tex. Cr. 411.

66. Tex.—*Davis v State*, 122 S.W. 2d 635, 135 Tex. Cr. 659, 68 C.J. p. 22 note 58.

67. Tex.—*Davis v State*, *supra*, 68 C.J. p. 22 note 59.

68. Tex.—*Due v State*, 57 S.W. 2d 849, 123 Tex. Cr. 73, 68 C.J. p. 22 note 60.

69. Tex.—*Roberts v State*, 131 S.W. 321, 60 Tex. Cr. 111. Displaying weapon as constituting offense see *infra* § 16.

70. Tex.—*Brent v State*, 123 S.W. 593, 57 Tex. Cr. 411, 68 C.J. p. 22 note 62.

Shooting firearms as constituting offense see *infra* §§ 19–21.

71. Tex.—*Brent v State*, *supra*.

72. Tex.—*Roberts v State*, 131 S.W. 321, 60 Tex. Cr. 111.

73. Tex.—*Bowles v State*, 147 S.W. 869, 66 Tex. Cr. 550, 68 C.J. p. 23 note 65.

74. N.Y.—*People v Russo*, 103 N.Y. S2d 603, 278 App. Div. 98, affirmed 102 N.E. 2d 834, 303 N.Y. 673.

75. Tex.—*Dominguez v State*, 147 S.W. 2d 480, 141 Tex. Cr. 67, 68 C.J. p. 23 note 68.

sion,<sup>76</sup> is not an offense. On the same principle, the owner of a weapon who changes his place of abode has a right to take the weapon to his new residence,<sup>77</sup> or to his permanent residence from a temporary one.<sup>78</sup> Also, an owner who finds himself in the possession of a weapon when away from home may properly carry it to his home,<sup>79</sup> if he acts in good faith,<sup>80</sup> or for a legitimate purpose.<sup>81</sup> Moreover a person having a right to keep or leave a weapon at a particular place, such as his place of business,<sup>82</sup> may carry<sup>83</sup> or send<sup>84</sup> the weapon to that place from some other place, as for example, from his home,<sup>85</sup> or place of business.<sup>86</sup> The carrying of a weapon between such places should not be habitual,<sup>87</sup> and must be bona fide.<sup>88</sup>

*Borrowers and lenders.* One who has borrowed a weapon may properly carry it to his residence,<sup>89</sup> and he may carry or send it back to the lender<sup>90</sup> or to the lender's home.<sup>91</sup> The lender himself, whether or not the loan of the weapon was bona fide,<sup>92</sup> may send for it,<sup>93</sup> or go to get the weapon<sup>94</sup> and carry it to his home<sup>95</sup> or elsewhere.<sup>96</sup>

*Buyers or donees.* A prohibited weapon, having been made the subject of sale,<sup>97</sup> barter,<sup>98</sup> or gift,<sup>99</sup> or having been surrendered in payment of a debt,<sup>1</sup> may, in good faith,<sup>2</sup> be carried from the place of purchase to the new owner or to his home.<sup>3</sup>

*Finder of a weapon* likewise may pick it up<sup>4</sup> and carry it with him to his home,<sup>5</sup> even though, before taking it home, he proceeds to the place to which he was going at the time of the finding.<sup>6</sup>

*Pledgee* commits no offense by simply carrying the pledged weapon to his home.<sup>7</sup>

### (3) Carrying to Public Authorities

One who is carrying or in possession of a prohibited weapon with no other object than to surrender it to the police or other authorities does not offend against statutes dealing with the carrying or possession of weapons, if, within a reasonable time, he surrenders the weapon, or complies with the statutes licensing or regulating its possession.

One who is carrying or in possession of a prohibited weapon with no other object than to surrender it to the police or other authorities does not offend against statutes dealing with the carrying or possession of weapons, if, within a reasonable time, he surrenders the weapon,<sup>8</sup> or complies with the statutes licensing or regulating its possession.<sup>9</sup> The legislative intent of a statute pertaining to the surrender to the police of certain firearms, and other deadly weapons, is to effect a voluntary surrender of unlicensed weapons and to grant immunity to those who turn them in if surrender is made under circumstances not suspicious, peculiar, or involving the commission of any crime.<sup>10</sup>

76. Tex.—Banks v State, 105 SW 821, 52 Tex Cr 167

77. Tex.—Brown v State, 261 SW 773, 97 Tex Cr 402  
68 CJ p 23 note 70

78. Tex.—Campbell v State, 11 S W 832, 28 Tex App 44

79. Tex.—Jarrett v State, 281 SW 872, 103 Tex Cr 447  
68 CJ p 23 note 72

80. Tex.—Moore v State, 217 SW 1036, 86 Tex Cr 502  
68 CJ p 23 note 73

81. Tex.—McQueen v State, 177 S W 91, 76 Tex Cr 636  
68 CJ p 23 note 74

82. Tex.—Burns v Texas Midland R. R., Civ App., 167 SW 264  
Hare v State, 160 SW 79, 71 Tex Cr 395

As exempted by statute see infra § 9

83. Tex.—Davis v State 122 SW 2d 635, 135 Tex Cr 659  
68 CJ p 23 note 77

84. Tex.—Cass v State, 216 SW 1099, 86 Tex Cr 369  
68 CJ p 23 note 78

85. Tex.—Davis v State, 122 SW 2d 635, 135 Tex Cr 659  
68 CJ p 24 note 79

86. Tex.—Davis v State, supra.  
68 CJ p 24 note 80.

87. Tex.—Davis v State, supra  
68 CJ p 24 note 81

88. Tex.—Davis v State, supra  
68 CJ p 24 note 82

89. Tex.—Farris v State, 251 SW 234, 94 Tex Cr 306  
68 CJ p 24 note 83

90. Tex.—Drawhorn v State, 27 S W 2d 546, 115 Tex Cr 359

91. Tex.—Due v State, 57 SW 2d 849, 123 Tex Cr 73—Veal v State, 125 SW 919, 58 Tex Cr 340

92. Tex.—Engman v State, 135 S W 565, 61 Tex Cr 496

93. Tex.—Engman v State, supra

94. Tex.—Engman v State, supra—  
Roberts v State, 131 SW 321, 60 Tex Cr 111

95. Tex.—Rosebud v State, 220 S W 1093, 87 Tex Cr 267

96. Tex.—Roberts v State, 131 S W 321, 60 Tex Cr 111  
68 CJ p 24 note 90

97. Ark.—Wylie v State, 199 SW 905, 131 Ark 572  
68 CJ p 21 note 91.

98. Tex.—Gates v State, 200 SW 841, 82 Tex Cr 655.  
68 CJ p 24 note 92

99. Tex.—Kellum v State, 147 S W 870, 66 Tex Cr 505

W Va.—State v. Merico, 87 SE 370, 77 W.Va. 314

1. DC—Bolt v U S, 2 F 2d 922, 55 App DC 120

Tex.—Elson v State, 254 SW 800, 95 Tex Cr 341

2. DC—Bolt v U S, 2 F 2d 922, 55 App DC 120

Tex.—Upton v State, 26 SW 197, 33 Tex Cr 231.

3. W Va.—In State v Merico, 87 SE 370, 77 W Va 314  
68 CJ p 24 note 96

4. Ala.—Johnson v State, 66 So. 875, 11 Ala App 301

5. Tex.—Tucker v State, 232 SW. 796, 89 Tex Cr 655  
68 CJ p 24 note 98

6. Tex.—Tucker v State, 232 SW. 796, 89 Tex Cr 655  
Mangum v State, 15 Tex App 362

7. Tex.—Mays v State, 101 SW 233, 51 Tex Cr 32

8. NY—People v La Pella, 4 NE 2d 943, 272 NY 81  
68 CJ p 24 note 2

9. Philippine—U S v. Mallanao, 6 Philippine 391  
68 CJ p 24 note 3

10. NY—People v Rosen, 74 NY. S 2d 624

**Immunity not established**

Surrender of unlicensed weapons to police under circumstances indi-

(4) Other Purposes or Motives

A weapon may be lawfully transported as an article of merchandise for delivery to a person entitled to its possession, or to a place where possession thereof is lawful

Applying the rule, discussed supra subdivision b (1) of this section, that it is not an offense to carry or possess a prohibited weapon for a harmless or legitimate purpose or motive, a weapon may be lawfully transported as an article of merchandise for delivery to a person entitled to its possession, or at a place where the possession thereof is lawful<sup>11</sup> So, a weapon may be carried in good faith for uses of honest work or for purposes of legitimate sport or recreation<sup>12</sup>

*Carrying to have repairs made* It has been held that statutes denouncing the carrying of weapons are not violated by taking a weapon to a particular place with the intention of having it repaired,<sup>13</sup> or by subsequently taking the weapon away and returning home with it<sup>14</sup>

*Carrying to pledge or sell* According to some authority, a pledgor, having redeemed or repossessed a pledged weapon, is permitted to carry it from the place where it was pawned or redeemed to his home, whether the home is a temporary or a permanent one.<sup>15</sup> No offense is committed by carrying a weapon to one's home for the purpose of sale,<sup>16</sup> or by taking the weapon to a specified place with the expectation of selling it,<sup>17</sup> or delivering it to the buyer<sup>18</sup> If the sale<sup>19</sup> or delivery<sup>20</sup> is not consummated, the seller or prospective seller may return with the weapon to his home or elsewhere, such as his place of employment

*Carrying to procure ammunition.* It has been

held that it is not a violation of the law to carry a firearm to a store or other place for the purpose of obtaining ammunition for it, or to carry it from such place to one's home<sup>21</sup>

*Possession and carrying by workmen* Some decisions held that a person whose work necessitates the use of a tool or implement of such a nature that it may constitute a weapon is not guilty of violating a statute forbidding the carrying or possession thereof,<sup>22</sup> unless he possesses or uses the implement outside of his employment<sup>23</sup> when he is not engaged in working<sup>24</sup>

*Possession and carrying for hunting or butchering* It has been held by some courts that a prohibited weapon may be lawfully carried for the purpose of hunting<sup>25</sup> or killing an animal.<sup>26</sup>

*Possession by pawnbrokers.* Statutes making it unlawful for any person to have in his possession designated weapons under certain conditions have been interpreted as being inapplicable to such weapons in the possession of a pawnbroker as unredeemed pledges on the date when the statutes went into effect.<sup>27</sup>

*Disarming another.* When the act of carrying or possessing a weapon is merely the incidental result of having disarmed another person, the weapon being retained to prevent injury, the statutes are not violated<sup>28</sup>

*Protecting life or property.* Where a person is confronted with sudden and imminent danger, and is threatened with felonious assault, or his property is about to be taken under circumstances amounting to a felony, it is not unlawful to have a prohibited weapon for the protection of life<sup>29</sup> or property<sup>30</sup>

cating that possessor was fearful that his possession might be revealed to police in course of an uncompleted investigation established that surrender was made under "peculiar" and "suspicious circumstances" so that possessor was not entitled to statutory immunity from arrest for unlicensed possession of a concealed weapon, the word "peculiar" meaning unusual, strange, odd  
N.Y.—People v. Robbins, 74 N.Y.S.2d 740, 190 Misc 767

11. Mo.—State v. Roberts, 39 Mo App 47  
68 C.J. p 25 note 5

12. Cal.—People v. Commons, 148 P 2d 724, 64 Cal App 2d Supp 925

13. W Va.—State v. Tapit, 44 S.E. 231, 52 W Va. 473.  
68 C.J. p 25 note 7.

14. Tex.—Davis v. State, 122 S.W.2d 635, 135 Tex Cr 659  
68 C.J. p 25 note 8.

15. Tex.—Davis v. State, supra  
68 C.J. p 25 note 11.

16. Tex.—Kirby v. State, 133 S.W. 682, 61 Tex Cr 1

17. Tex.—Zollicoffer v. State, Cr. 43 S.W. 992

18. Tex.—Snider v. State, Cr. 43 S.W. 84

19. Tex.—Davis v. State, 122 S.W.2d 635, 135 Tex Cr 659.  
68 C.J. p 25 note 15

20. Tex.—Snider v. State, Cr. 43 S.W. 84

21. Tex.—Rines v. State, Cr. 38 S.W. 1016  
68 C.J. p 25 note 18

22. Puerto Rico—People v. González, 34 Puerto Rico 740  
68 C.J. p 25 note 20

23. Puerto Rico—People v. González, supra

24. Puerto Rico—People v. González, supra  
68 C.J. p 25 note 22

25. Cal.—People v. Commons, 148 P 2d 724, 64 Cal App 2d Supp 925

Pistol  
Ill.—People v. Niemoth, 152 N.E. 537, 322 Ill 51

Tenn.—Moorefield v. State, 5 Lea 348

26. Ark.—Cornwell v. State, 60 S.W. 28, 68 Ark 447  
68 C.J. p 25 note 26

27. N.Y.—People v. Fallon, 146 N.Y. S 253  
68 C.J. p 25 note 28

28. N.Y.—People v. Persce, 97 N.E. 877, 204 N.Y. 397  
68 C.J. p 26 note 29

29. D.C.—Wilson v. U.S., 198 F.2d 299, 91 US App DC 135  
68 C.J. p 26 note 30  
Persons fearing attack as expressly exempted see infra § 9

30. N.Y.—People v. Pignatoro, 136 N.Y.S. 155, 26 N.Y. Cr. 531.  
68 C.J. p 26 note 31.

However, if his property has already been taken, his right to procure and carry a weapon with a view to arresting the wrongdoer depends on the facts of each case<sup>31</sup> No such right exists if he knows that an officer of the law is within calling distance, or may be obtained as readily as a weapon<sup>32</sup>

## § 6. — Weapons Prohibited

- a. In general
- b. Pistols
- c. Dangerous or deadly weapons

### a. In General

In order to constitute the offense of carrying or possessing a weapon, the weapon involved must answer the description of one of the prohibited instruments or weapons, and numerous weapons have been held to be prohibited within the meaning of the terms "arms," "fire-

arms," "instruments," or "weapons" generally, as employed by the statutes.

The carrying or possession of a particular weapon is unlawful when, and only when, such weapon is of the kind prohibited by the statute, that is, the weapon must come within the meaning of the terms employed in the statutes to designate forbidden weapons<sup>33</sup> In this connection, the courts have construed the meaning of such general designations as "arms,"<sup>34</sup> "firearms,"<sup>35</sup> "instruments,"<sup>36</sup> "contraband,"<sup>37</sup> or "weapons" generally.<sup>38</sup> The lawmaking body not infrequently designates by name the weapons or instruments which may not be possessed or carried, such as billies,<sup>39</sup> blackjacks,<sup>40</sup> bludgeons,<sup>41</sup> bowie knives,<sup>42</sup> brass knuckles,<sup>43</sup> daggers,<sup>44</sup> dangerous knives,<sup>45</sup> dirks,<sup>46</sup> razors,<sup>47</sup> slung shots,<sup>48</sup> and other particular instruments, including, in more recent times, machine guns,<sup>49</sup> and sawed off shot-

31. Tex—Wilson v State, 151 SW 804, 68 Tex Cr 572

32. Tex—Wilson v State, supra

33. Cal—People v Golden, 174 P 2d 32, 76 Cal App 2d 769

NY—People v Woods, 114 NYS 2d 611, 202 Misc 562  
68 CJ p 28 note 56

34. Puerto Rico—People v. Vadi, 34 Puerto Rico 441, 442  
68 CJ p 26 note 34

35. US—U S v Freeman, CA Ind., 203 F2d 387  
68 CJ p 26 note 35

### Weapons held to constitute firearms

(1) An automatic pistol, irrespective of whether it was equipped with a silencer or whether it could be so equipped

US—U S v Tot, CCANJ, 131 F2d 261, reversed on other grounds  
63 S Ct 1241, 319 US 463, 87 L Ed 1519

(2) A Very pistol, designed to fire warning flares

NY—People, on Complaint of Altomari, v Evergood, 74 NYS 2d 12

### Federal Firearms Act

(1) The Federal Firearms Act of 1938 making it unlawful for any person who has been convicted of crime of violence to receive any firearm which has been shipped in interstate commerce was intended to apply to existing guns

US—U S v. Tot, DCNJ, 42 F Supp 252, affirmed, CCA, 131 F 2d 261, reversed on other grounds  
63 S Ct 1241, 319 US 463, 87 L Ed 1519

(2) An air gun and possibly a tear gas gun were the only ones intended to be excluded from operation of Federal Firearms Act, and they are presumably excluded because air is not an explosive and tear gas is not a projectile

U.S.—U. S. v. Tot, supra.

36. Puerto Rico—People v Acevedo,

34 Puerto Rico 439

68 CJ p 26 note 36

### 37. Sawed-off shot gun

Sawed-off twelve gauge shot gun with eight and one-half inch single barrel was "contraband" within purview of statute making it unlawful to transport, conceal, or possess any contraband in a motor vehicle  
US—U S v One 1950 Pontiac Convertible Coupe, DCPa, 117 F Supp 532

38. Iowa—State v Williams, 29 N W 801, 70 Iowa 52  
68 CJ p 26 note 37

39. Cal—People v Canales, 55 P 2d 289, 12 Cal App 2d 215

40. Cal—People v Canales, supra—People v Mulhern, 35 P 2d 174, 175, 140 Cal App 212

NY—People v Quintana, 20 NYS 2d 806, 260 App Div 13  
68 CJ p 27 note 40

41. NY—People v Visarities, 222 NYS 401, 220 App Div. 657.  
68 CJ p 27 note 41

42. Tex—Brito v. State, Cr, 270 SW 2d 104  
68 CJ p 27 note 42

**Knives, generally,** are not covered by statute prohibiting the carrying on the person of "bowie knife or any other knife manufactured or sold for the purposes of offense or defense", and to come within such statute the knife must be one which is described therein

Tex—Brito v State, supra.

43. Cal—People v. Quinones, 35 P 2d 638, 140 Cal App 609

68 CJ p 27 note 43—9 CJ. p 319 note 10

44. Tex—Bivens v State, 113 SW 2d 921, 133 Tex Cr. 604

68 CJ p 27 note 44

**Dagger is any straight knife, worn**

on person and capable of inflicting death, except pocket knife, "dirk" and "dagger" are synonymous and consist of any straight stabbing weapon or weapon fitted primarily for stabbing, and "dagger" is generic term covering dirk, stiletto, poniard, etc

Cal—People v Syed Shah, 205 P 2d 1081, 91 Cal App 2d 716

45. NY—People v Cricuoli, 141 NYS 855, 157 App Div 201, 29 N. Y Cr 412

68 CJ p 27 note 45

46. Cal—People v Ruiz, 263 P 836, 88 Cal App 582

### Two-edged weapon

"Dirk," as referred to in statute prohibiting the carrying of knives on the person, has ordinary meaning of a poniard or two-edged weapon, and does not include a single-edged knife in scabbard, with blade about five inches long, slightly curved at the point, with a guard and bone handle

Tex—Bivens v State, 113 SW 2d 921, 133 Tex Cr 604

47. W Va—Claiborne v Chesapeake & O Ry Co, 33 SE 262, 264, 46 W Va 363

68 CJ p 28 note 48

48. Tex—Vargas v State, 79 SW. 2d 860, 128 Tex Cr 139.

68 CJ p 28 note 50

### 49. Saddle piece

A gun, which was minus a saddle piece and saddle type drum, without which no more than one shot could be fired therefrom at a time, was not a "machine gun" within statute defining offense of illegal possession of such a gun, in view of statutory definition of machine gun as weapon from which a number of shots or bullets may be rapidly or automatically discharged with one continuous pull of trigger.

guns<sup>50</sup> Where, as is usually the case, the statutes specifically name certain prohibited weapons, and conclude with a general prohibition against other unnamed instruments or weapons, the courts, in ascertaining the scope of such a general prohibition, frequently invoke the doctrine of ejusdem generis.<sup>51</sup>

### b. Pistols

Under some statutes, the carrying or possession of pistols or revolvers is specifically prohibited, and no particular form or shape is necessary to constitute a pistol within the purview of such provisions

Some statutes specifically prohibit the carrying or possession of pistols or revolvers, or of pistols and other dangerous or deadly weapons, or of pistols and other firearms, or prohibit the carrying, as a weapon, of any pistol except the army or navy pistol, which must be carried openly or uncovered and in the hand<sup>52</sup> Statutory language of such nature constitutes a legislative declaration that a pistol is at least prima facie<sup>53</sup> or presumptively<sup>54</sup> a dangerous weapon; in other words, it is a dangerous weapon per se<sup>55</sup> The normally foreseeable use of a pistol is not decisive of the issue as to whether it is a weapon, and hence, a firearm within the statutory prohibition<sup>56</sup> No particular form or

shape is necessary to constitute a pistol within the purview of such statutes<sup>57</sup> A revolver is a pistol,<sup>58</sup> and a shotgun is an arm of the same nature as a revolver<sup>59</sup>

*Unloaded or defective pistols.* Under statutes dealing specifically with pistols, a conviction may be had for unlawfully having or carrying a pistol, even though the pistol is unloaded,<sup>60</sup> or is loaded with ammunition which cannot be fired therein,<sup>61</sup> or is disassembled,<sup>62</sup> unless, it has been held, it cannot be readily assembled or fired<sup>63</sup> Similarly, it may be an offense to carry even a broken or defective pistol,<sup>64</sup> at least if it is susceptible of being fired in some manner,<sup>65</sup> as by striking the hammer with a knife or other instrument<sup>66</sup> It has been held, however, that it is not unlawful to have or carry a pistol which cannot be discharged by any method,<sup>67</sup> for in that event it has ceased to be a pistol<sup>68</sup> or firearm.<sup>69</sup>

### c. Dangerous or Deadly Weapons

Statutes prohibiting the carrying or possessing of dangerous or deadly weapons apply to weapons which in their intended or readily adaptable use are likely to produce death or serious bodily injury.

Under some statutes, the weapons which may not be carried or possessed are broadly designated

NY—People v Woods, 114 NYS 2d 611, 202 Misc 562

50. Tenn—Bucks v State, 36 SW 2d 892, 162 Tenn 406

51. Puerto Rico—People v Cruz, 34 Puerto Rico 305  
68 CJ p 28 note 55

52. Ga—Puryear v State, 44 Ga. 221

68 CJ p 28 note 58

*Army or navy repeater* is a firearm which, according to circumstances, may or may not be a "horseman's pistol" within an exception in a statute prohibiting carrying concealed weapons

Ga—Puryear v. State, supra

53. Mo—State v Rector, 40 SW 2d 639, 642, 328 Mo 669

Prohibition of dangerous or deadly weapons generally see infra subdivision c of this section

54. W Va—State v Tapit, 44 SE 231, 52 W Va 473

55. Kan—State v Abrams, 223 P 301, 115 Kan 520

Ky—Couch v Commonwealth, 255 S W 2d 478

68 CJ p 28 note 61

56. NY—People, on Complaint of Altomari, v Evergood, 74 NYS 2d 12

57. NY—People v. Anderson, 260 NYS 329, 236 App Div. 586

68 CJ p 28 note 62.

### Very pistol

Possession of a Very pistol of such size that it may be concealed on a person is violation of statute prohibiting possession of firearm of such size without written license, even though such a pistol is sawed-off shotgun within statutory provision declaring person attempting to use sawed-off shotgun against another guilty of misdemeanor

NY—People, on Complaint of Altomari, v Evergood, 74 NYS 2d 12

58. Ohio—Schraeder v State, 162 NE 647, 28 Ohio App 248

68 CJ p 28 note 63

59. Puerto Rico—People v Rodriguez, 35 Puerto Rico 253

60. Miss—Cittadino v State, 24 So 2d 93, 199 Miss 235

Tenn—Brooks v State, 215 SW 2d 785, 187 Tenn 361

Wash—State v Olsen, 263 P 2d 824, 43 Wash 2d 726

68 CJ p 28 note 65

61. Ohio—Lamb v State, 3 Ohio S & CP. 282, 7 Ohio NP 224

68 CJ p 29 note 66

62. Tex—Crain v State, 153 SW 155, 69 Tex Cr 55

68 CJ p 29 note 67

### Unattached cartridge clip

Pa—Commonwealth v. Grab, 54 Pa Dist & Co. 233

63. Ky.—Jarvis v Commonwealth, 206 SW 2d 831, 306 Ky. 190

68 CJ p 29 note 68.

### Missing cylinder

Ky—Jarvis v. Commonwealth, supra

64. Ga—Morris v State, 86 SE 462, 17 Ga App 271

68 CJ p 29 note 69

65. NY—People v Tardibuono, 20 NYS 2d 633, 174 Misc 305

68 CJ p 29 note 70.

66. Ala—Fielding v State, 33 So 677, 135 Ala 56—Redus v State, 2 So 713, 82 Ala 53

67. NY—People v De Bernardo, 106 NYS 2d 515, 199 Misc 563, modified on other grounds 125 N. YS 2d 641, 282 App Div. 920

People v De Witt, 140 NYS 2d 190, 285 App Div 1157

68 CJ p 29 note 72

*Remnant of what was once an automatic revolver*, which was totally and permanently unfit for use as a revolver, was not a "firearm," within statute making it unlawful to possess firearms without a license

NY—People v Boitano, 18 NYS 2d 644

68. NY—People v. Simons, 207 N. YS 56, 124 Misc. 28.

69. NY—People v. Simons, supra

as dangerous or deadly weapons,<sup>70</sup> and with respect to such provisions a dangerous or deadly weapon is one which in its intended or readily adaptable use is likely to produce death or serious bodily injury.<sup>71</sup> Under these statutes, it is unlawful to have or carry brass or metal knucks,<sup>72</sup> a black-jack,<sup>73</sup> a billy,<sup>74</sup> a razor,<sup>75</sup> a pistol,<sup>76</sup> or other firearm,<sup>77</sup> even though unloaded<sup>78</sup> or so defective that it cannot be fired.<sup>79</sup> A deadly weapon does not cease to be such by becoming temporarily inefficient,<sup>80</sup> nor is its essential character changed by dismemberment if the parts, with reasonable preparation, may be easily assembled so as to be effective.<sup>81</sup> What constitutes "reasonable preparation," within this rule, depends on the time required, changes to be made, parts to be inserted, and all other attendant factors.<sup>82</sup> A weapon designed for firing projectiles may be so defective or damaged that

it loses its initial character as a firearm, but that character is not lost when a relatively slight repair, replacement, or adjustment will make it an effective weapon.<sup>83</sup>

*Other dangerous or deadly weapons.* When a statute, having enumerated certain weapons, concludes with phraseology which in substance or effect constitutes a prohibition against other dangerous or deadly weapons, the legislative intention should be given effect.<sup>84</sup> Such intention is frequently but not invariably determined in the light of the doctrine of ejusdem generis,<sup>85</sup> and the term "other dangerous weapons" has been held to include firearms,<sup>86</sup> a butcher's knife,<sup>87</sup> a hunting knife,<sup>88</sup> a bayonet,<sup>89</sup> a kind of dagger or sharp-pointed knife with a blade about eight inches long,<sup>90</sup> an iron bar,<sup>91</sup> brass knuckles,<sup>92</sup> a piece of rubber hose,<sup>93</sup> and other instruments or weapons.<sup>94</sup> On the oth-

70. W Va.—Village of Barboursville ex rel Bates v Taylor, 174 SE 485, 115 W Va. 4, 92 A.L.R. 1093 68 CJ p 29 note 76

71. W Va.—Village of Barboursville ex rel Bates v Taylor, supra 68 CJ p 29 note 76 [a], [b] Definition of term

Generally see supra § 1 In connection with assault see Assault and Battery § 77.

In connection with homicide see Homicide § 25

In connection with robbery see Robbery § 28.

72. Mo.—State v Hall, 20 Mo App 397

73. Cal.—People v Duncan, 164 P 2d 510, 72 Cal App 2d 423

Idaho—State v. Hart, 157 P 2d 72, 66 Idaho 217

74. Idaho—State v Hart, supra.

75. Ky.—Williams v Commonwealth, 202 SW 2d 408, 304 Ky 761

68 CJ p 30 note 78.

76. Ky.—Skidmore v. Commonwealth, 228 SW 2d 739, 311 Ky 176

NY—People v. De Witt, 140 NYS 2d 190, 285 App Div. 1157

68 CJ p 30 note 79

Prohibition of pistols generally see supra subdivision b of this section

77. Mo.—State v. Baumann, 278 S W 974, 311 Mo 443—State v Rules, 204 SW. 1, 274 Mo. 618

78. Del.—State v Quail, 92 A. 859, 28 Del 310

68 CJ p 30 note 81

79. NY—People v. De Witt, 140 NYS 2d 190, 285 App Div 1157.

68 CJ p 30 note 82

80. Cal.—People v. Ekstrand, 81 P 2d 1045, 28 Cal App 2d 1—People

v Williams, 279 P 1040, 100 Cal App 149

81. Cal.—People v Ekstrand, 81 P 2d 1045, 28 Cal App 2d 1—People v Williams, 279 P 1040, 100 Cal App 149

Ky.—Jarvis v Commonwealth, 206 SW 2d 831, 306 Ky 190

NY—People, on Complaint of Di Buono, v Haskins, 76 NYS 2d 636, 190 Misc 888

#### Necessity of expertness

A 25-caliber pistol in such condition that it would take an expert at least one hour to place it in condition for use was not a dangerous weapon within statute regulating the carrying and use of dangerous weapons. NY—People, on Complaint of Di Buono, v Haskins, supra

82. NY—People, on Complaint of Di Buono v Haskins, supra

83. Mass.—Commonwealth v Bartholomew, 93 NE 2d 551, 326 Mass 218

#### Firing pin

The absence of the easily replaceable firing pin from machine gun did not destroy the character of the implement as a machine gun Mass—Commonwealth v Bartholomew, supra

84. Mich.—People v. Vaines, 17 N W 2d 729, 310 Mich 500

#### Other provisions

The words "other dangerous weapon" in a concealed weapons statute can be interpreted without reference to other sections of the penal code Mich—People v Vaines, supra

85. Philippine—U. S v Gavieres, 38 Philippine 757—U S v. Santo Nifo, 13 Philippine 141.

86. Philippine.—U S v. Santo Nifo, supra

68 CJ p 30 note 88

87. NC—State v. Erwin, 91 N.C. 545

68 CJ p 30 note 89

88. Mich.—People v Gogak, 171 N. W 428, 205 Mich 260

68 CJ p 30 note 90

89. NY—People v Panitz, 296 N. YS 80, 251 App Div 276

90. Philippine—U S v. Villareal, 28 Philippine 390

68 CJ p 91 note 91

91. Philippine—U S v Santo Nifo, 13 Philippine 141.

68 CJ p 30 note 92

92. Philippine—U S v Gavieres, 38 Philippine 757

93. Ill.—Schwarz v. Poehlmann, 178 Ill App 235

68 CJ p 30 note 94

94. Mich.—People v Vaines, 17 N. W 2d 729, 310 Mich 500

68 CJ p 30 note 95.

#### Ice pick

NY—People v Adamkiewicz, 81 N E 2d 76, 298 NY 176

#### Instruments carried for use as weapons

Pocket knives, razors, hammers, hatchets, wrenches, cutting tools, and other articles would constitute dangerous weapons within the concealed weapons statute if used or carried for use as weapons Mich—People v Vaines, 17 N W 2d 729, 310 Mich 500

#### Dangerous weapons per se

Daggers, dirks, stilettos, metallic knuckles, slung shots, pistols, and similar articles, designed for the purpose of bodily assault or defense, are generally recognized as "dangerous weapons per se" within the concealed weapons statute Mich.—People v. Vaines, supra.

er hand, it has been held that similar phraseology in other statutes was not intended to include pistols, or revolvers,<sup>95</sup> shotguns,<sup>96</sup> or other firearms,<sup>97</sup> penknives,<sup>98</sup> pocketknives,<sup>99</sup> or razors.<sup>1</sup> It is said by some authorities that when a statute, after naming certain weapons, forbids other dangerous or deadly weapons of like kind, it means like in kind in the respect of being dangerous or deadly,<sup>2</sup> and, if the statute is directed against concealed weapons, then in the further respect of being readily concealable on or about the person.<sup>3</sup> By other authorities, however, such statutory language is given a narrower meaning pursuant to the rule of ejusdem generis.<sup>4</sup>

### § 7. — Places Prohibited

Where a statute prohibits carrying or having possession of a weapon making no exception as to locality, it is unlawful to carry or possess such prohibited weapon anywhere, but where a statute merely prohibits the carrying only at certain places, the weapon may be carried anywhere except at the place or places prohibited.

Where a statute prohibits carrying or having

possession of a weapon or a designated kind of weapon making no exception as to locality, it is unlawful to carry or possess such prohibited weapon anywhere,<sup>5</sup> even on one's own premises.<sup>6</sup> Under statutes prohibiting the carrying only at certain places, as within the limits of a municipality, only on premises not one's own or under his control, or at any place other than one's own premises or place of business, the weapon may be carried anywhere except at the place or places prohibited,<sup>7</sup> but not at the place expressly prohibited.<sup>8</sup>

*Public places or assemblies.* Under some statutes it is a distinct offense to carry a weapon to or in certain public places, assemblies, gatherings, or the like,<sup>9</sup> unless permitted under proper authorization,<sup>10</sup> but under such provisions, a public place does not include a home or other private place.<sup>11</sup> A public assembly may include a justice's court in session and engaged in trying a cause,<sup>12</sup> or a parade marching through town.<sup>13</sup> A public barbecue may constitute a public gathering.<sup>14</sup> Under the rule of strict construction, a

95. Ill.—People v Sheldon, 152 NE 567, 568, 322 Ill 70  
68 CJ p 30 note 96

96. Kan.—Parman v Lemmon, 244 P 227, 119 Kan 323, 120 Kan 370, 44 ALR 1500  
68 CJ p 30 note 97

97. Ill.—People v Sheldon, 152 NE 567, 322 Ill 70

98. La.—State v Nelson, 38 La Ann 942, 58 AmR 202

99. La.—State v Pye, 72 So 2d 879, 225 La 365  
68 CJ p 30 note 1

An ordinary jackknife with a pointed blade  $3\frac{1}{16}$  inches long was not a "dangerous weapon per se", nor was it a "dangerous weapon" within the concealed weapons statute, in the absence of evidence that it was used or was carried for use as a weapon

Mich.—People v Vaines, 17 NW 2d 729, 310 Mich 500

1. La.—State v Nelson, 38 La Ann 942, 58 AmR 202  
68 CJ p 30 note 2

2. Cal.—People v Canales, 55 P 2d 289, 12 Cal App 2d 215  
68 CJ p 30 note 3

3. Cal.—People v Boyd, 178 P 2d 797, 79 Cal App 2d 90  
68 CJ p 31 note 4

A 45 caliber Colt Automatic pistol was a "firearm capable of being concealed upon the person" within statute forbidding persons convicted of felony involving assault and like crimes from carrying a "firearm capable of being concealed upon the person."

US—U. S v Farwell, DC Alaska, 76 F Supp. 35

4. Ill.—People v Sheldon, 322 Ill 70, 152 NE 567

5. Ky.—Hall v Commonwealth, 215 SW 2d 840, 309 Ky 74—*Corpus Juris* quoted in Commonwealth v Puckett, 125 SW 2d 1011, 1012, 277 Ky 131  
68 CJ p 31 note 7

Places exempted see *infra* § 9

6. Ky.—Hall v Commonwealth, 215 SW 2d 840, 309 Ky 74—*Corpus Juris* quoted in Commonwealth v Puckett, 125 SW 2d 1011, 1012, 277 Ky 131

NY—People, on Complaint of Altomari, v Evergood, 74 NYS 2d 12

Tenn.—Brooks v State, 215 SW 2d 785, 187 Tenn 361.

68 CJ p 31 note 8.

7. NC.—State v Bradley, 186 SE 240, 210 NC 290

Tex.—Johnson v State, Cr, 269 SW 2d 406—Poston v State, 104 SW 2d 516, 132 Tex Cr 317

68 CJ p 31 note 10.

#### Integral element of offense

Being off the premises of accused is integral part of offense of carrying concealed weapons

NC.—State v. Bradley, 186 SE 240, 210 NC 290

Possession of gun outside city limits would not be offense against city's ordinances

Utah.—State v Butcher, 279 P 497, 74 Utah 275

#### Place of business

A statute prohibiting a person

from carrying a pistol without a license "except in his dwelling house or place of business or on other land possessed by him" manifests the intent that the "place of business" referred to is land, and would not apply so as to exempt a taxicab driver who carried a pistol without a license while in his taxicab, since the cab would not be the driver's "place of business"

DC—U S v Waters, DC, 73 F Supp 72, appeal dismissed 69 SCt 168, 335 US 869, 93 LEd 413, cause certified 175 F2d 340, 84 US App DC 127

8. Va.—Zimmerman v Commonwealth, 138 SE 569, 148 Va 745

9. Minn.—Salisbury v State, 20 N. W 2d 349, 220 Minn 517  
68 CJ p 31 note 12

#### State institution

Statute making it a felony for any person to take into any state institution or grounds any firearms without consent of board of control was enacted for purpose of preventing the smuggling of firearms and explosives into state institutions

Minn.—Salisbury v State, *supra*

10. Minn.—Salisbury v. State, *supra*.

11. NY—People v Kee, 28 NY Cr. 46—People v Stramendino, 28 N.Y. Cr 43

12. Tex.—Summerlin v State, 3 Tex. App 444

13. Puerto Rico—People v Chivilla, 22 Puerto Rico 114

14. Ga.—Wynne v. State, 51 S.E. 636, 123 Ga. 566.

statute making it an offense to carry a weapon "to" a public gathering is not violated by one who lawfully or unlawfully, innocently or designedly comes into the possession of a weapon after reaching the place of the gathering and mingling with the persons there assembled,<sup>15</sup> and in view of this fact, and of the fact that the law seeks to protect the gathering itself rather than the precise spot at which the services or proceedings for which it has assembled may be conducted, it has been held that where the people composing the gathering have dispersed themselves about the grounds during an intermission or a mere temporary cessation of the proceedings, a person violates the statute by carrying a weapon so near the place where the proceedings are conducted that he will come into contact with a considerable number of the persons constituting the assemblage.<sup>16</sup>

In order to constitute the offense, there must be people assembled at a gathering of the kind contemplated by the statutes,<sup>17</sup> and the weapon must be carried at the time<sup>18</sup> and place<sup>19</sup> of the gathering, and if so carried, it is immaterial that the place of the assembly or gathering was on premises owned or controlled by the accused himself.<sup>20</sup> It has been held, however, that a statute penalizing any person who, while having or carrying a weapon, goes into a gathering or place where people are assembled, contemplates no special emphasis on the words "goes into" or similar words,<sup>21</sup> and that it is a violation of the statute to have or carry a prohibited weapon at and in such gathering or place.<sup>22</sup>

## § 8. — Manner of Carrying, Concealing, or Possessing

### a. In general

15. Ga.—*Modesette v State*, 41 SE 992, 115 Ga. 582
16. Ga.—*Culbertson v. State*, 47 SE 175, 119 Ga. 805.  
68 CJ p 32 note 19
17. Tex.—*Cassels v State*, 1 SW 2d 644, 108 Tex Cr 477.
18. Tex.—*Cassels v. State*, *supra*.
19. Mo.—*State v. Loahmann*, 58 S W 2d 309  
Tex.—*Cassels v State*, 1 SW 2d 644, 108 Tex Cr 477
20. Tex.—*Cassels v. State*, *supra*.  
68 CJ p 32 note 23
21. Tex.—*Cassels v State*, *supra*.
22. Tex.—*Cassels v. State*, *supra*.  
68 CJ p 32 note 25
23. Cal.—*Ex parte Bergen*, 214 P 521, 61 Cal App 226  
68 CJ p 32 notes 26, 27.
24. Cal.—*Ex parte Bergen*, *supra*.

- Mich.—*People v Williamson*, 166 N W 917, 200 Mich 342
25. Miss.—*Clark v City of Jackson*, 124 So 807, 155 Miss 668
26. Pa.—*Commonwealth v Festa*, 40 A 2d 112, 156 Pa Super 329  
68 CJ p 32 note 31
27. Ala.—*Thomas v State*, 64 So 192, 9 Ala App 67  
Tex.—*State v Carter*, 36 Tex 89
28. Pa.—*Commonwealth v Festa*, 40 A 2d 112, 156 Pa Super. 329  
68 CJ p 32 note 33
29. Ga.—*Barnes v State*, 97 SE 410, 23 Ga App 6  
68 CJ p 32 note 34
30. Ohio.—*Schraeder v State*, 162 NE 647, 28 Ohio App 248
31. Pa.—*Commonwealth v Lanzetti*, 97 Pa Super 126
32. Ohio.—*Schraeder v State*, 162 N E 647, 28 Ohio App 248

- b. On the person
- c. On or about the person
- d. In a vehicle
- e. Carrying concealed

### a. In General

The word "carry" in statutes denouncing the carrying of weapons may mean to convey or transport, and it imports the idea of having the weapon on or about the person, and not necessarily the idea of locomotion.

The word "carry" in ordinary usage means to convey or transport, and thus also may be its meaning in statutes denouncing the carrying of weapons.<sup>23</sup> The "carrying" of a weapon suggests the thought of going armed<sup>24</sup> and of having the weapon readily accessible and available for use.<sup>25</sup> The word "carry" within the purview of such statutes usually means simply to bear,<sup>26</sup> or to have on or about the person,<sup>27</sup> and does not necessarily import the idea of locomotion.<sup>28</sup> The offense of carrying weapons without a license, however, may well be deemed to require at least an intention to convey the weapon from one place to another.<sup>29</sup>

"On" and "about" In statutes penalizing the carrying of weapons on the person, "on" has its ordinary everyday meaning of being connected<sup>30</sup> or in contact with,<sup>31</sup> or attached to.<sup>32</sup> The word "on" signifies closer contact than the word "about,"<sup>33</sup> and is not to be construed in the sense of "adjacent."<sup>34</sup>

The word "about" is a comprehensive term having a broader meaning than "on"<sup>35</sup> and including everything that is included in the latter word.<sup>36</sup> In statutes interdicting the carrying of weapons about the person, the term "about," although sometimes given a meaning synonymous or nearly synonymous with that of "on,"<sup>37</sup> is also defined as meaning near,<sup>38</sup> near-by,<sup>39</sup> close at hand,<sup>40</sup> or in close

33. Pa.—*Commonwealth v Lanzetti*, 97 Pa Super 126
34. Pa.—*Commonwealth v Lanzetti*, *supra*
35. Ala.—*Ladd v State*, 9 So 401, 92 Ala 58  
68 CJ p 32 note 43
36. Mo.—*State v Scanlan*, 273 SW 1062, 308 Mo 683
37. La.—*State v. Brunson*, 111 So 321, 162 La. 902  
68 CJ p 33 note 45
38. D C.—*Brown v U S*, 58 App DC 311, 30 F 2d 474  
NC.—*State v McManus*, 89 NC 555.
39. Tex.—*Welch v State*, 262 SW. 485, 97 Tex Cr 617.  
68 CJ p 33 note 47
40. Ohio.—*Schraeder v State*, 162 NE 647, 28 Ohio App 248.



proximity<sup>41</sup> so as to be readily<sup>42</sup> or conveniently<sup>43</sup> accessible<sup>44</sup> or within easy,<sup>45</sup> immediate,<sup>46</sup> physical<sup>47</sup> reach<sup>48</sup> or convenient<sup>49</sup> control<sup>50</sup> without materially<sup>51</sup> altering one's position<sup>52</sup>

*Manner of possessing.* In order to establish the unlawful possession of a weapon, actual physical hold thereof is not necessary,<sup>53</sup> constructive possession may be sufficient<sup>54</sup> It has been suggested, however, that statutes penalizing the possession of weapons should not be construed to mean such a theoretical and technical possession as would follow from the legal ownership of a weapon in a collection of curious and interesting objects<sup>55</sup> It is not a violation of a statute prohibiting the manual possession of a weapon to have it in a dashboard compartment of a moving automobile<sup>56</sup>

### b. On the Person

One is said to have a weapon on his person when it is either in contact with his person or is carried in his clothing.

In common parlance,<sup>57</sup> and hence within the meaning of statutes prohibiting the carrying of weapons "on" the person, as distinguished from statutes using the words "on or about" the person, when it is said that some one has an article such as a weapon on his person, it means that it is either in contact with his person or is carried in his clothing,<sup>58</sup> including a garment such as a coat

which is being carried on the arm<sup>59</sup> Consequently, a weapon lying in a vehicle, for example, under one of the seats, is not being carried on the person of any of the passengers, not even those who are occupying the seat under which the weapon has been placed<sup>60</sup>

### c. On or About the Person

- (1) In general
- (2) In vehicles

#### (1) In General

A weapon is carried "on or about the person" in violation of statute when it is carried in such proximity to the person as to be convenient of access and within immediate physical reach, as where it is in the hand, or in clothing worn or carried by the accused.

The words "on or about the person" in a statute prohibiting the carrying of concealed weapons mean carrying on the person, or in such proximity to the person, as to be convenient of access and within immediate physical reach<sup>61</sup> A weapon is carried "about," or "on or about" the person, when it is in the accused's hand,<sup>62</sup> or is in clothing worn by the accused,<sup>63</sup> or in clothing, for example a coat, which he may be carrying on his arm<sup>64</sup>

*In receptacles carried.* A weapon is generally held to be carried on or about the person when it is in a receptacle attached to, or carried by, the accused as he moves,<sup>65</sup> such as a basket,<sup>66</sup> or when

Tex—Welch v State, 262 SW 485, 97 Tex Cr 617

41. DC—Brown v U S, 58 App DC 311, 30 F2d 474  
68 CJ p 33 note 49

42. Ill—People v Niemoth, 152 NE 537, 322 Ill 51

Va—Sutherland v Commonwealth, 45 SE 15, 109 Va 834, 132 Am SR 949, 23 L.R.A.N.S. 172

43. DC—Brown v U S, 58 App DC 311, 30 F2d 474  
68 CJ p 33 note 51

44. Ala—Cunningham v State, 76 Ala 88

Ky—Turley v Commonwealth, 209 SW 2d 843, 307 Ky 89

45. DC—Brown v U S, 58 App DC 311, 30 F2d 474  
68 CJ p 33 note 53

46. Ohio—Porello v State, 168 NE 135, 121 Ohio St 280

47. Ohio—Porello v State, supra

48. Mo—State v Conley, 217 SW 29, 280 Mo 21

Ohio—Schraeder v State, 162 NE 647, 28 Ohio App 248

49. Ky—Turley v Commonwealth, 209 SW 2d 843, 307 Ky 89.  
68 C.J. p 33 note 57.

50. Ill—People v Niemoth, 152 NE 537, 322 Ill 51

68 CJ p 33 note 58

51. Tex—Welch v State, 262 SW 485, 97 Tex Cr 617

52. Ill—Welch v State, supra, People v Niemoth, 152 NE 537, 322 Ill 51

68 CJ p 33 note 60

53. NY—People ex rel Darling v Warden of City Prison, 139 NYS 277, 154 App Div 413

People v Bellucci, 240 NYS 669, 136 Misc 174

People, on Complaint of Altomari, v Evergood, 74 NYS 2d 12

Momentary possession see supra § 5

54. NY—People ex rel Darling v Warden of City Prison, 139 NYS 277, 154 App Div 413

People v Bellucci, 240 NYS 669, 136 Misc 174

People, on Complaint of Altomari, v Evergood, 74 NYS 2d 12

55. NY—People v Persce, 97 NE 877, 204 NY 397

68 CJ p 36 note 26

56. Fla—Watson v. Stone, 4 So 2d 700, 148 Fla 516

57. Pa—Commonwealth v Lanzetti, 97 Pa Super 126

58. Pa—Commonwealth v. Lanzetti,

supra—Commonwealth v Bruno, 82 Pa Super 388

59. Pa—Commonwealth v Lanzetti, 97 Pa Super 126

60. Pa—Commonwealth v Lanzetti, supra.

61. Ill—People v Liss, 94 NE 2d 320, 406 Ill 419—People v Niemoth, 152 NE 537, 322 Ill 51

Ky—Williams v Commonwealth, 261 SW 2d 807—Hampton v Commonwealth, 78 SW 2d 748, 257 Ky 626

—Commonwealth v Nunnolley, 56 SW 2d 689, 247 Ky 109

Ohio—Porello v State, 168 NE 135, 121 Ohio St 280

Okl—Dillon v. City of Tulsa, Cr, 273 P 2d 145

62. Tex—Prewitt v State, 92 SW 800, 49 Tex Cr 323

63. Neb—Phillips v State, 49 NW 2d 698, 154 Neb 790—Bright v State, 252 NW 386, 125 Neb 817

68 CJ p 33 note 67.

64. Ala—Diffey v State, 5 So 576, 86 Ala 66.

65. W Va—State v Blazovitch, 107 SE 291, 88 W Va 612

68 CJ p 33 note 70.

66. W Va—State v Blazovitch, supra

68 CJ p 33 note 71.

the weapon is in a small bag or satchel,<sup>67</sup> valise,<sup>68</sup> hand bag,<sup>69</sup> sack,<sup>70</sup> bundle,<sup>71</sup> or knapsack<sup>72</sup> carried in the hand<sup>73</sup> or on the arm,<sup>74</sup> or a sack carried under the arm,<sup>75</sup> or a container suspended from the shoulder,<sup>76</sup> as well as a scabbard hung to the saddle<sup>77</sup> It has been held to the contrary, however, where a weapon was in a satchel<sup>78</sup> or suitcase,<sup>79</sup> or in saddlebags.<sup>80</sup> In any event, a weapon carried in a receptacle must be concealed if the statute so requires<sup>81</sup>

## (2) In Vehicles

As a general rule, carrying a weapon in a vehicle in which the accused is riding is within the statutory prohibition against carrying a weapon on or about the person, provided the weapon is owned by accused, or is to some extent within his possession or control.

According to some authorities, when a weapon is merely in a vehicle in which the accused is riding, and is not attached to his person, it cannot be said to be carried on or about the person,<sup>82</sup> but in other cases the court refused to recognize this rule where the weapon was on<sup>83</sup> or under<sup>84</sup> the seat of the vehicle, or was accessible, even though

not on or under the seat.<sup>85</sup>

*In motor vehicles* The advent of the automobile has had some influence in connection with the rules as to the carrying of weapons in vehicles, it being quite generally held that a weapon is carried on or about the person when it is in a motor vehicle in which the accused is riding,<sup>86</sup> provided that the weapon is owned by him, or is to some extent within his possession or control<sup>87</sup> This rule, although not without occasional dissent, is appropriately applied where a weapon is on,<sup>88</sup> under<sup>89</sup> or behind<sup>90</sup> the seat or cushion, or is between the seat and the cushion,<sup>91</sup> or is on the floor,<sup>92</sup> or in a pocket<sup>93</sup> of the door,<sup>94</sup> or even in a receptacle on the running board<sup>95</sup>

In some jurisdictions, however, or under certain circumstances, a different rule prevails, it having been held that a weapon was not carried on or about the person when it was under the seat<sup>96</sup> or on the floor of an automobile,<sup>97</sup> or in a pocket of the door,<sup>98</sup> or in a dashboard compartment<sup>99</sup> Where the statute requires concealment as an element of the offense, it is no offense to carry

67. W Va.—State v Blazovitch, supra.  
68 C J p 33 note 72

68. Tenn.—Corpus Juris quoted in Trousdale v State, 76 SW 2d 646, 647, 168 Tenn 210

W Va.—State v Blazovitch, 107 S E 291, 88 W Va. 612

69. Ga.—Willis v State, 32 SE 155, 105 Ga 633

W Va.—State v Blazovitch, 107 SE 291, 88 W Va. 612

70. Tenn.—Robinson v State, 3 Tenn Cas 59

71. Ga.—Edwards v State, 54 SE 809, 126 Ga. 89

72. La.—State v Jones, 121 So 300, 168 La 55

73. W Va.—State v Blazovitch, 107 SE 291, 88 W Va. 612

68 C J p 33 note 78

74. Ala.—Diffey v State, 5 So 576, 86 Ala 66

NC.—State v McManus, 89 NC 555

75. Ga.—Warren v. State, 64 SE 111, 6 Ga.App 18

76. La.—State v Jones, 121 So 300, 168 La. 55

68 C J p 33 note 81.

77. Tenn.—Barton v State, 7 Baxt 105

78. S C.—State v Weston, 94 SE 871, 108 SC 383

79. S C.—State v Weston, supra.

80. Va.—Sutherland v. Commonwealth, 65 SE 15, 109 Va. 834, 132 Am SR 949, 23 L.R.A., NS, 172

68 C J p 34 note 85.

81. Ga.—Sullivan v State, 65 SE 354, 6 Ga.App 533

68 C J p 34 note 86  
Concealment as essential element generally see supra § 4.

82. Tex.—Hardy v State, 40 SW 299, 37 Tex Cr 511

68 C J p 34 note 87.

83. Tex.—Garrett v. State, Cr, 25 SW 285

84. Tex.—Emerson v State, 190 S W 485, 80 Tex Cr 354

68 C J p 34 note 89

85. Tex.—De Friend v State, 153 SW 881, 69 Tex Cr 329

86. Okl.—Corpus Juris quoted in Dillon v City of Tulsa, Cr, 273 P 2d 145, 149

68 C J p 34 note 91

87. Tex.—Williams v State, 271 S W 617, 99 Tex Cr 586

68 C J p 34 note 92

88. DC.—Brown v U S, 30 F 2d 474, 58 App DC 311

68 C J p 34 note 94

89. Neb.—Phillips v State, 49 NW 2d 698, 154 Neb 790

N J.—State v Rabatin, 95 A.2d 431, 25 N J Super 24

Tex.—Wagner v State, 188 SW 1001, 80 Tex Cr 66

90. Ky.—Hampton v Commonwealth, 78 SW 2d 748, 257 Ky. 626

68 C J p 34 note 95

91. Tex.—Pauk v State, 261 SW. 779, 97 Tex Cr. 415

92. Tex.—Welch v. State, 262 SW 485, 97 Tex Cr 619

68 C J p 34 note 98

93. Mo.—State v Hogan, 273 SW 1060

68 C J p 34 note 99

94. Tex.—Spears v State, 17 SW. 2d 809, 112 Tex Cr 506

68 C J p 34 note 1.

95. Tex.—Armstrong v State, 265 SW 701, 98 Tex Cr 335

96. Fla.—Corpus Juris cited in Watson v Stone, 4 So 2d 700, 702, 148 Fla. 516

Ill.—People v Liss, 94 NE 2d 320, 406 Ill 419

68 C J p 35 note 3

97. Fla.—Corpus Juris cited in Watson v Stone, 4 So 2d 700, 702, 148 Fla. 516

68 C J p 35 note 4

98. Fla.—Corpus Juris cited in Watson v Stone, 4 So 2d 700, 702, 148 Fla. 516

68 C J p 35 note 5

99. Ky.—Elza v Commonwealth, 269 SW 2d 275—Williams v Commonwealth, 261 SW 2d 807

**Locked compartment**  
Ky.—Turley v Commonwealth, 201 SW 2d 843, 307 Ky 89

**Carried "around"**  
When a pistol was in the dashboard drawer of an automobile being driven by motorist he did not "carry it around with him," within statute making it unlawful to carry around a pistol without a license

Fla.—Watson v Stone, 4 So 2d 700, 148 Fla. 516.

a weapon in a vehicle if the weapon is not concealed<sup>1</sup>

#### d. In a Vehicle

Under a statute rendering it an offense to carry an unlicensed firearm in a motor vehicle, the presence of a firearm in the vehicle while accused was inside constitutes a violation, without regard to his moving of the car

Where the offense denounced by the statute is the carrying of an unlicensed firearm in a motor vehicle, the presence of the firearm in the vehicle while accused was inside constitutes a violation, and it is not necessary to show that accused moved the car, with the firearm inside, from one place to another<sup>2</sup> The automobile need not be physically operated by the person charged with carrying the weapon therein<sup>3</sup> An automobile is a vehicle within the contemplation of a statute prohibiting the carrying of a weapon concealed in a vehicle.<sup>4</sup>

#### e. Carrying Concealed

Under statutes directed against the carrying of concealed weapons, "conceal" means to hide, secrete, screen, or cover, and concealment does not necessarily presuppose complete invisibility.

Within the purport of statutes directed against the carrying of concealed weapons, "conceal" has its common, ordinary, and well understood signification, meaning to hide, secrete, screen, or cover<sup>5</sup> Concealment does not necessarily presuppose complete invisibility<sup>6</sup> Conversely, the fact that a weapon is not concealed does not necessarily mean that it is completely visible, for ordinarily a weapon carried in the hand is not unlawfully concealed,<sup>7</sup> and yet whenever a weapon is carried on the person, some part of the weapon is unavoidably hidden from view<sup>8</sup>

*What constitutes concealment.* If a weapon is hidden from ordinary observation, it is concealed<sup>9</sup> Stated more fully, the test is whether or not the weapon is hidden from general view,<sup>10</sup> or from the ordinary observation<sup>11</sup> of persons who are in full view of accused and near enough to see the weapon if it were not concealed,<sup>12</sup> and who come into contact with accused in the usual associations of life<sup>13</sup> The test is not whether the weapon is invisible to one having only a partial view of the accused's person<sup>14</sup>

*Partial concealment of a weapon*, even though prohibited by some statutes,<sup>15</sup> is not an offense under others,<sup>16</sup> unless carried in such a manner that it cannot be easily recognized as a weapon<sup>17</sup>

*If the surface of a weapon is covered*, the mere fact that its outlines are distinguishable, and that the object is recognizable as a weapon, will not prevent it from being unlawfully concealed<sup>18</sup>

### § 9. — Persons, Places, and Occasions Exempted or Privileged

- a In general
- b Peace officers and persons aiding them
- c Travelers
- d Persons fearing attack
- e Postmasters and mail carriers
- f Soldiers
- g Common carriers
- h. One's own premises or place of business

#### a. In General

Statutes denouncing offenses relating to the carrying or possession of weapons are applicable to all persons, places, and occasions provided the circumstances of the

1. Cal—People v Commons, 148 P 2d 724, 64 Cal App 2d Supp 925 68 C J p 35 note 6  
Concealment as essential element generally see supra § 4
2. Cal—People v Smith, 164 P 2d 857, 72 Cal App 2d Supp 875  
Pa—Commonwealth v Festa, 40 A 2d 112, 156 Pa Super 329
3. Iowa—State v Thomason, 276 N W 619, 224 Iowa 499
4. Cal—People v Smith, 164 P 2d 857, 72 Cal App 2d Supp 875
5. Ky—Avery v. Commonwealth, 3 S W 2d 624, 223 Ky 248 68 C J p 35 note 8
6. Ill—People v Euctice, 20 N E 2d 83, 371 Ill 159  
N J—State v Rabatin, 95 A 2d 431, 25 N J Super 24 68 C J p 35 note 9.

7. Ga.—Johnson v State, 165 S E 317, 45 Ga App 603  
Ind—Ridenour v State, 65 Ind 411, 412
8. Ga—Stockdale v State, 32 Ga. 225  
N C—State v Roten, 86 N C 701
9. Ky—Prince v Commonwealth, 277 S W 2d 470—Harms v Commonwealth, 219 S W 2d 8, 309 Ky 772—Hall v Commonwealth, 215 S W 2d 840, 309 Ky 74  
Intent to conceal see supra § 5
10. Ark—Carr v State, 34 Ark 448, 450, 36 Am R 15 68 C J p 35 note 14
11. Ill—People v Euctice, 20 N E 2d 83, 371 Ill 159  
Ky—Prince v Commonwealth, 277 S W 2d 470  
N J—State v Rabatin, 95 A 2d 431, 25 N J Super 24  
N.C—Corpus Juris cited in State v

- Williamson, 78 S E 2d 763, 765, 238 N C 652 68 C J p 35 note 15
12. Ala—Street v State, 67 Ala 87  
N C—Corpus Juris cited in State v Williamson, 78 S E 2d 763, 765, 238 N C 652
13. Ky—Prince v Commonwealth, 277 S W 2d 470 67 C J p 35 note 17
14. Ky—Williams v Commonwealth, 37 S W 680, 18 Ky L. 663 67 C J p 35 note 18
15. Miss—Martin v State, 47 So 426, 93 Miss 764 68 C J p 35 note 19
16. Ky—Daniel v Commonwealth, 6 Ky Op 32 68 C J p 36 note 20
17. Ga—Killet v. State, 32 Ga 292.
18. Ky—Robinson v Commonwealth, 268 S W 840, 207 Ky. 53. 68 C J p 36 note 22.

case are not embraced within an exception found in the statute.

Statutes creating offenses relating to the carrying or possession of weapons are applicable to all persons, places, and occasions provided the circumstances of the case are not embraced within an exception found in the statute.<sup>19</sup> Since courts have nothing to do with the wisdom and policy of the legislature as set forth in its enactments, they will not introduce exceptions or extend by construction those specifically mentioned.<sup>20</sup> However, under the rules governing the construction of penal statutes, provisions setting up an exemption should be liberally construed.<sup>21</sup> In any event, the law has no force or effect as against persons included within an exception in the statute,<sup>22</sup> although of course the exceptions cannot be used as a cloak for violating the statute.<sup>23</sup> Persons protected by an exception do not lose such protection merely because they may use the weapon unlawfully.<sup>24</sup>

*Engagement in federal service* does not alone confer any immunity from the operation of state laws regulating the carrying of weapons.<sup>25</sup>

#### b. Peace Officers and Persons Aiding Them

- (1) In general
- (2) Discharge of official duty
- (3) Valid appointment or authorization
- (4) Territorial jurisdiction

##### (1) In General

Officers and persons aiding them, if excepted by the statute, are not subject to provisions prohibiting the carrying or possession of weapons.

As a general rule, officers and persons aiding them, unless excepted by the statute, are subject like other persons to statutes prohibiting the carrying or possession of weapons.<sup>26</sup> The exception must

be found in the statute itself, and cannot be imported from the common law in derogation of the statute.<sup>27</sup> Thus, in the absence of an exception in the statute, a prohibition against the carrying of concealed weapons applies to peace officers<sup>28</sup> as well as to persons summoned to their aid.<sup>29</sup>

*Scope of exceptions.* Under some provisions, peace officers are generally excepted from the operation of statutes prohibiting the carrying or possession of weapons,<sup>30</sup> and such a general exception extends to conservators of the peace,<sup>31</sup> and likewise to persons summoned to an officer's aid.<sup>32</sup> When, however, the statute specifically names the persons excepted, the exception includes only those persons, or others of the same class or status, named in that statute,<sup>33</sup> and if the statute itself purports to except other persons in addition to the class or classes of persons definitely named, the identity of the others is to be ascertained with reference to the identity of those named.<sup>34</sup> Under statutes excepting certain peace officers and others such as civil officers, ministerial officers, or officers charged with the execution of the state laws, "ministerial officer" has been held to include a game warden<sup>35</sup> or a special bailiff appointed by a sheriff to execute a warrant of arrest,<sup>36</sup> and a town sergeant may be an officer charged with the execution of state laws.<sup>37</sup>

*Special officers and appointees.* An exception is frequently made in order to permit the carrying of weapons by persons deputized, appointed, or employed for a special purpose, such as the execution of process or the maintenance of the peace, and likewise by persons aiding or summoned to aid an officer in the discharge of his duties.<sup>38</sup> Persons thus specially appointed or summoned, however, are not entitled to the benefit of the exception unless they are acting lawfully<sup>39</sup> and in good faith<sup>40</sup> during the

19. Tex.—Lewis v State, 2 Tex App 26  
68 C J p 36 note 28  
Burden of proving privilege see infra § 13  
20. Ark.—Brown v State, 252 SW 18, 159 Ark 498, 31 ALR 1126  
68 C J p 36 note 30  
21. Nev.—Ex parte Davis, 110 P 1131, 33 Nev 309  
22. Nev.—Ex parte Davis, supra  
23. Tex.—Grant v State, 13 SW 2d 889, 112 Tex Cr 120  
68 C J p 36 note 35  
24. Puerto Rico—People v. Segarra, 36 Puerto Rico 103  
68 C J p 36 note 36  
25. Ark.—Hathcote v. State, 17 S W 721, 55 Ark 181  
26. Va.—Hall v Commonwealth, 130 SE 416, 143 Va 554.  
68 C J p 37 note 39.

27. Mo.—State v. Juhan, 25 Mo App 133  
28. Ala.—Johnson v State, 75 So 278, 16 Ala App 72.  
68 C J p 37 note 41  
29. Mo.—State v. Juhan, 25 Mo App 133  
Tex.—Polke v State, 118 SW 2d 793, 134 Tex Cr 496  
30. Tex.—Franklin v State, 183 S W 2d 573, 147 Tex Cr 636  
31. Tex.—Patton v State, 86 SW 2d 774, 129 Tex Cr 269  
68 C J p 37 note 43  
32. Tex.—O'Conner v. State, 40 Tex 27.  
33. Ariz.—Ex parte Abbey, 237 P 179, 28 Ariz 383  
68 C J p 37 note 45

34. Tex.—Lattimore v State, 145 S W 588, 65 Tex Cr 490  
68 C J p 37 note 46  
35. Ky.—Wallace v Commonwealth, 246 SW 466, 197 Ky 233  
36. Ky.—Wells v Commonwealth, 254 SW 743, 200 Ky 241  
37. W Va.—Town of Lester v Trail, 101 SE 732, 85 W Va. 386  
68 C J p 37 note 50  
38. Miss.—Simmons v State, 12 So 2d 139, 194 Miss 398  
39. Ark.—Allison v State, 256 S W. 42, 161 Ark 304  
68 C J p 37 note 53  
40. Ky.—Wells v Commonwealth, 254 SW 743, 200 Ky. 241.  
68 C J p 37 note 54.

limited time<sup>41</sup> and for the particular purpose<sup>42</sup> for which they have been appointed or summoned. Nevertheless, the cessation of the occasion or attainment of the purpose for which a person was aiding an officer does not immediately terminate the right to carry a weapon<sup>43</sup>. A reasonable time for such person to return home with the weapon should be allowed<sup>44</sup>.

### (2) Discharge of Official Duty

An officer is exempt from statutes prohibiting the carrying or possession of weapons only when he is engaged in the discharge of his official duty.

For an officer to be exempt from statutes prohibiting the carrying or possession of weapons, he must be engaged in the discharge of his official duty<sup>45</sup>. The duty in question may be either general<sup>46</sup> or specific<sup>47</sup>. The statute may be so phrased or construed as to require some officers, but not others, to be acting in the discharge of their duties when carrying weapons<sup>48</sup>. An officer who is entitled to carry a weapon in the performance of his duties, and who complies in other respects with the statutory requirements, has a right to carry the weapon in going to,<sup>49</sup> and returning from,<sup>50</sup> the place of such performance.

### (3) Valid Appointment or Authorization

In order for an officer to be immune from a statute prohibiting the carrying or possession of a weapon, his appointment must be valid and in accordance with the statutory formalities, but a person who carries a weapon

under the erroneous belief that he is a legally constituted officer is not guilty of any offense, provided his mistake is one of fact and is entertained in good faith.

In order to bring a person as an officer within immunity from the statute relating to the carrying or possession of weapons, his appointment must be valid and subsisting and in compliance with the statutory formalities<sup>51</sup>. The appointment is sometimes explicitly required to be made pursuant to the statutes<sup>52</sup>. In the absence, however, of such an explicit requirement, it has been held that a person who carries a weapon under the erroneous belief that he is a legally constituted officer is not guilty of any offense,<sup>53</sup> but the belief, although erroneous, must be a reasonable<sup>54</sup> or honest<sup>55</sup> belief entertained in good faith<sup>56</sup>. This class of cases is supported on the ground that the alleged officer acted under a mistake of fact,<sup>57</sup> and committed no offense because he had no intention of violating the law<sup>58</sup>. Consequently, he will not be protected if his mistake was one of law,<sup>59</sup> or if he knew or should have known that he was acting without legal authority<sup>60</sup>.

*Person aiding officer.* It has been held that if one who purports to be an officer has not been duly authorized or appointed, a person aiding him cannot claim exemption from statutes forbidding the carrying of weapons.<sup>61</sup>

### (4) Territorial Jurisdiction

An officer is entitled to carry a weapon outside of his immediate territorial jurisdiction only when he is performing some official duty authorized by law.

41. Tex.—Robison v State, 280 S W 776, 103 Tex Cr 141  
68 CJ p 37 note 55

42. Tex.—Baker v State, 108 S W 684, 53 Tex Cr 29  
68 CJ p 38 note 56

43. Tenn.—Brewer v State, 6 Baxt 446

44. Tenn.—Brewer v. State, supra  
68 CJ p 38 note 58

45. Ariz.—Strickland v State, 294 P 617, 37 Ariz 368—In re Abbey, 237 P 179, 28 Ariz 383

Tex.—Franklin v State, 183 S W 2d 573, 147 Tex Cr 636  
68 CJ p 38 note 59

46. Ky.—Voils v Commonwealth, 14 S W 2d 381, 228 Ky 149  
68 CJ p 38 note 60

47. Tenn.—Gayle v. State, 4 Lea 466  
68 CJ p 38 note 61

#### Searching for criminals

In prosecution of deputy game warden for carrying pistol and blackjack, the fact that warden was en route to farm to make investigation for purpose of ascertaining whether offense of keeping foxes captive had been committed did not bring warden within statutory exemption applica-

ble to any officer while "searching for criminals," where warden had no criminal warrant in his possession at the time  
Tenn.—Jackson v State, 101 S W 2d 477, 171 Tenn 185

48. Va.—Withers v Commonwealth, 65 S E 16, 109 Va 837  
68 CJ p 39 note 62

49. Ky.—Wallace v. Commonwealth, 246 S W 466, 197 Ky 233

50. Ky.—Wallace v Commonwealth, supra.  
68 CJ p 39 note 64.

51. Ky.—Wells v Commonwealth, 243 S W 1032, 195 Ky 754  
68 CJ p 39 note 65

**Written instrument of appointment**  
A special deputy sheriff, who had no written instrument of appointment designating his duties or authority, was not a "duly appointed peace officer," and hence was punishable for possessing loaded firearm which might be concealed on his person, without a license  
N Y.—People v Terwilliger, 14 N Y S 2d 267, 172 Misc 70

52. Tex.—Stephenson v State, 249 S W 492, 93 Tex Cr 578.  
68 CJ p 39 note 66

53. Tex.—Franklin v State, 183 S W 2d 573, 147 Tex Cr 636  
68 CJ p 39 note 67

54. Tex.—Barnett v. State, 229 S W 519, 89 Tex Cr 45  
68 CJ p 39 note 68

55. Tex.—Blair v. State, 9 S W 890, 26 Tex App 387  
Franklin v State, 183 S W 2d 573, 147 Tex Cr 636

56. Tex.—Baker v. State, 108 S W. 684, 53 Tex Cr 27.  
68 CJ p 39 note 70.

57. Tex.—Jones v State, 238 S W 661, 662, 91 Tex Cr 240  
68 CJ p 39 note 71

58. Tex.—Barnett v. State, 229 S W 519, 89 Tex Cr 45  
68 CJ p 39 note 72

59. Tex.—Ransom v State, 165 S W 932, 73 Tex Cr 442  
68 CJ p 39 note 73.

60. Tex.—Patton v State, 135 S W 556, 61 Tex Cr 352  
68 CJ p 40 note 74

61. Mo.—State v. Julian, 25 Mo App 133  
68 CJ p 40 note 75.

Under some statutes it has been held that an officer, although he may lawfully have or carry a weapon within his territorial jurisdiction whether or not on official business, is entitled to carry a weapon outside of his immediate jurisdiction only when he is performing some official duty authorized by law.<sup>62</sup> So, also, a person aiding an officer acting outside of his territorial jurisdiction cannot claim exemption from statutes forbidding the carrying of weapons.<sup>63</sup>

### c. Travelers

- (1) In general
- (2) Meaning and construction of exemption
- (3) Commencement and termination of journey

#### (1) In General

Under some statutes, persons traveling or on a journey are excepted from prohibitions against the carrying of weapons.

Where so provided by the statute, persons traveling or on a journey are excepted from prohibitions against the carrying of weapons.<sup>64</sup> The purpose of the exception is to enable travelers to protect themselves on the highways<sup>65</sup> against such potential or unknown dangers<sup>66</sup> as are not supposed to exist among their own neighbors,<sup>67</sup> and in defining its scope, the exception should be as broad as the reason for it,<sup>68</sup> but not broader.<sup>69</sup> The evil intended to be remedied by the prohibitory statutes is the carrying of weapons on the streets, in society, in the community, or among one's habitual associates.<sup>70</sup>

*Manner of carrying weapon* If the statute authorizes travelers to carry weapons in a particular manner or place, as with their baggage, there must be at least substantial compliance with the statute,<sup>71</sup> as by placing their weapons in the vehicles

in which they are riding,<sup>72</sup> and a traveler who violates such a statute by carrying a weapon on his person is not protected merely by his status as a traveler.<sup>73</sup>

*Time of carrying weapon* If the statute allows travelers to carry weapons only at specified times, as at night, a carrying at a different time is unlawful.<sup>74</sup>

*Use of weapon* The exception allows the privileged individual to carry a prohibited weapon irrespective of any necessity for its use.<sup>75</sup> Moreover, the use of the weapon, even though unlawful, does not make him amenable to the statute forbidding the carrying of weapons,<sup>76</sup> although the particular use made of the weapon may become relevant on the question of good faith in claiming the exemption,<sup>77</sup> and may constitute a violation of some other provision of the law.<sup>78</sup>

#### (2) Meaning and Construction of Exemption

- (a) In general
- (b) What constitutes traveling or being on a journey

##### (a) In General

The circumstances of each case are controlling in determining whether or not a person is a traveler or is on a journey within the meaning of the exemption from the statutory prohibition against the carrying or possession of a weapon.

In determining whether or not a person is a traveler or is on a journey within the meaning of the exemption from the statutory prohibition against the carrying or possession of a weapon, no unbending rule can be formulated,<sup>79</sup> and much must depend on the circumstances of each case.<sup>80</sup> The statutes use such words as "traveler," "traveling," and "journey" merely in their popular sense,<sup>81</sup> and consequently the meaning of the words is indefinite.<sup>82</sup> In view of the uncertainty with respect to

62. Mo—State v Owen, 258 S W 2d 662

68 C J p 40 note 77

63. Tex—Munn v State, Cr, 33 S W 977

68 C J p 40 note 77 [g]

64. Miss—Basham v Town of Sebastopol, 169 So 847, 172 Miss. 194

68 C J p 40 note 78

65. Ark—Davis v State, 45 Ark. 359—Carr v State, 34 Ark 448.

66. Ala—Gholson v State, 53 Ala 519, 25 Am R. 652

Ind—State v Smith, 61 NE 566, 157 Ind 241.

67. Ark—Hathcote v State, 17 S W 721, 55 Ark 181

Tenn—Smith v State, 3 Heisk 511.

68. Ark—Hathcote v State, 17 S W 721, 55 Ark 181

69. Ark—Hathcote v State, supra

68 C J p 40 note 83

70. Ark—Hathcote v State, supra

68 C J p 41 note 84

71. Tex—State v Clayton, 43 Tex 410

68 C J p 41 note 86

72. Tex—Maxwell v State, 38 Tex 170

73. Tex—Lewis v State, 2 Tex App 26.

74. Ky—Buchter v. Commonwealth, 6 Ky.Op 49

68 C J. p 41 note 89

75. Tex—Grant v State, 13 S W 2d 889, 112 Tex Cr 120

68 C J p 41 note 90

76. Tex—Grant v State, supra

68 C J p 41 note 91

77. Tex—Grant v State, supra

78. Ind—Alderson v State, 168 NE 481, 201 Ind 359

68 C J p 41 note 93

79. Ark—Hathcote v State, 17 S W. 721, 55 Ark 181

68 C J p 41 note 95

80. Ala—Wilson v State, 68 Ala 41.

81. Tex—Williams v State, 72 S W. 380, 44 Tex Cr 494

68 C J p 41 note 96

82. Tex—Bain v State, 44 S W 518, 38 Tex Cr 635

68 C J. p 41 note 97.

the import of statutes exempting travelers,<sup>83</sup> the lawmaking body, if it does not see fit to repeal<sup>84</sup> this possibly antiquated exemption,<sup>85</sup> should, it has been said, define the terms used,<sup>86</sup> and not leave it to the courts to interpret the statutory language in the light of good sense, and with respect to the spirit and intent of the statute itself,<sup>87</sup> thus making it difficult to decide what persons are travelers within the contemplation of the law,<sup>88</sup> and decisions even in the same jurisdiction are not harmonious.<sup>89</sup>

(b) What Constitutes Traveling or Being on a Journey

A person cannot be deemed to be traveling or on a journey, within the meaning of the exception in the statute prohibiting the carrying of weapons, unless he passes beyond the circle of his friends and immediate acquaintances, and is no longer within the routine of his daily business, or his ordinary habits, duties, or pleasures.

While the lexicographers' general definition of a traveler as one who makes a journey or who goes from place to place has been applied in some cases in determining a claim to exemption from the weapons statute as a traveler,<sup>90</sup> it is generally agreed that such definition is not to be followed in construing the statutory language,<sup>91</sup> because it is so broad that it would include almost every person who goes from one place to another<sup>92</sup> and consequently would emasculate the salutary legislation in question.<sup>93</sup>

As a general rule, a person cannot be deemed

to be traveling or on a journey within the meaning of the exception unless he passes beyond the circle of his neighbors, friends, and immediate acquaintances,<sup>94</sup> so that he finds himself at a distance from his home<sup>95</sup> or place of business<sup>96</sup> and is no longer within the routine of his daily business<sup>97</sup> or his ordinary habits, duties,<sup>98</sup> or pleasures.<sup>99</sup> The routine of one's daily business is in most cases a proper test,<sup>1</sup> but it fails as a test where a person, in the ordinary routine of his daily business, passes hurriedly along, is not brought into contact with the people, and has no general acquaintance among them.<sup>2</sup>

*Distance, time, and mode of conveyance.* In order to come within the exception, a person need not travel any prescribed distance,<sup>3</sup> or by any particular conveyance.<sup>4</sup> Persons going short distances, in some cases, ridiculously short distances, may still be travelers.<sup>5</sup> A tendency is apparent, at least in a number of the earlier cases,<sup>6</sup> to hold that a person who goes outside of his own county is a traveler within the meaning of the exception,<sup>7</sup> unless the distance traveled is comparatively slight.<sup>8</sup> As a practical matter in each case, the ultimate question is whether or not the person is on a real journey,<sup>9</sup> and the mere fact of crossing the boundary and passing back and forth from one county or state into another is not decisive.<sup>10</sup>

The present inclination of the courts is to lengthen the requisite distances as a result of improved

83. Tex.—Bain v State, supra.  
 84. Tex.—Hancock v State, 294 S W 218, 106 Tex Cr 666.  
 85. Ark.—Ellington v Town of Denning, 138 S W 453, 99 Ark 236.  
 86. Tex.—Hancock v State, 294 S W 218, 106 Tex Cr 666.  
 87. Ark.—Hathcote v State, 17 S W 721, 55 Ark 181.  
 Tenn.—Smith v State, 3 Heisk 511.  
 88. Tex.—Bain v State, 44 S W 518, 38 Tex Cr 635.  
 89. Tex.—George v State, 234 S W 87, 90 Tex Cr 179—Bain v State, 44 S W 518, 38 Tex Cr 635.  
 90. Tex.—Williams v State, 72 S W 380, 44 Tex Cr 494.  
 91. Ind.—Alderson v State, 168 N E 481, 201 Ind 359.  
 92. Tex.—Bain v State, 44 S W 518, 38 Tex Cr 635.  
 93. Miss.—McGuirk v. State, 1 So 103, 64 Miss 209.  
 Tenn.—Smith v State, 3 Heisk 511.  
 94. Ind.—State v Smith, 61 N E 566, 157 Ind 241, 87 Am S R 205.  
 68 C J p 42 note 10.  
 95. Ark.—Ellington v Town of Denning, 138 S W 453, 99 Ark 236.  
 68 C J p 42 note 11.  
 96. Tex.—Hickman v State, 160 S W 382, 71 Tex Cr 483.  
 68 C J p 42 note 12.  
 97. Ark.—Ellington v Town of Denning, 138 S W 453, 99 Ark 236.  
 68 C J p 42 note 13.  
 98. Ind.—State v Smith, 61 N E 566, 157 Ind 241, 87 Am S R 205.  
 68 C J p 42 note 14.  
 99. Ala.—Gholson v State, 53 Ala 519, 25 Am R 652—Eslava v State, 49 Ala 355.  
 1. Ark.—Hathcote v State, 17 S W 721, 55 Ark 181.  
 68 C J p 42 note 16.  
 2. Ark.—Hathcote v. State, supra.  
 68 C J p 42 note 17.  
 3. Tex.—Hancock v State, 294 S W 218, 106 Tex Cr 666.  
 68 C J p 42 note 18.  
**Held to be travelers**  
 Miss.—Basham v Town of Sebastopol, 159 So 847, 172 Miss 194.  
 68 C J p 42 note 18 [b].  
**Held not to be travelers**  
 (1) A person who had only traveled thirty-two miles  
 Tex.—Rickman v State, 134 S W 2d 668, 138 Tex Cr 191.  
 (2) Other persons  
 Tex.—Vogt v State, 258 S W 2d 795, 159 Tex Cr 211, certiorari denied.  
 Vogt v State of Texas, 74 S Ct 221, 346 US 901, 98 L Ed 401.  
 68 C J p 42 note 18 [c].  
 4. Tex.—Hancock v State, 294 S W 218, 106 Tex Cr 666.  
 68 C J p 43 note 19.  
 5. Ala.—Wilson v State, 68 Ala 41.  
 6. Tex.—George v State, 234 S W. 87, 88, 90 Tex Cr 179.  
 68 C J p 43 note 21.  
 7. Tex.—Ballard v State, 167 S W. 340, 74 Tex Cr 110.  
 68 C J p 43 note 22.  
 8. Tex.—Blackwell v State, 31 S W. 380, 34 Tex Cr 476.  
 68 C J p 43 note 23.  
 9. Tex.—Williams v State, 169 S W 1154, 74 Tex Cr 639.  
 10. Tex.—Paulk v State, 261 S W. 779, 97 Tex Cr 415.  
 68 C J p 43 note 25.

means of transportation<sup>11</sup> The emphasis thus falls more heavily now than formerly on the element of time required for the journey<sup>12</sup> It follows that in determining whether persons are travelers, it is not the distance alone,<sup>13</sup> but the mode of travel,<sup>14</sup> as modified by the prevalence of good roads<sup>15</sup> and the use of automobiles,<sup>16</sup> which is to be taken into account The fact that a person is unaware of his destination does not necessarily prevent him from being on a journey within the meaning of the statute<sup>17</sup> Similarly, the fact that a traveler does not go as far as he originally intended,<sup>18</sup> or that he is on his return trip,<sup>19</sup> does not make him any the less a traveler, but this rule, does not entitle a traveler, no matter how far he has been,<sup>20</sup> to begin carrying a prohibited weapon when he is on his return trip and only a few miles from home<sup>21</sup>

*A fugitive from justice* is not a person traveling so as to be exempt from statutes denouncing the carrying of weapons<sup>22</sup>

### (3) Commencement and Termination of Journey

The exemption for travelers from the operation of statutes prohibiting the carrying of weapons becomes operative when a person sets out on a journey, and continues until the journey terminates.

The exemption for a traveler, from the application of a statute prohibiting the carrying of weapons,

becomes operative when a person sets out on a journey,<sup>23</sup> as when he enters a vehicle<sup>24</sup> or when, contemplating a journey,<sup>25</sup> he is about to enter the conveyance<sup>26</sup> or is waiting for its arrival,<sup>27</sup> and the exemption continues until the journey terminates<sup>28</sup>

*Breaking continuity of journey* The exemption continues as long as the journey is being pursued<sup>29</sup> in good faith<sup>30</sup> The law does not require that a person who is otherwise a traveler must proceed hurriedly to his destination,<sup>31</sup> and it would be difficult to say precisely what delay on the trip would deprive him of the exemption while he was still in pursuit of his journey<sup>32</sup> A cessation of the journey on some legitimate business, incidental to the journey, does not terminate the protection afforded by this exemption<sup>33</sup> A rule to the contrary applies, however, where a traveler deflects or turns aside from his journey on pleasure<sup>34</sup> or some business or pursuit not connected with the journey,<sup>35</sup> especially if he visits saloons and engages in carousing and disturbing the peace<sup>36</sup>

*While stopping in towns, villages, or cities*, travelers do not need weapons any more than citizens do,<sup>37</sup> and consequently should lay them aside<sup>38</sup> or change the manner of carrying them so as not to offend against the statute,<sup>39</sup> unless the delay be slight, and the journey soon resumed<sup>40</sup> During a merely temporary cessation of the journey a trav-

11. Tex—Grant v State, 13 SW 2d 889, 112 Tex Cr 120  
68 CJ p 43 note 26

12. Tex—Vogt v State, 258 SW 2d 795, 159 Tex Cr 211, certiorari denied Vogt v State of Texas, 74 S Ct 221, 346 US 901, 98 LEd 401  
68 CJ p 43 note 27

13. Tex—Kemp v State, 31 SW 2d 652, 116 Tex Cr 90—Christian v State, 289 SW 54, 105 Tex Cr 562

14. Tex—Kemp v State, 31 SW 2d 652, 116 Tex Cr 90.

15. Tex—Kemp v State, supra—Christian v State, 289 SW 54, 105 Tex Cr 562

16. Tex—Kemp v State, 31 SW 2d 652, 116 Tex Cr 90  
68 CJ p 43 note 31.

17. Miss—Heywood v. State, 6 So 237, 66 Miss 402  
68 CJ p 43 note 32

18. Tex—Stayton v State, Cr, 40 S W 299

19. Tex—Christian v State, 289 S W 54, 105 Tex Cr 562.  
68 CJ p 43 note 35

20. Miss—McGuirk v State, 1 So 103, 64 Miss 209

21. Miss—McGuirk v State, 1 So 103, 64 Miss 209  
68 CJ p 44 note 38.

22. Tex—Rickman v State, 134 S W 2d 668, 138 Tex Cr 191  
68 CJ p 44 note 40

23. Tex—Wortham v State, 252 S W 1063, 95 Tex Cr 135  
68 CJ p 44 note 41

24. Tex—Campbell v State, 125 S W 893, 58 Tex Cr. 349, 21 Ann Cas 447

25. Tex—Texas Midland R Co v Geraldton, 117 SW 1004, 54 Tex Civ App 71, affirmed 128 SW 611, 103 Tex 402, 29 L.R.A.,NS, 799, Ann Cas 1913A 45—Dillingham v State, Cr, 32 S W 771.

26. Tex—Campbell v State, 125 S W 893, 58 Tex Cr 349, 21 Ann Cas 447—Dillingham v State, Cr, 32 S W 771

27. Tex—Texas Midland R Co v Geraldton, 117 SW 1004, 54 Tex Civ App 71, affirmed 128 SW 611, 103 Tex 402, 29 L.R.A.,NS, 799, Ann Cas 1913A 45  
68 CJ p 44 note 45

28. Tex—Grant v State, 13 SW 2d 889, 112 Tex Cr 120  
68 CJ p 44 note 46

29. Tex—Navarro v State, 96 SW 932, 50 Tex Cr 326—Lawson v State, Cr, 31 S W 645.

30. Tex—Grant v State, 13 SW 2d 889, 112 Tex Cr 120

31. Tex—Irvin v State, 100 SW 779, 51 Tex Cr 52

32. Tex—Irvin v State, supra.  
68 CJ p 44 note 50.

33. Tex—Kemp v State, 31 SW 2d 652, 116 Tex Cr 90  
68 CJ p 44 note 51

34. Tex—Tadlock v State, 64 SW 2d 963, 124 Tex Cr 637  
68 CJ p 44 note 52

35. Tex—Tadlock v State, supra.  
68 CJ p 44 note 53

36. Tex—Navarro v State, 96 SW. 932, 50 Tex Cr 326—Ratigan v. State, 26 SW 407, 33 Tex Cr 301

37. Miss—Rosaman v City of Okolona, 37 So 641, 85 Miss 583, 107 Am S R 303  
68 CJ p 44 note 55

38. Tex—Smith v State, 179 S.W. 711, 77 Tex Cr 489  
68 CJ, p 44 note 56

39. Ala—Eslava v. State, 49 Ala. 355

40. Ark—Carr v. State, 34 Ark 448, 36 Am R 15.



eler may carry a weapon with him while he is engaged in procuring a conveyance<sup>41</sup> or while engaged in, or transacting other legitimate business connected with, the prosecution of his journey<sup>42</sup>

After arriving in a city, a traveler should be given a reasonable opportunity to dispose of his weapons and comply with the law,<sup>43</sup> and if he takes lodging in a hotel or elsewhere he may be deemed a traveler until he reaches his room,<sup>44</sup> but he has no right to carry weapons during the remainder of his stay in the city<sup>45</sup> Even though the cessation of the journey is only temporary, a traveler is not entitled to carry a prohibited weapon while he strolls idly through the streets or public places of the community,<sup>46</sup> or visits places devoted to gambling<sup>47</sup> or the sale of intoxicating liquor,<sup>48</sup> and mingles generally with the citizens either for business or pleasure.<sup>49</sup>

*Substituting one vehicle or means of conveyance for another* after the journey has begun,<sup>50</sup> as by changing from an automobile to a train,<sup>51</sup> or from a horse to a team and buggy,<sup>52</sup> is not such an interruption of the journey as will deprive the traveler of the benefit of the exemption.

#### d. Persons Fearing Attack

Under some statutes, persons fearing attack or harm, or against whom threats have been made, are specially privileged to have or carry the proscribed weapons for purposes of defense

Under some statutes prohibiting the carrying or possession of weapons, persons fearing attack or harm, or against whom threats have been made, are specially privileged to have or carry the proscribed

weapons for purposes of defense<sup>53</sup> This privilege is restricted by some provisions to persons engaged in a lawful business, calling, or employment<sup>54</sup> Under statutes allowing a person who apprehends an attack to carry a weapon, it has been held that in order to justify him in carrying the weapon, the danger must be more than an indefinite or conditional threat, unaccompanied by any act indicating a design to execute the threat,<sup>55</sup> and that such person have no other means of defending himself, it being required, under some statutes, that the danger be so imminent and threatening as not to admit of the arrest of his adversary on legal process<sup>56</sup>

The apprehension must exist when the person arms himself,<sup>57</sup> and he is not entitled to the privilege if he is himself the aggressor,<sup>58</sup> or is in a place to which he has no right to go with a forbidden weapon on or about his person,<sup>59</sup> or, under some circumstances, if he is not engaged in a lawful business<sup>60</sup> The privilege ceases when the condition that sanctions the carrying ceases<sup>61</sup>

*Concealed weapons.* Under statutes allowing a person to carry a concealed weapon when he has been threatened with great bodily harm or has good grounds to apprehend an attack, the person so carrying a weapon must actually believe, and have good grounds for believing, that he is in danger of an attack or of great bodily harm<sup>62</sup> at the time and place when the weapon is carried,<sup>63</sup> although actual danger need not exist provided there are good reasons for believing that it does exist<sup>64</sup> The apprehended attack must be from a specific source or

41. Tex.—Stilly v State, 11 SW 458, 27 Tex App 445

42. Tex.—Witt v State, 231 SW 395, 89 Tex Cr 368  
68 C J p 45 note 60

43. Tex.—Kemp v State, 31 SW 2d 652, 116 Tex Cr 90  
68 C J p 45 note 61

44. Tex.—Ballard v State, 167 SW 340, 74 Tex Cr 110  
68 C J p 45 note 62

45. Tex.—Smith v State, 179 SW 711, 77 Tex Cr 489  
68 C J p 45 note 63

46. Tex.—Alexander v State, 122 SW 387, 57 Tex Cr 252.  
68 C J p 45 note 64

47. Tex.—Stilly v State, 11 SW 458, 27 Tex App 445

48. Tex.—Alexander v State, 122 SW 387, 57 Tex Cr 252.  
68 C J p 45 note 66

49. Ark.—Carr v State, 34 Ark 448, 36 Am R 15

50. Tex.—Campbell v. State, 125 S

W 893, 58 Tex Cr 349, 21 Ann Cas 447

51. Tex.—Campbell v State, supra.

52. Tex.—McDaniel v State, Cr, 26 SW 724

53. Miss.—Hurst v State, 58 So 206, 101 Miss 402  
68 C J p 45 note 71.

Right to carry in self-defense in absence of statute see supra § 5

#### 54. Separate requirements

Under statute requiring defendant to establish, as justification for carrying a concealed weapon, that he was engaged in a lawful business, calling, or employment, and that circumstances were such as would justify a prudent man in carrying weapon for defense of his person, property, or family, such elements are separate and distinct requirements  
Ohio—State v. Johnson, App, 112 N E 2d 62

55. W Va.—State v Workman, 14 S E 9, 35 W Va 367, 14 L R A 600.  
68 C J p 45 note 72

56. Tex.—Davenport v. State, 250 S W 179, 94 Tex Cr 38

68 C J p 45 note 73

57. Tex.—Pecht v State, 199 SW 290, 82 Tex Cr 136  
68 C J p 45 note 74.

58. Tex.—Ballard v. State, 167 SW 340, 74 Tex Cr 110  
68 C J p 46 note 75

59. Tex.—Tafolla v State, 161 SW. 1091, 72 Tex Cr 180  
Places prohibited see supra § 7

60. Ohio—State v. Johnson, App, 112 N E 2d 62  
68 C J p 46 note 77.

61. Tex.—Lovelace v. State, Cr, 68 SW 274

62. Miss.—Sullivan v. State, 126 So 646, 156 Miss 718  
68 C J p 46 note 79.

63. Ala.—Loreno v. Ross, 133 So 251, 222 Ala 567  
68 C J p 46 note 80.

64. Miss.—Hurst v. State, 53 So. 206, 101 Miss 402.  
68 C J p 46 note 81.

person,<sup>65</sup> and does not relate to ordinary perils incident to the discharge of one's duty.<sup>66</sup> Impending threats are the only ones which may be considered,<sup>67</sup> and while mere idle rumors are not enough,<sup>68</sup> it is sufficient if the threats have been communicated to accused,<sup>69</sup> even by a person who did not himself hear the threats made.<sup>70</sup> These statutes do not authorize one to carry a concealed weapon for purposes of offense.<sup>71</sup>

*Weapons of self-defense*, which may be lawfully carried under such statutes, have been held not to include brass knuckles, slung shots, or weapons of like kind or description;<sup>72</sup> but a person who fears that he is in danger and who is doing all he reasonably can to prepare himself against attack is protected by the statutory privilege, even though a firearm carried by him is unloaded<sup>73</sup> and unusable at the time.<sup>74</sup>

#### e. Postmasters and Mail Carriers

Statutes prohibiting the carrying or possession of weapons apply to postmasters and mail carriers unless excepted by the provisions thereof.

Statutes prohibiting the carrying or possession of weapons apply to postmasters<sup>75</sup> and mail carriers,<sup>76</sup> unless excepted by the statutes.<sup>77</sup> Within the meaning of statutory exceptions, postmasters may be civil officers,<sup>78</sup> but mail carriers are not exempt as civil officers of the United States,<sup>79</sup> or as revenue officers, or officers of the same or a similar kind as revenue officers,<sup>80</sup> or as officers charged with the execution of the state laws.<sup>81</sup>

#### f. Soldiers

United States soldiers are outside the purview of statutes making it unlawful to have or carry weapons, provided they are in the active discharge of their duties.

Statutes making it a criminal offense to drill or parade with firearms may exempt regularly organized militia or troops, or other military bodies, with-

out becoming vulnerable to criticism as class legislation.<sup>82</sup> It has been held that United States soldiers, although not expressly excepted, are nevertheless outside of the purview of statutes making it unlawful to have or carry weapons, provided they are in the active discharge of their duties.<sup>83</sup>

#### g. Common Carriers

Under statutes prohibiting the carrying of weapons, but exempting therefrom persons engaged in the business of common carriers, the exemption is not restricted to persons directly engaged in the transportation of freight or passengers, but extends to those employed to guard the property of carriers.

Within the meaning of a statute making it unlawful to have, carry, or wear certain weapons concealed on the person, an exemption of persons acting or engaged in the business of common carriers means something more than persons engaged in common carrying,<sup>84</sup> and includes persons acting or engaged in the business of common carriers other than the actual transportation of freight or passengers,<sup>85</sup> such as watchmen or others employed in guarding the trains, depots, or other property of common carriers.<sup>86</sup>

#### h. One's Own Premises or Place of Business

- (1) In general
- (2) What constitutes one's own premises
- (3) What constitutes place of business

##### (1) In General

Under some statutes the carrying or possession of a forbidden weapon is lawful if at one's home, premises, or place of business, and unlawful if off of such property.

Under some provisions, one's home or premises and place of business are expressly excepted from the operation of statutes making it unlawful to carry or possess weapons, and, of course, under such statutes the carrying or possession of a forbidden weapon is lawful if at one's home,<sup>87</sup> premises,<sup>88</sup> or place

65. Miss—Earhart v. State, 7 So 347, 67 Miss 325.

68. C J p 46 note 82.

69. Ala—Little v. State, 79 So 397, 16 Ala App 492.

70. Miss—McGuirk v. State, 1 So 103, 64 Miss 209.  
68 C J p 46 note 84.

68. Miss—Hurst v. State, 58 So 206, 101 Miss 402.

69. Miss—Hurst v. State, supra.

70. Miss—Huffstickler v. State, 93 So 1, 129 Miss 769—Hurst v. State, 58 So 206, 101 Miss 402.

71. Ala—Reach v. State, 11 So 414, 94 Ala 113.

68 C J p 46 note 83.

72. Ala—Bell v. State, 8 So 133, 89 Ala. 61.

73. Miss—Thomas v. City of Tupelo, 97 So. 522, 133 Miss 166.

74. Miss—Thomas v. City of Tupelo, supra.

75. Mo—State v. Jackson, 222 S W 746, 283 Mo 18.

76. Tex—Lattimore v. State, 145 S W 588, 65 Tex Cr 490.  
68 C J p 46 note 94.

77. Tex—Love v. State, 22 S W 140, 32 Tex Cr 85.

78. Tex—Love v. State, supra.

79. N C—State v. Boone, 44 S E 595, 132 N C 1107.

80. Rural mail carrier

Tex—Lattimore v. State, 145 S W 588, 65 Tex Cr 490.

81. W Va—State v. Barnett, 11 S E 735, 34 W Va 74.

82. Mass—Commonwealth v. Murphy, 44 N E 138, 139, 166 Mass 171, 32 L R A 606.

83. Tex—Lann v. State, 8 S W 650, 25 Tex App 495, 8 Am S R 445.  
68 C J p 47 note 2.

84. Nev—Ex parte Davis, 110 P. 1131, 33 Nev 309.  
68 C J p 47 note 4.

Railroad trains as constituting employees' place of business see infra subdivision h (3) of this section.

85. Nev—Ex parte Davis, supra.

86. Nev—Ex parte Davis, supra.

87. D C—Morton v. U S, 183 F 2d 844, 87 US App DC 135.  
68 C J p 47 note 8.

88. Tex—Baggett v. State, Cr, 21 S W 2d 774.  
68 C J p 47 note 9.

of business,<sup>89</sup> and unlawful if off of one's premises<sup>90</sup> or place of business,<sup>91</sup> it being immaterial that accused at the time of the offense was in close proximity thereto<sup>92</sup> This does not mean, however, that the exception confers any right to have or carry weapons on one's premises in violation of some other provision of the law.<sup>93</sup>

(2) What Constitutes One's Own Premises

- (a) In general
- (b) Husband and wife; parent and child
- (c) Landlord and tenant; licensees
- (d) Master and servant

(a) In General

A person is at his home or on his own premises, so as to be exempt from a statutory prohibition against the carrying or possession of weapons, if he lives on the premises and has exclusive possession, without respect to whether he has legal title thereto.

As used in statutes allowing the carrying or possession of weapons when on one's own premises, the word "premises" is synonymous with land<sup>94</sup> For a person to be at his home or on his own premises, it is not necessary that he have the legal title thereto<sup>95</sup> In essence it is sometimes more a question of the fact of possession than it is of the right of possession or the ownership of the fee<sup>96</sup> The exception is ordinarily satisfied if the person lives on the premises<sup>97</sup> and has exclusive possession<sup>98</sup> or some degree of actual dominion or control<sup>99</sup> of that part of the premises on which the alleged offense was committed The act of living or being on the premises must normally be with the permission or without the rightful interference of a person entitled to interfere or to terminate the occupancy<sup>1</sup> Continuous residence on the premises is not required, if a person regards such premises as his home, and

stays there when not engaged elsewhere.<sup>2</sup> Moreover, a place of temporary residence may comprise the premises contemplated by the exception<sup>3</sup> In other words, a person may have more than one place of residence<sup>4</sup>

*Public roads* Although there is authority to the contrary,<sup>5</sup> it is generally held that public roads, including those adjoining or dividing one's home or one's premises, do not comprise a part thereof within the purview of the statutory exception,<sup>6</sup> and this rule is applicable, even though the person claiming the benefit of the exception owns the freehold on which the road is located<sup>7</sup>

(b) Husband and Wife; Parent and Child

Under an exemption for the carrying of weapons on one's own premises, the place of residence of one of two married persons, who have only temporarily separated, may be deemed the premises of the other while the latter is staying there Where a parent and child make their home together, the premises of the one may be regarded as the premises of the other.

Within the meaning of the exception for the carrying of weapons on one's own premises, the place of residence of one of two married persons who have only temporarily separated, and have not been divorced,<sup>8</sup> may be deemed the premises of the other while the latter is staying there,<sup>9</sup> but premises owned by one of such persons in common with others, and occupied by a third person, are not the premises of the other spouse<sup>10</sup>

*Parent and child* Where a parent and a child make their home together, the premises of the one may be regarded as the premises of the other<sup>11</sup> within the limits of the curtilage,<sup>12</sup> and also outside of such limits, if there exists the requisite element of control over the outlying premises<sup>13</sup>

89. Tex.—Hutchins v State, 101 S W 795, 51 Tex Cr 339—Page v State, Cr, 25 S W 774  
90. Tex.—Mireles v State, 192 S W 241 80 Tex Cr 648 68 C J p 47 note 11  
91. Tex.—Hutchins v State, 101 S W 795, 51 Tex Cr 339  
92. Ark.—Clark v State, 4 S W 658, 49 Ark 174 68 C J p 47 note 13  
93. Tex.—Gibbs v State, 156 S W 687, 70 Tex Cr 278 68 C J p 47 note 14  
94. N C—State v Terry, 93 N C 585, 53 Am R 472 68 C J p 47 note 15  
95. Tex.—Craig v State, 131 S W 562, 60 Tex Cr 195 68 C J p 47 note 16  
96. N C—State v Perry, 26 S E 915, 120 N C 580 68 C J p 47 note 19.

97. Tex.—Fields v State, 166 S W 1166, 74 Tex Cr 70  
98. Ark.—Brown v State, 252 S W 18, 159 Ark 498, 31 A L R 1126 68 C J p 47 note 21  
99. Ark.—Clark v State, 4 S W 658, 49 Ark 174 68 C J p 48 note 22  
1. Ga.—Smith v. State, 82 S E 355, 14 Ga App 823 68 C J p 48 note 23.  
2. Tex.—Rather v State, 224 S W 776, 87 Tex Cr 624 68 C J p 48 note 24  
3. Tex.—Campbell v State, 11 S W 832, 28 Tex App 44  
4. Tex.—Rather v State, 224 S W 776, 87 Tex Cr 624  
5. N C—State v Hewell, 90 N C 705 68 C J p 48 note 29

6. Ark.—Moss v. State, 45 S W 987, 65 Ark 368 68 C J p 48 note 28  
7. Ark.—Moss v State, supra  
8. Tex.—Solosky v State, 236 S W 742, 90 Tex Cr 537. 68 C J p 48 note 31  
9. Tex.—Jones v State, 263 S W 586, 97 Tex Cr 567 68 C J p 48 note 32  
10. Tex.—Brannon v State, 5 S W 132, 23 Tex App 428  
11. Tex.—Rather v State, 224 S W. 776, 87 Tex Cr 624 68 C J p 49 note 34  
12. Ark.—Lemmons v State, 20 S W. 404, 56 Ark 559. 68 C J p 49 note 35  
13. Ark.—Lemmons v. State, supra. 68 C J p 49 note 36.

## (c) Landlord and Tenant; Licensees

Under a statutory exception permitting the carrying of weapons on one's own premises, a tenant may carry or possess weapons on the leased premises; but a licensee having merely the privilege of entering on lands for a special purpose cannot claim that such lands are his own premises for the purpose of the exemption.

Under a statutory exception permitting the carrying or possession of weapons on one's own premises, a tenant may carry or possess weapons on the leased premises,<sup>14</sup> and also on the landlord's adjacent premises comprising in effect a part of the property demised<sup>15</sup> This rule applies even though the lease has expired,<sup>16</sup> but it is subject to the qualification that the tenant must be in occupation of the premises<sup>17</sup> During such time as the tenant has actual possession, the premises belong, not to the landlord, but to the tenant<sup>18</sup> In the absence of any reservation of a right of entry, the landlord, during the term, has ordinarily no right to enter on the premises with a weapon<sup>19</sup>

*Licensees.* A licensee having merely the privilege of entering on lands for a special purpose, as to turn his horses into a pasture,<sup>20</sup> or to obtain wood for fuel<sup>21</sup> or timber for fence rails,<sup>22</sup> cannot properly claim that such lands are his premises for the purposes of the exception.

## (d) Master and Servant

The premises of another, where a person is employed, cannot be said to be the employee's premises within the statutory exemption for the carrying of weapons on one's own premises, even though he lives on the premises, unless he is in or near his lodgings.

Where a person is employed on the premises of another, such premises, although deemed under proper circumstances to be the employee's place of

business, as discussed *infra* subdivision h (3) of this section, cannot be said to be the employee's own premises within the statutory exemption for the carrying of weapons on one's own premises,<sup>23</sup> even though, it has been held, he lives on the premises,<sup>24</sup> unless, it has been held, he is in or near his lodgings<sup>25</sup> Since the reason for this rule is that a nonresident servant or laborer has no interest in the employer's land and no dominion over it, the rule may not apply where the employee is an overseer<sup>26</sup> or watchman,<sup>27</sup> especially a night watchman,<sup>28</sup> or other person vested with the right of dominion or superintendence over the premises<sup>29</sup> In any event, it is clear that the employee is not entitled to carry a weapon from his own premises to those of his employer<sup>30</sup>

## (3) What Constitutes Place of Business

Under statutes excepting one's place of business from a prohibition against the carrying or possession of weapons, "place of business" may be described broadly as the place where a person earns his livelihood.

Within the import of statutes excepting one's place of business from a prohibition against the carrying or possession of weapons, "place of business" may be described broadly as the place where a person earns his livelihood<sup>31</sup> This place, however, may not extend indefinitely or illimitably,<sup>32</sup> it may not embrace the open woods<sup>33</sup> or prairie,<sup>34</sup> or the public roads,<sup>35</sup> or other place in connection with which the person invoking the exception has no right of exclusive appropriation<sup>36</sup> The place of business contemplated by the exception has reference to a particular locality appropriated to a business,<sup>37</sup> and includes not only the store<sup>38</sup> or shop,<sup>39</sup> but also the factory<sup>40</sup> and the farm<sup>41</sup> As

14. Tex.—Rogers v State, 213 SW 637, 85 Tex Cr 421.  
68 C J p 49 note 37.

15. Tex.—Mireles v. State, 192 SW 241, 80 Tex Cr 648  
68 C J p 49 note 38

16. Tex.—Craig v State, 131 SW 562, 60 Tex Cr 195.  
68 C J p 49 note 39

17. Ark.—Lemmons v State, 20 SW 404, 56 Ark 559  
68 C J p 49 note 40

18. Ark.—Jones v State, 17 SW 719, 55 Ark 186  
68 C J p 49 note 41.

19. Tex.—Elliott v State, 45 SW 711, 39 Tex Cr 242  
68 C J p 49 note 42

20. Tex.—Whitesides v State, 58 SW 1016, 42 Tex Cr 151

21. Ark.—Lemmons v. State, 20 SW 404, 56 Ark 559.

22. Ark.—Lemmons v. State, *supra*.

23. N J—State v Bloom, 167 A 221,  
11 N J Misc 522  
68 C J p 49 note 44

24. NC—State v Deyton, 26 SE 159, 119 NC 880

25. NC—State v. Perry, 26 SE 915, 916, 120 NC 580  
68 C J p 49 note 46

26. NC—State v Terry, 93 NC 585, 53 Am R 472  
68 C J p 49 note 47

27. Puerto Rico—People v Díaz, 37 Puerto Rico 426.  
68 C J p 49 note 48

28. Tex.—Robison v State, 280 SW 776, 103 Tex Cr 141  
68 C J p 50 note 49

29. NC—State v. Terry, 93 NC 585, 53 Am R 472

30. Tex.—Mireles v State, 192 SW 241, 80 Tex Cr 648  
68 C J p 50 note 51

31. Ga.—Coker v. State, 76 SE 103, 12 Ga.App 425

32. Tex.—Baird v. State, 38 Tex 599

33. Tex.—Baird v State, *supra*.  
68 C J p 50 note 59

34. Tex.—Baird v State, *supra*

35. Ga.—Foy v State, 127 SE 619, 33 Ga.App 676  
68 C J p 50 note 61

36. Ga.—Reagan v State, 85 SE 353, 16 Ga.App 369  
68 C J p 50 note 62

37. Tex.—Baird v State, 38 Tex 599

38. Tex.—Baird v. State, *supra*.

39. Tex.—Baird v State, *supra*.  
68 C J p 50 note 65

40. Ga.—Newman v Griffin Foundry & Machine Co, 144 SE 386, 38 Ga.App 518  
68 C J p 50 note 66

41. Ga.—Coker v State, 76 SE 103, 12 Ga.App 425  
68 C J p 50 note 67.

to persons engaged in transportation, it includes the conveyances on which they ride in the performance of their duties.<sup>42</sup>

## § 10. — Defenses in General

Advice to the accused by another person that it would be well for him to arm himself, or that he has a legal right to carry a prohibited weapon, is not a defense.

As in other prosecutions, the absence of an essential element of the crime is of course a valid defense, as considered supra §§ 4-9. On the other hand, advice to the accused by another person that it would be well for him to arm himself,<sup>43</sup> or that he has a legal right to carry a prohibited weapon,<sup>44</sup> is not a defense. Also, since the mere fact that a wrong has been done to a person does not ordinarily entitle him to take the law into his own hands, it does not excuse his carrying a weapon contrary to a prohibitory statute,<sup>45</sup> and permission by another person to carry arms on his premises in violation of law does not excuse the offense.<sup>46</sup>

*Subsequent discovery of weapons* The claim that a person has discovered himself in possession of a weapon after he left his home or office is not a defense when later such a person is found in possession of the weapon.<sup>47</sup>

## § 11. — Licenses or Permits

Under statutes prohibiting the carrying of certain weapons without obtaining a license or permit, the carrying of the weapon is the corpus delicti, and the authority conferred by the license is a matter of defense.

Under some statutes, the carrying or possessing of certain weapons is prohibited and unlawful only where a license or permit has not been obtained therefor,<sup>48</sup> and a bond posted.<sup>49</sup> Under such provisions, the carrying of the weapon is the corpus delicti,<sup>50</sup> and the authority conferred by the license is a matter of defense.<sup>51</sup> In order to constitute a valid defense, a license or permit must be in compliance with the statute,<sup>52</sup> and if the statute so requires, the permit must be recorded,<sup>53</sup> and must contain a statement of the appropriate facts,<sup>54</sup> but need not contain more information than is called for by the statute.<sup>55</sup> Although a statute dealing with licenses to have and carry a concealed weapon does not expressly require that the application therefor be verified, an affidavit may be required as proof of good moral character in order to ascertain if the applicant has been convicted of a crime.<sup>56</sup> Where the statute provides for an investigation of statements in the application for a license, the officer responsible for determining whether to issue the license is entitled to consider the facts stated in the application, as well as the facts developed by outside investigation.<sup>57</sup>

A license is not required to be issued as of course on compliance with the conditions prescribed in the statute, but the determination as to issuance of licenses lies within the sound discretion of the appropriate officials,<sup>58</sup> and each application is to be decided on its individual merits.<sup>59</sup> While the courts ordinarily will not interfere with a deter-

42 Tex.—Barker v Satterfield, Cr. 111 SW 437

68 CJ p 50 note 68

43 Ala.—Barker v State, 28 So 589, 126 Ala. 83

44 NC.—State v Simmons, 56 SE 701, 143 NC 613

45 Tex.—Ballard v State, 167 SW 340, 74 Tex Cr 110  
68 CJ p 50 note 73

46 Tex.—Guthrie v State, 166 SW 730, 73 Tex Cr 536

47 Tex.—Sanderson v State, 80 S W 2d 755, 128 Tex Cr 307

48 DC.—Brown v U S, Mun App, 66 A 2d 491

Validity of licensing requirements generally see supra § 2

### Issuance of license

(1) Persons over twenty-one years of age and of good moral character applying to county commissioners for license to carry certain firearms, and presenting proper statutory bonds, were entitled to licenses, as against contention that issuance of licenses which allegedly were sought for deer hunting would endanger lives of persons hunting.

Fla.—Smith v. State ex rel Osborne, 163 So 524, 121 Fla. 241

(2) License need not be restricted to particular firearm, under the terms of some statutes, so that separate permit for each firearm is not required

Pa.—Henry v Pechin, 31 Pa Dist & Co 484, 27 Del Co 421

49 W Va.—State v Hazelett, 119 S E 177, 94 W Va. 436

68 CJ p 51 note 76

50 DC.—Brown v U S, Mun App, 66 A 2d 491

68 CJ p 51 note 77

51 DC.—Brown v. U. S, supra 68 CJ p 51 note 78

### Descriptive negative

Under the statute prohibiting the carrying of a pistol "Without a license" except in a dwelling house or place of business, quoted phrase is not an exception, but is a descriptive negative defining the corpus delicti

DC.—Brown v U S, supra

52 NJ.—State v Cortese, 134 A 294, 4 NJ Misc 665 (first case), affirmed 140 A 440, 104 NJ Law 312.

53 NJ.—State v Cortese, supra

54 Ga.—Donalson v State, 100 S E 40, 24 Ga.App 73

55 Ga.—Donalson v State, supra. Pa.—Henry v Pechin, 31 Pa Dist & Co 484, 27 Del Co 421

56 NY.—People v Joseph, 17 N YS 2d 943, 173 Misc 410

57 NY.—People v Joseph, supra.

58 NY.—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE 2d 439, 293 NY 846, motion granted 60 NE 2d 847, 294 NY 699

59 Pa.—Lovering v Dettre, 41 Pa Dist & Co 716, 57 Montg Co 307, 55 York Leg Rec 142.

### "Proper cause"

A person desiring to carry a pistol concealed did not show "proper cause" under the statute for issuance of a license therefor by showing good moral character, honorable discharges from the Armed Forces, and a desire to use pistol for target practice

NY.—Moore v Gallup, 45 NYS 2d 63, 267 App Div 64, affirmed 59 NE 2d 439, 293 NY 846, motion.

mination fairly reached,<sup>60</sup> the refusal of an official to grant such a license, on grounds not stated in the statute, will be held to be improper.<sup>61</sup> Possession of a dangerous weapon under a permit issued by constituted authority is a privilege and not a right,<sup>62</sup> and a person seeking a license to have and carry a weapon does not have a vested right thereto through the granting of earlier licenses.<sup>63</sup>

A license to carry a particular weapon does not authorize the licensee to carry a different weapon,<sup>64</sup> nor does it necessarily justify him in carrying a weapon either in a manner<sup>65</sup> or to a place<sup>66</sup> specifically prohibited by statute, or in using the weapon indiscriminately, or at will, for any and every purpose.<sup>67</sup> In the absence of a provision in the statute to the contrary, a person carrying a licensed weapon need not have the license with him,<sup>68</sup> and it has been held that a person who merely carries a gun in obedience to an order from the owner, who holds a proper license for the weapon, is not guilty of violating the statute.<sup>69</sup> A person may have a right to carry an unlicensed weapon under certain circumstances, as for a harmless or legitimate purpose or motive, as considered *supra* § 5, and it has been held that such circumstances exist when a person carries the weapon in anticipation of the commission of adultery by his spouse,<sup>70</sup> but it has also been held that no such right exists if he has sufficient time to procure a license to carry the weapon but neglects to do so.<sup>71</sup>

**Territorial limits.** Under some statutes it has

been held that within a particular territorial jurisdiction, the right to issue a license or permit to a person residing therein is confided exclusively to a designated licensing authority,<sup>72</sup> and hence, a permit issued to a resident of such jurisdiction or indeed to any other person by a magistrate or official who lacks the requisite authority within the jurisdiction is not a defense.<sup>73</sup> It has also been held that the grant of a license to carry or possess a weapon may be limited to a particular area,<sup>74</sup> such as the licensee's land,<sup>75</sup> and that the license does not excuse the carrying of an interdicted weapon outside of the licensed area.<sup>76</sup> However, where a license confers the right to carry a weapon, but limits the time or place, and the licensee finds it necessary to proceed to and from that place to another, which, if not his home, at least provides him with accommodations for eating or resting, the license must be deemed to protect him while thus carrying the weapon back and forth.<sup>77</sup> Under other statutes a local official, such as the chief police officer of a city, a police magistrate, a justice of the peace, or a sheriff, is authorized to issue a license or permit not only to a local resident but to any citizen of the state, and the validity of the permit is continuous with the state itself.<sup>78</sup>

**Revocation.** As in the case of other licenses, as discussed in Licenses § 2, a license or permit to carry a weapon creates no vested right,<sup>79</sup> and may cease to constitute a defense by reason of its having been revoked or terminated<sup>80</sup> as by the re-

granted 60 NE2d 847, 294 NY 699

60 NY—Moore v. Gallup, *supra*

61. Pa.—Henry v. Pechin, 31 Pa. Dist. & Co 484, 27 Del Co 421

62. NY—In re Plank, 101 NYS 2d 414—In re Di Maggio, 65 NYS 2d 613.

63. NY—Moore v. Gallup, 45 NY S2d 63, 267 App Div 64, affirmed 59 NE2d 439, 293 NY 846, motion granted 60 NE2d 847, 294 NY 699

**Carrying weapon pending new application**

Where, when an application for new license to carry revolver was made, suitable blanks and license forms had not been received, and the application was placed on file and never finally disposed of, license to carry revolver previously issued was valid, warranting applicant's discharge from custody for possessing and carrying a revolver unlawfully

NY—People ex rel Ferris v. Horton, 269 NYS 579, 239 App Div 610

64. Ga.—Allen v. State, 71 SE2d 870, 86 Ga App 604—Donalson v. State, 100 SE 40, 24 Ga App 73

65. Ga.—Socwell v. State, 109 SE 531, 27 Ga App 576

66. Ga.—Socwell v. State, *supra*

67. NY—Gross v. Goodman, 19 NYS 2d 732, 173 Misc 1063 In re Plank, 101 NYS 2d 414

68. NY—People v. Stuyvesant, 189 NYS 232, 197 App Div 641, 39 NY Cr 266

68 CJ p 51 note 86

69. Philippine—U S v. Samson, 16 Philippine 323

70. Ga.—Harris v. State, 85 SE 813, 15 Ga App 315

71. Ga.—Williams v. State, 82 SE 817, 15 Ga App 311

72. NY—People v. Carfano, 202 NYS 223, 207 App Div 866, appeal dismissed 144 NE 886, 238 NY 549—People v. Tarantolo, 194 NYS 672, 202 App Div 707, 39 NY Cr 529, affirmed 142 NE 311, 326 NY 627

73. NY—People v. Tarantolo, *supra*

68 CJ p 51 note 95

74. NC—State v. Harris, 51 NC 448

75. NC—State v. Harris, *supra*

76. NC—State v. Harris, *supra*

77. W Va.—State v. Hazelett, 119 SE 177, 94 W Va 436 68 CJ p 51 note 99

78. Ill.—People v. O'Donnell, 223 Ill App 161

Iowa—Fisher v. Tullar, 227 NW 580, 209 Iowa 35

79. NJ—State v. Cortese, 140 A 440, 104 NJ Law 312

80. NJ—State v. Cortese, *supra*

**Ground for revocation**

(1) Where father left a loaded revolver in open drawer accessible to children and one possessed himself of revolver and seriously injured another child, father's permit to carry a gun should be immediately revoked

NY—In re Di Maggio, 65 NYS 2d 613

(2) Evidence required revocation of licenses to carry pistol on ground that continuance of permits would be for the disadvantage, insecurity,

peal of the law authorizing the granting of the permit.<sup>81</sup>

## § 12. — Indictment and Information

- a. In general
- b. Statement of offense
- c. Issues, proof, and variance

### a. In General

An indictment in a prosecution for carrying or possessing weapons must be valid in its incipency

General rules governing indictments and informations are applicable in prosecutions for carrying or possessing weapons<sup>82</sup> The indictment must be valid in its incipency,<sup>83</sup> and on a motion to quash, a question involving any essential ingredient of the indictment,<sup>84</sup> including whether or not the instrument named is a weapon,<sup>85</sup> is a matter to be decided by the trial judge

### b. Statement of Offense

In a prosecution for carrying or possessing a weapon, the offense must be charged with precision and certainty, and all the substantial elements of the offense as defined by the statute must be alleged.

In a prosecution for carrying or possessing a weapon, the offense must be charged with precision and certainty,<sup>86</sup> in language which is at least as descriptive of the offense as is the language of the statute,<sup>87</sup> insufficiency in this respect cannot be supplied by proof<sup>88</sup> or eked out by inference<sup>89</sup> It is necessary to allege all the substantial elements of the offense as defined by the statute,<sup>90</sup> and although it is competent to charge more than one means or method of committing the same offense,<sup>91</sup> this should ordinarily be done conjunctively and not disjunctively<sup>92</sup> Under some statutes, it must be averred that the act was done unlawfully<sup>93</sup> or was in violation of law,<sup>94</sup> under others, this averment is unnecessary<sup>95</sup> It has been held that the indictment need not negative statutory exemptions,<sup>96</sup> but it has also been held that such allegations are required,<sup>97</sup> and that where the statute prohibits the carrying of a pistol without a license, the state must allege affirmatively that accused did not have a license<sup>98</sup> An indictment or information which falls short of charging a particular offense may be upheld as adequately setting out the commission of another offense<sup>99</sup>

and detriment of the one possessing the licenses

NY—In re Plank, 101 NYS 2d 414

81. NJ—State v Cortese, 140 A 440, 104 NJ Law 312

82. Tex—Brito v State, Cr, 279 SW 2d 104

83. La—State v Nelson, 38 La Ann 942

Tenn—Glasscock v City of Chattanooga, 11 SW 2d 678, 157 Tenn 518

84. La—State v. Nelson, 38 La Ann 942

Motion to dismiss granted  
NY—People v Tumminaro, 275 NYS 778, 242 App Div 501

85. La—State v Nelson, 38 La Ann 942

86. Me—State v Longley, 112 A 260, 119 Me 535

87. Tex—Brito v State, Cr, 279 SW 2d 104

68 CJ p 52 note 16.

**Uniform Firearms Act** completely revised the subject matter it covered, including inhibition against possession of firearms, hence form of indictment prescribed under former law, charging defendant with carrying pistol concealed about his person or on premises not his own or under his control, was not applicable to prosecution under Uniform Firearms Act

Ala—Stinson v State, 190 So 303, 28 Ala App 559, certiorari denied 190 So 305, 28 Ala App 559.

### Fact of previous conviction

Fact that language of information charging unlawful possession of pistol after being previously convicted of a crime of violence brought before jury the fact of previous conviction did not deprive defendant of a fair trial

Wash—Pettus v Cranor, 250 P 2d 542, 41 Wash 2d 567

88. La—State v Nelson, 38 La Ann 942

89. La—State v. Nelson, supra.

90. Ill—People v Sheldon, 152 N E 567, 322 Ill 70

68 CJ p 52 note 19

### Accusations held sufficient

US—Rivera v U S, CCA Puerto Rico, 151 F 2d 47

Cal—People v Bertolani, 230 P 675, 69 Cal App 137

Mo—State v Carter, 64 SW 2d 687

Or—State v Wood, 195 P 2d 703, 183 Or 650

68 CJ p 52 note 19 [e]

### Accusations held insufficient

(1) In general

DC—U S v Waters, DC, 73 F Supp 72, appeal dismissed 69 S Ct 168, 335 US 869, 93 L Ed 413, and cause certified 175 F 2d 340, 84 US App DC 127

68 CJ p 52 note 19 [b]

(2) The charge of possession of a firearm by one previously convicted of a crime of violence is insufficient to charge the offense of transporting firearms in interstate commerce

US—Monge v Sanford, CCA Ga, 145 F 2d 227

91. Puerto Rico—People v Santini, 36 Puerto Rico 344

Tex—Alphin v State, Cr, 33 SW 223

68 CJ p 52 note 21

92. Tex—Canterberry v State, Cr, 44 SW 522

93. Miss—Jordan v State, 39 So 895, 87 Miss 170, followed in Whittaker v State, 45 So 145

94. Mo—State v Rector, 40 SW 2d 639, 328 Mo 669

95. Tex—Tucker v State, 145 SW 611, 65 Tex Cr 627

96. Cal—In re Jingles, 165 P 2d 12, 27 Cal 2d 496

People v James, 235 P 81, 71 Cal App 374

Ill—People v Saltis, 160 NE 86, 328 Ill 494, appeal dismissed Saltis v People of State of Illinois, 48 S Ct 530, 277 US 575, 72 L Ed 995—People v Callicott, 153 NE 688, 322 Ill 390

Mo—State v Smith, 56 SW 2d 39, 332 Mo 44—State v Rector, 40 S W 2d 639, 328 Mo 669—State v. Renard, 273 SW 1058—State v. Brown, 267 SW 864, 306 Mo 532

97. Tex—Leatherwood v. State, 6 Tex App 244

98. DC—Bussie v U. S, Mun App, 81 A 2d 247

99. Tex—Lomax v State, 43 SW 92, 38 Tex Cr 318.

68 CJ p 53 note 26.

*Carrying and concealment.* In a prosecution for carrying weapons, the fact of carrying must be alleged,<sup>1</sup> and if the offense consists of the carrying of concealed weapons on or about the person, the fact of concealment must also be alleged.<sup>2</sup>

*Intent* In some jurisdictions, the mental element of the crime, or the intent of the accused in doing the prohibited act, must be alleged,<sup>3</sup> and a statute creating a presumption of intent to use certain weapons in violation of the statute does not obviate the necessity of alleging such intent in the information,<sup>4</sup> in other jurisdictions, the intent need not be alleged.<sup>5</sup>

*Description of weapon* The state has some latitude in describing the weapon involved,<sup>6</sup> but the description must suffice to bring the weapon within the prohibition of the statute.<sup>7</sup> A firearm is presumptively a dangerous and deadly weapon, and hence it is ordinarily unnecessary to allege either that it is a dangerous weapon<sup>8</sup> or that it was loaded at the time of the offense.<sup>9</sup> Under some statutes, in order to prevent evasions of the law, the state may properly charge in the disjunctive that accused carried a named weapon or other weapon of like kind or description,<sup>10</sup> a charge of this nature being

sufficiently definite to authorize a conviction for carrying any weapon which may be proved to fall within the prohibited class,<sup>11</sup> or a weapon of like kind or description.<sup>12</sup>

*Time* Although the time of the commission of the offense should be alleged,<sup>13</sup> time is not of the essence.<sup>14</sup>

*Allegations as to persons* An indictment for carrying weapons with intent to use against another person need not give the name of such other person.<sup>15</sup> Similarly, one may be indicted for carrying a weapon to the fear and terror of certain persons, without naming them.<sup>16</sup>

*Language of statute.* An indictment or information, charging the unlawful carrying or possession of weapons, is usually,<sup>17</sup> but not always,<sup>18</sup> sufficient when it follows the language of the statute. A charge in language less detailed or precise than that of the statute may be inadequate.<sup>19</sup>

### c. Issues, Proof, and Variance

The material elements of the offense of carrying or possessing a weapon, as charged in the indictment, must be proved by evidence which is not at variance with the allegations.

1. Tex.—Evage v State, 125 SW 2d 295, 136 Tex Cr 318  
68 CJ p 53 note 27

2. Cal.—People v Commons, 148 P 2d 724, 64 Cal App 2d Supp 925  
68 CJ p 53 note 28

#### Accusation held sufficient

Ala.—Brooks v City of Birmingham, 19 So 2d 74, 31 Ala App 496

#### Accusation held insufficient

NC—State v Bradley, 186 SE 240, 210 NC 290

3. Ark.—State v Bailey, 36 SW 690, 62 Ark 489  
68 CJ p 53 note 29

4. NY—People v Trudeau, 24 NY S 2d 34

5. Ind.—State v Judy, 60 Ind 138

6. Ga.—Nixon v State, 48 SE 966, 121 Ga 144  
68 CJ p 53 note 31.

#### Improper allegation

To charge offense of unlawfully carrying a pistol, it was only required to allege in complaint and information that defendant carried on and about his person a pistol, and additional allegation "to-wit a 38 cal owlhead revolver" was improper as burdening state with a useless descriptive designation of kind of pistol

Tex.—Wells v State, 210 SW 2d 154, 152 Tex Cr. 1.

7. W Va.—State v Lett, 60 SE 782, 63 W Va 665  
68 CJ p 53 note 32.

#### Description held sufficient

(1) Information charging defendants with violation of statute prohibiting felons to carry firearms capable of being concealed on person was not insufficient in failing to allege that firearms had barrels of less than twelve inches in length as stated in statute

Cal.—People v Israel, 206 P 2d 62, 91 Cal App 2d 773, appeal denied Israel v People of State of Cal., 70 S Ct 50, 338 US 838, 94 L Ed 512, rehearing denied 70 S Ct 150, 338 US 882, 94 L Ed 541

(2) An indictment for carrying concealed a weapon was not defective because in the accusative part it did not negative the weapon being an ordinary pocketknife, where the descriptive part described the weapon as being a pistol

Ky.—Bailey v Commonwealth, 249 SW 779, 198 Ky 629

#### Description held insufficient

An information charging defendant with illegally carrying weapon in that he intentionally concealed on his person a dangerous weapon consisting of large knife was fatally defective in that knife is not made dangerous weapon per se under statute prohibiting intentional concealment on the person of instrumentality customarily used as dangerous weapon, and for failure to describe the concealed instrumentality as one "customarily used as dangerous weapon"

La.—State v Davis, 39 So 2d 164, 214 La 885

8. Mo.—State v Rector, 40 SW 2d 639, 328 Mo 669

W Va.—State v Tapit, 44 SE 231, 52 W Va. 473

9. Miss.—State v Bollis, 19 So 99, 73 Miss 57  
68 CJ p 53 note 34

10. Ala.—Bell v State, 8 So 133, 89 Ala 61

11. Ala.—Bell v State, supra

12. Ala.—Bell v. State, supra

13. Ky.—Castle v Commonwealth, 255 SW 151, 200 Ky 577

14. NC—State v Spencer, 117 SE 803, 185 NC 765

15. Minn.—State v Simon, 203 NW 989, 163 Minn 317  
68 CJ p 53 note 40

16. Tenn.—State v Bentley, 6 Lea 205.

17. US—Velazquez v Sanford, C CA Ga, 150 F 2d 491

Ill.—People v Hunt, 272 Ill App 496

Mich.—People v Mocer, 293 NW 727, 294 Mich 483  
68 CJ p 54 note 43

18. Puerto Rico—People v. Velasco, 36 Puerto Rico 244

68 CJ p 54 note 42

19. Tenn.—Glasscock v City of Chattanooga, 11 SW 2d 678, 157 Tenn 518.



In a prosecution for carrying or possessing a weapon, the material elements of the offense, as charged in the indictment, must be proved<sup>20</sup> by evidence which is not at variance with the allegations<sup>21</sup> The fact, however, that the prosecution is bound to allege the substantial elements of the offense or even to negative various exceptions contained in the statute does not necessarily mean that the prosecution must prove all of such elements<sup>22</sup> or negatives.<sup>23</sup> The state may show that the offense was committed prior to the time alleged in the indictment,<sup>24</sup> or indeed at any time within the period of limitation<sup>25</sup> prior to the filing of the charge.<sup>26</sup>

### § 13. — Evidence

- a Presumptions and burden of proof
- b Admissibility
- c Weight and sufficiency

20. NY—People v Adamkiewicz, 81 NE2d 76, 298 NY 176  
Wash—State v Tully, 89 P2d 517, 198 Wash 605  
68 CJ p 54 note 47

21. Miss—Talley v State, 164 So 771, 174 Miss 349  
Tex—Bivens v State, 113 SW2d 921, 133 Tex Cr 604  
68 CJ p 54 note 48

#### Variance between accusation and judgment

Where defendant was charged with unlawfully carrying a pistol and convicted of rudely displaying a pistol, which is a distinct offense, since offense charged is not one consisting of degrees, there was a variance between complaint and judgment  
Tex—Williams v State, 194 SW2d 94, 149 Tex Cr 296

#### Held no variance

Neb—Bright v State, 252 NW 386, 125 Neb 817

#### Lack of license

22. NY—People v Grass, 141 NYS 204, 79 Misc 458, 29 NY Cr 184

23. Tex—Leatherwood v State, 6 Tex App 244

24. NC—State v Spencer, 117 SE 803, 185 NC 765

25. Tex—Schrimsher v. State, Cr, 80 SW 1013  
68 CJ p 54 note 53

26. Tex—Schrimsher v State, supra

27. NY—People v Adamkiewicz, 81 NE2d 76, 298 NY 176

#### Under Federal Firearms Act

Where defendant's explanation of acquiring possession of pistol, even

if credible, was unsatisfactory, possession, under the circumstances, was presumptive evidence that pistol had been shipped, transported, or received by someone who had brought it into state in violation of the Federal Firearms Act, and defendant was guilty of violating act, even though he received pistol by purchase

US—U S v Matsumoto, D C Fla., 45 F Supp 668

#### Presumption of prior conviction

In prosecution for possessing concealed firearm, introduction of prison record of accused as permitted by statute merely created lawful presumption of prior conviction

Cal—People v Beatty, 22 P2d 757, 132 Cal App 375

28. NC—State v Hinnant, 26 SE 643, 120 NC 572  
68 CJ p 55 note 58

29. Ark—Thompson v City of Little Rock, 105 SW2d 537, 194 Ark 78—Carr v. State, 34 Ark 448

30. NC—State v Lilly, 21 SE 563, 116 NC 1049—State v. McManus, 89 NC 555  
68 CJ p 60 note 31

31. Minn—State v Nyhus, 222 NW 925, 176 Minn 238—State v Simon, 203 NW 989, 163 Minn 317

32. NY—People v Adamkiewicz, 81 NE2d 76, 298 NY 176  
68 CJ p 59 note 29

#### Rebuttable presumption

(1) Statutory presumption that certain weapons are carried with unlawful intent is subject to rebuttal

NY—People v Adamkiewicz, supra

(2) Evidence negated presump-

### a. Presumptions and Burden of Proof

When a person has a weapon elsewhere than at a place allowed by the statute, the presumption is that the weapon is carried with the intent to conceal it, and the state has the burden of proving the essential elements of the offense

The general rules as to presumptions and burden of proof in criminal prosecutions apply in prosecutions for carrying and possession of weapons<sup>27</sup> Under some statutes, when a person has a weapon elsewhere than at a place where the carrying or possession of weapons is allowed by the statute, the presumption is that the weapon is carried with intent to conceal it,<sup>28</sup> and, when carried concealed, the presumption is that it is loaded and worn as a weapon,<sup>29</sup> having the effect of casting on the accused the burden of rebutting the presumption,<sup>30</sup> although the burden of the evidence remains with the state notwithstanding such presumptions<sup>31</sup> Under other statutes, the mere possession of a dangerous weapon is presumptive evidence of the intent to use the same unlawfully,<sup>32</sup> and the pres-

tion that possession of blackjack by accused implied an intention to use it

NY—People v Quintana, 20 NYS 2d 806, 260 App Div 13

#### Ejusdem generis and proof of intent

(1) Under statute providing that possession of any of weapons specified in another provision of statute is presumptive evidence of carrying, concealing, or possessing with intent to use such weapons, unlawfully, presumption is limited to possession of the weapons specified and such others as naturally fall into the same grouping, but as to items falling within the general provision of "any other dangerous or deadly instrument, or weapon", there must be proof of an intent to use unlawfully against another

NY—People v Adamkiewicz, supra

(2) It has been held, however, that a bayonet is within class of weapons designated as "any other dangerous or deadly instrument or weapon" in statute declaring person possessing a dagger, dirk, dangerous knife, razor, stiletto, "or any other dangerous or deadly weapon" guilty of misdemeanor, so that possession thereof is presumptive evidence of intent to use it unlawfully, although not specifically named in such statute

NY—People v Panitz, 296 NYS 80, 251 App Div 276

(3) Defendant's knowledge of his guilty possession of dangerous or deadly weapon may be inferred by jury from his false statements when arrested that he had no knowledge thereof

NY—People v. Panitz, supra.

ence of certain weapons in a room, structure, or vehicle is presumptive evidence of its illegal possession by all persons occupying the place or vehicle where the weapon is found,<sup>33</sup> which a person must negative by explanation or other proof.<sup>34</sup> It has been held, however, that a statute is invalid which provides that the possession of a firearm or ammunition by any person convicted of a crime is presumptive evidence that he received it in interstate commerce, since such a presumption is inconsistent with any argument drawn from experience.<sup>35</sup>

The state has the burden of the evidence to establish the essential elements of the offense,<sup>36</sup> including the nature of the weapon,<sup>37</sup> the carrying or manual possession of the weapon,<sup>38</sup> the fact of concealment,<sup>39</sup> the existence of such specific intent as the statute may require,<sup>40</sup> and the lack of a license.<sup>41</sup> The prosecution, however, need not prove that the weapon was carried openly or was concealed, where it is an offense to carry a weapon without a license irrespective of whether the weapon was carried openly or concealed.<sup>42</sup>

**33** NY—People v Terra, 102 NE 2d 576, 303 NY 332, appeal dismissed 72 S Ct 561, 342 US 938, 96 LEd 698.

#### Purpose of statute

By enacting statute providing that presence in an automobile of a revolver constitutes presumptive evidence of illegal possession of revolver by all persons in automobile, legislature intended merely to supply a procedure for the more efficient enforcement of statute interdicting the possession of weapons  
NY—People v. Logan, 94 NYS 2d 681

#### When to be invoked

The presumption created by statute by presence in an automobile of a revolver is to be invoked only if there is an absence of satisfactory evidence as to which occupant possessed revolver, and if undisputed facts established that revolver is actually possessed by particular individuals occupying automobile, there is no burden imposed on remaining occupants to go forward with proof tending to refute presumption which would otherwise attach by virtue of occupancy  
NY—People v Logan, supra

#### "Occupying"

(1) Word "occupying" used in statutory provision that presence of machine gun in any room, dwelling, structure, or vehicle shall be presumptive evidence of its illegal possession by all persons occupying place where machine gun is found, refers to persons, who either reside in room or use it in conduct and operation of business or other venture

NY—People v Terra, 102 NE 2d 576, 303 NY 332, appeal dismissed 72 S Ct 561, 342 US 938, 96 LEd 698

(2) Where occupants of automobile were interrogated in police office for about forty minutes, during which time automobile was left unattended and unlocked, occupants were not chargeable with occupancy of automobile during such period, and, therefore, were not chargeable

with presumption of possession of revolver found in the automobile after interrogation

NY—People v Crenshaw, 117 NY S 2d 202, 202 Misc 179

#### Presumption held rebuttable

NY—People v Russo, 103 NYS 2d 603, 278 App Div 98, affirmed 102 NE 2d 834, 303 NY 673

**34.** NY—People v Logan, 94 NY S 2d 681

**35.** US—Tot v U S, Mich & NJ, 63 S Ct 1241, 319 US 463, 87 LEd 1519—U S v Delia, Mich, 63 S Ct 1241, 319 US 463, 87 LEd 1519, certiorari denied U S v Minski, 63 S Ct 1431, 319 US 775, 87 LEd 1722

Minski v U S, CCA Mich, 131 F 2d 614, affirmed 63 S Ct 1241, 319 US 463, 87 LEd 1519, certiorari denied 63 S Ct 1431, 319 US 775, 87 LEd 1722

**36.** NY—People v Terra, 102 NE 2d 576, 303 NY 332, appeal dismissed 72 S Ct 561, 342 US 938, 96 LEd 698

People v Russo, 103 NYS 2d 603, 278 App Div 98, affirmed 102 NE 2d 834, 303 NY 673  
Tex—Rivera v State, 280 SW 580, 103 Tex Cr 297

#### Ordinance not to be proved

In prosecution for carrying a pistol as a weapon in violation of a city ordinance, it was not necessary to prove the ordinance and it was unimportant whether there was any ordinance, there being a state law on the subject

Ark—Thompson v City of Little Rock, 105 SW 2d 537, 194 Ark 78

#### Proof of shooting not required

Where testimony showed pistol carried by defendant was loaded, state was not required to prove that it would shoot

Ark—Thompson v City of Little Rock, supra

**37.** Ark—Vaughan v State, 105 S W 576, 84 Ark 332—McDonald v State, 102 SW 703, 83 Ark 26

#### Purpose for which weapon made or sold

In prosecution under the statute

making it unlawful for one to carry on or about his person a knife manufactured or sold for purposes of offense or defense, burden is on state to prove purposes for which knife was manufactured or sold  
Tex—Ramirez v State, 221 SW 2d 241, 153 Tex Cr 454

**38.** Fla—Watson v Stone, 4 So 2d 700, 148 Fla 516

Ga—Morgan v State, 191 SE 178, 55 Ga App 672

NY—People v Barber, 121 NYS 2d 170

**39.** Md—Davis v State, 97 A 2d 303, 202 Md 463—Wood v State, 65 A 2d 316, 192 Md 643

Mo—State v Hale, 70 Mo App 143

**40.** Minn—State v Nyhus, 222 N W 925, 176 Minn 238

Mont—State v Hodge, 273 P 1049, 84 Mont 24

#### Nature of cartridge

In order to establish crime of possessing cartridge containing and capable of emitting tear gas, state must prove by competent evidence defendant's knowledge that cartridges in his possession contained and were capable of emitting such gas, such knowledge not being presumed from contents of cartridges

Cal—People v Taylor, 40 P 2d 895, 4 Cal App 2d 220

**41.** DC—Bussie v U S, Mun App, 81 A 2d 247—Brown v U S, Mun. App, 66 A 2d 491

#### Quantum of evidence

In prosecution for carrying gun without license, prosecution was required only to prove that accused carried gun and had no license to carry it, and was not required to prove all contents of original record of all licenses for carrying guns issued by superintendent of police  
DC—Bussie v U S, Mun App, 81 A 2d 247

**42.** DC—U S v Waters, DC, 73 F Supp 72, appeal dismissed 69 S Ct 168, 335 US 869, 92 LEd 413, and cause certified 175 F 2d 340, 84 US App DC 127

While in some instances the state has the burden of proving the negative of a statutory exception, as discussed in Criminal Law § 572, the general rule is that the accused has the burden of excusing or justifying his act,<sup>43</sup> and hence the burden may be on him to bring himself within an exception in the statute,<sup>44</sup> or to prove the issuance of a license or permit.<sup>45</sup> On the same principle, it is held that a statute making it unlawful for an unnaturalized foreign-born person to possess certain firearms is not in violation of the organic law of the state or nation merely because it casts on the accused the burden of proving that he is a citizen of the United States.<sup>46</sup> It is nevertheless true, however, that the state continues to have the burden of proving the crime,<sup>47</sup> or, as is sometimes said, the burden

of establishing the allegations of the indictment<sup>48</sup> or of overcoming the presumption of innocence.<sup>49</sup>

#### b. Admissibility

Any legal evidence calculated to throw light on the unlawful act of carrying or possessing a weapon as charged is admissible, although to some extent the admission or exclusion of evidence is within the discretion of the trial court.

In a prosecution for carrying or possessing a weapon, any legal evidence calculated to throw light on the unlawful act as charged is admissible,<sup>50</sup> although to some extent the admission or exclusion of evidence is within the discretion of the trial court.<sup>51</sup> Evidence having a legitimate tendency to establish a valid defense in point of law is admissible,<sup>52</sup> but in the absence of such a tendency the

43 Tex—Johnson v State, Cr. 269 SW2d 406—Tolbert v State, 246 SW2d 896, 157 Tex Cr 101  
Wash—State v Krantz, 164 P 2d 453, 24 Wash 2d 350  
68 C J p 55 note 69

#### Going forward with evidence

The presumption created by a statute making possession of a firearm whose marks of identification have been tampered with prima facie evidence that tampering was done by possessor does not impose on possessor the burden of proving who committed the crime, or require him to persuade jury of his innocence, but it merely requires possessor to go forward with evidence to extent of raising a reasonable doubt that he tampered with the identification marks

Cal—People v Scott, 151 P 2d 517, 24 Cal 2d 774

#### Affirmative defense

If weapon was in such defective condition that it could not be fired that is an affirmative defense which defendant is called on to prove

Ky—Couch v. Commonwealth, 255 SW2d 478  
44 Ky—Smith v Commonwealth, 230 SW2d 478, 313 Ky 113  
Tex—Hutspeth v State, 254 SW 2d 130, 158 Tex Cr 188  
68 C J p 55 note 70

45 Ga—Reed v. State, 25 SE2d 692, 195 Ga 842  
McHenry v State, 198 SE 818, 58 Ga App 410  
NJ—State v Rabatin, 95 A 2d 431, 25 NJ Super. 24  
68 C J p 55 note 71

#### Inference from failure to produce proof

In prosecution for carrying pistol without license, jury may infer that if accused fails to produce proof that he had secured a license, accused has not done so

Ga—McHenry v. State, 198 SE 818, 58 Ga App 410

46. Cal—People v Guzman, 286 P 1037, 209 Cal 783, followed in People v Bruno, 286 P 1037, 209 Cal 782

#### People need not prove lack of naturalization

In prosecution of alien for possession of firearms capable of being concealed, people need not prove alienage and lack of naturalization as part of corpus delicti

Cal—People v Cortez, 296 P 98, 112 Cal App 22—People v Velasquez, 233 P 359, 70 Cal App 362

47. Tex—Humphries v State, 124 SW 635, 58 Tex Cr 30  
68 C J p 55 note 74

48 Ohio—Porello v State, 168 N E 135, 121 Ohio St 280

49 Ga—Amorous v State, 57 SE 999, 1 Ga App 313  
Tex—Rivera v State, 280 SW 580, 103 Tex Cr 297

50. Cal—People v Hagan, 275 P 2d 616, 128 Cal App 2d 491—People v Syed Shah, 205 P 2d 1081, 91 Cal App 2d 716—People v Cannizzaro, 31 P 2d 1066, 138 Cal App 28

Ky—Jarvis v Commonwealth, 206 SW 2d 831, 306 Ky 190  
Tex—Lively v State, 202 SW 2d 850, 150 Tex Cr 485  
68 C J p 56 notes 78, 80

#### Evidence of general character

In prosecution for carrying a pistol, it has been held that wherever a criminal intent is necessary to constitute the offense, evidence of the general character of defendant is admissible in his behalf

Tex—Lann v State, 8 SW 650, 25 Tex App 495, 8 Am SR 445

Police officer's testimony that still was found on raided premises within which police encountered accused with loaded pistol in his pocket, is material in prosecution for carrying concealed weapon

NJ—State v Bloom, 167 A 221, 11 NJ Misc 522

#### Evidence held inadmissible

##### (1) In general

NY—People v De Witt, 140 NYS 2d 190, 285 App Div 1113  
Tex—Poston v State, 104 SW2d 516, 132 Tex Cr 317  
68 C J p 56 note 80 [c]

(2) In prosecution for carrying pistols with intent to go armed, evidence of defendant's mistreatment of his wife and defiance of officers was irrelevant to question of guilt on pistol charge  
Tenn—Brooks v State, 215 SW 2d 785, 187 Tenn 361

(3) In prosecution for carrying concealed a deadly weapon, evidence that three months prior to commission of alleged crime defendant was in possession of a warrant for arrest of a third party as special bailiff was properly excluded as irrelevant and without weight to support defendant's contention that at time charged he was intent on serving the process and that it was necessary for him to carry a weapon for his own protection

Ky—Witt v Commonwealth, 215 S W 2d 949, 309 Ky 18

51. NM—State v Nieto, 280 P 248, 34 NM 232  
68 C J p 56 note 81

#### Discretion not abused

In prosecution for violating the Federal Firearms Act, refusal to allow defendant to introduce evidence of lack of prosecution by authorities of Puerto Rico for the affair which resulted in prosecution of defendant for violation of the Federal Firearms Act was not an abuse of discretion

US—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct 1010, 324 US 889, 89 L Ed 1437

52. Ala—Nelson v State, 65 So 844, 11 Ala App 221.  
68 C J. p 56 note 82.

evidence is not admissible<sup>53</sup> The accused is sometimes allowed to prove the circumstances of the carrying in mitigation of the punishment<sup>54</sup> When kept within reasonable limits, it is proper to admit evidence in explanation, rebuttal, or contradiction of that already given,<sup>55</sup> and to allow an inquiry into a witness' means of knowledge<sup>56</sup>

*Intent and motive* Evidence bearing on the intent of the accused in having a weapon on or about his person is admissible,<sup>57</sup> but where criminal intent or motive is immaterial, evidence tending to show a lack of criminal intent should be rejected<sup>58</sup> Where a person has carried and made use of a forbidden weapon, or has showed a disposition to make use of it the particular use to which the weapon has been put, or the disposition to use it, may become relevant in determining his intent,<sup>59</sup> or the good faith of his claim that he is protected by an exemption in the statute<sup>60</sup> Since it is a mental state or condition of the accused which is in question, persons other than the accused cannot give direct testimony concerning his motive<sup>61</sup>

*Time and place.* In general, the evidence should be confined to the time and place charged,<sup>62</sup> but since the offense of carrying a weapon is both continuous and transitory in its nature, some liberality must be exercised in the admission of evidence,<sup>63</sup> subject to the statute of limitations, and to the filing date of the indictment or information.<sup>64</sup> Relevant and material evidence of the ac-

cused's acts, appearance, and the like within a reasonable time before or after the commission of the offense is admissible,<sup>65</sup> and this is equally true of evidence showing that the offense was committed either prior<sup>66</sup> or subsequent<sup>67</sup> to the time alleged.

### c. Weight and Sufficiency

- (1) In general
- (2) Circumstantial evidence
- (3) Defenses

#### (1) In General

In order to justify a conviction for unlawfully carrying or possessing a weapon, the proof of guilt must be clear and certain beyond a reasonable doubt, but absolute certainty is not required.

In order to justify a conviction for carrying or possessing a weapon, the proof of guilt should be clear and certain<sup>68</sup> beyond a reasonable doubt,<sup>69</sup> but on the other hand, absolute certainty may not be required<sup>70</sup> The use of a weapon in a fight, although only for a moment, is evidence that it was carried as a weapon within the prohibition of the statute<sup>71</sup> It has been held that in order to establish a prima facie case, it is not incumbent on the state to prove that a firearm unlawfully carried or possessed was loaded,<sup>72</sup> nor is it necessary that the weapon be offered in evidence,<sup>73</sup> although no doubt this should be done whenever possible<sup>74</sup>

Proof of the carrying of a prohibited weapon,<sup>75</sup>

53. Ala—Johnson v State, 75 So 278, 16 Ala App 72  
68 C J p 56 note 83

54. Neb—Nugent v State, 176 N W 672, 104 Neb 235

55. Ala—Holman v. State, 39 So 646, 144 Ala 95  
68 C J p 56 note 86

56. Ala—Hainey v State, 41 So 968, 147 Ala 146

57. Cal—People v Canales, 55 P 2d 289, 12 Cal App 2d 215  
68 C J p 57 note 91

58. La—State v Martin, 31 La Ann 849  
68 C J p 57 note 93

59. NC—State v McManus, 89 NC 555  
68 C J p 57 note 88

60. Tex—Grant v State, 13 SW 2d 889, 112 Tex Cr 120

61. Ga—Morton v. State, 46 Ga 292

62. Ala—Johnson v State, 75 So 278, 16 Ala App 72  
68 C J p 57 note 96

#### Place of offense

In prosecution for carrying pistol, evidence that defendant bet on cock fight and resented referee's decision

was admissible to show place of offense and fact that defendant walked out of arena and drew pistol, and also to show inducing cause for display thereof

Tex—Claus v State, 93 SW 2d 727, 130 Tex Cr 250

63. Mo—State v Miles, 101 SW 671, 124 Mo App 283  
68 C J p 57 note 98

64. Tex—Schrimsher v State, Cr, 80 SW 1013

65. Ala—Harris v State, 46 So 749, 155 Ala 139  
68 C J p 57 note 1

66. NC—State v Spencer, 117 SE 803, 185 NC 765  
Tex—Dolezal v State, 191 SW 1158, 80 Tex Cr 603

67. Tex—Schrimsher v State, Cr, 80 SW 1013

68. Tex—Smith v State, 10 Tex App 420

69. US—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct 1010, 324 US 889, 89 L Ed 1437

NY—People v Terra, 102 NE 2d 576, 303 NY 332, appeal dismissed 72 S Ct 561, 342 US 938, 96 L Ed 698

People v Unger, 269 NYS 785, 241 App Div 741  
68 C J p 58 note 7

70. NY—People v Bellucci, 240 NYS 669, 136 Misc 174  
68 C J p 58 note 8

71. Ark—Henderson v State, 120 SW 966, 91 Ark 224

72. Mo—State v Baumann, 278 S. W 974, 311 Mo 443  
68 C J p 58 note 10

73. Puerto Rico—People v Claudio, 35 Puerto Rico 51, 52  
68 C J p 58 note 11

74. Puerto Rico—People v. Claudio, supra  
68 C J p 58 note 12.

75. Ga—Morgan v State, 191 SE 178, 55 Ga App 672—Webb v. State, 88 SE 751, 18 Ga App 44—Harris v State, 81 SE 587, 14 Ga App 521

Tex—Franklin v State, 183 SW 2d 573, 147 Tex Cr 636—Hyde v State, 68 SW 2d 200, 124 Tex Cr 285.

together with proof of the necessary jurisdictional facts,<sup>76</sup> and, in prosecutions for carrying a concealed weapon, proof of the concealment,<sup>77</sup> makes out a prima facie case, unless it can be inferred that accused was within an exemption in

the statute.<sup>78</sup> Evidence has been held either sufficient<sup>79</sup> or insufficient<sup>80</sup> to sustain a conviction or to establish particular matters in prosecutions for the carrying of concealed weapons, and the sufficiency of the evidence has also been adjudicated

#### Home or place of business

In prosecution for carrying pistol without license, the state makes out a prima facie case when it proves that the accused carried a pistol on his person or had manual possession of a pistol, not at his home or place of business

Ga.—Reed v State, 25 SE 2d 692, 195 Ga. 842

Allen v State, 71 SE 2d 870, 86 Ga. App. 604—McHenry v State, 198 SE 818, 58 Ga. App. 410—Fanning v State, 147 SE 788, 39 Ga. App. 531

76. Ga.—Morgan v State, 191 SE 178, 55 Ga. App. 672—Webb v State, 88 SE 751, 18 Ga. App. 44—Harris v State, 81 SE 587, 14 Ga. App. 521

77. Pa.—Commonwealth v. Joseph Bruno, 82 Pa. Super. 388

78. Ga.—Webb v State, 88 SE 751, 18 Ga. App. 44—Harris v State, 81 SE 587, 14 Ga. App. 521

79. U.S.—U.S. v Freeman, C.A. Ind., 203 F.2d 387

U.S. v Farwell, D.C. Alaska, 76 F. Supp. 35

Ala.—Jackson v State, 68 So.2d 850, 37 Ala. App. 335, certiorari denied 68 So.2d 853, 260 Ala. 698—Brogden v State, 34 So.2d 712, 33 Ala. App. 474

Cal.—People v Wissenfeld, 227 P.2d 833, 36 Cal. 2d 758

People v Rodriguez, 282 P.2d 132, 132 Cal. App. 2d 335—People v Marcias, 279 P.2d 987, 130 Cal. App. 2d 860, certiorari denied Marcias v People of State of California, 75 S.Ct. 901, 349 U.S. 967, 99 L.Ed. 1288—People v Hagan, 275 P.2d 616, 128 Cal. App. 2d 491—People v Nations, 263 P.2d 619, 121 Cal. App. 2d 595—People v Tullous, 259 P.2d 955, 119 Cal. App. 2d 637—People v Jensen, 247 P.2d 135, 112 Cal. App. 2d 668—People v Knox, 246 P.2d 81, 112 Cal. App. 2d 339—People v Ekberg, 211 P.2d 316, 94 Cal. App. 2d 613, certiorari denied 70 S.Ct. 988, 339 U.S. 969, 94 L.Ed. 1377—People v Israel, 206 P.2d 62, 91 Cal. App. 2d 773, certiorari denied Israel v California, 70 S.Ct. 50, 338 U.S. 838, 94 L.Ed. 512, rehearing denied 70 S.Ct. 150, 338 U.S. 882, 94 L.Ed. 541—People v Klinkenberg, 204 P.2d 47, hearing denied 204 P.2d 613, 90 Cal. App. 2d 608—People v Sparks, 185 P.2d 652, 82 Cal. App. 2d 145—People v Smith, 164 P.2d 857, 72 Cal. App. 2d 875—People v Vaughn, 161 P.2d 293, 70 Cal. App. 2d 439—

People v Felix, 137 P.2d 472, 58 Cal. App. 2d 646—People v Voss, 37 P.2d 846, 2 Cal. App. 2d 188—People v Mulherin, 35 P.2d 174, 140 Cal. App. 212—People v Cannizzaro, 31 P.2d 1066, 138 Cal. App. 28

Ga.—Anthony v. State, 83 SE 2d 217, 90 Ga. App. 448—Gaddis v State, 80 SE 2d 846, 89 Ga. App. 724—Allen v State, 71 SE 2d 870, 86 Ga. App. 604—Pinkston v State, 54 SE 2d 343, 79 Ga. App. 762—Pope v State, 45 SE 2d 682, 76 Ga. App. 289—Gile v State, 38 SE 2d 180, 73 Ga. App. 847—Harris v State, 35 SE 2d 17, 72 Ga. App. 716—Walker v State, 10 SE 2d 767, 63 Ga. App. 254—McHenry v State, 198 SE 818, 58 Ga. App. 410—Caldwell v State, 198 SE 793, 58 Ga. App. 408—Morgan v State, 191 SE 178, 55 Ga. App. 672—Johnson v State, 183 SE 194, 52 Ga. App. 383—McDuffie v State, 182 SE 57, 52 Ga. App. 17—Miller v State, 180 SE 648, 51 Ga. App. 437—Miller v State, 177 SE 82, 50 Ga. App. 30

Ill.—People v Euctice, 20 NE 2d 83, 371 Ill. 159—People v McMahon, 194 NE 233, 359 Ill. 97—People v Davies, 188 NE 337, 354 Ill. 168—People v Betts, 24 NE 2d 878, 303 Ill. App. 232

Iowa.—State v Thomason, 276 NW 619, 224 Iowa 499—State v Busing, 251 NW 620

Ky.—Prince v Com., 277 SW 2d 470—Kelly v Commonwealth, 232 S.W. 2d 1022, 313 Ky. 507

Md.—Davis v State, 97 A.2d 303, 202 Md. 463

Mass.—Commonwealth v Miller, 8 NE 2d 603, 297 Mass. 285

Mich.—People v Rogers, 5 NW 2d 668, 303 Mich. 94—People v Moceri, 293 NW 727, 294 Mich. 483

Neb.—Jones v State, 22 NW 2d 710, 147 Neb. 219

N.J.—State v Rabatin, 95 A.2d 431, 25 N.J. Super. 24

State v O'Connor, 49 A.2d 45, 134 N.J. Law 536

N.Y.—People v Namer, 142 N.Y.S. 2d 351, 286 App. Div. 890—People v Russo, 103 N.Y.S. 2d 603, 278 App. Div. 98, affirmed 102 NE 2d 834, 303 N.Y. 673—People v Logan, 95 N.Y.S. 2d 806, 276 App. Div. 1029—People v Messineo, 59 N.Y.S. 2d 776, 270 App. Div. 817—People v Lo Turco, 11 N.Y.S. 2d 644, 256 App. Div. 1098, affirmed 21 NE 2d 888, 280 N.Y. 844—People v Shauter, 285 N.Y.S. 245, 246 App. Div. 221, affirmed People v Stanger, 5 NE 2d 355, 272 N.Y. 607

People v Barber, 121 N.Y.S. 2d 170

N.C.—State v Williamson, 78 SE 2d 763, 238 NC 652

Okla.—Holden v State, 47 P.2d 223, 57 Okla. Cr. 34

Pa.—Commonwealth v Farley, 77 A.2d 881, 168 Pa. Super. 204

Commonwealth v Turpin, Quar. Sess., 69 Montg. Co. 322.

S.C.—Town of Clinton v Hall, 27 S.E. 2d 569, 203 S.C. 407

Tex.—Linsey v State, Cr., 279 S.W. 2d 862—Bryant v State, Cr., 274 S.W. 2d 838—Tunnell v State, 263 S.W. 2d 776, 159 Tex. Cr. 328—Allen v State, 259 S.W. 2d 225, 158 Tex. Cr. 666—Vogt v State, 258 S.W. 2d 795, 159 Tex. Cr. 211, certiorari denied Vogt v State of Tex., 74 S.Ct. 221, 346 U.S. 901, 98 L.Ed. 401—Smith v State, 255 S.W. 2d 223, 158 Tex. Cr. 305—Hutspeth v State, 254 S.W. 2d 130, 158 Tex. Cr. 188—Henson v State, 252 S.W. 2d 711, 158 Tex. Cr. 5—Anderson v State, Cr., 224 S.W. 2d 246—Williams v State, 215 S.W. 2d 630, 152 Tex. Cr. 485—Walker v State, 196 S.W. 2d 515, 149 Tex. Cr. 501—Franklin v State, 183 S.W. 2d 573, 147 Tex. Cr. 636—Stroud v State, 167 S.W. 2d 526, 145 Tex. Cr. 264—Montgomery v State, 116 S.W. 2d 737, 134 Tex. Cr. 489—Tyler v State, 106 S.W. 2d 301, 133 Tex. Cr. 24—Kimbrow v State, 102 S.W. 2d 416, 132 Tex. Cr. 65—French v State, 70 S.W. 2d 1002, 126 Tex. Cr. 246—Hyde v State, 68 S.W. 2d 200, 124 Tex. Cr. 285—Keys v State, 67 S.W. 2d 878, 125 Tex. Cr. R. 250

Wash.—State v Kelley, 220 P.2d 342, 36 Wash. 2d 772

68 C.J. p. 58 note 17 [a], [c], p. 59 note 19

80. Ala.—Roberts v. State, 153 So. 663, 26 Ala. App. 84

Cal.—People v Boyd, 178 P.2d 797, 79 Cal. App. 2d 90

Ga.—Davis v State, 200 SE 809, second case, 59 Ga. App. 343—McHenry v State, 198 SE 818, 58 Ga. App. 410

Ill.—People v Gregor, 194 NE 550, 359 Ill. 402

People v Beason, 97 NE 2d 603, 342 Ill. App. 621

Ky.—Bowman v Commonwealth, 217 S.W. 2d 967, 309 Ky. 414—Reid v Commonwealth, 184 S.W. 2d 101, 298 Ky. 800

Mont.—State v Gilbert, 232 P.2d 838, 125 Mont. 104

N.Y.—People v Blumenthal, 128 N.Y.S. 2d 735, 283 App. Div. 784

68 C.J. p. 58 note 17 [b], [d], [e].

in prosecutions for carrying or possessing weapons in any unlawful manner,<sup>81</sup> or for violating the Federal Firearms Act <sup>82</sup>

## (2) Circumstantial Evidence

The offense of carrying or possessing a weapon may be established by circumstantial evidence, and this is usually the only way to prove intent

The offense of carrying or possessing a weapon may be established by circumstantial evidence,<sup>83</sup> however, such evidence must exclude every reasonable hypothesis other than that of guilt.<sup>84</sup>

**Intent.** Circumstantial evidence is usually the only means of proving intent and it has accordingly been held that proof of the carrying or possession of a prohibited weapon, especially in a concealed or surreptitious manner, is evidence from which it is permissible to infer not only the intent to conceal the weapon,<sup>85</sup> but also the intent to wear it as a weapon, or the intent to injure or to use the weapon unlawfully against another <sup>86</sup> The mere fact, however, of having a weapon on or about one's person is not necessarily sufficient evidence of a specific intent.<sup>87</sup>

## (3) Defenses

In order to justify acquittal on a charge of carrying or possessing a weapon, there must be substantial evidence that accused, when having a prohibited weapon in his possession, was a person within the meaning of a statutory exception.

In order to justify acquittal, there must be substantial evidence that accused, when having a prohibited weapon in his possession, was a person within the meaning of an exception in the statute, as that he was a traveler,<sup>88</sup> or that for any other reason he did not violate the law, as considered supra § 9, a mere possibility of innocence will not suffice.<sup>89</sup> Nevertheless, it is not incumbent on accused to prove his defense beyond a reasonable doubt,<sup>90</sup> a preponderance of the evidence being sufficient,<sup>91</sup> and his innocence may be inferred not only from evidence adduced on his own behalf but also from that introduced by the state.<sup>92</sup>

## § 14. — Trial and Review

- a. Questions of law and fact
- b. Instructions

### a. Questions of Law and Fact

In prosecutions for the carrying or possession of

### 81. Evidence held sufficient

Cal—People v Rodriguez, 282 P 2d 132, 132 Cal App 2d 335—People v Garrow, 278 P 2d 475, 130 Cal App 2d 75, certiorari denied Garrow v State of California, 75 S Ct 779, 349 US 933, 99 L Ed 1263, rehearing denied 75 S Ct 892, 349 US 969, 99 L Ed 1290—People v Nations, 263 P 2d 619, 121 Cal App 2d 595—People v Erickel, 247 P 2d 72, 112 Cal App 2d 763—People v L'Hormedieu, 111 P 2d 921, 44 Cal App 2d 27—People v Quinones, 35 P 2d 638, 140 Cal App 609

DC—U S v Waters, DC., 73 F Supp 72, appeal dismissed 69 S Ct 168, 335 US 869, 93 L Ed 413, and cause certified 175 F 2d 340, 84 U S App DC 127

Bussie v U S, Mun App, 81 A 2d 247

NY—People v Logan, 95 NYS 2d 806, 276 App Div 1029

68 C J p 58 note 18 [a], p 59 note 20 [a]

### Evidence held insufficient

US—U S ex rel Murphy v Warden of Clinton Prison, DC NY, 29 F Supp 486, affirmed CCA, U S ex rel Murphy v Murphy, 108 F.2d 861, certiorari denied Murphy v. Warden of Clinton State Prison at Dannemore, NY, 60 S Ct 583, 309 US 661, 84 L Ed 1009, rehearing denied 60 S Ct 609, 309 U.S. 696, 84 L Ed 1036.

Cal—People v. Golden, 174 P 2d 32, 76 Cal App 2d 769—People v. Taylor, 40 P 2d 895, 4 Cal App 2d 220.

Mich—People v Petro, 70 NW 2d 69, 342 Mich 299

NY—People v Adamkiewicz, 81 NE 2d 76, 298 NY 176

People v Loporcario, 140 NYS 2d 150, 285 App Div 1088—People v Portese, 108 NYS 2d 471, 279 App Div 63—People v Quintana, 20 NYS 2d 806, 260 App Div 13—People v Glassman, 8 NYS 2d 349, 255 App Div 997—People v Di Landri, 293 NYS. 546, 250 App Div 52

People v Boitano, 18 NYS 2d 644

Tex—Ramirez v State, 221 SW 2d 241, 153 Tex Cr 454—Smith v State, 190 SW 2d 830, 149 Tex Cr 7—Davis v State, 122 SW 2d 635, 135 Tex Cr 659

68 C J p 58 note 18 [b], p 59 note 20 [b], [c]

### Corpus delicti

In prosecution for violation of the deadly weapon act, corpus delicti was established by testimony of arresting officers that at time of arrest accused was armed with blackjack, coupled with testimony of accused at the trial admitting such possession

Cal—People v Sparks, 185 P 2d 652, 82 Cal App 2d 145

82. US—Rivera v. U. S, CCA Puerto Rico, 151 F 2d 47—Cases v U S, CCA Puerto Rico, 131 F 2d 916, certiorari denied Cases Velazquez v U S, 63 S Ct 1431, 319 US 770, 87 L Ed 1718, rehearing denied 65 S Ct. 1010, 324 US 889, 89 L Ed 1437.

83. Ga—Morgan v. State, 191 SE 178, 55 Ga App 672  
68 C J p 59 note 23

### Alien possessing weapon

Alien character and possession of firearm were sufficiently proved by circumstantial evidence

Cal—People v Bedoy, 252 P 1061, 80 Cal App 783

84. Ga—Miller v State, 136 SE 539, 36 Ga App 304—Amorous v State, 57 SE 999, 1 Ga App 313

85. Mo—State v Carter, 168 SW 679, 259 Mo 349  
68 C J p 59 notes 28, 29

86. Ark—Carr v. State, 34 Ark 448, 36 Am R 15

68 C J p 59 note 29  
Presumption arising from possession of weapon see supra subdivision a of this section

87. Mont—State v Hodge, 273 P. 1049, 84 Mont 24  
68 C J p 59 note 30

88. Tex—Kemp v State, 31 SW 2d 652, 116 Tex Cr 90  
68 C J p 60 note 32

89. Ala—Nichols v State, 14 So 539, 100 Ala 23

90. Tex—Humphries v State, 124 S. W 635, 58 Tex Cr 30

91. Ohio—Fink v State, 178 NE 700, 40 Ohio App. 431

92. Ga—Webb v State, 88 SE 751, 18 Ga App 44—Harris v State, 81 SE 587, 14 Ga App 521.

weapons, questions of fact on which the evidence is conflicting are for the determination of the jury, such as with respect to intent or motive, or concealment, but questions of law are for determination by the court

General rules as to questions of law and fact apply in prosecutions for the carrying or possession of weapons.<sup>93</sup> Questions of fact on which the evidence is conflicting are for the determination of the jury,<sup>94</sup> while questions of law are for determination by the court.<sup>95</sup>

*Intent or motive*, when material in a prosecution for the carrying or possession of a weapon, must usually be inferred from words or acts, and is a question of fact to be determined by the jury<sup>96</sup> or by the court sitting without a jury,<sup>97</sup> although where the evidence is insufficient to warrant submission to the jury, the court may direct a verdict of acquittal.<sup>98</sup> The fact that a firearm, when carried or possessed by accused, was unloaded does not demonstrate his innocence as a matter of law,<sup>99</sup> but may be considered by the jury, with the other facts and circumstances in the case, in determining the intention of accused.<sup>1</sup>

*Concealment*, as an indispensable element of the offense of carrying concealed weapons, is a fact to be determined by the jury<sup>2</sup> where the evidence is conflicting,<sup>3</sup> and whether or not the weapon was carried or concealed on or about the person may also be for the jury.<sup>4</sup>

*Unlawful nature of the weapon* is often a question which is properly submitted to the jury.<sup>5</sup> Whether or not a firearm is in such a condition that it cannot be fired may likewise be a question for the jury or arbiter of the facts.<sup>6</sup> The court, however, may determine in the first instance whether the instrument in evidence is within the statute prohibiting possession of certain weapons.<sup>7</sup>

*Defenses* Where a defense has been interposed to an indictment or information for the carrying or possession of a weapon, the question of the guilt or innocence of accused is a matter for the jury, on conflicting evidence.<sup>8</sup> It is ordinarily the province and duty of the jury, under the instructions of the court, to weigh the evidence before it and de-

93. Mich—People v Vaines, 17 N W 2d 729, 310 Mich 500

94. US—U S v Tot, DCNJ, 42 F Supp 252, affirmed CCA, 131 F 2d 261, reversed on other grounds 63 S Ct 1241, 319 US 463, 87 L Ed 1519

Cal—People v L'Hommedieu, 111 P 2d 921, 44 Cal App 2d 27

DC—Wilson v U S, 198 F 2d 299, 91 US App DC 135

Mass—Commonwealth v Bartholomew, 93 NE 2d 551, 326 Mass 218

Mo—State v Carter, 64 SW 2d 687

NJ—State v Rabatin, 95 A 2d 431, 25 NJ Super 24

Tenn—Brooks v State, 213 SW 2d 7, 187 Tenn 67

Tex—Claus v State, 93 SW 2d 727, 130 Tex Cr 250—Gee v State, 87 SW 2d 483, 129 Tex Cr 312—Kerr v State, 81 SW 2d 530, 128 Tex Cr 373

W Va—State v. Cline, 22 SE 2d 871, 125 W Va 63

#### Rebuttal of prima facie case

In prosecution for carrying a pistol without a license, where state makes out prima facie case, it is a question for jury, under evidence, to determine whether defendant carried burden of rebutting prima facie case

Ga—Allen v State, 71 SE 2d 870, 86 Ga App 604

#### Dangerous weapon

In a prosecution for carrying as a concealed weapon an article or instrument which becomes a dangerous weapon only when used or carried for use as a weapon, whether the instrument was so used or carried becomes a question of fact.

Mich—People v Vaines, 17 NW 2d 729, 310 Mich 500

#### Evidence held sufficient to take case to jury

Cal—People v Sparks, 185 P 2d 652, 82 Cal App 2d 145

DC—Bussie v U S, Mun App, 81 A 2d 247

#### Evidence held insufficient to take case to jury

US—Giardano v U S, CCA Cal, 139 F 2d 198

95 W Va—Village of Barboursville ex rel Bates v Taylor, 174 SE 485, 115 W Va 4, 92 ALR 1093

96. Pa—Commonwealth v Festa, 40 A 2d 112, 156 Pa Super 329

68 C J p 60 note 44

97. Ala—Danal v State, 71 So 976, 14 Ala App 97

NY—People v Panitz, 296 NYS 2d 80, 251 App Div 276

98 NY—People v Rosen, 74 NYS 2d 624

99. Ark—Hathcock v State, 137 S W 551, 99 Ark 65

68 C J p 60 note 46

1. Ark—Hathcock v State, supra

Pa—Commonwealth v Sweitzer, 21 Pa Dist 807

2. Cal—People v Canales, 55 P 2d 289, 12 Cal App 2d 215

Ky—Tackett v Com, 261 SW 2d 298

68 C J p 60 note 49

3. Ill—People v Henneman, 10 NE 2d 649, 367 Ill 151

Ky—Shell v Commonwealth, 220 S W 2d 842, 310 Ky 339

68 C J p 60 note 50

#### Evidence held sufficient to take case to jury

Kv—Coomer v Commonwealth, 238 SW 2d 161—Kelly v Commonwealth, 232 SW 2d 1022, 313 Ky 507—Asher v Commonwealth, 220 SW 2d 867, 310 Ky 337—Johnson v Commonwealth, 215 SW 2d 838, 308 Ky 709—Turley v Commonwealth, 209 SW 2d 843, 307 Ky 89

—Newsome v Commonwealth, 205 SW 2d 688, 305 Ky 783

Pa—Commonwealth v Festa, 40 A 2d 112, 156 Pa Super 329

4. Ky—Shoupe v Commonwealth, 202 SW 2d 369, 304 Ky 737.

68 C J p 60 note 51

5. Cal—People v McKinney, 50 P 2d 827, 9 Cal App 2d 523

68 C J p 61 note 52

6. NY—People v Tardibono, 20 NYS 2d 633, 174 Misc 305

68 C J p 61 note 53

7. Cal—People v Canales, 55 P 2d 289, 12 Cal App 2d 215

8. Ky—Avery v Commonwealth, 3 SW 2d 624, 223 Ky 248

68 C J p 61 note 55

#### Evidence held insufficient to take case to jury

In prosecution for carrying concealed a deadly weapon, evidence was insufficient for the jury on defense that defendant was a peace officer at time of commission of offense and expressly authorized to carry such a weapon

Ky—Witt v Commonwealth, 215 S W 2d 949, 309 Ky 18

termine its sufficiency to bring the accused within an exception in the statute.<sup>9</sup> Whether accused when traveling deviated from his route is ordinarily a question of fact for the jury.<sup>10</sup>

### b. Instructions

In prosecutions for the carrying or possession of weapons, the court should give clear and uncontradictory instructions which correctly state the law in the light of the evidence.

General rules governing instructions apply in prosecutions for the carrying or possession of weapons.<sup>11</sup> It is the province and duty of the court, either of its own motion or on request to give clear and uncontradictory instructions<sup>12</sup> which correctly state the law<sup>13</sup> in the light of the evidence,<sup>14</sup> including the law pertaining to such theories or defenses<sup>15</sup> as may be adequately presented by the evidence.<sup>16</sup> The court may properly modify

a requested instruction,<sup>17</sup> and if it does not do so, it should refuse to give instructions which do not correctly state the law as applied to the facts,<sup>18</sup> or which have a tendency to confuse or mislead,<sup>19</sup> or contain a hypothesis not conforming to the evidence.<sup>20</sup> If the evidence is conflicting or susceptible of different interpretations, it is incumbent on the court, on proper request, to charge the jury in appropriate language and in such a manner as to invoke their decision as between the conflicting facts or theories.<sup>21</sup> It has been held that under ordinary circumstances it is not necessary for the court to define the meaning of the word "concealed."<sup>22</sup>

## § 15. — Sentence and Punishment

Under some statutes relating to punishment for the carrying or possession of weapons, the sentence imposed

9. Ark.—Town of Beebe v Judd, 205 S W 981, 136 Ark 22  
68 C J p 61 note 56

### Place

(1) In prosecution for violation of statute defining the offense a person commits in carrying a pistol without license except in his dwelling house or place of business or on other land possessed by him, jury question was presented as to whether place at which defendant was carrying weapon was his place of business  
D C—Alexander v U S, 210 F 2d 727, 93 US App DC 240

(2) In trial for carrying concealed pistol without license at place other than his abode, whether defendant, living in hotel, in a room of which he was arrested, was assigned to such room or merely visiting it at time, was question for jury on conflicting evidence

Ala.—Brooks v City of Birmingham, 19 So 2d 74, 31 Ala App 496

10. Ark.—Town of Beebe v Judd, 205 S W 981, 136 Ark 22  
68 C J p 61 note 57

11. Ala.—Clayton v. State, 155 So 718, 26 Ala App 94

12. Tex.—Schroeder v State, 99 S W 1003, 50 Tex Cr 111

13. Cal.—People v Mulherin, 35 P 2d 174, 140 Cal App 212  
68 C J p 61 note 61

### Instructions held proper or erroneously refused

US—Goforth v U S, C A N C, 218 F 2d 820—Quinones v U S, C C A Puerto Rico, 161 F 2d 79, certiorari denied 67 S Ct 1513, 331 US 833, 91 L Ed 1846

Cal.—People v Mulherin, 35 P 2d 174, 140 Cal App 212

Ga.—Allen v State, 71 SE 2d 870, 86 Ga App 604.

Mo—State v Charles, 268 SW 2d 830  
—State v Carter, 64 SW 2d 687  
NY—People v Portese, 108 NYS 2d 471, 279 App Div 63—People v Lucido, 4 NYS 2d 122, 254 App Div 750

Pa.—Commonwealth v Festa, 40 A 2d 112, 156 Pa Super 329

Tenn.—McNew v State, 144 SW 2d 740, 176 Tenn 492

Tex.—Walker v State, 195 SW 2d 363, 149 Tex Cr 438—Sanderson v State, 80 SW 2d 755, 128 Tex Cr 307

### Instructions held improper or properly refused

US—U S v Tot, C A N J, 131 F 2d 261, reversed on other grounds 63 S Ct 1241, 319 US 463, 87 L Ed 1519

Ky.—Skidmore v Commonwealth, 223 SW 2d 739, 311 Ky 176—Bundy v Commonwealth, 143 SW 2d 1054, 284 Ky 119—McCown v Commonwealth, 63 SW 2d 601, 250 Ky 574

Neb.—Phillips v State, 49 NW 2d 698, 151 Neb 790

Tex.—Wells v State, 210 SW 2d 154, 152 Tex Cr 1—Privitt v State, 208 SW 2d 635, 151 Tex Cr 423—Lebman v State, 94 SW 2d 1166, 130 Tex Cr 423

### Unnecessary instruction

In prosecution for carrying a concealed dirk or dagger, definition of pocket knife or definition thereof in instructions to jury was unnecessary  
Cal.—People v Syed Shah, 205 P 2d 1081, 91 Cal App 2d 716

14. La.—State v. Perez, 92 So 45, 151 La 526  
68 C J p 61 note 62

### Instructions held proper

Cal.—People v. Klinkenberg, 204 P 2d 47, hearing denied 204 P 2d 613, 90 Cal App 2d 608

Ky.—Simpson v Com, 215 SW 2d 844, 308 Ky 735

15. Iowa—State v Williams, 29 N W 801, 70 Iowa 52  
68 C J p 61 note 63

### Held error not to instruct as to defense

Ky.—Turley v Commonwealth, 209 SW 2d 843, 307 Kv 89

Tex.—Johnson v State, Cr, 269 SW 2d 406—Poston v State, 104 SW 2d 516, 132 Tex Cr 317—Reynolds v State, 104 SW 2d 17, 132 Tex Cr 204

### Instruction held too restrictive

(1) In general

Tex.—Dominguez v State, 147 SW 2d 480, 141 Tex Cr 67

(2) In prosecution for carrying concealed weapon, court's charge requiring defendant to show that circumstances which he claimed as justification for carrying weapon were associated or connected with his business, went beyond statutory requirements

Ohio—State v Johnson, App, 112 N E 2d 62

16. Tex.—Wortham v State, 252 S W 1063, 95 Tex Cr 135  
68 C J p 62 note 64

17. Mo.—Orrick v Akers, 83 SW 549, 109 Mo App 662

18. Mass.—Commonwealth v Miller, 8 NE 2d 603, 297 Mass 285

Mo.—State v Carter, 64 SW 2d 687.  
68 C J p 62 note 66

19. Ala.—Street v State, 67 Ala 87  
Tex.—Smith v State, 232 SW 811, 89 Tex Cr 606

20. Ala.—Wetzel v State, 176 So 224, 27 Ala App 517, certiorari denied 176 So 226, 234 Ala 610  
68 C J p 62 note 68

21. Tex.—Grant v State, 13 SW 2d 889, 112 Tex Cr 120

22. Ky.—Tackett v Commonwealth, 261 SW 2d 298—Avery v Commonwealth, 3 SW 2d 624, 223 Ky 248.



may be within the discretion of the court, subject to the right of review for an abuse of discretion, and subject also to the limitations fixed by the statute

Under some statutes relating to punishment for the carrying or possession of weapons, the sentence imposed may be within the discretion of the court, or sometimes of the jury, subject to the right of review for an abuse of discretion,<sup>23</sup> and subject also to the limitations fixed by the statute<sup>24</sup> in force at the time of the commission of the offense<sup>25</sup> Statutes declaring in the alternative that the penalty for unlawfully carrying weapons shall be a fine or imprisonment do not authorize both a fine and imprisonment<sup>26</sup> The power which the court may have to admeasure the punishment within certain limits is a judicial rather than an arbitrary power,<sup>27</sup> and the court is not warranted in imposing an excessive sentence,<sup>28</sup> that is, a sentence which is unjust in its relation to the offense for which accused has been convicted<sup>29</sup> Although it is held in some jurisdictions that a sentence not greater than the maximum fixed by law cannot be excessive in legal contemplation,<sup>30</sup> it is also held that where the charge embodies no more than the unlawful carrying of a weapon, the maximum penalty is not justified,<sup>31</sup> especially if accused pleads guilty,<sup>32</sup> and there is nothing to aggravate the offense<sup>33</sup>

Some statutes expressly provide that designated facts, such as apprehension of attack, may be con-

sidered in mitigation of the punishment, or justification of the offense, and it is accordingly held that discretionary power exists to assess a fine or impose an authorized punishment which is less than the minimum fixed by statute<sup>34</sup> In other jurisdictions, however, in the absence of such statutes, the apprehension of danger is not a circumstance which may be considered by way of extenuation<sup>35</sup> Although it would be manifestly improper to punish accused for one offense merely because he has committed another, his general conduct may be considered in gauging the punishment<sup>36</sup> Where the evidence shows without conflict that accused is exempted from the penal provisions of the statute or has not violated the law, the court is powerless to render a judgment of conviction, and has no choice but to discharge him<sup>37</sup>

## § 16. Pointing or Exhibiting Weapons

The aiming, drawing, pointing, or exhibiting of a weapon in a certain manner is an offense under some statutes, and it is immaterial to the commission of the offense that no physical injury resulted to anyone.

Under some statutes, the aiming, drawing, pointing, presenting, or exhibiting of a weapon under certain circumstances is a distinct offense,<sup>38</sup> kindred in its nature to that of carrying weapons,<sup>39</sup> and it is immaterial to the commission of the offense that the weapon, if a firearm, could not be discharged

23. NC—State v Woodlief, 90 SE 137, 172 NC 885.  
68 C J p 62 note 73

### Discretion not abused

Sentence to penitentiary for one year for carrying concealed automatic pistol was not abuse of discretion under evidence  
Neb—Bright v State, 252 NW 386, 125 Neb 817

24. Cal—In re O'Donnell, 9 P 2d 223, 121 Cal App 370  
68 C J. p 62 note 74

### Fine authorized by statute

The statute authorizing fine not exceeding a certain sum in addition to imprisonment on conviction of any crime punishable by imprisonment, in relation to which no fine is prescribed, includes all crimes, whether denounced in Penal Code or by special statutory enactment, and hence authorizes imposition of such a fine in addition to sentence of imprisonment in county jail or state prison on conviction of carrying concealed dirk or dagger  
Cal—People v Syed Shah, 205 P 2d 1081, 91 Cal App 2d 716

Fine lower than minimum held error  
Tex—Jenkins v State, 159 SW 2d 885, 143 Tex Cr. 515.

25. Tex—Perkins v State, App, 13 SW 790  
68 C J p 62 note 75

26. La—State v Daniel, 75 So 102, 141 La 423  
Tex—Everett v State, 226 SW 2d 873, 154 Tex Cr 262

27. NY—People v Miles, 158 NYS 819, 173 App Div 179, 34 NY Cr 555

28. Tenn—Brooks v State, 215 SW 2d 785, 187 Tenn 361  
68 C J p 62 note 79

### Sentence held not excessive

Ill—People v. Davies, 188 NE 337, 354 Ill 168  
Tex—Stroud v State, 167 SW 2d 526, 145 Tex Cr 264  
68 C J p 62 note 79 [a].

### Two offenses

Under statutes fixing punishment for carrying concealed deadly weapons on person at separate or solitary confinement not exceeding one year and for carrying firearms in motor vehicle without license at simple imprisonment not exceeding three years, definite sentence of two years in state penitentiary on conviction for both offenses was erroneous  
Pa—Commonwealth ex rel Monaghan v Burke, 82 A 2d 337, 169 Pa Super 256, certiorari denied Mona-

ghan v Burke, 72 S Ct 233, 342 US 898, 96 L Ed 673

29. NY—People v Miles, 158 NYS 819, 173 App Div 179, 34 NY Cr 555

30. Ga—Godwin v State, 51 SE 598, 123 Ga 569

31. Puerto Rico—People v. Laureano, 34 Puerto Rico 203  
68 C J p 63 note 83

### Evidence held insufficient to warrant maximum punishment

Okl—Holden v State, 47 P 2d 223, 57 Okl Cr 34

32. Puerto Rico—People v Laureano, 34 Puerto Rico 203

33. Puerto Rico—People v. Laureano, supra

34. Ala—Maxwell v. State, 39 So 382, 143 Ala 57

35. NC—State v Woodlief, 90 SE 137, 172 NC 885.

36. NC—State v. Woodlief, supra

37. Nev—Ex parte Davis, 110 P. 1131, 33 Nev 309  
68 C J p 63 note 92

38. Mo—State v Duvenick, 140 S W 897, 237 Mo 185  
68 C J p 63 note 94

39. Mo—State v Morris, 172 S.W 603, 263 Mo 339.  
68 C J p 63 note 93.

as considered supra § 17, or that no physical injury resulted to anyone<sup>40</sup> The commission of the crime of drawing a prohibited weapon while unlawfully armed therewith constitutes the statutory offense of committing a crime when armed.<sup>41</sup>

The word "aim," as used in some statutes, connotes intention,<sup>42</sup> and is synonymous with "draw"<sup>43</sup>

The word "draw" in this connection is judicially defined as meaning intentionally to point a weapon<sup>44</sup> It is not equivalent to "flourish"<sup>45</sup>

The word "point," although practically synonymous with "aim,"<sup>46</sup> is less specific than the latter term.<sup>47</sup> The pointing of a weapon at, or, in the language of some statutes, toward another, must necessarily be preceded by the drawing of the weapon for that purpose.<sup>48</sup>

### § 17. — Nature and Elements of Offenses, and Defenses

The very essence of the offense of pointing or exhibiting the weapon is the doing of the act, which is required by the statutes to be done intentionally, but the criminality of the act does not depend on motive. The legitimate defense of person or property constitutes a defense to a prosecution for pointing or exhibiting a weapon.

Under statutes prohibiting the pointing or exhibiting of weapons, the very essence of the offense is the doing of the criminal act,<sup>49</sup> which is expressly or impliedly required by the statutes to be done intentionally<sup>50</sup> The criminality of the act does not depend on motive,<sup>51</sup> more specifically,

malice, or an intent to injure, is not an ingredient of the offense<sup>52</sup> Moreover, neither present ability to commit an assault<sup>53</sup> nor present ability to see or harm the intended victim is an element of this offense<sup>54</sup>

*Weapons prohibited.* In determining the kind of weapons coming within the prohibition of statutes directed against the pointing or display of weapons, the construction placed on statutes forbidding the carrying of weapons may properly be considered<sup>55</sup> A pistol,<sup>56</sup> without proof that it is loaded or presently capable of committing an injury,<sup>57</sup> rifle,<sup>58</sup> or other firearm<sup>59</sup> is a deadly weapon within the purview of the statutes; a hatchet,<sup>60</sup> a club,<sup>61</sup> and even a pocketknife<sup>62</sup> may be deadly weapons. The pointing or exhibiting of a firearm in the manner prohibited by the statutes constitutes an offense even though the firearm is unloaded<sup>63</sup> or in such a condition that it cannot be discharged<sup>64</sup>

*Places prohibited.* Statutes making it unlawful to point or display weapons, instead of being applicable to places in general, may be limited in their scope to particular places; and hence to constitute an offense the accused must have pointed or displayed the weapon in a place prohibited by the statute, such as a private house,<sup>65</sup> a public place,<sup>66</sup> or a place of amusement<sup>67</sup> Under some statutes, the offense must be committed in the presence of one or more persons<sup>68</sup>

*Manner of pointing or exhibiting.* In order to constitute the offense, it is necessary that the weap-

40. Del—State v Donovan, 8 A 2d 876, 1 Terry 257

41. Ind—Alderson v State, 168 NE 481, 201 Ind 359  
68 C J p 63 note 98

42. Ga—Livingston v State, 65 SE 812, 6 Ga App 805

43. Ga—Livingston v State, supra Miss—Coleman v State, 48 So 181, 94 Miss 860.

44. Ind—Siberry v State, 47 NE 458, 149 Ind 684  
68 C J p 63 note 2.

45. NM—State v. Boyles, 174 P 423, 24 NM 464  
68 C J p 63 note 3

46. Miss—Coleman v. State, 48 So 181, 94 Miss 860

47. Ga—Livingston v. State, 65 SE 812, 6 Ga App 805  
68 C J p 63 note 5.

48. Ky—Hatfield v. Commonwealth, 254 SW 748, 200 Ky 243  
68 C J p 63 note 6.

49. Okl—Buchanan v. State, 219 P. 420, 25 Okl Cr 198.

50. Ga—Parsons v State, 84 SE 974, 16 Ga App 212  
68 C J p 63 note 9

51. Ind—Underhill v State, 114 NE 88, 186 Ind 587

52. Del—State v Gam, 74 A 7, 24 Del 25  
68 C J p 68 note 11

53. Ind—Underhill v State, 114 NE 88, 186 Ind 587

54. Ind—Lange v State, 95 Ind 114  
68 C J p 64 note 13.

55. Mo—State v Morris, 172 SW 603, 263 Mo 339

56. Ind—Underhill v State, 114 NE 88, 186 Ind 587  
68 C J p 64 note 16

57. Mass—Cittadino v State, 24 So 2d 93, 199 Miss 235

58. Okl—Golden v State, 290 P 1111, 48 Okl Cr 322—Billings v State, 166 P 904, 14 Okl Cr 12

59. Mo—State v Morris, 172 SW 603, 263 Mo 339

60. Mo—State v. Sebastian, 81 Mo 514.

61. Tex—Fuller v State, 87 SW. 332, 48 Tex Cr 300  
68 C J p 64 note 20

62. Miss—State v Ware, 59 So 854, 102 Miss 634

63. Mo—State v Morris, 172 SW. 603, 263 Mo 339  
68 C J p 64 note 24

**Gross carelessness** in handling of a shotgun may be a violation of the statute making it unlawful to present a shotgun, whether loaded or unloaded, at another

Ala—Davis v State, 19 So 2d 356, 31 Ala App 508, certiorari denied 19 So 2d 358, 246 Ala 101

64. Mo—State v Morris, 172 SW 603, 263 Mo 339

65. Tex—Ward v State, 167 SW. 343, 74 Tex Cr 94  
68 C J p 64 note 27.

66. Tex—Jones v State, 130 SW. 1001, 60 Tex Cr 56  
68 C J p 64 note 28.

67. NY—People v Tremaine, 222 N. YS 432, 129 Misc 650  
68 C J p 63 note 97

68. Puerto Rico—People v Guzmán, 19 Puerto Rico 50

on be pointed or exhibited in the manner denounced by the statutes,<sup>69</sup> some of which punish the offense whether committed playfully or otherwise,<sup>70</sup> or when committed in a rude, angry, or threatening manner.<sup>71</sup> The shooting of a firearm may constitute the offense of rudely displaying it,<sup>72</sup> but this is not necessarily so.<sup>73</sup> A weapon may be displayed willfully or unlawfully without being rudely displayed within the contemplation of the statute.<sup>74</sup>

**Persons exempted** Statutes forbidding the pointing or exhibition of weapons make exceptions for the benefit of designated classes of persons, such as officers<sup>75</sup> and travelers,<sup>76</sup> and no offense is committed where accused is within one of the excepted classes.

**Defenses** By express terms of the statutes or by judicial construction, the legitimate defense of person or property constitutes a defense to a prosecution for pointing or exhibiting a weapon.<sup>77</sup> The right of self-defense, however, does not necessarily justify the use of certain prohibited weapons,<sup>78</sup> and the use of insulting or abusive words does not constitute a justification.<sup>79</sup> The fact that the persons, in whose presence accused exhibited the weapon in a threatening manner, were at a certain dis-

tance is no defense where the weapon could be effectively used at such a distance.<sup>80</sup>

## § 18. — Prosecution and Punishment

- a Indictment and information
- b Evidence
- c Trial, punishment, and review

### a. Indictment and Information

Although the offense of pointing or displaying a weapon must be substantially described and no material element may be omitted, a mere formal defect or irregularity does not invalidate the accusation.

Although the offense of pointing or displaying a weapon must be substantially described and no material element may be omitted,<sup>81</sup> a mere formal defect or irregularity does not invalidate the accusation.<sup>82</sup> Under the decisions in various jurisdictions, it has been held that the state must charge that the interdicted act was committed intentionally<sup>83</sup> and unlawfully<sup>84</sup> with a prohibited firearm or other weapon<sup>85</sup> and in the prohibited manner<sup>86</sup> in the presence of the required number of persons.<sup>87</sup> It need not, however, be alleged that accused acted with malice,<sup>88</sup> or that the firearm was loaded<sup>89</sup> or was known by him to be loaded,<sup>90</sup> or was carried.<sup>91</sup>

69 Puerto Rico—People v Guzmán, supra.

70 Del—State v Donovan, 8 A 2d 878, 1 Terry 257.  
68 C J p 64 note 32.

#### Purpose of statute

The statute providing that it shall be unlawful for any person in jest or otherwise intentionally to point a firearm towards any other person was enacted for protection of human life and in recognition of manifest danger arising from careless handling of firearms.

Del—State v Donovan, supra.

71. Mo—State v Morris, 172 SW 603, 263 Mo 339.

#### Pointing not necessary element

The pointing of the weapon at complaining witness is not a necessary element of the statutory offense of exhibiting a deadly weapon in a rude, angry, or threatening manner.

Cal—Garfield v Peoples Finance & Thrift Co of Riverside, 74 P 2d 1061, 24 Cal App 2d 144.

72. Tex—Spiars v State, 50 SW 947, 40 Tex Cr 437—Gozy v State, 29 SW 783, 34 Tex Cr 146.

73. Tex—Lloyd v State, 184 SW 192, 79 Tex Cr 251.

74. Tex—Fuller v State, 87 SW 832, 48 Tex Cr 300.

75. Mo—State v Mosby, 81 Mo App 207.

68 C J, p 64 note 39.

76 Mo—State v Cousins, 110 SW 607, 131 Mo App 617.

77. Ga—Brocken v State, 46 SE 2d 738, 76 Ga App 585.  
68 C J p 64 note 42.

#### Right to kill

Within statute making it unlawful to point a gun at another except when done in "self-defense," the quoted term includes the right to kill in defense of one's child or to prevent commission of a felony.

Or—State v Nodine, 259 P 2d 1056, 198 Or 679.

#### Resisting trespassers

If one charged with feloniously exhibiting a deadly weapon takes his gun along when he goes to exclude trespassers from his premises, only to resist attack in case attack should be made on him for thus asserting his lawful rights, and he makes no demonstrations with the gun except in resistance to the approach of the trespassers on him for the purpose of assault, he is not guilty of the offense charged.

Mo—State v Plassard, 195 SW 2d 495, 355 Mo 90, appeal transferred 190 SW 2d 464.

68 C J p 64 note 42 [f].

78. Tenn—Day v State, 5 Sneed 496.  
68 C J p 65 note 43.

79. Ga—Winkles v State, 40 SE 259, 114 Ga 449.

68 C J p 65 note 44.

80 Mo—State v Darrow, 104 SW 2d 249.

81. Ga—Edwards v State, 111 SE 748, 28 Ga App 466.  
68 C J p 65 note 47.

#### Accusation held sufficient

Okl—Wilson v State, 209 P 2d 512, 89 Okl Cr 421, opinion adhered to 212 P 2d 144, 89 Okl Cr 421.

#### Accusation held insufficient

Ala—McCoy v State, 165 So 263, 27 Ala App 18.

82. Miss—Gamblin v. State, 45 Miss 658.  
68 C J p 65 note 48.

83. Ga—Edwards v State, 111 SE 748, 28 Ga App 466.  
68 C J p 65 note 49.

84. Ala—Bowen v State, 110 So 56, 21 Ala App 547.

85. Tex—Fuller v State, 87 SW 832, 48 Tex Cr 300.

86. Tex—Fuller v State, supra.  
68 C J p 65 note 52.

87. Miss—Parrett v State, 58 So 1, 101 Miss 306.

88. Ind—Graham v. State, 35 NE 1109, 8 Ind App 497.

89. Ind—Graham v State, supra.  
68 C J p 65 note 55.

90. Ohio—Geiger v State, 5 Ohio Cir Ct 283, 3 Ohio Cir Dec 141.

91. Miss—Gamblin v. State, 45 Miss. 658.

in a public place or a public assemblage<sup>92</sup> Where the statute prohibits the pointing or displaying of deadly weapons, the state may<sup>93</sup> or may not<sup>94</sup> be required to allege that a particular weapon is deadly, depending on whether or not the court can say that it is a deadly weapon per se

*Language of statute or statutory forms* An accusation in substantial conformity with the language of the statute is sufficient,<sup>95</sup> even though the language is in the alternative,<sup>96</sup> and each alternative averment may be sufficient to support the charge<sup>97</sup> Where the statutory language is in the disjunctive, an allegation in the conjunctive is not objectionable as charging more than one offense, where the terms employed are synonymous<sup>98</sup>

*Issues, proof, and variance* Pursuant to general rules, material allegations of the indictment must be proved,<sup>99</sup> and while unnecessary descriptive averments do not vitiate the indictment, an averment, although unnecessary, must be proved as laid,<sup>1</sup> unless it is mere surplusage<sup>2</sup>

#### b. Evidence

The state has the burden of proving the substantial elements of the offense of pointing or exhibiting a weapon,

and the existence of all of such elements must be shown by evidence which is competent in law.

In view of the presumption of innocence, the state has the burden of proving the substantial elements of the offense of pointing or exhibiting a weapon,<sup>3</sup> and the existence of all of such elements must be shown<sup>4</sup> by evidence which is relevant and material as well as competent in law<sup>5</sup> Unless an appellate court, under the rules governing the review of criminal proceedings, can say that the evidence is sufficient, a conviction for pointing or exhibiting a weapon will not be allowed to stand.<sup>6</sup>

#### c. Trial, Punishment, and Review

In prosecutions for pointing or exhibiting weapons, the question of whether the accused is guilty or innocent of handling the weapon in a prohibited manner is a question to be determined by the jury under the evidence. The quantum of punishment imposed by the trial court is subject to review, and, if excessive, may be modified or reduced

In prosecutions for pointing or exhibiting weapons, the question of whether accused is guilty or innocent of handling the weapon in the prohibited manner is a question to be determined by the jury under the evidence,<sup>7</sup> and the requisite intent to do

92. Mo—State v. Seal, 47 Mo App 603

93. Tex—Jones v State, 96 SW 29, 50 Tex Cr 210  
68 C J p 65 note 59

94. Okl—Golden v State, 290 P 1111, 48 Okl Cr 322  
68 C J p 65 note 59

95. Mo—State v Gibson, 300 SW 1106  
68 C J p 65 note 61

96. Ala—Elmore v. State, 37 So 156, 140 Ala 184  
68 C J p 65 note 62

97. Ala—Hughes v. State, 41 So 427, 148 Ala 661

98. Miss—Coleman v State, 48 So 181, 94 Miss 860  
68 C J p 65 note 65.

99. Ga—Bone v State, 74 SE 852, 11 Ga App 128  
68 C J p 65 note 67.

1. Del—State v Chambers, 41 A 197, 15 Del 550  
68 C J p 66 note 69

2. Ohio—Geiger v State, 5 Ohio Cir Ct 283, 3 Ohio Cir Dec 141

3. Okl—Wilson v State, 209 P 2d 512, 89 Okl Cr 421, opinion adhered to 212 P 2d 144, 89 Okl Cr 421  
68 C J p 66 note 73

#### Presence of several persons

In prosecution for unlawfully exhibiting a deadly weapon, state was not required to prove that such weapon was exhibited at any particular individual but only that it was exhibited in the presence of three or more persons.

Miss—Sykes v City of Crystal Springs, 61 So 2d 387, 216 Miss 18

4. Puerto Rico—People v Guzmán, 19 Puerto Rico 50

#### Intentional pointing

In order to sustain a conviction under the statute making it unlawful for any person to point a pistol at any other person, proof must show an intentional pointing of the weapon  
Okl—Parker v State, 273 P 2d 778—Wilson v State, 209 P 2d 512, 89 Okl Cr 421, opinion adhered to 212 P 2d 144, 89 Okl Cr 421

5. Ky—Hatfield v Commonwealth, 254 SW 748, 200 Ky 243.  
68 C J p 66 notes 75–77

#### Evidence held admissible

(1) In general  
Mo—State v. Darrow, 104 SW 2d 249  
68 C J p 66 note 77 [a]

(2) In prosecution for feloniously exhibiting a deadly weapon, wherein defendant contended that place where he exhibited the deadly weapon was his home and that in defending it he had a constitutional right to bear arms, refusal to permit defendant to introduce evidence tending to establish his right to possession of the realty was error  
Mo—State v Blassard, 195 SW 2d 495, 355 Mo 90

#### Evidence held inadmissible

Mo—State v Darrow, 104 SW 2d 249  
68 C J p 66 note 77 [b]

#### 6. Evidence held sufficient

(1) To sustain conviction of pointing a weapon at another

Ga—Murphy v State, 28 SE 2d 198, 70 Ga App 387

Miss—Golden v State, 71 So 2d 476, 220 Miss 18

Okl—Cochran v State, 144 P 2d 751, 78 Okl Cr 115—Newton v State, 68 P 2d 431, 61 Okl Cr 371

SC—State v Thompkins, 68 SE 2d 465, 220 SC 523

Wis—State v Abdella, 52 NW 2d 924, 261 Wis 393  
68 C J p 66 note 79 [a] (1)

(2) To sustain conviction for exhibiting a weapon

Miss—Sykes v City of Crystal Springs, 61 So 2d 387, 216 Miss 18  
68 C J p 66 note 79 [a] (2)

#### Evidence held insufficient

(1) To sustain conviction for unlawfully pointing a weapon at another

Ga—Brocken v State, 46 SE 2d 738, 76 Ga App 585

Miss—Austin v State, 6 So 2d 121, 192 Miss 342

Okl—Smith v State, 202 P 2d 709, 88 Okl Cr 276

68 C J p 66 note 80 [a] (1), [b]

(2) To sustain conviction of displaying a weapon in a public place  
Tex—Hobbs v State, 227 SW 2d 570, 154 Tex Cr 341

(3) To sustain conviction for displaying weapon

Tex—Taylor v State, 102 SW 409, 51 Tex Cr 442

7. Mo—State v Darrow, 104 SW 2d 249

68 C J p 66 note 87.

the unlawful act may be inferred from the surrounding circumstances<sup>8</sup> The jury should be correctly instructed,<sup>9</sup> in language which is not misleading,<sup>10</sup> with respect to the contentions made<sup>11</sup> and to the propositions of law pertinent to the facts of the case,<sup>12</sup> and they should return a proper verdict.<sup>13</sup> Substantial evidence tending to establish a valid defense, even though coming from the accused alone,<sup>14</sup> entitles him to an instruction presenting that defense<sup>15</sup> The quantum of punishment imposed by the trial court is subject to review,<sup>16</sup> and, if erroneous or excessive, may be modified or reduced<sup>17</sup>

### § 19. Shooting Firearms

Under some statutes, the shooting of a weapon in certain places or under designated circumstances is a specific offense.

Shooting firearms, in addition to being an aggravated assault, as discussed in Assault and Battery § 76, may, under some circumstances, constitute a breach of the peace, as discussed in Breach of the Peace § 2, and, under some statutes, it is made a specific offense to discharge a weapon in certain places or under designated circumstances<sup>18</sup> Except as provided by such statutes, however, the firing of a weapon does not constitute an offense<sup>19</sup>

### § 20. — Nature and Elements of Offenses, and Defenses

- a. Nature and elements of offenses
- b. Defenses

#### a. Nature and Elements of Offenses

Statutes which declare unlawful the discharging of

firearms in certain designated places are penal statutes of general and unrestricted nature The offense is committed only where the shooting occurs at a prohibited place, but unless otherwise provided, no particular intent, motive, purpose, or knowledge is required as an element of the offense.

Statutes which declare unlawful the discharging of firearms in certain designated places are penal statutes of general and unrestricted nature<sup>20</sup>

*Another's property.* Under a statute making it an offense to discharge firearms on another's property, a person who discharges a gun on his own premises is not guilty of a violation of the statute<sup>21</sup>

*Dwelling house or schoolhouse.* Under statutes which make it an offense to shoot at, toward, or into a dwelling house or certain other houses, the offense may be committed by two or more persons conspiring together<sup>22</sup> Statutes defining this offense include only those buildings specifically mentioned,<sup>23</sup> they do not, for example, include a tent set up as a temporary shelter<sup>24</sup> The offense is committed by a person who, while standing on the porch<sup>25</sup> or inside the dwelling house,<sup>26</sup> shoots at the floor<sup>27</sup> or at, toward, or into any other part of the dwelling,<sup>28</sup> and it is immaterial that he may have been guilty in the same transaction of unlawfully shooting at another person<sup>29</sup> Under some statutes, motive is important,<sup>30</sup> malice being an essential ingredient of the offense;<sup>31</sup> but under others, no particular intent, motive, purpose, or knowledge is required as an element of the offense<sup>32</sup> The kind of firearm used in the shooting is of no consequence<sup>33</sup>

8. Ga.—Parsons v State, 84 SE 974, 16 Ga App 212—Hawkins v State, 70 SE 53, 8 Ga App 705

9. NM—State v Boyles, 174 P. 423, 24 NM 464  
68 C J p 66 note 89

10. Mo—State v Lupp, 110 SW. 4, 130 Mo App 398.

11. Tex—Lloyd v State, 184 SW. 192, 79 Tex Cr 251

12. Mo—State v. Arnett, 167 SW 526, 258 Mo 253—State v Duvenick, 140 SW 897, 237 Mo 185

**Instructions properly refused**  
Cal—People v Diamond, 92 P 2d 486, 33 Cal App 2d 518  
Miss—Austin v. State, 6 So 2d 121, 192 Miss 342

**Verdict held sufficient**  
Ga—Jenkins v. State, 17 SE. 693, 92 Ga 470  
68 C J p 66 note 83 [a]

14. Mo—State v. Arnett, 167 SW 526, 258 Mo. 253.

15. Okl—Layman v State, 156 P 907, 12 Okl Cr 337—Doud v State, 154 P 1008, 12 Okl Cr 273

16. Okl—Maddox v. State, 15 P 2d 150, 54 Okl Cr 120

**Erroneous sentence**  
Cal—People v Drámond, 92 P 2d 486, 33 Cal App 2d 518  
Pa—Commonwealth ex rel Zambelli v Smith, 33 A 2d 925, 153 Pa Super 411.  
68 C J p 67 note 96

**Mitigating circumstances requiring modification**  
Okl—Cochran v State, 144 P 2d 751, 78 Okl Cr 115

18. NY—Gross v Goodman, 19 NY S 2d 732, 173 Misc 1063  
Ohio—State v Elder, 120 NE 2d 508

19. Tex—McDaniel v State, Cr App, 26 SW 724.

20. Ohio—State v. Elder, Mun, 120 NE 2d 508

21. Ohio—Martin v State, 71 NE 640, 70 Ohio St 219.

22. Ala—Brewer v State, 74 So 764, 15 Ala App 681.

23. Ala—Knowles v. State, 98 So 207, 19 Ala App 476.  
68 C J p 67 note 6

24. Ala—Knowles v State, supra  
25. Ga—Sapp v State, 86 SE 823, 17 Ga App 340

26. Ga—English v State, 74 SE. 286, 10 Ga App 791

27. Ga—English v State, supra  
28. Ga—Holmes v. State, 94 SE 69, 21 Ga App 150

29. Ga—Holmes v. State, supra.  
30. Fla—Sutton v. State, 59 So. 893, 54 Fla 150

31. Mo—State v. Woolsey, 33 SW. 2d 955  
68 C J, p 67 note 14

32. La—State v. Dowdell, 31 So. 151, 106 La 645.

33. Mo—State v. Woolsey, 33 SW. 2d 955.

*Highway or other public place.* It is a penal offense to discharge willfully any species of firearms in a public place or in any place where there is any person to be endangered thereby, although no injury to any person ensues.<sup>34</sup> In order to constitute the offense, the person discharging the firearm must either be possessed of some information, or have reasonable grounds to believe, that some person is in the place where the firearm is discharged, and hence likely to be endangered thereby.<sup>35</sup> Under statutes and ordinances making it a specific offense to discharge a firearm carelessly or at random on, along, or across or within a specified distance of, a public road or highway, the courts have frequently considered and determined what is and what is not a shooting carelessly<sup>36</sup> or at random,<sup>37</sup> or along or across<sup>38</sup> or at a specified distance from<sup>39</sup> a public highway, road, or other public place, and also what constitutes a public highway, road, or public place.<sup>40</sup>

*Within limits of municipality.* The discharge of firearms or other implements on the streets or within the limits of a town or other municipal corporation is prohibited in some jurisdictions.<sup>41</sup> It is the act of shooting which prohibitory legislation of this character is designed to punish,<sup>42</sup> and consequently it is immaterial whether the shot misses or takes effect.<sup>43</sup> If the prohibition is directed against the discharge of firearms without reasonable cause, the want of reasonable cause is necessary to con-

stitute the complete offense.<sup>44</sup> The specific offense of shooting at a target within the limits of a municipal corporation consists of two elements, namely, the shooting must be at a target,<sup>45</sup> and it must be within the corporate limits.<sup>46</sup>

*Shooting at a person* has been made a specific offense by statute in some jurisdictions.<sup>47</sup> Intent to hit, injure, or kill may or may not be material in the commission of this offense, depending on the construction given to the particular statute. Since shooting at a person implies an intent to hit him, it has been held that the nature of the load in the weapon may be important in determining the intent.<sup>48</sup> Where absence of malice is, under the statute, an ingredient of the offense, a malicious shooting does not violate the statute,<sup>49</sup> but the offense has been held committed where it appeared that accused held the firearm pointed directly at a car loaded with passengers, and deliberately fired it.<sup>50</sup> Maiming is not an offense included in the specific crime of shooting with intent to kill.<sup>51</sup>

#### b. Defenses

It is a good defense, in a prosecution for shooting a firearm, to show the existence of a reasonable cause or excuse for the shooting.

It is a good defense to a prosecution for shooting a firearm to show the existence of a reasonable cause or excuse for the shooting.<sup>52</sup> The fact that the shooting was accidental,<sup>53</sup> or was done in lawful self-defense<sup>54</sup> or in the protection of life<sup>55</sup>

34. N.Y.—Gross v Goodman, 19 N.Y. S 2d 732, 173 Misc 1063

#### Peace officer

Where a peace officer while standing on federal highway at point beyond corporate limits of the village stepped upon highway and waved his arms at motorist and, after motorist failed to observe and ignored officer's signal, fired his revolver at, or in direction of, motorist's automobile was criminally liable for such discharge of a firearm upon public highway in view of fact that it did not appear that officer was in the act of arresting or pursuing a felon at time of the discharge

Ohio—State v Elder, 120 N.E.2d 508

35. Okl.—Pritchett v State, 155 P. 2d 551, 79 Okl. Cr. 401

36. Mich.—People v Dudley, 90 N.W. 1058, 131 Mich. 261  
68 C.J. p. 67 note 18

37. Ky.—Commonwealth v Bynum, 50 S.W. 843, 20 Ky. L. 1982  
68 C.J. p. 67 note 19.

38. Ala.—Scott v. State, 44 So. 544, 152 Ala. 63.  
68 C.J. p. 67 note 20.

39. Ga.—Rumph v State, 45 S.E. 1002, 119 Ga. 123  
Ferguson v. State, 58 S.E. 57, 1 Ga. App. 841

40. Ala.—Gaston v State, 23 So. 682, 117 Ala. 162  
68 C.J. p. 67 note 22

41. Ind.—Flinn v State, 24 Ind. 286  
68 C.J. p. 68 note 23

#### Shooting of dog

Man who discharged gun at dog which was fighting with his dog was guilty of violating ordinance, making discharge of firearms, within the city, unlawful  
Ohio—McCullum v City of Cincinnati, 199 N.E. 603, 51 Ohio App. 67

42. Pa.—Commonwealth v. Borden, 61 Pa. 272

43. Pa.—Commonwealth v Borden, supra  
68 C.J. p. 68 note 25.

44. Pa.—Philadelphia v Wards, 1 Phila. 517

45. Ohio—Widmer v State, 142 N.E. 145, 109 Ohio St. 236.  
68 C.J. p. 68 note 28

46. Ohio—Deal v Garaux Bros Co, 181 N.E. 920, 42 Ohio App. 191.

47. Mich.—People v McCully, 65 N.W. 234, 107 Mich. 343  
Assault with intent to kill see Homicide §§ 72-96

48. Ga.—Allen v State, 28 Ga. 395, 73 Am. D. 760  
68 C.J. p. 68 note 33

49. Mich.—People v Peterson, 131 N.W. 153, 166 Mich. 10  
68 C.J. p. 68 notes 32 [a], 35

50. Mich.—People v Kreidler, 147 N.W. 559, 180 Mich. 654

51. N.D.—State v Mattison, 100 N.W. 1091, 13 N.D. 391

52. S.C.—Town Council of Chesterfield v Ratliff, 30 S.E. 593, 52 S.C. 563, 41 L.R.A. 503  
68 C.J. p. 68 note 38

53. Ala.—Sellers v. State, 61 So. 485, 7 Ala. App. 78  
68 C.J. p. 68 note 39

54. Ala.—Sellers v. State, supra.

55. Pa.—City of Lancaster v. Baer, 5 Lanc. Bar. No. 28  
68 C.J. p. 68 note 41.

or property,<sup>56</sup> or in the enforcement of the law,<sup>57</sup> is a defense, under some statutes, unless done unnecessarily,<sup>58</sup> recklessly,<sup>59</sup> or negligently.<sup>60</sup> It is no defense, however, that accused believed the firearm to be unloaded, if he was negligent in not ascertaining its real condition,<sup>61</sup> nor is it any defense that he discharged the weapon on the premises of another with the latter's permission.<sup>62</sup>

## § 21. — Prosecution and Punishment

- a Indictment or information
- b Evidence
- c Trial, punishment, and review

### a. Indictment or Information

An indictment for discharging a firearm must adequately charge the commission of the offense

An indictment for shooting a firearm must adequately charge the commission of the offense,<sup>63</sup> and, if it is necessary to constitute the offense that the shooting be willful, wanton, or malicious, the indictment must so charge.<sup>64</sup> Under some statutes, it must also charge that the shooting was unlawful,<sup>65</sup> and must negative accused's ownership of the property fired on.<sup>66</sup> An indictment in the language of the statute may, in some circumstances, be insufficient.<sup>67</sup>

### b. Evidence

The accused is entitled to introduce evidence bearing on any defense he may have, while the prosecution must prove all material allegations by the necessary quantum of competent, relevant, and material evidence

In a prosecution for shooting of a firearm, accused is entitled on the one hand to introduce evidence bearing on any defense he may have,<sup>68</sup> while on the other hand the prosecution must prove all the material allegations and elements<sup>69</sup> by the necessary quantum<sup>70</sup> of competent, relevant, and material evidence,<sup>71</sup> and under some statutes the state's proof must negative the statutory exceptions and provisos.<sup>72</sup> Thus, in prosecutions for discharging a firearm on or across a public road or highway, evidence which does not show that it is a public road is insufficient to sustain a conviction,<sup>73</sup> but undisputed testimony that it is a public road, used by the public, is sufficient to show at least prima facie that it is a public road or highway.<sup>74</sup>

### c. Trial, Punishment, and Review

In prosecutions for shooting a firearm, questions of fact are to be determined by the jury, under appropriate instructions by the court, and if the accused is found guilty, he should be sentenced according to law.

In prosecutions for shooting a firearm, questions of fact are to be determined by the jury.<sup>75</sup> Hence,

56. SC—Town Council of Chesterfield v Ratliff, 30 SE 593, 52 SC 563, 41 LRA 503  
68 CJ p 68 note 42

57. Pa—Commonwealth v Brenizer, 37 Pa Co 615, 19 Pa Dist 165  
68 CJ p 68 note 43

58. Pa—Commonwealth v Brenizer, supra  
68 CJ p 69 note 44

59. Pa—Commonwealth v Brenizer, supra

60. Pa—Commonwealth v Brenizer, supra

61. Ala—Gaston v State, 23 So 682, 117 Ala 162

62. Ga—Rumph v State, 45 SE 1002, 119 Ga 123

63. Tex—Allen v State, 32 SW 2d 854, 116 Tex Cr 15  
68 CJ p 69 note 51

**Complaint held not demurrable**  
Ala—Payne v City of Birmingham, 10 So 2d 36, 30 Ala App 559

**No fatal variance between indictment and proof**

Ala—Bullion v State, 47 So 2d 431, 35 Ala App 396

Ga—Joiner v State, 180 SE 911, first case, 51 Ga App 463

64. Ga—Ferguson v State, 58 SE 57, 1 Ga App 841  
68 CJ p 69 note 52

65. Ala—Brewer v State, 74 So 764, 15 Ala App 681—Sellers v State, 61 So 485, 7 Ala App 78

66. Ala—Brewer v State, 74 So 764, 15 Ala App 781

67. Ala—Sellers v State, 61 So 485, 7 Ala App 78  
68 CJ p 69 note 56

68. Ala—Gaston v State, 23 So 682, 117 Ala 162  
La—State v Nugent, 40 So 581, 116 La 99

69. Ga—Ferguson v State, 58 SE 57, 1 Ga App 841

**70. Evidence held sufficient**

(1) In general  
Ala—Lockhart v State, 39 So 2d 40, 34 Ala App 297—Payne v City of Birmingham, 10 So 2d 36, 30 Ala App 559

Ga—Joiner v State, 180 SE 911, first case, 51 Ga App 463  
Ky—Galloway v Commonwealth, 191 SW 2d 821, 301 Ky 299

Tenn—Shields v. State, 270 SW 2d 367

68 CJ p 69 note 60 [a].

(2) To prove "corpus delicti"  
Mo—State v Burney, 143 SW 2d 273, 346 Mo 859

**Evidence held insufficient**

Okl—Pritchett v State, 155 P 2d 551, 79 Okl Cr 401

68 CJ p 69 note 60 [b]

71. Fla—Sutton v State, 59 So 893, 64 Fla 120  
68 CJ p 69 note 61

72. Ga—Ferguson v State, 58 SE 57, 1 Ga App 841

73. Ala—Johnson v State, 17 So 99, 105 Ala 113

74. Ga—Chapman v State, 68 SE 271, 7 Ga App 820—Cleveland v State, 60 SE 801, 4 Ga App 62

75. Ala—Payne v. City of Birmingham, 10 So 2d 36, 30 Ala App 559  
Mo—State v Burney, 143 SW 2d 273, 346 Mo 859

**Evidence insufficient to take case to jury**

Evidence was insufficient to take to jury question of defendants' guilt of shooting at or into dwelling house, in view of physical facts totally disproving that gun shot by defendants outside such house was aimed at, or that load passed through window thereof

Ky—Deaton v Commonwealth, 196 SW 2d 742, 303 Ky 5.

whether there is a reasonable excuse for the shooting is a question of fact for the jury to determine under all the circumstances of each case<sup>76</sup> and under such appropriate instructions<sup>77</sup> as the evidence may warrant<sup>78</sup>. If accused is convicted or pleads guilty, he should thereupon be sentenced according to law,<sup>79</sup> but if the sentence is erroneous or if the punishment, whether consisting of a fine or imprisonment, or both, is excessive,<sup>80</sup> the judgment may be reversed or the punishment modified by an appellate court<sup>81</sup>. Where a person has been convicted for shooting a firearm in violation of an ordinance of a municipality which has been empowered by the legislature to forbid the discharge of firearms, and the record on review does not contain the ordinance in question, the court will presume that the municipality acted within its delegated power<sup>82</sup>.

## § 22. Sale, Gift, or Loan of Weapons

It is an offense under some statutes to sell, lend, or give firearms or other weapons to any unauthorized person

It is an offense in a number of jurisdictions to

sell, lend, or give firearms or other weapons to any unauthorized person, some statutes making it unlawful to engage in the business of a dealer in such weapons without a license<sup>83</sup>. Except where its sale, gift, or loan is specifically prohibited, a toy weapon is ordinarily not within the purview of the statute<sup>84</sup>. The term "minor" to whom weapons cannot be sold, given or lent, has a well defined signification<sup>85</sup>. Where the statute prohibits a sale of a weapon to any person without legal authority to carry it, whether the weapon was bought for the purpose of carrying it lawfully is a question to be determined on the facts of the particular case<sup>86</sup>. A single isolated transaction may constitute a violation of the statute<sup>87</sup>. The words "police authorities," as used in a statute providing that every person becoming the lawful possessor of a firearm capable of being concealed on the person, who shall sell, give, or transfer the firearm to any other person without first notifying the police authorities shall be guilty of a misdemeanor, mean the police officials in authority at police headquarters in the municipality where the transaction takes place<sup>88</sup>.

76 S C—Town Council of Chesterfield v Ratliff, 30 SE 593, 52 SC 563, 41 L R A 503

77 Ky—Deaton v. Com, 196 SW 2d 742, 303 Ky 5  
68 CJ p 70 note 69

### Instructions held proper

In prosecution of constable who was charged with firing a pistol shot into an automobile, instruction that an officer can arrest without a warrant when he has reasonable cause to believe the person arrested has committed, is committing, or is about to commit a felony was not erroneous when constable's defense was that automobile owner was about to commit a felony

Tenn—Shields v. State, 270 SW 2d 367

78 Ky—Johnson v Com, 221 SW 2d 440, 310 Ky 621.  
68 CJ p 70 note 70

### Instruction not required

Where defendant testified that gun fired accidentally and at no place did he claim that he was shooting at something else other than house of prosecuting witness, defendant was not entitled to an instruction on statute making it a misdemeanor for flourishing or use in a boisterous manner of a deadly weapon

Ky—Grigsby v Com, 184 SW 2d 77, 299 Ky 32

79 Ala—Payne v City of Birmingham, 10 So 2d 36, 30 Ala App 559.  
68 CJ p 70 note 71.

80. Okl—Turner v State, 242 P 1053, 33 Okl Cr 97  
68 CJ p 70 note 72

81. Fla—Taylor v State, 64 So 454, 67 Fla 127

82. Kan—City of Cottonwood Falls v Smith, 13 P 576, 36 Kan 401

83. Ala—Morningstar v State, 33 So 485, 135 Ala 66

### Accusation held sufficient

Information charging violation of statute prohibiting sale of billies and stating type of instrument unlawfully sold in language sufficient to enable person of common understanding to know what was intended was sufficient, though not charging sale of instrument "commonly known" as billy

Cal—People v Makovsky, 44 P 2d 536, 3 Cal 2d 366

### Proof

(1) In prosecution for sale of firearms in violation of ordinance prohibiting licensed retail dealer in firearms who is pawnbroker or secondhand dealer from selling firearms other than shotguns and hunting rifles, prosecution must prove that defendant was licensed retail dealer in firearms and that he was pawnbroker or secondhand dealer and that he sold a small firearm

Ohio—City of Cincinnati v Levine, 75 NE 2d 177, 81 Ohio App 181

(2) Evidence held sufficient to support conviction

Cal—People v Makovsky, 44 P 2d 536, 3 Cal 2d 366

(3) Evidence held insufficient to sustain conviction

Ohio—City of Cincinnati v Levine, 75 NE 2d 177, 81 Ohio App 181

84 Okl—Wiles v Peerson, 52 P. 2d 814, 175 Okl 328  
68 CJ p 70 note 77

An "air pistol" is not a "firearm," or a "missile" or a "projectile," within police regulation prohibiting the sale to children of such devices  
DC—Tendler v District of Columbia, Mun App, 50 A 2d 263

85. Tenn—State v Callicutt, 1 Lea 714

68 CJ p 70 note 78

### Prohibited weapons

A police regulation prohibiting the sale of firearms to children may not be construed beyond its plain meaning though other provisions of the regulation may reveal an intent to include in the prohibition weapons not covered by the words used  
DC—Tendler v District of Columbia, Mun App, 50 A 2d 263

86. Puerto Rico—People v Vélez-Ruiz, 37 Puerto Rico 863

87 Ala—Morningstar v State, 33 So 485, 135 Ala 66  
68 CJ p 70 note 80

88. NJ—State v Russo, 71 A 2d 142, 6 N J Super 250



§ 23. Other Offenses

Particular acts involving weapons may give rise also to certain other offenses, such as employing armed men, and drilling or parading with arms

Particular acts involving weapons may give rise also to certain other offenses<sup>89</sup> As used in a statute making it unlawful to organize, maintain, and employ an armed body of men, the word "employ" is not used in its restricted sense to import the act of hiring or the existence of the relation of master and servant, but is to be understood more broadly as meaning to make use of an armed body of men as an instrument or agency to accomplish some specific purpose<sup>90</sup> In order to constitute the offense, all the members of the group need not be armed, it being sufficient if any considerable number of them are armed, and are being aided

and abetted in their unlawful purpose by the others.<sup>91</sup> If the evidence is in conflict, it is for the jury to determine the facts with respect to the alleged employment of the men by accused,<sup>92</sup> their condition of being armed or unarmed,<sup>93</sup> and the nature of their mission<sup>94</sup>

*Drilling or parading with arms* In statutes making it a criminal offense to drill or parade with firearms, the firearms contemplated by the statutes include disabled firearms, which cannot be used to discharge a missile by means of gunpowder or any other explosive, where the disability is not apparent to the ordinary observer<sup>95</sup> Whether or not the weapon in controversy is a firearm within the intent of the statutes is a question for the court.<sup>96</sup>

III. PENALTIES AND FORFEITURES

§ 24. In General

The forfeiture of weapons involved in offenses discussed in this title is considered *infra* § 25.

Examine Pocket Parts for later cases.

§ 25. Confiscation of Weapon Involved in Offense

Forfeiture of weapons involved in offenses denounced by statute may be accomplished only by compliance with statutory requirements

Although sometimes held unconstitutional,<sup>97</sup> legislation defining the offenses discussed in this title sometimes provides for the forfeiture or confiscation of the weapons involved, and it may be the legislature's intention that the mere commission of the offense shall work a forfeiture, and that a judicial proceeding establishing a violation of the law or resulting in a conviction therefor shall not be required as a condition precedent<sup>98</sup> Authority for the forfeiture or confiscation of a weapon, however, must be derived from the general law of the state;<sup>99</sup> the officials of a municipal corporation, for

example, cannot lawfully provide for the forfeiture of a weapon carried in violation of a municipal ordinance, where neither the legislature nor the constitution of the state has empowered them to affix the penalty of a forfeiture,<sup>1</sup> and similarly it is held that where an ordinance is entirely silent as to the confiscation of a weapon, a court is in error in ordering its confiscation<sup>2</sup>

Although the court has erred, a defendant feeling aggrieved by the refusal to return a weapon may proceed according to the forms of law, and take the necessary steps to have the refusal to return the weapon reviewed in the proper court<sup>3</sup> Mandamus has been held to be a proper remedy to compel the return of a weapon, where there is no question as to its ownership.<sup>4</sup> Whether or not a statute would be constitutional as against the innocent owner of a weapon if it authorized the forfeiture of the weapon found in the possession of a thief or other person who had taken it without the owner's knowledge or consent has been raised but was not decided except inferentially.<sup>5</sup> In any event, statutes authorizing the confiscation of

89. Wash—State v Gohl, 90 P 259, 46 Wash 408

90. Wash—State v. Gohl, *supra* 68 C J p 70 note 84

91. Wash—State v Gohl, *supra*

92. Wash.—State v Gohl, *supra*

93. Wash—State v Gohl, *supra*

94. Wash—State v Gohl, *supra*

95. Mass—Commonwealth v Murphy, 44 NE 138, 166 Mass 171, 32 L R A 606

68 C J p 70 note 90

96. Mass—Commonwealth v. Murphy, *supra*.

97. Tex—Jennings v. State, 5 Tex App 298

68 C J p 71 note 94

98. Colo—McConathy v Deck, 83 P 135, 34 Colo 461, 4 L R A, N S, 358, 7 Ann Cas 896

99. Puerto Rico—Pacheco v. Municipal Judge of San Juan, 32 Puerto Rico 822

S C—City Council of Abbeville v. Leopard, 39 SE 248, 61 SC 99

1. S C—City Council of Abbeville v Leopard, *supra*

2. Ill—City of Chicago v. Holmes, 226 Ill App 407

3. N Y—People v. Carfano, 202 N. Y S 223, 207 App Div 866, appeal dismissed 144 NE 886, 238 N Y 549.

4. Puerto Rico—Pacheco v Municipal Judge of San Juan, 32 Puerto Rico 822  
68 C J p 71 note 4.

5. Mass—Boston Five Cents Sav. Bank v Searles, 130 NE 91, 237 Mass 489  
68 C J. p 71 note 5.

weapons or the labeling of forfeited property cannot be successfully invoked to justify the withholding of a weapon from the owner in the absence of a compliance with the statutory requirements.<sup>6</sup>

#### IV. CIVIL LIABILITY FOR NEGLIGENT OR ILLEGAL USE, SALE, GIFT, LOAN, OR MANUFACTURE

##### § 26. In General

The rules governing actions for injuries inflicted by negligence ordinarily govern in actions for injuries caused by the discharge of firearms.

It has been broadly stated that the rules of law governing civil actions for injuries caused by the discharge of firearms are not different from the rules governing actions for any injuries claimed to have been inflicted by negligence.<sup>7</sup>

##### § 27. Use

Liabilities for injuries resulting from use of weapons are considered *infra* § 28.

Examine Pocket Parts for later cases

##### § 28. — Liabilities

- a Negligent use
- b Illegal use

###### a. Negligent Use

Reasonable or ordinary care, commensurate with the danger, is required in the handling or use of firearms, and a person who negligently handles or uses a weapon is liable in damages for injuries to person or property proximately caused by his negligence.

With respect to the carrying or handling of firearms, the law requires reasonable<sup>8</sup> or ordinary<sup>9</sup> care, or a degree of care commensurate with the danger<sup>10</sup>. Firearms, however, are dangerous instrumentalities,<sup>11</sup> and since their possession or use is attended by extraordinary dangers,<sup>12</sup> a person having firearms in the vicinity of others is bound to exercise extraordinary care,<sup>13</sup> sometimes described as the utmost care,<sup>14</sup> or a very<sup>15</sup> high de-

6. N.Y.—Hollander v City of New York, 131 N.Y.S.2d 519, 283 App Div 1035  
68 C.J. p 71 note 6

###### Hearing

Where police seized antique dealer's stock of flintlock and percussion guns, on ground that they had not been properly recorded, without having held hearing on issue of whether the danger from these guns justified requiring them to be treated as modern pistols, dealer was entitled to return of his guns

N.Y.—Hollander v City of New York, *supra*

7. W.Va.—Koontz v Whitney, 153 SE 797, 109 W.Va. 114

8. N.H.—Webster v Seavey, 138 A 541, 83 N.H. 60, 53 A.L.R. 1202  
68 C.J. p 71 note 10

###### Strict accountability

The rule of strict accountability for the exercise of due care must be enjoined on those who handle loaded firearms

Ohio—Huber v. Collins, App., 50 N.E.2d 906.

9. Ohio—Huber v. Collins, *supra*  
68 C.J. p 71 note 11

10. Mass.—Bennett v Marquis, 90 N.E.2d 551, 325 Mass 375—Adams v Dunton, 187 N.E. 90, 284 Mass 63

Wis.—Wilfert v. Nielsen, 27 N.W.2d 893, 250 Wis 646.

68 C.J. p 71 note 12.

Care of reasonably prudent man under circumstances is required.

Mass.—Adams v Dunton, 187 N.E. 90, 284 Mass 63

Mo.—McLaughlin v Marlatt, 228 S.W. 873, judgment affirmed 246 S.W. 548, 296 Mo 656

N.Y.—Blanchard v Noteware, 32 N.Y.S.2d 188, 263 App Div 186

11. U.S.—Corpus Juris quoted in Folk v U.S., D.C.S.C., 102 F Supp 736, 740, reversed on other grounds, C.A., U.S. v Folk, 199 F.2d 889

Fla.—Corpus Juris cited in Skinner v Ochiltree, 5 So.2d 605, 606, 148 Fla 705, 140 A.L.R. 410

La.—Normand v Normand, App., 65 So.2d 614

Okl.—Corpus Juris cited in Hart v Lewis, 103 P.2d 65, 67, 187 Okl 394

68 C.J. p 72 note 13

A loaded gun is a "dangerous agency"

Ohio—Huber v Collins, App., 50 N.E.2d 906

12. U.S.—Corpus Juris quoted in Folk v U.S., D.C.S.C., 102 F Supp 736, 740, reversed on other grounds, C.A., U.S. v Folk, 199 F.2d 889  
68 C.J. p 72 note 14

13. U.S.—Corpus Juris quoted in Folk v U.S., D.C.S.C., 102 F Supp 736, 740, reversed on other grounds, C.A., U.S. v Folk, 199 F.2d 889

La.—Normand v Normand, App., 65 So.2d 614

68 C.J. p 72 note 15

###### Slight deviation as negligence

The standard of care required of reasonable person when dealing with such dangerous articles as fire, fire-

arms, explosives or highly inflammable matters, and corrosive or otherwise dangerous or noxious fluids, is so great that slight deviation therefrom will constitute negligence.

Cal.—Warner v Santa Catalina Island Co., 282 P.2d 12, 44 Cal.2d 310

###### More than ordinary care

Firearms are inherently dangerous and something more than ordinary care is required in their handling, possession and storage

N.Y.—Yusko v Remizon, 106 N.Y.S.2d 285, 199 Misc 1116, reversed on other grounds 116 N.Y.S.2d 922, 280 App Div 637

###### Shooting at targets

It is not necessarily unlawful to shoot at targets, but such act is dangerous and should be done with extraordinary care

Ohio—Kuhn v Bader, 101 N.E.2d 322, 89 Ohio App 203

14. U.S.—Corpus Juris quoted in Folk v U.S., D.C.S.C., 102 F Supp 736, 740, reversed on other grounds, C.A., U.S. v Folk, 199 F.2d 889  
68 C.J. p 72 note 16

###### Other statements

(1) Extreme caution

Ohio—Huber v Collins, App., 50 N.E.2d 906

(2) Utmost caution

U.S.—Bridges v Dahl, C.C.A. Mich., 108 F.2d 228

68 C.J. p 72 note 16 [a] (2).

(3) Additional statements see 68 C.J. p 72 note 16 [a] (1)

15. U.S.—Corpus Juris quoted in

gree,<sup>16</sup> or the highest degree,<sup>17</sup> of care. If another is injured in his person or property as a result of the discharge of firearms, even though the discharge is accidental or unintentional,<sup>18</sup> provided it is not unavoidable,<sup>19</sup> the person whose negligence<sup>20</sup> is the proximate cause<sup>21</sup> of the injury is liable in an action for damages<sup>22</sup>

One who has the custody of dangerous weapons owes a duty to others not to leave them where they may be found and used by persons of imma-

Folk v U S, DCSC, 102 F Supp 736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889

NY—Gross v Goodman, 19 NYS 2d 732, 173 Misc 1063

Pa—Snyder v Walters, 19 Pa Dist & Co 550, 25 Berks Co 253  
68 CJ p 72 note 17

**Ordinary care**, required of one firing gun in his store to show others how loud it would shoot, was very high degree of care  
Mo—White v Bunn, 145 SW 2d 138, 346 Mo 1112

**16 US—Corpus Juris quoted in**  
Folk v U S, DCSC, 102 F Supp 736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889

68 CJ p 72 note 18

**17. DC—Crump v Browning**, Mun App, 110 A 2d 695

**Fla—Corpus Juris cited in** Skinner v Ochiltree, 5 So 2d 605, 606, 148 Fla 705, 140 ALR 410

NC—Luttrell v Carolina Mineral Co, 18 SE 2d 412, 220 NC 782

Neb—Naegle v Dollen, 63 NW 2d 165, 158 Neb 373

68 CJ p 72 note 72 [a]

#### Police officer

The text rule being true generally, it is even more true of a police officer whose training and experience more intimately acquaint him with the nature and mechanism of firearms

DC—Crump v Browning, Mun App, 110 A 2d 695

**18 US—Corpus Juris quoted in**  
Folk v U S, DCSC, 102 F Supp 736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889

**Fla—Corpus Juris cited in** Skinner v Ochiltree, 5 So 2d 605, 606, 148 Fla 705, 140 ALR 410

Pa—Snyder v Walters, 19 Pa Dist & Co 550, 25 Berks Co 253

68 CJ p 72 note 19

**The test of liability** is not whether the injury was accidentally inflicted, but whether the defendant was free from blame

Mo—White v Bunn, 145 SW 2d 138, 346 Mo 1112

68 CJ p 72 note 19 [a].

**19 US—Corpus Juris quoted in**  
Folk v U S, DCSC, 102 F Supp 736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889

68 CJ p 72 note 20

**20 US—Corpus Juris quoted in**  
Folk v U S, DCSC, 102 F Supp

736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889  
68 CJ p 72 note 21

#### Facts held not to show negligence

In action to recover for gunshot wounds where defendant did not see plaintiff and was about to shoot at a flying bird, his failure to announce his presence to plaintiff was not negligence

NY—Blanchard v Noteware, 32 NYS 2d 188, 263 App Div 186

#### Firing at object not clearly identifiable

Hunter who fires at object before he makes certain that it is game and not a human being is negligent  
La—Fowler v Monteleone, App, 153 So 490  
68 CJ p 73 note 23 [a] (4)

**21. US—Corpus Juris quoted in**  
Folk v U S, DCSC, 102 F Supp 736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889  
68 CJ p 73 note 22

#### Intervening act of another

(1) Where owner of pistol, having left one cartridge in gun when he purported to unload it before handing it to customer for inspection, left gun with customer knowing that he was snapping it and as a result of such action by customer, owner's employee was accidentally shot, the intervening action of customer was not the sole proximate cause of injury and did not relieve owner of pistol from liability for such injury

Tenn—Levitan v Banniza, 236 SW 2d 90, 34 Tenn App 176

(2) Where the exposing of a loaded air rifle on a counter in defendant's store was the proximate cause of plaintiff's injury, it was held that the intervening act of plaintiff's companion in pulling the trigger while examining the rifle could not relieve defendant from liability  
NY—Gerbino v Greenhut-Siegel-Cooper Co, 152 NYS 502, 165 App Div 763, motion denied 109 NE 1075, 215 NY 645

**22. US—Corpus Juris quoted in**  
Folk v U S, DCSC, 102 F Supp 736, 740, reversed on other grounds, CA, U S v Folk, 199 F2d 889  
68 CJ p 73 note 23

Liability for wrongful death generally see Death §§ 21–26

**Shooting at targets** where there are objects from which balls may glance and endanger others is wanton and reckless, and person doing such shooting will be chargeable

civily for injury resulting to another's person

Ohio—Kuhn v Bader, 101 NE 2d 322, 89 Ohio App 203

#### No intent to hit human being

(1) If defendant without intending to hit a human being recklessly or wantonly shot where defendant had good reason to believe there were human beings, defendant was liable for injury caused to one who was struck by the bullet from defendant's gun

NY—Gross v Goodman, 19 NYS 2d 732, 173 Misc 1063

(2) Where person in charge of tavern ordered patron to leave knowing he had been boisterous on previous occasions and made no effort to obtain assistance and did not call enforcement officer, but fired pistol at floor while three to four feet from patron in effort to frighten him, person in charge was guilty of negligence

Wis—Oshogay v Schultz, 43 NW 2d 485, 257 Wis 323

#### Lawful act

Ordinarily, person accidentally wounding innocent bystander in lawful attempt to prevent commission of crime, or to apprehend felon, or when acting in self-defense, is not liable for injury to bystander, if guilty of no negligence

Okla—Cook v Hunt, 63 P 2d 693, 178 Okla 477

68 CJ p 72 note 21 [f].

#### Injury to trespasser

When one rightfully in possession of land shoots and injures a trespasser, he is not liable if he is guilty merely of ordinary negligence  
Mass—Haskins v Grybko, 17 NE 2d 146, 301 Mass. 322

#### In Louisiana

(1) It has been held that recovery of damages as result of accidental shooting by person engaged in a hunting expedition is not dependent on allegations and proof of gross negligence

La—Normand v Normand, App, 65 So 2d 914

(2) An earlier case apparently held that liability exists only where the negligence is gross

La—Siefker v Paysee, 40 So 366, 115 La 953, 4 LRA, NS, 119

(3) It has been said that this decision should not be so interpreted  
La—Normand v Normand, App, 65 So 2d 914

68 CJ p 73 note 23 [c]

ture years or judgment<sup>23</sup> These rules commonly impose liability on a person whose negligence allows another person under his authority or control to inflict injury with a weapon,<sup>24</sup> including a parent who negligently permits his minor child to have firearms or leaves them where the child may get possession of them, as discussed in Parent and Child §§ 66-69

**Liability of United States.** The United States may be liable under the Federal Tort Claims Act for injuries resulting from the negligent use or handling of weapons by a federal officer,<sup>25</sup> or a member of the armed services acting as a guard,<sup>26</sup> if a private employer would be liable therefor under the law of the place where the injury occurred<sup>27</sup>

**Injuries resulting from fright.** It has been held that damages are recoverable for physical injuries<sup>28</sup> such as illness<sup>29</sup> or a miscarriage<sup>30</sup> directly caused by fright proximately resulting from the negligent discharge of a firearm, at least where the discharge was intentional,<sup>31</sup> and particularly where it was wanton or reckless, and constitutes a willful tort, evidencing an apparent disregard of human safety<sup>32</sup> In accordance with the general rule discussed in Negligence § 114, that a negligent

act which frightens an animal is the proximate cause of injuries caused by the animal, where plaintiff himself was not frightened, but was injured by an animal frightened by the negligent firing or handling of a weapon by the defendant, it has been held that the negligent act is the proximate cause of the injury, and that defendant is therefore liable<sup>33</sup>

**Joint and several liability.** Where several persons, while engaged in a joint enterprise or acting in concert, participate in the negligent or wrongful use of weapons, resulting in injury to another, all are jointly and severally liable,<sup>34</sup> although it is impossible to determine who inflicted the particular injury<sup>35</sup> It has been held, however, that where two hunters fire their weapons negligently, they are both liable only if the injured person is struck by some shot from each of the two guns<sup>36</sup>

### b. Illegal Use

A person whose illegal use of a weapon causes injury to another is liable therefor regardless of negligence

If a person is violating the law by carrying, pointing, or shooting a weapon, he is civilly liable for any injury, even an accidental injury, inflicted by him with such weapon, the question of negli-

23. Okl.—Hart v Lewis, 103 P 2d 65, 187 Okl 394

Pa.—Mendola v Sambol, 71 A 2d 827, 166 Pa Super 351.

68 C J p 74 note 24

#### Proprietor of store

Proprietor of business, who gave shotgun to customer and permitted and encouraged him to place loaded shells in magazine of gun and to pump the mechanism thereof to eject the shells, should have anticipated the possibility that in manipulation of the gun in his place of business it might be discharged and injure other customers

Neb.—Naegle v Dollen, 63 NW 2d 165, 158 Neb 373

#### Children

Degree of care is more exacting with respect to duty to prevent injury to young children

US—Bridges v. Dahl, CCA Mich., 108 F 2d 228

24. NY—Castle v Duryea, 1 Abb Dec 327, 2 Keyes 169, 30 How Fr 591 note

68 C J p 74 note 26

Liability of master for shooting by servant see Master and Servant § 575

Liability of owner of amusement place or devices for negligence of concessioner or lessee see Theaters and Shows § 46

25. US—U S v. Folk, C.A.S.C., 199 F 2d 889.

#### Officer held not negligent

Federal officer who was pursuing through woods a man who fled from site of illicit distillery when officer approached was not negligent in carrying pistol in hand, cocked and with safety off, nor, when he fell and accidentally discharged pistol, was he negligent in failing to search for more than five or ten minutes for man pursued who was later found to have been struck by shot and to have died from loss of blood

US—U S v Folk, supra

26. US—Tastor v U S, DCCal, 124 F Supp 548

#### Guard's action held proximate cause of injury

US—Cerrri v U S, DCCal, 80 F Supp 831

#### Negligence held not shown

US—U S v. Jasper, C.A.Va., 222 F 2d 632

27. US—Duff v U S, C.A.Md., 171 F 2d 846

#### Trespasser or licensee

Under Maryland law, the United States was not liable for the accidental shooting of one who was either a trespasser or a licensee on its premises where the conduct of the guard was not wanton, willful, or reckless

US—Duff v U S, supra

28. Ala.—Alabama Fuel & Iron Co v. Baladoni, 73 So 205, 15 Ala 316

NY—Beck v Libraro, 221 NYS 737, 220 App Div 547

29. NY—Beck v Libraro, supra.

30. Ala.—Alabama Fuel & Iron Co v Baladoni, 73 So 205, 15 Ala. 316

31. Ala.—Alabama Fuel & Iron Co v Baladoni, supra

NY—Beck v Libraro, 221 NYS 737, 220 App Div 547

32. NY—Beck v Libraro, supra

33. Mass—Cole v Fisher, 11 Mass 137

34. Vt—Giguere v Rosselot, 3 A 2d 538, 110 Vt 173

68 C J p 74 note 37

#### Right of control

The doctrine of joint enterprise discussed generally in Negligence § 158 which requires each person to have an equal right to control the other in order that the negligence of one may be imputed to the other is applicable only to contributory negligence and does not prevent the joint liability of two persons, engaged in shooting, for injury to a third person

Vt—Giguere v Rosselot, supra

35. Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 A L R 2d 91

Ohio—Kuhn v Bader, 101 NE 2d 322, 89 Ohio App 203.

68 C J p 74 note 38

36. Mo—Schoening v Claus, 249 SW 2d 361, 363 Mo 119.

gence being immaterial<sup>37</sup> The act being unlawful, the fact that the plaintiff consented to the defendant's being armed, and to the defendant's use of the weapon, is no bar to the action,<sup>38</sup> the only effect of consent being to confine the recovery to compensatory damages.<sup>39</sup> The fact that defendant's motive in discharging the weapon is laudable is immaterial where his act is illegal.<sup>40</sup> A penal statute authorizing an action for damages for injury or death of a person injured by the discharge of a firearm intentionally pointed without malice does not apply where the injury resulted from willful acts, since such acts imply malice<sup>41</sup>

## § 29. — Procedure

- a. In general
- b. Defenses
- c. Pleading
- d. Evidence
- e. Trial
- f. Damages

### a. In General

Authorities differ as to whether trespass or case is the proper form of action to recover damages for injuries caused by a weapon. Persons liable for an injury resulting from the use of weapons may be joined as parties defendant.

Rules of law governing actions for injuries caused by the discharge of firearms generally are not different from the rules governing other actions for injuries claimed to have been inflicted by the negligence of defendant.<sup>42</sup> Where the injury caused by a weapon, although immediate, is inflicted negligently, some authorities hold that notwithstanding the negligent nature of the act, tres-

pass rather than case is the proper remedy,<sup>43</sup> except under certain circumstances,<sup>44</sup> but other authorities hold that either trespass or case is maintainable at the plaintiff's election<sup>45</sup> It has been provided by statutes in some jurisdictions that whenever trespass lies, an action on the case will also lie<sup>46</sup> Even under a code of procedure abolishing the distinctions between the different common-law forms of action, a distinction has been made between an action for an unintentional but negligent injury inflicted with a firearm, and an action for assault and battery resulting from an intentional shooting<sup>47</sup>

*Parthes.* Two persons who engaged in shooting may be joined as defendants regardless of whether each had an equal right to control the conduct of the other<sup>48</sup> The parent of a child who fired the shot causing injury may be joined as defendant in an action against the child.<sup>49</sup>

### b. Defenses

Ordinarily, defenses available in other cases of negligence are available in actions for injuries from firearms

Defenses available in actions for negligence generally, as considered in Negligence § 181, are in general good defenses in an action for damages for negligently injuring another with a weapon<sup>50</sup> Thus, valid defenses which may be available to defendant are that he was free from blame,<sup>51</sup> that his negligence was not the proximate cause of the injury, as considered supra § 28, or that the proximate cause of the injury was an act of God or the like.<sup>52</sup> It may also be a defense that plaintiff's negligence caused or contributed to the injury<sup>53</sup> unless plaintiff is able successfully to in-

37. Wis—Horton v Wylie, 92 NW 245, 115 Wis 505, 95 AmSR 953 68 CJ p 75 note 44

#### Negligence per se

Violation of an ordinance prohibiting discharge of firearms within limits of town is negligence per se Del—Farrow v. Hoffecker, 79 A 920, 23 Del 223

38. Wis—Horton v. Wylie, 92 NW 245, 115 Wis 505, 95 AmSR 953 —Evans v. Waite, 53 NW 445, 83 Wis 286

39. Wis—Evans, v. Waite, supra

40. NY—Gross v. Goodman, 19 N YS2d 732, 173 Misc 1063

#### Firing to frighten suspected thieves

Where truck driver, who had permit to carry pistol and had been warned to be on guard for suspected truck thieves, fired pistol to frighten some suspected thieves and bullet struck an innocent pedestrian, the driver was liable for pedes-

trian's injuries, notwithstanding driver was actuated by motives of fealty to his employer and acted on the most plausible motives

NY—Gross v Goodman, supra  
41. Vt—Giguere v Rosselot, 3 A 2d 538, 110 Vt 173

42. Cal—Jensen v Minard, 282 P 2d 7, 44 Cal 2d 325

43. Vt—Judd v. Ballard, 30 A. 96, 66 Vt 668  
68 CJ p 75 note 52

44. Mass—Cole v Fisher, 11 Mass 137  
68 CJ p 75 note 53

45. RI—Hawksley v. Peace, 96 A 856, 38 RI 544, LRA 1916D 1179  
68 CJ p 75 note 54

46. Va—Daingerfield v Thompson, 33 Gratt 136, 74 Va 136, 36 AmR 783

47. Mo—McLaughlin v Marlatt, 246 SW 548, 296 Mo 656.

48. Vt—Giguere v Rosselot, 3 A 2d 538, 110 Vt 173

49. Vt—Giguere v Rosselot, supra

50. Mo—White v Bunn, 145 SW 2d 138, 346 Mo 1112

#### Assumption of risk

Members of a hunting party do not necessarily assume risk of their companions' negligence

Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 A LR 2d 91

51. Okl—Annear v Swartz, 148 P 706, 46 Okl 98, LRA 1915E 267  
68 CJ p 75 note 61.

52. RI—Hawksley v Peace, 96 A 856, 38 RI 544, LRA 1916D 1179  
68 CJ. p 75 note 65.

53. US—Tastor v. U S, DCCal, 124 FSupp 548

Mo—White v. Bunn, 145 SW 2d 138, 346 Mo 1112

NY—Blanchard v. Noteware, 32 N. YS 2d 188, 263 AppDiv. 186  
68 CJ p 75 note 63.

voke the doctrine of last clear chance<sup>54</sup> The fact that two hunters were engaged in a joint enterprise in going to the place where one accidentally shot the other and that they intended to resume the relationship on returning did not show the existence of such a relationship when the accident occurred so as to impute to plaintiff the negligence of defendant<sup>55</sup> In an action for damages for negligent shooting, self-defense, defense of property, and provocation are not good defenses<sup>56</sup>

### c. Pleading

The complaint in an action for injuries caused by weapons must state a cause of action.

In an action to recover for injuries resulting from the improper handling or use of weapons, plaintiff must not only state a cause of action,<sup>57</sup> but his

declaration, petition, or complaint must show the nature thereof,<sup>58</sup> and must contain, under the codes, a plain and concise statement of the facts constituting the cause of action.<sup>59</sup> Plaintiff can recover only on the cause of action pleaded<sup>60</sup> The plea or answer must be sufficient<sup>61</sup> An answer inferentially admitting that the gun was pointed toward the plaintiff and pleading that the gun was accidentally discharged raises the issues whether the discharge was accidental or negligent,<sup>62</sup> and whether, if the gun was negligently handled, the negligence proximately caused the injury.<sup>63</sup>

### d. Evidence

The discharge of a firearm, resulting in an accidental or unintentional injury to the person or property of another, may constitute presumptive evidence of negligence, but the plaintiff has the burden of proving the cause of action alleged.

#### Duty of care

(1) Plaintiff hunting with defendant had burden to use care commensurate with the danger to avoid getting into dangerous position  
Wis—Wilfert v. Nielsen, 27 NW 2d 893, 250 Wis 646

(2) Decedent, by handing loaded rifle to defendant in front seat of automobile, did not relieve himself of duty of advising other occupants of automobile that rifle was loaded and did not thereby escape responsibility for exercising care for his own safety  
Ala—Nelson v Lee, 32 So 2d 22, 249 Ala 549

#### Facts held to show contributory negligence

(1) In general  
US—Lewis v U S, CANJ, 194 F2d 689

(2) In an action to recover for gunshot wounds, where plaintiff, hunting on a canal bank, saw defendant hunting in the bed of the canal, saw a pheasant on the ground before it took flight, and did not warn defendant of his presence, plaintiff did not exercise reasonable care  
NY—Blanchard v Noteware, 32 NY 2d 188, 263 AppDiv 186

#### Facts held not to show contributory negligence

(1) In general  
US—Tastor v U S, DCCal, 124 FSupp 548  
68 CJ p 75 note 63 [a].

(2) Where captain of hunting party had sounded horn to signal hunt was over, and several members of party left their stands in barricade, hunter was not negligent in going short distance from stand into barricaded area to pick mushrooms where he was shot by another hunter, and even if hunter was negli-

gent his negligence was not contributing cause to injury sustained when shot by another hunter who did not ascertain whether object he shot at was deer or human being  
La—Fowler v. Monteleone, App, 153 So 490

(3) Boy who was injured when gun of his hunting companion was allegedly negligently discharged at time companion was in rear as the two were approaching game in single file was not guilty of contributory negligence precluding recovery on ground that boy had deliberately placed himself in position of danger in front of companion bearing loaded gun  
La—Normand v Normand, App, 65 So 2d 914

54. Fla—Skinner v Ochiltree, 5 So 2d 605, 148 Fla. 705, 140 ALR 410

68 CJ p 75 note 64

55. Mass—Adams v Dunton, 187 NE 90, 284 Mass 63

56. Wis—Oshogay v Schultz, 43 N W 2d 485, 257 Wis 323

57. NY—Beck v Libraro, 221 NY S 737, 220 AppDiv 547

#### Declaration, petition, or complaint held sufficient

(1) In general  
Neb—Naegle v Dollen, 63 N.W 2d 165, 158 Neb 373  
68 CJ p 75 note 68 [a]

(2) Petition alleging that defendant when standing less than ten feet from plaintiff and while the muzzle of a loaded shotgun was pointed at plaintiff's left leg negligently caused the shotgun to be discharged proximately resulting in permanent injury to plaintiff was sufficient  
Ohio—Huber v Collins, App, 50 N E 2d 906

(3) Petition alleging that fourteen year old child caused revolver to be

fired at victim, that parents knew that child had pointed pistol at other customers, that store in which firing occurred was owned and operated by the parents, and that parents were negligent in violating ordinance pertaining to permits to deal in pistols, stated cause of action against child for recovery of damages

Ga—Skelton v Gambrell, 57 SE 2d 694, 80 Ga App 880

(4) Complaint alleging that defendants confederated together to protect premises of defendant company, that in performance of agreement they took with them deadly weapons, and that named defendant believing the common purpose could be best served thereby and in execution of such common purpose fired a tear-gas shell which struck plaintiff and fractured his skull, was based on theory of a "joint enterprise" and was good as against demurrer

Ind—Hogle v Reliance Mfg Co, 48 NE 2d 75, 113 Ind App 488, rehearing denied 48 NE 2d 999, 113 Ind App 488

#### Pleading construed

Ga—Skelton v Gambrell, 57 SE 2d 694, 80 Ga App 880

58. Mo—McLaughlin v Marlatt, 246 SW 548, 296 Mo 656  
68 CJ p 76 note 69

59. Mo—McLaughlin v Marlatt, supra

60. Ind—Sutton v Bonnett, 16 NE 180, 114 Ind 243

#### Plea held sufficient

Ala—Nelson v Lee, 32 So 2d 22, 249 Ala. 549

62. Ohio—Huber v Collins, App, 50 NE 2d 906

63. Ohio—Huber v Collins, supra.

The discharge of a firearm, resulting in an accidental or unintentional injury to the person or property of another, may constitute presumptive evidence of negligence,<sup>64</sup> and the doctrine of *ipsa loquitur* may be applicable.<sup>65</sup> While plaintiff is not required to show the manner in which the weapon was discharged, or to exclude all other possible causes to establish the causal connection between defendant's act and the injury,<sup>66</sup> he has the burden of proving the cause of action alleged.<sup>67</sup> Defendant has the burden of establishing his defense,<sup>68</sup> and when plaintiff has made out a *prima facie* case the burden of producing evidence shifts to defendant who must show justification or freedom from fault.<sup>69</sup>

General rules apply as to the admissibility<sup>70</sup> and

sufficiency<sup>71</sup> of evidence. The facts of each case must determine the quantum of evidence necessary to make a *prima facie* case of negligence in the use of a weapon.<sup>72</sup>

### e Trial

In an action to recover for injuries from the handling or use of weapons, questions of fact are for the jury under instructions which correctly state the law and are within the issues and the evidence.

In an action for damages for an injury caused by the negligent handling of a weapon, the principles of law underlying the trial of civil actions generally, particularly actions based on negligence, are applicable.<sup>73</sup> Although sometimes established as a matter of law,<sup>74</sup> the question of the defendant's

64. Ohio—Huber v Collins, supra 68 C J p 76 note 74

#### General rule not applicable

General rule that negligence is never presumed and is not to be inferred merely from fact that an accident occurred is not applicable to a situation where an injury results from the discharge of a gun in the hands of another

US—Norling v Carr, C A III, 211 F 2d 897

65. DC—Crump v. Browning, Mun App, 110 A 2d 695

Fla—Skinner v Ochiltree, 5 So 2d 605, 148 Fla 705, 140 A L R 410

Pa—Mobilia v Blystone, Com Pl, 31 Erie Co 307

66. Mass—Adams v Dunton, 187 NE 90, 284 Mass 63

67. Cal—Jensen v Minard, 282 P 2d 7, 44 Cal 2d 325

Mo—McLaughlin v Marlatt, 246 S W 548, 296 Mo 656

Tex—Koons v Rook, Com App, 295 S W 592

68. Ohio—Huber v. Collins, App, 50 NE 2d 906

68 C J p 76 note 81

69. Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 A L R 2d 91

Ohio—Huber v Collins, App, 50 NE 2d 906

Pa—Snyder v Walters, 19 Pa Dist & Co 550, 25 Berks Co 253.

#### When rule inapplicable

Where a firearm discharged in the presence of others and one of them is injured, or is fired at a place where another might be, the rule requiring defendant in order to exonerate himself to show not only the discharge was unavoidable, but also that he was utterly without fault, is applicable, but it is not applicable in a case where defendant, out fox hunting, fired at a rustle in the grass, and shot plaintiff, who had concealed himself there to frighten defendant's companions, defendant

not being liable as a matter of law merely because he intentionally fired thinking the rustling was caused by a fox

Mo—McLaughlin v Marlatt, 228 S W 873, judgment affirmed 246 S W 548, 296 Mo 656

#### 70 Evidence held admissible

Mo—Hayes v Dalton, App, 257 S W 2d 198

68 C J p 76 note 77 [a]

#### Evidence held inadmissible

Cal—Rudd v Byrnes, 105 P 957, 156 Cal 636, 26 L R A, N S, 134, 20 Ann Cas 124

68 C J p 76 note 77 [b]

#### 71 Evidence held sufficient

(1) To show that defendant was negligent

Ark—Hough v Leech, 62 S W 2d 14, 187 Ark 719

Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 A L R 2d 91

Tenn—Levitan v Banniza, 236 S W 2d 90, 34 Tenn App 176

68 C J p 76 note 78 [a] (2)

(2) To show that plaintiff did not assume risk of injury

Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 A L R 2d 91

(3) To show wantonness authorizing punitive damages

N J—Mazzilli v Selger, 93 A 2d 216, 23 N J Super 496, affirmed in part and reversed in part on other grounds 99 A 2d 417, 13 N J 296

(4) To authorize judgment for defendant

Kan—Fitts v Badger Lumber & Coal Co, 68 P 2d 631, 146 Kan 56

(5) To show that injury was caused by plaintiff's negligence

US—Lewis v U S, C A N J, 194 F 2d 689

Mass—Adams v Dunton, 187 NE 90, 284 Mass 63

(6) To show that plaintiff was not contributorily negligent

Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 A L R 2d 91

Mass—Adams v Dunton, 187 NE 90, 284 Mass 63

68 C J p 76 note 78 [a] (3)

(7) To show other matters

US—Lewis v U S, C A N J, 194 F 2d 689

La—Edwards v Wallace, App, 187 So 89

Mass—Bennett v Marquis, 90 NE 2d 551, 325 Mass 375—Adams v Dunton, 187 NE 90, 284 Mass 63

Ohio—Kuhn v Bader, 101 NE 2d 322, 89 Ohio App 203

Tenn—Levitan v Banniza, 236 S W 2d 90, 34 Tenn App 176

Wis—Wilfert v Nielsen, 27 N W 2d 893, 250 Wis 646

68 C J p 76 note 78 [a]

#### Evidence held insufficient

(1) To show that defendant was negligent

Ind—Sutton v Bonnett, 16 NE 180, 114 Ind 243

N Y—Yusko v Remizon, 116 N Y S 2d 922, 280 App Div 637

(2) To support a judgment against defendant

N Y—Blanchard v Noteware, 32 N Y S 2d 188, 263 App Div 186

(3) To show that defendant fired shots from his residence into group of persons, including plaintiff, engaged in general fight on highway, and thereby hit and injured plaintiff

La—Hill v Stanfa, App, 154 So 376

(4) To establish other particular matters

US—Lewis v U S, C A N J, 194 F 2d 689

72. Mo—McLaughlin v Marlatt, 246 S W 548, 296 Mo 656

73. Cal—Jensen v Minard, 282 P 2d 7, 44 Cal 2d 325

Pa—Mobilia v Blystone, Com Pl, 31 Erie Co 307

74. Wis—Harper v Holcomb, 130 N W 1128, 146 Wis 183.

68 C J p 76 note 85.

negligence, and whether such negligence was a proximate cause of the injury, are ordinarily questions of fact for the jury<sup>75</sup> It is also for the jury to determine whether plaintiff was chargeable with contributory negligence,<sup>76</sup> unless the evidence is insufficient to warrant the submission,<sup>77</sup> and the question of damages may be one for the jury<sup>78</sup> An instruction should be a correct and simple statement of pertinent law,<sup>79</sup> and should be within the issues and the evidence<sup>80</sup> Instructions should avoid a tendency to mislead the jury,<sup>81</sup> or improperly to discredit the contention of a party or the probative value of his evidence.<sup>82</sup> Findings must be in accord with the evidence<sup>83</sup>

#### f. Damages

Much discretion is left to the jury in assessing damages for injuries resulting from the handling or use of weapons.

In an action to recover damages for injuries resulting from the handling or use of weapons, much discretion is left to the jury in assessing the damages<sup>84</sup> Particular awards of damages have been held not excessive<sup>85</sup> Where the weapon was

fired with wanton and reckless indifference to the consequences, punitive damages may be awarded<sup>86</sup>

#### § 30. Sale, Gift, or Loan

Civil liability for the negligent or unlawful sale, gift, or loan of weapons, and procedure in actions to enforce such liability are considered infra §§ 31, 32

Examine Pocket Parts for later cases.

#### § 31. — Liabilities

One who negligently or illegally sells, gives, or lends a weapon may be liable for resulting injuries.

A person who, in lawfully disposing of a weapon to another, is chargeable with a negligent act or omission which is the proximate cause<sup>87</sup> of an injury that is the natural and probable consequence of the negligence, is liable therefor, subject to the rules of law applicable to negligence and contributory negligence<sup>88</sup> In an action for the negligent sale of a weapon to a minor, the question of the care or negligence of the minor in the use of the weapon is immaterial<sup>89</sup> To the general

75 Mass—Bennett v Marquis, 90 NE 2d 551, 325 Mass 375  
NY—Ford v Grand Union Co., 270 NYS 162, 240 App Div 294  
NC—Fox v Asheville Army Store, 1 SE 2d 550, 215 NC 187

Ohio—Ertel v De Witt, App., 101 NE 2d 296

Okl—Hart v Lewis, 103 P 2d 65, 187 Okl 394

Tenn—Leviton v Banniza, 236 SW 2d 90, 34 Tenn App 176

Tex—Berry v Harper Civ App., 111 SW 2d 795, error dismissed  
68 CJ p 76 note 86

Evidence held sufficient to take case to jury

US—Norling v Carr, CA Ill., 211 F 2d 897

Ala—Nelson v Lee, 32 So 2d 22, 249 Ala 549

Va—Alvey v Butchkavitz, 84 SE 2d 535, 196 Va 447

76. Ala—Nelson v Lee, 32 So 2d 22, 249 Ala 549

68 CJ p 76 note 87

77. Mo—White v Bunn, 145 SW 2d 138, 346 Mo 1112

Wis—Oshogay v Schultz, 43 NW 2d 485, 257 Wis 323

78 Mo—Hayes v Dalton, App., 257 SW 2d 198

W Va—Koontz v Whitney, 153 SE 797, 109 W Va 114.

79. Kan—Bolin v Ballinger, 293 P 472, 131 Kan 685  
68 CJ p 77 note 89

Instructions held proper or erroneously refused

Ark—Jefferson v. Nero, 280 SW 2d 884.

Fla—Skinner v Ochiltree, 5 So 2d 605, 148 Fla 705, 140 ALR 410

Ohio—Kuhn v Bader, 101 NE 2d 322, 89 Ohio App 203  
68 CJ p 77 note 89 [a]

Instructions held erroneous or properly refused

Cal—Jensen v Minard, 282 P 2d 7, 44 Cal 2d 310

Kan—Fitts v Badger Lumber & Coal Co., 68 P 2d 631, 146 Kan 56

Mo—Schoening v Claus, 249 SW 2d 361, 363 Mo 119

Ohio—Kuhn v Bader, 101 NE 2d 322, 89 Ohio App 203—Ertel v De Witt, App., 101 NE 2d 296

80. Kan—Bolin v Ballinger, 293 P 472, 131 Kan 685  
68 CJ p 77 note 90

81. Mo—McLaughlin v Marlatt, 246 SW 548, 296 Mo 656  
68 CJ p 77 note 91

82. Mo—McLaughlin v Marlatt, supra.  
68 CJ p 77 note 92

83. Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 ALR 2d 91

#### Degree of care

In action for personal injuries suffered in accidental shooting, trial court's statement in decision that defendant was required to use that degree of care that an ordinary prudent man would use under the same circumstances, did not indicate that court incorrectly gauged defendant's responsibility, where court also stated that defendant was required to

exercise the high degree of care required by law under the circumstances

DC—Crump v Browning, Mun App., 110 A 2d 695

#### Negligence of two defendants

Where evidence did not clearly show which of two defendants' shot struck plaintiff, finding that pellets lodged in plaintiff's eye and lip as result of shots fired "by defendants and each of them" was a sufficient finding that defendants were jointly liable and that negligence of both was cause of injury

Cal—Summers v Tice, 199 P 2d 1, 33 Cal 2d 80, 5 ALR 2d 91

84. La—Chataigne v. Bergeron, 10 La Ann 699

85. Minn—Corn v Sheppard, 229 N W 869, 179 Minn 490.  
68 CJ p 78 note 96

86. NJ—Mazzilli v Selger, 93 A 2d 216, 23 NJ Super 496, affirmed in part and reversed in part on other grounds, 99 A 2d 417, 13 NJ 296

87. US—Herman v. Markham Air Rifle Co., DC Mich., 258 F. 475  
68 CJ p 78 note 1

Parent's liability for furnishing weapon to infant tort-feasor see Parent and Child § 68.

88. US—Herman v. Markham Air Rifle Co., supra.  
68 CJ p 78 note 2

89 RI—Bernard v. Smith, 90 A 657, 36 RI 377.



rule that the negligent seller of an article is not liable to the third person who has no contractual relation with him, there is a well recognized exception in the case of articles or instruments which are inherently and imminently dangerous, as discussed in Negligence § 100 b, and such exception is applicable in the case of weapons.<sup>90</sup> A representation by the seller that an instrument such as a toy pistol is harmless refers only to the ordinary and usual uses thereof under reasonable conditions.<sup>91</sup> It has been held that one who sells a weapon knowing that it is to be given to the purchaser's sixteen-year-old son is not negligent so as to be liable for injuries resulting from its use.<sup>92</sup>

*Violation of statute or ordinance.* Where a statute or ordinance prohibits the sale, gift, or loan of firearms or other weapons, including ammunition therefor as well as toy firearms or toy weapons to minors or others, a person who illegally sells, gives, or lends prohibited weapons or ammunition with which an injury is inflicted is liable in damages to the injured person,<sup>93</sup> subject to the principles pertaining to actionable negligence,<sup>94</sup> contributory negligence,<sup>95</sup> and proximate cause.<sup>96</sup> The plaintiff's injury must be the result of a breach of a duty owed to him and must be the sort of injury the statute was intended to prevent.<sup>97</sup> The person who thus violates the law is liable for any consequence that should reasonably have been anticipated as a natural and probable result,<sup>98</sup> but the particular

casualty need not have been anticipated.<sup>99</sup>

### § 32. — Procedure

The complaint, declaration, or petition in an action against the seller of a weapon must state a cause of action, and the burden of proof is on plaintiff to establish his case. Questions of law are for the court, and questions of fact, for the jury.

The complaint, petition, or declaration, in an action for injuries caused by negligence in the sale, gift, or loan of weapons should disclose the necessary elements of actionable negligence,<sup>1</sup> it should aver that the negligence was the proximate cause of the injury,<sup>2</sup> and show that the injury should have been anticipated.<sup>3</sup> In an action grounded on the negligent or illegal sale of a weapon to a minor who has inflicted an injury therewith, the only issues being whether accused was negligent<sup>4</sup> or the sale was illegal,<sup>5</sup> and whether the injury was the natural and probable consequence of the negligence,<sup>6</sup> plaintiff must prove only what is required by those issues,<sup>7</sup> and need not aver that the minor was of such tender years that he could not appreciate the danger of his acts,<sup>8</sup> nor is it necessary to negative the want of due care on the part of such minor.<sup>9</sup> In an action for the death of one injured, defendant must plead decedent's contributory negligence.<sup>10</sup>

*Parties.* Persons whose presence is unnecessary for the complete determination of the controversy need not be joined as parties.<sup>11</sup>

90. US—Herman v Markham Air Rifle Co., DCMich, 258 F 475 68 CJ p 78 note 7

91. Ill—Miller v Sears, Roebuck & Co of Illinois, 250 Ill App 340

92. RI—Corey v Kaufman & Chermik, 36 A2d 103, 70 RI 27

93. NM—Zamora v J Korber & Co., 278 P2d 569, 59 NM 33 68 CJ p 78 notes 10, 11.

#### **Seller not liable**

It has been held, however, that a sporting goods store proprietor who sold cartridges to boy under age 18 was not liable for boy's death occurring when another boy loaded a small rifle with one of the cartridges and fired, notwithstanding ordinance prohibiting sale of explosives to minors

Ill—DeCicco v Vodrazka, 9 NE2d 451, 291 Ill App 612

94. Ga.—Hulsey v Hightower, 161 SE 664, 44 Ga App 455 68 CJ p 79 note 12.

95. Pa.—McMillen v Steele, 119 A 721, 275 Pa. 584 68 CJ p 79 note 13.

96. Ill.—Hartnett v. Boston Store

of Chicago, 106 NE 837, 265 Ill 331, LRA 1915C 460 68 CJ p 79 note 14

97. Kan.—Parman v Lemmon, 244 P 227, 119 Kan 323, 120 Kan 370, 44 ALR 1500 68 CJ p 79 note 12 [a].

98. Ga.—Spire v Goldberg, 106 SE 585, 26 Ga App 530 Pa.—Shaffer v Mowery, 108 A. 654, 265 Pa. 300

99. Pa.—Wassel v. Ludwig, 92 Pa Super 341

1. Minn.—Anderson v Settergren, 111 NW 279, 100 Minn 294 68 CJ p 79 note 20

**Pleading held sufficient** to state cause of action at common law, but not under city ordinances Ill—Semeniuk v Chentis, 117 NE 2d 883, 1 Ill App 2d 508

**Pleading held insufficient** Idaho—Carron v Guido, 33 P2d 345, 54 Idaho 494.

2. Ohio—Poe v. Canton-Mansfield Dry Goods Co, 173 NE 318, 36 Ohio App. 395 68 CJ p 79 note 21.

3. NJ—Driesse v. Verblaaauw, 153 A 388, 9 NJ Misc 173. 68 CJ p 79 note 22

4. RI—Bernard v Smith, 90 A 657, 36 RI 377

5. Pa.—McMillen v. Steele, 119 A 721, 275 Pa. 584

6. RI—Bernard v Smith, 90 A 657, 36 RI 377

7. Pa.—McMillen v. Steele, 119 A 721, 275 Pa. 584

8. NJ—Driesse v. Verblaaauw, 153 A 388, 9 NJ Misc. 173

9. RI—Bernard v. Smith, 90 A 657, 36 RI 377.

10. US—Pate v Howe, DCMc, 103 F Supp 421, affirmed, Howe v Pate, CA, 199 F2d 672

#### **11. Storekeeper's wife**

In action for death of boy shot by another boy with ammunition purchased at defendant's store, motion that defendant's wife who sold the ammunition be made party defendant on ground that full determination of case could not otherwise be made, held properly denied where it was unnecessary to protect her rights or for complete determination of controversy. Idaho—Carron v Guido, 33 P.2d 345, 54 Idaho 494.

**Evidence** In an action under a statute prohibiting sales to minors it is presumed that the legislature intended that the purchasing minor and innocent third persons should be protected against the hazard of third persons firing the weapon.<sup>12</sup> The burden of proof is on plaintiff as to essential elements of his cause of action,<sup>13</sup> and on defendant as to matters of affirmative defense.<sup>14</sup> The evidence adduced on the different issues must be sufficient for the purpose,<sup>15</sup> but the necessary degree of proof is not as great as that required to sustain a conviction for the criminal offense.<sup>16</sup> The violation of the statute is in itself evidence of negligence,<sup>17</sup> and where it is claimed that the weapon has been unlawfully placed in the hands of a minor, evidence as to the appearance of the minor,<sup>18</sup> or the nature of the clothing worn by him,<sup>19</sup> is admissible as being at least some indication of his age.

**Trial** If it is doubtful whether or not a particular weapon or device is harmless<sup>20</sup> or is within the prohibition of the law,<sup>21</sup> the question is for the jury; and it is also ordinarily within the province of the jury to determine the questions of negligence,<sup>22</sup> contributory negligence,<sup>23</sup> and proximate

cause,<sup>24</sup> although under suitable circumstances these questions may be for the court.<sup>25</sup>

### § 33. Manufacture

The manufacturer of a weapon may be liable to one injured as the result of his negligence.

A firearm, in the use for which it is intended, is a dangerous instrument within the scope of the principle that, under the ordinary rules of negligence, a manufacturer of such an instrument is liable in damages for an injury resulting from the negligent use of defective materials or from want of proper care and skill in the manufacturing process.<sup>26</sup> The most that is required, however, is the production of a weapon suitable for use under the conditions existing at the time it is put on the market,<sup>27</sup> and the manufacturer is not liable where the weapon is not used in an ordinary and reasonably foreseeable manner.<sup>28</sup> Under general rules, the complaint, declaration, or petition must be sufficient to state a cause of action,<sup>29</sup> and a want of proper care and skill in the manufacture must be alleged and proved<sup>30</sup> by sufficient evidence.<sup>31</sup> The mere bursting of a firearm does not alone suffice to make the manufacturer liable.<sup>32</sup>

12. US—Di Gironimo v American Seed Co, DCPa, 96 FSupp 795

#### 13. Defect in ammunition

US—Pate v Howe, DCMc, 103 F Supp 421, affirmed, Howe v Pate, CA, 199 F 2d 672

#### 14. Contributory negligence of decedent

US—Pate v Howe, DCMc, 103 F Supp 421, affirmed, Howe v Pate, CA, 199 F 2d 672

15. Mass—Pudlo v Dubiel, 173 N E 536, 273 Mass 172  
68 CJ p 79 note 30

#### Evidence held sufficient

(1) To support finding, verdict, or judgment for plaintiff

US—Pate v Howe, DCMc, 103 F Supp 421, affirmed, Howe v Pate, CA, 199 F 2d 672

(2) To support finding, verdict, or judgment for defendant

NY—Woodcock v Davignon, 21 N YS 2d 228, 259 AppDiv 1107

#### Evidence held insufficient

RI—Corey v Kaufman & Chernick, 36 A 2d 103, 70 RI 27

16. Pa.—McMillen v Steele, 119 A 721, 275 Pa 584  
68 CJ p 80 note 32 [a]

17. Mass—Pudlo v Dubiel, 173 N E 536, 273 Mass 172  
NM—Zamora v J. Korber & Co, 278 P 2d, 59 NM 33

18. Pa.—McMillen v Steele, 119 A 721, 275 Pa 584.

19. Pa.—McMillen v Steele, supra.  
68 CJ p 80 note 35 [a].

20. NY—Crist v Art Metal Works, 243 NYS 496, 230 AppDiv 114, affirmed 175 NE 341, 255 NY 624

21. Ga.—Mathews v Caldwell, 63 S E 250, 5 Ga App 336  
68 CJ p 80 note 41

22. Ga.—Spies v Goldberg, 106 S E 585, 26 Ga App 530  
68 CJ p 80 note 42

#### Evidence held insufficient to take case to jury

Okl—Wiles v Pearson, 52 P 2d 814, 175 Okl 328

23. NM—Zamora v J Korber & Co, 278 P 2d 569, 59 NM 33  
68 CJ p 80 note 43

24. Mass—Pudlo v Dubiel, 173 N E 536, 273 Mass 172  
68 CJ p 80 note 44

25. Ill—Cada v The Fair, 187 Ill App 111, 114  
68 CJ p 80 note 45

26. NY—Favo v Remington Arms Co, 73 NYS 788, 67 AppDiv 414

27. NY—Favo v Remington Arms Co, supra.  
68 CJ p 80 note 48

28. NY—Favo v Remington Arms Co, supra

#### Injury held not foreseeable

Representatives of manufacturer of tear gas gun resembling fountain pen would be justified in relying on supposition that buyer would keep gun for his own purpose and out of other persons' hands, and they could not be charged with knowledge that buyer would permit gun to remain

in such a position in his store as to attract others, as respects manufacturer's liability for injuries sustained by customer who examined gun

Pa—Scurfield v Federal Laboratories, 6 A 2d 559, 335 Pa 145

#### 29. Pleading held insufficient

Pa—Scurfield v Federal Laboratories, supra.

30. Ill—Miller v Sears, Roebuck & Co of Illinois, 250 Ill App 340  
NY—Favo v Remington Arms Co, 73 NYS 788, 67 AppDiv 414

31. Conn—Welshausen v Charles Parker Co, 76 A 271, 83 Conn 231  
68 CJ p 81 note 54

#### Sufficiency of evidence for jury

In action against cartridge manufacturer for loss of eyesight resulting when particle of metal from cartridge rebounded from shooting gallery backstop, evidence was sufficient to take to jury question as to whether defendant had been guilty of negligence in manufacturing and inspecting product dangerous to human life by deviating from great degree of care required of one manufacturing an explosive article  
Cal—Warner v Santa Catalina Island Co, 282 P 2d 12, 44 Cal 2d 310

32. Conn—Welshausen v Charles Parker Co, 76 A 271, 83 Conn 231  
68 CJ p 81 note 55.

**WEAR; WORN.** The verb "to wear" in one sense means to carry or bear upon the person,<sup>1</sup> and in another sense it fully covers the idea of abrasion, erosion, and deterioration as incident to use.<sup>2</sup>

*Wear and tear* The loss by wearing, as of machinery in use, the loss or injury to which anything is subjected by use, accident, etc., loss by service, exposure, decay, or injury incident to the ordinary use of a thing.<sup>3</sup>

Ordinary wear and tear applies more naturally to the gradual deterioration which results from use, lapse of time, and the operation of the elements,<sup>4</sup> but it has been held, and apparently it is the accepted doctrine, that the term will cover a specific and substantial injury suddenly sustained as the result of a structural defect.<sup>5</sup> However, ordinary wear and tear does not mean total destruction of the material, but means reasonable wear and tear by depreciation in value of the thing or material as may arise from ordinary and reasonable use.<sup>6</sup>

Leases frequently use the phrase "wear and tear," and as used in this connection the term is construed in Landlord and Tenant § 368 d (4) (g), and for other specific references see the index to that title.

*Wear of the creek* A term which has reference to the gradual and imperceptible changes in the banks of a creek by which the soil is taken from

one side of the stream and deposited on the other, and not to a sudden and violent change in the course of the stream by floods.<sup>7</sup>

**Worn.** The past participle of "wear," and hence, an adjective. It is defined as meaning showing wear or use, weakened by age, labor, worry, illness, or the like.<sup>8</sup>

"Worn" has been compared with, or distinguished from, "carried" see 13 C J S p 1764 note 37.

**WEARING APPAREL.** The term "wearing apparel" is what is known as a "bilingual pair," "wearing" coming from the Anglo-Saxon, and "apparel" from the Latin.<sup>9</sup> It is a common term used in an inclusive sense as embracing all articles which are ordinarily worn,<sup>10</sup> vesture, garments, dress, or anything that is worn by, or appropriated to, the person,<sup>11</sup> and it is sometimes defined in its popular sense as meaning all articles of dress generally worn by persons in the calling and condition of life and in the locality of the person in question.<sup>12</sup>

The term is generally applied to articles intended and adapted to be worn on the person for personal comfort or decency, and as protection against the elements,<sup>13</sup> but it may include articles worn on the person other than hats, shoes,<sup>14</sup> and what is commonly understood by the term "clothing,"<sup>15</sup> and in

1 Webster New Int D

2 Philippine—Government of the Philippine Islands v Harris, 37 Philippine 204, 207

3 Philippine—Government of the Philippine Islands v Harris, supra

"Natural wear and tear" see 65 C J S p 40 note 42

4 Vt—Drouin v Wilson, 67 A. 825, 827, 80 Vt 335, 13 Ann Cas 93

#### Similarly expressed

Any usual deterioration from the use of the premises in the lapse of time

Miss—Waddell v De Jet, 23 So 437, 438, 76 Miss 104

5 Vt—Drouin v Wilson, 67 A. 825, 827, 80 Vt 335, 13 Ann Cas 93

6 U.S.—Venice v Frazier Davis Const Co, D C Canal Zone, 87 F Supp 475, 480

#### In contract for carriage

The phrase has reference to the depreciation in value which results from the mere transportation itself, unaccompanied by negligence of the carrier

Tex—International & G N R Co v Young, Civ App, 72 S W 68

7 N.Y.—Henning v Bennett, 18 N YS 645, 646, 63 Hun 592.

8 Webster New Int D

Phrases employing the word "worn" and of which more recent adjudications have not been found see 71 C J p 1618 notes 95-97

9 N.Y.—In re Steimes' Estate, 270 NYS 339, 343, 150 Misc 279

10 U.S.—Arnold Constable & Co v U S, N.Y., 13 S Ct 406, 407, 147 US 494, 37 L Ed 253

Phrases employing the term "wearing apparel" and of which more recent adjudications have not been found see 68 C J p 82 notes 19-26

11 Me—Gooch v Gooch, 33 Me 535

Or—McClung v Stewart, 8 P 447, 448, 12 Or 431, 53 Am R 374

12 U.S.—Sellers v Bell, Ala., 94 F 801, 812, 36 CCA 502

N.Y.—In re Steimes' Estate, 270 N YS 339, 343, 150 Misc 279

W Va—Ohio Valley Bank v Minter, 150 SE 366, 368, 108 W Va 58

13 U.S.—In re Evans & Co, D C Del, 158 F 153, 156

N.Y.—In re Thorn's Estate, 292 N YS 622, 624, 161 Misc 253

Wis—Milwaukee Accredited Schools of Beauty Culture v Patti, 296 N W 616, 618, 237 Wis 277.

68 C J p 81 note 13

#### Similarly expressed

The wearing apparel necessary for immediate use must be such an amount of clothing as is necessary to meet the varying changes of climate, and the customary habits and ordinary necessities of the mass of people

NH—Peverly v Sayles, 10 NH 356, 357

#### Protection against weather

"Wearing apparel" includes whatever is necessary to a decent appearance and to protection against exposure to the changes of weather

U.S.—Sellers v Bell, Ala., 94 F 801, 812, 36 CCA 502

14 U.S.—In re Evans & Co, D C Del, 158 F 153, 156

Wis—Milwaukee Accredited Schools of Beauty Culture v Patti, 296 N W 616, 618, 237 Wis 277.

#### Shoes included

U.S.—Swayne v Hager, C C Cal, 37 F 780, 782, 13 Sawy 618

#### Suspenders, garters, and similar articles

U.S.—U S v A Steinhardt & Bro, C C N.Y., 141 F. 494, 495

15 U.S.—In re Evans & Co, D C Del, 158 F 153, 156

Wis—Milwaukee Accredited Schools of Beauty Culture v Patti, 296 N W 616, 618, 237 Wis 277.

68 C J p 81 note 14.

some cases it is applied to articles serving to ornament the person,<sup>16</sup> while in other cases articles of ornamentation of the person are not considered to be wearing apparel<sup>17</sup>

The term "wearing apparel" will sometimes be considered to include those articles which are reasonably proper and customary in the community in the way of ornaments,<sup>18</sup> and it sometimes will be considered to include ornamental articles which also serve some useful purpose, as for fastening the clothing<sup>19</sup>

Either because of the common law or by reason of statutes a debtor's wearing apparel is generally exempt property, as stated in Exemptions § 52, and such property is not subject to levy and sale under an execution, as stated in Executions § 19.

The specific property which will pass under a testamentary disposition of "wearing apparel" is treated in the CJS title Wills § 787, also 69 C J p 400 note 78-p 401 note 90.

**WEATHER.** The general condition of the atmosphere of a place at a given time, as regards its temperature, moisture, winds, clouds, etc., especially, the state of the sky as regards clouds and rain<sup>20</sup>

**WEATHERING.** A method of stabilizing raw natural gasoline, consisting in subjecting it to the atmosphere in open tanks, until by evaporation, sometimes accelerated by steam pipes, the required vapor pressure or vapor tension of the remaining liquid is had<sup>21</sup>

**WEBSTER'S UNABRIDGED DICTIONARY.** See 26 C J S p 1302 note 87.

**WEDGE.** As a noun, a tool held in place by hand while being struck, and used for splitting rock<sup>22</sup>

As a verb, "to wedge" conveys the conception of the progressive application of mechanical force,<sup>23</sup> and has been compared with, or distinguished from, "to clamp" see 14 C J S p 1192 note 84, and "to draw" see 28 C J S p 488 note 20.

**WEDLOCK.** The ceremony or state of marriage; the relation which is derived from marriage.<sup>24</sup> It has been held to be the equivalent of "matrimony" see 57 C J S p 453 note 10

The term is frequently employed in describing an illegitimate child as a child born "out of wedlock," and in this connection see Bastards § 1 et seq.

**WEED.** A word which may be applied to any one of those herbaceous plants which are useless and without special beauty or especially which are positively troublesome<sup>25</sup> It is also defined as meaning any plant growing in cultivated ground to the injury of the crop or desired vegetation, or to the disfigurement of the place; an unsightly, useless or injurious plant, underbrush<sup>26</sup>

**WEEK.** See Time § 11.

**WEEKDAY.** See Time § 12.

**WEEKLY.** Once a week;<sup>27</sup> coming, happening, or done once a week<sup>28</sup>

16 U S—In re Evans & Co, D C Del, 158 F 153, 156

Wis—Milwaukee Accredited Schools of Beauty Culture v Patti, 296 N W 616, 618, 237 Wis 277

68 C J p 81 note 15

#### Diamond ring

U S—In re Richards, D C Tex, 64 F Supp 923, 927.

#### Jewelry

"If one chooses to classify jewelry as one variety of 'wearing apparel,' it cannot be held that he is making an improper and indefensible use of the English language"

U S—One Pearl Chain v U S, 123 F 371, 377, 378, 59 CCA 499

17. Iowa—Neasham v McNair, 72 NW 773, 774, 103 Iowa 695, 38 LRA 847, 64 AmSR 202

68 C J p 81 note 16

18. W Va—Ohio Valley Bank v Minter, 150 SE 366, 368, 108 W Va 58

#### Similarly expressed

"Wearing apparel" includes what is reasonably proper and customary in the way of ornament.

U S—Sellers v Bell, Ala., 94 F 801, 812, 36 CCA 502

19 U S—In re Smith, D C Tex, 96 F 832, 834

68 C J p 81 note 17

#### Watch as useful article of dress

"A plain gold watch worth not more than \$50 is not usually worn habitually by farmers and country merchants as an ornament, but in this day, when everything moves on schedule time, a watch is an eminently useful, if not absolutely necessary, article of dress"

U S—Sellers v Bell, Ala., 94 F 801, 812, 36 CCA 502

20. New Standard D

Phrases employing the word and of which more recent adjudications have not been found see 68 C J p 82 notes 28-30

21. U S—Carbide & Carbon Chemicals Co v Phillips Petroleum Co, D C Del, 28 F2d 218—Carbide & Carbon Chemicals Corporation v Texas Co, D C Tex, 21 F2d 199, 201

Phrases employing the word and of which more recent adjudications

have not been found see 68 C J p 82 notes 32, 33

22. Ky—Langhorn, Johnson & Co v Wiley, 91 SW 255, 256, 28 Ky L 1186

23. U S—Bonnell v Ward, CCA N Y, 238 F 171

24 ND—State v Colton, 17 NW 2d 546, 549, 73 ND 582, 156 ALR 1403

25 Mo—City of St Louis v Galt, 77 SW 876, 878, 179 Mo 8, 63 LRA 778

68 C J p 82 note 43

26. Mo—City of St Louis v Galt, supra

27 Ark—Johnson v Tucker Lake Levee & Drainage Dist, 271 SW 965, 168 Ark 889

Phrases employing the word "weekly" and of which more recent adjudications have not been found see 68 C J p 82 note 50—p 83 note 62

28. Ark—Schuman v Metropolitan Trust Co, 134 SW 2d 579, 581, 582, 199 Ark 283—Edwards v Lodge, 113 SW 2d 94, 96, 195 Ark 470

**WEEPER.** A ditch dug through the shoulder of a road for the purpose of draining it.<sup>29</sup>

**WEIGHAGE.** The duty or toll imposed by English law to be paid for weighing merchandise, as for weighing wool at the king's beam, or for weighing

other avoirdupois goods<sup>30</sup>

**WEIGHT.** The quantity of heaviness, the quality of being heavy, or the degree or extent of downward pressure under the influence of gravity, or the quantity of matter as estimated by the balance or scale.<sup>31</sup>

29. N Y—Worden v State, 236 N Y S 505, 512, 134 Misc 848

Co v American Ore Reclamation Co, CCANY, 263 F 315, 316

the various titles throughout this work

30. N J—Hoffman v Jersey City, 34 N J Law 172, 176

**Phrases**

(1) "Weight of evidence" see Evidence §§ 1031-1039, Criminal Law §§ 900-909, and see the indexes to

(2) Other phrases employing the word "weight" and of which more recent adjudications have not been found see 68 C J. pp 83-149 notes 67-78.

31. U S—Dwight & Lloyd Sintering

## WEIGHTS AND MEASURES

This Title includes standards of quantity established by public authority; and enforcement of application of such standards to sales and other transactions in general

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

### Analysis

- § 1. Definitions—p 537
- 2. Regulation—p 545
- 3. — Of weights and measures—p 545
- 4. — Of sales of particular commodities—p 546
- 5. Inspectors or sealers of weights and measures—p 551
- 6. Public weighers and measurers—p 552
- 7. — Penalties and criminal liabilities for violation of statutes—p 554
- 8. Use of unauthorized or unsealed weights or measures—p 555
- 9. Use of false weights or measures—p 556
- 10. Having in possession false weights or measures—p 558
- 11. Fraudulent alteration of weights or measures—p 558
- 12. Selling or offering to sell less than quantity represented—p 558
- 13. Falsely packed bales of cotton—p 562
- 14. Packing in container substance foreign to contents thereof—p 562

See also descriptive word index in the back of this Volume

### § 1. Definitions

- a "Weight" and "measure" defined
- b Other terms defined

#### a. "Weight" and "Measure" Defined

"Weight" is defined to mean the quantity of heaviness, the quality of being heavy; and "measure," as a noun, means the extent, quantity, capacity, volume, or dimensions in general of anything, as ascertained by a certain rule or standard.

The primary and ordinary meaning of the word "weight" is the quantity of heaviness, the quality of being heavy, or the degree and extent of downward pressure under the influence of gravity, or the quantity of matter as estimated by the balance or scale.<sup>1</sup>

The word "measure," as a noun, is defined to mean the extent, quantity, capacity, volume, or

dimensions in general of anything, as ascertained by a certain rule or standard, a standard or measurement;<sup>2</sup> a quantity determined by a fixed standard,<sup>3</sup> amount<sup>4</sup> Thus the measure of a thing is the prescribed limit, not to be exceeded<sup>5</sup>

As a verb, the word "measure" means to compute or ascertain the extent, quantity, capacity, or dimensions of by applying a rule or standard; take the dimensions of; compare with a fixed standard<sup>6</sup>

#### b. Other Terms Defined

Various terms of admeasurement have been considered by the courts.

*Ampere.* As a unit of electrical volume see Electricity § 1 b.

*Arpent* or *arpen*. A measure of land of uncertain quantity, mentioned in Domesday and other old

1. U.S.—Dwight & Lloyd Sintering Co v. American Ore Reclamation Co, CCANY, 263 F 315, 316, certiorari denied 40 SCt 393, 252 US 582, 64 LEd. 727—Louisville Public Warehouse Co v Collector of Customs, Ky, 49 F. 561, 566, 1 CCA 371

"Troy weight" see *infra* subdivision b of this section.

#### Dry weight

A commercial term meaning air-dry weight.

US—U S v Perkins, NY, 66 F 50, 51, 13 CCA 324

#### 2. New Standard D

#### 3. Cal—O. T Johnson Corporation

v. Los Angeles County, 17 P.2d 792, 793, 128 Cal App 440.

4. Ga.—Atlanta, K. & N. R. Co v. Bryant, 34 SE. 350, 110 Ga 247

5. Tenn—Texas Co v McCanless, 148 SW 2d 360, 363, 177 Tenn 238.

6. New Standard D. 40 C.J. p 19 note 89.

books, by some called an acre, by others half an acre, and by others a furlong<sup>7</sup> As a French measure of land, it contains one hundred square perches of eighteen feet each, or about an acre. This unit of measure was adopted in Louisiana<sup>8</sup> The term is sometimes used to indicate a unit of lineal measure<sup>9</sup>

*Avowdupois* The name of a system of weights (sixteen ounces to the pound) used in weighing articles other than medicines, metals, and precious stones, so named in distinction from the Troy weight<sup>10</sup>

*Bale* While the word "bale" is defined in 11 CJS p 380 note 99 as meaning a package, it has also acquired a special significance, importing measurement by weight rather than by cubic feet<sup>11</sup>

*Barleycorn.* In linear measure, the third of an inch<sup>12</sup>

*Barrel* In the United States a barrel, liquid measure, is usually thirty-one and one-half gallons, the exception to the rule being a barrel of petroleum which contains forty-two gallons<sup>13</sup>

*Block* When used to express a measurement of distance, the word "block" means approximately

three hundred feet,<sup>14</sup> the length of one side of a square block,<sup>15</sup> or the distance between an existing street and navigable water<sup>16</sup> The word "block," as used to signify a city block, is defined in 11 CJS p 364 notes 50-62

*Bushel* The bushel is one of the fundamental standards; a measure of capacity, and the standard of dry measure It contains four pecks or thirty-two quarts<sup>17</sup> The bushel which is in use in the United States is the so-called Winchester bushel which was employed in England prior to the adoption of the imperial bushel by that country in 1826<sup>18</sup> A bushel may be either "heaped" or "struck," the "struck" bushel is the Winchester bushel of 2,150 42 cubic inches, the volume of a cylinder eighteen and one-half inches in internal diameter and eight inches in depth,<sup>19</sup> the "heaped" bushel, used in measuring corn in the ear, potatoes, parsnips, carrots, lime, bran, and various other substances equals a Winchester bushel, plus a cone nineteen and one-half inches in diameter and six inches high placed on top of it The heaped bushel contains 2,747 7167 cubic inches<sup>20</sup> Under statutes so providing, a specified amount by weight may constitute a bushel,<sup>21</sup>

7. Ala.—McMillan v Aiken, 88 So 135, 143, 205 Ala 35

8. Ala.—McMillan v Aiken, supra  
**Various amounts indicated**

"An arpent is a land measure varying in dimension from 84 of an acre to 14 acres and to 128 acres accordingly as the arpent meant is an arpent de Paris, an arpent commun, or an arpent d'ordonnance"

Ala.—McMillan v Aiken, supra  
Mo.—Troil v City of St Louis, 168 So 167, 171, 257 Mo 626

**Smaller than acre**

"It not unfrequently happens in our state that the word 'arpent' is used when 'acre' is meant, whereas there is a considerable difference between the two, the arpent being of 192 feet, and the acre of 209 and a fraction"

La.—Randolph v Sentilles, 34 So 587, 588, 110 La 419

9. Ala.—McMillan v Aiken, 88 So 135, 143, 205 Ala 35  
5 CJS p 372 note 6 [b]

10. Black L D

**Avowdupois pound,** means sixteen ounces in weight  
Cal.—Hale v Milliken, 90 P. 365, 369, 370, 5 Cal App 344

11. SC.—Bonham v Charlotte, C & A R Co, 16 SC 633, 634  
6 CJS p 1172 note 31

**Cotton**

(1) A "bale of cotton," as the term is used commercially, means a package of merchantable lint cotton, separated from the seed and

weighing approximately five hundred pounds

Okl.—Chicago, R I & P Ry Co v Cleveland, 160 P 328, 330, 61 Okl 64

6 CJS p 1172 note 31 [b]

(2) A standard bale of cotton is five hundred pounds

Mo.—Delta Realty Co v Hunter, 152 SW 2d 45, 54, 347 Mo 1108

**Rice**

A "bale" of rice means sixty pounds of rice

US.—Miravalle Supply Co v El Campo Rice Mill Co, C A Mo, 181 F 2d 679, 682

12. Black L D

13. Tex.—Pope v Joschke, Civ App, 228 SW 986, 987

14. Mo.—Lilly v Boswell, 242 SW 2d 73, 76, 362 Mo 444

**Similarly expressed**

In the settlement of the plains states, urban areas were platted generally in squares or blocks of three hundred feet on each side, and thus, when used as a measure of distance, the commonly accepted meaning of a "block" is three hundred feet.

Mo.—Lilly v Boswell, supra  
Neb.—Gorman v Dalgas, 36 NW 2d 561, 563, 151 Neb 1

15. NY.—Skolnick v Orth, 145 NYS 981, 982, 84 Misc 71

16. US.—U S v Benedict, CCA NY, 280 F 76, 82

17. US.—U S v Weber, 3 Ct Cust App 19, 22, 23

18. US.—U S v Weber, supra.

**Measure prepared by Federal government**

The standard bushel measure prepared by the United States government holds 77 6274 pounds of distilled water

US.—Ceballos v U S, NY, 146 F 380, 381, 76 CCA 652

U S v Weber, 3 Ct Cust App 19, 22

Ky.—Caldwell, Hunter & Co v Dawson, 4 Metc 121, 123

**Imperial bushel**

The imperial bushel now in use in Great Britain is larger than the Winchester bushel, containing 2,218-192 cubic inches of water

US.—U S v Weber, 3 Ct Cust App 19, 22, 23

19. US.—U S v Weber, supra.

20. US.—U S v. Weber, supra

**21. Corn**

Standard weight of corn fixed at fifty-six pounds to the bushel

Vt.—Richardson v Spafford, 13 Vt 245

**Wheat, rye, or Indian corn**

The bushel shall consist of sixty pounds of wheat, and of fifty-six pounds of rye or Indian corn

NY.—Milk v Christie, 1 Hill 102, 104

**Sweet potatoes**

The weight of sweet potatoes is fixed by law at fifty-five pounds to the bushel

Ga.—Fain & Stamps v Ennis, 62 SE 466, 4 Ga.App 716.

in which event, if the weight of the commodity sold is in conformity with the statutory definition, it is not material that it measures less than the Winchester bushel<sup>22</sup> or does not fill a measure of eight gallons<sup>23</sup>

**Carat** A measure of weight for diamonds and other precious stones, equivalent to three and one-sixth grains Troy, although divided by jewelers into four parts called "diamond grains"<sup>24</sup> As a standard of fineness of gold see 12 C J S p 1142 note 55.

**Case** As used with respect to rice, fifty pounds packed in cartons<sup>25</sup>

**Centimeter-Gram-Second System** A system of units for measurement in which the unit of length is the centimeter, the unit of mass the gram, and the unit of time one second<sup>26</sup>

**Centipoise** A unit for measuring viscosity<sup>27</sup>

**Chain** A measure used by engineers and surveyors, being twenty-two yards in length<sup>28</sup>

**Chaldron** Twelve sacks of coal, each holding three bushels, weighing about a ton and a half<sup>29</sup>

**Cord** The word "cord" is of common use and, in general, of well-known and unvarying meaning, and its meaning is of even mathematical certainty<sup>30</sup> It signifies a measurement of wood containing one hundred and twenty-eight cubic feet,<sup>31</sup> or, otherwise expressed, a pile of wood eight feet long, four feet high, and four feet wide<sup>32</sup> To constitute a cord it is not necessary that wood should be in a pile that is eight feet long, four feet high, and four feet wide, and a pile of any other dimensions is

sufficient if it contains the necessary quantity.<sup>33</sup>

**Coulomb.** As a term used in the measurement of electricity see Electricity § 1 b

**Cuerda.** A unit of land measurement employed in Puerto Rico, and equivalent to .9712 of an acre<sup>34</sup>

**Cwt** As the abbreviation for "hundredweight" see 1 C J S p 276 note 5 The term "hundredweight" is defined infra p 540 notes 54-56

**Dram** A unit of weight; in apothecaries' weight, sixty grains or one-eighth of an ounce, in avoirdupois, 27 34 grains or one-sixteenth of an ounce<sup>35</sup>

**Ell.** A measure of length, answering to the modern yard<sup>36</sup>

**Farad** Defined as the unit of electrical capacity in Electricity § 1 b

**Fathom** As a unit of lineal measure, a fathom is six feet<sup>37</sup> As a unit of land measurement, the word "fathom" is to be understood as meaning a square fathom which contains thirty-six square feet<sup>38</sup>

**Foot** A measure of length containing twelve inches or one third of a yard<sup>39</sup>

**Furlong** A measure of length derived from the furrow in an ordinary field, theoretically the side of a square containing ten acres, one eighth of a mile It is one-eighth of the statute mile, that is, forty rods or two hundred and twenty yards (201 17 meters)<sup>40</sup>

**Gallon** A liquid measure containing two hundred and thirty-one cubic inches, or four quarts,<sup>41</sup> the Winchester wine gallon of two hundred and thirty-

22. Vt—Richardson v Spafford, 13 Vt 245

23. NY—Milk v. Christie, 1 Hill 102

24. Black L D

25. US—Miravalle Supply Co v El Campo Rice Mill Co, C A Mo., 181 F 2d 679, 682

26. New Standard D See Electricity § 1 b

27. US—E I Du Pont De Nemours & Co v Gladden Co, D C N Y., 1 F Supp 1007, 1008

28. Black L D

29. Black L D

30. Minn—McManus v Loudon, 55 NW 139, 53 Minn 339

31. Tex—Sacks v State, 204 SW 430, 83 Tex Cr 560 13 C J p 1235 note 14

**Meaning according to custom and usage**

Without denying that the common meaning of the word "cord" pre-

vailed generally in the locality, it could be shown that, by reason of a particular custom and usage, the term, when used to designate a quantity of cedar posts, expressed the quantity of two hundred and fifty-six cubic feet

Minn—McManus v Loudon, 55 NW 139, 53 Minn 339

32. Tex—Sacks v State, 204 SW 430, 83 Tex Cr 560

13 C J p 1235 note 15

33. Tex—Sacks v State, supra

34. US—People of Puerto Rico v Eastern Sugar Associates, C C A Puerto Rico, 156 F 2d 316, 319

35. New Standard D

36. Black L D

37. Hawaii—Nahaolelau v. Kaaahu, 9 Hawaii 600, 601.

**Nautical measure** Black L D

38. Hawaii—Nahaolelau v. Kaaahu, 9 Hawaii 600, 601

**Used in mining** Black L D

39. Black L D

**Twelve-inch line**

A line extending twelve inches is a foot

Va—Spicer v Hartford Fire Ins Co of Hartford, Conn., 199 SE 499, 501, 171 Va 428

40. Webster New Int D

41. La—Corpus Juris quoted in State v Standard Oil Co of Louisiana, 178 So 601, 607, 188 La. 978 27 C J p 939 note 11

**Similarly defined**

The word "gallon" is defined as the volume of two hundred and thirty-one cubic inches (equivalent to 3-7853 liters) and is the same as the old English wine gallon

La—State v Standard Oil Co of Louisiana, 178 So 601, 607, 188 La. 978.



one inches,<sup>42</sup> the gallon of commerce, which is the wine gallon;<sup>43</sup> the standard gallon of the United States<sup>44</sup> It is this gallon which is used as a unit of liquid measure under the tariff acts, see Customs Duties § 124 b (2), and Internal Revenue § 534 b

The dry or corn gallon is the old English unit of measurement which has fallen into practical disuse.<sup>45</sup>

*Gall.* A liquid measure of one-eighth of a quart; in the United States 7 219 cubic inches<sup>46</sup>

*Gram.* In Troy weight, the twenty-fourth part of a pennyweight<sup>47</sup>

*Gramme.* The unit of weight in the metric system, the weight of a cubic centimeter of distilled water at the temperature of 4° centigrade It is equal to 15 4341 grains troy, or 5 6481 drachms avoirdupois.<sup>48</sup>

*Gross* The number of twelve dozen; twelve times twelve<sup>49</sup>

*Hogshcad* A measure of capacity containing the fourth part of a ton, or sixty-three gallons, a large cask, of indefinite content, but usually containing from one hundred to one hundred and forty gallons.<sup>50</sup>

*Horse power.* A unit which measures work done and weight carried,<sup>51</sup> and it is an arbitrary unit for the measurement of the rate at which a prime motor works<sup>52</sup> It is a unit of power capable of lifting

thirty-three thousand pounds a foot a minute.<sup>53</sup>

*Hundredweight* A weight commonly reckoned in the United States, and for many articles in England, at one hundred pounds avoirdupois<sup>54</sup> The term is commonly used in England to signify a weight of one hundred twelve pounds,<sup>55</sup> and at one time in this country the term had a common meaning as designating, not the twentieth part of a ton, but one hundred twelve pounds<sup>56</sup> The abbreviation for "hundredweight" is "Cwt" as set out in 1 C.J.S. p 276 note 5

*Inch.* The American standard of linear measure<sup>57</sup> A measure of length, containing one-twelfth part of a foot, originally supposed equal to three barleycorns<sup>58</sup> As measured by the metric system, two and fifty-four hundredth centimeters<sup>59</sup>

*Iron.* A unit of measurement of the thickness of shoe soles, equal to one forty-eighth of an inch<sup>60</sup>

*Joule* Defined see Electricity § 1 b.

*Kilderkin* A measure of eighteen gallons<sup>61</sup>

*Kilogram* The word "kilogram," the accepted abbreviation of which is "kilo" as stated in 1 C.J.S. p 276 note 5, is the designation of a unit of weight in a system not commonly used in this country, although the system is well known and understood<sup>62</sup> "Kilogram" is defined as, in the metric system, a unit of mass (or weight), originally defined as

42. La.—*Corpus Juris* quoted in State v Standard Oil Co of Louisiana, 178 So 601, 607, 188 La. 978 27 C.J. p 939 note 12

43. La.—*Corpus Juris* quoted in State v Standard Oil Co of Louisiana, 178 So 601, 607, 188 La. 978 27 C.J. p 939 note 13

44. U.S.—Nichols v. Beard, C.C. Mass., 15 F. 435, 437

La.—*Corpus Juris* quoted in State v Standard Oil Co of Louisiana, 178 So 601, 607, 188 La. 978

Compared to British imperial gallon "The United States standard gallon is to the British imperial standard gallon nearly as 5 is to 6," which gives our standard gallon as 231 cubic inches"

U.S.—Nichols v. Beard, C.C. Mass., 15 F. 435, 437

45. U.S.—Ceballos v. U.S., C.C.N.Y., 139 F. 705

46. New Standard D.

47. Black L.D.

48. Black L.D.

49. Webster New Int. D.

50. Black L.D.

51. Ohio—Fisher Bros. Co v

Brown, 146 N.E. 100, 104, 111 Ohio St. 602

As quantity of water

"While the term 'horse power' designates a definite amount of mechanical force, it may also, when used in connection with a given head of water, designate a definite quantity of water. Given the head and the mechanical power to be produced in terms of 'horse power,' the equivalent quantity of water can in theory be ascertained by mathematical calculation. In practice, however, allowance must be made for inevitable leakage, friction, and other inevitable losses in converting the water into mechanical force"

Me—Union Water Power Co v Lewiston, 65 A. 67, 71, 101 Me. 564

52. Ohio—Fisher Bros. Co v Brown, 146 N.E. 100, 104, 111 Ohio St. 602

Net horse power

Actually available horse power as distinguished from theoretical horse power

Wis—Kimberly-Clark Co. v. Patten Paper Co., 140 N.W. 1066, 1073, 153 Wis. 69

53. Ohio.—Foltz Grocery & Baking

Co v Brown, 146 N.E. 97, 99, 111 Ohio St. 646

68 C.J. p 152 note 64

Similarly defined

The prevailing value of the unit is Watt's horse power, which is defined as five hundred and fifty foot pounds per second, or thirty-three thousand foot pounds per minute Ohio—Fisher Bros. Co v Brown, 146 N.E. 100, 104, 111 Ohio St. 602

54. New Standard D.

55. New Standard D.

56. Ky.—Helm v. Bryant, 11 B. Mon. 64, 65

57. Va.—Spicer v. Hartford Fire Ins. Co. of Hartford, Conn., 199 S.E. 499, 501, 171 Va. 428

58. Black L.D. 31 C.J. p 391 note 3.

59. N.Y.—Ensign v. Travelers' Ins. Co., 184 N.Y.S. 7, 16, 193 App. Div. 369

60. U.S.—Sears v. U.S., C.C. Mass., 264 F. 257, 258.

61. Black L.D.

62. Cal.—Ellsworth v. Knowles, 97 P. 690, 692, 8 Cal. App. 630.

the mass of one cubic decimeter of water at its maximum density, but now, practically, as the mass of a certain piece of platinum preserved in the archives of the International Metric Commission at Paris, equaling 220462125 pounds, or 15,432 35 grains <sup>63</sup>

**Kilovolt.** The unit of electromotive force as stated in Electricity § 1 b

**Kilowatt.** A unit of power as defined in Electricity § 1 b.

**Knot.** While the word "knot" is frequently used interchangeably with "mile" as that term is used to signify the unit of measurement of distances at sea which is variously known as the "marine mile," "sea mile," or "geographical mile," as stated infra p 542 note 79, the word "knot" is also commonly used in admiralty cases to denote rate of speed,<sup>64</sup> and thus is defined to mean a speed of a nautical mile in an hour <sup>65</sup>

**Lace.** A term widely used in Cornwall to denote a measure of land equal to one pole <sup>66</sup>

**Litre** A measure of capacity in the metric system, being a cubic decimeter, equal to 61,022 cubic inches, or 2113 American pints, or 176 English pints <sup>67</sup>

**League.** A measure of distance of great antiquity, varying in different countries from about 242 to 46 English statute miles, now used on land chiefly on the continent of Europe, in Spanish America, and in the portion of the United States acquired from Mexico <sup>68</sup> It is sometimes employed as a unit of measure of superficial area, and in Texas land grants a "league" was equal to 4,428 acres <sup>69</sup> A "marine league," in English-speaking countries, is estimated at three miles,<sup>70</sup> three geographical miles or three sea miles <sup>71</sup>

**Mark** A unit of weight, most commonly used in measuring gold and silver <sup>72</sup>

**Metre.** The unit of measure in the metric system of weights and measures. It is a measure of length, being the ten-millionth part of the distance from the equator to the north pole, and equivalent to 39 37 inches From this unit all the other denominations of measure, as well as of weight, are derived <sup>73</sup>

**Metric system** A system of measures for length, surface, weight, and capacity, founded on the metre as a unit. The system originated in France, and was adopted by law there in 1795. It has also been adopted by law in other countries, and is recommended for general use by other governments <sup>74</sup>

**Micron** A unit of measure equal to  $\frac{1}{25000}$  of an inch <sup>75</sup>

**Mile** The word "mile" is defined generally to mean a measure of distance and of surface in the United States, Great Britain, and Ireland, and in all British possessions, remotely derived from the Roman mile, which was about sixteen hundred and twenty English yards <sup>76</sup> The word has two meanings, and may signify a unit of measure on land or it may denote a unit of measure of the sea <sup>77</sup> The statute or English mile was adopted as the standard of land measurement in the 35th year of the reign of Elizabeth, 1593, and measures five thousand two hundred and eighty feet <sup>78</sup> At about the same time that the statute or English mile was adopted as the standard of land measurement, the log came into use in England for measuring distance at sea, and the unit of measurement was variously known as the "marine mile," "sea mile," "geographical mile," or "knot," measuring six thousand and eighty-six and seven-tenths

63. NY—Richard v Haebler, 55 N YS 583, 588, 589, 36 App Div 94

**Similarly defined**

(1) A French measure of weight equal to about 22 pounds avoirdupois

NY—Richard v Haebler, supra.

(2) A French weight equal to 2-306 pounds

NY—Richard v. Haebler, supra

(3) In the new system, one thousand grams, and equal in weight to two pounds five and a half drams

NY—Richard v. Haebler, supra.

64. Me—Rockland, Mt D & S S B Co v Fessenden, 8 A. 550, 551, 79 Me 140

35 C J p 916 note 95

65. New Standard D.

66. Black L D

67. Black L D

68. New Standard D

69. Tex—Hunter v Morse, 49 Tex 219, 220

36 C J p 972 note 58

70. NJ—Bolmer v Edsall, 106 A 646, 650, 90 N J Eq 299

71. Me—Rockland, Mt D & S S B Co v Fessenden, 8 A 550, 552, 79 Me. 140.

72. NY—In re Hess, 198 NYS 573, 120 Misc 372.

73. Black L D

74. Black L D

In the Philippine Islands the metric system was adopted and the prior system of measurement employing the quinon realengo, and its subdivisions of balitas and brazas was prohibited by superior decree of the General Government of May 8, 1861.

Philippine—Romero v Director of Lands, 20 Philippine 119, 125

75 Ky—Coburn v North American Refractories Co, 174 SW 2d 757, 763, 295 Ky 566

76 New Standard D

"The Arabs in the north of Africa consider it a mile when so far as not to be able to distinguish a man from a woman"

US—U S v New Bedford Bridge, CC Mass, 27 F Cas No 15,867, 1 Woodb & M 401, 485

77. Me—Lazell v Boardman, 69 A. 97, 99, 103 Me 292, 13 Ann Cas 673

40 C J p 658 note 44

78 Me—Lazell v Boardman, 69 A. 97, 99, 103 Me 292, 13 Ann Cas. 673

40 C J p 658 note 47.

feet on the sea, on the scale of sixty geographical or sea miles to a degree <sup>79</sup>

*Minute* As a unit of angular measure, a "minute" is the sixtieth part of a degree <sup>80</sup> As a division of time see Time § 2, and in its less precise sense as indicating a small portion, or a short space of time see 58 C J S p 809 notes 51, 53

*Ohm*. Defined in Electricity § 1 b as the unit of resistance.

*Ounce* A weight of various countries and values, originally the twelfth part (uncia) of the Roman pound, in avoirdupois weight, the sixteenth part of a pound; in troy and apothecaries' weight, the twelfth part of a pound <sup>81</sup>

*Pace*. A measure of length containing two feet and a half, being the ordinary length of a step The geometrical pace is five feet long, being the length of two steps, or the whole space passed over by the same foot from one step to another <sup>82</sup>

*Pennyweight*. A Troy weight, equal to twenty-four grains, or one twentieth part of an ounce <sup>83</sup>

*Perch* As a unit of measure, the word "perch" has several different meanings As a measure of length, a perch varies locally in different countries, as in France from eighteen to twenty-two paces, but by statute in Great Britain and the United States it is equal to five and one-half yards, or sixteen and one-half feet, a rod, or pole <sup>84</sup> In square measure a perch is a square rod <sup>85</sup> In measuring

masonry or stone, a perch is usually twenty-four and three-quarters cubic feet (five and one-half yards by one foot by one and one-half feet), but by statute in several states a perch is twenty-five cubic feet, and in a few states it is sixteen and one-half cubic feet <sup>86</sup>

*Picul* A commercial weight, ordinarily one hundred and thirty-three and one-half pounds <sup>87</sup> As used in the Philippine Islands for sugar, a picul was 139 44 pounds <sup>88</sup>

*Pint*. A United States and British dry and liquid measure, equal to one-half a quart or one-eighth of a gallon in British apothecaries' measure divided into twenty fluid ounces, and in the United States into sixteen <sup>89</sup>

*Pocket* A measurement of rice in the amount of one hundred pounds <sup>90</sup>

*Pole*. A linear and surface measure; a perch or rod <sup>91</sup>

*Pound* The word "pound" is the designation of a unit of weight in the system in most common use in this country <sup>92</sup> The symbol "#" means a pound. <sup>93</sup>

*Quart* A measure of capacity both in dry and liquid measure, <sup>94</sup> the quart of dry measure containing sixty-seven and two-tenths cubic inches, <sup>95</sup> the eighth part of a peck, <sup>96</sup> the liquid quart containing fifty-seven and seventy-five hundredths cubic inches, <sup>97</sup> the fourth part of a gallon <sup>98</sup>

79. Me—Lazell v Boardman, supra 40 C J p 658 note 44

80. New Standard D

81. Webster New Int D.

82. Black L D

Otherwise expressed

The pace is measured from the heel of one foot to that of the other The usual length is a yard, or three feet, although sometimes it is 3 3 feet, making five paces to the rod The Roman pace was measured from the point where the heel of one foot left the ground to the point where it descended in the next stride, and was five Roman feet, equal to about 58 1 inches, a thousand such double strides making a mile Such a double step is now called a geometrical pace, reckoned by some at five and by others at 4 6 feet

New Standard D

83. Black L D

84. Webster New Int D

85. Webster New Int D

86. Webster New Int D 48 C J p 809 note 85

87. New Standard D.

88. US—Commissioner of Internal Revenue v Hawaiian Philippine Co, CCA 9, 100 F 2d 988, 990

89. New Standard D

48 C J p 1204 note 27

90. US—Minaville Supply Co v El Campo Rice Mill Co, C A Mo, 181 F 2d 679, 682

91. New Standard D.

92. Cal—Ellsworth v Knowles, 97 P 690, 692, 8 Cal App 630

"Avoirdupois pound" see supra p 538 note 10

Origin

"The old or original English pound was derived from the weight of 7,680 grains of wheat, all taken from the middle of the ears and well dried hence, 'grains' form the lowest fractional parts of a pound This continued to be the standard pound from William the Conqueror to Henry VIII, in whose reign the avoirdupois pound of 7,000 grains gradually came into use, in the reign of Elizabeth this was established by law, and has continued to be the standard The avoirdupois pound of 16 ounces is employed in the United States and in England in the weigh-

ing of all ordinary commercial commodities, the troy pound of 12 ounces, 5,760 grains, or more commonly its fractions, is the measure employed for weighing bullion, jewels, etc The troy pound and ounce are used by United States pharmacists in filling medical prescriptions, while the weights used by those of Great Britain are the imperial or avoirdupois pound, ounce, and grain The standard British pound at present is a piece of platinum preserved in the office of the Exchequer, at the temperature of 62° Fahr A number of authorized duplicates of it have been made and deposited at several institutions"

New Standard D

93. Me—State v Vogl, 99 A 2d 66, 67

94. US—U S v Boak Fish Co, C C Minn, 146 F 104, 105

95. US—U S v Boak Fish Co, supra.

96. Webster New Int D

97. US—U S v Boak Fish Co, C C Minn, 146 F 104, 105.

98. Black L D.

**Quarter** In American land law, a quarter section of land <sup>99</sup>

**Sack** A term which is sometimes used to signify a measure of quantity,<sup>1</sup> a measure of capacity, being the quantity contained, or supposed to be contained, in a sack<sup>2</sup> In the United States the sack is not a fixed measure, but, on the average, is three bushels or a little more<sup>3</sup>

**Second** A unit of angular measure, equal to one-sixtieth of a minute of arc<sup>4</sup> As a division of time see Time § 2, and as a term used to express a short interval of time and not in the precise sense see 79 C J S p 933 note 79

**Section** It is stated *infra* p 545 note 44 that a "township" is a division of territory six miles square, containing thirty-six sections Thus a section of land, as a subdivision of a township, is one mile square, and usually contains six hundred and forty acres<sup>5</sup> Sections are commonly divided into half-sections and quarter-sections<sup>6</sup>

**Square** The word "square," as used to indicate measure or distance, is generally defined to mean a block,<sup>7</sup> a piece of land defined by streets surrounding it,<sup>8</sup> a portion of a city bounded on all sides by streets or avenues,<sup>9</sup> a portion of ground

in a town or city surrounded by streets,<sup>10</sup> or a subdivision of a city or town inclosed by streets,<sup>11</sup> whether occupied by buildings or composed of vacant lots,<sup>12</sup> a subdivision of territory bounded on all sides by principal streets,<sup>13</sup> the territory bounded by four streets<sup>14</sup>

Phrases employing the word "square" in the sense of measurement are set out in the note <sup>15</sup>

**Ton** The word "ton" may be used to express either a ton of weight or a ton of measurement, and in each instance the same word is employed, but in each instance it is used in a sense and with a meaning quite different, and there is no identity, or even similarity, between the two <sup>16</sup>

When used to express weight, a ton is a certain weight in pounds,<sup>17</sup> and the weight may be two thousand pounds,<sup>18</sup> twenty hundredweight, with the hundredweight consisting of one hundred pounds,<sup>19</sup> or it may be two thousand two hundred and forty pounds,<sup>20</sup> twenty hundredweight, with the hundredweight consisting of one hundred and twelve pounds<sup>21</sup> The ton of two thousand pounds is known as the "short" ton,<sup>22</sup> while the ton of two thousand two hundred and forty pounds is known as the "gross"<sup>23</sup> or "long" ton<sup>24</sup> If the ton is

#### 99. Black L D

"Section" as containing 640 acres see *infra* note 5

In government surveys the term is used to designate a square piece of land, as the "southeast" or "northeast" quarter

Cal—McCartney v Dennison, 35 P 766, 767, 101 Cal 252

1. Wash—State v Nunn, 210 P 771, 122 Wash 437

2. Webster New Int D.

3. Webster New Int D.

4. New Standard D

5. Fla—South Florida Farms Co v Goodno, 94 So 672, 675, 84 Fla 532 As a division of public lands see Public Lands § 29

#### Fractional section

Where there is a deficiency in the area of a section so that it does not contain approximately six hundred and forty acres it may properly be called a "fractional section" Fla—South Florida Farms Co v Goodno, 94 So 672, 675, 84 Fla 532

6. Black L D

7. Ala—Mobile v Chapman, 79 So 566, 571, 202 Ala 194 58 CJ p 1310 note 49, p 1311 note 58

"Block" as approximately three hundred feet see *supra* p 538 note 14

8. Mo—Gilsonite Roofing, etc., Co

v St Louis Fair Assoc, 132 SW 657, 660, 211 Mo 589

9. Okl—Missouri, etc, R Co v Tulsa, 145 P 398, 401, 45 Okl 382

10. Mo—Kochitzky v Herbst, 140 SW 925, 929, 160 Mo App 443 58 CJ p 1311 note 52

11. Ala—Mobile v Chapman, 79 So 566, 571, 202 Ala 194

12. Mo—Mobile v Chapman, *supra*, Kochitzky v Herbst, 140 SW 925, 929, 160 Mo App 443

13. Ky—City of Maysville v Maysville, St R & Transfer Co, 108 SW 960, 962, 128 Ky 673 58 CJ p 1311 note 55

14. Ill—Harrison v People, 63 NE 191, 192, 195 Ill 466

#### 15. Phrases

(1) "Square fathom" see *supra* p 539 note 38

(2) "Square yard" see *infra* p 545 note 50

(3) Other phrases see 58 CJ. p 1311 notes 59–61

16. NY—Roberts v Opdyke, 40 NY 259, 252

17. NY—Reck v Phenix Ins Co, 7 NYS 492, 54 Hun 637

18. Cal—Higgins v California Petroleum & Asphalt Co, 52 P 1080, 1081, 120 Cal 629—Higgins v California Petroleum & Asphalt Co, 41 P 1087, 1089, 109 Cal 304 Kiessig v San Diego County, 124 P. 163, 164, 51 Cal App 2d 47

NY—Many v Beekman Iron Co, 9 Paige 188, 195

Pa—Weaver v Fegely, 29 Pa. 27, 70 Am D 151

Harrison, Frazier & Co v Mora, Ona & Co, 8 Pa Co 224, 225

19. Mo—Green v Moffert, 22 Mo. 529, 537

NY—Many v Beekman Iron Co, 9 Paige 188, 195

#### Twenty hundreds make one ton

Pa—Evans v Myers, 25 Pa. 114, 116

20. US—Herr v Tweedie Trading Co, NY, 181 F 483, 486, 487, 104 CCA 231

Cal—Higgins v California Petroleum & Asphalt Co, 52 P 1080, 1081, 120 Cal 629

Kiessig v San Diego County, 124 P 163, 164, 51 Cal App 2d 47 62 CJ p 1080 note 39

#### 21. In commerce

The word "ton" or "tun" is understood to mean twenty hundred gross or twenty hundredweight, each hundred consisting of one hundred and twelve pounds Ky—Helm v Bryant, 11 B Mon 64, 65

22. Cal—Kiessig v San Diego County, 124 P 2d 163, 164, 51 Cal App 2d 47

23. Cal—Kiessig v. San Diego County, *supra*, 28 CJ p 829 note 2

24. US—Heir v Tweedie Trading Co, NY, 181 F 483, 486, 487, 104 CCA. 231.

fixed by statute at two thousand pounds it is sometimes referred to as the "statutory ton."<sup>25</sup>

In nautical terminology and in commerce the word "ton" has several meanings,<sup>26</sup> the term being commonly used to signify the weight or space by which the burden of a ship is estimated.<sup>27</sup> Thus a ton is a unit of internal capacity for ships; one hundred cubic feet (28307 cu. m),—called specifically "register ton."<sup>28</sup> The term is also used to signify a unit approximately equal to the volume of a long ton weight of sea water, used in reckoning the displacement of vessels, especially war vessels; thirty-five cubic feet; called specifically "displacement ton."<sup>29</sup> The word "ton" is also used to signify a unit of volume for freight, approximate-

ly the volume of a ton weight of the particular commodity, called specifically "shipping ton,"<sup>30</sup> and thus it has been said that in measurement a ton is forty cubic feet.<sup>31</sup>

**Tonnage** The term "tonnage" has a variety of meanings,<sup>32</sup> and it may signify the capacity of a ship or vessel<sup>33</sup> or it may mean duties paid on the tonnage of a ship or vessel,<sup>34</sup> such duties commonly being called "tonnage duties."<sup>35</sup>

"Tonnage" is a well-understood commercial term in America,<sup>36</sup> signifying the internal cubic capacity of a vessel<sup>37</sup> in tons of one hundred cubic feet each,<sup>38</sup> the cubical tons or burden of a ship in tons, or the amount of weight which one or several ships will carry,<sup>39</sup> the number of tons bur-

Cal—Higgins v California Petroleum & Asphalt Co, 52 P 1080, 1081, 120 Cal 629

Kiessig v San Diego County, 124 P 2d 163, 164, 51 Cal App 2d 47—  
Hale v Milliken, 90 P 365, 370, 5 Cal App 344

25. Cal—Higgins v California Petroleum & Asphalt Co, 52 P. 1080, 1081, 120 Cal 629

Harrison, Frazier & Co v Mora, Ona & Co, 8 Pa Co 224, 225

26. Cal—Kiessig v San Diego County, 124 P 2d 163, 164, 51 Cal App 2d 47.

"Tons burden" have a technical meaning and connote a measurement peculiar to ships and shipping  
Cal—Kiessig v San Diego County, supra

27. NY—Reck v Phenix Ins Co, 7 NYS 492, 54 Hun 637

28. Cal—Kiessig v San Diego County, 124 P 2d 163, 164, 51 Cal App 2d 47

**As applied to measurement of vessels**

The word "ton," as applied to the measurement of vessels, has a certain definite meaning, well settled by custom and by the navigation laws of the United States, and it means 100 cubic feet of interior space

US—The Thomas Melville, La., 62 F 749, 751, 10 CCA 619

Cal—Kiessig v San Diego County, 124 P 2d 163, 165, 51 Cal App 2d 47.

29. Cal—Kiessig v. San Diego County, supra

30. Cal—Kiessig v. San Diego County, supra.

31. NY—Roberts v Opdyke, 40 N Y 259, 262

**Ton of merchandise** is often reckoned at forty cubic feet, and a ton of timber at forty-two cubic feet  
Cal—Kiessig v. San Diego County,

124 P 2d 163, 164, 51 Cal App 2d 47

32. Cal—Kiessig v San Diego County, 124 P 2d 163, 164, 51 Cal App 2d 47

33. DC—Mayor of Washington v Barnes, 6 DC 230, 232  
SC—Alexander v Wilmington & R R Co, 34 SCL 594, 595

**Capacity to carry cargo**

Mass—Thwing v. Great Western Ins Co, 103 Mass 401, 405, 4 Am R 567

34. DC—Mayor of Washington v Barnes, 6 DC 230, 232  
SC—Alexander v Wilmington & R R Co, 34 SCL 594, 595

**Term formerly applied to merchandise**

"Cowel, in his Law Dictionary, published in 1708, thus defines it 'Tonnage (tonnagium) is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton'"

US—Inman Steamship Co v. Tinker, NY, 94 US 238, 243, 24 L Ed 118

Way v New Jersey Steamboat Co, DCNY, 133 F 188, 192

35. **"Tonnage duties" defined**

(1) Duties on vessels in proportion to their capacity

US—Inman Steamship Co v Tinker, NY, 94 US 238, 243, 24 L Ed 118

Way v New Jersey Steamboat Co, DCNY, 133 F 188, 192

Fla—Vincent v Foss & Crabtree, Inc, 160 So 49, 53, 118 Fla. 717

NJ—Ross v Mayor and Council of Borough of Edgewater, 180 A 866, 873, 115 NJ Law 477.

(2) Duties laid on the carrying capacity of vessels

Pa—Commonwealth v. Philadelphia & R R Co, 62 Pa 286, 297

(3) The vital principle of such tax or duty is that it is imposed,

whatever the subject, solely according to the rule of weights either as to the capacity to carry or the actual weight of the thing itself

Inman Steamship Co v Tinker, NY, 94 US 238, 243, 24 L Ed 118

Way v New Jersey Steamboat Co, DCNY, 133 F 188, 192

NJ—Ross v Mayor and Council of Borough of Edgewater, 180 A 866, 115 NJ Law 477

The right of the federal government and the state governments to impose tonnage duties is treated in Commerce § 124

36. US—Clyde-Mallory Lines v State ex rel State Docks Commission, Ala., 56 SCt 194, 196, 296 US 261, 80 L Ed 215

At the time of the adoption of the constitution "tonnage" was a well-understood commercial term

US—Clyde-Mallory Lines v State ex rel State Docks Commission, supra

37. US—Clyde-Mallory Lines v State ex rel State Docks Commission, supra—Inman Steamship Co v Tinker, NY, 94 US 238, 243, 24 L Ed 118

Way v New Jersey Steamboat Co, CCNY, 133 F 188, 192

**Gross and net tonnage**

In the measurement of vessels, the entire cubic contents of the interior space, numbered in tons, is called the "gross tonnage," and when, from the entire cubic contents of the interior of the vessel, there are deducted the spaces occupied by the crew and by propelling machinery, the remainder, numbered in tons, is called the "net tonnage"

US—The Thomas Melville, La., 62 F 749, 751, 10 CCA 619

38. US—Inman Steamship Co v Tinker, NY, 94 US 238, 243, 24 L Ed 118

Way v New Jersey Steamboat Co, CCNY, 133 F 188, 192.

39. NY—Reck v Phenix Ins Co, 7 NYS 492.

den the ship will carry as estimated and ascertained by the official admeasurement and computation prescribed by the public authority<sup>40</sup> Also the contents of the vessel expressed in tons, each of one hundred cubical feet<sup>41</sup> The word has long been an official term, intended originally to express the burden that a ship would carry, in order that the various dues and customs levied on shipping might be imposed according to the size of the vessel, or rather in proportion to her capability of carrying the burden<sup>42</sup> Hence the word, as applied to a ship, has become almost synonymous with that of size<sup>43</sup>

**Township** In one sense the word "township" signifies a division of territory six miles square, containing thirty-six sections<sup>44</sup> In a different sense, the term signifies a division of a county, and is defined as such in Towns § 3

**Troy** Pertaining to or designating the system of weights (troy weights) commonly used in England and the United States for gold, silver, etc., so named from Troyes in France In this system one pound is equal to twelve ounces, one ounce is equal to twenty pennyweights, and one pennyweight is equal to twenty-four grains The ounce, however, is now preferably divided decimally for weighing bullion The troy pound thus contains five thousand seven hundred sixty grains. The troy pound, or more correctly the troy ounce, is also the basis of apothecaries' weight<sup>45</sup>

**Vara** A Spanish and Portuguese measure of length and surface.<sup>46</sup> As a measure of length, the

standard vara of Mexico is approximately thirty-three inches<sup>47</sup>

**Volt.** Defined as the unit of electromotive force in Electricity § 1 b

**Watt** As a term of electrical measurement see Electricity § 1 b.

**Yard.** A measure of length equalling three feet, or thirty-six inches, the standard of English and American lineal measure<sup>48</sup> The yard is not only a unit of lineal measure; it is also used as a unit of superficial measure, and it is also a unit used to measure a solid<sup>49</sup> When applied to a surface, a "square yard" is a unit of superficial measure,<sup>50</sup> and is equivalent to nine square feet.<sup>51</sup> The term "cubic yard" is well known, and means twenty-seven cubic feet<sup>52</sup>

## § 2. Regulation

As shown infra §§ 3-4, the regulation of weights and measures generally or with respect to the sale of particular commodities is a proper subject of legislative action, and within the police power of the state

Examine Pocket Parts for later cases.

## § 3. — Of Weights and Measures

The regulation of weights and measures is a proper and necessary subject of legislative action, and a valid exercise of the police power

Experience in all ages of the world has shown that the regulation of weights and measures is a

40 US—The Craigendoran, D CN Y, 31 F 87, 88

Cal—Kiessig v San Diego County, 124 P 2d 163, 166, 51 Cal App 2d 47

41. US—Wheeling, P & C Transp Co v City of Wheeling, W Va, 99 US 273, 284, 25 L Ed 412

42. US—Wheeling, P & C Transp Co v. City of Wheeling, W Va, 99 US 273, 284, 25 L Ed 412—In re State Tonnage Tax Cases, Ala., 12 Wall 204, 225, 20 L Ed 370

### Similarly expressed

According to the British Merchant Shipping Acts and the Suez and Panama Canal Regulations, "tonnage" is a measurement of the capacity or volume of a ship expressed in units of one hundred cubic feet—one unit of such volume being termed a ton measurement

Cal—Kiessig v. San Diego County, 124 P 2d 163, 164, 165, 51 Cal App. 2d 47.

"The method of measuring vessels of American registry to deter-

mine their cargo capacity is minutely described in RS 4153, codified in USCA, title 46, 'Shipping,' section 77 ('Tonnage')

Cal—Kiessig v San Diego County, supra See Shipping § 1 et seq

"The purpose of measuring a ship is twofold—primarily to form a basis for the payment of the various charges which are levied by Port and Harbour authorities, by Light-house Boards and for pilotage services, secondly for use in the registration or identification of the ship itself"

Cal—Kiessig v. San Diego County, supra

43. US—In re State Tonnage Tax Cases, Ala., 12 Wall 204, 225, 20 L Ed 370

44. Black L D

As a division of public lands see Public Lands § 29

45. Webster New Int D.

46. Webster New Int D.

47 US—U S v Perot, La., 98 US 428, 430, 431, 25 L Ed 251 66 CJ p 424 note 76

48. Webster New Int D

49. Ky—Louisville v. Hyatt, 2 B. Mon 177, 182, 36 Am D 594

50. Ky—Louisville v Hyatt, supra.

### Signifying cubic measure

"When applied to a solid, it [square yard] might and generally would import solid measure or a yard every way, according to the subject of measurement, and, therefore, as an excavation of unascertained extent in depth was the subject matter of the contract in this case, the 'square yard,' though abstractly it would mean a superficial yard, may have been, and probably was, intended to mean, synonymously with cubic yard, the square yard or yard every way of the solid contents of the excavated ground"

Ky—Louisville v Hyatt, supra

51. New Standard D, sub verbo "Measure"

52 Pa—Corcoran v. Chess, 131 Pa. 356, 18 A 876, 877.

proper, and even necessary, subject of legislative action<sup>53</sup> Under the constitution of the United States, art 1, § 8, congress is given power to establish uniform weights and measures. In the absence of an exercise of this power, while there is some authority to the contrary,<sup>54</sup> it has very generally been held that the several states may, for themselves, regulate weights and measures<sup>55</sup> Under a resolution of the senate adopted May 29, 1830, standards of weights and measures were prepared for the use of the customhouses<sup>56</sup> and by joint resolution adopted June 14, 1836, the secretary of the treasury was directed to deliver to the governor of each state of the Union a complete set of these weights and measures to the end that a uniform standard of weights and measures might be established throughout the United States,<sup>57</sup> and in some of them they have been adopted and continued in force as the standards of the state<sup>58</sup> Some of the states have exercised the power of regulating weights and measures by standards established by statute<sup>59</sup> or by the common law of the state<sup>60</sup> Legislation adopting and compelling the use of a uniform system of weights and measures is in the nature of police regulation<sup>61</sup> The enactment thereof is a valid exercise of the police power,<sup>62</sup> and such statutes are not unconstitutional<sup>63</sup> So it is within the police power of the state to require a dealer to weigh his commodity in the presence of the buyer,<sup>64</sup> or to forbid the sale of a table of values to be made part of a self-computing scale to be used in retailing meat, where such table, in cases

of certain weights and prices, indicates erroneously at a too high figure the value of an article sold,<sup>65</sup> and the danger of short weight is sufficient to warrant regulation of automatic vending machines<sup>66</sup> As the statutes have for their purpose the protection of the purchasing public by the elimination of deceptive methods in the marketing of products, they are to be liberally construed<sup>67</sup>

#### § 4. — Of Sales of Particular Commodities

- a In general
- b. Weighing, measuring, or surveying by public officer
- c Sale by weight
- d. Sale in quantities of designated weights or sizes
- e Standard containers
- f Furnishing ticket or certificate showing weight

##### a. In General

Reasonable regulations for retailers of particular commodities in respect of weights and measures may be made, and labels or tags of a certain description may be required to be affixed to containers or certain commodities on a sale thereof

Reasonable regulations for retailers of particular commodities in respect of weights and measures may be made,<sup>68</sup> and labels or tags of a certain description may be required to be affixed to packages or containers of certain commodities on a sale thereof<sup>69</sup>

53. Iowa—Harris v Rutledge, 19 Iowa 388 87 AmD 441  
68 CJ p 152 notes 66-71

54. US—The Miantinomi, CC Pa., 17 F Cas No 9521, 3 Wall Jr 46

55. Pa—Weaver v Fegely & Bro., 29 Pa. 27, 30, 70 AmD 151  
68 CJ p 152 note 73.

56. DC—Thompson v District of Columbia, 21 AppDC 395

Ky—Caldwell, Hunter & Co v Dawson, 4 Metc 121

57. US—Ceballos v United States, NY, 146 F 380, 76 CCA 652  
68 CJ p 153 note 76

58. US—Ceballos v United States, supra  
68 CJ. p 153 note 77.

59. US—Dwight & Lloyd Sintering Co v American Ore Reclamation Co., CCAN Y., 263 F 315, certiorari denied 40 S Ct 393, 252 US 582, 64 L Ed 727  
68 CJ p 153 note 79

60. Pa—Weaver v Fegely & Bro., 29 Pa. 27, 70 AmD 151  
68 CJ p 153 note 80

Regulation by city see Municipal Corporations § 259 b.

61. Ariz—Corpus Juris cited in State v De Witt, 65 P 2d 659, 660, 49 Ariz 197  
68 CJ p 153 note 81

62. Ark—McLean v State, 98 SW 729, 81 Ark 304, 126 AmSR 1037, 11 Ann Cas 72, affirmed 29 S Ct 206, 211 US 539, 53 L Ed 315  
68 CJ p 153 note 82

63. US—Hauge v City of Chicago, Ill, 57 S Ct 241, 299 US 387, 81 L Ed 297

Ariz—Corpus Juris cited in State v De Witt, 65 P 2d 659, 660, 49 Ariz 197

Iowa—Huss v City of Creston, 278 NW 196, 224 Iowa 844, 116 AL R 242  
68 CJ p 153 notes 83-86.

64. Cal—Cresci v Brock, App., 225 P 2d 685, hearing dismissed

65. Mass—Moneyweight Scale Co v McBride, 85 NE 870, 199 Mass 503, error dismissed 32 S Ct 534, 223 US 749, 56 L Ed 641

66. Ill—Larson v City of Rockford, 21 NE 2d 396, 371 Ill 441

67. Cal—Ex parte Fujii, 207 P 537, 189 Cal 55  
68 CJ p 153 note 88

68. US—May Coal & Grain Co v Kansas City, DCMo., 10 F Supp 792  
NY—Marquardt v Castoro, 68 N YS 2d 327

Regulation held unreasonable and discriminatory  
NY—Marquardt v Castoro, supra

Statute held intended to be of general application  
NY—People v Rueffer, 6 NYS 2d 103, 168 Misc 45, affirmed 18 N E 2d 633, 279 N.Y. 389

69. NY—People v Armour & Co., 162 NYS 621, 176 App Div 161.  
68 CJ. p 155 note 22

The provision requiring weight of coal to be shown on side of truck transporting coal, but excepting deliveries which were part of a carload delivery to a single purchaser did not apply to transportation of coal by dealer direct to his own yard, since such transaction was in the same category as a delivery of

### b. Weighing, Measuring, or Surveying by Public Officer

Under some statutes commodities therein enumerated are required to be weighed, measured, or surveyed by officers provided for that purpose, and such statutes are constitutional

Under some statutes enacted for the protection of the public in business dealings, commodities therein enumerated, such as coal, coke, cordwood, lumber, and shingles are required to be weighed, measured, or surveyed by officers provided for that purpose, and, for a violation thereof, penalties are imposed on the seller or buyer, or on both<sup>70</sup> Such provisions are constitutional,<sup>71</sup> at least as applied to sales directly to a consumer,<sup>72</sup> being a valid exercise of the police power<sup>73</sup>

### c. Sale by Weight

Under some statutes designated commodities are re-

quired to be sold by weight, and such statutes are not unconstitutional.

Under some statutes designated commodities are required to be sold by weight, and violation thereof is a criminal offense or a ground for imposing penalties<sup>74</sup> A statute requiring poultry retailers to sell table dressed poultry at a weight and price to be determined at the time of sale is not unconstitutional<sup>75</sup>

*Deduction by reason of rule of board of trade*  
It has been held that a statute providing that every sale of commodities therein designated shall be made on the basis of the actual weight thereof and making criminal any deduction by the purchaser from the actual weight, under a claim of right by reason of any custom or rule of a board of trade, is a valid exercise of the police power of the state,<sup>76</sup> and not

an entire carload sold to one purchaser

NY—Marquardt v. Castoro, 68 NYS 2d 327

#### Substantial compliance

Where 151½ pounds of rope was sold in container which was marked "154 lbs gross—3 lbs tare" and which bore tax which recited "gross weight, 154 lbs", there was substantial compliance with statute penalizing sale of a commodity in a container without indicating the net contents of the container plainly and conspicuously on the outside or top

NY—People, on Complaint of Goldsmith, v Masback Hardware Co, 22 NYS 2d 987, 175 Misc 177

#### Forfeiture proceedings

In action by state to forfeit concentrated commercial feeding stuff on the ground that it was without a registered brand and that sacks containing it had no tags or labels specifying the number of net pounds, name and address of vendor or distributor, and a guaranteed analysis of the contents, as required by statute, dismissal of the action was not an abuse of discretion under the evidence

Wash—State v Nelson, 207 P 2d 667, 33 Wash 2d 816

70. NC—State v Briggs, 165 SE 339, 203 NC 158  
68 CJ p 153 note 90

Validity of sale as affected by non-compliance with statutes see Contracts § 206; Sales § 66 b

**Statute held to relate to sales only and not to labor expended**

Me—Bruce v Sidelinger, 19 A 824, 82 Me 318  
68 CJ p 154 note 91.

71. W.Va.—State v. Peel Splint

Coal Co, 15 SE 1000, 36 W Va 802, 17 LRA 385

68 CJ p 153 note 95

72 NY—Marquardt v Castoro, 68 NYS 2d 327

**Provision held inapplicable to coal purchased and transported by dealer directly to his own yard**  
NY—Marquardt v Castoro, supra

73 US—Pittsburgh & S Coal Co v State of Louisiana, 15 S Ct 459, 156 US 590, 39 LEd 544  
W Va—State v Peel Splint Coal Co, 15 SE 1000, 36 W Va 802, 17 LRA 385

74. Ala—Woodard v State, 2 So 2d 330, 30 Ala App 144, followed in 3 So 2d 530, first case, 30 Ala App 223, certiorari denied 3 So 2d 530, second case, 241 Ala 557, certiorari denied 3 So 2d 530, third case, 241 Ala 556

68 CJ p 154 note 96  
Quantity to be delivered on sale by weight or measure see Sales § 173

#### Statutes reconciled

Statute providing for punishment of "whoever knowingly sells and delivers any coal, except at the weight and measure prescribed by law" was not repealed by subsequently enacted provision which denounces as a misdemeanor the sale of any property by a false weight, and hence short sales of coal are governed by former statute

Ala—Woodard v State, 3 So 2d 530 second case, 241 Ala 557, certiorari denied 3 So 2d 530, third case, 241 Ala 556—Woodard v State, 3 So 2d 530, third case, 241 Ala 556 certiorari denied 3 So 2d 530, second case, 241 Ala 557

75. Cal—Cresci v Brock, App, 225 P 2d 685, hearing dismissed

**Statute held not unconstitutional as against objections**

That it requires change in cus-

tomary way of conducting retail poultry business, that statute discriminates between retailer and seller of other foods, including meat products, or between retailer and wholesalers selling direct to customers, that statute prohibits sale other than by live weight, dressed weight, or table dressed weight, that it requires retailers to weigh package at time of sale, that statute permits cleaning and dismembering of table dressed poultry in absence of customer, that purpose of statute was protection of customer so that he might know exact price paid for poultry delivered to him, that legislature has not seen fit to require weight of meat and fish to be determined after removal of inedible portions, that other sections of Business and Professions Code deal with selling at false weights, and that purpose of act is to make detection of false weighing possible  
Cal—Cresci v Brock, supra

#### General welfare of public

A statute which ensures that a person may know the exact weight of the commodity he is receiving is one which comes within the legislative power to enact laws to protect public health, safety, morals, comfort, convenience or general welfare

Cal—Cresci v Brock, supra

#### Showing of prior false weighing unnecessary

Legislature can determine the possibility of providing for protection of customer against probability of false weighing and it is not necessary that there be a showing that retailers have actually engaged in any false weighing

Cal—Cresci v Brock, supra

76. US—House v Mayes, Mo, 31 S Ct 234, 219 US. 270, 55 LEd 213.



a violation of the organic law.<sup>77</sup> Such a statute, however, has no application to a deduction and withholding of payment in a settlement between a buyer and seller on a sale all the legal constituents of which were consummated in another state, although the commodity sold at no time left the state in which the statute was in force.<sup>78</sup>

*Sale by weight, dry measure, or numerical count*

A statute providing that all dry commodities, when sold in bulk or from bulk, shall be sold by weight, dry measure, or numerical count is not violated by the sale of chickens at an established price per chicken.<sup>79</sup> A statute providing that all fruits, vegetables, nuts, meats, fish, game, flour, corn meal, and chopped feed shall be sold by avoirdupois weight or numerical count, unless by agreement in writing of all contracting parties, and making any sale or offer to sell in violation of the statute a misdemeanor, is an unreasonable and burdensome obligation on persons engaged in a lawful business and is an unwarranted exercise of the police power<sup>80</sup> and in violation of a constitutional provision declaring that all men have certain inalienable rights, among which are those of enjoying and defending life and liberty, and acquiring, possessing, and protecting property.<sup>81</sup>

**d. Sale in Quantities of Designated Weights or Sizes**

Statutes or regulations may require certain commodities to be sold in quantities, the sizes or weights of which are therein prescribed, but arbitrary discrimination cannot be permitted.

Statutes or regulations may require certain commodities to be sold in quantities, the sizes or weights of which are therein prescribed,<sup>82</sup> but arbitrary discrimination not bearing a reasonable relation to the prevention of profiteering cannot be permitted.<sup>83</sup>

A statute which fixes the weight of a loaf of bread and makes it an offense to sell bread other than by the whole, half, or quarter loaf containing the full weight required unless labeled with the true weight is not unreasonable or oppressive<sup>84</sup> and is a valid exercise of the police power,<sup>85</sup> but, while the police power of the state may be exerted to protect purchasers from imposition by sale of short-weight loaves,<sup>86</sup> this power cannot be exerted in such a way as arbitrarily to interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions on them.<sup>87</sup> Thus, the fixing of a maximum weight

77. US—House v Mayes, supra

78. Kan—In re Martin, 101 P 1006, 80 Kan 245

79. Pa—Commonwealth v Great Atlantic & Pacific Tea Co., 35 Pa Dist & Co 288

**Statute strictly construed**

Pa—Commonwealth v Great Atlantic & Pacific Tea Co., supra

80. Ohio—Ex parte Steube, 110 N E 250, 91 Ohio St 135, L R A 1916E 377

81. Ohio—Ex parte Steube, supra

82. US—Armour & Co v State of North Dakota, N. D., 36 S Ct 440, 240 US 510, 60 L Ed 771

**Statute as not invalid**

Regulation of interstate commerce see Commerce § 86

Under due process clause see Constitutional Law § 674 b

**Lard**

US—Armour & Co v State of North Dakota, supra

**Ice**

NY—Devito v Moss, 9 N.Y.S.2d 730, 170 Misc 170

**Solid fuel**

(1) Provision requiring sale of solid fuel, with certain exceptions, in quantities of one ton or multiples thereof is not unconstitutional as an arbitrary interference with fundamental rights

NY—People, on Complaint of Lif-ton, v. Capitol Fuels of Queens,

11 N.Y.S.2d 22, 170 Misc 763, affirmed People v Capitol Fuels of Queens, 23 N.E.2d 547, 281 N.Y. 728

(2) Statutory language penalizing sale and delivery of less than two thousand pounds to ton of solid fuel, is sufficient to cover attempt or offer to sell or deliver or start to deliver solid fuel of less than such weight to ton

NY—People, on Complaint of Weis-ent, v. Mishkin, 11 N.Y.S.2d 77, 170 Misc 889, affirmed People v Mishkin, 24 N.E.2d 22, 281 N.Y. 765

(3) The guilt of defendant under statute providing punishment for sale or delivery, etc., of less than two thousand pounds by weight to the ton of solid fuel, may be predicated either on the first part of the section or the second part thereof, which makes knowledge on the part of defendant of a delivery of a lesser amount of fuel than the quantity he represents he is selling or delivering essential to liability thereunder

NY—People v J T Reynolds Corp., 33 N.Y.S.2d 314, 178 Misc 138, affirmed 43 N.E.2d 830, 289 N.Y. 598

(4) Sale or delivery of, attempt or offer to sell or deliver, or starting out or causing to be started out for delivery of, less than two thousand pounds to ton of solid fuel is offense *malum prohibitum* under

statute, so that accused's knowledge of his guilt thereof need not be proved

NY—People, on Complaint of Weis-ent, v. Mishkin, 11 N.Y.S.2d 77, 170 Misc 889, affirmed People v Mishkin, 24 N.E.2d 22, 281 N.Y. 765

**Statute construed in conformity with provision from which derived, and read without comma inadvertently inserted**

NY—People, on Complaint of Lif-ton, v. Capitol Fuels of Queens, 6 N.Y.S.2d 243, 168 Misc 912, affirmed 11 N.Y.S.2d 22, 170 Misc 763, affirmed People v Capitol Fuels of Queens, 23 N.E.2d 547, 281 N.Y. 728

83. NY—Devito v Moss, 9 N.Y.S.2d 730, 170 Misc 170

**Provision held not unconstitutional for discrimination**

NY—People, on Complaint of Lif-ton, v. Capitol Fuels of Queens, 11 N.Y.S.2d 22, 170 Misc 763, affirmed People v Capitol Fuels of Queens, 23 N.E.2d 547, 281 N.Y. 728

84. Kan—State v. McCool, 111 P. 477, 83 Kan 428

85. Kan—State v. McCool, supra

86. US—Jay Burns Baking Co v Bryan, Neb., 44 S Ct 412, 264 U S 504, 68 L Ed 813, 32 ALR 661

87. US—Jay Burns Baking Co v. Bryan, supra.

for each size or class of loaves of bread is not unreasonable or unconstitutional,<sup>88</sup> unless the maximum complained of is unnecessary and arbitrary,<sup>89</sup> and an act establishing a standard loaf of bread and authorizing a designated administrative officer of the state to prescribe reasonable tolerances or variations in excess of, but not under, the specified weights, and the time for which the weights shall be maintained is not invalid.<sup>90</sup> Tolerances, when established under such a statute, are made the legal tolerances of the state by force of statute and remain in force until changed or repealed by competent authority.<sup>91</sup> Where such statute provided that it does not apply to "fancy breads," but does not define the quoted term, the act is not unconstitutional although impliedly authorizing a designated officer to ascertain what is covered by the term.<sup>92</sup> Such a statute, although imposing fines for violations thereof, is not objectionable as prescribing punishment in the absence of fault.<sup>93</sup>

*Who are liable.* A corporation as well as a natural person is a "person" within the meaning of these statutes.<sup>94</sup>

#### e. Standard Containers

Congress has power to fix a standard of sizes for hampers and baskets for different uses, and a state has power to prescribe standard containers for particular commodities; but failure of a statute prescribing standard capacities for containers expressly to permit manufacture of containers of a certain capacity does not prohibit it.

Under the constitutional provision authorizing

congress to establish uniform weights and measures, congress has power to fix a standard of sizes for hampers and baskets for different uses, such as fruits and vegetables.<sup>95</sup> A state has the power to prescribe standard containers for particular commodities, such as raspberries and strawberries,<sup>96</sup> citrus fruits,<sup>97</sup> or milk,<sup>98</sup> and the legislature may itself or through a subordinate administrative body determine the necessity of providing such containers and whether they should be made mandatory.<sup>99</sup> Accordingly, such administrative body may make a valid order requiring the use of hallowcks of specified dimensions<sup>1</sup> or containers of a standard maximum capacity,<sup>2</sup> but failure of a statute prescribing standard capacities for containers expressly to permit manufacture for sale of containers of a certain capacity does not prohibit it,<sup>3</sup> and a statute declaring that bottles used for the sale of milk and cream shall be of specified capacities does not prohibit use of bottles of a different capacity when the measure is in fact true.<sup>4</sup> Words in a statute prohibiting the manufacture of hampers not complying with the statute setting out standard specifications must be given the meaning naturally attributable to them, with respect to the connection in which the words are used.<sup>5</sup>

There are no constructive offenses provided by such statute, and before a manufacturer may be punished, it must appear that his case is plainly within the statute.<sup>6</sup> An indictment charging the manufacture and sale of two-quart metal hampers for fruits and vegetables contrary to standard spec-

88 US—P F Petersen Baking Co v Bryan, Neb., 54 S Ct 277, 290 US 570, 78 L Ed 505, 90 A LR 1285

89 US—Jay Burns Baking Co v Bryan, Neb., 44 S Ct 412, 264 US 504, 68 L Ed 813, 32 ALR 661

90. US—P F Petersen Baking Co v Bryan, Neb., 54 S Ct 277, 290 US 570, 78 L Ed 505, 90 ALR 1285

91. Vt—State v Gladstone, 22 A. 2d 490, 112 Vt 233

92 US—P F Petersen Baking Co v Bryan, Neb., 54 S Ct 277, 290 US 570, 78 L Ed 505, 90 ALR 1285.

93 US—P. F Petersen Baking Co v Bryan, supra.

94. Kan—State v. Belle Springs Creamery Co., 111 P 474, 83 Kan 389, LRA 1915D 515

95. US—U S v. Porter, D C N Y, 12 F Supp 234.

Use of  
False weights or measures see infra § 9

Unauthorized or unsealed weights or measures see infra § 2.

96. US—Pacific States Box & Basket Co v Gehlar, D C Or., 9 F Supp 341, affirmed Pacific States Box & Basket Co v White, 56 S Ct 159, 296 US 176, 80 L Ed 138, 101 ALR 853

97. US—Snively Groves v Florida Citrus Commission, D C Fla., 23 F Supp 600

Held proper exercise of police power  
US—Snively Groves v Florida Citrus Commission, supra

98. Ariz—State v De Witt, 65 P 2d 659, 49 Ariz 197.

Statute held not unconstitutional  
Ariz—State v De Witt, supra

Statute held not impliedly repealed by statutes enacted to insure cleanliness and sanitation in handling milk and milk products  
Ariz—State v De Witt, supra

99. US—Pacific States Box & Basket Co v. White, Or., 56 S Ct 159, 296 US 176, 80 L Ed 138, 101 ALR 853.

1. US—Pacific States Box & Basket Co. v. White, supra.

Order made without special findings of fact held valid

US—Pacific States Box & Basket Co v White, supra

2 US—Snively Groves v Florida Citrus Commission, D C Fla., 23 F Supp 600

3 US—U S v Resnick, Pa., 57 S Ct 126, 299 US 207, 81 L Ed 127

4. Wis—State ex rel State Dept of Agr v Land O'Lakes Ice Cream Co., 18 NW 2d 325, 247 Wis 26

5. US—U S v Resnick, Pa., 57 S Ct 126, 299 US. 207, 81 L Ed 127

6. US—U S v Resnick, supra.

Acts held not punishable

Manufacture for sale and sale of two-quart metal hampers for fruits and vegetables is not punishable as a crime under statute prescribing standard capacities for containers, since statute prescribes standard capacities for no containers of capacity less than four quarts  
US—U. S. v. Resnick, supra.

ifications prescribed by statute must be construed to charge merely the manufacture and sale of hampers each of a capacity of two quarts, one-sixteenth of a bushel.<sup>7</sup> An indictment charging violation of statutes fixing the capacities of bottles used for the sale of milk by using a one-third quart bottle for the sale of milk to a named person has been held in conformity with the statutes as to form and substance.<sup>8</sup>

A libel against a quantity of hampers for fruits and vegetables alleging that the hampers are not standard containers for such commodities as provided by statute, and that they were being sold and being offered for sale, is not subject to exception because of failure to allege that they were sold or offered for sale in interstate commerce,<sup>9</sup> or as failing to show that the hampers were sold or offered for sale for use as containers for fruits and vegetables.<sup>10</sup>

#### f. Furnishing Ticket or Certificate Showing Weight

Under some statutes requiring the seller of coal to deliver a ticket or certificate showing the weight to the purchaser, a noncompliance is an offense, or a penalty is imposed. Such statutes are intended to protect purchasers, and being penal, must be strictly construed.

Under some statutes requiring the seller of coal to deliver a ticket or certificate showing the weight to the purchaser a noncompliance with this requirement is an offense<sup>11</sup> or a penalty is imposed therefor,<sup>12</sup> and under some statutes where coal of several sizes is carried in separate bins or compartments on the truck, a single weight certificate giv-

ing the gross weight of the load is not sufficient.<sup>13</sup> A statute providing that no person shall deliver, or cause to be delivered, or to be started out for delivery any solid fuel without weight certificates as therein provided does not prohibit transportation or possession of solid fuel without accompanying weight certificates, and the offense provided for in the statute cannot, therefore, occur in a county through which a coal truck merely passes after starting out for delivery and before actual delivery,<sup>14</sup> although it seems that the weight must be taken and the certificate furnished at the beginning of the act of transportation or delivery.<sup>15</sup> The conduct prohibited by the statute is the transfer of physical control over solid fuel from the seller to the buyer unless a certificate is presented, regardless of the geographical point at which the transfer occurs.<sup>16</sup> The statutes are intended to protect purchasers,<sup>17</sup> and should be construed so as to render enforcement possible and practical,<sup>18</sup> but, being penal statutes, strict construction is required.<sup>19</sup> Where the title of the statute is "An act to regulate the sale and delivery of solid fuel," it does not apply to the delivery of coal as a gift.<sup>20</sup> The statutes apply not only where the sale is made to the ultimate consumer, but also where made to a retail dealer.<sup>21</sup> Failure to deliver the ticket for the coal is a violation of the statute, although full weight was delivered.<sup>22</sup> Where the statute providing for the penalty does not prescribe the mode in which it shall be recovered, it may be recovered in an action of tort;<sup>23</sup> and it is not necessary to allege that the act was done against the form of the stat-

7. US—U S v Resnick, *supra*  
8. Ariz—State v De Witt, 65 P 2d 659, 49 Ariz 197

9. US—U S v Porter, DCNY, 12 F Supp 234

10. US—U S v. Porter, *supra*

11. NY—People v Delaware, L & W R Co, 143 NYS 159, 81 Misc 253, 30 NYC Cr 32

Pa.—Commonwealth v. Kuhn, 90 Pittsb Leg J 585

#### Delivery tickets

(1) Provision requiring that loads of solid fuel must be accompanied by delivery tickets was intended to protect ultimate purchaser and did not apply to transportation of coal by dealer direct to his own yard  
NY—Marquardt v Castoro, 68 NY S 2d 327

(2) Provision requiring delivery tickets for solid fuel to be issued in triplicate, serially numbered, and used only in consecutive order, is designed to prevent fraud and cheating and should be sustained unless

hardship thereof is out of proportion to public welfare, sought to be conserved

NY—People, on Complaint of Spencer, v Capitol Fuels of Queens, 11 NYS 2d 26, 170 Misc 769

(3) Such provision prohibits use of tickets other than in consecutive order, even though the tickets are issued serially as to each of separate delivery ticket machines which are used

NY—People on Complaint of Spencer v Capitol Fuels of Queens, *supra*

12. Mass—Lobby v. Downey, 5 Allen 299

NY—City of New York v Bruns, 51 NYS 1120, 23 Misc 635

13. Pa.—Commonwealth v. Marchel, 35 Pa Dist & Co 162

14. Pa.—Commonwealth v. Snyder, 44 Pa Dist & Co 264

15. Pa.—Commonwealth v. Fregel, 41 Pa Dist & Co. 551.

16. Pa.—Commonwealth v. Chalfant,

40 A 2d 153, 156 Pa Super 307, affirmed 42 A 2d 587, 352 Pa 193.

#### Removal in buyer's own vehicle

Offense prohibited is committed where buyer purchases solid fuel at seller's premises and removes it in buyer's own vehicle

Pa.—Commonwealth v. Chalfant, *supra*

17. Pa.—Commonwealth v. Chalfant, *supra*

Commonwealth v. Fregel, 41 Pa Dist & Co. 551.

18. Pa.—Commonwealth v Fregel, *supra*

19. Pa.—Commonwealth v. Snyder, 44 Pa Dist & Co 264

20. Pa.—Commonwealth v Troanovitch, 25 Pa Dist & Co 471

21. NY—People v Delaware, L & W R Co, 143 NYS 159, 160, 81 Misc 253, 30 NYC Cr 32  
68 CJ p 154 note 5

22. NY—City of New York v Bruns, 51 NYS 1120, 23 Misc 635

23. Mass—Levy v. Gowdy, 2 Allen 320.

ute.<sup>24</sup> In a prosecution for delivering coal unaccompanied by the certificate, testimony as to the dealers' understanding of what is meant by the term "delivery" as used in the statute is irrelevant, since the meaning attached to the word by the legislature, and not by the dealers, is the lodestar of construction.<sup>25</sup>

## § 5. Inspectors or Sealers of Weights and Measures

Under some statutes provision is made for inspectors or sealers of weights and measures to protect the public by seeing that the measure in weight and bulk by which sales and purchases are made corresponds with the standard, and such statutes are controlling as to the powers and duties of the inspectors and sealers.

Under some statutes provision is made for inspectors or sealers of weights and measures to protect the public by seeing that the measure in weight and bulk by which sales and purchases are made corresponds with the standard.<sup>26</sup> Such statutes are controlling as to the powers to be exercised by the inspectors or sealers<sup>27</sup> and the duties which they are required to fulfill.<sup>28</sup> Although under some statutes inspectors and sealers are public officers,<sup>29</sup> under others they are regarded as mere employees,<sup>30</sup> and they are state or local officers or employees, as the statutes may provide.<sup>31</sup>

*Appointment, removal, revocation, and discontinuance of office* The officers or tribunals or bodies by whom the appointment shall be made is a matter of local statutory regulation.<sup>32</sup> Inspectors

or sealers may be removed peremptorily without cause by the appointing power where it is so provided by organic law,<sup>33</sup> or by the legislation not in contravention of organic law,<sup>34</sup> but the rule is otherwise where the statute provides that they shall serve continuously during good behavior and shall be removed only for good and sufficient cause after an opportunity for a hearing is given.<sup>35</sup> They may be discharged for cause in accordance with statutory provision therefor,<sup>36</sup> and where power of removal for cause is vested in the governor of the state, he is the sole judge of the existence of the cause for removal and his action of removal is final and irreversible by the courts.<sup>37</sup> The status of one duly appointed inspector by a mayor is not affected by subsequent legislation vesting the power of appointment in another in the absence of clear and unambiguous direction that prior appointments were invalidated and revoked,<sup>38</sup> and where by statute it is made optional with a mayor whether or not there shall be a sealer of weights and measures, and the term of the latter is made coextensive with the mayor appointing him, the office may be discontinued by the mayor by refusing to name a successor and by removing a holdover appointee of a previous administration,<sup>39</sup> and this is so notwithstanding the council has fixed the compensation and bond of the officer and that he has passed a noncompetitive civil service examination.<sup>40</sup>

*Compensation.* The legislature may fix the compensation or fees to be paid for the services of in-

24. Mass—Levy v Gowdy, supra.  
25. Pa—Commonwealth v Chalfant, 40 A 2d 153, 156 Pa Super 307, affirmed 42 A 2d 587, 352 Pa 193.

26. NY—People v City of Rochester, 45 Hun 102.  
68 C J p 156 note 24.

Provision by municipality see Municipal Corporations § 259 b.

27. NY—Ford v New York Cent, etc, R Co, 53 NYS 764, 33 App Div 474.

68 C J p 156 note 26.

28. NY—People v Rochester, 45 Hun 102.

68 C J p 156 note 27.

29. W Va—Hatfield v Mingo County Court, 92 SE 245, 80 W Va. 165.

30. Pa—Emhardt v. Wilson, 20 Pa Dist & Co 608.

*Inspector whose duties are all ministerial and performed under the direction and supervision of the state commissioner of weights and measures has been held to be a mere employee, and not a public officer.*  
Ind—Freyermuth v. State ex rel Burns, 2 NE 2d 399, 210 Ind 235.

31. Pa—Emhardt v. Wilson, 20 Pa Dist & Co 608.  
68 C J p 156 note 30.

32. Ind—Board of Com'rs of Knox County v Ritterskamp, 36 NE 2d 969, 110 Ind App 436.

Pa—Hoover v Zemo, Com Pl, 7 Fay LJ 161.

68 C J. p 156 note 31.

33. Pa—Commonwealth v Hoyt, 98 A 782, 254 Pa 45.

68 C J p 156 note 32.

34. Ind—Board of Com'rs of Knox County v Ritterskamp, 36 NE 2d 969, 110 Ind App 436.

NJ—Bowby v Board of Chosen Freeholders of Morris County, 85 A 229, 83 NJ Law 346, affirmed 91 A 1068, 85 NJ Law 725.

35. Ind—Freyermuth v State ex rel Burns, 2 NE 2d 399, 210 Ind 235.

*Statute held not unconstitutional.*  
Ind—Freyermuth v State ex rel Burns, supra.

*Statute held not expressly or impliedly repealed by act providing for appointment and removal of city officers and employees by mayor.*

Ind—Freyermuth v. State ex rel Burns, supra.

36. Ind—Board of Com'rs of Knox County v Ritterskamp, 36 NE 2d 969, 110 Ind App 436.

*Purpose of statute providing for discharge of a county inspector of weights and measures by the state commissioner of weights and measures is to provide a method of discharge by the state commissioner if the county has an inspector who is failing to do his duty and if the county board of commissioners refuses to act.*

Ind—Board of Com'rs of Knox County v Ritterskamp, supra.

37. La—State v. Lamantia, 33 La Ann 446.  
68 C J p 157 note 34.

38. NY—City of New York v Valley Coal Co, 213 NYS 384, 126 Misc 323.

39. Ohio—State v. Minshall, 10 Ohio App 86.

40. Ohio—State v. Minshall, supra.

spectors or sealers,<sup>41</sup> or delegate this power to a municipality,<sup>42</sup> and may provide that the fees shall be paid by those at whose request the services are performed,<sup>43</sup> and, in the absence of constitutional restrictions, may authorize them to recover fees from persons for whom unsolicited services are rendered pursuant to statute,<sup>44</sup> or delegate the power to municipalities so to provide,<sup>45</sup> but it will not be inferred that such power has been delegated to a municipality in the absence of an express statutory provision.<sup>46</sup> Such fees must be reasonable.<sup>47</sup> In accordance with elementary rules with respect to fees of officers, these officers, although they entered on the office and performed all its duties, are not entitled to compensation where no compensation had been provided by law for such office,<sup>48</sup> and, where a local statute relating to inspectors has been repealed by a statute creating a uniform and state-wide system of inspection, there can be no recovery for services which are of no benefit and made useless by the subsequent legislation.<sup>49</sup>

*Review or control of action by courts.* If a sealer of weights and measures in deciding on the correctness of scales should proceed on erroneous principles of law the decision could be quashed on certiorari,<sup>50</sup> and in some cases he may be directed to take specific action,<sup>51</sup> but the courts have no jurisdiction to take from him the duty of deciding the

question on authority given him by the statutes on the ground that he threatens to come to a wrong conclusion.<sup>52</sup>

## § 6. Public Weighers and Measurers

- a In general
- b. Exclusiveness of right given public weigher
- c Weights as evidence

### a. In General

To carry out the provisions of statutes providing for weighing and measuring designated commodities, public weighmasters and measurers are provided for by statutes which are upheld as being within the police power of the state, their purpose being to get fair weights for all parties concerned and to protect the public.

To carry out the provisions of statutes providing for weighing and measuring designated commodities, public weighmasters and measurers are provided for by statutes<sup>53</sup> which are upheld as being within the police power of the state.<sup>54</sup> The purpose of these statutes is not to create a remunerative office,<sup>55</sup> but the purpose thereof is to get fair weights for all parties concerned,<sup>56</sup> and to protect the public from fraud and imposition,<sup>57</sup> as much by an official certificate as by competent weighing.<sup>58</sup>

*Privileges and right to fees.* The right of the public weigher to compensation is statutory,<sup>59</sup> and no civil personal liability therefor exists under a

41. NY—Ford v New York Cent. etc., R Co., 53 NYS 764, 33 App Div 474

68 CJ p 157 note 38

42. Cal—Milliken v Meyers, 144 P 321, 25 Cal App 510

43. NY—Fausnaugh v Rogers, 71 NYS 125, 62 App Div 535

44. NY—Ford v New York Cent & H R R Co., 53 NYS 764, 33 App Div. 474

68 CJ p 157 note 41

45. NY—Ford v New York Cent & H R R Co., supra.

46. NY—Fausnaugh v Rogers, 71 NYS 125, 62 App Div 535—Ford v New York Cent & H R R Co., 53 NYS 764, 33 App Div 474

47. DC—Thompson v District of Columbia, 21 App DC 395

68 CJ p 157 note 44

48. Pa—Nowling v Newell, 65 Pa Super 67

68 CJ p 157 note 46

49. Pa—Murphy v Atlantic Refining Co., 74 Pa Super 166

50. Mass—Moneyweight Scale Co v McBride, 85 NE 870, 199 Mass 508

51. Mass—Moneyweight Scale Co v McBride, supra.

52. Mass—Moneyweight Scale Co v McBride, supra.

53. Mo—State v Goffee, 91 SW 486, 192 Mo 670

68 CJ p 157 note 52

Municipal regulations see Municipal Corporations § 259 b

### Recommendation for appointment

Under act providing that directors of New Orleans Cotton Exchange must recommend cotton samplers, weighers, and inspectors to board of commissioners of port of New Orleans, and that directors are warrantors of those recommended, directors have implied right to withdraw a recommendation at will

La.—Walsh v New Orleans Cotton Exchange, 177 So 68, 188 La 338

### Abolition of office

(1) Resolution of county board of freeholders abolishing positions of assistant superintendents of weights and measures in interest of economy was not invalid on ground that positions were created by act of legislature and that there was no statutory authority for abolishing them, since positions were authorized by legislature, rather than created

NJ—Marks v Monmouth County, 180 A 215, 13 NJ Misc 560.

(2) Assistant superintendents of weights and measures, seeking to set aside resolution of county board of freeholders abolishing such positions, had burden to prove contention that action was taken for political reasons

NJ—Marks v. Monmouth County, supra.

54. SC—Hay Cotton Co v McLeod, 193 SE 438, 185 SC 127.

55. Okl—Inland Compress Co. v. Lee, 147 P 775, 47 Okl 101

56. SC—Hay Cotton Co v McLeod, 193 SE 438, 185 SC 127.

68 CJ p 158 note 55

57. Minn—State v Inland Coal & Dock Co., 293 NW 611, 208 Minn. 216

### Purpose is to protect both seller and public

SC—Hay Cotton Co v McLeod, 193 SE 438, 185 SC 127

58. Pa—Commonwealth v. Chalfant, 40 A 2d 153, 156 Pa Super 307, affirmed 42 A 2d 587, 352 Pa. 193

59. NC—Moose v Barrett, 27 SE 2d 532, 223 NC 524.

statute providing criminal sanctions for willful and wanton failure to comply with the statute<sup>60</sup> One not elected to office as a public weigher of a city pursuant to the provisions of the statute covering that vicinity cannot claim the privileges conferred by this statute where he was elected under a statute void as being special legislation<sup>61</sup> A public weigher who uses scales which have not been tested and sealed as provided for by statute is not entitled to a fee fixed by law for weighing the commodity,<sup>62</sup> and this is so although his inability to comply with the statute was due to the default of the secretary of state and the clerk of the county court<sup>63</sup> Under a statute empowering the state to enforce regulations relating to the weighing of coal shipped in carload lots except coal shipped for one's own use or consumption, the state is not entitled to recover fees for weighing coal loaded for transportation at the dock of the shipper and unloaded at the shipper's retail yard in another city.<sup>64</sup>

**Care and skill required** Public weighers hold themselves out to the public as skilled and careful in their calling, and in assuming the task of weighing, assume a duty to weigh carefully for the benefit of all whose conduct is to be governed, and if they fail in this duty they are liable in resulting damages.<sup>65</sup> One who is not in a public position as a weighmaster, bound to weigh for all persons, but who has scales designed to weigh heavy articles, and does such weighing for fees, for those who desire it, is bound to use only reasonable diligence to know that his scales are correct and reasonable care to avoid mistakes in using them.<sup>66</sup>

**Liability for loss of commodities weighed** It has been held that a delivery of commodities to a public weigher is not a bailment either gratuitous or otherwise, and if, for his own convenience, the owner leaves the commodities on the platform where they

are weighed and they are lost the weigher is not liable to the owner for such loss<sup>67</sup> According to other authority also holding the weigher not liable, the doctrine of bailment will not be distended so as to cover the period of the bailment other than from the time the commodity was delivered for weighing and its placement, after being weighed, on the platform with other goods of the dealer.<sup>68</sup>

**Duration of term, and removal of deputy.** Where the law provides for no particular duration of the term of a deputy public weigher, his appointment is for a term coextensive with the tenure of office of the weigher who appointed him, unless the appointment is revoked or otherwise nullified,<sup>69</sup> and the power of the weigher to appoint his deputy impliedly gives him the power to remove the deputy at will.<sup>70</sup>

**Liability of weigher for acts of deputy.** Where it is so provided by statute, public weighers and their bondsmen are liable for the errors or misconduct in office of deputy weighers resulting in any injury<sup>71</sup>

#### b. Exclusiveness of Right Given Public Weigher

Although there is some authority to the contrary, it is held that the legislature may validly enact statutes providing that only public weighers shall weigh designated commodities and receive compensation therefor, and issue certificates of weights, but the authority for the prohibition or abridgement of the business of private weighing must rest in some positive, valid, and legal inhibition.

While there is some authority to the contrary,<sup>72</sup> it has been held that the legislature may validly enact statutes providing that only public weighers shall weigh designated commodities and receive compensation therefor,<sup>73</sup> and issue certificates of weights,<sup>74</sup> and make it a misdemeanor for one other than a public weigher to weigh such commodities<sup>75</sup> and issue certificates of weights.<sup>76</sup> Legislation so providing is valid,<sup>77</sup> being within the police power of the state,<sup>78</sup> and not an unreasonable or arbitrary exer-

60. NC—Moose v Barrett, supra.  
Amount due weigher held not debt  
NC—Moose v Barrett, supra

61. SC—Barfield v. Stevens Mercantile Co., 67 SE 158, 85 SC 186

62. Ark.—Petty v Lyons, 171 SW 112, 115 Ark 372

63. Ark.—Petty v. Lyons, supra.

64. Minn.—State v Inland Coal & Dock Co., 293 NW. 611, 208 Minn 216

65. NY—Glanzer v. Shephard, 135 NE 275, 233 NY. 236, 23 ALR 1425

68 CJ p 158 note 62

66. Mich—McGeorge v. Walker, 31 NW. 601, 65 Mich 5.

67. NC—North State Cotton Co v Wilson, 74 SE 884, 159 NC 141  
68 CJ p 158 note 66

68. SC—Hay Cotton Co v McLeod, 193 SE 438, 185 SC 127

69. Tex—Findley v Calloway, Civ App, 246 SW 681

70. Tex—Findley v Calloway, supra  
68 CJ p 158 note 68

71. Tex—Findley v Calloway, supra

72. Okl—Lockhart v Anderson, 162 P 946, 62 Okl 209  
68 CJ p 158 note 70

73. US—Merchants' Exchange of St Louis v State of Missouri, 39 SCt 114, 248 US 365, 63 LEd 300

68 CJ p 158 note 71.

74. US—Merchants' Exchange of St Louis v State of Missouri, supra

75. US—Merchants' Exchange of St Louis v State of Missouri, supra.  
Ark—Petty v State, 143 SW 1067, 102 Ark 170

76. US—Merchants' Exchange of St Louis v State of Missouri, 39 SCt 114, 248 US. 365, 63 LEd 300

77. US—Merchants' Exchange of St Louis v State of Missouri, supra  
Miss—Planters' Compress Ass'n v. Hanes, 52 Miss 469

78. Miss—Gaines v Coates, 51 Miss. 335

cise of discretion,<sup>79</sup> but inasmuch as the business of private weighing is a legitimate vocation and falls within those ordinary occupations which a citizen is privileged to follow as an inalienable right subject only to valid exercise of the police power,<sup>80</sup> the authority for its prohibition or abridgment cannot be implied,<sup>81</sup> or inferred from the repeal of a statutory proviso permitting it,<sup>82</sup> but must rest in some positive and valid and legal inhibition.<sup>83</sup> It follows then that whether the right of a public weigher is exclusive is to be determined by the language and intent of the legislature.<sup>84</sup>

### c. Weights as Evidence

Statutes which attempt to make conclusive a finding of fact as to the weights by a public weighmaster are unconstitutional and void, but the legislature may give to the act of the weigher a high character as evidence and may give to official certificates of weights the force of prima facie evidence.

Statutes which attempt to make conclusive a finding of fact as to the weights by a public weighmaster are unconstitutional and void,<sup>85</sup> nevertheless, a legislature has the right to give to the act of the weigher in weighing commodities a high character as evidence,<sup>86</sup> and may give to official certificates of weights the force of prima facie evidence,<sup>87</sup> or may provide that the finding of the weighmaster can be impeached only when the party complaining was himself free from fault or negligence, and when it is demonstrated by clear, strong, and satisfactory evidence that there was, in fact, a substantial mistake in the weighing which was the result of fraud, bad faith, or negligence,<sup>88</sup> and in so doing they violate no constitutional provision.<sup>89</sup> Nevertheless, where official certificates are given the force of prima facie evidence, the owner of the commodity weighed should be given an opportunity to refute by showing weights thereof made by him before or after it was sent to, or put in, a public warehouse,<sup>90</sup> and, although a statute relating to

public weighers provides for the reweighing of any commodity when doubt or differences arise as to the correctness of the weight as shown by the weigher's certificate, the remedy so provided for correcting the error in weight is not the exclusive remedy when the party seeking a correction had no reason to doubt the correctness of the certificate in time to avail himself of such method, and like other instruments, the certificate may be attacked on the ground of fraud or mistake.<sup>91</sup>

### § 7. — Penalties and Criminal Liabilities for Violation of Statutes

Persons not public weighers, as well as public weighers, may be subject to penalties or criminally liable for violation of statutes providing for public weighers.

It has been said that although individuals are not prohibited by statute from weighing commodities for hire, if one not appointed a public weigher assumes to act officially he is intruding in the office, and renders himself liable to the penalty prescribed for doing so,<sup>92</sup> and, under the statutes so providing, a dealer, speculator, agent, or employee of any firm or corporation engaged in the sale or purchase of any commodity named in the statutes who weighs such commodity for the public and charges a fee therefor is liable to the public weigher or his deputy for a penalty<sup>93</sup> recoverable in a civil action in any court of competent jurisdiction.<sup>94</sup>

In an action by a public weigher to collect the penalty provided for by the statutes, however, it is necessary to allege and prove that the person engaged in weighing held himself out as the official public weigher or official deputy,<sup>95</sup> and that he was a dealer or speculator, agent, or employee of a firm or corporation engaged in the sale or purchase of the commodities enumerated in the statutes.<sup>96</sup> If the evidence fails to establish the foregoing facts, it is insufficient to sustain a verdict for plaintiff.<sup>97</sup>

79. U.S.—*Merchants' Exchange of St. Louis v. State of Missouri*, 39 S Ct 114, 248 U.S. 365, 63 L Ed 300.

80. Tex.—*Paschal v. Inman*, 157 S W 1158, 106 Tex 128.

81. N.J.—*Hoffman v. Jersey City*, 34 N.J. Law 172.

82. Tex.—*Paschal v. Inman*, 157 S W 1158, 106 Tex 128.

83. Tex.—*Paschal v. Inman*, supra.

84. Mo.—*State v. Merchants' Exchange of St. Louis*, 190 S W 903, 269 Mo 346, Ann Cas 1917E 871, affirmed 39 S Ct 114, 248 U.S. 365, 63 L Ed 300.

68 C.J. p 159 note 83.

85. Minn.—*Vega S S Co v. Consol-*

*idated Elevator Co.*, 77 NW 973, 75 Minn 308, 74 Am S R 484, 43 L R A 843.

68 C.J. p 160 note 85.

86. Minn.—*Vega S S Co v. Consolidated Elevator Co.*, supra.

87. Mo.—*State v. Goffe*, 91 S W 486, 192 Mo 670.

88. Minn.—*Vega S S Co v. Consolidated Elevator Co.*, 77 NW 973, 75 Minn 308, 74 Am S R 484, 43 L R A 843.

89. Mo.—*State v. Goffe*, 91 S W 486, 192 Mo 670.

90. Mo.—*State v. Merchants' Exchange of St. Louis*, 190 S W 903, 269 Mo 346, Ann Cas 1917E 871.

91. Cal.—*Johnson v. Kvale*, 271 P 379, 94 Cal App 424.

92. N.J.—*Hoffman v. Jersey City*, 34 N.J. Law 172.

93. Okl.—*Interstate Compress Co. v. Colley*, 211 P 413, 88 Okl 42—*Snyder Co-Op Ass'n v. Brown*, 172 P 789, 70 Okl 13.

94. Okl.—*Snyder Co-Op Ass'n v. Brown*, supra.

95. Okl.—*Interstate Compress Co. v. Colley*, 211 P 413, 88 Okl 42.

96. Okl.—*Interstate Compress Co. v. Colley*, supra.

97. Okl.—*Interstate Compress Co. v. Colley*, supra.  
68 C.J. p 161 note 1.

Under a statute providing that any duly elected cotton weigher shall receive certain fees for his services, and that any person other than the elected cotton weigher who shall weigh any cotton marketed in the town where the cotton weigher keeps his scales shall be guilty of a misdemeanor, an indictment alleging that a designated person was a duly elected, qualified, and acting cotton weigher for the county, and having his scales in the town for weighing cotton and that defendant knowing these facts unlawfully did weigh cotton sold in the town, sufficiently states an offense.<sup>98</sup> It is not necessary to allege further that the public cotton weigher had prepared a convenient place, easy of access to the public, for the performance of his duties, and that he had provided a pair of scales which had been tested as required by law.<sup>99</sup>

**Public weighers.** A statute providing that public weighers shall give slips either in writing or printing to every purchaser of coal when not in bags or packages showing the gross, tare, and net weight of the coal when delivered, and making a violation thereof a misdemeanor, a noncompliance with the statutory requirement by the weigher makes him punishable for a misdemeanor.<sup>1</sup> Under some statutes the weighmaster is guilty of a violation if he fails to weigh separately the coal in each compartment of a truck having several compartments.<sup>2</sup> Where the statute makes it unlawful for a weighmaster to issue a false or incorrect weight certificate, incorrectness connotes more than inaccuracy in what is stated and includes incompleteness as well,<sup>3</sup> but a conviction for violating the provision cannot be sustained where there is no evidence as to the form of the original certificate, but only as to the form of a triplicate copy kept by the weighmaster.<sup>4</sup> Furthermore, a weighmaster will not be found guilty of violating the provision because he increased the tare weight to make an allowance for the accumulation

of snow and moisture where there was no attempt to dispute the facts or show the possibility of fraud in the practice.<sup>5</sup> General rules as to the evidence apply in proceedings against licensed weighmasters for fraudulently weighing and issuing a delivery ticket for more than the actual weight.<sup>6</sup>

### § 8. Use of Unauthorized or Unsealed Weights or Measures

Statutes providing penalties for the use of other than standard weights and measures or weights and measures not stamped or sealed are enacted to prevent fraud or imposition; and such statutes, being penal, are not to be extended beyond their terms.

To prevent fraud or imposition statutes have been enacted providing penalties for the use of other than standard weights and measures<sup>7</sup> or weights and measures not stamped or sealed.<sup>8</sup> Such statutes are penal and are not to be extended beyond their terms.<sup>9</sup> By some statutes these penalties are confined to the use of weights and measures after the sealer has demanded to test them and has been refused,<sup>10</sup> or when they are found to be incorrect and stamped "condemned,"<sup>11</sup> by others, the penalties imposed are held to be enforceable, although the local authorities failed to give the notice prescribed by statute of the time when the standards were obtained by them.<sup>12</sup> Ordinarily, statutes requiring inspection, or sealing, or stamping of weights and measures apply only to those persons who use them in making sales of, or in buying, commodities,<sup>13</sup> and they do not apply to persons or corporations who keep them for their individual and private use,<sup>14</sup> or to the maker, vendor, or proprietor of weights and measures kept in stock for sale.<sup>15</sup>

**Selling or exposing for sale; what constitutes.** Where a customer of defendant picked up a box of berries and handed the cashier the price thereof and took away the box, the transaction is a sale within a statute making it an offense to use a measure not

98. Ark.—Petty v State, 143 SW 1067, 102 Ark 170

99. Ark.—Petty v State, supra

1. Me.—MacHatton v. Dufresne, 116 A. 449, 121 Me. 221.

2. Pa.—Commonwealth ex rel v Dyshel, 42 Pa Dist & Co 331.

3. Pa.—Commonwealth ex rel. v Dyshel, supra

4. Pa.—Commonwealth ex rel v. Dyshel, supra.

5. Pa.—Commonwealth ex rel. v Dyshel, supra

6. Evidence held sufficient

(1) To sustain conviction of weighmaster for issuance of incorrect weight certificate.

Pa.—Commonwealth ex rel. v Dyshel, supra

(2) To show beyond reasonable doubt that weighmaster had guilty knowledge that load weighed less than amount stated in ticket NY—People, on Complaint of Weis-ent, v Mishkin, 11 NYS 2d 77, 170 Misc 889, affirmed People v Mishkin, 24 NE 2d 22, 281 NY 765

7. La.—State v Cognevich, 50 So 439, 124 La 414  
68 C J p 161 note 6

Standard containers see supra § 5 e

8. NY—De Hoff v Aspegren, 166 NYS 1019  
68 C J p 161 note 7.

9. Ga.—Southwestern R. Co v. Cohen, 49 Ga 627

10. Mass.—Eaton v. Kegan, 114 Mass 433

68 C J p 161 note 9

11. Mass.—Eaton v Kegan, supra—Ritchie v Boynton, 114 Mass 431

12. Ga.—Finch v Barclay, 13 SE 566, 87 Ga 393  
68 C J p 161 note 12.

13. Minn.—Northwestern Elevator Co v Great Northern R Co, 141 NW 298, 121 Minn 321  
68 C J p 161 note 13

14. Minn.—Northwestern Elevator Co v Great Northern R Co, supra  
68 C J p 162 note 14

15. Pa.—Stolle v. Gabel, 14 Phila. 616  
68 C J p 162 note 15.



in conformity with the statutory requirements,<sup>16</sup> and keeping turnips in boxes used as measures is an exposing for sale by measure within the meaning of a provision making it unlawful "to expose for sale" by measure not sealed<sup>17</sup>

*Weights on unsealed scales as evidence* While, as shown in Contracts § 206, sales which contravene statutes which require weights and measures to be inspected and sealed by the proper officers are void, the fact that the scales on which a shipper weighed grain for shipment to himself were not tested or sealed as provided by statute does not prevent the use of the weights in evidence on an issue between the shipper and carrier as to the quantity shipped, since one may use his own unsealed scales, for purposes of his own, without offending statutes of the character under consideration<sup>18</sup>

*Confiscation of unauthorized measures* A state may enact and enforce legislation authorizing the confiscation of measures not in conformity with the standards prescribed<sup>19</sup>

*Indictment and information* In a prosecution for violation of a statute providing that the state superintendent of weights and measures shall establish tolerances and specifications for commercial weighing and establish a net weight of any commodity and prescribe such tolerances therefor as he may in his best judgment deem necessary for the protection of the public, and that any person violating such standards or tolerances shall be guilty of a misdemeanor the information must allege that tolerances or specifications concerning the commodity sold by defendant had been established by the superintendent of weights and measures at the time the unlawful act was charged to have been committed<sup>20</sup>

## § 9. Use of False Weights or Measures

### a In general

### b Elements and requisites of offense

### c. Indictment or complaint, variance between allegations and proof

### d. Evidence

### e Trial and judgment

#### a. In General

Selling by false weights and measures was an offense at common law, and the use of false weights and measures may be made an offense under statutes, and in the latter case, the common-law offense is merged in the statutory act, and the punishment prescribed by the statute is the only one that can be inflicted.

Selling by false weights and measures was, at common law, an indictable offense,<sup>21</sup> because it was one which affected the public,<sup>22</sup> and amounted to a deception against which common care and prudence are not sufficient to guard.<sup>23</sup> The use of false weights and measures may also be an offense under statutes,<sup>24</sup> the purpose of which is to require the use of weights and measures which themselves correctly express their value so that recourse need be had only to such weights and measures in order to determine the correct quantity weighed or measured,<sup>25</sup> and to enforce honest dealing by punishing frauds<sup>26</sup> Where the use of false weights and measures is prohibited and made punishable by statute, the common-law offense is merged in the statutory act,<sup>27</sup> and the punishment prescribed by the statute is the only one that can be inflicted<sup>28</sup> Merely saying in a statute, however, that a bottle which does not comply with statutory requirements as to markings and capacity is a false measure cannot make it so, nor can declaring that one using such a bottle that is in fact a correct measure is guilty of using a false measure make one so guilty.<sup>29</sup>

A mere private imposition without the use of false weights, measures, or tokens, by which one is defrauded of his property, is a civil injury, and an indictment cannot be supported at common law as for a public offense<sup>30</sup>

*Defenses* It is not a defense to a prosecution for using incorrect scales in selling commodities that the scales got out of balance because of the pans getting mixed up after being cleaned.<sup>31</sup>

16. Wis—Peeters v. State, 142 N W 181, 154 Wis 111

17. Ohio—Gates v City of Cleveland, 11 Ohio NP, NS, 545 68 C.J. p 162 note 17

18. Minn—Northwestern Elevator Co v Great Northern R Co, 141 N W 298, 121 Minn 321 68 C.J. p 162 note 20

19. Ohio—Eppinger v City of Cincinnati, 16 Ohio NP, NS, 257

20. Tex—Carson v State, 232 S W 807, 89 Tex Cr 556

21. DC—District of Columbia v Gant, 28 App DC 185 68 C.J. p 162 note 23

22. DC—District of Columbia v Gant, supra

23. DC—District of Columbia v Gant, supra.

24. Philippine—United States v Vicente, 35 Philippine 623 68 C.J. p 162 note 26

25. Wis—City of Milwaukee v Locher & Scheffrin Co, 159 N W 815, 164 Wis 167

26. NY—People v. Visconti, 136 N E 330, 234 NY 165

27. NY—People v. Fish, Sheld 537, 4 Park Cr 206

68 C.J. p 163 note 29.

28. Ky—Commonwealth v. Ramsey, 68 S.W 1098, 24 Ky L 492

29. Wis—State ex rel State Dept. of Agr v Land O'Lakes Cream Co, 13 N W 2d 325, 247 Wis 26 Standard containers generally see supra § 4 e.

30. DC—District of Columbia v. Gant, 28 App DC 185 Mass—Commonwealth v. Warren, 6 Mass 72

31. NY—New York v. Biffe, 91 N. Y S 737

Puerto Rico—Ortiz v. Munoz, 19 Puerto Rico 809.

### b. Elements and Requisites of Offense

At common law and under some statutes a fraudulent intent is necessary to constitute the offense of using false weights and measures, and, depending on the language of the statute, other matters may or may not be necessary elements.

To constitute the offense of using false weights or measures at common law a fraudulent intent was necessary,<sup>32</sup> and it is also an element of the statutory offense where the statute, in describing the act made punishable, uses the words, "with intent to defraud,"<sup>33</sup> or "with knowledge,"<sup>34</sup> or "knowingly"<sup>35</sup> On the other hand, it has been held that, where the statute creating the offense does not contain these words or words of like import, fraudulent intent is not an element of the offense,<sup>36</sup> but there is authority to the contrary<sup>37</sup>

*Fraud or injury* Where the statute penalizes one who injures or defrauds another by knowingly using false weights or measures, a person does not commit the offense unless he injures or defrauds another by the corrupt act,<sup>38</sup> and a person does not injure or defraud another unless that other suffers a detriment<sup>39</sup> Detriment may, however, be suffered through acceptance of the commodity with a promise, express or implied, to pay for such commodity as well as by immediate payment on delivery<sup>40</sup>

*Giving of short weight.* Where it is provided that any person who in weighing uses any scale or balance which shall be out of order or incorrect it is not necessary to constitute the offense that short weights were in fact given, it being sufficient for a conviction that the scales were incorrect<sup>41</sup>

*Number of acts necessary* Under a statute prohibiting all uses of false weights and measures, proof of a single instance of such use is sufficient to

warrant a conviction<sup>42</sup> It is not necessary to establish customary delinquency before the penalty provided by the statute can attach<sup>43</sup>

*Benefit to defendant* It is not essential to a conviction that any benefit should have resulted to defendant from the act charged.<sup>44</sup>

### c. Indictment or Complaint; Variance between Allegations and Proof

An indictment or complaint for the use of false weights and measures must charge every material ingredient of the offense, and a material variance between the pleadings and proof is fatal to a conviction.

An indictment or complaint for the use of false weights and measures must charge every material ingredient of the offense<sup>45</sup> It must be alleged that defendant used false weights<sup>46</sup> or measures<sup>47</sup> Although knowledge and intent need not be alleged where it is not a necessary element of the state's case,<sup>48</sup> where knowledge and intent is an element of the offense, it must be alleged that defendant knew that the weights were false,<sup>49</sup> and it must be alleged that the use of the false measure was with "intent to defraud" where the statute uses these words as descriptive of the act made punishable<sup>50</sup> If the offense is made a felony by statute, it must be alleged that it was feloniously committed,<sup>51</sup> and the names of the persons to whom the sales were made must be given, it not being sufficient to charge a sale to "divers persons."<sup>52</sup> When the offense is defined by the statute, it is usually sufficient to charge its commission in the language of the statute<sup>53</sup>

*Variance between pleadings and proof.* A material variance between the pleadings and proof in prosecutions under these statutes is fatal to a conviction<sup>54</sup>

32. Ind—Blanchard v. State, 29 NE 783, 3 Ind App 395  
68 C J p 163 note 33

33. Tenn—Rugg v State, 210 SW 630, 141 Tenn 362

34. N Y—People v Visconti, 136 N. E 330, 234 N Y 165.

35. Ind—Blanchard v State, 29 N E 783, 3 Ind App 395

36. Ohio—State v Weisberg, 55 N E 2d 870, 74 Ohio App 91  
68 C J p 163 note 37

37. Ky—Commonwealth v Ramsey, 68 S W 1098, 24 Ky L 492.  
68 C J p 163 note 38.

38. N Y—People v Berman, 16 N E 2d 384, 278 N Y 408

39. N Y—People v. Berman, supra.

40. N Y.—People v. Berman, supra.

41. N Y—City of New York v International Provision Co., 129 N Y S 212, 144 App Div. 290.

42. Wis—City of Milwaukee v Locher & Scheffrin Co., 159 NW 815, 164 Wis 167

43. Wis—City of Milwaukee v Locher & Scheffrin Co., supra.

44. Puerto Rico—People v Marquez Bros., 29 Puerto Rico 671

45. Iowa—State v Jamison, 81 N W 594, 110 Iowa 337.  
68 C J p 164 note 45

Complaint held sufficient although not stating the amount of tolerance, where it alleged that the shortage in the weight used was above the largest tolerance established for weights of the same kind as the weight referred to in the complaint  
Puerto Rico—People v Pagan, 36 Puerto Rico 463

46. Iowa—State v Jamison, 81 N. W 594, 110 Iowa 337.  
68 C J p 164 note 46.

47. Wis—State ex rel State Dept of Agr v Land O'Lakes Ice Cream Co., 18 NW 2d 325, 247 Wis 26

48. Ohio—State v Weisberg, 55 N. E 2d 870, 74 Ohio App 91

49. Ky—Commonwealth v. Ramsey, 68 S W 1098, 24 Ky L 492—O'Bannon v Commonwealth, 15 Ky L 654

50. Tenn—Rugg v State, 210 S W. 630, 141 Tenn 362  
68 C J p 164 note 48

51. N Y—People v. Fish, Sheld 537, 4 Park Cr 206.

52. N Y—People v Fish, supra.  
Tenn—State v Woodson, 5 Humphr. 55.

53. N C—State v. Perry, 50 N.C 252.

54. N C—State v Nixon, 50 N C 257.  
68 C J p 164 note 54.

d. Evidence

In prosecutions for using false weights and measures, relevant, material, and competent evidence is admissible, and the general rules relating to the weight and sufficiency of the evidence in criminal cases apply.

In a prosecution for using false weights a comparison with the official standard is not indispensable for the purpose of determining whether the weight is correct, although such a test would be conclusive,<sup>55</sup> but the falsity of the weight may be established by the persons who have compared it with a standard known to be correct<sup>56</sup> For the purpose of showing guilty knowledge, evidence that the scales in question were inaccurate on previous occasions is admissible,<sup>57</sup> and for this purpose it is also competent to prove that, at or about the time alleged in the complaint, defendant used, and caused to be used, in the weighing of stock and grain a loaded weight, heavier than correct weights kept by him<sup>58</sup>

Rules governing the weight and sufficiency of evidence in criminal prosecutions generally apply in prosecutions based on statutes of the character under consideration<sup>59</sup> To justify a conviction of using a false measure, there must be proof that the receptacle used was in fact a false measure<sup>60</sup>

e. Trial and Judgment

In a prosecution for using false weights, whether the weight is false is a question of fact, and the case should be submitted to the jury under proper instructions A judgment imposing a fine in excess of that permitted by the statute will be modified.

In a prosecution for using false weights, whether the weight is false is a question of fact.<sup>61</sup> The case should be submitted to the jury under proper instructions of the court,<sup>62</sup> and where the falsity of the weight is admitted, an instruction assuming its falsity is not prejudicial<sup>63</sup> A judgment imposing a fine in excess of that permitted by the statute will be modified to comply with the statute<sup>64</sup>

§ 10. Having in Possession False Weights or Measures

Statutes may make it a penal offense merely to have false weights or measures in one's possession, or authorize the forfeiture or confiscation thereof, and if fraudulent intent is an element of the offense, an indictment for the offense must allege that the act was done knowingly and willfully.

Statutes may make it a penal offense merely to have false weights or measures in one's possession,<sup>65</sup> or authorize the forfeiture or confiscation thereof<sup>66</sup> If fraudulent intent is an element of the offense of keeping a false weight for the purpose of buying or selling therewith, an indictment for the offense must allege that the act was done knowingly and willfully<sup>67</sup>

§ 11. Fraudulent Alteration of Weights or Measures

In a prosecution for fraudulently altering a weight or measure after it is officially sealed, the burden is on the prosecution to show that such alteration was made after the weight or measure was inspected and sealed.

In a prosecution under a statute making it an offense for any person, with a fraudulent intent, to alter any weight or measure after it is officially sealed, the burden is on the prosecution to show that such alteration was made after the weight or measure was inspected and sealed.<sup>68</sup> It is not a question of what might have been done by defendant, but what he actually did<sup>69</sup>

§ 12. Selling or Offering to Sell Less than Quantity Represented

- a In general
- b Elements of offense
- c Indictment, information, or complaint
- d. Evidence

a. In General

Under some statutes which are constitutional and

55. Iowa—State v. Frolick, 64 NW 264, 95 Iowa 424

56. Iowa—State v. Frolick, supra.

57. Iowa—State v. Jamison, 81 NW 594, 110 Iowa 337

58. Neb—State v. Kellner, 35 N.W. 891, 22 Neb 668

59. Evidence held sufficient to sustain a conviction  
NY—People v. Fisher-Beer Co., 46 NYS 2d 40, 267 App Div 838  
68 CJ p 164 note 62 [a]

Evidence held insufficient

(1) To sustain a conviction  
Tex—Sacks v. State, 204 SW 430, 83 Tex Cr 560  
63 CJ p 164 note 62 [b].

(2) To establish that defendant was guilty of lack of ordinary care  
Tex—Smith v. State, 121 SW 2d 347, 135 Tex Cr 488

60. Wis—State ex rel. State Dept. of Agr. v. Land O'Lakes Ice Cream Co., 18 NW 2d 325, 247 Wis 26

61. Iowa—State v. Frolick, 64 NW 264, 95 Iowa 424

62. Tex—Smith v. State, 121 SW 2d 347, 135 Tex Cr 488.

Requested instruction held properly refused

Requested charge that intent was a necessary ingredient and that jury must acquit unless they found that defendant had such intent  
Tex—Smith v. State, supra.

63. Iowa—State v. Frolick, 64 NW 264, 95 Iowa 424

64. NY—People v. Fisher-Beer Co., 46 NYS 2d 40, 267 App Div 838

65. Ky—Commonwealth v. Ramsey, 68 SW 1098, 24 Ky L 492

66. Ohio—Williams v. Sandles, 112 NE 206, 93 Ohio St 92, Ann Cas 1918D 154, error dismissed 38 S Ct 222, 245 US 680, 62 L Ed 544  
68 CJ p 164 note 67

67. Ky—Commonwealth v. Ramsey, 68 SW 1098, 24 Ky L 492

68. Philippine—United States v. Co. Chicuyco, 22 Philippine 336.

69. Philippine—United States v. Co. Chicuyco, supra.

which, being penal, must be strictly construed, it is an offense to sell or offer for sale designated articles or commodities in quantity less than represented.

Under some statutes it is an offense to sell or offer for sale designated articles or commodities in quantity less than represented.<sup>70</sup> Such statutes are constitutional.<sup>71</sup> They are obviously broader in their scope than those which make selling, or offering, or attempting to sell by the use of false weights and measures an offense, and cover any case where an actual misrepresentation is made, whether or not accomplished by direct and immediate use of false weights or measures.<sup>72</sup> They are not intended solely for the punishment of violators thereof,<sup>73</sup> but are also intended to protect the public from short weights and measures.<sup>74</sup> Being penal, they are subject to the rule of strict construction,<sup>75</sup> but they need not be given their narrowest meaning if the plain intention of the legislature is otherwise.<sup>76</sup>

*Attempt to sell less than the quantity represented* is an "offer to sell" within the meaning of the statutes.<sup>77</sup>

*Persons liable.* Under a statute providing that whoever, himself, or by a servant or agent, is guilty of giving false or insufficient weight or measure shall be punishable, evidence of giving short weight by defendant's servant in his absence warrants a conviction of defendant.<sup>78</sup> The act may apply to wholesalers as well as retailers,<sup>79</sup> but a wholesaler

of a product in lots made up of pound packages would be guilty of violating the statute only where he delivers a less amount or weight of the product than that which the purchaser purchased and which the wholesaler purported to deliver, regardless of the weight of the product in each package or false labeling of any package as to the weight of the product therein contained,<sup>80</sup> even though such false labeling might lead to a future violation of the law by a retailer.<sup>81</sup> A statute applicable to any person who by himself, or by his servant or agent or another person shall do the forbidden act authorizes the prosecution of the agent as well as the person for whom he was working, and includes all persons who may have had any connection with the forbidden act,<sup>82</sup> and the mere fact that the agent may have been required by his principal to perform the act does not prevent his being liable.<sup>83</sup>

*Defenses.* It is not a defense to a prosecution for selling or offering for sale a commodity weighing less than the amount marked on its label that the shortage was caused by lapse of time or other circumstances, as it must be presumed that all of this was taken into consideration in determining the standard weight after allowing for shrinkage.<sup>84</sup>

#### b. Elements of Offense

Under some statutes, but not under others, knowledge or intent is an element of the offense of selling or offering to sell less than the quantity represented, and some

70. DC—Great Atlantic & Pacific Tea Co v District of Columbia, 89 F2d 502, 67 App DC 30, certiorari denied 57 S Ct 794, 301 US 691, 81 L Ed 1347

68 CJ p 165 note 78

#### Invoice not mentioning gross weight or net weight

Where rope was customarily sold by gross weight and manufacturer's invoices and price lists all referred to gross weight, but defendant's invoice for about one hundred fifty-one pounds of rope actually delivered by defendant did not mention either gross weight or net weight, but represented that one hundred fifty-four pounds were delivered, defendant was guilty of violation of statute penalizing delivery of less of a commodity than the quantity actually represented by seller, notwithstanding container in which rope was sold was marked "154 lbs gross—3 lbs tare" and bore tag reciting "gross weight, 154 lbs" and notwithstanding lack of intent to deceive or defraud

NY—People, on Complaint of Goldsmith, v Masback Hardware Co, 22 NYS 2d 987, 175 Misc 177

71. Cal—Ex parte Marley, 175 P 2d 832, 29 Cal 2d 525

68 CJ p 165 note 78 [b].

72. Minn—State v Armour & Co, 136 N W. 565, 118 Minn 128

73. Ala—Smith v. State, 136 So 270, 233 Ala 346

74. DC—Great Atlantic & Pacific Tea Co v District of Columbia, 89 F2d 502, 67 App DC 30, certiorari denied 57 S Ct 794, 301 US 691, 81 L Ed 1347

68 CJ p 165 note 81.

#### To insure honest, accurate, and fair dealing to the general public

NY—People, on Complaint of Goldsmith, v Masback Hardware Co, 22 NYS 2d 987, 175 Misc 177

75. Pa—Commonwealth ex rel. Bureau of Weights & Measures v C G Heyd & Co, 41 A 2d 63, 156 Pa. Super 428, reversed on other grounds 42 A 2d 621, 352 Pa 194

76. Pa—Commonwealth ex rel Bureau of Weights & Measures v. C G Heyd & Co, supra

77. Minn—State v I A Grant Co, 197 N W 738, 158 Minn 334

78. Cal—Corpus Juris quoted in Ex parte Marley, 175 P 2d 832, 835, 29 Cal 2d 525

Mass—Commonwealth v Sacks, 100 NE 1019, 214 Mass 72, 43 L R A, NS, 1, Ann Cas 1914B 1076.

79. Pa—Commonwealth ex rel Bureau of Weights & Measures v C G Heyd & Co, 42 A 2d 621, 352 Pa 194

#### Statutes held not in pari materia

A wholesaler marketing butter under its own label which falsely certified the weight of the package to be a full pound was subject to the penalties imposed by the Short Weights Act as against contention that such act was not applicable to wholesalers because they are exempted from operation of the Commodities Act which was passed on the same day as the Short Weights Act and that the two acts are in pari materia

Pa—Commonwealth ex rel Bureau of Weights & Measures v. C. G Heyd Co, supra

80. Pa—Commonwealth ex rel Bureau of Weights & Measures v C G Heyd & Co, supra

81. Pa—Commonwealth ex rel Bureau of Weights & Measures v. C. G Heyd & Co, supra.

82. Tex—Culpepper v State, 172 S W 2d 697, 146 Tex Cr 188

83. Tex—Culpepper v State, supra.

84. Puerto Rico—People v. Diaz, 26 Puerto Rico 246.

other matters may or may not, depending on the wording of the statute, be necessary elements, but generally shortage of weight and misrepresentation of quantity are necessary elements.

It is within the power of the legislature to make acts of the character under consideration an offense without regard to the intent or knowledge of the doer, and, if such legislative intention appears, the court must give it effect, although the intent of the doer may be innocent<sup>85</sup> Thus, where qualifying words such as knowingly, intentionally, or fraudulently are omitted from provisions creating the offense it is held that guilty knowledge and intent are not elements of the offense,<sup>86</sup> the view being taken that the acts denounced are mala prohibita, of which neither specific intent, fraud, or deception is an element,<sup>87</sup> and that deceit through carelessness is just as much prohibited as that which is due to clear intent<sup>88</sup> These statutes make the seller the guarantor of the weight and quantity of the commodity sold without regard to his intent or knowledge<sup>89</sup> The phraseology of some legislation creating the offense is such, however, that knowledge and wrongful intent is an indispensable element of the offense,<sup>90</sup> as where, in defining the offense, the statute uses the word "knowingly"<sup>91</sup> or "fraudulently"<sup>92</sup>

It has been held that, in order to convict one delivering less of a commodity sold than represented, it must appear that delivery was intended to be in execution of the sale to the person to whom delivery is attempted, and when it appears that a sale to one person is attempted to be completed by the delivery of another person's order resulting from an honest mistake, the statutes do not apply<sup>93</sup>

*Shortage of weight* is a necessary element of the offense<sup>94</sup>

*Misrepresentation of quantity* is the thing penalized by the statute,<sup>95</sup> and where it is agreed between the seller and the buyer, whether by express agreement or by mutual, although unexpressed, understanding, that an offer of sale includes in the weight indicated the weight of the wrappings of the commodity sold, and such commodity so sold together with its wrappings conforms in weight to the terms of the sale, the penalty of the statute does not attach<sup>96</sup>

*Injury* Under a provision making it unlawful for a seller of goods to injure or defraud another by knowingly delivering less than the quantity he represents, a person does not commit the offense unless he injures or defrauds another by the corrupt act,<sup>97</sup> and a person does not injure or defraud another unless that other suffers a detriment<sup>98</sup> Accordingly, a transaction which did not result in a consummated sale has been held not punishable under such a provision<sup>99</sup> Detriment may, however, be suffered through acceptance of the commodity with a promise, express or implied, to pay for such commodity as well as by immediate payment on delivery<sup>1</sup> On the other hand, it has been held that a consummated sale is not essential to establish a violation of a provision making it an offense "to practice deceit or fraud" in the sale of any commodity in quantities of less weight or measure than that represented by the seller<sup>2</sup>

Under a statute providing that one having charge of scales for the purpose of weighing or measuring property who knowingly represents any false weights or measures whereby any person may be defrauded or injured shall be punishable, the false report of a weight which may result in an injury is a completed offense even though injury does not

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| <p>85. DC—Great Atlantic &amp; Pacific Tea Co v District of Columbia, 89 F 2d 502, 67 App DC 30, certiorari denied 57 S Ct 794, 301 US 691, 81 L Ed 1347<br/>68 CJ p 166 note 86</p> <p>86. Cal—<i>Corpus Juris</i> quoted in Ex parte Marley, 175 P 2d 832, 835, 29 Cal 2d 525</p> <p>DC—Great Atlantic &amp; Pacific Tea Co v District of Columbia, 89 F 2d 502, 67 App DC 30, certiorari denied 57 S Ct 794, 301 US 691, 81 L Ed 1347<br/>68 CJ p 166 note 88</p> <p>Actual fraud or deceit not essential<br/>NY—People, on Complaint of Goldsmith, v. Masback Hardware Co, 22 NYS 2d 987, 175 Misc 177</p> <p>87. Minn—State v Armour &amp; Co, 136 NW 565, 118 Minn 128<br/>Puerto Rico—People v. Escriba, 26 Puerto Rico 207.</p> | <p>88. Minn—State v I. A. Grant Co, 197 NW 738, 158 Minn 334<br/>68 CJ p 166 note 90</p> <p>89. Ala.—Smith v State, 136 So 270, 223 Ala 346<br/>Cal—<i>Corpus Juris</i> quoted in Ex parte Marley, 175 P 2d 832, 835, 29 Cal 2d 525</p> <p>90. Ala.—Woodard v. State, 2 So 2d 330, 30 Ala App 144, followed in 3 So 2d 530, first case, 30 Ala App 223, certiorari denied 3 So 2d 530, second case, 241 Ala 557, certiorari denied 3 So 2d 530, third case, 241 Ala 556<br/>68 CJ p 166 note 87.</p> <p>91. Ala.—Woodward v State, supra<br/>NY—People v J T Reynolds Corp, 33 NYS 2d 314, 178 Misc 138, affirmed 43 NE 2d 830, 289 NY 598<br/>68 CJ p 166 note 87 [b].</p> | <p>92. Philippine—U S v Madrigal, 27 Philippine 347<br/>68 CJ p 166 note 87 [a]</p> <p>93. NJ—City of Newark v East Side Coal Co, 73 A 484, 77 NJ Law 732</p> <p>94. Puerto Rico—People v. Hernandez, 28 Puerto Rico 39</p> <p>95. Minn—State v Armour &amp; Co, 136 NW 565, 118 Minn 128</p> <p>96. Minn—State v Armour &amp; Co, supra<br/>68 CJ p 166 note 95</p> <p>97. NY—People v Berman, 16 NE 2d 384, 278 NY 408</p> <p>98. NY—People v Berman, supra</p> <p>99. NY—People v. Goldberg, 131 NYS 481, 146 App Div 950</p> <p>1. NY—People v Berman, 16 NE 2d 384, 278 NY 408</p> <p>2. Ill—City of Chicago v. Berry's, 159 Ill App 522.</p> |
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occur,<sup>3</sup> and it has been held, under a statute making it an offense for one to sell or offer or expose for sale less than the quantity he represents, that if there has been a sale or offer or exposure for sale for less than actually represented the penalty attaches regardless of whether any one has been deceived thereby<sup>4</sup>

*Payment for commodity purchased* is not essential to a conviction where the statute on which the prosecution is based omits reference to the question of terms of sale or payment<sup>5</sup>

*Delivery* Under a prosecution for knowingly delivering less of a commodity than the quantity represented, delivery of an article of merchandise by a dealer to a customer is an element of the offense,<sup>6</sup> and a mere offer to deliver less than a quantity represented does not constitute a violation of a statute penalizing delivery of less than represented.<sup>7</sup> A physical tender of possession by one person to another who accepts such possession is ordinarily sufficient to constitute a delivery,<sup>8</sup> and even a conditional delivery may be sufficient to constitute a violation of the statute<sup>9</sup>

*Control of weighing device* Under a statute making it an offense for any person to sell or offer for sale less than the quantity he represents of any commodity, or to take or attempt to take more than the quantity he represents, "when as the buyer or weigher of any commodity, he furnishes the weight, measure, or weighing or measuring device," the quoted phrase refers to the seller as well as the buyer, and it is essential, to convict the seller of the statutory offense, that he be in control of the weighing device<sup>10</sup>

### c. Indictment, Information, or Complaint

An indictment, information, or complaint will ordinarily be sufficient if it states the offense in the language

of the statute; and generally the pleading should allege the essential elements of the offense.

An indictment, information, or complaint based on statutes of the character under consideration will ordinarily be sufficient if it states the offense in the language of the statute.<sup>11</sup> If knowledge is made an element of the offense by the statute, it must be alleged that the sale forming the basis of the prosecution was by short weight with defendant's knowledge,<sup>12</sup> but where the statute makes the seller a guarantor of the quantity sold regardless of the intent or knowledge, it is not necessary to allege that the act was knowingly done.<sup>13</sup> Where a malicious intent is not an element of the offense an allegation thereof will be treated as surplusage and need not be proved.<sup>14</sup> It has been held that the indictment should allege the names of the person or persons to whom the sales or offers to sell were made and that it is not sufficient to allege that the sales were made to "divers persons."<sup>15</sup> Where such control is an essential element of the offense, an indictment which fails to allege that the weighing device involved was under the control of defendant is insufficient.<sup>16</sup> A complaint for willfully selling bread short in weight does not state an offense if the tolerance in weight authorized is not alleged therein, since, in the absence of such an allegation, the court cannot know whether the bread weighed less than the minimum weight allowed, and cannot take judicial notice of such allowance,<sup>17</sup> and where the statute limits the offense to a sale within a stated time after baking, the complaint must allege that the sale was made within that time.<sup>18</sup>

*Issues, proof, and variance* One who is indicted under these statutes cannot be convicted of another and distinct offense denounced by another statute,<sup>19</sup> and if the evidence does not establish the commission of the offense charged, defendant should be

3. Ind—Lipschitz v State, 96 NE 945, 946, 176 Ind 673  
68 C.J. p 166 note 98

4. Minn—State v Armour & Co, 136 NW 565, 118 Minn 128

5. NY—People v Visconti, 136 NE 330, 234 NY 165

6. NY—People v Berman, 16 NE 2d 384, 278 NY 408  
People v Rotter, 7 N.Y.S.2d 270, 255 App Div 803

7. NY—People v Kaminsky, 280 N.Y.S. 900, 245 App Div 768.

8. NY—People v Berman, 16 N.E. 2d 384, 278 NY 408

9. NY—People v Berman, supra  
People v. Rotter, 7 N.Y.S.2d 270, 255 App Div 803

10. Tex—Culpepper v State, 172 S.W.2d 697, 146 Tex Cr 188

11. Ind—Lipschitz v State, 96 NE 945, 176 Ind 673  
68 C.J. p 167 note 4

**Complaint held sufficient** for selling less than quantity represented

Ala—Smith v State, 136 So 270, 223 Ala 346

NY—People, on Complaint of Weis-ent, v Mishkin, 11 N.Y.S.2d 77, 170 Misc 889, affirmed People v Mishkin, 24 N.E.2d 22, 281 NY 765

12. Ala—Woodard v State, 2 So 2d 330, 30 Ala App 144, followed in 3 So 2d 530, first case, 30 Ala App 223, certiorari denied 3 So 2d 530, second case, 241 Ala 557, certiorari denied 3 So 2d 530, third case, 241 Ala. 556.

Minn—State v Washed Sand & Gravel Co, 162 NW 451, 136 Minn 361, L.R.A. 1917D 1127

13. Ala—Smith v State, 136 So 270, 223 Ala 346

14. Puerto Rico—People v. Colón, 26 Puerto Rico 272

15. Tenn—Rugg v State, 210 S.W. 630, 141 Tenn 362

16. Tex—Culpepper v State, 172 S.W.2d 697, 146 Tex Cr 188

17. Puerto Rico—People v Mulero, 32 Puerto Rico 827

18. Tex—Ford v State, 286 S.W. 1089, 105 Tex Cr 114.

19. Puerto Rico—People v Mayaguez Sugar Co, 37 Puerto Rico 106  
—People v Barbosa, 28 Puerto Rico 48.

acquitted<sup>20</sup> An immaterial variance is not fatal to a conviction<sup>21</sup>

#### d. Evidence

The burden of proof rests on the state to procure a conviction under the short weight statutes. Evidence tending to show absence of intent to defraud is properly excluded where such intent is not an element of the offense, but any competent evidence is admissible to establish the shortage of weight.

The burden of proof rests on the state to procure a conviction under the short weight statutes<sup>22</sup>. Thus, in a prosecution for knowingly delivering less of a commodity than that represented, the people must prove a delivery by a dealer to a customer of an article of merchandise,<sup>23</sup> but do not have the burden of proving that by such delivery accused succeeded in injuring or defrauding<sup>24</sup>. Where intent to defraud is not an element of the offense of selling or exposing for sale less than the quantity represented, evidence tending to show absence of such intent is properly excluded<sup>25</sup>. To establish the allegation of shortage in weight, the insufficiency of the weight need not be proved by the testimony of an official weighmaster or inspector,<sup>26</sup> but it may be established by any competent evidence<sup>27</sup>.

*Weight and sufficiency.* Rules governing the weight and sufficiency of evidence in criminal prosecutions generally apply in prosecution based on statutes of character under consideration<sup>28</sup>.

#### § 13. Falsely Packed Bales of Cotton

A statute making it a crime falsely to pack a bale of cotton prohibits false packing with intent to defraud by placing foreign substances in the bale, or doing something to it so that the reasonable result would be to defraud the person dealing therewith; and an indictment or information based on the statute should allege the particular matter constituting the act or fraud relied on.

A statute making it a crime to "falsely pack a bale of cotton" prohibits the false packing of a bale of cotton with intent to defraud by placing sand, earth, stones, or other foreign substances in the bale of cotton, or in some other way doing something to it so that the reasonable result would be to defraud the persons dealing therewith<sup>29</sup>. An indictment or information based on this statute should allege the particular matter constituting the act or fraud relied on, by charging that defendant with intent to defraud did falsely pack a bale of cotton by then and there placing certain sand, earth, stones, or other foreign substance in the bale of cotton so that the reasonable result thereof would be to defraud the persons dealing with such bale<sup>30</sup>.

#### § 14. Packing in Container Substance Foreign to Contents Thereof

Under statutes providing for the punishment of anyone who in bailing or packing in any container any commodity sold by weight includes therein any substance foreign to the contents thereof, it is no defense in a prosecution for packing bags with coal in which noncombustible substances were placed that defendants packed

20. Puerto Rico—People v Barbosa, supra

21. Held no fatal variance between allegation that container in which defendant purported to sell to named person one gallon of ice cream contained less than one gallon, and proof that state inspector furnished named person with a sum to purchase ice cream and that named person in presence of inspector purchased ice cream.

Tex—Gandy v State, 139 S W 2d 275, 139 Tex Cr 140

22. Pa—Commonwealth ex rel Bureau of Weights & Measures v C G Heyd & Co, 41 A 2d 63, 156 Pa Super 428, reversed on other grounds 42 A 2d 621, 352 Pa 194

23. NY—People v Berman, 16 NE 2d 384, 278 NY 408

24. NY—People v Berman, supra. People v Ring, 3 NYS 2d 817, 254 App Div 709, affirmed 16 NE 2d 386, 278 NY 413

25. Minn—State v People's Ice Co, 144 NW 962, 124 Minn 307

26. Pa—Commonwealth v Cohen, 157 A 216, 103 Pa Super 496

27. Kan—State v Molz, 139 P. 376, 91 Kan 901, 68 CJ p 167 note 17.

#### 28. Evidence held sufficient

(1) To sustain conviction Ill—City of Chicago v Ohlsen, 7 N E 2d 469, 289 Ill App 614 NY—People v Ring, 16 NE 2d 386, 278 NY 413—People v Abruzzese, 16 NE 2d 386, 278 NY 411

People, on Complaint of Weisent v Mishkin, 11 NYS 2d 77, 170 Misc 889, affirmed People v Mishkin, 24 NE 2d 22, 281 NY 765

Pa—Commonwealth v. Kuhn, 90 Pittsb Leg J 585

68 CJ p 167 note 19 [a]

(2) To establish beyond reasonable doubt that defendants knowingly delivered less coal than quantity represented

NY—People, on Complaint of Weisent, v Mishkin, 11 NYS 2d 77, 170 Misc 889, affirmed People v Mishkin, 24 NE 2d 22, 281 NY 765

(3) To warrant finding there was an implied representation as to weight

DC—Great Atlantic & Pacific Tea Co v District of Columbia, 89 F 2d 502, 67 App DC 30, certiorari denied 57 S Ct 794, 301 US 691, 81 L Ed 1347

#### Evidence held insufficient

(1) To sustain conviction NY—People v Berman, 16 NE 2d 384, 278 NY 408

People v Rotter, 7 NYS 2d 270, 255 App Div 803—People v Kaminsky, 280 NYS 900, 245 App Div 768

Pa—Commonwealth ex rel Bureau of Weights & Measures v C G Heyd & Co, 42 A 2d 621, 352 Pa 194

Commonwealth v Clodoveo, 47 Pa Dist & Co 329

68 CJ p 167 note 19 [b]

(2) To raise issue as to violation being a mistake without intent to cheat and defraud

DC—Great Atlantic & Pacific Tea Co v District of Columbia, 89 F 2d 502, 67 App DC 30, certiorari denied 57 S Ct 794, 301 US 691, 81 L Ed 1347

(3) To show delivery of merchandise

NY—People v Berman, 3 NYS 2d 946, 254 App Div 98, affirmed 16 NE 2d 384, 278 NY 408

29. Tex—Ex parte Montgomery, 218 S W 1042, 86 Tex Cr 636

30. Tex—Ex parte Montgomery, supra.

coal in bags and sold it in the same condition that it came to them, if they did it to defraud

Under statutes requiring coal to be sold by weight and providing that whoever with intent to defraud or injure in baling or packing in any container any commodity sold by weight includes therein any sub-

stance foreign to the contents thereof shall be punished, in a prosecution for packing bags with coal in which noncombustible substances were placed, the fact that defendants packed coal in bags and sold it in the same condition that it came to them is not a defense if they did it to defraud<sup>31</sup>

**WEIR, WAER, WEAR, or WER.** In one sense the word "weir" means a dam;<sup>1</sup> a dam across a river,<sup>2</sup> an obstruction placed in a stream to raise the water, divert it into a mill-race or irrigation ditches, or form a fish pond.<sup>3</sup>

The term may also be used as referring to "a contrivance for the purpose of regulating and measuring the amount of water that should pass from a feeder through different flumes."<sup>4</sup>

The word is also employed to denote a trap or device for catching fish, and is defined in this sense in Fish § 1. Statutes regulating the taking of fish by means of weirs are treated in Fish § 30.

**WELCOME.** As a noun, "welcome" is defined to mean a cordial or kindly greeting to, or reception of, a guest or newcomer<sup>5</sup>

The adjective "welcome," in ordinary and common acceptation, means free or willingly permitted, as to do, to have, or enjoy, anything.<sup>6</sup> It implies cordial and friendly permission or license, the privilege to use or enjoy the thing involved.<sup>7</sup>

**WELD.** As a noun, the state of being welded, also, a welded joint.<sup>8</sup> As a verb, to unite closely or intimately, to join closely<sup>9</sup>

*Welding.* The art, practiced immemorially, of uniting two pieces of metal in one piece by heating those portions which are to be welded to a temperature at which they become plastic and then pressing them strongly together so as to effect a union.<sup>10</sup> It

has been compared with "cementing" see 14 C.J.S. p 61 note 1.

**WELFARE.** It has been said that the word "welfare" pertains primarily to those material things of life having a relation to one's physical well-being and comfort which are dependent, under the present economic system, upon the individual's financial resources<sup>11</sup> The term is defined as meaning the state or condition of faring or doing well; state or condition in regard to well-being, especially, condition of health, happiness, prosperity, or the like,<sup>12</sup> well-doing or well-being, in any respect; prosperity; happiness<sup>13</sup> Expressed negatively, "welfare" means exemption from evil or calamity,<sup>14</sup> exemption from pain or discomfort.<sup>15</sup>

"Welfare" has been held to be almost identical with "happiness" see 39 C.J.S. p 773 note 30, and it has been compared with, or distinguished from, "comfort" see 15 C.J.S. p 244 note 34.

In determining who shall have the custody of an infant, it is generally recognized that the controlling consideration is the welfare of the infant, as stated in Infants § 7 b (1) and in Divorce § 309 a.

**WELL.** As a noun, the word "well" means a deep, narrow pit dug in the earth, and usually walled, for the purpose of obtaining a supply of water;<sup>16</sup> a hole dug in the ground in order to obtain water;<sup>17</sup> a hole or shaft sunk into the earth in order to obtain a fluid, as water, oil, brine, or natural gas, from

31. Mass.—Commonwealth v. Adamian, 147 NE 344, 252 Mass. 105 68 CJ p 167 note 22.

1. New Standard D.

2. NJ.—Arnold v Mundy, 6 N.J. Law 1, 55, 10 Am D 356.

3. New Standard D

4. Ill.—Merrifield v Canal Com'rs, 72 NE 405, 407, 587, 212 Ill 456, 67 L.R.A. 369

5. Va.—Eagle Lodge, Inc. v Hofmeyer, 71 SE 2d 195, 204, 193 Va 864

6. Va.—Eagle Lodge, Inc. v Hofmeyer, supra.

7. Va.—Eagle Lodge, Inc. v Hofmeyer, supra.

8. US.—In re Copperweld Steel Co., Cust & Pat App, 62 F 2d 363

9. US.—In re Copperweld, supra.

10. US.—Thomson Spot Welder Co v. Ford Motor Co, Mich, 44 S Ct 533, 534, 265 US 445, 68 L Ed 1098

Phrases employing the word "welding" and of which more recent adjudications have not been found see 68 CJ p 168 notes 12-14

11. NY.—In re Buell's Estate, 66 NYS 2d 180, 185, 186, 198 Misc 358.

12. NY.—In re Buell's Estate, supra

Phrases

(1) "Public welfare" defined see

Social Security and Public Welfare § 1

(2) Other phrases employing the word "welfare" and of which more recent adjudications have not been found see 68 CJ p 168 notes 17-21

13. US.—Wiseman v Tanner, D.C. Wash, 221 F 694, 698.

14. NY.—In re Buell's Estate, 66 N. YS 2d 180, 185, 198 Misc 358

15. NY.—In re Buell's Estate, supra

16. US.—Andrews v Cross, CC NY, 8 F 269, 275, 19 Blatchf 294

17. Ind.—Koch v Fishburn, 164 N. E 721, 722, 90 Ind App 287

Mont.—Littrell v Wilcox, 27 F 394, 396, 11 Mont. 77.



a subterranean supply,<sup>18</sup> a hole sunk or drilled into the earth to such a depth as to reach a supply of water,<sup>19</sup> a pit sunk in the earth until a water-bearing stratum of the earth is reached, from which the water therein will flow into the pit, and a supply of water be thus obtained,<sup>20</sup> a place where water is reached by an orifice in the ground, and where it does not flow to the surface<sup>21</sup>

It has been stated that some of the above definitions which were set out in Corpus Juris support the concept that a hole or shaft in the ground is not a well, and cannot properly be described as such, unless it is used to produce water, oil, gas, or some like substance;<sup>22</sup> but this ignores the broader meaning of the word "well,"<sup>23</sup> and in its broader sense the term is defined as meaning any shaft or pit dug or bored in the earth,<sup>24</sup> any space enclosed, partly enclosed, or otherwise constructed or shaped, as to suggest, or be likened to, a well for water, as a vessel or space for holding lubricating oil, etc., or a deep drawer in a bureau or desk<sup>25</sup>

In engineering, the word "well" is defined as meaning a pit or hole in the ground reaching to hardpan or bedrock; hence, a hollow cylinder of reinforced concrete, steel, timber, masonry, built in such a hole as a support for a bridge or building<sup>26</sup>

It has been said that a well is not a machine, but a process, a method of obtaining a supply of water from the earth.<sup>27</sup> The term aptly designates the soil covered by and used with it, and it may refer to an artificial excavation and erection in and upon land<sup>28</sup>

"Well" has been compared with, or distinguished from, "spring" see 81 C J S. p 840 note 16.

The word "well," as used in mining parlance, is defined in Mines and Minerals § 3 h A tunnel as a horizontal well see 90 C J S. p 964 note 53.

The word "well" may be used either as an adjective or as an adverb,<sup>29</sup> and as an adjective, "well" is defined as meaning being in health, sound in body and mind; not ailing, diseased or sick, healthy<sup>30</sup> As an adverb, "well" is defined as meaning in a good and proper manner, justly, suitably to one's condition, to the occasion, or to a proposed end or use<sup>31</sup>

**WELLHOLE.** The open space in a floor, to accommodate a staircase<sup>32</sup>

**WELSHER.** One who at a race track makes bets or receives money to be bet and absconds without paying his losses or returning the money intrusted to him.<sup>33</sup>

**WELSH MORTGAGE.** See Mortgages § 3.

**WEN.** An indolent encysted tumor of the skin, especially a sebaceous cyst, something far different from the malignant swelling which indicates "Hodgkin's disease"<sup>34</sup>

**WENCH.** According to the dictionary, "wench" is an archaic, provincial, or contemptuous word meaning a damsel or young woman of lowly condition.<sup>35</sup> It is also defined as meaning a servant or maid,<sup>36</sup> and it does not necessarily carry any implication of unchastity<sup>37</sup>

**WEREGILD.** The price of homicide, or other atrocious personal offense, paid partly to the king for the loss of a subject, partly to the lord for the

18. US—Eastern Gulf Oil Co v Kentucky State Tax Commission, DCKy, 17 F2d 394, 396

19. Or—West v McDonald, 136 P 650, 651, 67 Or 551

20. US—Andrews v Carman, CC NY, 1 F Cas No 371, 2 Ban & A 277, 278, 13 Blatchf 307, 9 Off Gaz 1011

Or—West v McDonald, 136 P 650, 651, 67 Or 551

21. Or—West v McDonald, 136 P 650, 651, 67 Or 551

Vt—Magoon v Harris, 46 Vt 264, 271

22. Okl—Seismograph Service Corporation v Mason, 145 P2d 967, 969, 193 Okl 623

23. Okl—Seismograph Service Corporation v Mason, supra

24. Okl—Seismograph Service Corporation v Mason, supra

#### Phrases

(1) "Driven well" see 28 C J S p 493 notes 45, 46.

(2) Other phrases employing the word "well" and of which more recent adjudications have not been found see 68 C J p 169 notes 34-50

25. Okl—Seismograph Service Corporation v Mason, supra

26. Okl—Seismograph Service Corporation v Mason, supra

27. US—Andrews v Carman, CC NY, 1 F Cas No 371, 2 Ban & A 277, 278, 13 Blatchf 307, 9 Off Gaz 1011

28. NY—Ocean Causeway v Gilbert, 66 NYS 401, 404, 54 App Div 118, 68 C J p 168 note 29.

#### 29. Phrases

(1) "Well-founded" is a term having a double significance, it may mean founded on good reasons or it may be defined as not baseless or having no support

Iowa—State v Mahoney, 97 NW 1089, 1091, 122 Iowa 168.

(2) Other phrases employing the word "well" either as an adjective or as an adverb and of which more recent adjudications have not been found see 69 C J p 169 note 52-p 170 note 80

30. Ala—Vann v. McCord, 114 So 418, 419, 22 Ala App. 241, 68 C J p 169 note 51

31. Webster New Int D

32. Or—Staples v Senders, 101 P 2d 232, 235, 164 Or. 244

33. NY—People v Monroe, 182 N E 439, 443, 349 Ill 270

34. Tenn—Life & Casualty Ins Co v King, 195 SW. 585, 589, 137 Tenn 685

35. New Standard D.

36. Fla—Sharp v. Bussey, 187 So. 779, 780, 137 Fla. 96, 121 A.L.R. 1148

37. Fla—Sharp v. Bussey, supra.

loss of a vassal, and partly to the next of kin of the injured person <sup>38</sup>

**WEST.** One of the four cardinal points of the compass which is in a direction at right angles to that of north and south, and on the left hand of a person facing north; the point directly opposite the east <sup>39</sup>

As an adjective, in the absence of qualifying words, the term will be construed as meaning due west <sup>40</sup>

"West" as a term relating to boundaries see Boundaries § 4.

**WESTERLY.** A term which may signify due west <sup>41</sup>

**WESTERN.** Of or pertaining to the west <sup>42</sup>

**WEST VIRGINIA.** The name of one of the United States of America <sup>43</sup>

**WESTWARDLY.** A term which, with nothing to control it, may mean west or due west, but such is

not its precise significance, and it is controlled by circumstances <sup>44</sup>

**WET.** The word "wet" is used as a noun to designate one who is in favor of allowing the sale of intoxicating liquors. <sup>45</sup> As an adjective, "wet" is defined as meaning consisting of, covered with, or soaked with, water or other liquid <sup>46</sup>

**WETHER.** A castrated male sheep. <sup>47</sup>

**WHACK.** A slang word meaning to divide into shares, often used in the phrase "to whack up" <sup>48</sup>

**WHALE.** An air-breathing, warm-blooded animal of the order of mammals known as cetaceans, which, although popularly and almost universally classified as a fish, is scientifically not a fish <sup>49</sup>

*Whaling voyage.* A term used in trade and commerce, <sup>50</sup> meaning a cruise on the high seas in search of whales <sup>51</sup>

**WHARF; WHARFAGE; WHARFINGER.** See Wharves § 1.

**WHARFING OUT.** See Navigable Waters § 73.

38. Black L D

68 C J p 170 note 85

39. Webster New Int D

40. La—Plaquemines Oil & Development Co v State, 23 So 2d 171, 176, 208 La 425

68 C J p 170 note 87

Phrases employing the word "west" and of which more recent adjudications have not been found see 68 C J p 170 notes 88-96

41. Ariz—Wiltsee v King of Arizona Min & Mill Co, 60 P 896, 898, 7 Ariz 95

68 C J p 170 note 97.

Phrases employing the word "westerly" and of which more recent adjudications have not been found see 68 C J p 170 notes 98, 99

42. Webster New Int D

Phrases employing the word "western" and of which more recent adjudications have not been found see 68 C J p 170 notes 2-5.

43. Bouvier L D.

Historical note

West Virginia was formed in 1861

of the western counties of Virginia, owing to their nonconcurrence in the ordinance of secession passed by the legislature of that state. A constitution was framed by a convention which met at Wheeling on Nov 26, 1861. This was submitted to the people on April 3, 1862, and ratified almost unanimously. The consent of the body, recognized by the federal government as the legislature of Virginia, was given, and congress then passed an act approved Dec 31, 1862, providing for the admission of the new state into the Union upon condition of the adoption of an amendment to the constitution providing for emancipation of slaves. This was done, and the state was admitted to the Union. The first constitution remained in force until 1872, when the present constitution was framed by a convention which met on January 16, 1872, and completed its labors on April 9 of that year. It was submitted to the people and ratified by them on August 22, 1872

Bouvier L D

44. NC—Spruill v. Davenport, 46 NC 203, 208

68 C J p 170 note 6

45. Ind—State v Shumaker, 157 NE 769, 776, 200 Ind 623, 58 ALR 954

"Dry" as a person opposed to the sale of intoxicating liquors see 28 CJS p 570 notes 1, 2

46. Webster New Int D.

Phrases

(1) "Wet natural gas" see Mines and Minerals § 2 b (4)

(2) "Wet steam" see 32 CJS p 1038 note 64

47. NC—State v. Royster, 65 NC 539

48. Mich—Schook v Zimmerman, 155 NW 526, 531, 188 Mich 617

49. US—Central Commercial Co v U S, 11 Ct Cust App 131, 132 See Fish § 1

50. NY—Child v. Sun Mut. Ins Co, 5 NY Super. 26, 44

51. US—Gifford v. Kollock, DC Mass, 10 F Cas No 5,409, 3 Ware 45, 47

## WHARVES

This Title includes the construction, maintenance, regulation, and use of wharves, landings, piers, and docks for the landing of vessels, whether constructed under franchises granted therefor or directly by the government, and whether the use be subject to payment of wharfage or other fees or free, organization, franchises, and powers of wharf or dock companies; and rights, duties, and liabilities of such companies or of municipalities in respect of the management and use of their wharves, piers, or docks

**Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index**

### *Analysis*

- § 1 Definitions—p 566
- 2 Right to construct and maintain—p 572
- 3 — Grants, franchises, and privileges—p 573
- 4 Transfer of wharf rights by owners—p 574
- 5 — Lease—p 574
- 6 — Sale and conveyance—p 577
- 7 Government regulation and supervision—p 578
- 8 Licenses and taxes—p 580
- 9 Management and use—p 580
- 10 — Mode and purpose of use—p 581
- 11 Wharfage—p 582
- 12 — Right to wharfage—p 582
- 13 — Amount—p 584
- 14. — Lien—p 586
- 15 — Remedies—p 588
- 16 Injuries to vessels or cargoes—p 590
- 17. — Concealed defects and obstructions, and shallow water—p 591
- 18 — Moorings and fastenings—p 593
- 19. — Defenses in general—p 593
- 20 — Contributory negligence—p 593
- 21 — Persons liable—p 594
- 22 — Actions—p 595
- 23 Injuries to persons—p 598
- 24 — Actions—p 601
- 25 Injuries to wharves—p 602
- 26 — Remedies—p 604
- 27. — Damages—p 606

**See also descriptive word index in the back of this Volume**

### § 1. Definitions

- a. Wharf
- b. Dock
- c Dockage
- d Landing
- e. Pier

- f. Wharfage
- g Wharfinger
- h Other terms

#### a. Wharf

A wharf is a structure, on the margin of navigable waters, alongside of which vessels can be brought for the

sake of being conveniently loaded or unloaded; and the term "wharf" may indicate a locality as well as an actually existing artificial structure.

A wharf is an artificial landing-place,<sup>1</sup> built or constructed for the purpose of loading or unloading goods,<sup>2</sup> a structure, on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded.<sup>3</sup> It does not include a drawbridge,<sup>4</sup> or houseboats moored in a river,<sup>5</sup> or the piling, dolphins, boardwalks, piping, and the like designed to provide access to such houseboats,<sup>6</sup> but warehouses have been held to be included within the right to erect "wharves."<sup>7</sup>

A wharf is a substantial and permanent structure built out from the upland and forming an extension thereof.<sup>8</sup> It need not be of any particular design; the only necessity being that it affords a place where vessels land.<sup>9</sup> A wharf is sometimes made on the land at the water's edge, and is sometimes built in the water to the channel of a river or other part,<sup>10</sup> but in any case, water of sufficient depth to float vessels is an essential part of every wharf, a necessary incident thereof, or appurtenance thereto, without which there can be no

wharf and no wharfage.<sup>11</sup> The structure may be removed further into the water for the convenience of the operation of unloading and loading, and still be a wharf.<sup>12</sup>

The term "wharf" is not limited to an actually existing artificial structure but may indicate a locality as well,<sup>13</sup> although the mere fact of its being designated on maps as a wharf does not necessarily make it so.<sup>14</sup> Wharves have been distinguished from other structures, such as slips and basins,<sup>15</sup> and docks.<sup>16</sup>

"Private wharf," with respect to title, means one privately owned,<sup>17</sup> but with respect to use it is one which the owner or lessee reserves for his private use.<sup>18</sup>

*Public or quasi-public wharf.* A "public wharf" is one which may be used generally by the public, either with or without compensation.<sup>19</sup> Generally, it belongs to some governmental organization such as a city.<sup>20</sup> Where a wharf, the subject of private ownership, is thrown open to use by the public in general on payment of fixed wharfage rates, it becomes a quasi-public wharf, to the use of which all are entitled on payment of reasonable wharfage

1. US—John J. Sesnon Co v U S, Alaska, 182 F 573, 576, 105 CCA 111, certiorari denied 31 S Ct 714, 220 US 609, 55 LEd 608 "Barn" distinguished see Barn 9 C JS p 1544 note 26

Wharf as not

Highway see Highways § 1 a  
Street see Municipal Corporations § 1653

#### Similar definitions

- (1) "A wharf is a landing"  
Mo—Meyers v Kansas City, 18 S W2d 900, 901, 323 Mo 200

- (2) A wharf is an improved landing  
Pa—Reighard v. Flinn, 44 A 1080, 194 Pa 352

2. NC—State v Cowan, 29 NC 239, 249  
Or—Harris v City of St Helens, 143 P 941, 72 Or 377, Ann Cas 1916D 1073

3. La—State v Louisiana Terminal Co, 154 So 731, 732, 179 La 671 68 CJ p 202 note 3

#### Other definitions

- (1) A structure of timber, masonry, cement, earth or other material, built on the shore of a harbor, river, canal, or the like, especially one extending parallel to the shore line so that vessels may lie close alongside to receive and discharge cargo, passengers, etc

NY—A E F's Inc v City of New York, 58 NYS 2d 90, 93, 185 Misc 312, affirmed 59 NYS 2d 397, 269 App Div. 1020, reversed on other

grounds 68 NE2d 177, 295 NY 381

- (2) A structure of timber, masonry, cement, earth or other material, built on shore or margin of harbor, river, canal, or other navigable water, so that vessels can be brought alongside it to receive and discharge cargo, passengers, etc  
Or—Port of Portland v Reeder, 280 P2d 324, 332, 203 Or 369

- (3) More definitions see 68 CJ p 202 note 3 [a]

4. Wis—Jeffery v Kewaunee, G B & W Ry Co, 207 NW 283 189 Wis 207

5. Or—Port of Portland v Reeder, 280 P2d 324, 203 Or 369

6. Or—Port of Portland v Reeder, supra

7. Cal—Clark v City of Los Angeles, 116 P 966, 968, 160 Cal 317

8. Or—Port of Portland v Reeder, 280 P2d 324, 203 Or 369

9. US—John J. Sesnon Co v U S, Alaska, 182 F 573, 105 CCA 111, certiorari denied 31 S Ct 714, 220 US 609, 55 LEd 608

10. NC—State v Cowan, 29 NC 239 68 CJ p 203 note 10

11. Md—Wharf Case, 3 Bland 361  
NY—Langdon v New York, 93 NY 129.

12. Mass—Fitchburg R Co v Boston, etc, R Co, 3 Cush 58. 68 CJ p 203 note 12.

13. NJ—Bacon v Mulford, 41 N J Law 59 68 CJ p 203 note 14

14. NY—Stevens v. Rhinelander, 28 NY Super 285 68 CJ p 203 note 15

15. US—City of Philadelphia v Standard Oil Co of Pennsylvania, DCPa, 12 F Supp 647, affirmed, CCA, 79 F2d 764, certiorari denied 56 S Ct 443, 297 US 705, 80 LEd 992.

Wharf necessarily connotes structure adjacent to water

US—City of Philadelphia v Standard Oil Co of Pennsylvania, supra

16. Ohio—Bingham v. Doane, 9 Ohio 165, 167

"Dock" defined see infra subdivision b of this section

17. US—The M L C No 10, C CANY, 10 F2d 699, certiorari denied 46 S Ct 488, 271 US 675, 70 LEd 1146

18. NY—Malloy v Staten Island Rapid Transit R Co, 28 NYS 979, 78 Hun 166 68 CJ p 203 note 18

19. Me—Hamilton v Portland State Pier Site Dist, 112 A 836, 120 Me 15 68 CJ p 203 note 19

20. Mich—Kemp v Stradley, 97 N W 41, 134 Mich 676, 679—Horn v. People, 26 Mich 221, 224.

rates,<sup>21</sup> although owned by an individual<sup>22</sup> It is not necessary that a wharf handle all commodities or freight indiscriminately for every branch of the public in order to make it a public wharf<sup>23</sup> A private wharf and warehouse may become a public freight station by contract, fee-simple title or lease not being necessary<sup>24</sup>

*Whether wharf is public or private* depends on the ownership of the soil, the purpose for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure<sup>25</sup> It is not the ownership of the property that determines its public character, but rather the use to which it is put.<sup>26</sup>

### b. Dock

A dock is an artificial basin or inclosure in connection with a harbor for the reception of vessels, also a place for building, repairing, or laying up ships It may include bulkheads, piers, slips, a waterway, surrounding waters, wharves, and the space between wharves.

A dock is an artificial basin or inclosure in connection with a harbor, for the reception of vessels,<sup>27</sup> a place for vessels, either excavated from the land, or surrounded by wharves,<sup>28</sup> the slip or water-

way extending between two piers or projecting wharves, or cut into the land for the reception of ships,<sup>29</sup> a landing,<sup>30</sup> also a place for building, repairing, or laying up ships<sup>31</sup> It may include bulkheads,<sup>32</sup> piers,<sup>33</sup> slips,<sup>34</sup> a waterway,<sup>35</sup> surrounding waters,<sup>36</sup> wharves,<sup>37</sup> the space between wharves,<sup>38</sup> and the space between two contiguous wharves.<sup>39</sup> It does not include a drawbridge<sup>40</sup>

*Dry dock* is a structure contrived for the purpose of taking ships out of the water in order to repair them,<sup>41</sup> a watertight basin which after pumping out allows examination and work on the bottom of a vessel<sup>42</sup> It is a fixed structure and cannot be termed either a ship or vessel<sup>43</sup> Used in its common, ordinary sense, the term means a dry place to work in,<sup>44</sup> and the definition has been enlarged to include modern facilities for repairing boats out of the water<sup>45</sup> A dry dock and a marine railway are used for a like purpose,<sup>46</sup> and it has been held that the term "dry dock" includes a marine railway.<sup>47</sup>

*Floating dock* is described as one which receives a vessel when the dock is submerged, after which the watertight compartments of the dock are pumped out and the buoyancy of the dock raises the

21. Wash—Barrington v Commercial Dock Co, 45 P 748, 15 Wash 170, 33 L.R.A. 116  
68 C.J. p 203 note 21.

22. U.S.—Dutton v Strong, Wis, 1 Black 23, 17 L.Ed. 29  
68 C.J. p 203 note 22

23. Alaska—U.S. v Citizens Light, Power & Water Co, 8 Alaska 532

24. U.S.—U.S. v Baltimore & O.R. Co, 34 S.Ct. 75, 231 U.S. 274, 58 L.Ed. 218

25. Ala.—Compton v. Hawkins, 8 So. 75, 90 Ala. 411, 24 Am.S.R. 823, 9 L.R.A. 387

68 C.J. p 204 note 24

26. Alaska—U.S. v Citizens Light, Power & Water Co, 8 Alaska 532

27. Cal.—Clark v Los Angeles, 116 P. 966, 160 Cal. 317, 323  
19 C.J. p 380 note 34.

#### Similar definition

Wash—State v Superior Court for King County, 173 P. 186, 187, 102 Wash. 331

19 C.J. p 380 note 34 [a].

28. Ohio—Bingham v. Doane, 9 Ohio 165, 167

29. Cal.—Clark v Los Angeles, 116 P. 966, 160 Cal. 317, 323

N.J.—Wescott v American Creosoting Co, 97 A. 493, 494, 86 N.J. Eq. 104

30. Mo.—Meyers v Kansas City, 18 S.W.2d 900, 901, 323 Mo. 200.

31. N.S.—Snow v. Morton, 8 N.S. 237, 246  
19 C.J. p 380 note 45

32. N.Y.—Hart v Albany, 9 Wend. 571, 591, 24 Am.D. 165

33. N.J.—Wescott v American Creosoting Co, 97 A. 493, 494, 86 N.J. Eq. 104

N.Y.—Hart v Albany, 9 Wend. 571, 591, 24 Am.D. 165

34. N.Y.—Hart v. Albany, supra.

35. Wash—State v. Superior Court for King County, 173 P. 186, 187, 102 Wash. 331

36. N.Y.—Hart v Albany, 9 Wend. 571, 591, 24 Am.D. 165  
19 C.J. p 380 note 41

37. U.S.—Roberts v Brooks, N.Y., 78 F. 411, 415, 24 C.C.A. 158  
N.Y.—Hart v Albany, 9 Wend. 571, 591, 24 Am.D. 165

38. Wash—State v Superior Court for King County, 173 P. 186, 187, 102 Wash. 331  
19 C.J. p 380 note 43

39. N.S.—Snow v. Morton, 8 N.S. 237, 246

40. Wis.—Jeffery v. Kewaunee, G. B. & W. Ry. Co., 207 N.W. 283, 189 Wis. 207

41. U.S.—Cope v Vallette Dry Dock Co, La., 119 U.S. 625, 627, 7 S.Ct. 336, 30 L.Ed. 501

19 C.J. p 380 note 45, p 817 note 8

42. U.S.—Maryland Casualty Co v. Lawson, C.C.A. Fla., 101 F.2d 732, 733

43. U.S.—Cope v. Vallette Dry Dock Co, La., 119 U.S. 625, 627, 7 S.Ct. 336, 30 L.Ed. 501

44. U.S.—Continental Casualty Co. v. Lawson, D.C. Fla., 2 F.Supp. 459, 460, reversed on other grounds, C.C.A., 64 F.2d 802

45. U.S.—Continental Casualty Co. v. Lawson, supra.

46. U.S.—Norton v Vesta Coal Co., C.C.A. Pa., 63 F.2d 165  
Continental Casualty Co. v. Lawson, D.C. Fla., 2 F.Supp. 459, 460, reversed on other grounds, C.C.A., 64 F.2d 802

"Marine railway" defined see infra subdivision h of this section

47. U.S.—Avondale Marine Ways, Inc. v. Henderson, La., 74 S.Ct. 100, 101, 346 U.S. 366, 98 L.Ed. 77  
Western Boat Bldg. Co. v. O'Leary, C.A. Wash., 198 F.2d 409, 410—Maryland Casualty Co. v. Lawson, C.C.A. Fla., 101 F.2d 732, 733—Continental Casualty Co. v. Lawson, C.C.A. Fla., 64 F.2d 802, 804.  
Contra

Norton v Vesta Coal Co., C.C.A. Pa., 63 F.2d 165, 166

Colonna's Shipyard v. Lowe, D.C. Va., 22 F.2d 843, 844.

vessel<sup>48</sup> While the structure and operation of a floating dock differ somewhat from that of a dry dock and a marine railway,<sup>49</sup> the terms "dry dock," "floating dock," and "marine railway" are sometimes interchangeable.<sup>50</sup> "Floating dock" has been distinguished from "graven dock" or "graving dock"<sup>51</sup>

*Graven dock or graving dock* A graving dock is a water-tight chamber fitted with timber or iron gates, which are shut against the tide after the vessel has entered for the purpose of being inspected or repaired.<sup>52</sup> Except for details of construction, it is the same as a dry dock.<sup>53</sup> A graven dock is permanently attached to, and in that manner is, a part of the land, and therein it is distinguished from a floating dock.<sup>54</sup>

### c. Dockage

Dockage is compensation in the nature of rent, and may include the charge against vessels for the privilege of mooring to the wharves or in the slips, or the pecuniary compensation for the use of a dock while a vessel is undergoing repairs.

Dockage is compensation in the nature of rent,<sup>55</sup> and may include the charge against vessels for the privilege of mooring to the wharves or in the

slips,<sup>56</sup> or the pecuniary compensation for the use of a dock, while a vessel is undergoing repairs.<sup>57</sup> The term is used in contradistinction to "wharfage,"<sup>58</sup> although the terms have been held to be synonymous,<sup>59</sup> and are sometimes used interchangeably as meaning a charge for the use of a wharf or dock.<sup>60</sup>

"Dry dockage" means giving dockage in a dry dock.<sup>61</sup>

### d. Landing

A landing is a bank or wharf to or from which persons may go from or to some vessel in the contiguous waters, but a landing does not necessarily include a wharf.

A "landing" is variously defined as a bank or wharf to or from which persons may go from or to some vessel in the contiguous waters,<sup>62</sup> a place for going or setting on shore,<sup>63</sup> a place on a river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers,<sup>64</sup> a place where vessels can be moored and loaded or discharged,<sup>65</sup> a wharfage place for crafts,<sup>66</sup> the place where any kind of a craft lands,<sup>67</sup> the terminus of a road on a river or other navigable water, for the use of travelers, and the

48. US—Maryland Casualty Co v Lawson, CCA Fla., 101 F2d 732, 733

49. US—Maryland Casualty Co v Lawson, supra

Wash—Rohlf v Department of Labor and Industries, 69 P2d 817, 819, 190 Wash 566

50. US—Maryland Casualty Co v Lawson, CCA Fla., 101 F2d 732, 733

#### Location and purpose the same

"Necessarily, all are located on navigable waters and used for exactly the same purposes, i. e., to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat. A ship's master speaks of 'dry docking' his vessel regardless of which method is used."

US—Maryland Casualty Co v Lawson, supra

51. US—Maryland Casualty Co v Lawson, supra

NY—Butler v Robins Dry Dock & Repair Co., 147 NE 235, 240 NY 23

Manufacturers' Liability Ins Co v. Hamilton, 222 N.Y.S. 394, 129 Misc 665

52. US—The Vidal Sala, DCGa., 12 F 207, 211

53. US—Maryland Casualty Co v Lawson, CCA Fla., 101 F2d 732

54. N.Y.—Butler v. Robins Dry

Dock & Repair Co., 147 NE 235, 240 NY 23

Manufacturers' Liability Ins Co v Hamilton, 222 N.Y.S. 394, 129 Misc 665

#### Operation

When a graven dock is to be used for purposes of repairs to a ship, gates are opened and the ship floated into the dock. The gates are then closed and the water pumped out and the ship allowed to settle on blocks at the bottom of the dock and thus made available for purposes of repair.

NY—Butler v Robins Dry Dock & Repair Co., 147 NE 235, 240 NY 23

55. US—The Indomable, CCA NY, 279 F 827, 831

Ives v The Buckeye State, DC Mich., 13 F Cas No 7,117, 1 Newb Adm 69, 71

56. Pa—McNeely & Price Co v Philadelphia Piers, 196 A 846, 849, 329 Pa 113

19 CJ p 381 note 49

57. US—The Indomable, CCA NY, 279 F 827, 831

19 CJ p 381 note 50

58. Cal—People v Roberts, 92 Cal 659, 664, 28 P 689

Pa—McNeely & Price Co v Philadelphia Piers, 196 A 846, 849, 329 Pa 113

"Wharfage" defined see infra subdivision f of this section.

59. US—Empire Warehouse Co v. The Brooklyn, DCNY, 46 F. 132, 133

Md—Baltimore v Baltimore, etc., Steamboat Co., 104 Md 485, 497, 65 A 353

60. US—Empire Warehouse Co v The Brooklyn, DCNY, 46 F 132, 133

Cal—People v Roberts, 92 Cal 659, 664, 28 P 689

61. US—The George W Elder, D COr., 159 F 1005, 1009

62. La—State v Louisiana Terminal Co., 154 So 731, 179 La 671 35 CJ p 935 note 36

63. Hawaii—Hall v Wilder S S Co., 9 Hawaii 68, 70.

64. Md—Chaney v Anne Arundel County, 86 A. 1039, 1040, 119 Md 385

35 CJ p 935 note 38

#### Similar definitions

Mo—Meyers v Kansas City, 13 S W2d 900, 901, 323 Mo 200 35 CJ p 935 note 38 [a]

65. US—Waite v O'Neil, Tenn., 76 F 408, 417, 22 CCA 248, 34 LR A 550

66. Md—Chaney v Anne Arundel County, 86 A. 1039, 119 Md 385 35 CJ p 935 note 40

67. Me—McCann v Minot, 78 A. 465, 467, 107 Me 393 35 CJ p 936 note 41.

loading and unloading of goods;<sup>68</sup> the yard or open place which is used for deposit and the convenient communication between the land and water<sup>69</sup> The term "landing" as used in a statute requiring a license for the keeping of a landing necessarily refers to a place,<sup>70</sup> and it has been said to have the same significance as a wharf,<sup>71</sup> but a landing does not necessarily include a wharf<sup>72</sup>

*Landing place* is a place where things are collected and deposited for transportation or shipment from that place, whether it is by water or rail<sup>73</sup>

*Public landing* is a piece of ground on the bank or margin of a river, provided for the open and common use of all persons in the debarkation of themselves or their goods,<sup>74</sup> a place on a river or other navigable water for loading or unloading goods or for the reception and delivery of passengers<sup>75</sup> It is dedicated to the public use and held in trust for the public the same as a street<sup>76</sup> Public landings have been recognized both by immemorial usage and by law from the earliest existence of the state<sup>77</sup>

#### e. Pier

As the term is customarily used with respect to projections into navigable water, a "pier" is a structure extending from the solid land out into the water to afford convenient passage for persons and property to and from vessels alongside of the pier

"Pier" generically means a support, and in its precise use, the absence or presence of water surround-

ing it is immaterial,<sup>78</sup> although its customary use is with respect to projections into navigable water<sup>79</sup> As thus used, a pier is a structure extending from the solid land out into the water to afford convenient passage for persons and property to and from vessels alongside of the pier,<sup>80</sup> a projecting quay, wharf, or other landing-place,<sup>81</sup> a projecting wharf or landing-place<sup>82</sup>

*Pierhead* is the projecting end of a pier forming a wharf or landing place<sup>83</sup>

*Public pier.* A pier may be public or private,<sup>84</sup> and a public pier has been held to constitute a part of the highway.<sup>85</sup>

*Bridge pier* is a projecting wharf, a permanent structure attached to, and firmly connected with, the mainland<sup>86</sup>

#### f. Wharfage

Wharfage in its most general legal sense is the use of a wharf furnished in the ordinary course of navigation, or, in its limited sense, it is a charge or rent for the use of a wharf

In its most general legal sense, wharfage is the use of a wharf furnished in the ordinary course of navigation,<sup>87</sup> and in this sense the term is usually applied to the use of a wharf by a vessel for the loading and unloading of goods or passengers, but it also may clearly include the use of a wharf while lying alongside for protection<sup>88</sup>

*As compensation.* In its limited sense wharfage is a charge or rent for the use of a wharf<sup>89</sup> and

68. SC—State v Randall, 32 SC L 110, 111, 47 Am D 548

69. SC—State v. Graham, 49 SC L 310

70. La—State v Louisiana Terminal Co, 154 So 731, 179 La 671

71. La—State v Louisiana Terminal Co, supra

72. Pa—Reighard v Flinn, 44 A 1080, 194 Pa 352

68 CJ p 203 note 16—35 CJ p 935 note 40 [a]

73. Me—McCann v Minot, 78 A 465, 467, 107 Me 393  
35 CJ p 936 note 49

74. Wis—Gardiner v Tisdale, 2 Wis 153, 188, 60 Am D 407  
50 CJ p 855 note 98

75. Mo—State v Dreyer, 129 SW 904, 229 Mo 201  
50 CJ p 856 note 99.

76. Ill—Chicago, etc., R Co v People, 78 NE 790, 222 Ill 427  
50 CJ p 856 note 1  
Dedication of public landing see Dedication § 8

Public landing analogous to public way

Mass—Cape Cod S S Co. v. Select-

men of Provincetown, 3 NE 2d 244, 245, 295 Mass 65

77. Mass—Cape Code S S Co v Selectmen of Provincetown, supra

78. NJ—Chelsea Land & Improvement Co v Westcott, 72 A 1007, 75 N J Eq 367

Pa—Terminal Coal Co v Pennsylvania R Co, 139 A 612, 291 Pa 103

79. NY—In re Water Front on North River in City of New York, 205 NYS 56, 122 Misc 863

68 CJ p 205 note 49

80. NJ—Seabright v Allgor, 56 A 287, 69 N J Law 641, 644

68 CJ p 205 note 50

81. Md—Western Maryland Tidewater R Co v Baltimore, 68 A. 6, 106 Md 561, 570

68 CJ p 205 note 51

82. NY—People v New York, etc., Ferry Co, 7 Hun 105, 108, modified on other grounds 68 NY 71

45 CJ p 513 note 24

83. Webster New Int D.

"Pierhead line"

"These words may suggest the outer limits of piers, but we think they should in no event be construed

as fixing the inner harbor line, which when established becomes the outer shore land boundary"

Wash—Puget Mill Co v State, 160 P 310, 315, 93 Wash 128

84. NJ—Borough of Seabright v Allgor, 56 A 287, 288, 69 N J Law 641

85. NY—Radway v Briggs, 37 N Y 256, 4 Transcr A 98, 35 How Pr. 422

86. Wis—Johnson v Northwestern Nat Ins Co, 39 Wis 87, 90

87. US—The James T Furber, D. C Me, 129 F 808, 810  
68 CJ p 204 note 25

88. US—Beard v Marine Lighterage Corporation, DCNY, 296 F 146, 147

68 CJ p 204 note 26

Mode and purpose of use see infra § 10

89. US—Ouachita Packet Co v Aiken, La, 7 SCt 907, 910, 121 US 444, 30 L Ed 976

68 CJ p 204 note 28

"Dockage" defined see supra subdivision c of this section

"Wharfage" in this sense generally see infra §§ 11-15

"shed hire,"<sup>90</sup> including dockage or moorage,<sup>91</sup> the compensation paid for loading goods on a wharf or shipping them off.<sup>92</sup> The term "wharfage" is applied to a charge for landing goods, whether on an artificial erection or a natural landing.<sup>93</sup>

*Top wharfage* is a charge levied on the owners of merchandise for the privilege of using the pier or wharf, in transferring the freight to and from vessels docking there, or of having their goods lie on the dock in the course of loading and unloading operations.<sup>94</sup>

#### g. Wharfinger

A wharfinger is one who for hire receives merchandise on his wharf either for the purpose of forwarding or for delivery to the consignee on such wharf.

A wharfinger is one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf,<sup>95</sup> one who keeps a wharf for receiving goods for hire.<sup>96</sup> Wharfingers who carry goods from their wharves for their wharf customers but not for strangers, except under special circumstances, are not common carriers.<sup>97</sup>

#### h. Other Terms

The terms "key," "marine railway," "moorage," "slip," and other terms have been defined by the courts.

Judicial decisions have defined and applied particular terms connected with the law of wharves

other than those considered supra subdivisions a-g of this section.

*Key* is a quay,<sup>98</sup> a wharf to land or ship goods or wares at.<sup>99</sup>

*Keyage* is the money or toll taken for lading or unlading wares at a key or wharf.<sup>1</sup>

*Marginal street* is a dock or wharf used in conjunction with, and in furtherance of, commerce and navigation.<sup>2</sup>

*Marine railway* is an inclined structure at the water's edge which extends below the water<sup>3</sup> and runs from some distance in the water to any desired point on dry land.<sup>4</sup> It is used to bring a boat up out of the water onto a dock.<sup>5</sup> It carries a cradle which moves on rollers or wheels.<sup>6</sup> The cradle runs below the water and receives the vessel which is then hauled out<sup>7</sup> by some power other than its own, and not connected with navigation.<sup>8</sup>

*Moorage* is a sum due by law or usage for mooring or fastening of ships to trees or posts at the shore or to a wharf.<sup>9</sup>

*Public ship* is a ship dedicated to public use.<sup>10</sup>

*Quay* is a landing place,<sup>11</sup> a place where vessels are loaded and unloaded,<sup>12</sup> a vacant space between the first row of buildings and the water's edge, used for the reception of goods and merchandise imported or to be exported,<sup>13</sup> a wharf at

90. US—Wilkins v Trafikaktiebolaget Grangesberg Okelosund, CCA Tex., 10 F2d 129, 131

91. Md—Mayor, etc., of Baltimore v Baltimore & Philadelphia Steamboat Co., 65 A. 353, 358, 104 Md 485

68 CJ p 204 note 30

92. US—The Little Charley, DC Md., 31 F2d 120, 122

68 CJ p 204 note 31.

#### Other definitions

(1) Money paid for landing goods on or loading them from a wharf US—Manhattan Lighterage Corporation v Moore-McCormack Line, DCNY, 45 FSupp 271, 273

(2) A fee levied for the use of a wharf by freight or merchandise in respect of which the fee is charged Pa—McNeely & Price Co v Philadelphia Piers, 196 A. 846, 849, 329 Pa. 113

(3) More definitions see 68 CJ p 204 note 31 [a]

93. Cal—Sacramento v. The New World, 4 Cal 41, 44

94. Pa—McNeely & Price Co v Philadelphia Piers, 196 A. 846, 848, 329 Pa. 113.

95. Cal—Teahan v. Industrial Ac-

cident Commission, 292 P 120, 121, 210 Cal 342

68 CJ p 204 note 34

Wharfinger as not seaman see Seamen § 1 b

Appointment see Municipal Corporations § 642

96. Pa—National Union Bank of Reading v Shearer, 74 A 351, 352, 225 Pa 470, 17 Ann Cas 664

68 CJ p 204 note 35

97. Del—Reed v Wilmington Steamboat Co., 40 A. 955, 15 Del 193

10 CJ p 51 note 59

98. Ky—Rowan v Portland, 8 B Mon 232, 253

99. Ky—Rowan v Portland, supra

1. Ky—Rowan v. Portland, supra

2. NY—In re Triborough Bridge Approach, City of New York, 288 NYS 697, 711, 159 Misc 617.

3. US—Maryland Casualty Co v Lawson, CCA Fla., 101 F2d 732 733

"Dry dock," "floating dock," and "marine railway" compared and distinguished see supra subdivision b of this section

4. Wash—Rohlf v Department of

Labor and Industries, 69 P2d 817, 819, 190 Wash 566

5. US—Continental Casualty Co v Lawson, DC Fla., 2 FSupp 459, 460, reversed on other grounds, CCA., 64 F2d 802

6. US—Maryland Casualty Co v Lawson, CCA Fla., 101 F2d 732, 733

7. US—Maryland Casualty Co v Lawson, supra

8. Wash—Rohlf v Department of Labor and Industries, 69 P2d 817, 819, 190 Wash 566

9. Md—Wharf Case, 3 Bland 361, 373

10. Ill—Chicago v Chicago, etc., R Co., 150 NE 250, 253, 319 Ill. 351

50 CJ p 863 note 36

11. La—St Anna's Asylum v. New Orleans, 29 So 117, 104 La 392.

12. La—St Anna's Asylum v New Orleans, supra.

13. US—New Orleans v U. S. La., 10 Pet 662, 715, 9 LEd 573. La—Fleitas v New Orleans, 24 So 623, 51 La Ann. 1, 21.



which goods or wares may be landed or shipped,<sup>14</sup> a wharf, usually constructed of stone, but sometimes of wood, iron, etc., along a line of coast or a river bank, or around a harbor or dock<sup>15</sup>

*Slip* is an opening between two pieces of land or wharves,<sup>16</sup> or a small dock,<sup>17</sup> open water adjoining a wharf<sup>18</sup> In its application to structures and places for the accommodation of vessels, the word is said to be peculiar to New York,<sup>19</sup> and to be used in two senses, that is, as designating the docks which form the intermediate space<sup>20</sup> and also as designating the intermediate space formed by the docks<sup>21</sup>

*Wharfboat* is a boat, moored to or at a bank of a river, used for a wharf.<sup>22</sup>

*Wharf property* may include boathouses, wharves, and sidewalks over tidal lands<sup>23</sup>

## § 2. Right to Construct and Maintain

The basis of the right to erect a wharf is either in the ownership of the soil or the right of eminent domain, and in the absence of constitutional inhibition the state can build or aid others in building wharves for public use and in aid of trade or commerce

The basis of the right to erect a wharf is either in the ownership of the soil or the right of eminent domain<sup>24</sup> In the absence of constitutional inhibition the state can build or aid others in building wharves for public use and in aid of trade or

commerce,<sup>25</sup> and this right can be delegated to county commissioners<sup>26</sup> Where a dock is built by a city on land belonging to the United States, the dock becomes part of the government's land in the absence of special circumstances leading to a conclusion to the contrary, as where there was no specific authority shown for the erection of the dock as property of the city<sup>27</sup>

*Prescription or adverse possession.* Title to a wharf may be obtained by prescription or adverse possession,<sup>28</sup> as may also the right to occupy a dock<sup>29</sup> or to maintain a wharf,<sup>30</sup> but not so where the occupation and use thereof constitute a public nuisance<sup>31</sup> To initiate an adverse holding the possession must be hostile,<sup>32</sup> and not by one in such a relationship as landlord and tenant<sup>33</sup> There should be proof of knowledge by, or notice to, the owner of an adverse claim and enjoyment to establish title by prescription against him,<sup>34</sup> the receipt of wharfage will not of itself authorize the presumption of knowledge<sup>35</sup> Possession of a wharf, under color and with claim of title, is sufficient to put another claimant on proof of a better title, or at least of an equal right with the person in possession<sup>36</sup> Proof of a right to unload a vessel at a wharf is not proof of title to the wharf, and proof of the claim and exercise of such right is not proof of possession of the wharf, or that a tenant holds the wharf under the claim-

14. Ky—Rowan v Portland, 8 B Mon 232, 253  
51 CJ p 120 note 32.
15. La—St Anna's Asylum v New Orleans, 29 So 117, 104 La. 392, 403
16. NY—Thompson v New York, 11 NY 115, 120  
68 CJ p 205 note 55
17. NY—Thompson v. New York, 11 NY 115, 120  
68 CJ p 205 note 56
18. SC—Port Utilities Commission of Charleston v Marine Oil Co., 175 SE 818, 173 SC 346
19. NY—Thompson v New York, 5 NY Super 487, 498, affirmed 11 NY 115
20. NY—Thompson v. New York, 11 NY 115, 120
21. NY—Thompson v. New York, 11 NY 115, 120  
68 CJ p 205 note 59
22. Webster New Int D
23. NY—Siebel v Pleayl, 172 NY S 798
24. Ind—Jeffersonville v. Louisville, etc. Steam Ferry Co., 27 Ind 100, 89 AmD 495
25. Vt—City of Burlington v Central Vermont Ry. Co., 71 A 826, 82 Vt 5.

- Delegation of right to municipal corporation see Municipal Corporations § 1055
- Powers, duties, and liabilities of municipal dock department or commissioners see Municipal Corporations § 644
- Prerogative of sovereignty**  
Ownership, control, and operation of port facilities are essentially and usually prerogatives of sovereignty  
US—Commissioner of Internal Revenue v Ten Eyck, CCA 2, 76 F 2d 515.
- Duty to provide facilities**  
NY—In re New York, 135 NY 253, 31 NE 1043, 31 AmSR 825  
20 CJ p 579 note 43[a]
- Statutory provision held unconstitutional**  
That section of the act authorizing the department of state docks and terminals to expand port facilities, providing that no more than two thousand five hundred dollars of amount received from sale of bonds or from any other state funds shall be expended in payment of services of an attorney, is unconstitutional  
Ala—Sweet v Wilkinson, 40 So 2d 427, 252 Ala 343
26. Md—Chaney v. Commissioners

- of Anne Arundel County, 86 A 1039, 119 Md 385  
68 CJ p 205 note 67.
27. US—Berger v Ohlson, CCA Alaska, 120 F 2d 56
28. Ky—Burke v Trabue's Ex'x, 126 SW 125, 137 Ky 580  
68 CJ p 207 note 99
29. Mass—Nichols v. Boston, 98 Mass 42, 93 AmD 132—Sargent v Ballard, 9 Pick 251
30. Mass—Gray v Bartlett, 20 Pick 186, 32 AmD 208
31. NY—Knickerbocker Ice Co. v Forty-Second St, etc. R Co., 78 NYS 838, 39 Misc 27, affirmed 83 NYS 469, 85 App Div 530, affirmed 68 NE 864, 176 NY. 408, reargument denied 69 NE 1125, 177 NY. 528
32. NY—Bedlow v New York Floating Dry-Dock Co., 19 NE 800, 112 NY. 263, 2 LRA 629
33. NY—Bedlow v New York Floating Dry-Dock Co., supra  
68 CJ p 207 note 3
34. NY—Thompson v New York, 11 NY 115
35. NY—Thompson v New York, supra.
36. US—Linthicum v Ray, Dist. Col., 9 Wall 241, 19 LEd. 657.

ant,<sup>37</sup> the right to unload at a wharf being consistent with title in another<sup>38</sup> Moreover, where the state has laid out a public street on which a wharf was subsequently constructed and the wharf became the property of the state, a lot owner who uses the wharf and street as a means of access to his lot cannot acquire any rights to the wharf by adverse possession against the state<sup>39</sup>

### § 3. — Grants, Franchises, and Privileges

- a. In general
- b. Construction

#### a. In General

The privilege of erecting wharves to project into the stream may be granted or withheld at the pleasure of the state, and the right cannot be exercised by an individual except by a grant for that purpose by the sovereign power or by prescription, but no particular, technical words are necessary to constitute a valid grant.

Since the title to the soil under navigable waters is, as shown in Navigable Waters § 89, in the sovereign, the privilege of erecting wharves to project into the stream is one which may be granted or withheld at the pleasure of the state,<sup>40</sup> and being a franchise, the right cannot be exercised by an individual, except by a grant for that purpose by the sovereign power, or by prescription<sup>41</sup> No particular, technical words are necessary to constitute a valid grant,<sup>42</sup> and a statutory requirement that a grant should specify the quantity of the land that might be used, has been held to be directory only.<sup>43</sup> A right granted by harbor commissioners to use piers for docking vessels is a mere privilege or license<sup>44</sup> A grant of wharf rights does not include the right to receive vessels at each of its sides<sup>45</sup> Where a license to extend a wharf to a point below high water mark

and accompanying plans were not recorded within one year after effective date of the license as required by statute, the license became void in the strict sense, and thereafter the structure involved was maintained on the lands of the commonwealth without right<sup>46</sup>

*Appurtenances included.* Ordinarily the grant of a wharf right includes as appurtenant thereto a right of access over adjacent lands under water<sup>47</sup> It has been held, however, that the grant of the right to maintain a pier will not confer any right of access from or over the lands which the city may at its pleasure cause to be filled in, although in such case, as long as this territory is not filled in it serves the purpose of access to the pier, constituting merely a privilege by sufferance and not a legal right,<sup>48</sup> and a dock company acquired no right to land included in a road leading to the wharf and adjoining land under water by its act of incorporation<sup>49</sup>

*Exclusive privileges* The state may grant an exclusive privilege to an individual to erect and keep a public wharf,<sup>50</sup> or to erect and maintain sheds by private persons on public piers<sup>51</sup> Exclusive riparian rights do not attach, as a matter of course, to a grant of lands under water,<sup>52</sup> and, in the absence of an express grant, and of any manifest intent to convey it, no exclusive right of wharfage passes<sup>53</sup>

*Revocability.* A legislative act may operate as a grant or as a revocable license according to the circumstances of the case,<sup>54</sup> and it is held that valid sovereign grants, once made, are inviolable,<sup>55</sup> but that licenses are revocable<sup>56</sup> if there is compliance with the statute relating to revocation<sup>57</sup>

*On termination of franchise,* the ownership of wharves may become vested in the public body<sup>58</sup>

37. NJ—Kipp v Den ex dem Van Blarcom, 24 NJ Law 854

38. NJ—Kipp v Den ex dem Van Blarcom, supra

39. Cal—Arques v. City of Sausalito, 272 P 2d 58, 126 Cal App 2d 403

40. La—De Gruy v Aiken, 9 So 747, 43 La Ann 798  
68 C J p 205 note 72

41. Cal—City of Oakland v E K Wood Lumber Co, 292 P 1076, 211 Cal 16, 80 A L R 379  
68 C J p 205 note 73

42. NY—Langdon v New York, 93 NY 129  
68 C J p 205 note 74

43. Cal—City of Santa Cruz v Southern Pac R Co, 126 P. 362, 163 Cal 538  
68 C J p 206 note 75

44. Cal—Union Oil Co. of Califor-

nia v Rideout, 177 P 196, 38 Cal App 629

45. Mass—Wellington v City of Cambridge, 100 NE 1096, 214 Mass 35  
68 C J p 206 note 77

46. Mass—Tilton v City of Haverhill, 42 NE 2d 588, 311 Mass 572

47. NY—In re New York, 87 NE 759, 193 NY 503, motion denied  
88 NE 1125, 194 NY 586  
68 C J p 206 note 79

48. NY—In re New York, supra.

49. NJ—Quinlan v Borough of Fair Haven, 131 A 870, 102 NJ Law 443

50. Miss—Martin v O'Brien, 34 Miss. 21  
68 C J p 206 note 81.

51. NY—People v Baltimore, etc., R Co, 22 NE 1026, 117 NY. 150.

52. US—Turner v People's Ferry Co, CCNY, 21 F 90

53. US—Turner v People's Ferry Co, supra

54. Mass—Bradford v McQuesten, 64 NE 688, 182 Mass 80  
68 C J p 206 note 86

55. NY—Langdon v New York, 93 NY 129  
68 C J p 206 note 87

56. NY—In re Pier Old No 49, East River, in City of New York, 124 N E 148, 227 NY 119  
68 C J p 206 note 88

57. NY—In re Pier Old No 49, East River, in City of New York, supra.  
68 C J p 206 note 90

58. Cal—City of Los Angeles v Pacific Coast S S Co, 187 P. 739, 45 Cal App 15  
68 C J. p 206 note 91.

### b. Construction

Such a rule of construction must be adopted as will render a grant effectual for some purpose, and if the purpose is not plainly expressed in the grant, the intent of the parties must be ascertained from the nature and situation of the land granted and all the surrounding circumstances.

Where the sovereign grants land under water, which cannot, in its natural state, be subjected to any of the uses to which dry land may be devoted, such a rule of construction must be adopted as will render the grant effectual for some purpose.<sup>59</sup> The purpose may be plainly expressed in the grant, but if it is not, then the intent of the parties must be ascertained from the nature and situation of the land granted, and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent.<sup>60</sup> Following these rules, many specific grants have been construed by the courts.<sup>61</sup> Thus, a grant of wharfage has been held to confer no proprietary rights in the soil.<sup>62</sup> An ordinance understood by all parties as granting the right to build and maintain a wharf was given a liberal interpretation to that effect.<sup>63</sup> A statute authorizing riparian owners to construct wharves must be construed with a statute empowering municipalities to regulate wharf construction,<sup>64</sup> and as thus construed it has been held that such owners have no right, without permission, to construct a wharf into navigable water within a city or town in such manner as unnecessarily to interfere with navigation and acquire a vested right by doing so.<sup>65</sup> A provision of a permit should not be interpreted to nullify it.<sup>66</sup>

### § 4. Transfer of Wharf Rights by Owners

A license to construct a dock on state land is assignable, subject to the right of the state to revoke the license.

A license to construct a dock on state land is

assignable, subject only to the right of the state to revoke the license.<sup>67</sup>

### § 5. — Lease

- a In general
- b Rights and liabilities of lessor
- c Rights and liabilities of lessee

#### a. In General

Wharves may be leased, but the leasing thereof is generally regulated by statute, and ordinarily public areas cannot be leased for private purposes. The lease itself is merely a letting of the franchise of wharfage, and no property in, or right to, the wharf itself passes to the lessee.

Wharves may be leased,<sup>68</sup> but the leasing thereof is generally regulated by statute, and ordinarily, public areas cannot be leased for private purposes.<sup>69</sup> Moreover, the owner of a public pier which had exclusive control thereof at the time of an accident cannot give retroactive effect to a lease between the owner and a steamship company so as to change the relationship of wharfinger and permittee existing between such parties at the time of the accident.<sup>70</sup>

The lease itself is merely a letting of the franchise of wharfage, no property in, or right to, the wharf itself passes to the lessee,<sup>71</sup> although, as shown infra subdivision c (1) of this section, the beneficial use of all the lessor's rights and privileges in the demised premises and of the easements connected therewith passes to the lessee for the term provided for. To create a lease of a wharf no particular words are necessary provided the intention of the parties is clear.<sup>72</sup>

*Construction.* In the construction of leases of wharves, the intention of the parties at the time the lease was executed and delivered as to what was included in it must govern,<sup>73</sup> and that inten-

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| <p>59. NY—Langdon v New York, 93 NY 129</p> <p>60. Cal—Rush v. Jackson, 24 Cal 308</p> <p>NY—Langdon v New York, 93 NY 129</p> <p>61. Ala—Murphy v Montgomery, 11 Ala 586</p> <p>68 CJ p 206 note 94—26 CJ p 1021 note 2 [a]</p> <p>62. Ala—Murphy v Montgomery, 11 Ala 586</p> <p>63. Cal—City of Santa Cruz v Southern Pac. R Co., 126 P 362, 163 Cal 538</p> <p>68 CJ p 207 note 96</p> <p>64. Or—Port of Portland v Reeder, 280 P 2d 324, 203 Or. 369</p> <p>65. Or—Port of Portland v. Reeder, supra.</p> | <p>66. US—Rocky Point Oyster Co v Standard Oil Co of New York, DC RI, 265 F 379</p> <p>68 CJ p 207 note 97</p> <p>67. NY—Ziegele v. Richelieu, etc., Nav Co., 38 NYS 1022, 3 App Div 77</p> <p>Wharfage rights as property see Navigable Waters § 73</p> <p>68. Or—Treadgold v. Willard, 160 P 803, 81 Or 658</p> <p>68 CJ p 207 note 13</p> <p>Power of municipality to lease see Municipal Corporations § 1815</p> <p><b>Lease of land for wharves</b></p> <p>Docks commission, with approval of governor, could lease land to city for docks, wharves, and piers</p> <p>Ala.—State ex rel Radcliff v City of Mobile, 155 So 872, 229 Ala 93</p> | <p>69. Me—Hamilton v Portland State Pier Site Dist., 112 A 836, 120 Me 15</p> <p>68 CJ p 207 note 15</p> <p>70. US—Manhattan Lighterage Corp v. Moore-McCormack Line, DC NY, 45 F Supp 271</p> <p>71. NY—New York Pilot Com'rs v Clark, 33 NY 251</p> <p>Taylor v Beebe, 26 NY Super 262</p> <p>72. Mass—Viaux v John T Scully Foundation Co., 142 NE 81, 247 Mass 296</p> <p>68 CJ p 208 note 18</p> <p>73. Wash—Brown v. Carkeek, 44 P. 887, 14 Wash 443.</p> <p>68 CJ p 208 note 21.</p> |
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tion must be discovered from the language employed in the instrument itself, considered in the light of surrounding circumstances<sup>74</sup>

### b. Rights and Liabilities of Lessor

A lessor may reserve the right to charge wharfage against vessels not owned or chartered by the lessee, and he does not lose the right to unobstructed access to navigable water by the lessee's permissive erection of a pier. The lease does not always warrant the condition of the wharf, and the lessor is bound by provisions of the lease relating to the purchase of machinery placed on the premises with his consent, and of ordinances relating to the installation of fire extinguishers.

A lessor may reserve the right to charge wharfage against vessels not owned or chartered by the lessee<sup>75</sup>. The wharf proprietor does not lose the right to unobstructed access to navigable water by a lessee's permissive erection of a pier,<sup>76</sup> and in such case, the lessee must bear the cost and burden of removal and restoration at the termination of the lease<sup>77</sup>. The lease does not always warrant the condition of the wharf<sup>78</sup> or that it is fit for the purpose for which it is hired,<sup>79</sup> and where the lease provides that the obligation of the landlord to keep the demised premises in repair shall not accrue until written demand stating the particular repairs to be made is given, the fact that the landlord often makes repairs without such written request does not impose on him any obligation to make repairs in the absence of a written request<sup>80</sup>. A provision that the lessor, at the expiration of the lease, should buy "machinery and apparatus" placed on the premises with his consent, included appliances and structures of a permanent character<sup>81</sup>. Under an ordinance imposing on a pier owner the duty to provide fire extinguishers, the lessor is liable for such equipment, although the lessee is compelled to install it.<sup>82</sup>

*Tenant's breach of covenant.* The measure of the landlord's damages for a tenant's breach of a covenant to put and to maintain a wharf in good condition is the difference in value at the time the tenant surrendered possession and the time he took possession,<sup>83</sup> not the cost of reconstructing the pier.<sup>84</sup> In an action for breach of an agreement in the lease to return the dock to the lessor in its original condition, the court when giving the lessor judgment against the contractor for damage to the dock properly refuses to enter judgment for the lessor against a subcontractor whose negligence was chiefly responsible for the loss, but with whom no privity of contract existed<sup>85</sup>.

*Retaking of possession.* A lessor is justified in some cases in retaking possession under a lease, for lessee's violation of its terms,<sup>86</sup> as for instance, where the lessee permits a vessel carrying explosives to lie at the pier<sup>87</sup>.

*Abandonment by lessee.* On an abandonment by the lessee, the right to the possession of the wharf, and to its earnings will revert to the owner.<sup>88</sup>

### c. Rights and Liabilities of Lessee

- (1) In general
- (2) Maintenance and repair
- (3) Rent

#### (1) In General

The rights and liabilities of the lessee depend on a proper construction of the lease. He may become entitled only to the wharfage without acquiring any exclusive right to possession, but it has been held that the beneficial use and enjoyment of all the rights and privileges possessed by the lessor in the demised premises for the term provided for pass to the lessee.

The rights and liabilities of the lessee depend on a proper construction of the lease<sup>89</sup>. He may become entitled only to the wharfage, without acquir-

74. Wash—Brown v. Carkeek, supra.  
68 C.J. p. 208 note 22

75. U.S.—The M. L. C. No. 10, C.C.A. N.Y., 10 F.2d 699, certiorari denied 46 S.Ct. 488, 271 U.S. 675, 70 L.Ed. 1146

76. Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163

77. Md.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, supra.

78. Mass.—Viaux v. John T. Scully Foundation Co., 142 N.E. 81, 247 Mass. 296.

79. Mass.—Viaux v. John T. Scully Foundation Co., supra.

80. U.S.—Cia Exportadora E Importadora Mexicana, S. A., v. Marra Bros., D.C.N.Y., 59 F.Supp. 989

81. U.S.—Great Northern Ry. Co. v. Philadelphia & Reading Coal & Iron Co., Minn., 242 F. 799, 155 C.C.A. 387

82. N.Y.—People ex rel Pennsylvania R. Co. v. Leo, 188 N.Y.S. 226, 196 App.Div. 426

83. N.Y.—City of New York v. McCarthy, 157 N.Y.S. 711, 171 App.Div. 561

84. N.Y.—City of New York v. McCarthy, supra.

85. Wash.—Nelson v. City of Seattle, 38 P.2d 1034, 180 Wash. 1.

86. U.S.—Peirce v. New York Dock Co., C.C.A.N.Y., 255 F. 165

87. U.S.—Peirce v. New York Dock Co., supra.

88. Wash.—Bogart v. Sound Motor Co., 134 P. 468, 74 Wash. 679

89. U.S.—Peirce v. New York Dock Co., C.C.A.N.Y., 265 F. 148  
68 C.J. p. 208 note 36

#### Contract for storage of ships constructed

(1) Not to imply agreement on part of owners to raise and move sunken boat

U.S.—City of Newark v. Mills, C.C.A. N.J., 35 F.2d 110, certiorari denied 50 S.Ct. 237, 281 U.S. 722, 74 L.Ed. 1140

(2) To imply undertaking to remove boats on expiration of term

U.S.—City of Newark v. Mills, supra

ing any exclusive right to possession<sup>90</sup> He cannot interfere with the public use of the pier for purposes of navigation<sup>91</sup> A lease of a pier includes its appurtenances,<sup>92</sup> such as the right to tie vessels thereto,<sup>93</sup> and to a sufficient channel<sup>94</sup> The lessee may abandon or surrender his lease,<sup>95</sup> but a lessee's property rights are not lost because their exercise may be inexpedient or unnecessary for a time<sup>96</sup>

The beneficial use and enjoyment of all the rights and privileges possessed by the lessor in the demised premises for the term provided for pass to the lessee,<sup>97</sup> and he thereby acquires the right, not only to the use and enjoyment of the premises demised, and of all easements connected therewith,<sup>98</sup> but also the right to adapt the premises to the purpose of securing the most profitable use of them not inconsistent with the terms of the lease,<sup>99</sup> and the lessor has no right or power of interference therewith<sup>1</sup> The lessee cannot be required to pay charges required by law to be paid by the pier owner,<sup>2</sup> but he may be liable for damage to the lessee of another part of the dock, if he is responsible therefor<sup>3</sup> If, on terminating the lease, the tenant leaves rubbish on the premises, he will be liable for any damages occasioned thereby,<sup>4</sup> but such act does not amount to a continued use and occupation of the estate<sup>5</sup>

**Renewal of lease** The holding over by lessee after expiration of the lease, together with the continued payment of rent, creates a tenancy from year to year,<sup>6</sup> but is not a renewal or extension of the lease<sup>7</sup>

**Subletting.** An agreement to allow a steamboat owner to use a lessee's facilities to repair his steamboat is not a subletting in violation of the lease<sup>8</sup>

**Relief from forfeiture** Equity will not relieve against a forfeiture arising from breach of covenant, where there cannot be just compensation decreed for the breach<sup>9</sup>

**Tenant's claims as to title** A lessee, retaining rights secured by the lease, is estopped to controvert his landlord's title,<sup>10</sup> and his exercise of a wharfing-out privilege cannot ripen into adverse title<sup>11</sup>

## (2) Maintenance and Repair

A lease of a wharf may require the lessee to maintain it or keep it in repair, or to make good any damage from the occupation, and in such case the lessee's liability is not limited to repairs easily made.

A lease of a wharf may require the lessee to maintain it<sup>12</sup> or keep it in repair,<sup>13</sup> or to make good any damage from the occupation,<sup>14</sup> and in such case, the lessee's liability is not limited to repairs easily made<sup>15</sup> It has been held, however, that the lessee is under no obligation to reconstruct and re-

90. NY—Pilot Com'rs v Clark, 33 NY 251

Right of lessee to wharfage fees see infra § 12

91. NY—Pilot Com'rs v Clark, supra

92. US—Pearce v New York Dock Co., CCANY, 255 F 165

Flats built on tide lands extending to deep water, when necessary to the use of a wharf, may pass under a lease as an appurtenance thereto Wash—Brown v Carkeek, 44 P 387, 14 Wash 443

93. US—Pearce v New York Dock Co., CCANY, 255 F 165

94. Mass—Philadelphia & Reading Coal & Iron Co v Salem Terminal Corporation, 152 NE 61, 256 Mass 95—Philadelphia & Reading Coal & Iron Co v Salem Terminal Corporation, 148 NE 444, 252 Mass 439

95. Cal—Security-First Nat Bank of Los Angeles v Marzen, 82 P 2d 727, 28 Cal App 2d 446

**Circumstances amounting to surrender**

Where lessee of portion of wharf used for dance hall and its lessor executed a lease to city for a term of more than a year in advance of date of expiration of lessee's lease, and monthly rental was to be paid by

city to both original lessee and lessor, and repairs could be made by city only with approval of original lessee and lessor, execution of the lease to city constituted a surrender by original lessee of its lease

Cal—Security-First Nat Bank of Los Angeles v Marzen, supra

96. Mass—Philadelphia & Reading Coal & Iron Co v Salem Terminal Corporation, 148 NE 444, 252 Mass 439

97. NY—Bedlow v New York Floating Dry-Dock Co, 19 NE 800, 112 NY 263, 2 L.R.A. 629 68 CJ p 209 note 43

98. NY—Bedlow v New York Floating Dry-Dock Co, supra

99. NY—Bedlow v New York Floating Dry-Dock Co, supra 68 CJ p 209 note 45

1. NY—Bedlow v New York Floating Dry-Dock Co, supra 68 CJ p 209 note 46

2. Pa—Haley v American Agr Chemical Co, 73 A. 557, 224 Pa. 316

3. Wash—Pacific Grocery Co v James Griffiths & Sons, 191 P. 785, 112 Wash 285

4. Me—Wilson v. Prescott, 62 Me 115

5. Me—Wilson v Prescott, supra.

6. US—Edward Hines Lumber Co v. American Car & Foundry Co, CCA Ill, 262 F 757, certiorari denied 40 SCt 179, 251 US 557, 64 L Ed 413

7. US—Edward Hines Lumber Co v American Car & Foundry Co, supra

8. La—Higgins Lumber & Export Co v. Drackett, 125 So 322, 12 La App 70.

9. US—Pearce v New York Dock Co., CCANY, 265 F 148

10. Or—Treadgold v Willard, 160 P 803, 81 Or 658 68 CJ p 209 note 55

11. Cal—City of Oakland v. Wheeler, 168 P 23, 34 Cal App. 442.

12. NC—Chambers v North River Lure, 102 SE 198, 179 NC 199 68 CJ p 209 note 57

13. NY—City of New York v McCarthy, 157 NYS 711, 171 App Div 561

14. Mass—Viaux v. John T Scully Foundation Co, 142 NE 81, 247 Mass 296 68 CJ p 209 note 59

15. NY—City of New York v McCarthy, 157 NYS 711, 171 App. Div 561 68 CJ. p 210 note 60.

build levees and bulkheads destroyed by a storm of extraordinary violence<sup>16</sup>

### (3) Rent

The lessee of a wharf is liable for the rent expressly agreed to be paid, and the construction of the agreement by the parties may be considered in determining the amount due.

The lessee of a wharf is liable for the rent expressly agreed to be paid,<sup>17</sup> and the construction of the agreement by the parties may be considered in determining the amount due<sup>18</sup> It has even been held that the agreed rent must be paid although the premises were destroyed before entry under the lease,<sup>19</sup> or subsequently became useless for the purpose for which they were hired,<sup>20</sup> and a lessee in possession before execution of a rental contract requiring the lessor to furnish six feet of water has no right to refuse to pay rent or vacate the premises because of the lessor's failure to furnish such depth of water<sup>21</sup> There is no liability, however, for rent accruing after the passage of an ordinance which prevents lessees from using the leased pier<sup>22</sup> If a lessee continues to use the wharf after the termination of the lease, he remains liable for the value of such use,<sup>23</sup> and this value is determined by the rental stipulated for a like period in the lease<sup>24</sup> One who is let into possession under a contract to take a lease, but violates his agreement, must account, under an implied contract, for the wharfage received.<sup>25</sup>

*Defenses to actions for rent* Eviction is a good defense to an action on the lease to recover the rent,<sup>26</sup> and so is the failure to construct the wharf in conformity with the stipulations of the lease<sup>27</sup> Where the lessor made a deduction from the rent for the use of a part of the rented space, the lessee was

not entitled to credit for rent collected by the lessor from a third party for the use of such space<sup>28</sup>

*Ejectment for nonpayment.* The lessee of a wharf and slip may be ejected for nonpayment of rent,<sup>29</sup> and it is no defense that the lessor failed to maintain six feet of water in the slip as required by the lease contract, since such failure did not constitute an eviction<sup>30</sup>

## § 6. — Sale and Conveyance

Wharf rights may be the subject of a sale or reservation, and in the sale of a wharf the law imputes to a purchaser knowledge of all the facts appearing on the paper evidence of title which it is necessary for him to inspect to ascertain its sufficiency. The right to wharfage will pass as an incident to a pier sold on a tax sale.

Since a wharf right, as shown in Navigable Waters § 73 a, is a property right, it is the subject of sale,<sup>31</sup> and therefore it may also be the subject of reservation<sup>32</sup> In the sale of a wharf the law imputes to a purchaser knowledge of all facts appearing at the time of his purchase on the paper or record evidence of title which it is necessary for him to inspect to ascertain its sufficiency<sup>33</sup> The right to wharfage will pass as an incident to a pier sold on a tax sale<sup>34</sup>

*Construction* Where the terms of a contract for the sale of a wharf are expressed, they must control its construction<sup>35</sup> Where they are not thus expressed, however, the construction will be controlled by the use and condition of the property at the time of sale, and certain implications or presumptions of law arising thereon<sup>36</sup> Thus, flats necessary to the use of a wharf, and usually occupied with it, may pass as appurtenant to it<sup>37</sup> Such implications or presumptions, however, will only be applied in the

16. La.—Eager, Ellerman & Co v New Orleans, 36 La Ann 933

17. SC—Port Utilities Commission of Charleston v Marine Oil Co, 175 SE 818, 173 SC 346

18. US—Davis v North Bank Dock Co, DC Or, 294 F 336

19. Me—Hill v. Woodman, 14 Me 38

20. Mass—Viaux v John T Scully Foundation Co, 142 NE 81, 247 Mass 296  
68 CJ p 210 note 66

21. SC—Port Utilities Commission of Charleston v Marine Oil Co, 175 SE 818, 173 SC 346

22. NY—Magner v Mills, 242 NY S 705, 137 Misc 535

23. NY—Yonkers v Palisade Ferry Co, 58 NYS 173, 40 App Div 613

24. Or—Lewis v. Northwestern Warehouse Co, 127 P 33, 63 Or 239

68 CJ p 210 note 69

25. NY—New York v Hill, 13 How Pr 280

26. Pa.—In re Cone's Estate, 9 Pa Co 257  
68 CJ p 210 note 71

27. NY—People v Kelsey, 38 Barb 269, 14 Abb Pr 372  
68 CJ p 210 note 72

28. NY—Carroll v Patterson, Graham & Co, 194 NYS 529

29. SC—Port Utilities Commission of Charleston v. Marine Oil Co, 175 SE 818, 173 SC 346

30. SC—Port Utilities Commission of Charleston v Marine Oil Co, supra

31. Md—Baltimore v White, 2 Gull 444  
68 CJ p 210 notes 78-83

32. Mass—Hastings v Grimshaw, 27 NE 521, 153 Mass 497, 12 LR A 617  
68 CJ p 210 note 77

33. Md—Baltimore v White, 2 Gull 444  
68 CJ p 210 note 78

34. NY—Smith v New York, 68 N. Y 552

35. Mass—Wood v West Boston, etc, Bridges, 122 Mass 394  
Va—Hardy v McCullough, 23 Gratt 251, 64 Va. 251

36. Mass—Doane v Broad St Assoc, 6 Mass 332  
68 CJ p 210 note 81

37. Mass—Doane v Broad St Assoc, supra  
68 CJ p 210 note 82.

absence of an express contract on the subject between the parties <sup>38</sup>

## § 7. Government Regulation and Supervision

- a. In general
- b Rates

### a. In General

Wharves belong to a class of property in which the public is concerned, and as to which the government has reserved the right to regulate and control, and the government has a right of general supervision over the establishment and operation of wharves which is usually exercised by the enactment of statutes giving stipulated powers of supervision to boards or commissions

Wharves belong to a class of property in which the public is concerned,<sup>39</sup> and as to which the government has reserved the right, as between its citizens, to regulate and control <sup>40</sup> As shown in Commerce

§ 44, although wharves are related to commerce and navigation as aids and conveniences, nevertheless, being local in their nature, and requiring special regulations at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belong to the states in which they are situated. It has been held, however, that where no wharfage is charged the public, the legislature has no power of regulation, since no public interest is affected <sup>41</sup>

The government has a right of general supervision over the establishment of wharves<sup>42</sup> and their operation,<sup>43</sup> which is usually exercised by the enactment of statutes giving stipulated powers of supervision to boards or commissions<sup>44</sup> Among such powers may be enumerated the powers to supervise and regulate the making of wharves,<sup>45</sup> the mode in which they may be used and occupied,<sup>46</sup>

38. Va.—Hardy v McCullough, 23 Gratt 251, 64 Va 251

39. US—Weems Steamboat Co of Baltimore v Peoples Steamboat Co, CC Va., 141 F 454, affirmed 152 F 1022, 82 CCA 276, reversed on other grounds 29 S Ct 661, 214 US 345, 53 LEd 1024, 16 Ann Cas 1222

Rules and regulations by wharfinger see infra § 10

40. US—Baltimore & O R Co v U S, CA 3, 201 F 2d 795

Cal—City of Oakland v El Dorado Terminal Co, 106 P 2d 1000, 41 Cal App 2d 320

68 CJ p 211 note 86

41. Va.—Hunter v Commonwealth, 60 SE 102, 107 Va 909

42. Cal—City of Oakland v El Dorado Terminal Co, 106 P 2d 1000, 41 Cal App 2d 320

68 CJ p 211 note 98

43. Cal—City of Oakland v El Dorado Terminal Co, supra

68 CJ p 212 note 99

### Railroads furnishing wharfage

(1) Railroads opening their piers for a charge to truckers for carriage of cargo to or from seagoing ships are subject to regulation under Shipping Act as parties "furnishing wharfage . . . in connection with a common carrier by water" and hence are subject to orders of federal maritime board

US—Baltimore & O R Co v U S, CA 3, 201 F 2d 795

(2) The fact that such railroads may be subjected to regulation by federal maritime board in some respects and by interstate commerce commission in other respects does not render such regulation unlawful

US—Baltimore & O R Co v U S, supra

(3) Such railroads are subject to the act notwithstanding they did not receive, handle, store or deliver such truck-borne freight

US—Baltimore & O R Co v U S, CA 3, 208 F 2d 734

44. NY—In re Pier Old No 49, East River, in City of New York, 173 NYS 320, 185 App Div 539 reversed in part on other grounds and affirmed in part 124 NE 148, 227 NY 119

68 CJ p 212 note 1

### Authority limited to that given by statute

The authority of park and harbor commissioners is limited to that given them by the statute creating the commission, and under an act creating such commission to manage and control land and harbor improvements, excepting rights and privileges in lands theretofore granted, commission is unauthorized to interfere with possession of wharf property, title to which arose prior to the enactment through public sale by burgess and town council, which sale was followed by deed to predecessor of person in possession of wharf

Pa—Paasch v Wright, 177 A 795, 317 Pa 454

### Act fixing salaries of state officers and employees

(1) Held not violative of constitution as applied to employee of state docks commission

Ala—State Docks Commission v State ex rel Cummings, 150 So 345, 227 Ala 414

(2) Held applicable to employee of state docks commission employed from month to month

Ala—State Docks Commission v State ex rel Cummings, supra

(3) Held inapplicable to day or casual laborers employed by state docks commission

Ala—State Docks Commission v State ex rel Cummings, supra

45. La—Warriner v Board of Com'rs of Port of New Orleans, 62 So 157, 132 La 1098

Pa—Kusenberg v Browne, 42 Pa 173

### Rejection of bids held lawful

Rejection by the board of harbor commissioners of all bids for the construction of a wharf was lawful where the board believed that the bids would prove to be too high for the appropriation and that such action was to the best interests of the public

Hawai—Marshall Const Co v Bigelow, 29 Hawai 641

46. La—Warriner v Board of Com'rs of Port of New Orleans, 62 So 157, 132 La 1098

Pa—Kusenberg v Browne, 42 Pa 173

### Berthing, loading, and unloading of vessels

The unrestrained berthing, loading, and unloading of vessels under the direction of one owner at one wharf is not in conformity with the purposes of the legislature in the creation of a port department, which through its commission, appointed to promote commerce for the harbor, should have the exclusive control and management of the port unhampered by those whose interests might tend to hinder the adequate and comprehensive development of the entire harbor

Cal—City of Oakland v El Dorado Terminal Co, 106 P 2d 1000, 41 Cal App 2d 320

Wharf storage facilities provided at shipside for cargo unloaded from water carriers are subject to regulation by the maritime commission, whether publicly owned or not, under

the erection of sheds,<sup>47</sup> the maintenance of a sufficient depth of water,<sup>48</sup> and the lighting and policing of wharves,<sup>49</sup> and much is sometimes left to the discretion of the board or commission.<sup>50</sup> It is the duty of commissioners, having charge and control of a public landing, to defend the rights of the public to the use of such landing.<sup>51</sup>

### b. Rates

Wharves are subject to governmental regulation in the matter of charges. By local state laws wharfage rates are generally required to be reasonable, and by those laws their reasonableness must be judged. A customary rate cannot control the statutory rate.

Wharves are subject to governmental regulation in the matter of charges,<sup>52</sup> the right being based on

the theory that the right to wharfage is in the nature of a franchise from the sovereign, and occupation is affected with public interest,<sup>53</sup> and particular boards or commissions may be authorized to fix the rates of wharfage or dockage.<sup>54</sup> The federal Shipping Act, 46 U.S.C.A. § 816, which deals with persons furnishing wharfage facilities and gives a federal board power whenever it finds that any regulation or practice is unjust or unreasonable, to determine, prescribe, and order enforced a just and reasonable regulation or practice, is comprehensive enough to give the board power over persons furnishing wharfage facilities with respect to rates, even though the words "rates" or "rate-making power" are not used in connection with the board's power over those persons.<sup>55</sup> As shown in Com-

the Shipping Act of 1916, §§ 1, 17, as amended, 46 U.S.C.A. §§ 801, 816

US—State of California v U S, Cal, 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

47 La—Warriner v Board of Com'rs of Port of New Orleans, 62 So 157, 132 La 1098

48 La—Warriner v Board of Com'rs of Port of New Orleans, supra

49 La—Warriner v Board of Com'rs of Port of New Orleans, supra

50 La—Warriner v Board of Com'rs of Port of New Orleans, supra

68 C J p 212 note 7

51 Md—Maxa v Commissioners of Harford County, 148 A 214, 158 Md 229

52 Fla—Bagdad Land & Lumber Co v Louisville & N R Co, 172 So 851, 127 Fla 139

68 C J p 211 note 89, p 218 note 26 [a]

Amount of charges generally see infra § 13

53. US—The M L C No 10, CC ANY, 10 F 2d 699, certiorari denied 46 S Ct 488, 271 US 675, 70 L Ed 1146

NY—Marine Lighterage Corporation v Luckenbach S S Co, 248 NYS 71, 139 Misc 612

### 54. Statutes construed

(1) The statute relating to the regulation and supervision of storage warehouses by the department of public service while excluding docks and wharves and definitely defining them, was intended to allow port commissioners to retain rate-fixing jurisdiction over water-borne goods only, and was not intended wholly to exclude docks and wharves from the jurisdiction of the department.

Wash—State ex rel Port of Seattle v Department of Public Service, 95 P 2d 1007, 1 Wash 2d 102

(2) Under such statute the carriage of goods via land from dock at which vessel berthed to the dock to which goods are consigned is an operation which is merely incidental to the carriage by water and does not divest goods of their water-borne character, so as to deprive commissioners of port of the right to fix rates on goods consigned to its dock but discharged at another dock and transported by land to the dock of the port

Wash—State ex rel Port of Seattle v Department of Public Service, supra

(3) Where, however, goods were consigned to consignee by way of water and arrived at a dock other than that of the port and consignee took delivery at the dock where goods were discharged from boat and subsequently selected dock of the port as the most advantageous place for storage and at his discretion goods were moved to the dock of the port by way of truck to be transshipped by land at a later date, goods lost their water-borne character upon delivery to the consignee at the dock where they were discharged from incoming vessel, and port commissioners had no power to fix warehouse rates as to such goods, but power resided in department of public service under statute

Wash—State ex rel Port of Seattle v Department of Public Service, supra

55. Pa—McNeely & Price Co v Philadelphia Piers, 196 A 846, 329 Pa 113

### Demurrage or storage charges

(1) The maritime commission, having found that terminal operators were making noncompensatory wharf demurrage or storage charges and allowing excessive free time, was not

limited to a general prohibition against further preferential and unreasonable practices, but had power to prescribe schedules of maximum free time and of minimum charges, and properly fixed charges that would reflect the actual cost of services, since noncompensatory demurrage would necessitate overcharges for other services

US—State of California v U S, Cal, 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

(2) The determination of the proper cost basis should be left to the discretion of the commission

US—State of California v U S, D C Cal, 46 F Supp 474, affirmed 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

(3) The withholding of rate-making power for services other than water carriage does not qualify the unlimited statutory grant to the commission of power to stop effectively all unjust and unreasonable practices in receiving, handling, storing, or delivering property

US—State of California v U S, Cal, 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

(4) The phrase "regulation or practice" in the Act extends to discrimination resulting from noncompensatory wharf demurrage or storage charges

US—State of California v U S, Cal, 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089



merce § 136, the rates of wharfage for the use of public wharves may in the absence of federal legislation, be governed by local state laws. By such laws wharfage rates are generally required to be reasonable; and by those laws their reasonableness must be judged.<sup>56</sup> Rates may properly be fixed to promote the policy of benefiting the commerce of the port,<sup>57</sup> but a customary rate of wharfage cannot control the rates fixed by statute.<sup>58</sup>

The taking of tolls without a permit from, or regulation by, the duly constituted authorities may not be said to constitute a dedication of wharfing facilities for public use.<sup>59</sup>

*Extortionate wharfage.* Where wharfage charged is extortionate, it is for the state so to regulate it as to prevent extortion.<sup>60</sup>

## § 8. Licenses and Taxes

A license tax or occupation tax may be imposed on a wharf, and a tax for the privilege of conducting a wharfbow may be imposed.

(5) The furnishing of storage at nominal rates, on expiration of free time period amounts substantially to an extension of the free time and results in discriminatory and unreasonable practices  
US—State of California v U S, D C Cal, 46 F Supp 474, affirmed 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

(6) Maritime commission's rate order, which did not affect the rates and practices of any terminals outside water fronts located in the state, did not conflict with provision of the federal constitution that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another  
US—State of California v U S, D C Cal, 46 F Supp 474, affirmed 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

### "Free time"

(1) Board has authority to make reasonable rules and regulations with respect to duration of "free time" given truckers for the removal of water-borne freight from railroad piers

US—Baltimore & O R Co v U S, C A 3, 208 F 2d 734

(2) Evidence sustained order of the board increasing the duration of "free time" given and applying the order to export freight, domestic cargo, and long-haul freight.

US—Baltimore & O R Co v U S, supra

(3) Evidence did not establish that such order was invalid on the ground that it favored the truck freight over rail freight

US—Baltimore & O R Co v U S, supra

### Public owners

The term "person," as used in the Shipping Act, includes an entity other than a technical corporation, partnership, or association if the plain purposes of the act preclude the exclusion of such entity, and hence it includes the state as well as a city operating waterfront piers and terminals

US—State of California v U S, Cal, 64 S Ct 352, 320 US 577, 88 L Ed 322, rehearing denied 64 S Ct 516, 321 US 802, 88 L Ed 1089, and City of Oakland v U S, 64 S Ct 516, 321 US 802, 88 L Ed 1089

56 US—Ouachita & Mississippi River Packet Co v Aiken, La., 7 S Ct 907, 121 US 444, 30 L Ed 976

68 C J p 211 note 93

57. US—Ulster S S Co v Board of Com'rs of Port of New Orleans, C A La., 299 F 474, certiorari denied 45 S Ct 99, 266 US 620, 69 L Ed 472

58. US—The Scow No 15, N Y, 92 F. 1008, 34 C C A 149

59. Cal—City of Oakland v El Dorado Terminal Co, 106 P 2d 1000, 41 Cal App 2d 320.

60 US—Cannon v. New Orleans, La., 20 Wall 577.

Although, under the federal Constitution, article 1 § 10, a state cannot provide for any tonnage tax, a license tax<sup>61</sup> or occupation tax<sup>62</sup> may be imposed on a wharf. So a statute may impose a tax for the privilege of conducting a wharfbow.<sup>63</sup> A corporation engaged solely and exclusively in operating machinery for removing freight from ships to railroad cars is not engaged in the business of keeping a landing within the meaning of a statute imposing a license tax.<sup>64</sup>

## § 9. Management and Use

Where a wharf is public, the owner is under obligations to concede to others the privilege of using it on payment of reasonable wharfage, but where it is private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper.

Where a wharf is public, the owner is under obligations to concede to others the privilege of using it on payment of reasonable wharfage,<sup>65</sup> but where it is private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper,<sup>66</sup> even though the wharf

De Bary Baya Merchants' Line v Jacksonville, T & K W Ry Co, C C Fla., 40 F 392

61 US—Northern Commercial Co v U S, Alaska, 217 F 30, 133 C C. A 140

68 C J p 212 note 12

Tonnage tax

In general see Shipping § 4

Power to levy see Commerce § 124

### Public wharf

Utility maintaining public warehouse in which it received fish from public generally for freezing and storage for hire, and in connection therewith a public wharf, and not fish buyers who, although they actually carried on business done in warehouse and on wharf, were only tenants at will or at sufferance and had no control over wharf or warehouse, was liable for tax imposed on operation of public wharf

Alaska—U S v Citizens Light, Power & Water Co, 8 Alaska 532

62 Wis—State v Beckley, 202 N W 173, 186 Wis 80

63 Miss—Bluff City R Co v Clarke, 49 So 177, 95 Miss 689

68 C J p 205 note 60 [a]

64 La—State v. Louisiana Terminal Co, 154 So 731, 179 La 671

65. N Y—Harper v Williams, 18 N.

E 77, 110 N Y 260

68 C J p 212 note 15

66. US—Weems Steamboat Co v. People's Steamboat Co, Va., 29 S. Ct 661, 214 US 345, 53 L Ed 1024, 16 Ann Cas 1222

68 C J p 212 note 17.

extends beyond low-water mark, and was erected without the consent of the state,<sup>67</sup> and even though there may be no other wharf at the place<sup>68</sup>

Where a city erects a dock on land belonging to the United States which becomes part of the federal government's land, the public of the city at best has a mere license to use the dock, and the United States has a right to terminate the use of the dock<sup>69</sup>

*Adverse right by public as against private owner.* The public cannot obtain an adverse right as against a private wharf owner by mere user<sup>70</sup> In order to obtain it there must be an intention on the part of the owner to dedicate the property to the use of the public and there must be an acceptance of such dedication on the part of some public authority, which may sometimes be implied,<sup>71</sup> and in the absence of such dedication and acceptance the use will be regarded as under a simple license,<sup>72</sup> subject to withdrawal at the pleasure of the owner by giving reasonable notice,<sup>73</sup> and, after he has given such a notice to an individual, and thereby revoked the license as to him, an entry on the latter on the wharf is a trespass for which an action will lie,<sup>74</sup> but it is otherwise before notice has been given<sup>75</sup>

## § 10. — Mode and Purpose of Use

Vessels resorting to a public wharf are subject to the general rules of law regulating the use of such property and the mooring of vessels, and the mode and purpose of use may be the subject of a special agreement between the parties.

Vessels resorting to a public wharf are subject to the general rules of law regulating the use of such property and the mooring of vessels;<sup>76</sup> and the mode and purpose of use may be the subject of a special agreement between the parties<sup>77</sup> While, as shown in Highways § 1 a, a wharf is not in any ordinary sense a highway, the keeping of a pier gives a license to draymen to enter thereon in the following of their employment,<sup>78</sup> but a wharf located on a public street is not to be made a place for keeping or storing personal property<sup>79</sup> All business done on wharves or marginal streets must be in connection with the loading and unloading of vessels at the piers, docks, and bulkheads thereof<sup>80</sup> Under some statutes sheds may be constructed on piers and a prescriptive right to maintain sheds may be acquired, not extending beyond right given by statute<sup>81</sup>

*Private rules and regulations* A wharfinger, who is required to permit the use of his wharves for the loading and unloading of vessels with a view to the welfare of the public, may make reasonable rules and regulations looking to the control and management of the business conducted on them,<sup>82</sup> but he cannot impose unreasonable restrictions.<sup>83</sup> He may prohibit the use of the wharf for unusual and unaccustomed purposes,<sup>84</sup> and may limit the use for discharging vessels as the convenience of the wharf makes reasonable because of its size, convenience, or amount of business,<sup>85</sup> but he cannot create a monopoly<sup>86</sup> In order that a rule may

67. NY—Wetmore v Brooklyn Gas-light Co, 42 NY 384  
Crooked Lake Nav Co v Keuka Nav Co, 4 NYSt 380, 43 Hun 635, affirmed 22 NE 1126, 115 NY 667

68. US—Weems Steamboat Co v People's Steamboat Co, Va, 29 S Ct 661, 214 US 345, 53 L Ed 1024, 16 Ann Cas 1222

69. US—Berger v Ohlson, CCA Alaska, 120 F 2d 56.

**Erection within Alaska railroad terminal reserve**

Where city of Anchorage erected wharf within Alaska railroad terminal reserve, at best, the public of the city of Anchorage had a mere license to use the dock, and officers of the Alaska railroad, which was solely owned by the United States, who had charge of the terminal reserve for the government, had right to terminate the use of the dock.

US—Berger v Ohlson, supra.

70. US—Weems Steamboat Co v. People's Steamboat Co, Va, 29 S Ct 661, 214 US 345, 53 L Ed 1024, 16 Ann Cas 1222  
68 C J, p 212 note 20.

71. US—Weems Steamboat Co v People's Steamboat Co, supra  
Ala—Compton v Hawkins, 8 So 75, 90 Ala 411, 24 Am SR 823, 9 L R A 387

72. US—Weems Steamboat Co v People's Steamboat Co, Va, 29 S Ct 661, 214 US 345, 53 L Ed 1024, 16 Ann Cas 1222  
68 C J p 213 note 22

73. US—Weems Steamboat Co v People's Steamboat Co, supra  
68 C J p 213 note 23

74. NY—Bogert v Haight, 20 Barb 251

75. US—New Orleans, etc, R Co v Hanning, La, 15 Wall 649, 21 L Ed 220

76. NY—Pilot Com'rs v. Clark, 33 NY 251  
Regulation and control by government see supra § 7

77. Mass—Proprietors Boston Pier, etc v Central Wharf, etc, Corp, 14 Allen 271

78. NY—Clancy v Byrne, 56 NY 129, 15 Am R 391

79. Cal—Arques v City of Sausalito, 272 P 2d 58, 126 Cal App 2d 403

80. NY—Villas v. Featherston, 87 NY S 1094, 94 App Div 259  
In re Triborough Bridge Approach, City of New York, 288 NY S 697, 159 Misc 617

"Marginal street" defined see supra § 1 h

81. NY—In re Water Front on North River in City of New York, 205 NYS 56, 122 Misc 863

Title by prescription or adverse possession generally see supra § 2

82. Pa—Lincoln v. Pennsylvania Warehousing Co, 8 Pa Co 195

83. Mass—Croucher v Wilder, 98 Mass 322

Pa—Lincoln v Pennsylvania Warehousing Co, 8 Pa Co 195

84. Ala—Compton v Hawkins, 8 So. 75, 90 Ala. 411, 24 Am SR 823, 9 L R A 387

Mass—Croucher v. Wilder, 98 Mass. 322

85. Mass—Croucher v. Wilder, supra.

86. Pa—Lincoln v Pennsylvania Warehousing Co, 8 Pa Co 195  
68 C J p 213 note 36.

be binding in such case notice thereof must be proved,<sup>87</sup> unless the rule is unreasonable, in which case it is immaterial whether the shipowner had notice of the rule or not<sup>88</sup>

*Choice of berths* The choice of berths at a public wharf may be under the control of the dockmaster, as shown in Navigable Waters § 17, or it may be regulated by the custom of the port<sup>89</sup>

*Unloading* A wharf owner who has become bound to unload a vessel at his wharf must do so within a reasonable time,<sup>90</sup> and the vessel owner does not waive his rights by allowing the vessel to be discharged at a later time<sup>91</sup>

## § 11. Wharfage

Wharfage is defined supra § 1 Matters relating to the right to wharfage, the amount thereof, and liens therefor are considered infra §§ 12-15.

Examine Pocket Parts for later cases.

## § 12. — Right to Wharfage

- a In general
- b Mode and extent of use
- c Persons entitled
- d Persons or vessels liable

### a. In General

The owner, proprietor, or keeper of a wharf is entitled to a reasonable remuneration for the use of it by others, and the right to collect wharfage is an incorporeal right incident to the use of a wharf for the mooring, loading, and unloading of vessels

The owner, proprietor, or keeper of a wharf is entitled to a reasonable remuneration for the use

of it by others<sup>92</sup> The right to collect wharfage is an incorporeal right incident to the use of a wharf for the mooring, loading, and unloading of vessels<sup>93</sup> The right to collect wharfage may exist as an incident to the ownership of land abutting on a navigable river, being a riparian right of the proprietor, and, as such, a right of property, subject of course to reasonable legislative regulation,<sup>94</sup> or it may exist as a franchise conferred by legislative grant<sup>95</sup> Compensation for wharfage may be claimed on an express or an implied contract, according to the circumstances,<sup>96</sup> and even statutory charges may be superseded by a specific bargain with a private wharf owner for a different rate<sup>97</sup> If the proprietor of wharf privileges permits a town to erect a wharf and collect tolls, he will be entitled to only a reasonable compensation for the use of the river bank, and not to the tolls<sup>98</sup>

### b. Mode and Extent of Use

Generally, every use of a wharf, even for a short period of time, will render the user liable for wharfage charges, and wharfage may be chargeable for a vessel not attached to the wharf at all, but attached only to other vessels which are so attached

No use of a wharf can be made even for a few minutes, without liability being incurred,<sup>99</sup> the idea of use of the private property of the wharfinger being at the root and of the essence of a legal wharfage charge<sup>1</sup> What constitutes a use of a wharf such as will involve liability for wharfage depends on the circumstances of the case,<sup>2</sup> unless the statutes define in what that use is to consist<sup>3</sup> As the word is ordinarily understood, wharfage may be said to accrue when a vessel makes use of a wharf for the purpose of receiving or discharging cargo

<sup>87</sup> Mass—Croucher v Wilder, 98 Mass 323  
68 C J p 213 note 37.

<sup>88</sup> Pa—Lincoln v Pennsylvania Warehousing Co., 8 Pa Co 195

<sup>89</sup> Pa—Lincoln v The Volusia, 4 Pa L J R 65, 6 Pa L J 469  
68 C J p 213 note 40

<sup>90</sup> Mass—Garfield, etc, Coal Co v Fitchburg R Co, 44 NE 119, 166 Mass 119  
68 C J p 214 note 43

<sup>91</sup> Mass—Garfield, etc, Coal Co v Fitchburg R Co, supra

<sup>92</sup> US—Murray v The Meteor, DCNY, 93 F Supp 274—U S v Berger, DC Alaska, 66 F Supp 950  
Power of municipality to exact or regulate wharfage see Municipal Corporations § 1814

#### Use of natural landings

Where government, as owner of land constituting the Alaska railroad's terminal reserve, could if it

desued, have prevented any person from having access thereto, government could make whatever reasonable charges it saw fit for use of land, so that, where government demanded of ocean carrier wharfage charges for use of beach located on such terminal reserve for discharge of cargo, fact that tariff containing schedule of wharfage rates mentioned docks or wharfs only, without reference to use of shore land, did not prevent recovery by government of wharfage charges for use of shore land

US—U S v Berger, supra

<sup>93</sup> NY—Eastman v New York, 46 NE 841, 152 NY 468  
68 C J p 214 note 50

<sup>94</sup> Ala—Demopolis v Webb, 6 So 408, 87 Ala 659  
68 C J p 214 note 51

<sup>95</sup> Cal—City of Oakland v E K

Wood Lumber Co, 292 P 1076, 211 Cal 16, 80 A L R 379  
68 C J p 214 note 52

<sup>96</sup> Fla—Bagdad Land & Lumber Co v Louisville & N R Co, 172 So 851, 127 Fla 139  
68 C J p 215 note 53

<sup>97</sup> US—The M L C No 10, C CANY, 10 F 2d 699, certiorari denied 46 S Ct 488, 271 US 675, 70 L Ed 1146  
68 C J p 215 note 54

<sup>98</sup> Ky—Columbus v Grey, 2 Bush 476

<sup>99</sup> Pa—Easby v The Whitburn, 14 Phila 600

<sup>1</sup> Mo—St Louis v Eagle Packet Co, 114 SW 21, 214 Mo 638  
68 C J p 215 note 58

<sup>2</sup> Mo—St Louis v Eagle Packet Co, supra  
68 C J p 215 note 59

<sup>3</sup> US—The Davidson, DCRI, 122 F 1006, 70 L R A 193.  
68 C J p 215 note 60

or passengers,<sup>4</sup> or for the purpose of safety or protection,<sup>5</sup> or as a place for mooring<sup>6</sup>

Wharfage may be chargeable for a vessel not attached to the wharf at all, but attached only to other vessels which are so attached,<sup>7</sup> and it may become due, although no cargo be discharged from the vessel on the wharf, or taken from the wharf on board the vessel.<sup>8</sup> It has been held that mere anchorage at a wharf does not authorize a wharfage charge<sup>9</sup> unless the statute so provides,<sup>10</sup> and a charge for wharfage is not authorized by the fastening of a line from a vessel sunk at the wharf,<sup>11</sup> or not alongside the wharf.<sup>12</sup>

*Overlapping use* In the absence of statutory authority therefor, wharfage cannot ordinarily be charged against one whose vessel, lying in public waters, under reasonable circumstances overlaps an adjoining wharf,<sup>13</sup> particularly where the overlapping does not injure the wharf owner.<sup>14</sup> The statutes relating to this matter are not uniform, some permitting a recovery for such a use,<sup>15</sup> and others denying it.<sup>16</sup> However, while overlapping is not the ordinary use which gives rise to a claim for wharfage, yet it has been held that the occupancy of a berth in a private dock so as to overlap the adjoining wharf is such a beneficial use of the adjoining owner's property as to entitle him to compensation therefor,<sup>17</sup> especially where lines are fastened to the wharf.<sup>18</sup> One who paid compensa-

tion for years for the overlapping of another's wharf, may not deny his liability to pay for the privilege.<sup>19</sup>

### c. Persons Entitled

Generally speaking, the right to wharfage goes with the wharf, and the owner of upland to which wharfage attaches is entitled thereto as long as he retains the ownership of the soil.

Generally speaking, the right to wharfage goes with the wharf,<sup>20</sup> and such right may be conveyed by grant.<sup>21</sup> The owner of upland to which wharfage attaches is entitled thereto as long as he retains the ownership of the soil,<sup>22</sup> and while a giving to the public of a perpetual right of way over the land, without an actual grant or conveyance thereof, does not constitute a relinquishment of any of his rights incident to his ownership in the fee,<sup>23</sup> the condemnation of his land terminates his right to wharfage.<sup>24</sup> A municipality cannot deprive a private owner of his right to wharfage<sup>25</sup> except on payment of just compensation.<sup>26</sup> Under some statutes wharfage may be apportioned between owners of adjoining wharves.<sup>27</sup>

*Tenants in common* Where there are several owners of a wharf, they become tenants in common of the revenue arising from the use of it,<sup>28</sup> and this revenue or income is apportioned among them according to the extent of each party's ownership.<sup>29</sup>

4 US—Old Dominion S S Co v City of New York, DCNY, 286 F 155, affirmed, CCA, 286 F 157 68 CJ p 215 note 61

5 US—The Wm H Brinsfield, DC Md, 39 F 215 68 CJ p 215 note 62

6 NY—New York Dock Co v India Wharf Brewing Co, 111 NYS 432, 127 App Div 385, affirmed 90 NE 1162, 196 NY 557 68 CJ p 215 note 63

7 US—The Kate Tremaine, DC NY, 14 FCas No 7,622, 5 Ben 60 Cal—People v Roberts, 25 P 496, 3 Cal Unrep Cas 372

8 US—The Kate Tremaine, DC NY, 14 FCas No 7,622, 5 Ben 60 Fla—Corpus Juris cited in Bagdad Land & Lumber Co v Louisville & N R Co, 172 So 851, 852, 127 Fla 139

9 US—The Gem, DCMich, 10 FCas No 5,303, Brown Adm 37

10 NY—Walsh v New York Floating Dry Dock Co, 77 NY. 448 68 CJ p 215 note 67

11 US—The City of Bangor, DC Mass, 13 FSupp. 648

12 US—Pelham v The B F Woolsey, DCNY, 16 F. 418.

13 Mass—Wellington v City of Cambridge, 100 NE 1096, 214 Mass 35

68 CJ p 216 note 69

14 US—The Davidson, DCRI, 122 F 1006, 70 LRA 193 68 CJ p 216 note 70

15 US—The Hercules, DCMich, 28 F 475 68 CJ p 216 note 71

16 US—The Cornwall, DCNY, 6 FCas No 3,249, 10 Ben 108 68 CJ p 216 note 72

17 RI—Rich v Tanenbaum, 198 A 240, 60 RI 254 68 CJ p 216 note 73

Recovery of pro rata proportion of customary wharfage charge for overlapping use generally see infra § 13 c

18 RI—Rich v Tanenbaum, 198 A 240, 60 RI 254—Adams v John R White & Son, 103 A 230, 41 RI 157

19. RI—Adams v John R White & Son, supra

20. NY—Langdon v New York, 93 NY 129 68 CJ p 216 note 77

21. NY—Langdon v New York, supra 68 CJ p 216 note 79

22. NY—Verplanck v New York, 2 Edw 220

23. NY—Verplanck v New York, supra

24. US—The James McDonough, N Y, 200 F 556, 119 CCA 36 68 CJ p 216 note 83

25. NY—Murray v. Sharp, 14 NY Super 539—New York v Scott, 1 Cal 513

26. NY—Murray v Sharp, 14 NY Super 539

27 Pa—Simpson v Neill, 89 Pa 183 68 CJ p 216 note 86

Recovery of pro rata proportion of customary wharfage charge for overlapping use generally see infra § 13 c

28. US—The Golden Rod, DCMe, 197 F 830, affirmed 208 F 24, 125 CCA 322 68 CJ p 216 note 88

29 US—The City of Hartford, DCNY, 5 FCas No 2,751, 10 Ben 150 NY—Verplanck v. New York, 2 Edw. 220.

*Lessor and lessee.* If a public wharf is leased by a municipality, the lessee becomes entitled to the wharfage,<sup>30</sup> although he cannot demand compensation from persons using such wharf as a highway.<sup>31</sup> A lessee of water front may make a charge for yard rent while a vessel is being repaired.<sup>32</sup> A lease for the use of certain vessels does not authorize the lessee, however, to charge wharfage for other vessels.<sup>33</sup> Thus, it is held that the lease of a pier to a steamship company does not deprive the owner of the right to collect wharfage for a use of the slip by other vessels.<sup>34</sup>

#### d. Persons or Vessels Liable

The owner or agent of a vessel using a wharf, the consignee of the cargo, a factor, a charterer, or the vessel itself, may be liable for wharfage charges; but a person using a public wharf as a highway or one who has acquired by deed a right of way over a wharf is not required to pay wharfage.

Under the statute or by agreement of the parties, the owner or agent of a vessel using a wharf,<sup>35</sup> the consignee of the cargo,<sup>36</sup> or a factor,<sup>37</sup> may be liable for wharfage charges. Where a vessel is chartered, the owner is not responsible for wharfage afterward incurred, but the remedy is against the vessel<sup>38</sup> or the charterer.<sup>39</sup> Persons using a public wharf as a highway are not required to pay wharfage,<sup>40</sup> nor is one who has acquired by deed a right of way over a wharf.<sup>41</sup> The owner of a warehouse and adjoining pier is under no obligation, however, to furnish free wharfage to a lighter employed by the owner of wool stored in the ware-

house, to receive and remove such wool.<sup>42</sup>

*Vessels.* Under proper circumstances, any floating structure may be subject to a charge for wharfage,<sup>43</sup> as for instance a floating dry dock,<sup>44</sup> a floating boat house,<sup>45</sup> an oyster barge,<sup>46</sup> a "dead ship," that is, one entirely withdrawn from commerce and navigation,<sup>47</sup> or a vessel so injured as not to be navigable.<sup>48</sup> Furthermore, the nature of the service or the character of the contract is not changed by the circumstances that the watercraft is without masts, or sails, or other motive power of her own.<sup>49</sup> Where a tug leaves her tow at a wharf for her own convenience, wharfage may, under some statutes, be collected of either.<sup>50</sup>

### § 13. — Amount

- a In general
- b Contracts
- c Nature, mode, and extent of use
- d Reduced rates, extra charges, and double charges

#### a. In General

Statutory provisions fixing the specific amounts to be charged as wharfage must be followed, and in the absence of a statute or contract specifically fixing the amount, the amount of wharfage charged must be reasonable. Charges may be graduated by the tonnage of the vessels using the wharf, or wharfage can be fixed at the market rate.

Statutory provisions fixing the specific amounts to be charged as wharfage are mandatory and must be followed.<sup>51</sup> In the absence of a contract or statute

30. NY—New York Pilot Com'rs v Clark, 33 NY 251

31. NY—Taylor v Atlantic Mut Ins Co, 37 NY 275, 4 Transcr A 279

32. La—Higgins Lumber & Export Co v Drackett, 125 So 322, 12 La App 70

33. US—Beard v Marine Lighterage Corporation, DCNY, 296 F 146

68 CJ p 217 note 93

34. US—Beard v Marine Lighterage Corporation, supra

35. US—Atlantic Dock Co v Wenberg, DCNY, 2 FCas No 622, 9 Ben 464

68 CJ p 217 note 95

36. NY—Woodruff v Havemeyer, 13 NE 628, 106 NY 129

68 CJ p 217 note 96

37. SC—Fitzsimons v Milner, 31 SCL 370

68 CJ p 217 note 97

38. Pa—Philadelphia v. Naglee, 1 Ashm 37

39. Pa—Philadelphia v. Naglee, supra

40. NY—Taylor v Atlantic Mut Ins Co, 37 NY 275, 4 Transcr A 279

41. NY—New York Dock Co v India Wharf Brewing Co, 111 NYS 432, 127 App Div 385, affirmed 90 NE 1162, 196 NY 557

68 CJ p 217 note 2

42. US—Beard v Marine Lighterage Corporation, DCNY, 296 F. 146

43. NY—Walsh v New York Floating Dry Dock Co, 8 Daly 387, affirmed 77 NY 448

68 CJ p 217 notes 5-8

44. NY—Walsh v New York Floating Dry Dock Co, supra

68 CJ p 217 note 5

45. US—Woodruff v One Covered Scow, DCNY, 30 F 269

46. US—Braisted v Denton, DC NY, 115 F 428

68 CJ p 217 note 7.

47. US—Murray v The Meteor, DCNY, 93 FSupp 274

48. US—The Geo E Berry, DC N.Y., 25 F. 780

49. US—Ex parte Easton, NY, 95 US 68, 74, 24 LEd 373

68 CJ p 217 note 9

50. US—The Barge No 6, DCNY, 27 F 472

51. NY—G W Sheldon & Co v. Kerr, S S Co, 200 NYS 276

68 CJ p 218 note 12

Government regulation of rates generally see supra § 7

#### Indirect rebate held illegal

Wharfinger's conduct whereby wharfinger succeeded by indirection in giving rebate to certain shippers and brought about condition under which unequal and discriminatory rates were in effect constituted violation of rebate and preference sections of Public Utilities Act; wharfinger could not justify its action in permitting car loading and unloading of freight without assessing and collecting charges contained in published tariffs on ground that same discriminatory practice prevailed in certain docks which were publicly owned and therefore beyond regulatory power of commission, where there was no evi-

specifically fixing the amount, the amount of wharfage charged must be reasonable<sup>52</sup> Charges for wharfage may be graduated by the tonnage of the vessels using the wharf,<sup>53</sup> computed on a basis of registered<sup>54</sup> or of gross<sup>55</sup> tonnage Like demurrage, wharfage can be fixed at a market rate, which represents the amount of damage, loss of profits, etc<sup>56</sup> A shipowner using a wharf after notice of the scale of charges is liable in accordance with such scale<sup>57</sup>

*Free wharfage and exempt goods* Under the provisions of some statutes or special agreements certain goods may be exempted from wharfage charges under certain circumstances<sup>58</sup> Provision may also be made for free wharfage for the assembling of cargo for seven days after the assignment of a wharf to a vessel<sup>59</sup>

*Excessive or illegal charges* Where wharfage charges are excessive, the proper remedy seems to be to commence an action at law to determine the excess, and, the excess being thus established, to seek an injunction from a court of equity to restrain the collection of such excess<sup>60</sup> So, in a case where no wharfage can be legally demanded, an injunction will issue to prevent the collection thereof<sup>61</sup> An illegal wharfage charge, not voluntarily paid, may be recovered back,<sup>62</sup> but the rule is different if the payment is voluntary<sup>63</sup> Damages are sometimes expressly given by statute for extortion in exacting wharfage,<sup>64</sup> but such statutes being

highly penal, no presumptions may be indulged in against defendant in an action thereunder.<sup>65</sup>

### b. Contracts

In the absence of a regulation of prices for the use of private wharves, the parties are at liberty to make their own bargain as to compensation; in such case the rule that wharfage charges must be reasonable does not apply.

Where there is no regulation of prices for the use of private wharves, the parties are at liberty to make their own bargain as to compensation<sup>66</sup> In such case the rule that wharfage rates must be reasonable does not apply, and any rate satisfactory to the contracting parties may be charged<sup>67</sup> Where a price is agreed on for the use of the wharf, the contract furnishes the measure of compensation,<sup>68</sup> and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.<sup>69</sup> A ship compelled by stress of weather to moor to a private wharf is not liable to a wharfage charge, however, where no fixed rate is in use, there being no implied contract in such case<sup>70</sup>

### c. Nature, Mode, and Extent of Use

The amount chargeable as wharfage depends in a large measure on the language of the statutes or port regulations, or on the recognized usage of the port, and may be governed by the nature, mode, and extent of the use of the wharf

The amount chargeable as wharfage depends in

dence that private car unloaders operating in such docks ever made charges less than standard rate, or that any shipper made any special profit

Cal—Parr-Richmond Terminal Corporation v Railroad Commission of California, 43 P 2d 1088

52. US—The Capitaine Faure, D CNY, 7 F 2d 131, affirmed, CCA, 7 F 2d 133—Ulster S S Co v Board of Com'rs of Port of New Orleans, CCA La, 299 F 474, certiorari denied 45 SCt 99, 266 US 620, 69 LEd 472

53. US—Ouachita, etc, Packet Co v Aiken, La, 7 SCt 907, 121 US 444, 30 LEd 976  
68 CJ p 218 note 17

54. US—The Craigendoran, DC NY, 31 F 87  
68 CJ p 218 note 18

55. US—The Thomas Melville, La, 62 F 749, 10 CCA 619  
68 CJ p 218 note 19

Whether considered as tonnage duty within the prohibition of the federal Constitution see Commerce § 124, Municipal Corporations § 1814.

56. US—The Trinidad, DCNY, 251 F 174

57. US—Beard v Marine Lighterage Corporation, DCNY, 296 F 146

58. Miss—Butler v Smith, 35 Miss 457  
68 CJ p 220 note 59

59. US—Ulster S S Co v Board of Com'rs of Port of New Orleans, CCA La, 299 F 474  
68 CJ p 220 note 63

60. US—Cincinnati, etc, Packet Co v Catlettsburg, Ky, 105 US 559, 26 LEd 1169  
68 CJ p 220 note 64

61. Md—Wharf Case, 3 Bland 361

62. US—Northwestern Union Packet Co v St Paul, CCMinn, 18 F Cas No 10,346, 3 Dill 454

63. Iowa—Muscatine v Keokuk Northern Line Packet Co, 45 Iowa 185

64. US—The Allan Wilde, CCA NY, 264 F 291

65. NY—Murphy v Voorhis, 10 Daly 457, 14 NY Wkly Dig 230  
68 CJ p 220 note 69

66. US—Parkersburg, etc, Transp

Co v Parkersburg, WV, 2 SCt 732, 107 US 691, 27 LEd 584  
68 CJ p 218 note 27

Regulation of rates generally see supra § 7

67. US—The Capitaine Faure, DC NY, 7 F 2d 131, affirmed, CCA, 7 F 2d 133  
68 CJ p 218 note 29

68. US—Galveston Wharf Co v Phillips, DC Tex, 4 F Supp 248  
68 CJ p 218 note 30

### Subsequent purchasers of vessel

Where libellant caused the arrest of a vessel and she was withdrawn from navigation and placed at libellant's wharf, claimants of the vessel, who were sisters of the owner and lived at the same address used by him, were chargeable with knowledge of the agreed rate of wharfage at time of transfer of vessel's title to them

US—Murray v The Meteor, DC NY, 83 F Supp 212

69. Fla—Bagdad Land & Lumber Co v Louisville & N R Co, 172 So 851, 127 Fla. 139  
68 CJ p 219 note 31

70. US—Heron v The Marchioness, CCA Fla, 42 F 173.

a large measure on the language of the statutes or port regulations,<sup>71</sup> or on the recognized usage of the port<sup>72</sup> Thus, full rates are usually allowed where a vessel uses or is made fast to a wharf,<sup>73</sup> and have been allowed for the use of a stage berth<sup>74</sup> or the use of a dock without the wharf,<sup>75</sup> and under some circumstances, for a use by two vessels lying abreast<sup>76</sup> Under some statutes half rates are chargeable where a vessel is made fast to another vessel lying at a wharf,<sup>77</sup> or for anchorage in the slip or basin<sup>78</sup> No wharfage may be collected, however, for the period during which a vessel lies sunk<sup>79</sup> Where a vessel lying at a wharf overlaps on the next adjoining wharf, the owner of the adjoining wharf may recover a pro rata proportion of the customary wharfage charge on such vessel<sup>80</sup> While a vessel which makes fast to two distinct wharves must pay accordingly,<sup>81</sup> only one charge can be made for a single berth,<sup>82</sup> even though the wharf is owned by several persons<sup>83</sup> A wharfage charge can be allowed only for the time the vessel actually occupied the wharf,<sup>84</sup> and, even though a price is agreed on, the entire contract price cannot be recovered where the vessel was not at the wharf the whole period<sup>85</sup>

#### d. Reduced Rates, Extra Charges, and Double Charges

Under certain circumstances, a vessel may be entitled to reduced rates of wharfage or may contract for less than the usual rate, on the other hand, a vessel may be liable to extra charges

Under certain circumstances, a vessel may be entitled to reduced rates of wharfage<sup>86</sup> or may contract for less than the usual rate<sup>87</sup> On the other hand, a vessel may in some cases be liable to extra charges<sup>88</sup> Thus, under some statutes, double wharfage may be recovered by a wharfinger from a vessel which leaves the wharf without first paying wharfage,<sup>89</sup> provided a demand has been made of the owner of the vessel or other person in charge of her,<sup>90</sup> but such statutes are not applicable to vessels otherwise provided for, such as those in the clam or oyster trade<sup>91</sup> The added amount is not a penalty, but is a wharfage rate<sup>92</sup> It is, moreover, dependent on the right to single wharfage<sup>93</sup>

### § 14. — Lien

- a In general
- b Creation, termination, and revival
- c Enforcement

#### a. In General

A maritime lien exists on vessels and other floating structures for wharfage charges, and may arise either by virtue of the common law or under a statute.

A maritime lien exists on vessels and other floating structures for wharfage charges<sup>94</sup> Thus, a contract, express or implied, for wharfage furnished a foreign vessel is a maritime contract, and the proprietor of the wharf has a maritime lien on the vessel for his wharfage fees,<sup>95</sup> and, also, wharfage

71. Ga.—Robertson v Wilder & Co., 69 Ga 340

72. US—Muller v Spreckels, DC Pa., 48 F 574

73. US—The Brooklyn, DCNY, 46 F 132  
68 CJ p 219 note 37

74. US—The Francesca T, DCNY, 9 FCas No 5,030, 9 Ben 34  
68 CJ p 219 note 38

75. US—Muller v Spreckels, DC Pa., 48 F 574  
68 CJ p 219 note 39

76. Ga.—Robertson v Wilder & Co., 69 Ga 340  
68 CJ p 219 note 40

77. US—The Brooklyn, DCNY, 46 F 132—The B F Woolsey, DCNY, 16 F 418

78. NY—Walsh v New York Floating Dry Dock Co, 77 NY 448  
68 CJ p 219 note 43

79. US—The B F Woolsey, DCNY, 16 F 418  
68 CJ p 219 note 44

**Implied contract to pay not created**  
Fact that owner of vessel, which sank while tied up at wharf for storage, paid increased rate for a few months after vessel sank did

not create implied contract to pay that rate as long as vessel remained as obstruction in wharf  
US—The City of Bangor, DC Mass., 13 FSupp 648

80. US—The Wm H Brinsfield, D CMd, 39 F 215  
68 CJ p 219 note 45  
Overlapping use generally see supra § 12 b

**Wharfage charge held reasonable**  
RI—Rich v Tanenbaum, 198 A 240, 60 RI 254

81. US—The Virginia Rulon, CCNY, 28 FCas No 16,974, 13 Blatchf 519

82. US—The City of Hartford, DCNY, 5 FCas No 2,751, 10 Ben 150  
68 CJ p 219 note 47

83. US—The City of Hartford, DCNY, 5 FCas No 2,751, 10 Ben 150  
Apportionment among several owners see supra § 12 c

84. US—Earle v The Alida, DC Pa., 8 FCas No 4,245

85. US—Earle v The Alida, supra  
86. Cal—Soule v San Francisco Gas Light Co, 54 Cal 241  
68 CJ p 219 note 50

87. US—The M L C No 10, CCANY, 10 F2d 699, certiorari denied 46 SCt 488, 271 US 675, 70 LEd 1146  
68 CJ p 219 note 51

88. US—The Thomas Melville, La., 62 F 749, 10 CCA 619  
68 CJ p 219 note 52

89. US—Braisted v Denton, DCNY, 115 F 428—The Virginia Rulon, CCNY, 28 FCas No 16,974, 13 Blatchf 519

90. US—The Shady Side, DCNY, 23 F 731  
68 CJ p 219 note 55

91. US—Braisted v Denton, DCNY, 115 F 428  
68 CJ p 220 note 56

92. US—The Ann Ryan, DCNY, 1 FCas No 428, 7 Ben 20—The Virginia Rulon, CCNY, 28 FCas No 16,974, 13 Blatchf 519

93. US—The Ann Ryan, DCNY, 1 FCas No 428, 7 Ben 20

94. US—The Denelfred, DCMich, 59 F2d 213  
68 CJ p 220 note 71

95. US—The Western Wave, CCA La., 77 F2d 695, certiorari denied Board of Com'rs of Port of

furnished to a domestic vessel held to be maritime in its nature,<sup>96</sup> and a lien arises therefor enforceable in admiralty, when the wharfage is furnished in the ordinary course of navigation<sup>97</sup> No such lien ordinarily arises, however, where the vessel has been withdrawn from navigation,<sup>98</sup> as where a vessel is kept for the purpose of storage<sup>99</sup> or sinks at the wharf<sup>1</sup> A wharfage claim is entitled to a maritime lien, whether the wharf is privately or publicly owned,<sup>2</sup> and even in a vessel's home port<sup>3</sup>

**Statutory lien** On a domestic vessel within the state to which she belongs, the state has unrestricted power to create liens, under such limitations as it may determine,<sup>4</sup> and the use of the word "lien" is not essential to its creation<sup>5</sup> The statutes creating such liens may apply to private wharves<sup>6</sup> and the liens so created may be enforced in admiralty,<sup>7</sup> if the conditions of the statute which assumes to give them are complied with<sup>8</sup>

**Waiver** A wharf proprietor may waive his lien,<sup>9</sup> either expressly or impliedly, as by failing to enforce it for an unreasonable length of time,<sup>10</sup> but no usage or custom can displace it or prevail in conflict with the law which gives it<sup>11</sup> The taking of a bond to secure payment of wharfage charge

is not a waiver of the right to a lien<sup>12</sup> The doctrine that a lien against the vessel is waived by one who looks wholly to the credit of some person is inapplicable where the lienholder was unaware of the financial difficulties of the person on whose credit he was relying<sup>13</sup>

**Priorities** A lien for wharfage is made, under the general maritime law, a lien next in rank to wages<sup>14</sup> The proceeds of a vessel arrested and sold to satisfy claims are chargeable with preferred claims for wharfage<sup>15</sup>

### b. Creation, Termination, and Revival

In order to create a lien for wharfage, it is necessary that the contract be made by some person who has authority to pledge the vessel to the performance of the contract, in addition, the services must be rendered on the credit of the ship

In order to create a lien for wharfage, it is necessary that the contract be made by some person who has authority to pledge the vessel to the performance of the contract,<sup>16</sup> as, for instance, the charterer or his agent,<sup>17</sup> when acting with such authority<sup>18</sup> Moreover, there must be in all cases, either in fact or by presumption of law, a credit of the ship,<sup>19</sup> and when such credit is negatived by the evidence, no such lien, whether maritime or statutory, will

New Orleans v North American Fruit & S S Corporation, 56 S Ct 156, 296 US 633, 80 L Ed 450  
68 CJ p 220 note 72

96. US—Ex parte Easton, NY, 95 US 68, 24 L Ed 373  
68 CJ p 221 note 73

97. US—Ex parte Easton, supra  
68 CJ p 221 note 74

98. US—Hanna v The Meteor, C AN Y, 179 F 2d 957  
Murray v The Meteor, DC NY, 78 F Supp 637, reversed on other grounds Murray v Schwartz, CA, 175 F 2d 72  
68 CJ p 221 note 75

99. US—Robinson v The C Vanderbuilt, DC NY, 86 F 785, affirmed 93 F 986, 34 CCA 682  
68 CJ p 221 note 76

1. US—Taylor v The Joseph Walker, DC NY, 23 F Cas No 13,795  
68 CJ p 221 note 77

2. US—Beard v Marine Lighterage Corporation, DC NY, 296 F 146

3. US—Beard v Marine Lighterage Corporation, supra—The Suelco, DC NY, 286 F 286

4. US—Murray v The Meteor, DC NY, 83 F Supp 212—Murray v The Meteor, DC NY, 78 F Supp

637, reversed on other grounds, C A, 175 F 2d 72  
68 CJ p 221 note 80

5. US—The Virginia Rulon, CC NY, 28 F Cas No 16,974, 13 Blatchf 519  
Ind—Coal-Float v Jeffersonville, 13 NE 115, 112 Ind 15

6. US—Beard v Marine Lighterage Corporation, DC NY, 296 F 146

7. US—Beard v Marine Lighterage Corporation, supra  
68 CJ p 221 note 83

8. US—The Cumbria, DC Mass, 156 F 378  
68 CJ p 221 note 84

9. US—The Dora Mathews, DC Ala, 31 F 619

10. US—The Dora Mathews, supra

11. US—The Dora Mathews, supra

12. US—El Amigo, CCA Tex, 285 F 868, certiorari denied sub nom Importers S S Co v Houston Marine Engineering Works, 43 S Ct 700, 262 US 751, 67 L Ed 1215

13. US—Larsen v New York Dock Co, CC AN Y, 166 F 2d 687

14. US—The Shrewsbury, DC Ohio, 69 F 1017

15. US—New York Dock Co v The Poznan, NY, 47 S Ct 482, 274 US 117, 71 L Ed 955

Larsen v New York Dock Co, CC AN Y, 166 F 2d 687

### Notwithstanding another attachment against vessel

Where libellant caused arrest of a vessel and she was withdrawn from navigation and placed at libellant's wharf, libellant was entitled to assert, as a preferential claim, the fair and reasonable value of the vessel's occupancy of part of the pier which he operated, notwithstanding another attachment was in effect during a portion of time embraced in libellant's claim, where primary benefit of wharfage was the preservation of the vessel for its owners  
US—Murray v The Meteor, DC NY, 83 F Supp 212

16. US—The Western Wave, CCA La, 77 F 2d 695, certiorari denied Board of Com'rs of Port of New Orleans v North American Fruit & S S Corporation, 56 S Ct 156, 296 US 633, 80 L Ed 450  
68 CJ p 221 note 85

17. US—The Ioannis Vatis, DC NY, 16 F 2d 284

18. US—The Capitaine Faure, DC NY, 7 F 2d 131, affirmed, CCA, 7 F 2d 133  
68 CJ p 221 note 87

19. US—The Suelco, DC NY, 286 F 286  
68 CJ p 221 note 88.



be recognized<sup>20</sup> So where the contract embraces other valuable considerations, the supply of which would give no lien against the ship, and which cannot be separated from the wharfage proper, no lien will arise<sup>21</sup>

*Termination of lien* A lien for wharfage arises from day to day and has been held to cease on the arrest of the vessel,<sup>22</sup> although a lien for wharfage has been sustained as a service rendered to the ship after arrest in aid of her safekeeping which inured to the benefit of her owners<sup>23</sup>

*Revival of lien* Where a vessel is removed secretly or wrongfully from a wharf, and afterwards brought back without fraud or force, the lien of the wharfinger is revived<sup>24</sup>

### c. Enforcement

A wharfinger may enforce his lien by a proceeding in rem against the vessel or the proceeds arising from her sale by order of a court of admiralty, or he may sue the owner in personam, and when permitted by statute the lien may be enforced by distress.

A wharfinger may enforce his lien by a proceeding in rem against the vessel<sup>25</sup> or the proceeds arising from her sale by order of a court of admiralty,<sup>26</sup> or he may sue the owner in personam<sup>27</sup> A public boat, devoted to a specific public use, however, cannot be arrested to enforce such a lien<sup>28</sup> A wharfage lien is not ordinarily one which can be enforced by a detention of the vessel,<sup>29</sup> but only by an application to the court,<sup>30</sup> and that not in exclusion, but in concurrence, with other liens standing in the same

degree of privilege<sup>31</sup> The lien is good in the hands of whoever holds it<sup>32</sup> When permitted by statute a lien for wharfage may be enforced by distress.<sup>33</sup>

### § 15. — Remedies

Claims for wharfage may, in a proper case, be enforced in admiralty or by action, and general rules of procedure apply.

A court of admiralty has jurisdiction of a claim for wharfage, such claim being maritime in its nature,<sup>34</sup> and it has been held that the jurisdiction of admiralty is, except as to common-law remedies, exclusive,<sup>35</sup> and that a state statute providing for attachment and other proceedings in rem against vessels for such a claim is void.<sup>36</sup> An admiralty court has also jurisdiction of a claim for the statutory rate of double wharfage imposed in the case of a departure without payment of wharfage<sup>37</sup> Where the vessel is withdrawn from commerce and the wharfage is in the nature of storage, an admiralty court has no jurisdiction<sup>38</sup>

The common-law remedy for the collection of wharfage is by action,<sup>39</sup> but where the method is prescribed by statute, such method must be followed<sup>40</sup>

*Defenses in general* Where defendant has had the use of the wharf, and plaintiff was in possession under color of title it is no defense to a claim for wharfage that plaintiff's title is defective<sup>41</sup> Furthermore, one using a wharf cannot resist payment of wharfage on the ground that the wharf had not been well built or was out of repair.<sup>42</sup> It

20 US—The Advance, NY, 71 F 987, 18 CCA 404  
68 CJ p 222 note 89

21 US—The Cimbria, DC Mass, 156 F 378  
68 CJ p 222 note 90—38 CJ p 1228 note 32 [b]

22 US—The William Leishear, D C Md, 21 F 2d 862  
The Poznan, DC NY, 297 F 345, reversed on other grounds, C CA, 9 F 2d 838, reversed on other grounds 47 S Ct 482, 274 US 117, 71 L Ed 955

23 US—Murray v The Meteor, D C NY, 83 F Supp 212

24 US—Johnson v The McDonough, D C Pa, 13 F Cas No 7,395, 6 Galp 101

25 US—Ex parte Easton, NY, 95 US 68, 24 L Ed 373  
68 CJ p 222 note 4

26 US—United Hydraulic Cotton-Press Co v The Alexander McNeil, DC Ga, 24 F Cas No 14,404

27 US—Ex parte Easton, NY, 95 U.S. 68, 24 L Ed 373.

United Hydraulic Cotton-Press Co v The Alexander McNeil, DC Ga, 24 F Cas No 14,404

28 US—The Seneca, DC NY, 21 F Cas No 12,668, 8 Ben 509  
68 CJ p 222 note 7

29 US—The Phebe, DC Me, 19 F Cas No 11,065, 1 Ware 360

30 US—The Phebe, supra

31 US—The Phebe, supra

32 US—Eley v The Shrewsbury, DC Ohio, 69 F 1017  
68 CJ p 222 note 11

33 NY—Marshall v Vultee, 1 E D Smith 294, reversed on other grounds 11 NY 461  
68 CJ p 222 note 12

34 US—Yacht Charterers v Diesel Yacht Yankee Clipper, DC Conn, 121 F Supp 118—Murray v The Meteor, DC NY, 93 F Supp 274

1 CJ p 1277 notes 18, 19, 25

35 Mich—McMorran v The Millinokett, 157 NW 421, 191 Mich 151  
NY—Brookman v Hamill, 43 NY 554, 3 Am R 731

Marine Lighterage Corporation v Luckenbach, S S Co, 248 NY S 71, 139 Misc 612

36 NY—Brookman v Hamill, 43 NY 554, 3 Am R 731

37 US—The Virginia Rulon, CC NY, 28 F Cas No 16,974, 13 Blatchf 519  
1 CJ p 1277 note 20

38 US—Murray v Schwartz, C A NY, 175 F 2d 72  
The C Vanderbilt, DC NY, 86 F 785, affirmed 93 F 986, 34 CC A 682  
1 CJ p 1277 note 22

39 NY—Hastorf v Kelly, 9 Daly 403

40 NY—Warren v. McDiarmid, 34 How Pr 304  
68 CJ p 223 note 19.

41 Wash—Corpus Juris quoted in Port of Willapa Harbor v Nelson Crab & Oyster Co, 131 P 2d 155, 156, 15 Wash 2d 515  
68 CJ p 223 note 21.

42 La—Schwartz v. Thirty-Two Flatboats, 14 La Ann 243  
Pa—Prescott v Burgess & Town Council of Duquesne, 48 Pa 118.

has also been held that plaintiff's assignment of its interest in the suit was no defense <sup>43</sup>

*Laches* The question of laches depends largely on the facts of the particular case.<sup>44</sup> Thus, under one set of facts, the defense was not available after a delay of three years,<sup>45</sup> while under another, the question was "hardly open" after two and a half years <sup>46</sup>

*Set-off and counterclaim.* The defendant may show, by way of recoupment, that the port and wharves<sup>47</sup> or other places required to be kept in repair by the wharfinger<sup>48</sup> were out of repair, whereby he sustained damage. However, a claim in favor of a third person cannot be set off <sup>49</sup>

*Parties* Remedies, whether by action or distress, must be pursued in the name of the party in interest,<sup>50</sup> and not in the name of the agent who made the contract or one who is appointed to make the collection or do both <sup>51</sup> An action to recover wharfage is not an action for the recovery of real or personal property, and persons claiming to own the wharf are not necessary parties to an action for wharfage <sup>52</sup> A wharf owner may maintain assumpsit against the owner of an adjacent wharf, rather than proceeding against overlapping vessels <sup>53</sup> Steamers are not jointly liable for lighter wharfage, and therefore not subject to be impleaded in a libel against harbor craft receiving cargo from,

or delivering it to, such steamers.<sup>54</sup>

*Evidence.* Plaintiff, in order to recover in an action for wharfage, has the burden of proof to establish his right to such wharfage,<sup>55</sup> as his right under an agreement therefor <sup>56</sup> A lessee must show a proper lease of the wharf to him.<sup>57</sup> One contracting for wharf facilities at a rate in excess of that prescribed by statute will be presumed to have waived the statute <sup>58</sup> The boat owner has the burden to prove an agreement not to charge wharfage <sup>59</sup> In an action to recover wharfage charges allegedly wrongfully exacted, plaintiff is required to show that in equity and good conscience the money defendant has is really plaintiff's, and defendant should not keep it <sup>60</sup>

Ordinarily, any relevant and material evidence, otherwise admissible, may be received in an action for wharfage <sup>61</sup> Thus, testimony pertinent to the question of the value of the use of plaintiff's property by defendant is admissible,<sup>62</sup> and where a plaintiff is entitled to the wharfage received by defendant, and the latter refuses to state the amount received, plaintiff is entitled to prove what the reasonable wharfage would have been,<sup>63</sup> but testimony relating to an item of damages that is not recoverable should not be admitted <sup>64</sup>

A fact in issue is sufficiently proved by a preponderance of evidence in an action for wharfage <sup>65</sup>

43. NY—Trowbridge v City of Albany, 7 Hill 429  
68 CJ p 223 note 23

44. US—The Libbie Purdy, DC Mass., 32 F Supp 67

45. NY—G W Sheldon & Co v Kerr S S Co, 200 NYS 276  
68 CJ p 223 note 25

46. US—The Golden Rod, Me., 208 F 24, 125 CCA 322  
68 CJ p 223 note 26

47. NY—Buckbee v Brown, 21 Wend 110

48. Tex—Sterrett v Houston, 14 Tex 153  
68 CJ p 223 note 29

49. US—The Francesca T, DCN Y., 9 FCas No 5,030, 9 Ben 34  
68 CJ p 223 note 30

50. NY—Woodruff v Havemeyer, 12 NE 628, 106 NY 129, 27 NY Wkly Dig 42  
68 CJ p 223 note 32

51. NY—Buckbee v. Brown, 21 Wend 110  
68 CJ. p 223 note 33.

52. NY—Kelsey v Murray, 18 Abb Pr 294, 28 How Pr 243

53. RI—Adams v John R White & Son, 103 A 230, 41 RI 157  
68 CJ p 223 note 35.

54. US—The M L C No 10, C CANY, 10 F2d 699, certiorari denied 46 SCt 488, 271 US 675, 70 LEd 1146

68 CJ p 223 note 36

55. US—The Devona, CCANY, 16 F2d 362

68 CJ p 224 note 41

56. US—The Devona, supra

57. NY—Taylor v Beebe, 26 NY Super 262

58. US—The Allan Wilde, DCN Y., 255 F 171, affirmed, CCA, 264 F 291

68 CJ p 224 note 44

59. La—Higgins Lumber & Export Co v Drackett, 125 So 322, 12 La App 70

68 CJ p 224 note 45

60. US—Davison Gulfport Fertilizer Co v Gulf & S I R Co, CCA Miss, 92 F2d 107, certiorari denied 58 SCt 141, 302 US 738, 82 LEd 570

61. RI—Adams v John R White & Son, 94 A 675, 38 RI 240  
68 CJ p 224 note 47

62. RI—Adams v John R White & Son, 103 A 230, 41 RI 157

63. N.Y.—Steers v Brooklyn, 4 NE 7, 101 NY 51—Smith v. Brooklyn, 101 NY 616

64. RI—Adams v John R White & Son, 94 A 675, 38 RI 240

65. US—The Trinidad, DCN Y., 251 F 174

68 CJ p 224 note 53

#### Evidence held sufficient

(1) To authorize wharfinger's recovery

RI—Rich v Tanenbaum, 198 A 240, 60 RI 254

(2) To establish that wharfage was furnished on credit of the vessel, that libellant properly applied most of payments received from former owner to settlement of libellant's claim for rent rather than to reduction of the wharfage account, and that libellant never waived its lien

US—The Libbie Purdy, DC Mass., 32 F Supp 67

#### Evidence held insufficient

(1) To overturn plain language of contract exempting vessel

US—Galveston Wharf Co v. Phillips, DC Tex., 4 F Supp 243

(2) To establish claim of intervening petitioners for damages inflicted by the vessel and for coal furnished to the vessel

US—The Libbie Purdy, DC Mass., 32 F Supp 67.

(3) Other illustrations

US—Sociedad Armadora Aristomenis

*Trial* The question of the nature of the contract for the use of a pier<sup>66</sup> and whether there was such a use of the wharf as would involve liability for wharfage<sup>67</sup> are questions for the jury in an action for wharfage. So, whether or not the wharf was a public wharf is a question of fact,<sup>68</sup> and where the right to wharfage depends on the existence of a grant from a municipal corporation, whether or not a grant will be presumed is peculiarly the province of a jury to determine.<sup>69</sup> A nonsuit should be granted where the evidence is insufficient to support plaintiff's cause of action.<sup>70</sup>

*Damages* In an action for wharfage for the use of a wharf by the overlapping of vessels lying at defendant's wharf, damages to the plaintiff's building situated within a few inches of the line of the wharf are not recoverable.<sup>71</sup>

## § 16. Injuries to Vessels or Cargoes

A proprietor of a dock is ordinarily bound to know its condition and is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the proprietor negligently causes or permits to exist, if such person was himself in the exercise of due care.

A proprietor of a dock is ordinarily bound to

know its condition<sup>72</sup> and is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the proprietor negligently causes or permits to exist, if such person was himself in the exercise of due care.<sup>73</sup>

*Degree of care required* While there is a duty to provide a safe berth<sup>74</sup> a wharf proprietor is not an insurer of the safety of his dock.<sup>75</sup> He is, however, required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready,<sup>76</sup> and if he fails to use such due care, if there is a defect which is known to him, or which, by the use of ordinary care or diligence, should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby,<sup>77</sup> but it has been held that the wharfinger sufficiently discharges his duty to use reasonable care to furnish a safe berth if he warns the vessels.<sup>78</sup>

A wharf proprietor owes no duty to a trespasser,<sup>79</sup> but this rule applies only where he does not know of the presence of the trespasser, or have

Panama, S A v 5020 Long Tons of Raw Sugar, C A Pa., 223 F 2d 417  
68 C J p 224 note 53 [a]

66. NY—Clark v J & C Auditors, 155 NE 679, 244 NY 382  
68 C J p 224 note 55

67. Mo—St Louis v Eagle Packet Co., 114 SW 21, 214 Mo 638

68. Md—Brown v Ellicott, 2 Md 75

69. NY—Thompson v New York, 5 NY Super 487, affirmed 11 NY 115

70. La—Harvey Canal Land & Imp Co v Koch-Ellis Marine Contractors, App., 34 So 2d 66

71. RI—Adams v John R White & Son, 94 A 675, 38 RI 240

72. US—The Chancellor, C C A N Y., 30 F 2d 227

73. US—The Murray River, D C N Y., 38 F 2d 990  
68 C J p 224 note 62

74. US—Berwind-White Coal Mining Co v City of New York, C C A N Y., 135 F 2d 443—The Murray River, D C N Y., 38 F 2d 990

75. US—Berwind-White Coal Mining Co v City of New York, C C A N Y., 135 F 2d 443—Norfolk Tidewater Terminals v Wood Towing Corp., C C A Va., 94 F 2d 164—The Roslyn, C C A N Y., 93 F 2d 278  
Central Barge Co v City of Minneapolis, D C Minn., 123 F Supp 275  
—Todd Atlantic Shipyards Corp v

The Southport, D C S C., 95 F Supp 331, affirmed City Compress & Warehouse Co v U S, C A., 190 F 2d 699  
68 C J p 225 note 64

76. US—Stegemann v Miami Beach Boat Slips, C A Fla., 213 F 2d 561—City Compress & Warehouse Co v U S, C A S C., 190 F 2d 699—Waldie v Steers Sand & Gravel Corp., C C A N Y., 151 F 2d 129  
Central Barge Co v City of Minneapolis, D C Minn., 123 F Supp 275  
—The Zeller No 14, D C N Y., 74 F Supp 538—Ford Motor Co v Bradley Transp Co., D C Mich., 74 F Supp 460, affirmed, C A., 174 F 2d 192

68 C J p 225 note 65

**Right to presume berth was safe**  
Invitee had right to presume that berth was safe

US—Norfolk Tidewater Terminals v Wood Towing Corp., C C A Va., 94 F 2d 164

### Mutual advantage in mooring

Where use of respondent's property by loaded barges included use, for sometimes extended periods, of piers and slip, and there was a mutual advantage in this arrangement of temporary location, barge was an invitee and respondent was bound to use ordinary care for safety of those who had occasion to use premise for purposes for which they had been appropriated

US—Valentine v Pennsylvania R Co., D C N Y., 131 F Supp 108

### Mooring without charge

A towing company which moored loaded barges at wharf, in anticipation of arrival of ship on which cargo of barges was to be loaded, was an invitee of wharfinger, to whom wharfinger owed duty to use reasonable care to furnish safe berth, notwithstanding no charge was made by wharfinger for mooring of barges, in view of fact that it was customary to handle barges without charge for convenience of steamships which used wharfinger's piers

US—Norfolk Tidewater Terminals v Wood Towing Corp., C C A Va., 94 F 2d 164

77. US—The Roslyn, C C A N Y., 93 F 2d 278  
68 C J p 225 note 66

78. US—Central Barge Co v City of Minneapolis, D C Minn., 123 F Supp 275  
68 C J p 225 note 67

79. US—Dutton v Strong, Wis., 1 Black 23, 17 L Ed 29  
68 C J p 225 note 68

### Not trespasser

Tug entering slip in river to assist in undocking vessel berthed on north side of pier immediately south of pier maintained by riparian owner and standing on his land was not a "trespasser"

reason to expect his advent<sup>80</sup> As to a licensee, he is only bound to refrain from injuring the ship willfully or wantonly<sup>81</sup>

*In the application of the foregoing rules, dock proprietors have been held liable<sup>82</sup> or not liable<sup>83</sup> for injury to vessels, according to the facts of the particular case under consideration Thus, they have been held liable for loss due to explosion,<sup>84</sup> fire,<sup>85</sup> ice,<sup>86</sup> or storms,<sup>87</sup> for damage due to the collapse of the wharf,<sup>88</sup> or for the moving of a boat<sup>89</sup> or its capsizing<sup>90</sup>*

On the other hand, there was no liability in other cases, and, under different circumstances, where the loss was caused by landslide,<sup>91</sup> or solely by the unusual violence of a storm,<sup>92</sup> for damage from freezing,<sup>93</sup> collision,<sup>94</sup> or ice,<sup>95</sup> and for the disappearance of a boat<sup>96</sup>

## § 17. — Concealed Defects and Obstructions, and Shallow Water

A dock owner must exercise reasonable diligence to ascertain the existence of defects, obstructions, or other hazards that would operate to make the use of the wharf unsafe or perilous to vessels, and he is liable for any damage done to any vessel by reason of the neglect of such duty.

A dock owner must exercise reasonable diligence to ascertain the existence of defects, obstructions, or other hazards that would operate to make the use of the wharf unsafe or perilous to vessels, and he is liable for any damage done to any vessel by reason of the neglect of such duty,<sup>97</sup> and this rule applies whether the owner is an individual, or a corporation, whether such corporation is private or municipal,<sup>98</sup> and regardless of whether the wharf is maintained solely for the purpose of col-

US—The Dalzellace, DCNY, 18 F Supp 419, affirmed, CCA, Dalzell v Valvoline Oil Co, 87 F2d 1002

80. US—The Chancellor, CCAN Y, 30 F2d 227

81. US—The Santa Barbara, CCA Md, 299 F 147, certiorari denied Canton Co of Baltimore v Brown, 45 S Ct 95, 266 US 612, 69 LEd 467

68 CJ p 225 note 69

82. US—City of Portland v Luckenbach S S Co, CA Or, 217 F2d 894

68 CJ p 225 note 70

83. US—Brigham v John F Schmadeke, Inc, DCNY, 262 F 571

68 CJ p 225 note 71, p 226 note 78

84. NJ—Republic of France v Lehigh Valley R Co, 117 A 598, 97 NJLaw 474

68 CJ p 226 note 72

85. US—The Santa Barbara, CCA Md, 299 F 147, certiorari denied Canton Co of Baltimore v Brown, 45 S Ct 95, 266 US 612, 69 LEd 467

68 CJ p 226 note 73

86. US—Connors Marine Co v Beson & Co, CCAN Y, 94 F2d 572

87. US—The John Carroll, CCA NY, 275 F 302

68 CJ p 226 note 74

88. NY—Vogemann v. American Dock & Trust Co, 115 NYS 741, 131 App Div 216, affirmed 92 NE 1105, 198 NY 586

68 CJ p 226 note 75

89. US—The Dalzelline, DCNJ, 15 F Supp 122, modified on other grounds, CCA, 89 F2d 160

68 CJ p 226 note 76.

90. US—The Barrenfork, DC Va, 300 F 366, modified on other grounds, CCA, Virginian Ry Co v. U. S., 18 F2d 772, certiorari de-

nied 47 S Ct 110, 273 US 718, 71 LEd 857

68 CJ p 226 note 77

91. US—Pacific Mail S S Co v Panama R Co, CCAN Y, 251 F 449, 163 CCA 625, certiorari denied 39 S Ct 9, 248 US 567, 63 LEd 424

92. US—Niagara Transit Co v Northwestern Fuel Co, Wis, 258 F 893, 169 CCA 613

68 CJ p 226 note 80

**Waiting for notice of dangerous conditions**

Where captain left loaded barge, which was moored to respondent's pier in accordance with usual practice, and did not return to barge until after storm abated, during which time barge was damaged, respondent was not negligent in waiting for notice of dangerous condition of barge before taking steps to move barge to a safer location

US—Valentine v Pennsylvania R Co, DCNY, 131 F Supp 108

93. US—The Kennebec, Md, 258 F 222, 169 CCA 290

68 CJ p 226 note 81

94. US—Brigham v John F Schmadeke, Inc, DCNY, 262 F 571

68 CJ p 226 note 82

**Special equipment**

Lessee of pier did not have duty with respect to floating stages moored at side of pier to prevent steamship for whose docking pier was hired by another company from coming into contact with pier, since stages were special equipment, and hence lessee was without fault in collision between tug assisting steamship to undock and floating stage

US—The Dalzelline, DCNY, 15 F Supp 122, modified on other grounds, CCA, 89 F2d 160

**Owner of float stage, which suction of undocking ship caused to swing out from pier and result in collision with tug assisting steamship to undock was not even secondarily liable, where another corporation, an independent contractor, was in charge of the float stage, and there was no evidence that the float stage was not adequate and suitable in every respect for work to which it was to be put, when turned over by owner to independent contractor**  
US—The Dalzelline, CCAN Y, 89 F2d 160

95. US—Central Barge Co v City of Minneapolis, DCMinn, 123 F Supp 275

96. NY—Blank v Marine Basin Co, 165 NYS 883, 178 App Div 666  
68 CJ p 227 note 84

97. US—Norfolk Tidewater Terminals v Wood Towing Corp, CCA Va, 94 F2d 164

Manhattan Lighterage Corporation v Moore-McCormack Line, DCNY, 45 F Supp 271—Hams v Luckenbach Terminals, DCNJ, 38 F Supp 485

68 CJ p 227 notes 87-92

**When duty accrues**

With respect to wharfinger's responsibility for damage to cargo and barge which sunk off dock, duty of wharfinger, which did not expect barge, could not have arisen before barge docked, and its duty accrued when its president and general manager directed mooring of barge  
US—The Mascot, DCNJ, 28 F Supp 770

98. US—Tracy Towing Line v City of Jersey City, DCNJ, 105 F Supp 910

68 CJ p 227 note 87

Duty of consignee to furnish safe berth see Shipping § 105.

lecting wharfage<sup>99</sup> The wharfinger is under the duty of exercising reasonable diligence in ascertaining the condition of the berths,<sup>1</sup> and the existence, if any, of dangerous obstructions<sup>2</sup> Where there are dangerous obstructions present, it is the duty of the wharf owner to remove them,<sup>3</sup> notify vessels using the wharf of their existence and position,<sup>4</sup> or close the wharf to the public<sup>5</sup> While it may be incumbent on a wharfinger to use reasonable diligence in ascertaining whether there is water sufficient to accommodate a boat of the character assigned to the berth for unloading,<sup>6</sup> and to give notice of the insufficiency of the water,<sup>7</sup> he is not ordinarily liable for damages caused by insufficient water<sup>8</sup>

*Owner's knowledge of defect or obstruction.* In

order to show that a wharf owner was negligent it is not necessary to show that he knew of the obstruction,<sup>9</sup> it being sufficient to show that he could have discovered its existence by reasonable diligence,<sup>10</sup> but a liability will not attach to the owner or occupant of the premises, if the defect or obstacle is so hidden that its existence cannot be discovered by a reasonable examination commensurate with the use to be made of the premises<sup>11</sup>

*In the application of these rules, wharf proprietors have been held liable for injuries to vessels resulting from an uneven bottom<sup>12</sup> or from submerged obstructions<sup>13</sup> such as rock,<sup>14</sup> coal,<sup>15</sup> cinders,<sup>16</sup> a sunken ship,<sup>17</sup> or spiles<sup>18</sup> On the other hand, liability has been denied in certain cases involving dangerous access to the wharf,<sup>19</sup> and cases*

99. US—Kenny v Balbach Smelting & Refining Co, DCNY, 6 F 2d 671, affirmed, CCA, 6 F 2d 672 68 CJ p 227 note 88

1. US—Norfolk Tidewater Terminals v Wood Towing Corp, CCA Va, 94 F 2d 164

Tracy Towing Line v City of Jersey City, DCNJ, 105 F Supp 910—Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271—Hams v Luckenbach Terminals, DCNJ, 38 F Supp 485 68 CJ p 227 note 89

2. US—Smith v Burnett, App DC, 19 S Ct 442, 173 US 430, 43 L Ed 756

Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271 68 CJ p 227 notes 91, 92

3. US—Berwind-White Coal Mining Co v City of New York, CCANY, 135 F 2d 443

New York Cent R Co v American Dock Co, DCNY, 80 F Supp 368—Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271—Hams v Luckenbach Terminals, DCNJ, 38 F Supp 485—The Cornell No 20, DCNY, 8 F Supp 431 68 CJ p 227 note 91

4. US—Tracy Towing Line v City of Jersey City, DCNJ, 105 F Supp 910—Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271—Hams v Luckenbach Terminals, DCNJ, 38 F Supp 485—The Cornell No 20, DCNY, 8 F Supp 431—Sargent Barge Line v New York Silk Dyeing Co, DCNY, 3 F Supp 566, affirmed, CCA, 68 F 2d 1014 68 CJ p 227 note 91

#### Warning held inadequate

(1) An invitee using a wharf was not put on notice of broken condition of piling at pier by fact that acci-

dent had happened to another barge of invitee at point more than one hundred yards away and danger sign had been placed thereat by wharfinger, since danger notice at one place on long pier indicated that remainder of pier was safe for mooring US—Norfolk Tidewater Terminals v Wood Towing Corp, CCA Va, 94 F 2d 164

(2) Placing of small red lantern on end of pier is inadequate warning of sunken wreck at entrance to slip US—The Cornell No 20, DCNY, 8 F Supp 431

5. US—Heissenbuttel v. New York, DCNY, 30 F 456

6. US—The Mascot, DCNJ, 28 F Supp 770

Verdon v Brooklyn Heights R Co, DCNY, 157 F 481. 68 CJ p 228 note 93

7. US—James H Rhodes & Co v U S Lighterage Corp, CCANY, 98 F 2d 770

8. US—Keane v Diamond Mills Paper Co, DCNY, 33 F 2d 798 68 CJ p 228 note 94

9. US—Smith v Burnett, 10 App DC 469, affirmed 19 S Ct 442, 173 US 430, 43 L Ed 756 Mass—Garfield, etc, Coal Co v Rockland-Rockport Lime Co, 67 N E 863, 184 Mass 60, 100 Am SR 543, 61 L R A 946

#### Defect held constructive notice

Fact that a fender pile was missing from the above water portion of fender system at a public pier was constructive notice to those charged with maintenance of pier that a dangerous condition probably existed US—Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271

Good reputation of wharf does not necessarily excuse wharfinger

US—Red Star Towing & Transp Co v. The Russell No 7, DCNY, 70

F Supp 713, affirmed, CCA, 168 F 2d 717

10. US—Norfolk Tidewater Terminals v Wood Towing Corp, CCA Va, 94 F 2d 164

Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271 68 CJ p 228 note 2

11. US—Hagan v Brockie, DCPa, 11 F 745

NY—Leary v Woodruff, 4 Hun 99, 6 Thomps & C 390, affirmed 76 NY 617.

12. US—New York Trap Rock Corp v City of New York, DCNY, 116 F Supp 814—The Mascot, DCNJ, 28 F Supp 770—The Plainfield, DCNY, 18 F Supp 416 68 CJ p 228 note 4

13. US—Kenny v. Venetian Contracting Co, DCNY, 60 F 2d 1053 68 CJ p 229 note 5

14. US—Kenny v Venetian Contracting Co, supra The Good News, DCNY, 272 F 482, affirmed, CCA, 281 F 1020

15. US—The Good News, supra

16. US—Hudson v. Pittsburgh Plate Glass Co, DCPa, 263 F 730

17. US—The Cornell No 20, DCNY, 8 F Supp 431

18. US—Norfolk Tidewater Terminals v Wood Towing Corp, CCA Va, 94 F 2d 164

New York Cent R Co v American Dock Co, DCNY, 80 F Supp 368—Manhattan Lighterage Corp v Moore-McCormack Line, DCNY, 45 F Supp 271—The Dalzellance, DCNY, 18 F Supp 419, affirmed Dalzell v Valvoline Oil Co, CCA, 87 F 2d 1002 68 CJ p 229 note 9

19. NY—McCaldin v. Parke, 37 N E 622, 142 NY 564.

68 CJ p 229 note 14.

in which defendants had no notice of the defect<sup>20</sup>

### § 18. — Moorings and Fastenings

The owner of a wharf owes a duty of reasonable care in berthing and in maintaining the fastenings on a vessel, and he is liable for damage to the vessel or its cargo due to his negligence in this respect

A vessel has the right to be furnished with reasonable and ordinary mooring devices<sup>21</sup>. The owner of a wharf owes a duty of reasonable care in berthing and in maintaining the fastenings on a vessel,<sup>22</sup> including the duty of inspecting the lines securing the vessel,<sup>23</sup> and he will be liable for damage to the vessel or its cargo due to his negligence in this respect<sup>24</sup>. Where the choice of lines and devices on a wharf used to secure a ship are supervised by an employee of the ship, the ultimate responsibility for mooring the vessel is on the ship and her owners<sup>25</sup>.

Where a master whose vessel is in peril attaches it to a private pier without the consent or license of the owner, he becomes a trespasser, and if the presence of the vessel at the pier endangers the safety of the pier or threatens its destruction, the owner may cut the vessel loose, and will not be liable to the vessel for such action<sup>26</sup>. Where, however, the occupancy of the wharf is lawful, the owner cannot terminate it by setting the vessel adrift, so as to endanger her safety, until he has

put the vessel owner in fault by giving him reasonable notice to remove his vessel.<sup>27</sup> Thus, a wharf owner may be liable for removing a vessel from his wharf to an unsafe place where she was injured,<sup>28</sup> but not where the lines holding a flotilla of barges broke<sup>29</sup>.

### § 19. — Defenses in General

The fact that other boats used a berth without injury, constitutes no defense, where the known condition of the berth is such as might be expected to produce injury, but inevitable accident affords a complete exoneration of a wharf owner.

Fact that other boats used a berth without injury, constitutes no defense, where the known condition of the berth was such as might be expected to produce injury<sup>30</sup>. Inevitable accident affords a complete exoneration of a wharf owner<sup>31</sup>. An injury caused by wind<sup>32</sup> or by ice floes<sup>33</sup> cannot, however, be said to be attributable to an act of God, where the physical circumstances are not unusual.

### § 20. — Contributory Negligence

Patrons using a wharf or slip are required to use ordinary care in the operation of their vessels, and, if by the exercise of such care, they could have discovered the defect or obstruction causing the injury, they are guilty of contributory negligence, which may bar recovery

Patrons using a wharf or slip are required to exercise ordinary care<sup>34</sup> and furnish seaworthy vessels,<sup>35</sup> and, if by such exercise of care, they

20 NY—Seaman v New York, 80 NY 239, 36 Am R 612  
68 CJ p 229 note 15

21. US—Todd Atlantic Shipyards Corp v The Southport, DCSC, 95 F Supp 331, affirmed, CA, City Compress & Warehouse Co v U S, 190 F 2d 699

22 US—Roah Hook Brick Co v Erie R Co, CANY, 179 F 2d 601 —Burns Bros v Long Island R Co, CANY, 176 F 2d 406, rehearing denied 176 F 2d 950

Central Barge Co v City of Minneapolis, DC Minn, 123 F Supp 275—John I Hay Co v The Allen B Wood, DCLa, 121 F Supp 704, affirmed, CA, Martin Oil Service v John I Hay Co, 219 F 2d 237—Puget Sound Tug & Barge Co v Olympic Forest Products Co, DC Wash, 21 F Supp 940

Dock workers employed by city which operated wharf for use of privately owned river barges were chargeable with duty to exercise fundamentals of good seamanship with respect to running additional lines from moored barge to wharf when informed ice and high water were coming down river toward wharf  
US—Central Barge Co. v. City of

Minneapolis, DC Minn, 123 F Supp 275

23 US—O'Boyle, Inc, v City of New York, DCNY, 85 F Supp 858 —Seaboard Sand & Gravel Corporation v Youghiogheny & Ohio Coal Co, DCNY, 65 F Supp 489

24. US—Roah Hook Brick Co v Erie R Co, CANY, 179 F 2d 601 —Connors Marine Co v Besson & Co, CCANY, 94 F 2d 572 —John I Hay Co v The Allen B Wood, DCLa, 121 F Supp 704, affirmed, CA, Martin Oil Service v John I Hay Co, 219 F 2d 237

25 US—City Compress & Warehouse Co v U S, CASC, 190 F. 2d 699

26. US—Dutton v Strong, Wis, 1 Black 23, 17 L Ed 29

27. NY—Heaney v Heeney, 2 Den 625

28. US—New York, S & W R Co v Roney, NJ, 138 F 47, 70 CCA 473—Smith v Yellow Pine Co, NY, 114 F 99, 52 CCA 47

29. US—The Bartle Daly, DCNY, 45 F 2d 605

30. US—Hastorf v Leonhard Michael Brewing Co, DCNY, 248 F 835, affirmed, CCA, 269 F 1022

31 US—Clarkson Coal & Dock Co v Northern Lakes S S Co, Minn, 251 F 181, 163 CCA 337—Meyer v Pennsylvania R Co, DCNY, 125 F 428

32 US—Clarkson Coal & Dock Co v Northern Lakes S S Co, Minn, 251 F 181, 163 CCA 337  
68 CJ p 230 note 26

#### Vessel not properly moored

Drifting of vessel after it broke from dock during gale was not inevitable accident or vis major where vessel was not properly moored when it was laid up, mooring was not corrected after warning of approaching gale was given, anchors were not cast either before or after breakaway, and master could have used nearby telephone to summon help properly to moor vessel

US—The President Madison, DC Wash, 13 F Supp 692, affirmed, C. CA, 91 F 2d 835

33. US—Connors Marine Co v Besson & Co, CCANY, 94 F 2d 572

34. US—Smith v Burnett, App DC, 19 S Ct 442, 173 US 430, 43 L Ed 756  
68 CJ. p 230 note 27

35. US—The Barrenfork, DC Va, 300 F. 366, modified on other

could have discovered the defect or obstruction causing the injury, they are guilty of contributory negligence, which may bar recovery<sup>36</sup> Thus, the failure to watch the tide, has been held to be contributory negligence,<sup>37</sup> and so has the failure to ascertain the depth of the water,<sup>38</sup> the failure to moor properly,<sup>39</sup> or to take notice of approaching storms,<sup>40</sup> leaving the boat unattended during a storm,<sup>41</sup> and the refusal to use appliances furnished by the wharfinger,<sup>42</sup> and the assumption of responsibility with knowledge of the danger will defeat recovery<sup>43</sup>

On the other hand, in the absence of notice of facts calling for its own investigation, a vessel berthing under a permit from the owner of the wharf is entitled to rely on the good reputation of the wharf<sup>44</sup> One in charge of a boat has a right to rely on the directions or assurances of wharf owners or their agents<sup>45</sup> and, in various cases, alleged negligent conduct has been held not to be neg-

ligence contributing to the injury,<sup>46</sup> as, for example, where the alleged contributory negligence was failure to examine the bottom,<sup>47</sup> leaving the boat unattended,<sup>48</sup> or alleged incompetent navigation<sup>49</sup>

## § 21. — Persons Liable

In addition to the liability of the owner and lessee of a wharf for injuries to vessels or cargoes, liability has also been imposed on shipowners, and a ship itself.

In addition to the liability of the owner or lessee of a wharf for injuries to vessels or cargoes, liability has also been placed on shipowners,<sup>50</sup> and a ship itself<sup>51</sup> A principal may be held liable for the acts of his agent causing injury<sup>52</sup> or for those of an independent contractor who is under his direction<sup>53</sup> A principal is not liable for the acts of an independent contractor who agreed to be liable for all damages arising from his negligence<sup>54</sup> It has been held that a dredging company, performing work according to contract, is not liable for

grounds, CCA, Virginian Ry Co v U S, 13 F2d 772, certiorari denied 47 S Ct 110, 273 US 718, 71 L Ed 857

36 US—Drummond Lighterage Co v Oregon-Washington R & Nav Co, CCA Wash, 20 F2d 118  
Hudson v Pittsburgh Plate Glass Co, DCPa, 263 F 730

37 US—Peterson v Great Neck Dock Co, DCNY, 75 F 683  
68 CJ p 230 note 30

38 US—O'Boyle v New York Steam Co, DCNY, 254 F 640  
68 CJ p 230 note 31

39 US—The President Madison, DC Wash, 13 F Supp 692, affirmed, CCA, 91 F2d 835

**Vessel, out of commission** with fixed status of rest for indefinite period and its crew withdrawn, is required to be moored with greater care than vessel in commission under power with full crew and with temporary moorings for taking and releasing cargo

US—The President Madison, supra  
40. US—The President Madison, supra

### Duty of watchman

Watchman on vessel moored to dock during gale had duty to look, think, and act and invoke every known agency at his immediate command to protect vessel and dock

US—The President Madison, supra

**Knowledge of approach of "whole gale"** requires higher degree of prudence to resist its destructive force than lack of knowledge or ordinary wind

US—The President Madison, supra

41. US—Valentine v Pennsylvania R Co, DCNY, 131 F Supp 108

42 US—Morey v City of New Rochelle, NY, 254 F 425, 166 C CA 57  
68 CJ p 230 note 32

43. US—The Mascot, DCNJ, 28 F Supp 770—Sargent Barge Line v New York Silk Dyeing Co, DCNY, 3 F Supp 566, affirmed, CCA, 68 F2d 1014

68 CJ p 230 note 33

### Watchman not inspecting lines

Watchman was negligent, after vessel was moved by third party, in not notifying charterer or attempting to check or adjust lines until tug was sinking

US—Tracy Towing Line v City of Jersey City, DCNJ, 105 F Supp 910

44. US—Manhattan Lighterage Corporation v Moore-McCormack Line, DCNJ, 45 F Supp 271

45 US—New York Trap Rock Corp v Christie Scow Corp, DCNY, 92 F Supp 989—The Mascot, DCNJ, 28 F Supp 770

68 CJ p 231 note 34

### Right to assume better information

The owner of vessel obeying orders of wharfinger is justified in assuming that wharfinger is better informed than any one else with respect to condition of premises

US—Connors Marine Co v Besson & Co, CCANY, 94 F2d 572

Morey v City of New Rochelle, CCANY, 254 F 425—The Stroma, CCANY, 50 F 557

46. US—Berwind-White Coal Mining Co v City of New York, CCA NY, 135 F2d 443

The Mascot, DCNJ, 28 F Supp 770—The Dalzelline, DCNY, 15

F Supp 122, modified on other grounds, CCA, 89 F2d 160  
68 CJ p 231 note 35

### Acts of independent contractors

NY—Vogemann v American Dock & Trust Co, 115 NYS 741, 131 App Div 216, affirmed 92 NE 1105, 198 NY 586

47 US—Daly v New York Dock Co, NY, 254 F 691, 166 CCA 189

68 CJ p 231 note 36

48 US—Norfolk Tidewater Terminals v Wood Towing Corp, CCA Va, 94 F2d 164—Goodwin-Gallagher Sand & Gravel Corporation v. Washington Bulkley, Inc, DCNY, 31 F2d 112, affirmed, CCA, 31 F2d 115

### Wharfinger providing watchman

US—John I Hay Co v The Allen B Wood, DCLa, 121 F Supp 704, affirmed, CA, Martin Oil Service v John I Hay Co, 219 F2d 237

49. US—State of Maryland v Miller, DC Md, 180 F 796, modified 194 F 775, 114 CCA 495  
68 CJ p 231 note 38

50. US—The Jamaica, DCNY, 51 F2d 858  
68 CJ p 231 note 42

51. US—The Jamaica, DCNY, 51 F2d 857  
68 CJ p 231 note 43

52. US—Pennsylvania R Co v. Atha, DCNJ, 22 F 920  
68 CJ p 231 note 44

53. US—Keane v Diamond Mills Paper Co, DCNY, 33 F2d 798.  
68 CJ p 231 note 45

54 US—Roah Hook Brick Co v Erie R Co, CANY, 179 F2d 601,

damages caused by a pile carried into the dredge area by the shifting of the mud<sup>55</sup> A wharfinger is not liable for damage to a moored vessel caused by another ship over which he has no control<sup>56</sup> Persons who are not wharfingers and who do not owe the vessel or the wharf owner any duty to maintain a ship in a safe condition are not liable for damages resulting from obstructions in the ship<sup>57</sup>

**Lessor and lessee** Generally, where a wharf is in the possession and occupation of a lessee, he is responsible for any injury arising from defects or obstructions in the wharf that are known or should be known to him,<sup>58</sup> and, in the absence of any covenant from his lessor to keep it in repair, this duty, as to all defects or obstructions arising after his tenancy began, rests altogether on him, and there is no liability on the lessor,<sup>59</sup> but where the wharf is leased, and at the time of the demise and delivery of possession to the lessee it is in a defective and unsafe condition, and in consequence, thereafter, while in possession of the lessee, an injury happens to one lawfully thereon, the lessor, who is receiving a benefit by way of rent or otherwise, is liable<sup>60</sup> A lessor who covenants to keep a wharf in repair is liable for damage from obstructions,<sup>61</sup> but it has also been held that a lessor has no duty as to piles placed by the lessee until some notice of the obstruction is given<sup>62</sup> Both lessor and lessee may be liable severally for the damages,<sup>63</sup> nor is it material whether the

former or the latter is bound to repair.<sup>64</sup>

## § 22. — Actions

- a In general
- b Pleading
- c Evidence
- d Trial
- e Damages

### a. In General

An action for damages inflicted by the negligence of a dock company may be brought in admiralty or at law

An action for damages inflicted by the negligence of a dock company may be brought in admiralty<sup>65</sup> or at law<sup>66</sup> With respect to admiralty jurisdiction, a contract whereby the owner of a wharf covenanted to maintain a safe berth for a vessel was a maritime contract<sup>67</sup>

**Venue** Where the owner of a wharf negligently permitted the dock to be in an unsafe condition, and injury was sustained by a barge which was there by his invitation, and in pursuance of a contract with him, an action for damages is transitory, and not local,<sup>68</sup> but it is local where the declaration proceeds on another ground, to wit, the duty of defendant to keep the wharf in question in such good order and repair that it might be safely used as a place of loading and disembarkation<sup>69</sup>

**Laches** An action for damages incurred at a wharf may become barred by laches<sup>70</sup>

55. US—Sargent Barge Line v Davis, DCNY, 12 F2d 784, affirmed, CCA, 12 F2d 787

56. US—In re Barrett, DCNY, 108 FSupp 710, affirmed, CA, North Atlantic & Gulf S S Co v U S, 209 F2d 487

57. US—Berwind-White Coal Mining Co v City of New York, CCANY, 135 F2d 443

Waldie v Steers Sand & Gravel Corp, DCNY, 54 FSupp 585, reversed on other grounds, CCA, 151 F2d 129

58. US—O'Rourke v Peck, CCNY, 40 F 907, 24 Blatchf 473  
68 CJ p 231 note 47

59. US—Moore v Oceanic Steam Nav Co, DCNY, 24 F 237

60. US—Manhattan Lighterage Corp v Moore-McCormack Lane, DCNY, 45 FSupp 271

NY—Moody v New York, 43 Barb 282, 34 HowPr 288

61. US—Eastern Massachusetts St Ry Co v Transmarine Corporation, CCA Mass, 42 F2d 58, certiorari denied 51 S Ct 86, 282 US 883, 75 L Ed 779  
68 CJ p 231 note 50.

62. NY—Seaman v New York, 80 NY 239, 36 Am R 612

63. US—Onderdonk v Smith, DC NY, 21 F 588, affirmed, CCA, 27 F 874, 23 Blatchf 562  
68 CJ p 232 note 52

### Primary and secondary liability

Where corporate lessee in charge of dock had moved libellant's steam tug, and capsizing of tug was result of shifting of tug by corporation to a portion of pier other than portion to which tug was originally moored, and title to pier passed to city on day of shifting and there was but a limited period during which city could have been informed of defects in portion of pier to which tug was shifted, city was not jointly liable with corporation but was secondarily liable since city billed libellant for berth space commencing on day city acquired title to pier, thus holding itself out as a wharfinger

US—Cunningham v City of New York, DCNY, 91 FSupp 460

64. US—Leonard v Decker, DCNY, 22 F 741  
68 CJ p 232 note 53

65. US—Ball v Trenholm, DCSC, 45 F 588

1 CJ p 1288 note 38 [b] (1), p 1289 note 50 [b]

66. US—Mercantile Bank of the Americans v Flower Lighterage Co, CCANY, 10 F2d 705, certiorari denied 46 S Ct 639, 271 US 688, 70 L Ed 1152

67. US—Eastern Massachusetts St Ry Co v Transmarine Corporation, CCA Mass, 42 F2d 58, certiorari denied 51 S Ct 86, 282 US 883, 75 L Ed 779

68. Pa—Dempsey v Delaware Iron Co, 12 Phila 314

69. Pa—Dempsey v Delaware Iron Co, supra

70. US—Mercantile Bank of the Americans v Flower Lighterage Co, CCANY, 10 F2d 705, certiorari denied 46 S Ct 639, 271 US 688, 70 L Ed 1152  
68 CJ p 232 note 62

### Delay satisfactorily explained

Five weeks' delay by owner of tug before giving notice of claim for damage thereto allegedly caused by striking submerged pile near riparian owner's pier subjected claim to sus-



## b. Pleading

The plaintiff must prove that the defendant was negligent and that such negligence caused the injury, and a petition alleging damage due to a defective fire box of a locomotive crane and proof showing it was due to a defective ash pan does not present a fatal variance.

Plaintiff must prove that defendant was negligent<sup>71</sup> and that such negligence caused the injury<sup>72</sup> and, in some cases, it has been held that he must show the absence of contributory negligence<sup>73</sup>. A petition alleging damage due to a defective fire box of a locomotive crane and proof showing it was due to a defective ash pan has been held not to present a fatal variance.<sup>74</sup>

## c. Evidence

The plaintiff in an action for injury to a vessel or its cargo has the burden of proving the truth of his allegations, in order to satisfy this requirement, the allegations must be clearly proved by a fair preponderance of the evidence.

Plaintiff in an action for injury to a vessel or its cargo has the burden of proving the truth of his allegations,<sup>75</sup> including defendant's negligence,<sup>76</sup> and that it was the proximate cause of the damage<sup>77</sup>. Ordinarily, a lack of ordinary care by the wharfinger is never presumed<sup>78</sup> even though the circumstances shift the burden of producing further evidence to the wharfinger.<sup>79</sup> It has been held,

however, that the wharfinger has the burden of showing that the accident was unavoidable,<sup>80</sup> or that he had warned vessels<sup>81</sup>.

*The doctrine of res ipsa loquitur* has no application to a case where negligence of the wharf owner is obvious from all the evidence<sup>82</sup>. Under the doctrine the collapse of a wharf raises a presumption of negligence<sup>83</sup> but it does not, strictly speaking, change the burden of proof<sup>84</sup>. The unexpected sinking of a vessel in her berth, from an unexplained cause, raises a presumption of negligence by the owner of such vessel,<sup>85</sup> and unseaworthiness of the vessel<sup>86</sup>.

*Admissibility* The report of a dredging contractor, after completing his work, that the dock was free from obstructions, may be considered in determining whether the dock owner used reasonable care<sup>87</sup>. Proof of usage in other similar places has been held admissible on the issue of implied contract<sup>88</sup>. As bearing on the question of damages, it is competent, if plaintiff is able to do so by competent witnesses, to show the value of the vessel before and after the injury<sup>89</sup>.

*Weight and sufficiency.* The facts alleged in an action for damage to a ship or its cargo must be clearly proved<sup>90</sup> by a fair preponderance of the

picion, but was satisfactorily explained, where tug owner had in meantime employed diver to examine river bottom.

US—The Dalzellace, 18 FSupp 419, affirmed, CCA, Dalzell v Valve Oil Co, DCNY, 87 F2d 1002

71 US—P Sanford Ross, Inc. v Moran Towing & Transportation Co, CCANY, 55 F2d 1052, certiorari denied 53 SCt 12, 287 US 608, 77 LEd 529

NY—Barber v Abendroth, 7 NE 417, 102 NY 406, 55 AmR 821.

72. US—P Sanford Ross, Inc. v Moran Towing & Transportation Co, CCANY, 55 F2d 1052, certiorari denied 53 SCt 12, 287 US 608, 77 LEd 529

73 NY—Barber v. Abendroth, 7 NE 417, 102 NY 406, 55 AmR 821 68 CJ p 232 note 66

74. US—American Creosote Works v Wren, CCALa, 13 F2d 991

75. US—American Agr Chemical Co v O'Donnell Transp Co, DC NY, 62 FSupp 239

Pacific Mail S S Co v Panama R Co, NY, 251 F 449, 163 CCA 625, certiorari denied 39 SCt 9, 248 US 567, 63 LEd 424

76. US—Tracy Towing Line v City of Jersey City, DCNJ, 105 F Supp. 910—Red Star Towing &

Transp Co v The Russell No 7, DCNY, 70 FSupp 713, affirmed, CCA, 168 F2d 717—Hams v Luckenbach Terminals, DCNJ, 38 FSupp 485—Sargent Barge Line v New York Silk Dyeing Co, DCNY, 3 FSupp 566, affirmed, CCA, 68 F2d 1014 68 CJ p 232 note 70

**Burden of proof not shifted**

Libellant had burden of proof on issue as to whether city exercised reasonable care toward barge, even though city was bailee, and proof of damage while barge was in hands of city did not shift burden of proof on such issue to city

US—Central Barge Co. v. City of Minneapolis, DCMinn, 123 F Supp 275

77. US—American Agr Chemical Co v O'Donnell Transp. Co, DC NY, 62 FSupp 239 68 CJ p 232 note 71

78. US—Hams v. Luckenbach Terminals, DCNJ, 38 FSupp 485 Stevens v Maritime Warehouse Co, CCANY, 263 F. 68

79. US—Stevens v. Maritime Warehouse Co, supra

80. US—Central Barge Co v City of Minneapolis, DCMinn, 123 F Supp 275

81. US—The Dunnigan Sisters, DCNY, 53 F2d 502.

82. US—Puget Sound Tug & Barge Co v Olympic Forest Products Co, DCWash, 21 FSupp 940

83. US—Pacific Mail S S Co v Panama R Co, NY, 251 F 449, 163 CCA 625, certiorari denied 39 SCt 9, 248 US 567, 63 LEd 424

84. US—Pacific Mail S. S. Co v Panama R Co, supra

85. US—The Jamaica, DCNY, 51 F2d 858

Tracy Towing Line v City of Jersey City, DCNJ, 105 FSupp 910

86. US—The Jamaica, DCNY, 51 F2d 858

Tracy Towing Line v City of Jersey City, DCNJ, 105 FSupp 910

87. Me—Rockland & Rockport Lime Co v Coe-Mortimer Co, 98 A 657, 115 Me 184

88. NY—Blank v. Marine Basin Co, 165 NYS 883, 178 App Div 666

89. Mich—Michaud v. Grace Harbor Lumber Co, 81 N.W. 93, 122 Mich 305 68 CJ p 233 note 83.

90. US—Crossan v. Wood, DCNY, 44 F 94.

evidence<sup>91</sup> This rule has been applied to evidence with respect to negligence,<sup>92</sup> contributory negligence,<sup>93</sup> and proximate cause<sup>94</sup> The rule has also been applied as to relations<sup>95</sup> and agreements of parties,<sup>96</sup> the defense of vis major,<sup>97</sup> circumstances of injury,<sup>98</sup> unseaworthiness,<sup>99</sup> persons liable,<sup>1</sup> and damages<sup>2</sup> Proof of the existence of an ob-

struction is generally at least prima facie evidence of negligence,<sup>3</sup> and proof that others than plaintiff had used the dock in safety is of little probative value where a dangerous condition is shown,<sup>4</sup> but such fact must nevertheless be considered in determining the liability of the wharf owner<sup>5</sup>

91. US—Hams v Luckenbach Terminals, DCNJ, 38 FSupp 485—Sargent Barge Line v New York Silk Dyeing Co, DCNY, 3 FSupp 566, affirmed, CCA, 68 F2d 1014 38 CJ p 233 note 86

**Mere proof of injury insufficient**

US—Valentine v Pennsylvania R Co, DCNY, 131 FSupp 108

92. US—Kenny v Venetian Contracting Co, DCNY, 60 F2d 1053 38 CJ p 233 note 87

**Evidence held sufficient**

(1) To show negligence

US—Martin Oil Service v John I Hay Co, CA La, 219 F2d 237

Central Barge Co v City of Minneapolis, DCMinn, 123 FSupp 275 —Tracy Towing Line v City of Jersey City, DCNJ, 105 FSupp 810—N Wagman & Co v U S Lines Co, DCPa, 104 FSupp 189 —The Zeller No 14, DCNY, 74 FSupp 538—Seaboard Sand & Gravel Corporation v Youghiogheny & Ohio Coal Co, DCNY, 65 FSupp 489—Puget Sound Tug & Barge Co v Olympic Forest Products Co, DC Wash, 21 FSupp 940 38 CJ p 233 note 87 [c].

(2) To show that there was no negligence

US—Pittsburgh Consol Coal Co v Harrison Const Co, CA Pa, 223 F2d 260—Mississippi Val Barge Line Co v Cooper Terminal Co, CA Ill, 217 F2d 321—Swenson v The Argonaut, CANJ, 204 F2d 636

Central Barge Co v City of Minneapolis, DCMinn, 123 FSupp 275 —New York Trap Rock Corp v Colonial Sand & Stone Co, DCNY, 115 FSupp 96—Seagrave Transp Co v Eskay Coal & Fuel Co, DCNY, 106 FSupp 687, modified on other grounds, CA, 205 F2d 257—Tracy Towing Line v City of Jersey City, DCNJ, 105 FSupp 910

68 CJ p 233 note 87 [c]

**Evidence held insufficient**

(1) To establish negligence

US—Stegemann v Miami Beach Boat Slips, CA Fla, 213 F2d 561

Central Barge Co v City of Minneapolis, DCMinn, 123 FSupp 275 —Red Star Towing & Transp Co v The Russell No 7, DCNY, 70 FSupp 713, affirmed, CCA, 168 F2d 717—American Agr Chemical Co v O'Donnell Transp Co, DCNY, 62 FSupp 239—Manhattan Lighterage Corp. v Moore-McCor-

mack Line, DCNY, 45 FSupp 271 —Hams v Luckenbach Terminals, DCNJ, 38 FSupp 485 68 CJ p 233 note 87 [a]

(2) To establish liability on part of operator of pier for thirty-five per cent damage to cargo

US—N Wagman & Co v U S Lines Co, DCPa, 104 FSupp 189

93. US—Kenny v Venetian Contracting Co, DCNY, 60 F2d 1053 68 CJ p 233 note 88

**Evidence held sufficient**

US—Tracy Towing Line v City of Jersey City, DCNJ, 105 FSupp 910

94. US—Kenny v Venetian Contracting Co, DCNY, 60 F2d 1053 68 CJ p 233 note 89

**Evidence held sufficient**

(1) To establish that alleged failure of city to inspect wharf and kevels in use did not contribute to failure of kevels which were sheered off, resulting in ship breaking from moorings

US—Central Barge Co v City of Minneapolis, DCMinn, 123 FSupp 275

(2) To establish that lack of watchmen was not contributing factor in break-away of ship from moorings

US—Central Barge Co v City of Minneapolis, supra

(3) To show that broken submerged pile projecting from pier caused sinking of barge being towed out of adjacent ship

US—New York Cent R Co v American Dock Co, DCNY, 80 FSupp 368

(4) To establish that damage to scow was caused by failure of city to provide a berth with enough water

US—New York Trap Rock Corp v City of New York, DCNY, 116 FSupp 814

(5) To show other matters

US—Cunningham v City of New York, DCNY, 91 FSupp 460 68 CJ, p 233 note 89 [a], [b], [c]

**Evidence held insufficient**

(1) To show that there was a causal connection between presence of wreckage on beach of boat basin and alleged damage to bottom of derrick lighter.

US—Hams v Luckenbach Terminals, DCNJ, 38 FSupp 485

(2) Other illustrations see 68 CJ p 233 note 89 [a], [b]

95. US—E J Keller Co v Reading Co, CCA Pa, 49 F2d 33 68 CJ p 234 note 90

96. US—The Fire Island, DCNY, 2 FSupp 513 68 CJ p 234 note 91

97. Evidence held insufficient to sustain the defense

US—Puget Sound Tug & Barge Co v Olympic Forest Products Co, DC Wash, 21 FSupp 940

**Evidence held sufficient**

US—The Dalzellace, DCNY, 18 FSupp 419, affirmed Dalzell v Valvoline Oil Co, 87 F2d 1002 68 CJ p 234 note 92

**Evidence held insufficient**

US—Red Star Towing & Transp Co v The Russell No 7, DCNY, 70 FSupp 713, affirmed, CCA, 168 F2d 717—American Agr Chemical Co v O'Donnell Transp Co, DCNY, 62 FSupp 239

**Evidence held sufficient**

(1) To show unseaworthiness

US—Mississippi Val Barge Line Co v Cooper Terminal Co, CA Ill, 217 F2d 321

(2) To rebut presumption of unseaworthiness

US—Tracy Towing Line v City of Jersey City, DCNJ, 105 FSupp 910

1. US—Perkins v Bethlehem Steel Corporation, CCANJ, 43 F2d 334 68 CJ p 234 note 93

Evidence held sufficient to show sole liability of wharf owner  
US—City of Portland v Luckenbach S S Co, CA Or, 217 F2d 894

**Evidence held sufficient**

US—The Welfare, DCNY, 1 FSupp 585 68 CJ p 234 note 94 [a, c]

**Evidence held insufficient**

US—Stevens v Maritime Warehouse Co, CCANY, 263 F 68 68 CJ p 234 note 94 [b]

3. Va—Petersburg v Applegarth's Adm'r, 28 Gratt 321, 69 Va 321, 26 Am R. 357

4. US—Merritt v. Sprague, DC Me, 191 F 627

5. US—American Agr. Chemical

# d. Trial

Conflicting evidence presents a question for the jury in actions to recover for injuries to vessels or cargo, and a finding in the nature of a conclusion of law will not defeat specific findings of fact.

In determining whether a jury question is presented in an action for an injury to a vessel at a wharf the rules ordinarily applicable in other civil actions govern<sup>6</sup> Generally speaking, conflicting evidence will present a question for the jury,<sup>7</sup> and a law question is presented only when the facts are such that but one reasonable conclusion can be drawn<sup>8</sup> Thus, the questions of negligence,<sup>9</sup> contributory negligence,<sup>10</sup> and assumption of risk,<sup>11</sup> have been held to be jury questions A finding in the nature of a conclusion of law will not defeat specific findings of fact<sup>12</sup>

# e. Damages

In an action for injury to a vessel or cargo the extent of the recovery by the vessel owners is a sum sufficient fully to indemnify them for their loss

In an action for injury to a vessel or cargo the extent of the recovery by the vessel owners is a sum sufficient fully to indemnify them for their loss<sup>13</sup> If the vessel is a total loss, such sum is the reasonable value of the vessel at the time of the injury<sup>14</sup> This reasonable value has been arrived at by deducting from the original cost ten per cent each year for depreciation,<sup>15</sup> and by considering sales of similar barges<sup>16</sup> Where repairs are possible, however, the measure of damages is the cost

of repairing the vessel,<sup>17</sup> and not the difference between her value before, and her value after, the injury<sup>18</sup> The amount paid to a wrecking company, in good faith, for raising a vessel, is recoverable,<sup>19</sup> and so are overhead expenses incurred while repairing the ship in the owner's shipyard,<sup>20</sup> the wages of men which the wrecking company required the owner to furnish,<sup>21</sup> and interest on such expenditures from the time they were actually made<sup>22</sup>

*Division of damages.* If both parties were at fault the damages will be divided<sup>23</sup>

## § 23. Injuries to Persons

- a In general
- b Invitees, licensees, and trespassers
- c Persons liable and defenses

### a. In General

The owner or occupant of a pier or wharf must exercise reasonable care to keep it in a safe condition, and a person may recover for injuries sustained as a result of a defect therein.

The owner or occupant of a pier or wharf must exercise reasonable care to keep it in a safe condition, so that those having a lawful right can go on it without incurring risk of injury,<sup>24</sup> and what constitutes reasonable care depends largely on the uses to which the pier is put<sup>25</sup> Consequently, if a person, when properly on the wharf, in the exercise of reasonable care and diligence, sustains injury through a defect in the wharf, he is entitled to recover,<sup>26</sup> unless the defect was so hidden and con-

- Co v O'Donnell Transp Co, DC NY, 62 FSupp 239
- 6. US—American Creosote Works v Wren, CCA La, 13 F2d 991
- 7. US—American Creosote Works v Wren, *supra*
- 8 Tex—Galveston, H & S A Ry Co v American Grocery Co, 36 SW2d 985, 122 Tex 1, affirmed 52 S Ct 342, 285 US 127, 76 L Ed 659
- 9 US—American Creosote Works v Wren, CCA La, 13 F2d 991
- 10. NY—Vroman v Rogers, 30 NE 388, 132 NY 167 68 CJ p 234 note 3
- 11. Mich—Michaud v Grace Harbor Lumber Co, 81 NW 93, 122 Mich 305
- 12. NY—Blank v Marine Basin Co, 165 NYS 883, 178 App Div 666 68 CJ p 234 note 5
- 13. DC—Smith v Burnett, 10 App DC 469, affirmed 19 S Ct 442, 173 US 430, 43 L Ed 756
- 14. DC—Smith v Burnett, *supra*
- 15. US—Hudson v. Pittsburgh

- Plate Glass Co, DCPa, 263 F 730
- 16. US—The Welfare, DCNY, 1 FSupp 585 68 CJ p 234 note 10
- 17 US—Puget Sound Tug & Barge Co v Olympic Forest Products Co, DC Wash, 21 FSupp 940 Union Ice Co v Crowell, Me, 55 F 87, 5 CCA 49
- 18 US—Union Ice Co v Crowell, *supra*
- 19. US—Virginian Ry Co v U S, CCA Va, 13 F2d 772, certiorari denied 47 S Ct 110, 273 US 718, 71 L Ed 857 68 CJ p 234 note 13
- 20 US—Puget Sound Tug & Barge Co v Olympic Forest Products Co, DC Wash, 21 FSupp 940
- 21. US—Virginian Ry Co v U S, CCA Va, 13 F2d 772, certiorari denied 47 S Ct 110, 273 US 718, 71 L Ed 857
- 22. US—Virginian Ry Co v U S, *supra*
- 23. US—Sullivan v Lake Superior El Co, DCMinn, 56 F 735. 68 CJ p 235 note 16

### Recoupment

- A vessel, which is required to pay full damages as result of collision with other vessels after breaking away from dock, has right of recoupment for half of damages from owner of dock, where owner of dock is jointly negligent
- US—The President Madison, CCA Wash, 91 F2d 835
- 24. US—Jones v Waterman S S Corp, CCA Pa, 155 F2d 992 Flynn v Reading Co, DCPa, 50 FSupp 218 68 CJ p 235 note 17
- 25. US—Harvey v Old Dominion S S Co, CCANY, 299 F 549 Wash—Gregg v King County, 141 P 340, 80 Wash 196, Ann Cas 1916C 135
- 26. US—Muese v Abbott, CCA Mass, 160 F2d 590—Jones v Waterman S S Corp, CCA Pa, 155 F2d 992
- Cal—Biondini v Amship Corp, 185 P2d 94, 81 Cal App 2d 751—Leenders v California Hawaiian Sugar Refining Corp, 139 P2d 987, 59 Cal App 2d 752 68 CJ p 235 note 19.

cealed that it could not be discovered by such examination and inspection as the construction, uses, and exposures of the wharf reasonably required.<sup>27</sup> Plaintiff's right of action in such a case arises from the duty which the law imposes on the owner or occupant to keep the wharf safe, and not from contract.<sup>28</sup> The question of liability is somewhat analogous to that where public streets are involved.<sup>29</sup> The compliance with a statutory provision that wharves should be insufficient unless constructed in a specified manner has been held not to be the owner's measure of duty to the public.<sup>30</sup>

In the application of these rules, it has been held that a safe gangplank must be provided,<sup>31</sup> but that the nailing of a plank over a hole did not constitute negligence.<sup>32</sup> A dock proprietor is chargeable with notice that its public dock may be used as a public street or public place by any member of the public,<sup>33</sup> including young children,<sup>34</sup> and has also been held liable for injuries to stevedores<sup>35</sup> and other labor-

ers,<sup>36</sup> car passengers,<sup>37</sup> and public officers.<sup>38</sup>

#### b. Invitees, Licensees, and Trespassers

The proprietor of a wharf is held to different degrees of care in dealing with invitees, licensees, and trespassers.

A wharf proprietor is held to different degrees of care in dealing with invitees, licensees, and trespassers.<sup>39</sup>

**Invitees.** To the invitee the wharf proprietor owes a positive duty to maintain the wharf in reasonably safe condition,<sup>40</sup> and to warn him of known dangers.<sup>41</sup> This class may include workmen,<sup>42</sup> seamen,<sup>43</sup> marine engineers,<sup>44</sup> barge captains,<sup>45</sup> cargo surveyors,<sup>46</sup> and patrons of a store kept by defendant.<sup>47</sup>

**Licensees.** As to a licensee, the proprietor owes a duty merely to refrain from willful and wanton injury<sup>48</sup> or affirmative negligence unnecessarily increasing the danger.<sup>49</sup> Licensees within this rule

27. Mass—Wendell v. Baxter, 12 Gray 494.  
68 C.J. p. 235 note 20.

28. US—Muise v. Abbott, CCA Mass, 160 F.2d 590—Jones v. Waterman S. S. Corp., CCA Pa., 155 F.2d 992.  
68 C.J. p. 235 note 21.

29. NY—Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 31 NE 987, 134 NY 461, 30 Am S.R. 685, 29 Abb. N.Cas. 238.

30. Wash—Gray v. King County, 248 P. 397, 140 Wash. 169.

31. Cal—Wilson v. Union Iron Works Dry Dock Co., 140 P. 250, 167 Cal. 539.  
68 C.J. p. 235 note 26.

32. US—Pearson v. Mallory S. S. Co., CCA Fla., 278 F. 175.

33. Wash—Gregg v. King County, 141 P. 340, 80 Wash. 196, Ann. Cas. 1916C 135.

34. Wash—Gregg v. King County, supra.

35. Cal—Leenders v. California Hawaiian Sugar Refining Corp., 139 P.2d 987, 59 Cal. App.2d 752.  
Me—Trask v. Hallowell Granite Works, 76 A. 919, 106 Me. 458.  
68 C.J. p. 235 note 30.

36. NY—Swords v. Edgar, 59 NY 28, 17 Am. R. 295.  
68 C.J. p. 235 note 31.

37. Wash—Gray v. King County, 248 P. 397, 140 Wash. 169.  
68 C.J. p. 236 note 32.

38. Cal—Wilson v. Union Iron Works Dry Dock Co., 140 P. 250, 167 Cal. 539.  
68 C.J. p. 236 note 33.

39. Tex—Walters v. Southern S. S. Co., Civ. App., 113 S.W.2d 320, error dismissed.

40. Cal—Leenders v. California Hawaiian Sugar Refining Corp., 139 P.2d 987, 59 Cal. App.2d 752.  
NY—Koehler v. Grace Line, Inc., 136 N.Y.S.2d 87, 285 App. Div. 154.

#### Scope of invitation

Captain of fishing boat, from time of arrival at fishing pier with a cargo of fish for a store situated on pier until departure from ice plant also situated on pier, was engaged in transaction of business with tenants of pier and was a business visitor of such tenants with respect to liability of public corporation as proprietor of pier, but thereafter, while vessel was tied to another portion of pier for sole convenience of captain without any economic benefit to proprietor of pier, captain was a mere licensee who took premises as he found them.

Mass—Pereira v. Gloucester Community Pier Ass'n, 61 NE.2d 658, 318 Mass. 391.  
68 C.J. p. 236 notes 36-40.

41. US—Paleockrasas v. Garcia, C.A.N.Y., 183 F.2d 244.

42. Cal—Biondini v. Amship Corp., 185 P.2d 94, 81 Cal. App.2d 751—Leenders v. California Hawaiian Sugar Refining Corp., 139 P.2d 987, 59 Cal. App.2d 752.

La—Dallas v. Crescent Forwarding & Transp. Co., App., 13 So.2d 113.  
68 C.J. p. 236 note 36.

43. US—Jones v. Waterman S. S. Corp., CCA Pa., 155 F.2d 992—Bailey v. Texas Co., CCA N.Y., 47 F.2d 153.

Flynn v. Reading Co., D.C. Pa., 50 F. Supp. 218.

Cal—Skoglund v. Moore Dry-Dock Co., 53 P.2d 1001, 11 Cal. App.2d 287.  
Mass—Hayes v. Boston Fish Market Corp., 66 NE.2d 713, 319 Mass. 556.

#### Off-duty fireman

Fireman on ship docked at shipyard for repairs who was paid off on Saturday and ordered to report on following Tuesday was in employment of ship while returning thereto through shipyard on evening before day upon which he had been ordered to report so as to be invitee to whom shipyard owners owed duty of due care.

Cal—Skoglund v. Moore Dry-Dock Co., 53 P.2d 1001, 11 Cal. App.2d 287.

44. Wash—Nelson v. Booth Fisheries Co., 6 P.2d 388, 165 Wash. 521.  
68 C.J. p. 236 note 38.

45. NY—Quinn v. Staten Island Rapid Transit Ry. Co., 121 NE 340, 224 NY 493.  
68 C.J. p. 236 note 39.

46. NY—Koehler v. Grace Line, Inc., 136 N.Y.S.2d 87, 285 App. Div. 154.

47. Md—Burke v. Maryland, D. & V. Ry. Co., 106 A. 353, 134 Md. 156.

48. Cal—Biondini v. Amship Corp., 185 P.2d 94, 81 Cal. App.2d 751.

Mass—Pereira v. Gloucester Community Pier Ass'n, 61 NE.2d 658, 318 Mass. 391.

Or—Lange v. St. Johns Lumber Co., 237 P. 696, 115 Or. 337.

Tex—Walters v. Southern S. S. Co., Civ. App., 113 S.W.2d 320, error dismissed.

Wash—Christensen v. Weyerhaeuser Timber Co., 133 P.2d 797, 16 Wash. 2d 424.

49. Tex—Walters v. Southern S. S. Co., Civ. App., 113 S.W.2d 320, error dismissed.  
68 C.J. p. 236 note 42.

may include ship repairers,<sup>50</sup> barge captains,<sup>51</sup> captains of other vessels,<sup>52</sup> persons patrolling the docks,<sup>53</sup> and persons unloading vessels<sup>54</sup> or visiting them,<sup>55</sup> but not truckmen on a wharf to receive freight.<sup>56</sup> The keeping of a pier, built into or adjacent to navigable waters, for the purpose of loading and unloading vessels, gives a general license to all persons to go on and use it in the manner and for the purposes contemplated<sup>57</sup>

*Trespassers.* A trespasser ordinarily cannot recover for injuries to himself where the wharf proprietor has no notice of his presence<sup>58</sup> A child entering on a public dock has been held not to be a trespasser, however,<sup>59</sup> nor are persons who go on a dock and fasten vessels to it<sup>60</sup>

### c. Persons Liable and Defenses

The person who has exclusive control and management of a defective wharf is generally liable for injuries sustained thereon.

50. Wis—Taylor v Northern Coal & Dock Co, 152 NW 465, 181 Wis 223, Ann Cas 1916C 167  
68 CJ p 236 note 43

51. NY—Quinn v Staten Island Rapid Transit Ry Co, 121 NE 340, 224 NY 493  
68 CJ p 236 note 44

52. Mass—Pereira v Gloucester Community Pier Ass'n, 61 NE 2d 658, 318 Mass 391

53. Tex—Walters v Southern S S Co, Civ App, 113 SW 2d 320, error dismissed

54. US—Harvey v Old Dominion S S Co, CCANY, 299 F 549  
68 CJ p 236 note 45

55. Ga—Kinnebrew v Ocean S S Co of Savannah, 171 SE 385, 47 Ga App 704, followed in 171 SE 386, 47 Ga App 706

Or—Lange v St Johns Lumber Co, 237 P 696, 115 Or 337  
68 CJ p 236 note 46

56. Mass—Manter v New Bedford, Martha's Vineyard & Nantucket Steamboat Co, 141 NE 579, 246 Mass 551

57. NY—Swords v Edgar, 59 NY 28, 17 Am R 295

58. Cal—Hamakawa v Crescent Wharf & Warehouse Co, 50 P 2d 803, 4 Cal 2d 499

NY—Malloy v Staten Island Rapid Transit R. Co, 28 NYS 979, 78 Hun 166

59. Wash—Gregg v King County, 141 P 340, 80 Wash 196, Ann Cas 1916C 135

68 CJ p 236 note 50

60. Pa—Degan v Dunlap, 15 Phila 69, 39 Leg Int 32

61. Fla—Cooney-Eckstein Co v King, 67 So 918, 69 Fla 246

62. Mass—Fuller v Andrew, 119 NE 694, 230 Mass 139  
68 CJ p 237 note 56

63. Md—Baltimore, etc, R Co v Rose, 4 A 899, 65 Md 485  
68 CJ p 237 note 57

64. US—The Tamaha, DCNY, 262 F 218  
68 CJ p 237 note 58

65. NY—Leonard v Prince Line, CCANY, 157 F 2d 987  
Or—Miles v Spokane, P & S Ry Co, 155 P 2d 938, 176 Or 118  
68 CJ p 237 note 59

66. Or—Miles v Spokane, P & S Ry Co, supra

**Under "safe place" statute,** providing that owner or lessee of real property should not construct and maintain any place of employment that is not safe, railway owner was not liable for injuries to a longshoreman resulting from violation of statute where the premises were in possession of terminal company tenant who had the duty to repair  
Or—Miles v Spokane, P & S Ry Co, supra

### Reservation of right of wharfage

Reservation in lessor of right to collect and retain wharfage accruing from vessels temporarily tying up to portion of pier leased was held not to make premises public so as to make lessor liable for injury from defective condition of premises to employee of company operating demised premises for lessee

NY—Lafredo v Bush Terminal Co, 185 NE 398, 261 NY 323, reargument denied 188 NE 48, 262 NY 522

### 67. Effect of covenant to repair as to third persons

Where lease of portion of wharf

As a general rule, one having exclusive control and management of a defective wharf is liable for injuries occasioned thereby<sup>61</sup> The owner of the land on which a wharf was built, who took possession of the wharf, has been held liable,<sup>62</sup> and so has a railroad company owning a pier<sup>63</sup> A dock owner may be liable for injuries resulting from a known danger created by a third person<sup>64</sup>

*Lessor and lessee.* Ordinarily, a lessee in possession of a wharf must keep it in repair, and is responsible for injuries from defects which are known or should be known by him,<sup>65</sup> and the lessor has been held not liable<sup>66</sup> So, in the absence of a covenant by the lessor to repair,<sup>67</sup> the lessee,<sup>68</sup> and not the lessor,<sup>69</sup> has this duty as to defects arising after the tenancy began. The lessor receiving a benefit by way of rent or otherwise is liable, however, for injuries resulting from defects existing at the time of the demise,<sup>70</sup> provided it appears that

and elevator required board of commissioners of Port of New Orleans to keep elevator and wharf in safe condition and employee of lessee was injured as result of defective condition of elevator, the employee could not base a cause or right of action against the dock board for breach of duty to maintain elevator in safe condition, since the employee was not a party to lease and there was no privity of contract between the employee and the dock board  
La—Fouchaux v Board of Com'rs of Port of New Orleans, 190 So 373, 193 La 182, certiorari denied 60 S Ct 112, 308 US 554, 84 L Ed 466

### Notice

(1) Dock owner was not liable for death of longshoreman killed when door on dock fell, for breach of covenant in lease that owner would make needed repairs to dock on notice from lessee, where no notice was given

NY—De Clara v Barber S S Lines, 139 NYS 2d 568, 285 App Div 1062, appeal granted 127 NE 2d 98, 308 NY 957.

(2) Constructive notice was insufficient to destroy dock owner's exemption from liability for breach of covenant to repair in lease

De Clara v Barber S S Lines, supra  
68 NY—Ahern v Steele, 22 NE 193, 115 NY 203, 12 Am SR 778, 5 LRA 449  
68 CJ p 237 note 60

69. NY—De Clara v Barber S S Lines, 139 NYS 2d 568, 285 App Div 1062, appeal granted 127 NE 2d 98, 308 NY 957

70. Pa—Towt v Philadelphia, 33 A 1034, 173 Pa 314.  
68 CJ p 237 note 61.

he knew when he leased the wharf that it was in an unsafe condition, or that by reasonable care and diligence he could have known of its unsafe condition<sup>71</sup> Where the lessor grants merely the wharfage, he is not relieved from liability to third persons for injuries resulting from a failure to keep the premises in repair,<sup>72</sup> even though the lease may contain a covenant to repair on the part of the lessee<sup>73</sup> The lessor and lessee may be jointly liable for the damages<sup>74</sup>

**Defenses.** No liability arises for extraordinary or inevitable accidents,<sup>75</sup> or for injuries arising from a want of judgment or prudence on part of plaintiff,<sup>76</sup> or where he is held to have assumed the risk inherent in the situation<sup>77</sup>

## § 24. — Actions

Actions for personal injuries sustained on wharves are governed by rules applicable to civil actions generally.

General rules governing other civil actions apply

71. Md—State v Boyce, 21 A 322, 73 Md 469

### Lessor held not liable

La—Miller v Board of Commissioners of Port of New Orleans, Royal Indemnity Co, Intervener, App, 1 So 2d 97, affirmed Miller, Royal Indemnity Co, Intervener v Board of Com'rs of Port of New Orleans, 7 So 2d 355, 199 La 1071

72. US—Cleary v Oceanic Steam Nav Co, CCNY, 40 F 908  
NY—Taylor v New York, 4 ED Smith 559

73. NY—Taylor v New York, supra  
68 CJ p 237 note 64.

74. RI—Joyce v Martin, 10 A 620, 15 RI 558

75. Pa—Philadelphia, etc, R Co v Ervin, 89 Pa 71, 33 AmR 726  
Johnston v Pennsylvania R Co, 4 A 2d 539, 135 Pa Super 45

76. Cal—Molles v Dollar S S Lines, 29 P 2d 308, 136 Cal App 369

La—Dallas v Crescent Forwarding & Transp Co, App, 13 So 2d 113  
NJ—Baldwin v North River Coal & Wharf Co, 180 A 422, 13 NJ Misc 681

Pa—Bullich v Kensington Shipyard & Drydock Co, 177 A 20, 317 Pa 510

Johnston v Pennsylvania R Co, 4 A 2d 539, 135 Pa Super. 45  
68 CJ p 236 note 54

### Plaintiff held not contributorily negligent

(1) In attempting to pass through shipyard to ship on which he was employed when route was inadequately lighted

Cal.—Skoglund v. Moore Dry-Dock

Co, 53 P 2d 1001, 11 Cal App 2d 287

(2) In slipping on slimy pier while attempting to board vessel, notwithstanding he saw the slime, but used reasonable care for his safety under the circumstances  
Mass—Hayes v Boston Fish Market Corp, 66 NE 2d 713, 319 Mass 556

77. La—Dallas v Crescent Forwarding & Transp Co, App, 13 So 2d 113

78. Ga—Kinnebrew v Ocean S S Co of Savannah, 171 SE 385, 47 Ga App 704, followed in 171 SE 386, 47 Ga App 706

79. Ga—Kinnebrew v Ocean S S Co of Savannah, supra

80. Fla—Cooney-Eckstein Co v King, 67 So 918, 69 Fla 246

81. US—Jones v Reading Co, D C Pa, 45 F Supp 566

### Res ipsa loquitur

(1) That truck driver knew that he was injured by the collapse of a plank in a scaffold erected by general contractor and used by subcontractor did not prevent the application of the doctrine of res ipsa loquitur as to subcontractor on the ground that driver knew as much about the cause of his injuries as subcontractor did, since driver had no way of knowing how or why the plank collapsed and subcontractor was in the superior position with respect to such knowledge  
Cal—Biondini v Amship Corp, 185 P 2d 94, 81 Cal App 2d 751

(2) Where seaman employed by steamship company which railroad had authorized to use pier was injured in fall when he stepped on

in actions for personal injuries sustained on wharves<sup>78</sup>

**Pleading.** The complaint in such an action must state facts sufficient to constitute a cause of action<sup>79</sup> A declaration alleging that defendant had exclusive control and management of a wharf was not demurrable for failing to allege that such defendant was the owner or occupant<sup>80</sup>

**Evidence.** General rules with respect to presumptions,<sup>81</sup> and burden of proof,<sup>82</sup> are applicable in such actions Plaintiff must show the negligence of defendant,<sup>83</sup> and that such negligence was the proximate cause of the injury<sup>84</sup>

Competent evidence relevant and material to the issues should be admitted<sup>85</sup> Thus, evidence of defects in a dock other than that which caused the injury is admissible,<sup>86</sup> as is evidence of previous experience with the same defect,<sup>87</sup> and evidence as to the condition of the dock shortly after the injury

loose iron pipe, mere presence of pipe on pier was insufficient to impose on railroad burden of going forward with evidence to show it exercised proper care on theory that thing causing injury was under railroad's exclusive management and accident was one not happening in ordinary course of things unless railroad was negligent

US—Flynn v Reading Co, D C Pa, 50 F Supp 218

(3) Where seaman was an invited or business guest on defendant's pier when seaman was injured by falling from edge of pier when lights on pier were suddenly extinguished, and there was a contractual relationship between seaman and defendant, and lighting system on pier was under defendant's management, rule that mere breaking of an electric wire presents no facts from which alone an inference of negligence can be drawn by jury did not apply

US—Jones v Reading Co, D C Pa, 45 F Supp 566

82. Cal—Cornell v Hearst Sunical Land & Packing Corp, 131 P 2d 404, 55 Cal App 2d 708

83. Pa—Johnston v Pennsylvania R Co, 4 A 2d 539, 135 Pa Super 45

84. Pa—Johnston v. Pennsylvania R Co, supra

85. NY—De Clara v Barber S S Lines, 139 NYS 2d 568, 285 App Div 1062, appeal granted 127 N E 2d 98, 308 NY 957

86. Wis—Propsom v Leatham, 50 NW 586, 80 Wis 608

87. NY—Newall v Bartlett, 21 N E 990, 114 NY 399

68 CJ p 238 note 73.

was sustained,<sup>88</sup> but evidence as to how a dock compared with others used for the same purposes is not admissible<sup>89</sup> Where it was alleged that a company was negligent in not providing cap logs for its pier, it has been held error to overrule an offer to show that the placing of cap logs thereon would interfere with the loading of vessels in the course of the company's business<sup>90</sup>

General rules have been applied in determining the weight and sufficiency of the evidence to support a verdict<sup>91</sup> or findings relating to various issues,<sup>92</sup> or to show negligence,<sup>93</sup> contributory negligence,<sup>94</sup> proximate cause,<sup>95</sup> status of parties,<sup>96</sup> or persons liable<sup>97</sup>

*Questions for jury* In actions for personal in-

juries on wharves, where there is conflicting evidence, the court should submit to the jury questions of fact,<sup>98</sup> including the questions of negligence,<sup>99</sup> contributory negligence,<sup>1</sup> assumption of risk,<sup>2</sup> and the status of parties<sup>3</sup> In the absence of sufficient evidence of negligence, the question is properly withdrawn from the jury<sup>4</sup>

*Instructions* Rules governing civil actions generally apply as to the giving<sup>5</sup> or refusing<sup>6</sup> of instructions in this class of cases.

## § 25. Injuries to Wharves

- a In general
- b Injury by vessels

88. NY—De Clara v Barber S S Lines, 139 NYS 2d 568, 285 App Div 1062, appeal granted 127 NE 2d 98, 308 NY 957
- 89 Wis—Propsom v Leatham, 50 NW 586, 80 Wis 608
- 90 Pa—Philadelphia, etc, R Co v Ervin, 89 Pa 71, 33 AmR 726
- 91 **Evidence held insufficient**  
US—Jones v Reading Co, DCPa, 45 F Supp 566  
NC—Phillips v Gulf Refining Co, 190 SE 729, 211 NC 736
- 92 US—Leonard v Prince Line, C CANY, 157 F2d 987  
68 CJ p 238 note 75
- 93 **Evidence held sufficient**  
Cal—Biondini v Amship Corp, 185 P 2d 94, 81 Cal App 2d 751—Skoglund v Moore Dry-Dock Co, 53 P 2d 1001, 11 Cal App 2d 287  
Va—Southern Stevedoring Corp v Harris, 58 SE2d 302, 190 Va 628
- Evidence held insufficient**  
US—Flynn v Reading Co, DCPa, 50 F Supp 218  
Cal—Molles v Dollar S S Lines, 29 P 2d 308, 136 Cal App 369  
NJ—Gudnestad v Seaboard Coal Dock Co, 99 A 2d 201, 27 NJ Super 227, affirmed in part and reversed in part on other grounds 104 A 2d 313, 15 NJ 218  
68 CJ p 238 note 76
- 94 NY—Clove v Robins Dry Dock & Repair Co, 179 NYS 784, 190 App Div 315  
68 CJ p 238 note 77
- Evidence held sufficient**  
Cal—Cornell v Hearst Sunical Land & Packing Corp, 181 P 2d 404, 55 Cal App 2d 708  
68 CJ p 238 note 77 [a]
95. **Evidence held sufficient**  
US—Hartford Acc & Indem Co v Gulf Refining Co, DCLa, 127 F Supp 469  
Cal—Skoglund v. Moore Dry-Dock Co, 53 P 2d 1001, 11 Cal App 2d 287  
68 CJ p 238 note 78
- Evidence held insufficient**  
Va—Southern Stevedoring Corp v Harris, 58 SE 2d 302, 190 Va 628
- 96 Mass—Fuller v Andrew, 119 NE 694, 230 Mass 139  
68 CJ p 238 note 79
- Evidence held sufficient to show plaintiff an invitee**  
Cal—Leenders v California Hawaiian Sugar Refining Corp, 139 P 2d 987, 59 Cal App 2d 752  
68 CJ p 238 note 79 [a]
- 97 Fla—King v Cooney-Eckstein Co, 63 So 659, 66 Fla 246, Ann Cas 1916C 163  
68 CJ p 238 note 80
- 98 NY—Hait v Delaware, etc, R Co, 27 NYS 767, 76 Hun 296
- Control of instrumentality causing injury**  
In action by drayman's truck driver against general contractor and subcontractor for injuries sustained in collapse of a scaffold erected by general contractor and used by subcontractor, whether either or both contractors had control of scaffold so as to make res ipsa loquitur doctrine applicable was for jury  
Cal—Biondini v Amship Corp, 185 P 2d 94, 81 Cal App 2d 751
99. Cal—Biondini v Amship Corp, supra—Leenders v California Hawaiian Sugar Refining Corp, 139 P 2d 987, 59 Cal App 2d 752  
NJ—Byrne v Union Stevedoring Corp, 18 A 2d 603, 126 NJ Law 216  
NY—Brophy v Export S S Corporation, 189 NE 710, 263 NY 587  
Tex—Merchants Bldg Corporation v Adler, Civ App, 110 SW 2d 978, error dismissed  
68 CJ p 238 note 83
- 1 US—Jones v Reading Co, DCPa, 45 F Supp 566
- NJ—Byrne v Union Stevedoring Corp, 18 A 2d 603, 126 NJ Law 216  
NY—Koehler v Grace Line, Inc, 136 NYS 2d 87, 285 App Div 154  
Tex—Merchants Bldg Corporation v Adler, Civ App, 110 SW 2d 978, error dismissed  
68 CJ p 238 note 84
- 2 Mass—Gray v Boston, R B & L R Co, 159 NE 441, 261 Mass 479  
68 CJ p 238 note 85
- 3 Cal—Biondini v Amship Corp, 185 P 2d 94, 81 Cal App 2d 751  
68 CJ p 238 note 86
- Invitee or licensee**  
Whether injured person was an invitee or merely a licensee was for jury  
Cal—Biondini v Amship Corp, supra
- 4 Wash—Christensen v Weyelhaeuser Timber Co, 133 P 2d 797, 16 Wash 2d 424
- 5 NY—Koehler v Grace Line, Inc, 136 NYS 2d 87, 285 App Div 154  
68 CJ p 239 note 89
- Instruction held error**  
NY—De Clara v Barber S S Lines, 139 NYS 2d 568, 285 App Div 1062, appeal granted 127 NE 2d 98, 308 NY 957  
Wash—Corbaley v Pierce County, 74 P 2d 993, 192 Wash 688
6. US—Plant Inv Co v Cook, Fla, 74 F 503, 20 CCA 625
- Customary practice**  
In action to recover for injuries sustained when plaintiff was disembarking from his yacht at defendant's boatyard, request to charge as to customary practice as factor for jury's consideration in determining negligence of defendant was properly refused, where request omitted any reference to conditions similar to those which jury might have found to have existed  
NY—Solomon v Dunham Shipyard & Sales Co, 142 NYS 2d 619, 286 App Div 893.

### a. In General

The proprietor of a wharf is entitled to the enjoyment of his property undisturbed by the negligent conduct of others

The proprietor of a wharf is entitled to the enjoyment of his property undisturbed by the unlawful overt or negligent acts or omissions of others,<sup>7</sup> and is not bound to anticipate such acts,<sup>8</sup> although he acquires no rights that can interfere in the use of navigable waters by the public<sup>9</sup>

**Dredging** A wharf owner not only has a right to dredge the adjoining slip to the extent necessary to make it commercially useful,<sup>10</sup> but under some statutes is under a duty to do so,<sup>11</sup> and he does not, by so doing, become liable to the owner of a neighboring wharf for the damage caused thereto by the consequent shifting of the loose soil and mud on which it rested<sup>12</sup>

**Obstructions** A mere obstruction to a public navigable stream, unaccompanied by any personal injury, may not authorize an action for damages by

a wharf owner, this being a damage common to all who use the stream<sup>13</sup> The deposit of sand or sediment rendering a wharf less accessible caused by a lawful structure erected on the shore of an adjoining proprietor likewise does not give rise to a cause of action<sup>14</sup> Any obstruction, however, that renders the waters adjacent to a wharf unnavigable deprives the owner thereof of its use, and destroys the value of his property, and if such obstructions are placed there unlawfully either by the overt act or negligence of another, the owner is entitled to compensation for the loss of his landing,<sup>15</sup> or for the expense of removing such obstruction.<sup>16</sup>

### b. Injury by Vessels

A wharf proprietor may recover damages for injury thereto caused by the negligence of a vessel, in the absence of contributory negligence or assumption of risk

Damages may be recovered from a vessel or her owners for the negligent injury of a wharf or pier,<sup>17</sup> in the absence of negligence on part of

7. US—Ford Motor Co v Bradley Transp Co, C A Mich, 174 F 2d 192

Orrell v Wilmington Iron Works, DCNC, 89 F Supp 418, affirmed in part and reversed in part on other grounds, C A, 185 F 2d 181

W Va—Fry v Campbell's Creek Coal Co, 16 SE 796, 37 W Va 604

#### Leased pier

Lessee of pier is liable to lessor for reasonable cost of repairing the pier after one section of it had collapsed, where the collapse was caused by overloading, and not by any visible defect in condition of pier either when lease was made or when collapse took place

US—Cia Exportadora E Importadora Mexicana, S A, v Marra Bros, DCNY, 59 F Supp 989

8. US—Ford Motor Co v Bradley Transp Co, C A Mich, 174 F 2d 192

9. Ind—Sherlock v Bainbridge, 41 Ind 35, 13 Am R 302  
67 C J p 239 note 92

10. NY—White v Nassau Trust Co, 61 NE 169, 168 NY 149, 64 L R A 275, reargument denied 61 NE 1135, 168 NY 678

11. NY—Fairchild v Union Ferry Co of New York & Brooklyn, 201 NYS 295, 121 Misc 513, affirmed 207 NYS 835, 212 App Div 823, affirmed 148 NE 750, 240 NY 666

12. NY—White v Nassau Trust Co, 61 NE 169, 168 NY 149, 64 L R A 275  
68 C J p 239 note 95.

13. Mass—Breed v Lynn, 126 Mass 367  
68 C J p 239 note 96

14. Mass—Jubilee Yacht Club v Gulf Refining Co, 140 NE 280, 245 Mass 60

15. US—Orrell v Wilmington Iron Works, DCNC, 89 F Supp 418, affirmed in part and reversed in part on other grounds, C A, 185 F 2d 181

68 C J p 239 note 97—45 C J p 522 note 69

16. US—Orrell v Wilmington Iron Works, supra

68 C J p 239 note 98

17. US—Ford Motor Co v Bradley Transp Co, C A Mich, 174 F 2d 192

General Am Transp Corp v The Patricia Chotin, DCLa, 120 F Supp 246—Sewerage and Water Bd of New Orleans v The Joe L Hill, DCLa, 118 F Supp 951, affirmed, Koch-Ellis Marine Contractors v Sewerage and Water Bd of New Orleans, C A, 218 F 2d 771—In re Barrett, DCNY, 108 F Supp 710, affirmed North Atlantic & Gulf S S Co v U S, C A, 209 F 2d 487—Publiker Industries v American-Hawaiian S S Co, DC Pa, 78 F Supp 223

Ill—Philadelphia & Reading Coal & Iron Co v Calumet Shipyard & Dry Dock Co, 88 NE 2d 891, 339 Ill App 142

68 C J p 239 note 1

#### Liability as affected by contract

(1) Provision in towage agreement that officer of any tug who should go on board of vessel to as-

sist her movement or handling should be the sole servant of the vessel and her owners, etc., was not binding on owner of pier who sought to hold tug companies liable for negligence in undocking of steamship and consequent damage to pier

US—Publiker Industries v Tugboat Neptune Co, C A Pa, 171 F 2d 48

NY—Robins Dry Dock & Repair Co v Navigazione Libera Triestina S A, 279 NYS 257, 154 Misc 788, affirmed 257 NYS 908, 235 App Div 841, affirmed 185 NE 698, 261 NY 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing & Transp Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 L Ed 568, and 54 S Ct 72, 290 US 657, 78 L Ed 569

(2) In action for injuries to pier which resulted from undocking of steamship by two tugboats, where a captain of one of the tugboats directed the operation and gave all orders except for original casting off of steamship and such captain was in general charge of operation, relation between two tugboat companies to steamship and its owner was that of independent contractors, and liability of tugboat company could not be avoided on theory that such tugboat captain was loaned by the tugboat company to steamship and came under the authority of steamship captain

US—Publiker Industries v Tugboat Neptune Co, supra

(3) In action in New York by dock owner against shipowner and tow-



the wharf proprietor contributing to the injury,<sup>18</sup> or assumption of risk<sup>19</sup> There is no liability in the absence of negligence<sup>20</sup> where the boat is being handled in the customary manner,<sup>21</sup> but the doctrine of inevitable accident has no application where there is a lack of a proper exercise of nautical skill<sup>22</sup>

**Compulsory pilotage** Where a statute provides for compulsory pilotage, a shipowner is not ordinarily liable for injuries to a dock inflicted exclusively by the negligence of a pilot so employed,<sup>23</sup> although it has been held that the employment of a compulsory pilot does not relieve the master of the duty to exercise supervision of the ship or the con-

sequences of negligence injuring a wharf<sup>24</sup>

## § 26. — Remedies

- a Injunction
- b Actions for damages

### a. Injunction

The creation or continuance of an obstruction to the use of a wharf may be enjoined in a proper case

In some circumstances relief may be had by injunction to restrain the creation of obstructions to or on wharves,<sup>25</sup> or the continuance thereof,<sup>26</sup> generally on the theory of nuisance<sup>27</sup> Thus, the con-

ing company hired to undock vessel for damages to dock gate, company could not be held solely liable for pilot's negligence, despite clause in towing contract relieving company from liability, on ground that pilot did not have state license as contemplated by the clause, since tug-masters undocking vessels are not required to have state licenses under state law

US—Moran Towing & Transp Co v Navigazione Libera Triestina, S A, CCANY, 92 F2d 37, certiorari denied Navigazione Libera Triestina, S A v Moran Towing & Transp Co, 58 S Ct 145, 302 U S 744, 82 LEd 575

(4) A towing company, which was held solely liable by state courts for damages to dock gate resulting from undocking vessel, was entitled to recover amount of judgment, disbursements, and attorneys' fees from shipowner under contract providing that pilot furnished by company should be shipowner's servant and that shipowner should be liable for damages

US—Moran Towing & Transp Co v Navigazione Libera Triestina, S A, CCANY, 92 F2d 37, certiorari denied Navigazione Libera Triestina, S A v Moran Towing & Transp Co, 58 S Ct 145, 302 U S 744, 82 LEd 575

### Duty to remove pilot

Duty of ship's captain to remove from command pilot furnished by towing company for undocking operations should be exercised only in exceptional cases

NY—Robins Dry Dock & Repair Co v Navigazione Libera Triestina S A, 279 NYS 257, 154 Misc 788, affirmed 257 NYS 908, 235 App Div 841, affirmed 185 NE 698, 261 NY. 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing & Transp Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 LEd 568 and 54 S Ct 72, 290 US 657, 78 LEd 569

18. US—Ford Motor Co. v. Brad-

ley Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F2d 192

68 CJ p 240 note 2

### Duty to warn master

Plaintiff's dock foreman and other employees, knowing nothing about navigation, were not bound to warn master of vessel backing out of slip at night of danger that vessel's overhang might strike machinery on dock whose presence was well known to master, since they were under no obligation to warn master unless they saw a danger of which he apparently was unaware

US—Ford Motor Co v. Bradley Transp Co, supra

### Plaintiff held not barred

US—Ford Motor Co. v Bradley Transp Co, supra

### Plaintiff held barred

US—Ira S Bushey & Sons v U S, CANY, 172 F2d 447

19 US—The West Point, DC Mass, 271 F 502

68 CJ p 240 note 3

20. Minn—Vincent v Lake Erie Transp Co, 124 NW 221, 109 Minn 456, 27 LRA, NS, 312

68 CJ p 240 note 5

### Vessel in complete charge of another

Agent operating vessel owned by the United States through the War Shipping Administration was not liable for damage to pier during undocking operations which were in complete charge of tug captain whose negligence was responsible for the damage

US—Publisher Commercial Alcohol Co v Independent Towing Co, C CA Pa, 165 F2d 1002

Publisher Industries v American-Hawaiian S S Co, DCPa, 78 FSupp 223

21. US—The Bart Tully, Tenn, 251 F 856, 164 CCA 72

68 CJ p 240 note 6

22. US—Charente S. S Co v. U S, CCA La, 12 F2d 412

### Occurrence of squall

Owner of barge which broke lines during squall and collided with dock

was bound to know that his barge presented an expanse of sail area on which high winds could operate, and that violent squalls with high winds were frequent in the early spring in the area of his landing, and was bound to moor his barge so that expected storms would not part mooring lines

US—Sherwood Refining Co v. Whiteman, DCLa, 127 FSupp 478

23 US—Homer Ramsdell Transp. Co v La Compagnie Generale Transatlantique, NY, 21 S Ct 831, 182 US 406, 45 LEd 1155

NY—New York Dock Co v New York & Cuba Mail S S Co, 252 NYS 836, 141 Misc 911, affirmed 255 NYS 836, 235 App Div 611, affirmed 182 NE 200, 259 NY 606, appeal dismissed 53 S Ct 22, 287 US 566, 77 LEd 499

### Employee held not "compulsory pilot"

NY—Robins Dry Dock & Repair Co v Navigazione Libera Triestina S A, 279 NYS 257, 154 Misc 788, affirmed 257 NYS 908, 235 App Div 841, affirmed 185 NE 698, 261 NY 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing & Transp Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 LEd 568 and 54 S Ct 72, 290 US 657, 78 LEd 569

24. US—Charente S S Co v. U. S, CCA La, 12 F2d 412

25. Mass—Philadelphia & Reading Coal & Iron Co v Salem Terminal Corporation, 148 NE 444, 252 Mass 439

68 CJ p 240 note 12—45 CJ p 522 note 70

26. NY—Coddington v White & Money Penny, 9 NY Super 390

Interference with trade or business generally see Injunctions § 138

27. Md—Maxa v Commissioners of Harford County, 148 A 214, 158 Md 229

68 CJ p 241 note 14.

tinuous occupancy of a public landing has been enjoined<sup>28</sup> as has the obstruction of the navigation of vessels to plaintiff's wharf,<sup>29</sup> such as by filling in the surrounding water space,<sup>30</sup> and unnecessary obstructions on wharves have been removed.<sup>31</sup> The court may abate the nuisance and enjoin defendants from continuing it,<sup>32</sup> and this right exists against a city as well as against an individual.<sup>33</sup>

### b. Actions for Damages

An action for damages may be brought for an injury to, or an obstruction of, a wharf, and general rules as to evidence and trial are applicable.

An action for damages will lie for an injury to a wharf or dock,<sup>34</sup> or for an obstruction to its use.<sup>35</sup> The fact that a wharf is a public nuisance precludes an action for damages,<sup>36</sup> but the fact that a ship followed a usual, but negligent, custom is no

defense in an action for injury,<sup>37</sup> and patriotic motives will not excuse negligent action causing damage unless it be shown that the persons responsible were under some legal compulsion to act as they did.<sup>38</sup>

**Evidence** The burden of proof is on plaintiff to show the negligence of defendant,<sup>39</sup> that such negligence caused the damage,<sup>40</sup> and freedom from contributory negligence,<sup>41</sup> although there is a presumption of negligence which arises when a boat collides with stationary property.<sup>42</sup> The admission of evidence that a tug captain, who moved defendant's steamer, had another accident, and blamed ship's engines, has been held to be prejudicial.<sup>43</sup>

General rules have been applied in determining the weight and sufficiency of the evidence,<sup>44</sup> such as

28 Md—Maxa v Commissioners of Harford County, *supra*

29 Conn—Frink v Lawrence, 20 Conn 117, 50 AmD 274  
68 CJ p 241 note 16

30 NY—Hudson River R Co v Loeb, 30 NY Super 418

31 NY—Coddington v White & Moneypenny, 9 NY Super 390  
68 CJ p 241 note 18

32 NY—Penniman v New York Balance Co, 13 HowPr 40

33 Mass—Breed v Lynn, 126 Mass 367—Haskell v New Bedford, 108 Mass 208

34 US—Metropolitan Sand & Gravel Corp v The Dwyer No 25, DCNY, 130 FSupp 172  
68 CJ p 241 note 22

#### What law governs

Common law liability of tugboat owners for damage to pier during undocking operations was determinable in accordance with law of state where tort occurred, and in ascertaining that law trial court was entitled to make use not only of pertinent state court decisions but also to employ rulings of maritime law including those of federal courts for districts of that estate or any other maritime decisions which might seem to reflect law of the state.

US—Publisher Commercial Alcohol Co v Independent Towing Co, CCA Pa, 165 F2d 1002

35 W Va—Fry v Campbell's Creek Coal Co, 37 W Va 604, 16 SE 796

45 CJ p 522 notes 71, 72

#### Necessity of special injury

Mass—Thayer v New Bedford R Co, 125 Mass 253

Wash—Wilson v Oregon-Washington R, etc, Co, 71 Wash 102, 127 P 847

36 Wis—Yates v. Judd, 18 Wis 118.

37 US—Charente S S Co v U S, CCA La, 12 F2d 412

38 US—Publisher Commercial Alcohol Co v Independent Towing Co, CCA Pa, 165 F2d 1002

39 US—Gibbs Corp v Arundel Corp, CA Fla, 209 F2d 561  
68 CJ p 241 note 29

40 US—Gibbs Corp v Arundel Corp, CA Fla, 209 F2d 561  
68 CJ p 241 note 30

41 US—Ira S Bushey & Sons v U S, CANY, 172 F2d 447

42 US—The Cullen No 32, CCA NY, 62 F2d 68, affirmed 54 S Ct 10, 290 US 82, 78 LEd 189  
Patterson Oil Terminals, Inc v The Port Covington, DCPa, 109 FSupp 953, affirmed, CA, 205 F2d 694—Ford Motor Co v Bradley Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F2d 192

Cal—General Petroleum Corp of Cal v City of Los Angeles, 109 P2d 754, 42 Cal App2d 591

#### Evidence held not inconsistent with inference

In action for damages to wharf caused by alleged negligence of pilot in docking a ship, conflicting evidence as to strength of gust of wind at time of collision, as to distance of vessel from wharf as it proceeded toward dock, and as to whether two tugs should have been used in view of weather conditions was not inconsistent with inference of negligence arising from fact that moving ship collided with wharf.

Cal—General Petroleum Corp of Cal v City of Los Angeles, *supra*

**Against whom presumption operates**  
The presumption of negligence of moving vessel colliding with stationary object, such as wharf, operates against all parties, including tugs, participating in management

of vessel at all times when negligent management thereof was a factor in causing collision.

US—Patterson Oil Terminals, Inc v The Port Covington, DCPa, 109 FSupp 953, affirmed, CA, 205 F2d 694

#### Proof of facts giving rise to inference

(1) In action by dock owner against operator of vessel for damages to dock and for loss of coal on dock, allegedly sustained when vessel collided with scow standing alongside dock, dock owner relying exclusively on *res ipsa loquitur* doctrine must, before such doctrine could be applied, prove by evidence facts from which, under the peculiar circumstances, the inference of negligence could be drawn, namely, the ramming of the dock by the vessel or the collision with the scow, with resulting damage to the dock.

Wash—Pacific Coast R Co v American Mail Line, 172 F2d 226, 25 Wash 2d 809

(2) Although *res ipsa loquitur* doctrine does not prevail in state, federal court may arrive at its own conclusion on the facts as they existed as to whether vessel was negligently navigated, legitimate inferences from established facts being proper.

US—Ford Motor Co v Bradley Transp Co, DCMich, 74 FSupp. 460, affirmed, CA, 174 F2d 192

43 US—Robins Dry Dock & Repair Co v Navigazione Libera Triestina, S. A., CCANY, 32 F2d 209, certiorari denied 50 S Ct 30, 280 US 574, 74 LEd 626

#### 44. Evidence held sufficient

(1) To sustain a judgment for plaintiff

US—Koch-Ellis Marine Contractors

evidence relating to the issue of negligence,<sup>45</sup> contributory negligence,<sup>46</sup> and proximate cause<sup>47</sup>

*Questions for jury* Inasmuch as fact questions are ordinarily for the jury, a relevant issue, supported by some substantial testimony, should be submitted<sup>48</sup>

*Instructions* should not be misleading,<sup>49</sup> must be supported by the evidence,<sup>50</sup> and are properly refused where the terms involved present questions of

fact, and not of law,<sup>51</sup> particularly where the subject was covered in an instruction given<sup>52</sup>

## § 27. — Damages

In an action for damages to a pier or wharf, the recovery is limited to the actual loss sustained

In an action for damages to a pier or wharf, the recoverable damages must be limited to actual loss excluding consequences which are contingent, speculative, or merely possible,<sup>53</sup> hence, no allowance can

v Sewerage & Water Bd of New Orleans, C A La., 218 F 2d 731

(2) To sustain finding

US—Douglas Public Service Corp v Barge Transport Co, CCA Tex., 158 F 2d 89

(3) Other illustrations see 68 C J p 241 note 38 [c]

### 45 Evidence held sufficient

(1) To establish negligence

US—Publicker Industries v Tugboat Neptune Co, C A Pa., 171 F 2d 48

Metropolitan Sand & Gravel Corp v The Dwyer No 25, DC NY, 130 F Supp 172—Hartford

Acc & Indem Co v Gulf Refining Co, DCLa., 127 F Supp 469—

John I Hay Co v The Allen B Wood, DCLa., 121 F Supp 704, affirmed, CA, Martin Oil Service v

John I Hay Co, 219 F 2d 237—Todd Atlantic Shipyards Corp v

The Southport, DCSC, 95 F Supp 331, affirmed, CA, City Compress

& Warehouse Co v U S, 190 F 2d 699—Ford Motor Co v Bradley

Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F 2d 192

Cal—General Petroleum Corp of Cal v City of Los Angeles, 109 P 2d 754, 42 Cal App 2d 591

Ill—Philadelphia & Reading Coal & Iron Co v Calumet Shipyard &

Dry Dock Co, 88 NE 2d 891, 339 Ill App 142

NJ—Swan-Finch Oil Corporation v Warner-Quinlan Co, 171 A 800, 112 NJ Law 519

68 C J p 241 note 35

(2) To give rise to presumption that wharfinger had been negligent in providing unsafe mooring facilities for vessels using its docks whereupon ship broke loose from dock and collided with dry dock

US—City Compress & Warehouse Co v U S, CASC, 190 F 2d 699

(3) To establish negligence on part of ship crew which concurred with negligence of wharfinger who had provided unsafe mooring facilities in bringing about collision and damage to dry dock

US—City Compress Warehouse Co v U S, supra

*Evidence held insufficient*

(1) To show negligence.

US—White Stack Towing Corp v Hewitt Oil Co, CASC, 216 F 2d 776

The Trenton, DCNY, 22 F Supp 833, affirmed, In re O'Brien Bros, CCA, 101 F 2d 1017

NY—Robins Dry Dock & Repair Co v Navigazione Libera Tries-

tina S A, 279 NYS 257, 154 Misc 788, affirmed 257 NYS 908, 235 App Div 841, affirmed 185 N

E 698, 261 NY 455, reargument denied 188 NE 47, 262 NY 521, certiorari denied Moran Towing &

Transp Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 L Ed 568, and 54 S Ct 72, 290 US 657, 78 L Ed 569

68 C J p 241 note 38

(2) To bring the case within the doctrine of res ipsa loquitur

Wash—Pacific Coast R Co v American Mail Line, 172 P 2d 226, 25 Wash 2d 809

(3) To show freedom from fault in manner of mooring barge and that collision was due solely to storm

US—Sherwood Refining Co v Whiteman, DCLa., 127 F Supp 478

*46. Evidence held sufficient*

To show freedom from contributory negligence

US—Swenson v The Argonaut, C A NJ, 204 F 2d 636

General Am Transp Corp v The Patricia Chotin, DCLa., 120 F Supp 246—Ford Motor Co v

Bradley Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F 2d 192

*47 Evidence held sufficient*

(1) To establish that negligence was a proximate cause of the injury to the dock or wharf

US—Hartford Acc & Indem Co v Gulf Refining Co, DCLa., 127 F Supp 469—John I Hay Co v The

Allen B Wood, DCLa., 121 F Supp 704, affirmed, CA, Martin Oil Service v John I Hay Co, 219 F 2d 237

—General Am Transp Corp v The Patricia Chotin, DCLa., 120 F Supp 246—Ford Motor Co v Bradley

Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F 2d 192

NJ—Swan-Finch Oil Corporation v

Warner-Quinlan Co, 171 A 800, 112 NJ Law 519

NY—Robins Dry Dock & Repair Co v Navigazione Libera Tries-

tina S A, 279 NYS 257, 154 Misc 788, affirmed 257 NYS 908, 235 App Div 841, affirmed 185 NE 698, 261 NY 455, reargument denied

188 NE 47, 262 NY 521, certiorari denied Moran Towing & Transp

Co v Robins Dry Dock & Repair Co, 54 S Ct 72, 290 US 656, 78 L Ed 568, and 54 S Ct 72, 290 US 657, 78 L Ed 569

68 C J p 241 note 36

(2) To show that negligence was not proximate cause of damage

US—Braithwaite Lands Liquidation Co v The Ben Hur, C A La., 212 F 2d 851—Gibbs Corp v Arundel

Corp, CA Fla., 209 F 2d 561

Metropolitan Sand & Gravel Corp v The Dwyer No 25, DC NY, 130 F Supp 172

68 C J p 241 note 37

(3) To establish that any failure properly to maintain wooden bumper along dock was not proximate cause of accident

US—Ford Motor Co v Bradley Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F 2d 192

*48. US—Hoskins Coal & Dock Corp v Great Lakes Dredge & Dock Co, CCA Ill., 112 F 2d 263*

Ford Motor Co v Bradley Transp Co, DCMich, 74 F Supp 460, affirmed, CA, 174 F 2d 192

68 C J p 242 note 41

*49. Ill—Pennsylvania Co v Dunham, Towing & Wrecking Co, 185 Ill App 110*

68 C J p 242 note 43

*50. Wash—Wilson v Oregon-Washington R, etc, Co, 71 Wash 102, 127 P 847*

*51. NY—New Jersey Steamboat Co v New York, 15 NE 877, 109 NY 621*

68 C J p 242 note 44

*52. NY—New Jersey Steamboat Co v New York, supra*

*53. US—General Am Transp Corp v The Patricia Chotin, DCLa., 120 F Supp 246*

*Future shoaling*

Damages for a future shoaling of the water in front of wharfage prop-

be made, in computing damages, for the loss of the use of a dock, where no actual loss resulted<sup>54</sup> Under a statute authorizing a suit for injury to "wharf

property used as such," only damages resulting from interference with the actual use of the wharf may be recovered<sup>55</sup>

**WHAT.** A pronominal word used as singular or plural<sup>1</sup> One of the uses of the word is as a compound relative, equivalent to "which" with an antecedent demonstrative<sup>2</sup>

**WHATEVER.** All that, no matter what, or of any kind soever that it may be<sup>3</sup>

**WHATSOEVER.** An indefinite relative, which has a very broad and comprehensive<sup>4</sup> or a distinct<sup>5</sup> meaning, and it is often defined as, all that, no matter what, or anything soever which,<sup>6</sup> anything that may be, or one thing or another<sup>7</sup>

**WHEAT.** A grain, the edible product of a cereal grass (*Triticum sativum*), the most important of the cereals, excelled by rice alone in the number of people by whom it is used as a staple food<sup>8</sup> It has been distinguished from "alfalfa" see 3 CJS p 513 note 80.

**WHEEL.** A circular rim and hub connected by spokes or rays in one structure, or a disk, solid

or perforated, made to rotate on an axis and employed to reduce friction and facilitate movement or transportation, as in vehicles, to perform rotary motion, as in machines, to modify speeds, as in the form of pulleys, etc<sup>9</sup>

**WHEELERS.** In the motor trucking industry, "wheelers" are persons employed to load freight on outgoing trucks or trailer bodies, and it is a part of their duty to report physical defects in, and the need for repairs to, such bodies<sup>10</sup>

**WHEELMAN.** In the process of loading or unloading coal, one who empties the coal into a barrow and, when the barrow is full, runs it to where it is to be dumped<sup>11</sup>

**WHEELWRIGHT.** A man whose occupation is to make or repair wheels and wheeled vehicles.<sup>12</sup>

**WHEN.** It is frequently stated that "when" is an adverb of time,<sup>13</sup> and as such it has no fixed meaning,<sup>14</sup> but, on the contrary, has a wide variety of ap-

erty based on the opinions of witnesses are too speculative  
Wash—Wilson v Oregon-Washington R, etc, Co, 71 Wash 102, 127 P 847

54 U S—The Ferguson, D C N Y, 167 F 234  
68 C J p 242 note 47

55 Mass—Butchers' Slaughtering & Melting Ass'n v City of Boston, 101 NE 426, 214 Mass 254

1. Webster New Int D

Phrases employing the word "what" and of which more recent adjudications have not been found see 68 C J p 242 notes 3-7.

2. Ga—Langford v State, 26 SE 2d 385, 386, 69 Ga App 619

3. Va—City of Richmond v Sutherland, 77 SE 470, 472, 114 Va 688

Phrases employing the word "whatever" and of which more recent adjudications have not been found see 68 C J p 242 note 11-p 243 note 22

4. N Y—Schuck v Shook, 10 N Y S 935, 936, 24 Abb N Cas 463  
68 C J p 243 note 24

**Broad significance**

Neb—Campagna v Home Owners' Loan Corporation, 300 NW 894, 895, 140 Neb 572

5. Ohio—Red Star Yeast & Prod-

ucts Co v Hague, 157 NE 393, 395, 25 Ohio App 100

68 C J p 242 note 25

6. Ohio—Red Star Yeast & Products Co v Hague, supra

Phrases employing the word "whatsoever" and of which more recent adjudications have not been found see 68 C J p 243 notes 28-34

7. N Y—Schuck v Shook, 10 N Y S 935, 936, 24 Abb N Cas 463

8. New Standard D

Phrases employing the word "wheat" and of which more recent adjudications have not been found see 68 C J p 243 notes 36-47

9. New Standard D

**Phrases**

(1) "Wheel guard" as a part of a bridge see Bridges § 1

(2) Other phrases employing the word in its various forms and of which more recent adjudications have not been found see 68 C J p 243 note 49-p 244 note 54

10. U S—Crean v M Moran Transp Lines, D C N Y, 57 F Supp 212, 216

11. Mass—Griffin v Curran, 80 NE 509, 510, 194 Mass 359

12. Ark—Shelton v Little Rock Auto Co, 146 SW 129, 130, 103 Ark 142

68 C J p 244 notes 55, 56.

13. Mich—Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205

Mo—Wahl v Wahl, 206 SW 2d 334, 338, 357 Mo 89—Thompson v Thompson, 175 SW 2d 885, 888—Saunders v Jones, 147 SW 2d 424, 427, 347 Mo 255

N Y—In re Burdall's Will, 13 N Y S 2d 896, 898, 171 Misc 822

In re Van Auker's Estate, 31 N Y S 2d 897, 901

NC—Chas W Priddy & Co v Sanderford, 20 SE 2d 341, 343, 221 NC 422

Ohio—Ohio Nat Bank of Columbus v Boone, 40 NE 2d 149, 152, 139 Ohio St 361

68 C J p 244 note 58

**A "when" clause indicates the time of an event**

Ark—Life & Casualty Ins Co of Tennessee v Kinney, 177 SW 2d 768, 770, 206 Ark 804

**Frequently used as referring to time**

Iowa—Hartz v Truckenmiller, 293 NW 568, 571, 228 Iowa 819

14 Mich—Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205

**Sensible construction**

Because of the difficulty or impossibility of doing two acts at once, and since the law does not deal in split seconds of time, the word "when" is to be given a sensible con-

plications and has many meanings,<sup>15</sup> and it is variously defined.<sup>16</sup>

Ordinarily "when" means at the time of,<sup>17</sup> at the time that;<sup>18</sup> at, or during, the time that;<sup>19</sup> at that time,<sup>20</sup> at the time;<sup>21</sup> at the time it is,<sup>22</sup> at what time,<sup>23</sup> at which time,<sup>24</sup> at the moment that,<sup>25</sup> as soon as,<sup>26</sup> while<sup>27</sup>

However, the word "when" is not always used in an absolute sense,<sup>28</sup> and it does not necessarily refer to the instant of time spoken of,<sup>29</sup> it may be used in a relative sense,<sup>30</sup> referring not to the present, but to a different time,<sup>31</sup> and it may mean just at or after the time that,<sup>32</sup> or immediately after,<sup>33</sup> at or just after,<sup>34</sup> at or just after the moment that.<sup>35</sup>

The word "when" may even refer to future events,<sup>36</sup> although not to those of an unlimited future,<sup>37</sup> and in its future sense it means after,<sup>38</sup> after the time that,<sup>39</sup> afterwards,<sup>40</sup> at a time after,<sup>41</sup> immediately after,<sup>42</sup> or just after the moment<sup>43</sup>

"When" does not mean before<sup>44</sup>

Although the word "when" is primarily an adverb of time, as stated supra p 607 note 13, it may, if the context so indicates,<sup>45</sup> be used to express a contingency<sup>46</sup> or a condition,<sup>47</sup> having a hypothetical or conditional meaning,<sup>48</sup> or implying a condition precedent,<sup>49</sup> and in this sense it has been said that "when" may be employed as akin to or as having the meaning of the word "as,"<sup>50</sup> or as having the same

struction in the law, as to the time of doing the acts

Mich—Toy ex rel Elliott v Voelker, supra

15. Mass—Commonwealth v Cohen, 146 NE 228, 229, 250 Mass 570

16. Iowa—Hartz v Truckenmiller, 293 NW 568, 571, 228 Iowa 819

**Phrases** employing the word "when" and of which more recent adjudications have not been found see 68 CJ p 244 note 85—p 250 note 29

17. Mich—Corpus Juris cited in Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205  
68 CJ p 244 notes 60–67

18. Ohio—Gehrunge v Collister, 3 NE 2d 700, 701, 52 Ohio App 314  
68 CJ p 244 note 64

19. Idaho—Abercrombie v Stoddard, 228 P 232, 233, 39 Idaho 146  
NM—In re Morrow's Will, 73 P 2d 1360, 1364, 41 NM 723

**During the time that**  
Tex—Walker v Koger, Civ App, 99 SW 2d 1034, 1037

20. US—U S v Willings, Pa, 4 Cranch 48, 54, 2 LEd 546  
Del—State v Donahoe, 63 A 643, 646, 21 Del 278

21. Iowa—Hartz v Truckenmiller, 293 NW 568, 571, 228 Iowa 819  
68 CJ p 244 note 62

22. Mass—Commonwealth v Cohen, 146 NE 228, 229, 250 Mass 570  
68 CJ p 244 note 63

23. NM—In re Morrow's Will, 73 P 2d 1360, 1364, 41 NM 723  
Ohio—Gehrunge v Collister, 3 NE 2d 700, 701, 52 Ohio App 314  
68 CJ p 244 note 65

24. Iowa—Hartz v Truckenmiller, 293 NW 568, 571, 228 Iowa 819  
Ohio—Gehrunge v Collister, 3 NE 2d 700, 701, 52 Ohio App 314  
68 CJ p 244 note 66

25. Idaho—Abercrombie v Stoddard, 228 P. 232, 233, 39 Idaho 146

26. Idaho—Abercrombie v Stoddard, 228 P 232, 233, 39 Idaho 146  
Ind—Pittsburgh, C, C & St L R Co v Burton, 38 NE 594, 139 Ind 357

27. Tex—Walker v Koger, Civ App, 99 SW 2d 1034, 1037.

28. Va—Lipscomb v Nuckols, 172 SE 886, 891, 161 Va 936  
68 CJ p 244 note 69

29. Va—Lipscomb v Nuckols, supra—Pulliam v Aler, 15 Gratt (56 Va) 54, 59

30. Ga—Georgia Railway & Power Co v Thompson, 16 SE 2d 115, 117, 65 Ga App 512

Va—Lipscomb v Nuckols, 172 SE 886, 891, 161 Va 936  
68 CJ p 244 note 69

31. Va—Lipscomb v Nuckols, supra  
68 CJ p 244 note 69

32. Ga—Corpus Juris cited in Georgia Railway & Power Co v Thompson, 16 SE 2d 115, 117, 65 Ga App 512  
68 CJ p 244 notes 70–75

33. Ga—Corpus Juris cited in Georgia Railway & Power Co v Thompson, 16 SE 2d 115, 117, 65 Ga App 512  
68 CJ p 244 notes 70–75

34. Idaho—Abercrombie v Stoddard, 228 P 232, 233, 39 Idaho 146

35. NM—In re Morrow's Will, 73 P 2d 1360, 1364, 41 NM 723

36. NY—In re Birdsall's Estate, 49 NYS 450, 463, 22 Misc 180, 2 Gibb Surr 293

ND—State v Jorgenson, 142 NW 450, 462, 25 ND 539, 49 L.R.A.N.S. 67

37. NY—Ziegler v Chapin, 27 NE 471, 473, 126 NY 342.  
68 CJ p 244 note 77

38. Mich—Corpus Juris cited in Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205  
68 CJ p 244 notes 70–75.

39. NM—In re Morrow's Will, 73 P 2d 1360, 1364, 41 NM 723

Tex—Walker v Koger, Civ App, 99 SW 2d 1034, 1037  
68 CJ p 244 note 70

40. Va—Pulliam v Aler, 15 Gratt (56 Va) 54, 60

41. NY—Kirtz v Peck, 21 NE 130, 131, 113 NY 222

**Reasonable time after**  
Mich—Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205

42. Idaho—Abercrombie v Stoddard, 228 P 232, 233, 39 Idaho 146

43. Ind—Pittsburgh, C, C & St L R Co v Burton, 38 NE 594, 139 Ind 357

44. Mich—Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205

45. Va—Lipscomb v Nuckols, 172 SE 886, 891, 161 Va 936  
68 CJ p 247 notes 53, 54.

46. Mo—State ex rel Kansas City v School Dist of Kansas City, 62 SW 2d 813, 817, 333 Mo 288  
68 CJ p 247 note 56

47. NY—Pine v Okoniewski, 11 NYS 2d 13, 15, 256 App Div 519  
68 CJ p 247 note 55

48. Ga—Atlantic Coast Line R Co v Jones, 63 SE 834, 837, 132 Ga 189

**Expressing conditional limitation**  
Iowa—Hartz v Truckenmiller, 293 NW 568, 571, 228 Iowa 819

49. NJ—Muller v Cox, 130 A 811, 813, 98 NJ Eq 188.  
68 CJ p 247 note 58.

**By indicating time,** "when" may create a condition precedent in the respect that one act is to be done before another  
Mich—Toy ex rel Elliott v Voelker, 262 NW 881, 887, 273 Mich 205

50. NJ—Fisher v. Johnson, 38 NJ. Eq 46, 47.

significance as the words "at,"<sup>51</sup> or "if."<sup>52</sup> In this sense "when" is defined as meaning in the event that;<sup>53</sup> in case;<sup>54</sup> provided,<sup>55</sup> on condition that,<sup>56</sup> upon,<sup>57</sup> upon which,<sup>58</sup> whenever,<sup>59</sup> where,<sup>60</sup> wherever,<sup>61</sup> in virtue of the circumstances that;<sup>62</sup> and which are.<sup>63</sup>

The word "when" is frequently used in determining the time of the enjoyment or vesting of estates<sup>64</sup> or the time or event upon which legacies are to vest<sup>65</sup>

"When" has been held to be equivalent to, or synonymous with, "upon" and "upon which" see 67 CJS p 495 note 921. It has been held to be

equivalent to, or synonymous with, "whenever,"<sup>66</sup> and the terms have been distinguished.<sup>67</sup> "When" has also been distinguished from "while"<sup>68</sup>

**WHENEVER.** The word "whenever" is an adverb of time<sup>69</sup> rather than of place,<sup>70</sup> frequently looking to the future rather than the past,<sup>71</sup> but not the remote future<sup>72</sup>

It has been said that in its common acceptation "whenever" means,<sup>73</sup> or its natural meaning is,<sup>74</sup> as long as,<sup>75</sup> as often as;<sup>76</sup> as soon as,<sup>77</sup> at any time,<sup>78</sup> at any and all times,<sup>79</sup> at any time when,<sup>80</sup> at whatever time<sup>81</sup> It has also been held to mean

51. Va.—Sellers' Ex'r v. Reed, 13 S E 754, 755, 88 Va 377.  
68 C J p 247 note 60

52. Iowa—Hartz v Truckenmiller, 293 NW 568, 571, 228 Iowa 319  
SC—Collins v Atlantic Coast Line R Co, 190 SE 817, 825, 183 SC 284

Va.—Lipscomb v Nuckols, 172 SE 886, 891, 161 Va 936  
68 C J p 247 note 61

**In legislative enactments and in common speech**

The word "when" is frequently employed as equivalent to the word "if" in legislative enactments as well as in common speech

Ga.—Atlantic Coast Line R Co v Jones, 63 SE 834, 837, 132 Ga 189

SC—Collins v Atlantic Coast Line R Co, 190 SE 817, 825, 183 SC 284

53. Cal.—Bogue v Roeth, 276 P 1071, 1075, 98 Cal App 257

SC—Collins v Atlantic Coast Line R Co, 190 SE 817, 825, 183 SC 284

54. Va.—Lipscomb v Nuckols, 172 SE 886, 891, 161 Va 936  
68 C J p 248 note 62

55. US—Heberton v McClain, CC Pa, 135 F 226, 227  
68 C J p 248 note 64

56. SC—Collins v Atlantic Coast Line R Co, 190 SE 817, 825, 183 SC 284

57. Miss.—Sam v State, 31 Miss 480, 485

Pa.—Adams v Williams, 2 Watts & S 227, 228

58. Va.—Lipscomb v Nuckols, 172 SE 886, 891, 161 Va 936

59. Va.—Lipscomb v. Nuckols, supra  
68 C J p 248 note 66

60. Kan.—Atchison, T & S F R Co v Billings, 52 P 61, 63, 7 Kan App 399

61. Kan.—Atchison, T. & S F R Co v Billings, supra

62. SC—Collins v. Atlantic Coast

Line R Co, 190 SE 817, 825, 183 SC 284

63. US—Vandegrift & Co v U S, 9 Ct Cust App 112, 121  
68 C J p 248 note 69

64. Mo—Wahl v Wahl, 206 SW 2d 334, 338, 357 Mo 89—Thompson v Thompson, 175 SW 2d 885, 888—Sanders v Jones, 147 SW 2d 424, 427, 347 Mo 255

NY—In re Burdall's Will, 13 NYS 2d 896, 898, 171 Misc 822  
In re Cramer's Estate, 47 NYS 2d 826, 829—In re Van Auken's Estate, 31 NYS 2d 897, 901

NC—Chas W Priddy & Co v San-derford, 20 SE 2d 341, 343, 221 NC 422

Ohio—Ohio Nat Bank of Columbus v Boone, 40 NE 2d 149, 152, 139 Ohio St 361

68 C J p 244 note 78

65. NJ—Cody v Fitzgerald, 65 A 2d 750, 752, 2 NJ 93

66. Pa.—In re Cooper's Estate, 23 A 456, 459, 147 Pa 322  
68 C J p 245 note 81

67. NY—Ziegler v Chapin, 27 NE 471, 473, 126 NY 342

68. Mo—St Louis v Withaus, 3 S W 395, 397, 90 Mo 646

69. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573

NY—People v Minuse, 70 NYS 2d 426, 431, 190 Misc 57

Tex.—Bloss v State, 75 SW 2d 694, 695, 127 Tex Cr 216

68 C J p 250 note 31

**Primarily an adverb of time**

Mo—State ex rel Kansas City v School Dist of Kansas City, 62 S W 2d 813, 817, 333 Mo 288

70. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573

Me—Kennebec & Portland R Co v Portland & Kennebec R Co, 59 Me 9, 61.

71. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573

NY—People v Minuse, 70 NYS 2d 426, 431, 190 Misc 57

68 C J p 250 note 33

72. Ill.—Wade v Victory Mut Life Ins Co, 51 NE 2d 704, 707, 384 Ill 555

73. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
Ont—McDonell v Smith, 17 UCQ B 310, 318

74. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
US—Griffin v U S, DCGa, 270 F 263, 265

75. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
NJ—Moore v Johnson, 88 A 699, 701, 85 NJ Law 40

76. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
Ont—McDonell v Smith, 17 UCQ B 310, 318

77. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
68 C J p 250 note 38

78. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
68 C J p 250 note 39

79. Fla.—Chiapetta v Jordan, 16 So 2d 641, 644, 153 Fla 788

80. Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
Ohio—Crawford v Weidemeyer, 113 NE 267, 268, 93 Ohio St 461

81. US—Gage v. U S, Ct Cl, 101 F Supp 765, 766

Cal.—Corpus Juris quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573

Fla—Chiapetta v Jordan, 16 So 2d 641, 644, 153 Fla 788

NY—People v Minuse, 70 NYS 2d 426, 431, 190 Misc 57

Tex.—Bloss v State, 75 SW 2d 694, 695, 127 Tex Cr 216

no matter when;<sup>82</sup> at whatever time it shall happen,<sup>83</sup> or at what time soever.<sup>84</sup>

The word "whenever" may be used to express condition or contingency,<sup>85</sup> and when used in this sense it is defined to mean if,<sup>86</sup> if and so long as,<sup>87</sup> in all cases;<sup>88</sup> in case;<sup>89</sup> in those cases,<sup>90</sup> in any and every instance in which;<sup>91</sup> should;<sup>92</sup> upon which,<sup>93</sup> and where.<sup>94</sup>

It has been held that "whenever" is sometimes, but not always, equivalent to "as soon as" see 6 C.J.S. p 782 note 17, p 783 note 18. "Whenever" has also been held to be equivalent to "in the event" see 42 C.J.S. p 480 note 47, and has been distinguished from "wherever."<sup>95</sup>

*Phrases* employing the word "whenever" and of which more recent adjudications have not been found see 68 C.J. p 250 note 44-p 251 note 81.

**WHENSOEVER.** At whatever time<sup>96</sup>

**WHERE.** The word "where," as an adverb,<sup>97</sup> when used to denote locality, is somewhat indefinite<sup>98</sup> It is defined as meaning a place at which,<sup>99</sup> at or in which or what place;<sup>1</sup> at the place;<sup>2</sup> in which<sup>3</sup>

"Where" may also be employed as an adverb of time,<sup>4</sup> and as such is defined as meaning when,<sup>5</sup> or when in any such case;<sup>6</sup> and in connection with estates the word is used to express the time of the enjoyment or of the vesting of interest<sup>7</sup>

Expressing condition or contingency, "where" is defined as meaning if;<sup>8</sup> under circumstances in which<sup>9</sup>

**WHEREAS.** The word "whereas" is defined as meaning the thing being so that,<sup>10</sup> the fact is,<sup>11</sup> the fact or case really being that,<sup>12</sup> that being the case,<sup>13</sup> considering that things are so,<sup>14</sup> considering that,<sup>15</sup> when in fact,<sup>16</sup> while on the contrary,<sup>17</sup>

Vt.—Peryer v Pennock, 115 A 105, 95 Vt 313, 17 A.L.R. 863  
68 C.J. p 250 note 41

82. U.S.—Gage v U.S., Ct Cl., 101 F Supp 765, 766

Fla.—Chiapetta v Jordan, 16 So 2d 641, 644, 153 Fla 788

83. Cal.—*Corpus Juris* quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573  
68 C.J. p 250 note 42.

84. Cal.—*Corpus Juris* quoted in Morse v Custis, 101 P 2d 702, 704, 38 Cal App 2d 573

#### Strictly construed

"Whenever" strictly construed means . . . 'at what time soever'"

U.S.—Williams v Potter, D.C.N.Y., 210 F 318, 325

85. Mich.—People v Merhige, 180 N W 418, 422, 212 Mich 601

Mo.—State ex rel Kansas City v School Dist of Kansas City, 62 S W 2d 813, 817, 333 Mo 288

N.Y.—People v Minuse, 70 N.Y.S 2d 426, 431, 190 Misc 57

86. Mo.—State ex rel Kansas City v School Dist of Kansas City, 62 S W 2d 813, 817, 333 Mo 288

N.Y.—People v Minuse, 70 N.Y.S 2d 426, 431, 190 Misc 57  
68 C.J. p 251 note 61

87. Iowa—Illinois Cent R Co v Waterloo, C.F. & N Ry Co., 164 N.W 208, 210, 182 Iowa 550  
68 C.J. p 251 note 62

88. Vt.—Whitcomb v Rood, 20 Vt 49, 53  
68 C.J. p 251 note 63

89. Mich.—People v Merhige, 180 N W 418, 422, 212 Mich 601

N.Y.—People v Minuse, 70 N.Y.S 2d 426, 431, 190 Misc 57

90. Cal.—People v Melone, 15 P. 294, 296, 73 Cal 574.

91. Fla.—Chiapetta v Jordan, 16 So 2d 641, 644, 153 Fla 788

92. N.Y.—People v Minuse, 70 N.Y.S 2d 426, 431, 190 Misc 57

Ohio—Crawford v Weidemeyer, 113 NE 267, 268, 93 Ohio St 461

93. Mich.—People v Merhige, 180 N W 418, 422, 212 Mich 601

94. Mich.—People v Merhige, supra

95. Me.—Kennebec & Portland R Co v Portland & Kennebec R Co, 59 Me 9, 61

N.J.—Moore v Johnson, 88 A 699, 701, 85 N.J. Law 40  
68 C.J. p 254 note 90

96. Alta.—Froment Alberta Lumber Co, Ltd v Alberta Dept of Agriculture, [1925] 3 Dom L.R. 377, 386

97. Webster New Int D

*Phrases* employing the word "where" and of which more recent adjudications have not been found see 68 C.J. p 251 note 92-p 251 note 21

98. N.Y.—Cook v Kelsey, 19 N.Y. 412, 414

99. Ind.—State v Hogreiver, 53 NE 921, 923, 152 Ind 652, 45 L.R.A. 504

1. Mo.—Swink v Anthony, 81 S.W. 915, 916, 107 Mo App 601

N.Y.—Cook v Kelsey, 19 N.Y. 412, 414

2. Iowa—Girl v U.S. Railroad Administration, 189 N.W. 834, 835, 194 Iowa 1382

3. Ala.—Pond v State, 55 Ala 196, 197

Cal.—British North America Bank v Madison, 33 P 762, 764, 99 Cal 125

4. U.S.—Doe ex dem Poor v Considine, Ohio, 6 Wall 458, 474, 18 L Ed 869

Ohio—Krieger v Stauffer, Com Pl., 67 NE 2d 449, 456

5. Tex.—Ex parte Boyd, 96 SW 1079, 1080, 50 Tex Cr 309

6. U.S.—In re Pennsylvania Co., Conn., 11 S.Ct. 141, 143, 137 US 451, 34 L Ed 738

Campbell v. Milliken, C.C. Colo., 119 F 982, 986

7. U.S.—Doe ex dem Poor v Considine, Ohio, 6 Wall 458, 475, 18 L Ed 869

Ohio—Krieger v Stauffer, Com Pl., 67 NE 2d 449, 456

8. Ill.—Frank Parmelee Co v Wheelock, 79 NE 652, 654, 224 Ill 194  
68 C.J. p 252 note 11.

9. Ind.—State v Hogreiver, 53 NE 921, 923, 152 Ind 652, 45 L.R.A. 504

10. U.S.—Dalton v U.S., Ill., 127 F 544, 547, 62 C.C.A. 238

68 C.J. p 252 note 27

*Phrases* employing the word "whereas" and of which more recent adjudications have not been found see 68 C.J. p 253 notes 33-41

11. Cal.—People v Ennis, 70 P 84, 137 Cal. 263, 266

12. U.S.—Dalton v U.S., Ill., 127 F 544, 547, 62 C.C.A. 238

13. Ky.—Jones v City of Paducah, 142 SW 2d 365, 367, 283 Ky 628

14. N.Y.—Dean v Clark, 30 N.Y.S 45, 47, 80 Hun 80  
68 C.J. p 252 note 23

15. Ky.—Jones v City of Paducah, 142 SW 2d 365, 367, 283 Ky 628

16. Colo.—Stoltz v People, 148 P 865, 866, 59 Colo 342  
68 C.J. p 252 note 28

17. U.S.—Dalton v U.S., Ill., 127 F 544, 547, 62 C.C.A. 238

Colo.—Stoltz v People, 148 P 865, 866, 59 Colo 342.

while the contrary,<sup>18</sup> implying an admission of facts, something followed by a different statement, and sometimes by inference of something consequent,<sup>19</sup> although<sup>20</sup>

It has been said that the word "whereas" implies a recital and, generally, cannot be used in the direct and positive averment of a fact;<sup>21</sup> although, as shown by the context, what follows may be positive averment and not recital<sup>22</sup>

**WHEREBY.** The word "whereby" is defined as meaning by or through which, by the help of which; in accordance with which,<sup>23</sup> and it also means and by it.<sup>24</sup>

"Whereby" is not the equivalent of "because" see 10 J C S. p 222 note 28

**WHEREFORE.** The word "wherefore" is defined as meaning for what reason<sup>25</sup>

**WHEREIN.** In which, in which place, thing, or respect<sup>26</sup>

**WHEREUPON.** An adverb of time<sup>27</sup> or a relative conjunction,<sup>28</sup> but not a word of numbers or quantity.<sup>29</sup> While the word may not be definite as to time,<sup>30</sup> it imports subsequence,<sup>31</sup> although not im-

mediate sequence<sup>32</sup>

"Whereupon" is defined as meaning after which;<sup>33</sup> in consequence of which,<sup>34</sup> upon which.<sup>35</sup>

**WHEREVER.** At or in whatever place; wheresoever.<sup>36</sup> The word is sometimes used as a particle,<sup>37</sup> as equivalent to "as often as" see 67 C.J.S. p 487 note 28, implying a single initiative<sup>38</sup>

**WHETHER.** As an adverb, "whether" is defined as the first alternative; introducing a direct alternative question with a correlative "or;" sometimes introducing a direct simple question, the correlative being implied or lost sight of.<sup>39</sup>

As a conjunction, "whether" is defined as the first alternative; in case; if, introducing an alternative clause, followed by a correlative "or," or "or whether," sometimes also introducing a single alternative, the other, usually negative, being implied; as, tell us whether you are going (or not)<sup>40</sup>

In a legal sense,<sup>41</sup> "whether" is defined as meaning which of two or several,<sup>42</sup> which of two alternatives expressed by a sentence or the clause of a sentence, and followed by "or"<sup>43</sup> The word is used as a pronoun, and also as a particle expressing one part of a disjunctive question in opposition to the other<sup>44</sup> The word "whether," neither in com-

18. Cal—People v Ennis, 70 P 84, 86, 137 Cal 263

19. US—Dalton v U S, Ill, 127 F 544, 547, 62 C C A 238

20. Conn—Hill v Smith, 111 A 840, 812, 95 Conn 579

21. US—Dalton v U S, Ill, 127 F 544, 547, 62 C C A 238  
68 C J p 252 note 31

22. Colo—Stoltz v People, 148 P 865, 866, 59 Colo 342  
68 C J p 252 note 32

23. Wis—State ex rel Finnegan v Lincoln Dairy Co, 265 NW 197, 200, 221 Wis 1

Phrases employing the word "whereby" and of which more recent adjudications have not been found see 68 C J p 253 notes 43, 44

24. W Va—Acme Food Co v Older, 61 SE 235, 236, 64 W Va 255, 17 L R A, N S, 801

25. Vt—Lycoming Fire Ins Co v Wright, 55 Vt 526, 531

26. Webster New Int D

Phrases employing the word "wherein" and of which more recent adjudications have not been found see 68 C J p 253 notes 49–53

27. Mo—Foster & Foster v Nowlin, 4 Mo 18, 23

28. "Grammatically the word is a relative conjunction, by which the

proposition set forth in the antecedent clause is to be followed in time and in act by the matter set forth in the concluding clause"

Cal—In re Sanford's Estate, 68 P 494, 496, 136 Cal 97

29. Mo—Foster & Foster v Nowlin, 4 Mo 18, 23

30. Wis—State v Van Ellis, 32 NW 32, 33, 69 Wis 19

31. Wyo—Lee v Cook, 1 Wyo 413, 419  
68 C J p 254 note 69

32. Fla—City of Orlando v Orlando Water & L Co, 39 So 532, 534, 50 Fla 207.

68 C J p 254 note 70

33. Va—Gilligan v Commonwealth, 37 SE 962, 964, 99 Va 816  
68 C J p 254 note 72

Phrases employing the word "whereupon" and of which more recent adjudications have not been found see 68 C J p 254 notes 75–83

34. Va—Gilligan v. Commonwealth, 37 SE 962, 964, 99 Va 816

35. Wyo—Lee v Cook, 1 Wyo 413, 419  
68 C J p 254 note 74.

36. Webster New Int D

Phrases employing the word "wherever" and of which more recent adjudications have not been found see 68 C J. p 254 notes 86–88, 91.

37. NJ—Moore v Johnson, 88 A 699, 701, 85 NJ Law 40

38. NJ—Moore v Johnson, 88 A 699, 701, 85 NJ Law 40

39. Miss—Board of Sup'rs, Warren County, v Vicksburg Hospital, 163 So 382, 386, 173 Miss 805

40. Miss—Board of Sup'rs, Warren County, v. Vicksburg Hospital, supra

41. Miss—Board of Sup'rs, Warren County, v Vicksburg Hospital, supra

42. Miss—Corpus Juris quoted in Board of Sup'rs, Warren County, v Vicksburg Hospital, 163 So 382, 386, 173 Miss 805  
68 C J p 254 note 96

Phrases employing the word "whether" and of which more recent adjudications have not been found see 68 C J p 254 notes 1, 2

43. Miss—Corpus Juris quoted in Board of Sup'rs, Warren County, v Vicksburg Hospital, 163 So 382, 386, 173 Miss 805  
Ont—Scragg v London, 28 UCQB 457, 460

44. Miss—Corpus Juris quoted in Board of Sup'rs, Warren County, v Vicksburg Hospital, 163 So. 382, 386, 173 Miss 805  
68 C J p 254 note 98.



mon parlance nor in legal phraseology, has ever had the force of a *vide licet* <sup>45</sup>

**WHICH.** A term said to be of varying usage, and to give writers a great deal of trouble <sup>46</sup> Although, as a relative pronoun, the word often has more than one antecedent, and there is no reason for limiting the clause beginning with the term to one, <sup>47</sup> the term will refer to the last antecedent, be it word or clause, to which it can properly apply, unless a common-sense reading requires a different construction. <sup>48</sup>

"Which" has been held to be equivalent to "and being" see 3 C.J.S. p 1069 note 6, "and if that" see 3 C.J.S. p 1072 note 331, "and it" see 3 C.J.S. p 1072 note 331, and "that" see 86 C.J.S. p 655 note 41.1.

45. Miss—*Corpus Juris* quoted in Board of Sup'rs, Warren County, v Vicksburg Hospital, 163 So 382, 386, 173 Miss 805

Mo—State ex rel and to Use of Berra v Sestric, 159 SW 2d 786, 789, 349 Mo 182

Pa—Voegtly v Alleghany Third Ward School Directors, 1 Pa 330, 331

46 US—Tennessee v Bank of Commerce, C.C.Tenn, 53 F 735, 748

Phrases employing the word "which" and of which more recent adjudications have not been found see 68 C.J. p 255 notes 10-15

47 US—Lowrey v Cowles Electric Smelting & Aluminum Co., C.C. Ohio, 68 F 354, 372

48 Tenn—Peterson v Turney, 2 Tenn Ch A 519, 534

#### "Which" clause

It is a fundamental rule of sentence structure that a "which" clause is usually used to describe, modify, or limit the preceding subject, and is not used to indicate the time of the event

Ark—Life & Casualty Ins Co of Tennessee v Kinney, 177 SW 2d 768, 770, 206 Ark 804

49. Ind—Shepherd v Washington Park Cemetery Ass'n, 186 NE 356, 358, 97 Ind App 455

50 US—Jackson v Texas Co., C.C. A Okl, 75 F 2d 549, 553

Kan—Lawrence v Leidigh, 50 P 600, 602, 58 Kan 594, 62 Am SR 631

51. Ill—Cummings v Lohr, 92 NE 970, 972, 246 Ill 577

52 US—Jackson v Texas Co., C.C. A Okl, 75 F 2d 549, 553

53. US—Jackson v Texas Co., supra

54. Me—Lambert v. New England

Fire Ins Co, 90 A 2d 451, 455, 148 Me 60

Mo—Zancker v Northern Ins Co of New York, 176 SW 2d 523, 526, 238 Mo App 110

NJ—Atlantic Cas Ins Co v Interstate Ins Co, 100 A 2d 192, 197, 28 NJ Super 81

55. US—Provident Life & Accident Ins Co v Nitsch, C.C.A. Tex, 123 F 2d 600, 603, 138 A LR 399

"While" clause indicates time of an event

Ark—Life & Casualty Ins Co of Tennessee v Kinney, 177 SW 2d 768, 770, 206 Ark 804

56. Ill—Cummings v Lohr, 92 NE 970, 972, 246 Ill 577

Me—Lambert v New England Fire Ins Co, 90 A 2d 451, 455, 148 Me 60

Mo—Zancker v Northern Ins Co of New York, 176 SW 2d 523, 526, 238 Mo App 110

NJ—Atlantic Cas Ins Co v Interstate Ins Co, 100 A 2d 192, 197, 28 NJ Super 81

Wis—American Steam Laundry Co v Riverside Printing Co, 177 N W 852, 853, 171 Wis 644

57. Ill—Chicago & A R Co v Fisher, 31 NE 406, 409, 141 Ill 614

Philip Blum & Co v Standard Acc Ins Co, 83 NE 2d 605, 336 Ill App 354—Bernhardt v Merchants Reserve Life Ins Co, 221 Ill App 66, 68—Chicago Union Traction Co v Lawrence, 113 Ill App 269, 273—St Louis Nat Stock Yards v Godfrey, 101 Ill App 40, 53—Illinois Central R Co v Jernigan, 101 Ill App 1, 12

58. Kan—Lawrence v Leidigh, 50 P 600, 602, 58 Kan 594, 62 Am SR 631

59. Cal—People v Higgins, 197 P 2d 417, 420, 87 Cal App 2d Supp 938.

**WHIFF.** To inhale or draw in, as air or tobacco smoke, also to drink <sup>49</sup>

**WHIFFLE BOARD.** Defined see Gaming § 1 g.

**WHILE.** The word "while" may be used either as a conjunction <sup>50</sup> or as an adverb, <sup>51</sup> and as a conjunction it is often used adversatively and to imply contrast, <sup>52</sup> but it also in some constructions introduces a parenthetical clause <sup>53</sup>

As an adverb or an adverbial modifier, <sup>54</sup> "while" is a word of time and not of causation, <sup>55</sup> and it expresses duration <sup>56</sup> and implies some degree of continuance. <sup>57</sup>

Either as a conjunction or as an adverbial modifier, <sup>58</sup> "while" is defined as meaning during the time that, <sup>59</sup> at the same time, <sup>60</sup> at the same time that, <sup>61</sup> as long as, <sup>62</sup> pending; <sup>63</sup> and when. <sup>64</sup>

Ill—Chicago & A R Co v Fisher, 31 NE 406, 409, 141 Ill 614

Philip Blum & Co v Standard Acc Ins Co, 83 NE 2d 605, 336 Ill App 354—Bernhardt v Merchants Reserve Life Ins Co, 221 Ill App 66, 68—Chicago Union Traction Co v Lawrence, 113 Ill App 269, 273—St Louis Nat Stock Yards v Godfrey, 101 Ill App 40, 53—Illinois Cent R Co v Jernigan, 101 Ill App 1, 12

Mo—Perringer v Lynn Food Co, App, 148 SW 2d 601, 609

68 C.J. p 255 notes 23, 24

#### Similarly defined

During or in the time that  
Ill—Bernhardt v Merchants Reserve Life Ins Co, 221 Ill App 66, 68

Phrases employing the word "while" and of which more recent adjudications have not been found see 68 C.J. p 255 note 23—p 256 note 57

60. Ind—Greener v Niehaus, 89 N E 377, 378, 44 Ind App 674

61. Ind—Hamann v Mink, 99 Ind 279, 285

#### At the same time as

Ill—Bernhardt v Merchants Reserve Life Ins Co, 221 Ill App 66, 68

62. Ill—Bernhardt v Merchants Reserve Life Ins Co, supra

Me—Lambert v New England Fire Ins Co, 90 A 2d 451, 455, 148 Me 60

Mo—Zancker v Northern Ins Co of New York, 176 SW 2d 523, 526, 238 Mo App 110

NJ—Atlantic Cas Ins Co v Interstate Ins Co, 100 A 2d 192, 197, 28 NJ Super 81

68 C.J. p 255 note 20

63. Ga—Fireman's Fund Ins Co v Jackson, 131 SE 359, 360, 161 Ga 559

64. US—Commercial Travelers' Mut. Acc Assoc. of America v.

"While" is also defined as meaning a space of time, especially when short and marked by some action or happening<sup>65</sup>

"While" has been distinguished from "provided" see 73 C.J.S. p 267 note 4.

**WHIP.** To beat or lash<sup>66</sup>

*Whipping* A mode of punishment by the infliction of stripes, occasionally used in England and a few of the American states.<sup>67</sup> As not a cruel and unusual punishment see Criminal Law § 1978 b.

**WHIPSTOCK.** As a device used in the drilling of oil wells see Mines and Minerals § 3 h.

**WHISKEY.** Defined see Intoxicating Liquors § 13.

**WHISTLING.** Applied to a horse, a noise made in respiration while trotting or cantering.<sup>68</sup>

**WHITE.** The word "white" is defined generally as meaning of the color of pure snow, milk, or sunlight; reflecting to the eye all the rays of the spectrum combined, the opposite of black or dark<sup>69</sup>

In an ethnological sense, the word "white" denotes the members of the white or Caucasian race or people, and is used to distinguish between the white, the African, and the Mongolian races<sup>70</sup>

*White person.* A person of the Caucasian race,<sup>71</sup> persons having a light complexion, as members of

the Caucasian race; opposed to negro and also the red, yellow, and brown races<sup>72</sup> The words are of common speech and not of scientific origin,<sup>73</sup> and import a racial and not an individual test,<sup>74</sup> and have reference to race rather than to color.<sup>75</sup>

In the United States, at least, the term has acquired a well settled meaning in common speech,<sup>76</sup> indicates only a person of what is popularly known as the Caucasian race,<sup>77</sup> is used to include all persons belonging to such race in distinction from members of races sometimes referred to as the black, brown, red, and yellow races,<sup>78</sup> and, as commonly understood, includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as fair whites or dark whites, and although certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin.<sup>79</sup>

Taken in a strictly literal sense, the term constitutes a very indefinite description of a class of persons, where none can be said to be literally white,<sup>80</sup> and it has been said that a construction of the term to mean Europeans and persons of European descent is ambiguous<sup>81</sup>

The term "white person" has been held to include an Armenian born in Asiatic Turkey,<sup>82</sup> Arabs,<sup>83</sup> a person with but one-sixteenth part Indian blood,<sup>84</sup> and a Syrian<sup>85</sup>

The term has been held not to include Afghans,<sup>86</sup> American Indians,<sup>87</sup> Chinese,<sup>88</sup> a Filipino,<sup>89</sup> Hawai-

Fulton, N.Y., 79 F 423, 425, 24 CCA 654

65. US—Lumber Mut Cas Ins Co of N.Y. v Stukes, D.C.S.C., 72 F Supp 463, 467

Va—Ayres v Harleysville Mut Casualty Co, 2 SE2d 303, 306, 172 Va 383

66. Webster New Int D 68 C.J. p 256 note 60

67. Black L D

68. N.Y.—King v. Cave, cited in 29 Alb L.J. 25

69. Webster New Int D

70. US—In re Ellis, D.C.Or., 179 F 1002, 1003, 1004 See Race 74 C.J.S. p 281 notes 6-15

71. US—In re Ellis, D.C.Or., 179 F 1002, 1004 68 C.J. p 258 note 29

Phrases employing the term "white person" and of which more recent adjudications have not been found see 68 C.J. p 258 note 60-p 259 note 64

72. Okl.—Scott v Epperson, 284 P 19, 20, 141 Okl 41

73. US—U. S. v. Bhagat Singh

Thind, Or., 43 S.Ct. 338, 339, 261 US 204, 67 L.Ed. 616

74. US—Takao Ozawa v U.S., Hawaii, 43 S.Ct. 65, 68, 260 US 178, 67 L.Ed. 199

68 C.J. p 258 note 32

75. US—U.S. v Balsara, CCA N.Y., 180 F 694, 696—In re Najour, CCGa., 174 F 735

76. US—In re Camille, C.C.Or., 6 F 256, 257, 6 Sawy 541

68 C.J. p 258 note 34

77. US—U.S. v Bhagat Singh Thind, Or., 43 S.Ct. 338, 339, 261 US 204, 67 L.Ed. 616—Takao Ozawa v U.S., Hawaii, 43 S.Ct. 65, 68, 260 US 178, 67 L.Ed. 199

78. US—U.S. v Ali, D.C.Mich., 7 F 2d 728, 731

79. US—Petition of Easurk Emsen Charr, D.C.Mo., 273 F 207, 209

80. "Those called white may be found of every shade from the lightest blonde to the most swarthy brunette"

US—In re Camille, C.C.Or., 6 F 256, 257, 6 Sawy 541

68 C.J. p 258 note 38

81. US—In re Halladjan, C.C. Mass., 174 F 834, 835, 837

82. US—In re Halladjan, supra

83. US—In re Mohriez, D.C. Mass., 54 F Supp 941, 942

Contra

US—In re Ahmed Hassan, D.C. Mich., 48 F Supp 843, 845

84. Me—Bailey v Fiske, 34 Me 77, 78

85. US—Dow v U.S., C.C.A.S.C., 226 F 145

68 C.J. p 258 note 42

86. US—In re Feroz Din, D.C. Cal., 27 F 2d 568

87. US—In re Camille, C.C.Or., 6 F 256, 257, 6 Sawy 541

Okl.—Scott v Epperson, 284 P 19, 20, 141 Okl 41

88. US—In re Fisher, D.C. Cal., 21 F 2d 1007

In re Ah Yup, D.C. Cal., 1 F Cas. No 104, 5 Sawy 155, 157, 17 Alb. L.J. 385

89. US—In re Cariaga, D.C. Mich., 47 F 2d 609

ians,<sup>90</sup> natives of India,<sup>91</sup> Japanese,<sup>92</sup> Koreans,<sup>93</sup> members of the Mongolian race,<sup>94</sup> or negroes,<sup>95</sup> and the term does not include persons of various blood mixtures.<sup>96</sup>

Under Code Noir of France, which obtained in Louisiana, if the proportion of African blood did not exceed one-eighth, the person was deemed white<sup>97</sup>

*Other phrases* employing the word "white" are set out in the note<sup>98</sup>

**WHITING.** Chalk which has been dried, and afterward ground, levigated, and again dried<sup>99</sup>

**WHO.** A word which may serve as a pronoun or conjunction or both<sup>1</sup> "Who," "which," and "that" agree in being relatives, and are more or less interchangeable as such<sup>2</sup> Primarily and grammatically,

the word relates to persons, but may include artificial persons, such as corporations<sup>3</sup>

**WHOEVER.** A comprehensive term<sup>4</sup> which refers to a person or persons,<sup>5</sup> and may include artificial persons, such as a municipality,<sup>6</sup> corporations,<sup>7</sup> and public officers as well as private persons<sup>8</sup>

It has been held to be synonymous with "person" see 70 C.J.S. p 689 note 85.

**WHOLE.** The word "whole" is defined generally as meaning entire, complete,<sup>9</sup> without omission, reduction, or diminution,<sup>10</sup> comprising all of the parts<sup>11</sup>

The word is sometimes used in a somewhat different sense to mean hale, hearty, strong, sound,<sup>12</sup> well<sup>13</sup>

90. Utah—In re Kanaka Nian, 6 Utah 259, 21 P 993, 4 L.R.A. 726

#### Hindus

91 US—U S v Bhagat Singh Thind, Or, 43 S.Ct. 338, 339, 261 US 204, 67 L.Ed. 616  
68 C.J. p 253 note 43

#### Parsees

US—Wadia v U S, C.C.A.N.Y., 101 F.2d 7, 8

92. US—In re Fisher, D.C. Cal., 21 F.2d 1007  
68 C.J. p 253 note 49

93 US—Petition of Easurk Emsen Charr, D.C. Mo., 273 F. 207, 209

94 US—In re Buntaro Kumagai, D.C. Wash., 163 F. 922, 924  
68 C.J. p 253 note 52

95 US—U S v Perryman, 100 U.S. 235, 236, 25 L.Ed. 645, 15 Ct.Cl. 621

**Person of one-fourth African blood**  
Ky—Gentry v McMinnis, 3 Dana 382, 385

#### 96 Not white person

(1) Person in whom Malay blood predominates

US—In re Lampitoe, D.C. N.Y., 232 F. 382

(2) Person whose father was English, and mother half Chinese and half Japanese

US—In re Knight, D.C. N.Y., 171 F. 299, 300

(3) Person having German father and Japanese mother

US—In re Young, D.C. Wash., 198 F. 715, 716—In re Young, D.C. Wash., 195 F. 645, 646

(4) Person having white Canadian father and Indian mother

US—In re Camille, C.C. Or., 6 F. 256, 258, 6 Sawy 541

(5) Person whose mother was Chinese and father was part Portuguese and part Chinese

US—In re Fisher, D.C. Cal., 21 F.2d 1007.

97 US—In re Camille, C.C. Or., 6 F. 256, 258, 6 Sawy 541

SC—State v Davis, 18 S.C.L. 558, 560

#### 98 Phrases

(1) "White damp" see Mines and Minerals § 3h

(2) "White metal" see 57 C.J.S. p 1074 note 46

(3) "White mule" see Intoxicating Liquors § 13, and Criminal Law § 535

(4) "White oak," an American oak of the eastern United States, having characteristic leaves with usually seven deep, rounded, entire lobes, also, its very hard strong wood, used in construction work and in manufacturing. By extension, any species of oak of the group of which the above is typical, having acorns maturing the first season  
Ark—Taylor v Union Sawmill Co., 152 S.W. 150, 151, 105 Ark. 518

(5) "White top," a noxious weed, otherwise known as "lepidum draba"  
Utah—Barlow v Davis, 137 P.2d 357, 359, 103 Utah 566

(6) Additional phrases employing the word "white" and of which more recent adjudications have not been found see 68 C.J. p 257 notes 20-26

99. US—U S v Tiffany, C.C. N.Y., 117 F. 367

**"Whiting card"** is a heavy piece of machinery used in the textile industry for combing cotton fibre and other types of fibres

Ga—J C Pirkle Mach Co v Lester, 54 S.E.2d 298, 299, 79 Ga.App. 512

1. Ind—Seiler v State, 67 N.E. 448, 449, 160 Ind. 605  
68 C.J. p 259 note 66

**Phrases** employing the word "who" and of which more recent adjudications have not been found see 68 C.J. p 259 notes 69-72

2 Utah—Dunn v Bryan, 299 P. 253, 255, 256, 77 Utah 604

3. NY—In re Lydig's Estate, 260 N.Y.S. 147, 150, 145 Misc. 321

4. Me—Mott v. Mott, 78 A. 900, 107 Me. 481

5. Ind—State v Bruner, 35 N.E. 22, 24, 135 Ind. 419

6. Ind—State v Bruner, supra  
Mass—Attorney General v City of Woburn, 79 N.E.2d 187, 189, 322 Mass. 634

7. US—American Socialist Soc. v. U S, C.C.A.N.Y., 266 F. 212, 213  
68 C.J. p 259 note 75

8 Mass—Palmer v Wakefield, 102 Mass. 214, 215

9. Tex—Great Eastern Casualty Co v Smith, Civ App., 174 S.W. 687

W Va—Clark v Commercial Casualty Ins Co., 148 S.E. 319, 320, 107 W Va. 350

#### Phrases

(1) "Whole blood" see 11 C.J.S. p 366 note 161

(2) Other phrases employing the word "whole" and of which more recent adjudications have not been found see 68 C.J. p 259 note 80-p 260 note 14

10 Tex—Great Eastern Casualty Co v Smith, Civ App., 174 S.W. 687, 688

11. Pa—In re Duffy's Estate, 169 A. 142, 144, 313 Pa. 101

12 Tex—Great Eastern Casualty Co v Smith, Civ App., 174 S.W. 687, 688

W Va—Clark v Commercial Casualty Ins Co., 148 S.E. 319, 320, 107 W Va. 380

13 Tex—Great Eastern Casualty Co v Smith, Civ App., 174 S.W. 687, 688.

"Whole" has been held to be synonymous with, or equivalent to, "all" see 3 CJS p 869 note 2.

**WHOLESALE.** The word "wholesale" is defined in Sales § 1 e (2). Phrases employing the word are set out in the note <sup>14</sup>

**WHOLESALER.** The word "wholesaler" is defined in Sales § 1 e (2).

**WHOLESOME.** The word is defined to mean sound, tending to promote health <sup>15</sup>

**WHOLLY.** The word "wholly" is defined as meaning in a whole or complete manner, <sup>16</sup> entirely, <sup>17</sup> completely, <sup>18</sup> fully, totally, <sup>19</sup> perfectly <sup>20</sup>

"Wholly" is also used in the sense of exclusively, <sup>21</sup> and as so used means to the exclusion of other things <sup>22</sup>

"Wholly" has been held to be equivalent to, or synonymous with, "equally" see 30 CJS p 294 note 84, "exclusively" see 33 CJS p 114 note 44, "purely" see 73 CJS p 1259 note 43, "solely" see 81 CJS p 387 note 50, and "totally" see 86 CJS p 987 note 33.

**WHOM IT MAY CONCERN.** See 15 C.J.S. p 799 notes 22-24.

**WHORE.** The word "whore" has a common and accepted meaning, <sup>23</sup> implying the practice of whoredom, <sup>24</sup> and signifies a woman who practices unlawful sexual commerce, <sup>25</sup> a woman who prostitutes her body for hire; <sup>26</sup> a woman who practices or holds unlawful sexual intercourse with men either for hire <sup>27</sup> or to gratify a depraved passion, <sup>28</sup> a prostitute, <sup>29</sup> a hoolot <sup>30</sup> The term may be employed as referring to a courtesan, a strumpet, <sup>31</sup> a lewd or incontinent woman, <sup>32</sup> a concubine, <sup>33</sup> a punk or a wench <sup>34</sup>

The term is sometimes applied to one who has admitted adultery or fornication, <sup>35</sup> but a single act of intercourse does not constitute a woman a whore <sup>36</sup>

"Whore" has been distinguished from "bitch" see 11 CJS p 351 note 98.

**WHOREDOG.** A man addicted to whoring; a man addicted to sexual intercourse with women other than his own wife <sup>37</sup>

#### 14 Phrases

(1) "Wholesale dealer" see 25 CJS p 1045 notes 40-47

(2) "Wholesale factory prices" see 35 CJS p 477 note 1

(3) "Wholesale insurance" distinguished from "group insurance" see Insurance § 15

(4) "Wholesale price" see 72 CJS p 499 note 16

(5) Other phrases employing the word "wholesale" and of which more recent adjudications have not been found see 68 CJ p 260 notes 31-33, 53-p 261 note 64

15 Ohio—Leonardi v. A. Habermann Provision Co, 56 NE2d 232, 237, 143 Ohio St 623

16 Tenn—Knox v Washer, 284 S W 888, 889, 153 Tenn 630

**Phrases** employing the word "wholly" and of which more recent adjudications have not been found see 68 CJ p 261 note 76-p 262 note 2

17. NJ—Friedman v National Cas Co, 41 A 2d 128, 130, 132 NJ Law 470

Tenn—Knox v Washer, 284 S W 888, 889, 153 Tenn. 630

18. NJ—Friedman v. National Cas. Co, 41 A 2d 128, 130, 132 NJ Law 470

Pa—Kahn v Griscom, 18 A 2d 499, 504, 144 Pa Super 126—Eisenhauer v New York Life Ins Co, 189 A 561, 563, 125 Pa Super 403

Tenn—Knox v. Washer, 284 S W. 888, 889, 153 Tenn. 630.

19 Ind—Chicago & Calumet Dist Transit Co v Mueller, 12 NE 2d 247, 249, 213 Ind 530

NJ—Friedman v National Cas Co, 41 A 2d 128, 130, 132 NJ Law 470

20 Tenn—Knox v Washer, 284 S W 888, 889, 153 Tenn 630

21 Va—Commonwealth v City of Richmond, 81 SE 69, 73, 116 Va 69, LRA 1915A 1118

22 Ind—Chicago & Calumet Dist Transit Co v Mueller, 12 NE 2d 247, 249, 213 Ind 530

Va—Commonwealth v City of Richmond, 81 SE 69, 73, 116 Va 69, LRA 1915A 1118

23. W Va—Cottle v Cottle, 40 SE 2d 863, 868, 129 W Va 344

**Phrases** employing the word "whore" and of which more recent adjudications have not been found see 68 CJ p 262 notes 18-20

24. Mo—Ferber v Brueckl, 243 SW 230, 231, 210 Mo App 223 See Libel and Slander § 30

25. W Va—Cottle v Cottle, 40 SE 2d 863, 868, 129 W Va 344

26. Ind—Peterson v Murray, 41 NE 836, 837, 13 Ind App 420 W Va—Cottle v Cottle, 40 SE 2d 863, 868, 129 W Va 344

27. Or—Barnett v. Phelps, 191 P 502, 503, 97 Or 242, 11 ALR 663 68 CJ p 262 note 5

28. Ind—Peterson v Murray, 41 NE 836, 837, 13 Ind App 420

Mich—Rowe v Myers, 169 NW 823, 825, 204 Mich 374

29. W Va—Cottle v Cottle, 40 SE 2d 863, 868, 129 W Va 344 68 CJ p 262 note 11

"Prostitute" defined see Prostitution § 1

30 W Va—Cottle v. Cottle, supra 68 CJ p 262 note 9

31 Ind—Peterson v Murray, 41 NE 836, 837, 13 Ind App 420

SC—Zimmerman v McMakin, 22 SC 372, 378, 53 Am R 720

32. Ala—Scott v McKinnish, 15 Ala 662, 664

33. Iowa—Sheehy v Cokley, 43 Iowa 183, 185, 22 Am R 236

34. SC—Zimmerman v McMakin, 22 SC 372, 378, 53 Am R 720

35. Ga—Michelson v Lavin, 20 SE 292, 293, 95 Ga 565

**Applied to a single woman,** "whore" is equivalent to charging her with having been guilty of fornication Ill—Slaughter v Johnson, 181 Ill App 693, 698

**Woman not necessarily promiscuous** "The term 'whore' does not necessarily imply, in common parlance, that the woman referred to is promiscuous and mercenary in the matter of lewdness"

Ill—Claypool v. Claypool, 56 Ill App. 17, 22

36 Ind—Peterson v Murray, 41 NE 836, 837, 13 Ind App. 420 68 CJ p 262 note 15

37 NB—Currie v. Stairs, 25 NB 4, 11.

**WHOREDOM.** A comprehensive term, including every species of illicit intercourse between the sexes,<sup>38</sup> any act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person.<sup>39</sup>

**WHOREHOUSE.** A bawdy house; a house of ill fame;<sup>40</sup> a house of common prostitution.<sup>41</sup>

**WHOREMASTER.** In its ordinary and usual meaning, one who practices lewdness, in its secondary meaning, one who keeps or procures whores for others; a pimp; a procurer.<sup>42</sup>

**WHORISE.** Lewd, unchaste; incontinent,<sup>43</sup> resembling a whore in character or conduct, addicted to unlawful sexual pleasures<sup>44</sup>

**WICKED.** Sinful; criminal, guilty; unjust<sup>45</sup> It has been compared with, or distinguished from, "bad" see 7 C J S. p 1317 note 8.

**WIDE.** The word "wide," from which comes "width,"<sup>46</sup> is defined as meaning of a specified measure in a direction at right angles to that of length<sup>47</sup>

**WIDEN.** A word of clear and definite meaning,<sup>48</sup> in its ordinary sense it means to increase in width, to extend<sup>49</sup>

It has been held to be equivalent to, or synonymous with, "extend" see 35 C.J.S. p 288 note 35.

**WIDOW.** The word "widow," of Sanskrit derivation,<sup>50</sup> and meaning without a husband, or lack of a husband,<sup>51</sup> is said to be as old as the language itself<sup>52</sup>

The present meaning of the term is familiar, well fixed,<sup>53</sup> certain,<sup>54</sup> and definite,<sup>55</sup> and it is defined, both popularly and legally,<sup>56</sup> to mean a woman who has lost her husband by death<sup>57</sup> and has not taken another,<sup>58</sup> the surviving lawful wife of a dece-

38. Ind—Rodebaugh v Hollingsworth, 6 Ind 339

See Libel and Slander § 30

39. Ind—Fahnestock v State, 1 N E 372, 376, 102 Ind 156  
68 C J p 262 note 23

40. N Y—Wright v Paige, 36 Barb 438, 440

See Disorderly Houses § 1 et seq

41. N Y—Wright v Paige, 36 Barb 438, 440

42. Ky—Hickerson v. Masters, 226 S W 1072, 1073, 190 Ky 168  
See Prostitution § 6

43. Ala—Scott v McKinnish, 15 Ala 662, 664

S C—Zimmerman v McMakin, 22 S C 372, 378, 53 Am R 720

"Whorish bitch" see 11 C J S p 351 note 6

44. S C—Zimmerman v McMakin, 22 S C 372, 378, 53 Am R 720

45. S C—State v Haynie, 68 SE 2d 628, 629, 221 S C 45

46. Mont—State v Board of Com'rs of Big Horn County, 273 P. 290, 293, 83 Mont 540

47. Mont—State v Board of Com'rs of Big Horn County, supra

48. N J—Beck v. United New Jersey R., etc, Co, 39 N J Law 45, 47

49. Del—In re Day, 109 A 573, 30 Del 556

#### Phrases

(1) "Widen a street" means merely to extend its width  
Cal—Wilcoxon v San Luis Obispo, 35 P 988, 989, 101 Cal 508  
68 C J p 262 note 35

(2) Other phrases employing the word "widen" and of which more recent adjudications have not been

found see 68 C J p 262 note 36—p 263 note 38

50. N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453  
Ohio—Kunkle v Reeser, 5 Ohio S & CP 422, 425

51. N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453  
Ohio—Kunkle v Reeser, 5 Ohio S & CP 422, 425

52. Mont—O'Malley v O'Malley, 129 P 501, 502, 46 Mont 549, Ann Cas 1914B 662  
N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453

53. N J—Corpus Juris quoted in Montclair Trust Co v Reynolds, Ch, 56 A 2d 904, 905, 906, 141 N J Eq 276

N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453

54. N J—Corpus Juris quoted in Montclair Trust Co v Reynolds, Ch, 56 A 2d 904, 905, 906, 141 N J Eq 276

N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453

55. N J—In re Embiricos' Estate, 52 N Y S 2d 425, 427, 184 Misc 453

56. N J—Corpus Juris quoted in Montclair Trust Co v Reynolds, Ch, 56 A 2d 904, 905, 906, 141 N J Eq 276

N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453

Wait v Wait, 4 Barb 192, 205

57. N J—In re Embiricos' Estate, 52 N Y S 2d 425, 427, 184 Misc 453

58. N J—Corpus Juris quoted in Montclair Trust Co v Reynolds, Ch, 56 A 2d 904, 905, 906, 141 N J Eq 276

N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453.

68 C J p 263 note 45

#### Generally

Ohio—In re Waters' Estate, Prob, 101 NE 2d 815, 816

57. Ga—Odom v Atlanta & W P R Co, 51 SE 2d 466, 467, 78 Ga App 477

Ill—People ex rel Mosco v Service Recognition Bd, 86 NE 2d 357, 361, 403 Ill 442

N J—Corpus Juris quoted in Montclair Trust Co v Reynolds, 56 A. 2d 904, 906, 141 N J Eq 276

N Y—Corpus Juris quoted in In re Embiricos' Estate, 52 N Y S 2d 424, 427, 428, 184 Misc 453

S C—Lytle v Southern R.—Carolina Division, 171 SE 42, 44, 171 S C 221, 90 A L R 915

68 C J p 263 note 46

#### Phrases

(1) "Widow's allowance" see Executors and Administrators §§ 323-366

(2) "Widow's quarantine" as the right of a widow to occupy and enjoy the mansion house and curtilage of her husband, rent free, for a fixed period after his death or until dower is assigned to her see Executors and Administrators § 327

(3) "Widow's thirds" see Dower § 6 b

(4) Other phrases employing the word "widow" and of which more recent adjudications have not been found see 68 C J p 263 note 53—p 264 note 70

58. Ill—People ex rel Mosco v Service Recognition Bd, 86 NE 2d 357, 361, 403 Ill 442

N J—Corpus Juris quoted in Montclair Trust Co v Reynolds, 56 A. 2d 904, 905, 906, 141 N J Eq. 276

N Y—Corpus Juris quoted in In re

dent,<sup>59</sup> a wife who outlives her husband,<sup>60</sup> one whose husband is dead,<sup>61</sup> a surviving wife,<sup>62</sup> and it has been said that in legal writings "widow" is an addition given to a woman who is unmarried and whose husband is dead.<sup>63</sup>

The word "widow" denotes the woman who was the decedent's lawful wife at the time of his death,<sup>64</sup> and in order for a woman to become the widow of a man at the time of his death the parties must have been united by a valid marriage,<sup>65</sup> and the marriage must have continued up to the time of the husband's death.<sup>66</sup> Thus, if one of the parties was unable to enter into a lawful marriage,<sup>67</sup> or if there is a valid marriage but it is terminated by a final decree of divorce,<sup>68</sup> the woman will not be regarded as the widow of the man, but if it is merely an interlocutory decree of divorce which is granted, and the husband dies before the divorce becomes

final, the woman will be deemed to be a widow.<sup>69</sup>

Ordinarily a wife becomes a widow if the marital relation was in existence at the time of the husband's death, even though the wife may have abandoned the husband,<sup>70</sup> but the term may be used so it will not include an unfaithful wife who has abandoned her husband<sup>71</sup> or a wife who at her husband's death is living in adultery with another man.<sup>72</sup>

Immediately on the death of her husband the surviving wife becomes a widow,<sup>73</sup> but she does not become a widow until after her husband's death,<sup>74</sup> and a wife dying and leaving a husband surviving can in no sense be regarded as a widow.<sup>75</sup>

The word "widow" is frequently defined as meaning an unmarried woman whose husband is dead,<sup>76</sup> but it also is defined as meaning a married woman whose husband is dead,<sup>77</sup> and these definitions

Embricos' Estate, 52 NYS 2d 425, 427, 428, 184 Misc 453  
68 C.J. p 263 note 46

#### Similarly defined

(1) A woman whose husband is deceased and who has not remarried  
Ill—People ex rel Mosco v Service Recognition Bd, 86 NE 2d 357, 361, 403 Ill 442

(2) A woman who has lost her husband by death and remains unmarried

NJ—Montclair Trust Co v Reynolds, Ch, 56 A 2d 904, 905, 141 N J Eq 276

(3) Husbandless  
Ohio—Rittenhouse v. Hicks, 10 Ohio Dec (Reprint) 759

59. NJ—Corpus Juris quoted in Montclair Trust Co v Reynolds, Ch, 56 A 2d 904, 905, 141 N J Eq 276

Tex—Hayworth v Williams, 116 S W 43, 45, 102 Tex 308, 132 Am SR 879

60. Ala—Goodman v McMillan, 61 So 2d 55, 57, 58, 258 Ala 125

NJ—New Jersey Title Guarantee & Trust Co v Perry, 170 A 34, 35, 115 N J Eq 8

61. NJ—New Jersey Title Guarantee & Trust Co v Perry, supra

62. US—Moore Dry Dock Co v Pillsbury, C A Cal, 169 F 2d 988, 990

63. Ill—People ex rel Mosco v Service Recognition Bd, 86 NE 2d 357, 361, 403 Ill 442

NY—In re Embricos' Estate, 52 NYS 2d 425, 427, 428, 184 Misc 453

64. Or—Rosell v. State Industrial Accident Commission, 95 P 2d 726, 729, 164 Or 173

65. US—Castor v. U S, C A Mo, 174 F 2d 481, 483—Bolin v Marshall, C C A Or, 76 F 2d 668, 669.

NY—In re Klumenko's Estate, 2 NYS 2d 145, 146, 166 Misc 148

**Putative wife of deceased man cannot be said to be his widow**

La—Vaughan v Dalton-Lard Lumber Co, 43 So 926, 927, 119 La 61  
Navarrette v Joseph Laughlin, Inc, App, 20 So 2d 313, 318—Fulton Bag & Cotton Mills v Fernandez, App, 159 So 339, 345

66. US—Schurink v. U S, C A Ala, 177 F 2d 809, 811

67. US—Castor v. U S, C A Mo, 174 F 2d 481, 483  
Muir v U S, D C Cal, 93 F Supp 939, 941—Morton v U S, D C Pa, 93 F Supp 75, 76

Okl—In re Jones' Estate, 155 P 2d 980, 982, 195 Okl 168

#### Bigamous wife not widow

NY—Battalico v Knickerbocker Fireproofing Co, 294 NYS 481, 485, 250 App Div 258

68. US—Schurink v. U S, C A Ala, 177 F 2d 809, 811

Ala—Goodman v. McMillan, 61 So 2d 55, 58, 288 Ala 125—Alabama Pension Commission v Morris, 4 So 2d 896, 897, 242 Ala 110

Mich—Dahlin v Knights of Modern Maccabees, 115 NW 975, 977, 151 Mich 644

NJ—New Jersey Title Guarantee & Trust Co v Perry, 170 A 34, 35, 115 N J Eq 8—Block v. P & G Realty Co, 124 A 372, 96 N J Eq 159

NY—Voke v Platt, 96 NYS 725, 726, 48 Misc 273

Wis—In re Buchanan's Will, 251 N W 250, 251, 213 Wis 299

68 C.J. p 263 note 47 [b]

#### Wife defendant in pending divorce action

Iowa—In re Quinn's Estate, 55 NW 2d 175, 176, 243 Iowa 1271

69. Ill—Chapman v Gulf, M & O

R Co, 86 NE 2d 552, 556, 337 Ill App 611

#### Possibility of reconciliation

It cannot be assumed that the parties would not have become reconciled before the decree became final  
Ill—Chapman v Gulf, M & O R Co, supra

70. US—Kandelin v Social Security Board, C C A NY, 136 F 2d 327, 328

71. SC—Lytle v Southern Ry—Carolina Division, 171 SE 42, 43, 44, 171 SC 221, 90 ALR 915

72. SC—Lytle v. Southern Ry—Carolina Division, supra

#### Only technically a widow

Tenn—Prater v Prater, 9 SW 361, 364, 87 Tenn 78, 10 Am SR 623

73. Ga—Leatherman v J Austin Dillon Co, 13 SE 2d 94, 64 Ga App 314

74. US—Schurink v. U S, C A Ala, 177 F 2d 809, 811

75. Wis—Chesterfield v Hoskin, 113 NW 647, 649, 133 Wis 368

76. US—Trathen v U S, C A Pa, 198 F 2d 757, 759

Trathen v U S, D C Pa, 96 F. Supp 809, 812

NY—In re Embricos' Estate, 52 NYS 2d 425, 427, 428, 184 Misc 453  
—In re Ray's Estate, 35 NYS 481, 484, 13 Misc 480

77. Or—Rosell v State Industrial Accident Commission, 95 P 2d 726, 729, 164 Or 173

Wash—Lewis v Department of Labor and Industries, 70 P 2d 298, 190 Wash 620—McKay v Department of Labor and Industries, 39 P 2d 997, 998, 180 Wash 191, 98 ALR 990—Meton v State Industrial Insurance Department, 177 P. 696, 697, 104 Wash 652.

present the question which has arisen in a number of cases whether a woman who has become a widow continues as such after her remarriage. It is generally recognized that widowhood ceases on the woman's remarriage,<sup>78</sup> and a widow who remarries cannot be a widow,<sup>79</sup> since the word "widow" is exclusively descriptive of an unmarried condition.<sup>80</sup> However, the word "widow" is frequently used to refer to the person of the surviving spouse, rather than to her marital state or condition,<sup>81</sup> that is, the term does not indicate whether she remains a widow or marries again,<sup>82</sup> and thus it has been said that in the general sense of mankind, and even in a legal sense,<sup>83</sup> although a widow remarries and becomes the wife of another she does not cease to be the widow of the deceased husband.<sup>84</sup> The question whether a wife whose husband has died is to be regarded as a widow after her remarriage commonly arises in cases involving exemptions from inheritance taxes, and is treated in Taxation § 1163 a.

"Widow" has been compared with, or distinguished from, "wife" see Husband and Wife § 3, and "widower"<sup>85</sup>

Statutes providing for a right of action in case of death may designate the widow to be the beneficiary, and the meaning of the term as used in this connection is treated in Death § 34.

The word "widow" is commonly employed in this work in relation to the right to take or inherit property upon the death of the husband, and the term is treated in this connection in Descent and Distribution §§ 48-60, and in Wills § 691.

Under many of the workmen's compensation acts, upon the death of an employee, his widow may be entitled to obtain compensation or benefits, and the meaning which has been attributed to the word "widow," as used in this connection, is treated in the C.J.S. title Workmen's Compensation § 140, also 71 C J p 536 note 36-p 541 note 21

The word "widow" is also treated in various other titles throughout this work and for specific references see the various title indexes and consult the Descriptive-Word Index. References may also be found under the heading "surviving spouse."

*As a verb* The word "widow" is defined as meaning to make a widow; to deprive of something desirable or that suggests a husband's companionship or support.<sup>86</sup>

**WIDOWER.** The word "widower" is a correlative of the word "widow,"<sup>87</sup> and in common, colloquial, and accepted use refers to a man whose wife is dead,<sup>88</sup> and is defined generally as meaning a man who has lost his wife by death<sup>89</sup> and has not re-

78. N Y—In re Embiricos' Estate, 52 N Y S 2d 425, 427, 428, 184 Misc 453

79. Ill—People ex rel Mosco v Service Recognition Bd., 86 NE 2d 357, 361, 403 Ill 442

Ohio—In re Waters' Estate, Prob., 101 NE 2d 815, 816

Pa—Appeal of Kerns, 14 A 435, 438, 120 Pa 523.

In common parlance, the term "widow" means an unmarried woman  
Pa—In re Conway's Estate, 5 Pa Dist 332, 334

80. Ohio—In re Waters' Estate, Prob., 101 NE 2d 815, 817.

81. US—Trathen v U. S., C A Pa., 198 F 2d 757, 759

Ark—Davis v Neal, 140 SW. 278, 279, 100 Ark 399, L R A 1916A 999

Cal—In re McArthur's Estate, 292 P 469, 471, 210 Cal 439, 72 A L R 1318

Ga—Georgia Railroad & Banking Co v Garr, 57 Ga 277, 279, 24 Am R 492

Kan—Duckett v Kansas Soldiers' Compensation Board, 66 P 2d 410, 412, 145 Kan 520

Mich—In re Rhead's Estate, 284 N W. 706, 288 Mich 220.

Mont—Mathews v Marsden, 230 P 775, 778, 71 Mont 502

82. US—Trathen v U. S., C A Pa., 198 F 2d 757, 759

Ark—Davis v Neal, 140 SW 278, 279, 100 Ark 399, L R A 1916A 999

Cal—In re McArthur's Estate, 292 P 469, 471, 210 Cal 439, 72 A L R 1318

Kan—Duckett v Kansas Soldiers' Compensation Board, 66 P 2d 410, 412, 145 Kan 520

Mich—In re Rhead's Estate, 284 N W 706, 288 Mich 220

Mont—Mathews v Marsden, 230 P 775, 777, 71 Mont 502

83. Fla—Corpus Juris quoted in Holland v State ex rel Carroll, 200 So 695, 146 Fla 308

68 C J p 263 note 48

84. Cal—In re McArthur's Estate, 292 P 469, 471, 210 Cal 439, 72 A L R 1318

Fla—Corpus Juris quoted in Holland v State ex rel Carroll, 200 So 695, 146 Fla 308

Kan—Duckett v Kansas Soldiers' Compensation Board, 66 P 2d 410, 412, 145 Kan 520

Mich—In re Rhead's Estate, 284 N W 706, 288 Mich 220.

Mont—Mathews v Marsden, 230 P 775, 777, 71 Mont 502

N Y—In re Ray's Estate, 35 N Y S 481, 484, 18 Misc 480

Ohio—In re Waters' Estate, Prob., 101 NE 2d 815, 817.

68 C J p 263 note 48

85. US—Western Union Tel Co v McGill, Kan., 57 F 699, 703, 6 CC A 521, 21 L R A 818

68 C J p 263 note 51.

86. SC—Lytle v Southern Ry—Carolina Division, 171 SE 42, 44, 171 SC 221, 90 A L R 915

87. N Y—Wait v. Wait, 4 Barb 192, 205

88. Me—Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

Phrases employing the word "widower" and of which more recent adjudications have not been found see 68 C J p 264 notes 74, 75

89. Me—Corpus Juris cited in Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

N Y—Wait v. Wait, N Y, 4 Barb 192, 205

Tex—Corpus Juris cited in Calvert v Fisher, Civ App., 259 SW 2d 944, 946.

married,<sup>90</sup> a man whose wife is dead<sup>91</sup>

As commonly used, "widower" is not descriptive of a man who was previously a widower but has remarried,<sup>92</sup> and it has been said that it would only be used in a figurative sense with such a meaning,<sup>93</sup> since a man ceases to be a widower when he marries again<sup>94</sup> However, it has also been said that a man, although married to another woman, is still the widower of his former wife<sup>95</sup>

In a broad sense the term may include a married man who has lost his wife either by death or judicial decree<sup>96</sup>

"Widower" has been compared with "husband" see Husband and Wife § 2

**WIDOWHOOD.** The state or condition of being a widow, or, sometimes, a widower An estate is sometimes settled on a woman "during widowhood," which is expressed in Latin, "*durante viduitate*"<sup>97</sup>

**WIDTH.** The quality of being wide, extent from side to side; breadth, wideness,<sup>98</sup> the idea of breadth throughout the entire length,<sup>99</sup> a certain measure between the sides measuring in a direction at right angles to that of length<sup>1</sup>

90. Mo—Abrams v Unknown Heirs of Rice, 295 S W 83, 85, 317 Mo 216

Me—Corpus Juris cited in Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

Tex—Corpus Juris cited in Calvert v Fisher, Civ App, 259 S W 2d 944, 946

91. Ill—People v Snyder, 187 NE 158, 160, 353 Ill 184, 88 A L R 1012

Me—Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

92. Me—Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

93. Me—Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

94. Me—Canal Nat Bank of Portland v Bailey, 51 A 2d 482, 483, 142 Me 314

95. Cal—In re McArthur's Estate, 292 P 469, 471, 210 Cal 439, 72 A L R 1318

Kan—Duckett v Kansas Soldiers' Compensation Board, 66 P 2d 410, 412, 145 Kan 520

Mich—In re Rhead's Estate, 284 N W 706, 707, 288 Mich 220

Mont—Mathews v Marsden, 230 P 775, 778, 71 Mont 502

NY—In re Ray's Estate, 35 N Y S 481, 484, 13 Misc 480

Ohio—In re Water's Estate, Prob, 101 NE 2d 815, 818.

96. Ohio—Kunkle v Reeser, 5 Ohio S & C P 422, 425  
68 C J p 264 note 71

97. Black L D

Phrases employing the word "widowhood" and of which more recent adjudications have not been found see 68 C J p 264 notes 76-79

98. Mont—State v Board of Com'rs of Big Horn County, 273 P 290, 293, 83 Mont 540

Phrases employing the word "width" and of which more recent adjudications have not been found see 68 C J p 264 notes 84-86

99. Mont—State v Board of Com'rs of Big Horn County, supra

1. Mich—Phelps v Brevoort, 174 N W 281, 284, 207 Mich 429

2. Ark—Meyer v State, 236 S W 2d 996, 999, 218 Ark 440

3. NC—State v Shoaf, 102 SE 705, 179 NC 744, 9 A L R 426

4. Phrases

(1) "Wife's equity" see Husband and Wife § 29

(2) "Wife whipping" see Husband and Wife § 13

5. Tex—McCracken v Taylor, Civ App, 146 S W 693, 695

6. US—Corkran v U S, D C W Va, 79 F Supp 222, 223

7. Mo—Crawford v Kansas City

**WIENER.** A frankfurter; a sausage prepared from the flesh of cattle, sheep, swine, or goats,<sup>2</sup> a small sausage of unknown content, commonly called a "hot dog"<sup>3</sup>

**WIFE.** The word "wife" is defined in Husband and Wife § 3. The word is employed in various phrases which are set out in the note<sup>4</sup>

**WIFEHOOD.** The state of being a wife<sup>5</sup>

**WILCO.** A term employed in aviation circles meaning message received, understood and will comply<sup>6</sup>

**WILD.** The word "wild" is defined generally as meaning impatient of, or not subjected to, restraint or regulation<sup>7</sup>

**WILDCAT.** Not sound or safe<sup>8</sup>

**WILE.** As a noun, a trick or stratagem practiced for insnaring or deception, a sly, insidious artifice<sup>9</sup> "Wile" has been held to be synonymous with "trick" see 89 C J S p 521 note 31

As a verb, to cheat cunningly, mislead or lead with guile, hoodwink; entice, lure.<sup>10</sup>

Stock Yards Co, 73 S W 2d 308, 312, 228 Mo App 673

#### Phrases

(1) "Wild animals" see Animals § 2  
Injuries by wild animals to persons or animals see Animals §§ 142-144  
Birds and beasts of a wild nature as game see Game § 1

(2) "Wild cat" is a device attached to a winch and operates on the principle of a friction clutch

Cal—Lejeune v General Petroleum Corporation, 18 P 2d 429, 431, 129 Cal App 404

(3) "Wild land" defined see Property § 7 d (2) (e)

(4) "Wild train" see Railroads § 1 q (2)

(5) Other phrases employing the word "wild" and of which more recent adjudications have not been found see 68 C J p 265 notes 5-11

8. Webster New Int D

#### Phrases

(1) "Wildcat strike" see 83 C J S p 545 note 5

(2) "Wildcat train" see Railroads § 1 r (2)

(3) Other phrases employing the term "wildcat" and of which more recent adjudications have not been found see 68 C J p 265 notes 13-15.

9. Webster New Int D.

10. Iowa—State v Hamann, 80 N. W. 1064, 1065, 109 Iowa 646.



**WILL.**

—As a Noun. A faculty of the mind,<sup>11</sup> the faculty of conscious, and especially deliberate, action,<sup>12</sup> the governing power of the mind,<sup>13</sup> manifesting itself in choice, determination, discretion, pleasure, direction, disposition, or inclination<sup>14</sup>

The word may be used as indicating command,<sup>15</sup> consent,<sup>16</sup> desire or wish<sup>17</sup> or intent,<sup>18</sup> and of itself the term connotes purpose, intent, deliberation, volition, freedom from unreasonable restraint, voluntariness, desire, the power to choose, and discretion<sup>19</sup>

"Will" has been held to be equivalent to, or synonymous with, "desire," and the terms have also been distinguished, see 26 CJS p 1242 notes 2, 5

—As a verb. While the word "will" may be used as a principal verb, meaning to dispose of,<sup>20</sup> its more frequent use is as an auxiliary verb,<sup>21</sup> indicating a time in the future,<sup>22</sup> and executory rather than executed in its meaning<sup>23</sup> It is a word of certainty,<sup>24</sup> and commonly it has the mandatory sense of "shall" or "must,"<sup>25</sup> but it is not always used imperatively,<sup>26</sup> and may be used in a directory sense<sup>27</sup>

"Will" has been held to be equivalent to, or synonymous with, "may" see 57 CJS p 459 note

30, "must" see 64 CJS p 1080 note 41, and "shall" see 80 CJS p 135 note 70, and it has been compared with, or distinguished from, "may" see 57 CJS p 459 note 33, and "shall" see 80 CJS p 135 note 71

*Would.* The word "would" is defined as "expressing what might be expected,"<sup>28</sup> and means "necessarily will,"<sup>29</sup> indicating an element of certainty far greater than that expressed by "could"<sup>30</sup>

"Would" has been held to be synonymous with, or equivalent to, "could" see 12 CJS p 892 note 82, "did" see 26 CJS p 1302 note 92, and "should" see 80 CJS p 140 note 76.

"Would" has been compared with or distinguished from "did" see 26 CJS p 1302 note 93, and "should" see 80 CJS p 1302 note 78.

**WILLFUL; WILLFULLY.** The words "willful" and "willfully" are of familiar use in every branch of the law,<sup>31</sup> being commonly employed in averring or describing an act,<sup>32</sup> or in denoting the quality of an act,<sup>33</sup> or in describing the intent with which an act is done,<sup>34</sup> and when so used the terms imply the ability to do the act described.<sup>35</sup>

"Willful" and "willfully" have various meanings,<sup>36</sup> are susceptible of different shades of meaning

11. Ala—McRee's Adm'rs v Means, 34 Ala 349, 352

12. Ohio—State v Schwab, 143 NE 29, 31, 109 Ohio St 532

13. Wis—Lowe v State, 96 NW 417, 424, 118 Wis 641

14. Ala—McRee's Adm'rs v Means, 34 Ala 349, 352

15. Mont—Barney v Hays, 29 P 282, 284, 11 Mont 571, 28 Am SR 495

68 CJ p 265 note 22

16. Conn—State v Gaul, 50 Conn 578, 579

17. Ohio—State v Schwab, 143 NE 29, 31, 109 Ohio St 532

68 CJ p 265 note 24

18. Mont—Barney v Hays, 29 P 282, 284, 11 Mont 571, 28 Am SR 495

19. Ark—Scott v Dodson Ark, 214 SW 2d 357, 362, 214 Ark 1

20. Ind—Mills v Franklin, 28 NE 60, 61, 128 Ind 444

21. Tex—McElroy v Luster, Civ App, 254 SW 2d 893, 896—Airline Motor Coaches v Guidry, Civ App, 241 SW 2d 203, 209

*Phrases* employing the word "will" and of which more recent adjudications have not been found see 68 CJ p 265 notes 35–39

22. N J—Chapman v. Holmes, 10 N J Law 20, 26.

**In third person**

The word "will" in the third person, like "shall" in the first person, ordinarily denotes simple futurity

Minn—Muirhead v Johnson, 46 NW 2d 502, 506, 232 Minn 408

23. Mass—Weed v Boston, etc, Ice Co, 12 Allen 377, 379

24. Minn—Carson v Turrish, 168 NW 349, 352, 140 Minn 445, LRA 1918F 154

Mo—Hubbard v Turner Department Store Co, 278 SW 1060, 1061, 220 Mo App 95

Tex—McElroy v Luster, Civ App, 254 SW 2d 893, 896—Airline Motor Coaches v Guidry, Civ App, 241 SW 2d 203, 209

25. Tex—McElroy v Luster, Civ App, 254 SW 2d 893, 896—Airline Motor Coaches v Guidry, Civ App, 241 SW 2d 203, 209

**"Will" misused for "shall"**

Okl—Russell v Harrison, 124 P 762, 763, 33 Okl 225

26. Mo—Hall v Martindale, App, 166 SW 2d 594, 608

27. US—Kronberg v Hale, CA Cal, 180 F 2d 128, 131

28. Mo—Taylor v Metropolitan St Ry Co, 165 SW 327, 331, 256 Mo 191

**Indicating intention**

The word "would" does not refer to what the person did, but what he intended to do

US—U S v Grossman, D C N Y, 55 F 2d 408, 411

29. Ga—U S Casualty Co v Kelly, 50 SE 2d 238, 240, 78 Ga App 112

*Phrases* employing the word "would" and of which more recent adjudications have not been found see 68 CJ p 266 notes 46–50

30. Ga—U S Casualty Co v Kelly, supra

31. Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

68 CJ p 266 note 54

32. Neb—Minkler v State, 15 NW 330, 331, 14 Neb 181

33. Cal—Swall v Anderson, App, 140 P 2d 196, 199

68 CJ p 285 note 47

34. Cal—Swall v Anderson, supra 68 CJ p 285 note 48

35. NC—Lamm v Lamm, 49 SE 2d 403, 404, 229 NC 248

68 CJ p 272 note 56, p 290 note 22

36. US—Spies v U S, NY, 63 S Ct 364, 367, 317 US. 492, 87 L Ed. 418

Trenton Chemical Co v U S, C. A Mich, 201 F 2d 776, 779—Kempe v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Mass, 142 F 2d 132, 137.

In re Haynes, DCKan, 88 F. Supp 379, 381—Bowles v. Ward, D. C Pa, 65 F.Supp. 880, 890.

or degrees of intensity,<sup>37</sup> and are used in different senses in different connections,<sup>38</sup> and generally their signification will depend on the context in which they appear,<sup>39</sup> the nature of the subject to which they refer,<sup>40</sup> and the evident purpose of the writer.<sup>41</sup>

The words are not necessarily technical,<sup>42</sup> and in civil jurisprudence they are not considered to be words of art,<sup>43</sup> and, although it has been said that they have a well-defined signification in law,<sup>44</sup> they are elastic words,<sup>45</sup> and have acquired no peculiar meaning in law which is universally accepted.<sup>46</sup> In certain branches of the law they do have a technical<sup>47</sup> or special<sup>48</sup> meaning, and there is a difference

in meaning in common usage and as used in the field of criminal law,<sup>49</sup> and when used in penal statutes and in statutes dealing with crime they have a restricted meaning which is accepted, well-understood, and well-defined,<sup>50</sup> but even in the field of criminal law the meaning of the terms is rather flexible.<sup>51</sup> When used in penal statutes and in statutes dealing with crime the words are strong and forceful,<sup>52</sup> and of substantial meaning,<sup>53</sup> and are to be given force<sup>54</sup> and effect.<sup>55</sup>

"Willful" and "willfully" are often<sup>56</sup> and variously<sup>57</sup> defined, in both the civil and the criminal law,<sup>58</sup> and may be defined with a reasonable degree of satisfaction,<sup>59</sup> although they are not easy of ex-

Cal—Swall v Anderson, App, 140 P 2d 196, 199

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Iowa—Blakeley v Shortel's Estate, 20 NW 2d 28, 31, 236 Iowa 787

Neb—Union Transfer Co v Bee Line Motor Freights, 34 NW 2d 363, 365, 150 Neb 280

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571  
68 CJ p 285 note 43

**Phrases** employing the words "willful" or "willfully" and of which more recent adjudications have not been found see 68 CJ p 279 note 80—p 285 note 39, p 295 note 36—p 300 note 24

**When qualifying a verb, "willfully"** has same signification as "willful"  
Puerto Rico—People v Vilar, 17 Puerto Rico 1015, 1020

37. Neb—Hiatt v Tomlinson, 158 NW 383, 385, 100 Neb 51  
68 CJ p 285 note 44

38. Tex—City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

39. US—Spies v U S, NY, 63 S Ct 364, 367, 317 US 492, 87 L Ed 418

Trenton Chemical Co v U S, C A Mich, 201 F 2d 776, 779—Kempe v. U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Mass, 142 F 2d 132, 137

Bowles v Ward, DCPa, 65 F Supp 880, 890

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Iowa—Blakeley v Shortel's Estate, 20 NW 2d 28, 31, 236 Iowa 787

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571

Wash—State v James, 221 P 2d 482, 494, 495 496, 36 Wash 2d 882

68 CJ p 266 note 62, p 285 note 51

**Different meanings in different contexts**

US—U S v Reid, DCMd, 110 F Supp. 253, 257.

#### Meaning indicated by context

The words should be given that meaning only which the context indicates was intended

Cal—Swall v Anderson, App, 140 P 2d 196, 199

#### Different meanings in same statute

Although the presumption is that a word is used throughout the same statute in the same sense, the meaning of the word "willful" in different sections of the same statute must be considered in the different contexts in which the word is found, and it has been recognized that differences in the nature of the penalties imposed may properly lead to differences in the construction of the word, even when used in different sections of the same statute

Tex—Paddock v Siemoneit, 218 SW 2d 428, 435, 147 Tex 571

40. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Iowa—Blakeley v Shortel's Estate, 20 NW 2d 28, 31, 236 Iowa 787

Neb—Union Transfer Co v Bee Line Motor Freights, 34 NW 2d 363, 365, 150 Neb 280

68 CJ p 266 note 62

41. NY—In re Mallon's Estate, 97 NYS 23, 25, 110 App Div 61

68 CJ p 285 note 52

42. Cal—Towle v Matheus, 62 P 1064, 1066, 130 Cal 574

43. Tex—Greer v Franklin Life Ins Co, 221 SW 2d 857, 859, 148 Tex 166

44. Idaho—Mills v Glennon, 6 P 116, 118, 2 Idaho (Hasb) 105.

45. Fla—County Canvassing Board of Primary Elections of Hillsborough County v Lester, 118 So 201, 202, 96 Fla 484

46. Cal—Towle v Matheus, 67 P 1064, 1066, 130 Cal 574

47. US—Baltimore & O R Co v Felgenhauer, CCA Mo, 168 F 2d 12, 19

68 CJ p 266 note 57, p 272 note 48

48. Ark—New Union Coal Co v Walker, 31 SW 2d 753, 755, 182 Ark 460

68 CJ p 266 note 58

49. Tex—Greer v Franklin Life Ins Co, 221 SW 2d 857, 859, 148 Tex 166

50. US—U S v Wilson, DCNM, 116 F Supp 911, 912, 913

Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

68 CJ p 290 notes 13–15

51. Tex—Greer v Franklin Life Ins Co, 221 SW 2d 857, 859, 148 Tex 166

52. US—Thompson v Hays, CCA Mo, 11 F 2d 244, 248

68 CJ p 290 note 16

53. NY—People v Potter, 112 NY S 298, 300

54. US—Thompson v Hays, CCA Mo, 11 F 2d 244, 248

Vt—State v Burlington Drug Co, 78 A 882, 886, 84 Vt 243

55. US—Thompson v Hays, CCA Mo, 11 F 2d 244, 248

56. Okl—State v McMains, 241 P 2d 976, 983, 95 Okl Cr 176

Tex—Jones v Traders & General Ins Co, Civ App, 144 SW 2d 689, 693—Moore v Moore, Civ App, 142 SW 2d 270, 272

68 CJ p 266 note 59

57. Va—Lynch v Commonwealth, 109 SE 427, 428, 131 Va 762

68 CJ p 285 note 50

58. Tex—Jones v Traders & General Ins Co, Civ App, 144 SW 2d 689, 693

#### Cases relating to criminal penalties

"Innumerable definitions of the word 'willfully' may be found in the cases relating to criminal penalties"  
US—U S v Beatty, DC Iowa, 88 F Supp 646, 649

59. Del—Lobdell Car Wheel Co v Subielski, 125 A 462, 464, 32 Del 462.

act<sup>60</sup> or precise<sup>61</sup> definition.

The words "willful" and "willfully," as ordinarily employed, mean nothing more than that the person, of whose action or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent,<sup>62</sup> that is, that what has been done arises from the spontaneous action of his will.<sup>63</sup> Thus the terms imply a conscious act of the mind<sup>64</sup> and denote an attitude of the mind and

will,<sup>65</sup> but they import something more than a mere exercise of the will,<sup>66</sup> and include the idea of consciousness<sup>67</sup> or knowledge,<sup>68</sup> that is, knowledge of all the circumstances;<sup>69</sup> and, when used in connection with an act forbidden by law, the terms carry the idea that, with knowledge, the will consented to, designed, and directed the act.<sup>70</sup> Thus the terms signify an act done knowingly,<sup>71</sup> permissively,<sup>72</sup> voluntarily,<sup>73</sup> deliberately,<sup>74</sup> persistently,<sup>75</sup> perversely,<sup>76</sup> obstinately,<sup>77</sup> or even an act performed

60. Iowa—State v Willing, 105 N W 355, 356, 129 Iowa 72  
68 C J p 266 note 61

61. US—U S v Three Railroad Cars, DC N Y, 28 F Cas No 16,513, 1 Abb 196, 201  
68 C J p 285 note 42

62. US—Cole v Loew's Inc., DC Cal, 8 FR D 508, 515  
Cal—Ex parte Trombley, 193 P 2d 731, 739, 31 Cal 2d 801

Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347  
68 C J p 267 note 73, p 269 note 6

63. Cal—Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709  
68 C J p 267 note 73

64. US—Chicago-Coulterville Coal Co v Fidelity & Casualty Co of New York, CCMo, 130 F 957, 962  
68 C J p 268 note 85

65. US—U S v Philadelphia & R R Co, DCPa, 223 F 207, 210

66. Va—King v Empire Collieries Co, 139 SE 478, 479, 148 Va 585

67. Cal—People v Okamoto, 147 P 598, 599, 26 Cal App 568  
68 C J p 287 note 86

68. US—In re Schnabel, DC Minn, 61 F Supp 386, 394

Mo—Plant v Thompson, 221 SW 2d 834, 839, 359 Mo 391

Tenn—Erby v State, 184 SW 2d 14, 16, 181 Tenn 647

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571

W Va—Young v State Compensation Com'r, 14 SE 2d 774, 776, 123 W Va 299

68 C J p 287 note 86

**Knowledge as well as purpose and intent**

Ind—Vandalia R Co v Clem, 96 NE 789, 790, 49 Ind App 94

69. Cal—People v Okamoto, 147 P 598, 599, 26 Cal App 568  
68 C J p 287 note 86

70. Neb—Hallowell v Borchers, 34 NW 2d 404, 411, 150 Neb 322

Tex—Woodhouse v State, 3 SW 323, 324, 67 Tex 416

Franklin Life Ins Co v Greer, Civ App, 219 SW 2d 137, 142  
Wash—State v Bixby, 177 P 2d 689, 698, 27 Wash 2d 144

71. US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

U S v Wilson, DC NM, 116 F Supp 911, 912—U S v Martell, DCPa, 104 F Supp 140, 143—U S v Saglietto, DC Va, 41 F Supp 21, 28—U S v Clatterbuck, DC Md, 26 F Supp 297, 299

Ala—Padgett v State, 56 So 2d 116, 117, 36 Ala App 355

Del—Lobdell Car Wheel Co v Subiolski, 125 A 462, 464, 32 Del 462  
Neb—Hallowell v Borchers, 34 NW 2d 404, 411, 150 Neb 322—Union Transfer Co v Bee Line Motor Freight, 34 NW 2d 363, 365, 150 Neb 280

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571

Franklin Life Ins Co v Greer, Civ App, 219 SW 2d 137, 142

Wash—State v James, 231 P 2d 482, 496, 36 Wash 2d 882—State v Bixby, 177 P 2d 689, 698, 27 Wash 2d 144

68 C J p 269 note 1, p 286 note 69

#### Similarly expressed

An act done of one's own will, knowingly, and not by mere accident or inadvertence

NY—People ex rel Kwiatkowski v Trenkle, 9 NYS 2d 661, 668, 169 Misc 687

72. Neb—Union Transfer Co v Bee Line Motor Freight, 34 NW 2d 363, 365, 150 Neb 280

73. US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

Trenton Chemical Co v U S, C A Mich, 201 F 2d 776, 779—Inland Freight Lines v U S, C A Utah, 191 F 2d 313, 316—Nabob Oil Co v U S, C A Okl, 190 F 2d 478, 480

U S v Wilson, DC NM, 116 F Supp 911, 912—U S v Schneiderman, DC Cal, 106 F Supp 906, 935—U S v Martell, DCPa, 104 F Supp 140, 143—U S v Schneiderman, DC Cal, 102 F Supp 87, 93

Ariz—Shumway v Farley, 203 P 2d 507, 511, 68 Ariz 159

Neb—Union Transfer Co v Bee Line Motor Freight, 34 NW 2d 363, 365, 150 Neb 280

NJ—Wegiel v Hogan, 100 A 2d 349, 351, 28 NJ Super 144—State v Winne, 91 A 2d 65, 84, 21 NJ Super 180

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571  
68 C J p 286 note 63

#### Voluntary act becoming willful

Every voluntary act of a human being is intentional; but, generally speaking, a voluntary act becomes willful in law only when it involves some degree of conscious wrong or evil purpose upon the part of the actor, or at least an inexcusable carelessness on his part, whether the act be right or wrong

Okl—Shields v State, 89 P 2d 756, 760, 184 Okl 618

68 C J p 274 note 85 [b] (2)

74. US—Beatty v U S, C A Iowa, 191 F 2d 317, 318—Inland Freight Lines v U S, C A Utah, 191 F 2d 313, 316—Nabob Oil Co v U S, C A Okl, 190 F 2d 478, 480—U S v Capitol Meats, C C A N Y, 166 F 2d 537, 538

Scheide v Porstmann, DC Md, 66 F Supp 483, 488

Neb—Claim of Schroeder, 43 NW 2d 572, 575, 153 Neb 73—Clark v Village of Hemingford, 26 NW 2d 15, 21, 147 Neb 1044—Moise v Fruit Dispatch Co, 283 NW 495, 497, 135 Neb 648

68 C J p 292 note 64

75. Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882.

76. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed, 381

U S v Martell, DCPa, 104 F Supp 140, 143—U S v Beatty, D C Iowa, 88 F Supp 646, 650

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

77. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

U S v Martell, DCPa, 104 F Supp 140, 143—U S v Beatty, D C Iowa, 88 F Supp 646, 650—In re Haynes, DC Kan, 88 F Supp 379, 381.

stubbornly<sup>78</sup> The terms also signify an act done by design, with set purpose<sup>79</sup>

The terms are also employed to denote an intentional act,<sup>80</sup> an act done intentionally<sup>81</sup> or pur-

posely,<sup>82</sup> as distinguished from an accidental act,<sup>83</sup> an act done by accident,<sup>84</sup> or accidentally,<sup>85</sup> or carelessly, thoughtlessly, heedlessly, or inadvertently,<sup>86</sup> or otherwise beyond the control of the person to be

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

78. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

U S v Martell, DCPa, 104 F Supp 140, 143—U S v Beatty, DC Iowa, 88 F Supp 646, 650—In re Haynes, DCKan, 88 F Supp 379, 381

Me—Carroll v Marcoux, 56 A 848, 849, 98 Me 259

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

79. US—U S v Beatty, DC Iowa, 88 F Supp 646, 650

80. US—Nabob Oil Co v U S, C A Okl, 190 F 2d 478, 480  
U S v Martell, DCPa, 104 F Supp 140, 143  
Cole v Loew's Inc, DCCal, 8 F RD 508, 515

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

Conn—Soucy v Wysocki, 96 A 2d 225, 228, 139 Conn 622

Ind—Southern Ry Co v McNeeley, 88 NE 710, 713, 44 Ind App 126

Iowa—Blakeley v Shortal's Estate, 20 NW 2d 28, 31, 236 Iowa 787

81. US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

Trenton Chemical Co v U S, CAMich, 201 F 2d 776, 779—U S v Wilson, DCNM, 116 F Supp 911, 912, 913—U S v Saglietto, DC Va, 41 F Supp 21, 28—U S v Clatterbuck, DCMd, 26 F Supp 297, 299

Ala—Padgett v State, Ala App, 56 So 2d 116, 117, 36 Ala App 355

Del—Lobdell Car Wheel Co v Subielski, 125 A 462, 464, 32 Del 462

Neb—Hallowell v Borchers, 34 NW 2d 404, 411, 150 Neb 322

NJ—Wegiel v Hogan, 100 A 2d 349, 351, 28 NJ Super 144—State v Winne, 91 A 2d 65, 84, 21 NJ Super 180

Tex—Paddock v Siemonet, 218 S W 2d 428, 434, 147 Tex 571

Franklin Life Ins Co v Greer, Civ App, 219 S W 2d 137, 142—**Corpus Juris** quoted in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d 965, 968

Wash—State v Evans, 201 P 2d 513, 514, 32 Wash 2d 278—State v Bixby, 177 P 2d 689, 698, 27 Wash 2d 144.

68 CJ p 272 note 54, p 273 note 76, p 291 note 42.

#### Intentional action or inaction

Cal—Anderson v Newkirk, 225 P 2d 247, 249, 101 Cal App 2d 171

#### Intentional and voluntary commission of wrongful act

US—U S v Ewald Iron Co, DC Ky, 67 F Supp 67, 75

#### Act done intentionally and tortiously

Ind—Chicago, St L & P R Co v Nash, 27 NE 564, 565, 1 Ind App 298

#### Thing done or omitted

The words "willful" and "willfully" denote merely that the thing done or omitted was done or omitted intentionally

US—Cole v Loew's Inc, DCCal, 8 FRD 508, 515

Cal—Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

68 CJ p 268 note 92

#### Act intentionally and unnecessarily committed

If an act is intentionally and unnecessarily committed, there can be no doubt it is willfully committed

US—Roberts v U S, CCA Tex, 126 F 897, 903, 61 CCA 427

Ala—State v Abram, 10 Ala 928, 932

82. US—U S v Schneiderman, DCCal, 102 F Supp 87, 93—U S v Clatterbuck, DCMd, 26 F Supp 297, 299

Ala—Padgett v State, 56 So 2d 116, 117, 36 Ala App 355

Del—Lobdell Car Wheel Co v Subielski, 125 A 462, 464, 32 Del 462

68 CJ p 273 note 74, p 292 note 64

83. US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Nicastro v U S, CA Utah, 206 F 2d 89, 92—Kempe v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Mass, 142 F 2d 132, 137, 138

U S v Martell, DCPa, 104 F Supp. 140, 143—R F C v Foust Distilling Co, DCPa, 103 F Supp 167, 171—Gutman v Lawton Estates, DCNY, 102 F Supp 724, 725—Connor v Wheeler, DCPa, 77 F Supp 875, 879—Haber v Garthly, DCPa, 67 F Supp 774, 776—Bowles v Ward, DCPa, 65 F Supp 880, 890—Bowles v Batson, DCS C, 61 F Supp 839, 844

—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 F Supp 581, 583—U S v Saglietto, DC Va, 41 F Supp 21, 28—Carson Naval

Stores Co v U S, DCGa, 29 F Supp 818, 821

Cal—Murrill v State Bd. of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

DC—U S v Barsky, DC, 7 FRD 38, 40

Ind—Cooprider v State, 31 NE 2d 53, 56, 218 Ind 122, 132 ALR 553

Iowa—State v Hofer, 28 NW 2d 475, 483, 238 Iowa 820

La—Piazza v Zimmermann, App, 49 So 2d 491, 494

Neb—Union Transfer Co v Bee Line Motor Freight, 34 NW 2d 363, 365, 150 Neb 280

NJ—State v Orecchio, 99 A 2d 595, 598, 27 NJ Super 484

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

Tex—Paddock v Siemonet, 218 S W 2d 428, 434, 147 Tex 571

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882—State v Bixby, 177 P 2d 689, 698, 27 Wash 2d 144

84. DC—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354  
68 CJ p 289 note 95

85. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

Trenton Chemical Co v U S, C A Mich, 201 F 2d 776, 779—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479

U S v Wilson, DCNM, 116 F Supp 911, 912

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Wash—State v Evans, 201 P 2d 513, 514, 32 Wash 2d 278

68 CJ p 289 note 94

#### Distinguished from act done accidentally or negligently

A willful act is an act consciously and intentionally, as distinguished from accidentally or negligently, done, where the negligence is not so gross that the intention could be implied from the gross disregard of duty constituting the negligence

Fla—Love v State, 144 So 843, 844, 107 Fla 376

86. Ala—Padgett v State, 56 So 2d 116, 117, 36 Ala App 355

Del—Lobdell Car Wheel Co v Subielski, 125 A 462, 464, 32 Del 462

#### Distinguished from that which is thoughtless

Ind—Cooprider v State, 31 NE 2d 53, 56, 218 Ind. 122, 132 ALR 553.

charged<sup>87</sup> Thus the words "willful" and "willfully" suggest some power of choice,<sup>88</sup> a choice of the free will either in doing or not doing the act,<sup>89</sup> and distinguish an intentional act from an act which is involuntary.<sup>90</sup> The words signify something more than mere inadvertence,<sup>91</sup> and mean more than involuntary<sup>92</sup> or unintentional,<sup>93</sup> and more than mistake,<sup>94</sup> carelessness,<sup>95</sup> or misunderstanding<sup>96</sup> They import that the conduct was deliberate, and not merely thoughtless and on the spur of the moment, and the result of a lack of judgment,<sup>97</sup> and thus, when an act is done feloniously,<sup>98</sup> maliciously,<sup>99</sup> unlawfully,<sup>1</sup> or wantonly<sup>2</sup> it is done willfully, but an act which merely reflects thoughtlessness, and ex-

hibits only an error of judgment, with no accompanying bad or evil purpose, is not willful<sup>3</sup>

Since a willful act differs essentially from a negligent act,<sup>4</sup> the words "willful" and "willfully" are used to signify something more than ordinary<sup>5</sup> negligence,<sup>6</sup> and something more than the want of ordinary care.<sup>7</sup>

The words "willful" and "willfully" imply such elements as design, intent, and purpose,<sup>8</sup> deliberation,<sup>9</sup> determination,<sup>10</sup> and premeditation,<sup>11</sup> and they are commonly employed to denote an act which is wrongful<sup>12</sup> or prohibited by law,<sup>13</sup> and also to indicate the intentional and deliberate doing of a wrongful act;<sup>14</sup> the doing of a forbidden act pur-

87. Neb—Union Transfer Co v Bee Line Motor Freight, 34 NW 2d 363, 365, 150 Neb 280

88. Pa—Appeal of Board of School Directors of Cass Township, Schuylkill County, 30 A 2d 628, 630, 151 Pa Super 543

89. NY—People, on Inf of Harden, v Fruci, 67 NYS 2d 512, 514, 188 Misc 384

90. Pa—Commonwealth v O'Leary, 79 A 2d 789, 792, 168 Pa Super 569—Commonwealth v Hubbs, 8 A 2d 618, 621, 137 Pa Super 244

91. US—Inland Freight Lines v U S, CA Utah, 191 F 2d 313, 316—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479

US v Clatterbuck, DCMd, 26 F Supp 297, 299

DC—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354

US v Barsky, DC, 7 FRD 38, 40  
68 CJ p 268 note 87

92. US—Nicastro v U S, CA Utah, 206 F 2d 89, 92

R F C v Foust Distilling Co, DCPa, 103 F Supp 167, 171—Gutman v Lawton Estates, DCNY, 102 F Supp 724, 725—Connor v Wheeler, DCPa, 77 F Supp 875, 879—Haber v Garthly, DCPa, 67 F Supp 774, 776

Cal—Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

NJ—State v Orecchio, 99 A 2d 595, 598, 27 NJ Super 484

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

Wash—State v Bixby, 177 P 2d 689, 698, 27 Wash 2d 144

93. US—Nicastro v U S, CA Utah, 206 F 2d 89, 92

R F C v Foust Distilling Co, DCPa, 103 F Supp 167, 171—Gutman v Lawton Estates, DCNY, 102 F Supp 724, 725—Connor v

Wheeler, DCPa, 77 F Supp 875, 879—Haber v Garthly, DCPa, 67 F Supp 774, 776

94. Del—Phoenix Finance Corporation v Iowa-Wisconsin Bridge Co, 5 A 2d 664, 666, 24 Del Ch 71

Miss—E L Bruce Co v Edwards, 3 So 2d 846, 847, 192 Miss 1

95. Miss—E L Bruce Co v Edwards, supra

96. Del—Phoenix Finance Corporation v Iowa-Wisconsin Bridge Co, 5 A 2d 664, 666, 24 Del Ch 71

97. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

#### Similarly expressed

Since a willful act is an act done by design and with set purpose, the mere passiveness which indolently permits an act to be done through the lack of will to prevent falls very far short of that positive condition of the mind which causes an act to be done by design and with set purpose  
US—U S v Beatty, DC Iowa, 88 F Supp 646, 650

98. US—Howenstine v U S, CC A Cal, 263 F 1, 4  
68 CJ p 294 note 97

99. Ga—Carroll v Aetna Life Ins Co, 146 SE 788, 789, 39 Ga App 78

68 CJ p 294 note 98

1. Ky—Gatewood v Commonwealth, 285 SW 193, 215 Ky 360, 362  
68 CJ p 294 note 99

2. La—State v Pellerin, 43 So 159, 160, 118 La 547.

3. Miss—Mississippi State Bd of Dental Examiners v Mandell, 21 So 2d 405, 409, 198 Miss 49

4. Cal—Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

One is positive, the other negative  
Cal—Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, supra.

5. US—Inland Freight Lines v U

S, CA Utah, 191 F 2d 313, 316—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479

6. US—Inland Freight Lines v U S, CA Utah, 191 F 2d 313, 316—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479

Fla—Jackson v Edwards, 197 So 833, 835, 144 Fla 187

68 CJ p 274 note 87, p 291 note 47

7. Neb—Claim of Schroeder, 43 NW 2d 572, 575, 153 Neb 73—Clark v Village of Hemingford, 26 NW 2d 15, 21, 147 Neb 1044—Moise v Fruit Dispatch Co, 283 NW 495, 497, 135 Neb 648

8. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Minn—Sohm v Sohm, 3 NW 2d 496, 497, 212 Minn 316

68 CJ p 268 notes 84, 88–90, p 269 note 4, p 286 note 68

#### Suggest the presence of intention

Pa—Appeal of Board of School Directors of Cass Township, Schuylkill County, 30 A 2d 628, 630, 151 Pa Super 543

9. Fla—County Canvassing Board of Primary Elections of Hillsborough County v Lester, 118 So 201, 202, 96 Fla 484

68 CJ p 271 note 37, p 286 note 68, p 290 note 7

10. Va—King v Empire Collieries Co, 139 SE 478, 479, 148 Va 585  
68 CJ p 269 note 5

11. Mo—Plant v Thompson, 221 S W 2d 834, 839, 359 Mo 391  
68 CJ p 269 note 5

12. Conn—Soucy v Wysocki, 96 A 2d 225, 228, 139 Conn 622

13. US—U S v Boston & Me R R, DCMass, 30 F Supp 780, 782  
68 CJ p 275 note 12, p 287 note 83, p 292 note 58

14. US—In re Maples, DCMont, 105 F 919, 921

68 CJ p 274 note 90

#### Similarly expressed

The intentional doing of a prohibi-

posely in violation of law<sup>15</sup>

The terms may import a specific intent to violate the law,<sup>16</sup> a specific intent to do what the law forbids,<sup>17</sup> a deliberate intent<sup>18</sup> or a purpose<sup>19</sup> to do a wrongful act; an intent to commit a wrong either through actual malice or from which malice will be imputed,<sup>20</sup> a deliberate purpose to accomplish something forbidden,<sup>21</sup> a determination to do the act although known to be forbidden,<sup>22</sup> a determination to execute one's own will in spite of defiance of the law,<sup>23</sup> a determination to do a prohibited act with a bad intent and without justifiable excuse,<sup>24</sup> a deliberate intention for which there is no reasonable excuse<sup>25</sup> The terms may, therefore, denote a conscious<sup>26</sup> or intentional<sup>27</sup> violation of law, and convey the idea of an act done with knowledge that it is unlawful,<sup>28</sup> and they are sometimes used to signify

that a person has failed to obey a statute, having knowledge of the facts<sup>29</sup>

While the words "willful" and "willfully" may denote a specific intent or a particular design,<sup>30</sup> it may be no more than an intent,<sup>31</sup> design,<sup>32</sup> purpose, or willingness<sup>33</sup> to do or commit a specific act or make the omission referred to,<sup>34</sup> a deliberate intention<sup>35</sup> or set purpose<sup>36</sup> to do or refrain from doing some act. Thus, an intent to do a wrongful act is not an essential element,<sup>37</sup> and it is not necessary that there should be an express intent or purpose,<sup>38</sup> and the terms do not of necessity imply an active desire to produce a particular impression, or to induce a particular line of conduct<sup>39</sup>

The words "willful" and "willfully" are frequently used in a sense which does not imply any malice<sup>40</sup>

ed act or the conscious omission of a prescribed act

Ill—Joseph Taylor Coal Co v Dawes, 122 Ill App 389, 395

#### Wrongful act done intentionally

Minn—Anderson v International Harvester Co, 116 N W 101, 102, 104 Minn 49, 16 L R A, N S, 440

15. N C—State v Stephenson, 10 S E 2d 819, 823, 218 N C 258  
68 C J p 273 note 70

16. U S—U S v Schneiderman, D C Cal, 102 F Supp 87, 93  
68 C J p 293 note 75

17. U S—U S v Schneiderman, D C Cal, 106 F Supp 906, 935

18. Colo—Williams v People, 57 P 701, 702, 26 Colo 272

19. Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d 965, 968

Utah—Rickenberg v State, 198 P 767, 768, 58 Utah 270

Wash—State v Bixby, 177 P 2d 689, 698, 27 Wash 2d 144

20. La—Matthews v Franklin, App, 74 So 2d 309, 315

21. Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d 965, 968  
68 C J p 291 note 26

Purpose or willingness to commit the forbidden act

S D—Freeman v Huron, 66 N W 928, 8 S D 435, 438

22. Cal—McPheeters v Board of Medical Examiners of State of California, 284 P 938, 939, 103 Cal App 297  
68 C J p 269 note 5

23. Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d 965, 968

S C—State v Alexander, 48 S C L 247, 254

24. Iowa—Kletzing v Armstrong, 93 N W 500, 501, 119 Iowa 505  
68 C J p 273 note 58

25. Md—Rosenberg v State, 165 A 306, 307, 164 Md 473

26. N Y—Sanders v Kilbrick Realty Corp, 99 N Y S 2d 56, 61—Mulgrim v Marie Dore, Inc, 98 N Y S 2d 187, 189—Howland v Firoz Realty Corp, 72 N Y S 2d 734, 735

27. U S—Nabob Oil Co v U S, C A Okl, 190 F 2d 478, 479

28. La—State v Nicholls, 23 So 980, 986, 50 La Ann 699

Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d 965, 968

29. U S—Schmeller v U. S, C C A Ohio, 143 F 2d 544, 553  
68 C J p 287 note 84

#### Similarly expressed

The word "willfully" is used to describe the attitude of a person who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements

U S—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Tex—Paddock v Siemonett, 218 S W 2d 428, 435, 147 Tex 571

#### Failure to observe known statute

U S—Carson Naval Stores Co v U S, D C Ga, 29 F Supp 818, 821

#### Knowledge of statute or rule

The authorities seem to uphold the proposition that before one can willfully violate a statute or a rule he must first have knowledge of it

W Va—Young v State Compensation Com'r, 14 S E 2d 774, 776, 123 W Va 299

30. U S—Fidelity & Casualty Co v Bank of Timmonsville, S C, 139 F 101, 103, 71 C C A 299.  
68 C J p 274 note 3

31. S C—Talbert v Charleston & W

C R Co, 55 S E 138, 139, 75 S C 136

32. Cal—Ex parte Ahart, 159 P 160, 162, 172 Cal 762

33. Cal—Ex parte Trombley, 193 P 2d 734, 739, 31 Cal 2d 801

Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

La—Corpus Juris cited in State v Vinzant, 7 So 2d 917, 922, 200 La 301

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

68 C J p 268 note 91, p 286 note 66

34. Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882.  
68 C J p 286 note 67

35. U S—U S v Clatterbuck, D C Md, 26 F Supp 297, 299

La—Corpus Juris cited in State v Vinzant, 7 So 2d 917, 922, 200 La 301  
68 C J p 268 note 86

36. La—State v Vinzant, 7 So 2d 917, 922, 200 La 301

37. W Va—Young v State Compensation Com'r, 14 S E 2d 774, 776, 123 W Va 299

38. Wis—Barlow v Foster, 136 N W 822, 826, 149 Wis 613

39. Conn—Preston v Mann, 25 Conn 118, 128

40. U S—Cole v Loew's Inc, D C Cal, 8 F R D 508, 515

Cal—Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Utah—Peterson v Peterson, 189 P 2d 961, 962, 112 Utah 542—Kidman v Kidman, 164 P 2d 201, 202, 109 Utah 81

68 C J p 268 note 93, p 287 note 77.

or wrong,<sup>41</sup> or anything necessarily blamable<sup>42</sup> or malevolent,<sup>43</sup> and the terms do not necessarily imply an intent, motive, or purpose which is evil,<sup>44</sup> wrongful,<sup>45</sup> criminal,<sup>46</sup> or vicious<sup>47</sup> The terms do not necessarily mean maliciously,<sup>48</sup> malevolently,<sup>49</sup> or corruptly,<sup>50</sup> and do not necessarily denote perverseness, moral delinquency,<sup>51</sup> ill-will,<sup>52</sup> or bad faith<sup>53</sup>

Since there may be a willful act without knowingly doing a wrong,<sup>54</sup> the words "willful" and "willfully" do not necessarily import a malicious act,<sup>55</sup> and do not necessarily denote an intent to violate the law<sup>56</sup> or to acquire any advantage<sup>57</sup>

The words "willful" and "willfully" are frequently used in a sense that signifies something more than intentional,<sup>58</sup> or intentionally,<sup>59</sup> and something more than voluntary,<sup>60</sup> or voluntarily;<sup>61</sup> and more than

41. US—Cole v Loew's Inc, DC Cal, 8 FRD 508, 515

Cal—Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Utah—Peterson v Peterson, 189 P 2d 961, 962, 112 Utah 542—Kidman v Kidman, 164 P 2d 201, 202, 109 Utah 81

68 CJ p 268 note 93

42 US—Cole v Loew's Inc, DC Cal, 8 FRD 508, 515

Cal—Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

68 CJ p 269 note 94

43 US—Bowles v Ammon, DC Neb, 61 F Supp 106, 117

NY—Monahan v Jacobs & Politi, 66 NYS 2d 207, 213, 187 Misc 332

Sanders v Kilbrick Realty Corp, 99 NYS 2d 56, 61—Milgrim v Marie Dore, Inc, 98 NYS 2d 187, 189—Howland v Firoz Realty Corp, 72 NYS 2d 734, 735

44 US—Nicastro v U S, CA Utah, 206 F 2d 89, 92—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 480—Schmeller v U S, CCA Ohio, 143 F 2d 544, 553—Powell v U S, CCA NC, 112 F 2d 764, 767

Connor v Wheeler, DCPa, 77 F Supp 875, 879—Batson v Bowles, DC SC, 61 F Supp 839, 844—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 F Supp 581, 583

Cole v Loew's Inc, DCCal, 8 FRD 508, 515

Cal—Ex parte Trombley, 193 P 2d 734, 739, 31 Cal 2d 801.

Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

DC—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354.

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

68 CJ p 269 note 95, p 287 note 75

45. Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618.

W Va—Billings v State Compensation Com'r, 16 SE 2d 804, 806, 123 W Va 498

68 CJ p 269 note 96

46. US—Nicastro v U S, CA Utah, 206 F 2d 89, 92—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 480

DC—Barsky v U S, 167 F 2d 241, 251, 83 US App DC 127

NY—Abbate v Herbruck, 104 NY S 2d 983, 985, 199 Misc 923

NY—Sanders v Kilbrick Realty Corp, 99 NYS 2d 56, 61—Milgrim v Marie Dore, Inc, 98 NYS 2d 187, 189—Howland v Firoz Realty Corporation, 72 NYS 2d 734, 735

47 US—Oregon—Washington R & Nav Co v U S, CCA Idaho, 205 F 337, 339—U S v Atchison, T & S F R Co, DC Ill, 166 F 160, 163

48 Tex—Greer v Franklin Life Ins Co, 221 SW 2d 857, 859, 148 Tex 166

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

49 US—Scheide v Porstmann, DC Md, 66 F Supp 483, 488

50 Pa—Commonwealth v O'Leary, 79 A 2d 789, 792, 168 Pa Super 569

#### Meaning beyond usual connotation

In common parlance "willfully" does not mean corruptly, and to so construe it would be to give it a meaning far beyond its usual connotation

Pa—Commonwealth v Hubbs, 8 A 2d 618, 621, 137 Pa Super 244

51. US—Cole v Loew's Inc, DC Cal, 8 FRD 508, 515

Cal—Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

68 CJ p 269 note 97

52. US—Cole v Loew's Inc, DC Cal, 8 FRD 508, 515

68 CJ p 287 note 78

53. Pa—Commonwealth v Hubbs, 8 A 2d 618, 621, 137 Pa Super 244

#### Existence or nonexistence of good faith not involved

Ill—Eldorado Coal & Coke Co v Swan, 81 NE 691, 693, 227 Ill 586

68 CJ p 271 note 38

54 Ala—Ex parte Allen, 2 So 2d 321, 322, 241 Ala 137.

68 CJ p 271 note 39

55 NC—Brown v Brown, 32 SE 320, 321, 124 NC 19, 70 Am SR 574

68 CJ p 269 note 96

56 Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

68 CJ p 287 note 79

#### Similarly expressed

"Willful" does not mean specifically designed to be violative of the law

US—Bowles v Ammon, DC Neb, 61 F Supp 106, 117

NY—Monahan v Jacobs & Politi, 66 NYS 2d 207, 213, 187 Misc 332

57 Cal—People v O'Brien, 31 P 45, 47, 96 Cal 171.

68 CJ p 287 note 81

58 Ill—People v Player, 32 NE 2d 932, 309 Ill App 435

68 CJ p 275 note 17.

#### More than intent to commit an offense

NC—State v Stephenson, 10 SE 2d 819, 823, 218 NC 258

59 US—Wardlaw v U S, CA Tex, 203 F 2d 884, 885

NY—McDougall v Service Garage, 69 NYS 2d 176, 180, 187 Misc 950

68 CJ p 291 note 45

60. Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Tex—Franklin Life Ins Co v Greer, Civ App, 219 SW 2d 137, 141—Paddock v Siemoneit, Civ App, 214 SW 2d 651, 659

68 CJ p 275 note 18.

#### More than voluntary act of party

NY—Pyramid Musical Corporation v Floral Park Bank, 48 NYS 2d 866, 867, 268 App Div 783

Cortillion Fabrics Corp v National Safety Bank & Trust Co of NY, 84 NYS 2d 880, 882, 193 Misc 741

61. US—Wardlaw v U S, CA Tex, 203 F 2d 884, 885.

NY—Lightbody v Russell, 45 NY S 2d 15, 17

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571.

68 CJ p 291 note 48.

knowingly,<sup>62</sup> willingly,<sup>63</sup> or purposely,<sup>64</sup> and more than deliberate<sup>65</sup>

The terms may be employed to convey the idea of tort or wrong,<sup>66</sup> and to denote malice,<sup>67</sup> although it may be only malice of a milder kind,<sup>68</sup> or legal malice<sup>69</sup> in a greater or lesser degree.<sup>70</sup> In this

sense the terms may signify an intent which is evil,<sup>71</sup> bad,<sup>72</sup> wrongful,<sup>73</sup> unlawful,<sup>74</sup> wicked,<sup>75</sup> felonious,<sup>76</sup> or criminal,<sup>77</sup> a motive which is evil,<sup>78</sup> improper,<sup>79</sup> bad,<sup>80</sup> wrongful,<sup>81</sup> or malevolent;<sup>82</sup> an evil or corrupt motive or intent,<sup>83</sup> and, in terms of purpose, a purpose which is evil,<sup>84</sup> or bad,<sup>85</sup> a pur-

62 US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Boston & M R R v U S, CC A Mass, 117 F 2d 428, 431

U S v Boston & Me R R, DC Mass, 30 F Supp 780, 782  
68 CJ p 291 note 44

63 US—U S v Boston & Me R R, supra

64 Ind—Miller v Miller, 47 NE 338, 339, 17 Ind App 605

Wis—Brown v State, 119 NW 338, 340, 137 Wis 543

65 La—Matthews v Franklin, App, 74 So 2d 309, 315

66 Mo—State v Grassie, 74 Mo App 313, 316

Vt—Savage v Tullar, Brayt 223

67 Okl—State v McMains, Cr, 241 P 2d 976, 983

Tex—Moore v Moore, Civ App, 142 S W 2d 270, 272

68 CJ p 273 notes 69, 73, p 275 note 15, p 276 note 32, p 291 note 36

**Embodies element of maliciousness**  
Minn—State v Ward, 150 NW 209, 210, 127 Minn, 510, Ann Cas 1916C 674

68 CJ p 272 note 55, p 291 note 36

68 Ind—Southern R Co v McNeeley, 88 NE 710, 711, 44 Ind App 126

68 CJ p 291 note 38

69. NJ—Duro Co v. Wishnevsky, 16 A 2d 64, 66, 126 NJ Law 7

Tex—Franklin Life Ins Co v Greer, Civ App, 219 S W 2d 137, 141

Rankin v State, 139 S W 2d 811, 812, 139 Tex Cr 247

68 CJ p 276 notes 31, 32, p 291 note 31, p 293 note 81

**Milder kind of legal malice**

Vt—Buchanan v Cook, 40 A 102, 104, 70 Vt 168

68 CJ p 293 note 81 [a]

70. Neb—Hiatt v Tomlinson, 158 NW 383, 385, 100 Neb 51

68 CJ p 272 note 53, p 290 note 18

71. US—U S v Kahriger, CA Pa, 210 F 2d 565, 571—U S v Perplies, CCA Wis, 165 F 2d 874, 876

La—**Corpus Juris** cited in State v Vinzant, 7 So 2d 917, 922, 200 La 301

NJ—State v Orecchio, 99 A 2d 595, 598, 27 NJ Super 484

Duro Co v. Wishnevsky, 16 A 2d 64, 66, 126 NJ Law 7

NY—Lightbody v Russell, 45 NYS 2d 15, 17

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618.

State v McMains, 241 P 2d 976, 983, 95 Okl Cr 176

Tenn—Erby v State, 184 S W 2d 14, 16, 181 Tenn 647

Tex—Franklin Life Ins Co v Greer, Civ App, 219 S W 2d 137, 141—Pad-

dock v Siemoneit, Civ App, 214 S W 2d 651, 659—**Corpus Juris** cited

in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d

965, 968—Moore v Moore, Civ App, 142 S W 2d 270, 272

Rankin v State, 139 S W 2d 811, 812, 139 Tex Cr 247

68 CJ p 273 notes 64, 73, p 274 notes 93, 5, p 276 note 29, p 291 notes 31, 32, p 293 note 77

**Similarly expressed**

(1) An evil intent without justifiable excuse

Tex—Paddock v Siemoneit, 218 S W 2d 428, 434, 147 Tex 571

**Corpus Juris** quoted in City of Baird v West Texas Utilities Co, Civ App, 145 S W 2d 965, 968

68 CJ p 273 note 59

(2) An evil or improper intent or feeling

US—Roberts v U S, Tex, 126 F 897, 905, 61 CCA 427

(3) Knowingly and with evil intent

Tex—Garza v State, Cr, 47 S W 983, 984

72 US—Chicago, St P, M & O Ry Co v U S, Minn, 162 F 835, 841, 90 CCA 211

68 CJ p 273 note 63

73 Mo—State v Waters, App, 189 S W 624

68 CJ p 273 note 62, p 293 note 80

74. NC—State v Shipman, 163 SE 657, 660, 202 NC 518

68 CJ p 274 note 2

75. Cal—Swall v Anderson, App, 140 P 2d 196, 199

68 CJ p 293 note 79

76 Ark—Blevins v State, 107 S W 393, 394, 85 Ark 195

68 CJ p 274 note 94

77. Cal—Swall v Anderson, App, 140 P 2d 196, 199

La—**Corpus Juris** cited in State v Vinzant, 7 So 2d 917, 922, 200 La 301

68 CJ p 291 note 24, p 293 note 76

78 US—Wardlaw v U S, CA Tex, 203 F 2d 884, 885—U S v Perplies, CCA Wis, 165 F 2d 874, 876

Roberts v U S, Tex, 126 F 897, 905, 61 CCA 427

79. US—Roberts v. U S, supra

80. Mo—State v Equitable Loan &

Investment Co, 41 S W 916, 919, 142 Mo 325

68 CJ p 273 note 76

**Similarly expressed**

Bad motive or purpose with the direct effect of injuring another

Cal—McPheeters v Board of Medical Examiners of State of California, 284 P 938, 939, 103 Cal App 297

81. Ark—New Union Coal Co v Walker, 31 S W 2d 753, 755, 182 Ark 460

Ill—Odin Coal Co v Denman, 57 N. E 192, 185 Ill 413, 419, 76 Am S R. 45

82 Cal—Swall v Anderson, App, 140 P 2d 196, 199

68 CJ p 293 note 74

83 Neb—State v Donahue, 135 N. W 1030, 1034, 91 Neb 311, Ann. Cas 1913D 18

68 CJ p 273 note 60

84 US—Beatty v U S, CA Iowa, 191 F 2d 317, 318

Ga—Thornton v State, 10 SE 2d 714, 715, 63 Ga App 255

Iowa—Nelson v Deering Implement Co, 42 NW 2d 522, 527, 241 Iowa 1248

Miss—Mississippi State Bd of Dental Examiners v Mandell, 21 So 2d 405, 409, 198 Miss 49

NY—McDougall v Service Garage, 69 NYS 2d 176, 180, 187 Misc 950

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

68 CJ p 274 note 86, p 276 note 26, p 293 note 71

**Wicked purpose or perverse disposition**

US—Roberts v U S, Tex, 126 F 897, 905, 61 CCA 427

85 US—Wardlaw v U S, CA Tex, 203 F 2d 884, 885—Trenton Chemical Co v U S, CA Mich, 201 F 2d 776, 779—Beatty v U S, CA Iowa, 191 F 2d 317, 318—Na-

bob Oil Co v U S, CA Okl, 190 F 2d 478, 479—One 1941 Buick Sedan, Motor No 64286106 v U S, CCA Wyo, 158 F 2d 445, 448

U S v Wilson, DC NM, 116 F Supp 911, 912, 913—U S v Martell, DC Pa, 104 F Supp 140, 143—In re Haynes, DC Kan, 88 F Supp 379, 381

Cal—People v Tolamchoff, 138 P 2d 61, 64, 58 Cal App 2d 815

Ga—Thornton v State, 10 SE 2d 714, 715, 63 Ga App 255

Iowa—Nelson v Deering Implement Co, 42 NW 2d 522, 527, 241 Iowa 1248

Mass.—New England Trust Co. v.



pose which is wrongful,<sup>86</sup> or guilty,<sup>87</sup> or malevolent,<sup>88</sup> or stubborn;<sup>89</sup> an evil design<sup>90</sup> or mind,<sup>91</sup> a determination,<sup>92</sup> preference,<sup>93</sup> or a purpose<sup>94</sup> to do wrong. In this sense the terms signify the element of perverseness<sup>95</sup> or turpitude,<sup>96</sup> or an element of intractableness such as the headstrong disposition to act by the rule of contradiction,<sup>97</sup> and there may be involved some degree of conscious wrong or culpable carelessness,<sup>98</sup> and the terms may be used to

denote conduct which amounts to deliberate bad faith<sup>99</sup> or which is quasi-criminal in nature.<sup>1</sup>

The terms may be used to indicate an intent or purpose to injure,<sup>2</sup> an act intentionally done for the purpose of causing injury;<sup>3</sup> a conscious purpose,<sup>4</sup> or an actual<sup>5</sup> or deliberate<sup>6</sup> intent or design<sup>7</sup> to injure another, a design, purpose, and intent to do wrong and inflict injury.<sup>8</sup>

Paine, 59 NE 2d 263, 269, 317 Mass 542

Miss—Mississippi State Bd of Dental Examiners v Mandell, 21 So 2d 405, 409, 198 Miss 49

Mo—State v Equitable Loan & Investment Co., 41 SW 916, 919, 142 Mo 325

NY—Lightbody v Russell, 45 NYS 2d 15, 17

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Tenn—Erby v State, 184 SW 2d 14, 16, 181 Tenn 647

Tex—Paddock v Siemoneit, 218 SW 2d 428, 434, 147 Tex 571

Paddock v Siemoneit, Civ App, 214 SW 2d 651, 659

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

68 CJ p 275 note 8, p 276 note 25, p 293 note 70

#### Bad or corrupt purpose

Kan—State v Wilson, 196 P 758, 762, 108 Kan 641, 651

Miss—Mississippi State Bd of Dental Examiners v Mandell, 21 So 2d 107, 409, 198 Miss 49

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

#### Act done with bad purpose

Sask—Anderson v Canadian Northern R Co, 10 Sask L 325, 342, 35 Dom L R 473

Vt—State v Palmer, 110 A 436, 438, 94 Vt 278

86 NY—Pyramid Musical Corporation v Floral Park Bank, 48 NYS 2d 866, 867, 268 App Div 783

Cortillion Fabrics Corp v National Safety Bank & Trust Co of N Y, 84 NYS 2d 880, 882, 193 Misc 741

Lightbody v Russell, 45 NYS 2d 15, 17

68 CJ p 273 note 80, p 291 note 40

87 Conn—State v Foote, 43 A 488, 490, 71 Conn 737

88. Cal—Swall v Anderson, App, 140 P 2d 196, 199

68 CJ p 293 note 74

89. Miss—Page v State, 133 So 216, 217, 160 Miss 300

Utah—State v Rickenberg, 198 P 767, 768, 58 Utah 270

90. La—Corpus Juris cited in State v Vinzant, 7 So 2d 917, 922, 200 La. 301

Vt—State v Burlington Drug Co, 78 A 882, 84 Vt. 243, 253

#### Similarly expressed

(1) A perverse, deliberate design and malice

Ind—Wales v. Miner, 89 Ind 118, 128

Chicago, St L & P R Co v Nash, 27 NE 564, 565, 1 Ind App 298

(2) A deliberate design

Ind—Wales v. Miner, 89 Ind 118, 128

(3) An evil design and purpose

Mich—Montgomery v Muskegon Booming Co, 50 NW 729, 731, 88 Mich 633, 26 Am SR 308

68 CJ p 291 note 30

91. US—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479

92. Okl—Citizens' State Bank of Okeene v Cressler, 170 P 230, 233, 69 Okl 68

68 CJ p 273 note 66

93. Ark—St Louis, I M & S R Co v Batesville & W Tel Co, 97 SW 660, 662, 80 Ark 499

94. Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

68 CJ p 273 note 68, p 291 note 29

68 CJ p 273 note 68, p 291 note 29

#### Conscious purpose to do wrong

US—Pullen v U S, CCA Tex, 164 F 2d 756, 759

95. Tenn—American Mut Liability Ins Co v Gart, 125 SW 2d 140, 141, 174 Tenn 297.

96. NY—McDougall v Service Garage, 69 NYS 2d 176, 180, 187 Misc 950

68 CJ p 277 note 45

97. Kan—Bersch v Morris & Co, 189 P 934, 936, 106 Kan 800, 9 ALR 1374

98. Fla—County Canvassing Board of Primary Elections of Hillsborough County v Lester, 118 So 201, 203, 96 Fla 484

68 CJ p 274 note 85

99. Fla—County Canvassing Board of Primary Elections of Hillsborough County v Lester, 118 So 201, 203, 96 Fla 484

68 CJ p 274 note 85

68 CJ p 274 note 85

68 CJ p 274 note 85

68 CJ p 274 note 85

68 CJ p 274 note 85

68 CJ p 274 note 85

68 CJ p 274 note 85

1. US—Rowe v Gatke Corporation, supra

68 CJ p 274 note 84

2. Ohio—Panchula v Kaya, 18 NE 2d 1003, 1005, 59 Ohio App 550

Similarly expressed

To be willful the harm must have been intentionally inflicted

US—Delaware & H R Corporation v Bonzik, CCA Pa, 105 F 2d 341, 343

3. US—Evens v Texas Pac-Missouri Pac Terminal R R of New Orleans, CCA La., 134 F 2d 275, 276

Injury intentionally inflicted

A wrongdoer acts willfully when he inflicts injury intentionally

Ohio—Haacke v. Lease, App, 41 NE 2d 590, 597

4. NJ—Duro Co v Wishnevsky, 16 A 2d 64, 66, 126 NJ Law 7.

5. Del—Tyndall v Rippon, 61 A 2d 422, 425, 5 Terry 458

6. Ky—Jones v Mobile & O. R Co, 127 SW 144, 145

68 CJ p 291 note 27.

Similarly expressed

"Willfully" involves ill will of a degree that is the equivalent of a deliberate intent to injure others

Minn—Brehmhorst v Beckman, 35 N W 2d 719, 730, 227 Minn 409

7. NY—Pyramid Musical Corporation v Floral Park Bank, 48 NYS 2d 866, 867, 268 App Div 783

Cortillion Fabrics Corp v National Safety Bank & Trust Co of N Y, 84 NYS 2d 880, 882, 193 Misc 741

68 CJ p 275 note 78, p 291 note 41

Similarly expressed

(1) Done with the direct object in view of injuring another

US—Hazel v. Southern Pac Co, CCA Or, 173 F 431, 432

Miss—Ousley v State, 122 So 731, 732, 154 Miss 451

(2) The intention designedly and purposely to cause injury

Cal—McPheeters v Board of Medical Examiners of State of California, 284 P 938, 939, 103 Cal. App. 297

8. La—Corpus Juris cited in State v Vinzant, 7 So 2d 917, 922, 200 La. 301

68 CJ p 272 note 57.

However, it is not necessary that there should be an actual intent to injure;<sup>9</sup> a willingness to inflict the injury complained of will be sufficient,<sup>10</sup> and it will be sufficient if the action or inaction was with the knowledge, express or implied, of the probable consequence that serious injury would likely result,<sup>11</sup> or that it was with an indifference to consequences,<sup>12</sup> or with a wanton and reckless disregard of the probable consequences,<sup>13</sup> or that it was with a careless disregard whether or not one had the right so to act.<sup>14</sup> Thus the words "willful" and "will-

fully" are employed to characterize conduct such as evinces an intentional or reckless indifference to the safety of others,<sup>15</sup> or a disregard of the rights of others,<sup>16</sup> or a wanton indifference to the natural consequences of the act,<sup>17</sup> or a reckless disregard as to whether or not the act is in violation of law.<sup>18</sup>

The words "willful" and "willfully" are frequently used in the same sense to denote that what was done or omitted was without just cause<sup>19</sup> or justifiable<sup>20</sup> excuse,<sup>21</sup> or that it was committed or

9. Ind—Bedwell v De Bolt, 50 NE 2d 875, 878, 221 Ind 600  
Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882  
68 C J p 277 note 80

#### Well recognized rule

"The authorities, from the earliest years of the common law, recognize the rule that there may be a willful wrong without a direct design to do harm. This principle has been applied to furious driving, to collisions between vessels, to the taking of unruly animals into crowds, to carelessly laying out of poison for rats, to want of caution toward drunken persons, and to the careless casting of logs and the like upon highways."

Ind—Southern Ry Co v McNeeley, 88 NE 710, 712, 44 Ind App 126  
Iowa—Blakeley v Shortel's Estate, 20 NW 2d 28, 31, 236 Iowa 787

10. Ind—Southern Ry Co v McNeeley, 88 NE 710, 713, 44 Ind App 126

Iowa—Blakeley v Shortel's Estate, 20 NW 2d 28, 31, 236 Iowa 787

11. Cal—Anderson v Newkirk, 235 P 2d 247, 249, 101 Cal App 2d 171  
Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

#### Similarly expressed

Consciousness that injury is likely to result from the act done or omission to act  
Mo—Plant v Thompson, 221 SW 2d 834, 839, 359 Mo 391

12. Ind—Bedwell v De Bolt, 50 NE 2d 875, 878, 221 Ind 600

13. Cal—Anderson v Newkirk, 235 P 2d 247, 249, 101 Cal App 2d 171  
Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

14. US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381.

Beatty v. U S, CA Iowa, 191 F 2d 317, 318—Zimberg v U S, CCA Mass, 142 F 2d 132, 138  
In re Haynes, DCKan, 88 F Supp 379, 381.

Iowa—Nelson v. Deering Implement

Co, 42 NW 2d 522, 527, 241 Iowa 1248

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882  
68 C J p 277 note 33

#### Similarly expressed

Conduct marked by careless disregard of its rightfulness

La—Piazza v Zimmermann, App, 49 So 2d 491, 494

15. Ind—Southern Ry Co v McNeeley, 88 NE 710, 713, 44 Ind App 126

Iowa—Blakeley v Shortel's Estate, 20 NW 2d 28, 31, 236 Iowa 787  
Neb—Claim of Schroeder, 43 NW 2d 572, 575, 153 Neb 73—Clark v Village of Hemingford, Neb, 26 NW 2d 15, 21, 147 Neb 1044—Moise v Fruit Dispatch Co, 283 NW 495, 497, 135 Neb 648  
68 C J p 275 note 11

16. US—Beatty v U S, CA Iowa, 191 F 2d 317, 318

Iowa—Nelson v Deering Implement Co, 42 NW 2d 522, 527, 241 Iowa 1248

68 C J p 276 note 30

#### Similarly expressed

Without regard for the rights of others

Mo—State v Vollenweider, 67 SW 942, 943, 94 Mo App 158

As though rights of others did not exist

A wrongdoer acts willfully when he is so utterly indifferent to the rights of others that he acts as though such rights did not exist  
Ohio—Haacke v Lease, App, 41 NE 2d 590, 597.

17. NJ—Duro Co v Wishnevsky, 16 A 2d 64, 66, 126 NJ Law 7

18. US—U S v Schneiderman, D C Cal, 102 F Supp 87, 93

19. Conn—Soucy v Wysocki, 96 A 2d 225, 228, 139 Conn 622

NC—State v Chambers, 78 SE 2d 209, 211, 238 NC 373—State v Ellison, 52 SE 2d 9, 230 NC 59—State v Hayden, 32 SE 2d 333, 334, 224 NC 779—State v Dickens, 1 SE 2d 837, 838, 215 NC 303  
68 C J p 277 note 36, p 293 note 86

#### Similarly expressed

(1) Without just (lawful) cause  
Okla—Bohannon v State, Cr, 271 P

2d 739, 743—State v McMains, Cr, 241 P 2d 976, 983

68 C J p 277 note 37

(2) Without reasonable cause

US—Kellems v U S, D C Conn, 97 F Supp 681, 682

(3) Without just or reasonable cause

Minn—Anderson v International Harvester Co, 116 NW 101, 102, 104 Minn 49, 16 L R A, NS, 440

20. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

U S v Martell, D C Pa, 104 F Supp 140, 143—In re Haynes, D C Kan, 88 F Supp 379, 381

Del—Lobdell Car Wheel Co v Subielski, 125 A 462, 464, 32 Del 462

NJ—State v Orecchio, 99 A 2d 595, 598, 27 NJ Super 484

NY—Lightbody v. Russell, 45 NY. S 2d 15, 17

Tex—Paddock v Siemoneit, Civ App, 214 SW 2d 651, 659

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

68 C J p 277 note 38, p 291 note 32, p 293 note 87

21. US—U S v Martell, D C Pa, 104 F Supp 140, 143—In re Haynes, D C Kan, 88 F Supp 379, 381

Conn—Soucy v Wysocki, 96 A 2d 225, 228, 139 Conn 622

NC—State v Chambers, 78 SE 2d 209, 211, 238 NC 373—State v Ellison, 52 SE 2d 9, 230 NC 59—State v Hayden, 32 SE 2d 333, 334, 224 NC 779—State v Dickens, 1 SE 2d 837, 838, 215 NC 303

68 C J p 277 notes 34, 36, p 293 note 86

#### Similarly expressed

(1) Without lawful excuse

NM—Ex parte Williams, 265 P 2d 359, 361, 58 NM 37

68 C J p 277 note 39

(2) Without lawful excuse or necessity

Ala—Jones v State, 62 So 306, 307, 7 Ala App 180—Robinson v State, 62 So 303, 305, 7 Ala App 172

(3) Without reasonable excuse

Cal—Green v Stewart, 289 P 940, 944, 106 Cal App 518

68 C J p 274 note 99, p 293 note 89

omitted without lawful or legal<sup>22</sup> justification,<sup>23</sup> and with no legal<sup>24</sup> or reasonable<sup>25</sup> ground for believing the act to be lawful,<sup>26</sup> and the terms are sometimes used to signify that what was done was without authority.<sup>27</sup>

While the words "willful" and "willfully" are sometimes used to signify an act committed malevolently,<sup>28</sup> or out of mere wantonness or lawlessness,<sup>29</sup> that is, wantonly, and in disregard of the rights of others,<sup>30</sup> the terms generally are not applied to conduct which necessarily amounts to wantonness,<sup>31</sup> although the conduct may approximate wantonness in a degree.<sup>32</sup> The words "willful" and "willfully" may be used to describe an act which implies an actual or conscious infraction of duty<sup>33</sup> or to signify an intentional failure to perform a plain duty,<sup>34</sup> a deliberate intention or set purpose to omit to perform a required duty,<sup>35</sup> a deliberate purpose not to discharge some duty necessary to safety,<sup>36</sup>

and thus the terms may mean contrary to duty<sup>37</sup> or contrary to a known duty,<sup>38</sup> but usually the terms signify something more than an intentional and occasional breach of duty.<sup>39</sup>

It is stated supra p 625 notes 40-43 that the words "willful" and "willfully" are frequently used in a sense that does not imply any malice or wrong, or anything necessarily blamable, or malevolent, and the words are generally used in this mild sense<sup>40</sup> in civil cases.<sup>41</sup> However, it is also stated supra p 627 notes 66-85 that the words "willful" and "willfully" may be employed to convey the idea of tort or wrong, and to denote malice, and to signify an intent which is evil, or a purpose which is bad, and this is sometimes referred to as the bad sense,<sup>42</sup> or the darker shade of meaning of the terms,<sup>43</sup> and this bad sense or darker shade of meaning may be attributed to the words in cases where intent is material,<sup>44</sup> and the terms will sometimes be construed as having this

22 Tex—Rankin v State, 139 SW 2d 811, 812, 139 Tex Cr 247  
68 CJ p 277 note 40, p 293 note 91

#### Without lawful justification

Tex—Galveston, H & S A R Co v Bowman, Civ App, 25 SW 140, 141

23 NC—State v Chambers, 78 SE 2d 209, 211, 238 NC 373—State v Ellison, 52 SE2d 9, 230 NC 59—State v Hayden, 32 SE2d 333, 334, 224 NC 779—State v Dickens, 1 SE2d 837, 838, 215 NC 303  
Tex—Rankin v State, 139 SW 2d 811, 812, 139 Tex Cr 247  
68 CJ p 293 note 92

#### Similarly expressed

Without grounds justifying the act

Tex—Henderson v State, 111 SW 736, 53 Tex Cr 533—Ross v State, Cr, 108 SW 697

24. Tex—Greer v. Franklin Life Ins Co, 221 SW 2d 857, 859, 148 Tex 166

Franklin Life Ins Co v Greer, Civ App, 219 SW 2d 137, 141  
68 CJ p 277 note 41

25 Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

Rankin v State, 139 SW 2d 811, 812, 139 Tex Cr 247  
68 CJ p 274 note 5, p 277 note 42, p 293 note 93

26. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

Ga—Thornion v State, 10 SE 2d 714, 715, 63 Ga App 255

Miss—Mississippi State Bd of Dental Examiners v Mandell, 21 So 2d 407, 409, 198 Miss 49

N Y—McDougall v Service Garage, 69 NYS 2d 176, 180, 187 Misc 950

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Tex—Greer v Franklin Life Ins Co, 221 SW 2d 857, 859, 148 Tex 166

Franklin Life Ins Co v Greer, Civ App, 219 SW 2d 137, 141, 142—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

Rankin v State, 139 SW 2d 811, 812, 139 Tex Cr 247  
68 CJ p 274 note 5, p 277 note 43, p 293 note 93

27. Iowa—Nelson v Deering Implement Co, 42 NW 2d 522, 527, 241 Iowa 1248

68 CJ p 277 note 33

28 US—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479

29. NY—Pyramid Musical Corporation v Floral Park Bank, 48 NYS 2d 866, 867, 268 App Div 783

Cortillion Fabrics Corp v National Safety Bank & Trust Co, of N Y, 84 NYS 2d 880, 882, 193 Misc 741

68 CJ p 273 note 82

30 Iowa—State v Savre, 105 NW 387, 389, 129 Iowa 122, 113 Am SR 452, 3 LRA, NS, 455—Parker v Parker, 71 NW 421, 423, 102 Iowa 500

31. Neb—Claim of Schroeder, 43 NW 2d 572, 575, 153 Neb 73—Clark v Village of Hemingford, 26 NW 2d 15, 21, 147 Neb 1044—Morse v Fruit Dispatch Co, 283 NW 495, 497, 135 Neb 648

W Va—Billings v State Compensation Commissioner, 16 SE 2d 804, 806, 123 W Va 498

32 Neb—Claim of Schroeder, 43 NW 2d 572, 575, 153 Neb 73—Clark v Village of Hemingford, 26 NW 2d 15, 21, 147 Neb 1044—Morse

v Fruit Dispatch Co, 283 NW 495, 497, 135 Neb 648

33 Cal—McPheeters v Board of Medical Examiners of State of California, 284 P 938, 939, 103 Cal App 297

34 Cal—Ellis v Burns Valley School Dist of Lake County, 18 P 2d 79, 81, 128 Cal App 550

35. Cal—People v Swiggy, 232 P 174, 176, 69 Cal App 574

Tex—Corpus Juris quoted in City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

36. US—Rowe v Gatke Corporation, CCA Ind, 126 F 2d 61, 66

37 Iowa—State v Roth, 144 NW 339, 344, 162 Iowa 638, 50 LRA, NS, 841  
68 CJ p 292 note 50

38 US—Beatty v U S, CA Iowa, 191 F 2d 317, 318

Iowa—Nelson v Deering Implement Co, 42 NW 2d 522, 537, 241 Iowa 1248

68 CJ p 274 note 95

39. US—Rowe v Gatke Corporation, CCA Ind, 126 F 2d 61, 66

40 Iowa—State v Meek, 127 NW 1023, 1024, 148 Iowa 671, 31 LRA, NS, 566, Ann Cas 1912C 1075.  
68 CJ p 272 note 51 [a]

41. Cal—Chan v Title Ins & Trust Co, App, 237 P 2d 53, 57—Wilson v Security-First Nat Bank of Los Angeles, 190 P 2d 975, 977, 84 Cal App 2d 427—Davis v Morris, 99 P 2d 345, 348, 37 Cal App 2d 269

42. NY—In re Mallon's Estate, 97 NYS 23, 25, 110 App Div 61  
68 CJ p 290 note 19

43. Vt—In re Cote, 106 A 519, 521, 93 Vt 10—State v Burlington Drug Co, 78 A 882, 886, 84 Vt 243

44. Ark—New Union Coal Co v.

meaning in legal<sup>45</sup> or legislative<sup>46</sup> usage. The most frequent use of the words "willful" and "willfully" in the bad sense or with the darker shade of meaning is in penal statutes<sup>47</sup> and in statutes dealing with crime,<sup>48</sup> and in such statutes the words mean more than they do in common usage,<sup>49</sup> and have a more extensive signification than merely intentional or designed.<sup>50</sup> However, the words are not used in this bad sense, or with this darker shade of meaning in all statutes dealing with crime,<sup>51</sup> in such statutes the words have many meanings,<sup>52</sup>

and generally in such statutes the meaning of the words will depend in a large measure on the nature of the criminal act and the facts of the particular case.<sup>53</sup> In statutes forbidding an act which in itself is wrong,<sup>54</sup> and in statutes dealing with offenses involving moral turpitude,<sup>55</sup> and therefore constituting felonies,<sup>56</sup> the words "willful" and "willfully" are generally considered to mean with evil or malevolent purpose or motive, criminal intent, or the like,<sup>57</sup> but in statutes forbidding or denouncing an act which in itself is not wrong,<sup>58</sup>

Walker, 31 SW 2d 753, 755, 182 Ark 460  
68 CJ p 273 note 73

45 Tex—Franklin Life Ins Co v Greer, Civ App, 219 SW 2d 137, 141

68 CJ p 272 note 41

#### Pleadings in tort actions

Ind—Chicago, St L & P R Co v Nash, 27 NE 564, 565, 1 Ind App 298

46 NJ—Duro Co v Wishnevsky, 16 A 2d 64, 66, 126 NJ Law 7

47. Miss—Mississippi State Bd of Dental Examiners v Mandell, 21 So 2d 407, 409, 198 Miss 49

Okl—Shields v State, 89 P 2d 756, 761, 184 Okl 618

Tex—Corpus Juris cited in City of Baird v West Texas Utilities Co, Civ App, 145 SW 2d 965, 968

68 CJ p 272 note 43, p 290 note 8

#### Statutes imposing penalty or forfeiture

NY—McDougall v Service Garage, 69 NYS 2d 176, 180, 187 Misc 950

#### Used to characterize forbidden act

When the word "willful" is used in a penal statute to characterize a forbidden act, it means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful

Tex—Burns v State, 61 SW 2d 512, 513, 123 Tex Cr 611

68 CJ p 272 note 44

48. US—U S v Murdock, Ill, 54 S Ct 223, 225, 290 US 389, 78 L Ed 381

Schmeller v U. S., CCA Ohio, 143 F 2d 544, 553

U S v Wilson, DCNM, 116 F Supp 911, 912—U S v Martell, DCPa, 104 F Supp 140, 143—In re Haynes, DCKan, 88 F Supp 379, 381

Cal—Murrill v State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

La—State v Vinzant, 7 So 2d 917, 922, 200 La 301

Tex—Paddock v. Siemonett, 218 S W 2d 428, 434, 147 Tex 571

Wash—State v James, 221 P 2d 282, 494, 495, 496, 36 Wash 2d 882

68 CJ. p 272 notes 42, 45, p 290 notes 8, 9, 11.

49. US—Roberts v U S, Tex, 126 F 897, 904, 61 CCA 427  
68 CJ p 272 note 50

50 Mass—Commonwealth v Kneeland, 20 Pick 206, 224

#### Similarly expressed

'The word "willful," as used within the meaning of the statute, implies something more than a mere voluntary purpose. When used in criminal statutes, the word "willful" means not only designedly, but also with a "bad purpose"'

NC—State v Clifton, 67 SE 751, 752, 152 NC 800, 28 LRA, NS, 673

51. US—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479—U S v Perplies, CCA Wis, 165 F 2d 874, 876—Kempe v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Mass, 142 F 2d 132, 137

Wash—State v James, 221 P 2d 282, 494, 495, 496, 36 Wash 2d 882  
68 CJ p 277 notes 48, 49

#### Few criminal cases

It is only in very few criminal cases that "willful" means done with bad purpose

DC—Dennis v U S, 171 F 2d 986, 990, 84 US App DC 31—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354—Townsend v U S, 95 F 2d 352, 358, 68 App DC 223

52 DC—Maragon v U S, 187 F 2d 79, 80, 87 US App DC 349

53. DC—Dennis v U S, 171 F 2d 986, 990, 84 US App DC 31—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354—Townsend v U S, 95 F 2d 352, 358, 68 App DC 223

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

Context of statute most important  
US—U S v Perplies, CCA Wis, 165 F 2d 874, 876

54. Cal—Swall v Anderson, App, 140 P 2d 196, 199  
68 CJ. p 293 note 82

55 US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Trenton Chemical Co v U S, CA Mich, 201 F 2d 776, 780—Na-

bob Oil Co v U S, CA Okl, 190 F 2d 478, 479—U S v Perplies, CCA Wis, 165 F 2d 874, 876—Kempe v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Miss, 142 F 2d 132, 137—Binkley Mining Co of Missouri v Wheeler, CCA 8, 133 F 2d 863, 871  
U S v Beatty, DC Iowa, 88 F Supp 646, 649—Carson Naval Stores Co v U S, DCGa, 29 F Supp 818, 822

Cal—Swall v Anderson, App, 140 P 2d 196, 199

NY—People, on Complaint of Weber v Keane, 47 NYS 2d 347, 349, 181 Misc 592

68 CJ p 293 note 82

56 US—U S v Perplies, CCA Wis, 165 F 2d 874, 876

NY—People, on Complaint of Weber v Keane, 47 NYS 2d 347, 349, 181 Misc 592

57 US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Trenton Chemical Co v U S, CA Mich, 201 F 2d 776, 780—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479—U S v Perplies, CCA Wis, 165 F 2d 874, 876—Kempe v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Mass, 142 F 2d 132, 137—Binkley Mining Co of Missouri v Wheeler, CCA 8, 133 F 2d 863, 871

U S v Beatty, DC Iowa, 88 F Supp 646, 649  
Cal—Swall v Anderson, App, 140 P 2d 196, 199

NY—People, on Complaint of Weber v Keane, 47 NYS 2d 347, 349, 181 Misc 592

#### More than intentional knowing violation

US—In re Haynes, DCKan, 88 F Supp 379, 381

58. US—U S v Illinois Cent R Co, La, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Trenton Chemical Co v U S, CA Mich, 201 F 2d 776, 780—Nabob Oil Co v U S, CA Okl, 190 F 2d 478, 479—Kempe v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Miss, 142 F 2d 132, 137.

and in statutes dealing with offenses which do not involve moral turpitude,<sup>59</sup> the words will usually be deemed to be used without such implication,<sup>60</sup> and in such instances the words are used in the sense of intentionally or purposely,<sup>61</sup> or to denote conduct which is intentional, or knowing, or voluntary, as distinguished from conduct which is accidental, or conduct which is marked by a careless disregard of its rightfulness.<sup>62</sup> Thus, sometimes when employed in statutes dealing with crime the words "willful" and "willfully" mean no more than that the person charged with the duty knows what

he is doing, and they do not mean that, in addition, he must suppose that he is breaking the law.<sup>63</sup>

The words "willful" and "willfully" are defined generally as meaning disposed or ready,<sup>64</sup> ready,<sup>65</sup> willing,<sup>66</sup> willingly,<sup>67</sup> desirous;<sup>68</sup> wishful,<sup>69</sup> inclined or favorably disposed in mind,<sup>70</sup> prompt to do, give, grant<sup>71</sup>

The words are further defined as meaning consciously;<sup>72</sup> done consciously,<sup>73</sup> in obedience to the will,<sup>74</sup> or with free activity of the perpetrator's will;<sup>75</sup> governed by the will,<sup>76</sup> without regard to reason,<sup>77</sup> or without yielding to reason,<sup>78</sup> proceed-

U S v Beatty, D C Iowa, 88 F Supp 646, 649  
Cal—Swall v Anderson, App, 140 P 2d 196, 199

#### Similarly expressed

"The general notion that a willful act implies a bad purpose is derived from criminal statutes. It has no such meaning when used in a statute to denounce an act not in itself wrong."

Neb—Union Transfer Co v Bee Line Motor Freights, 34 NW 2d 363, 365, 150 Neb 280

59. Cal—Swall v. Anderson, App, 140 P 2d 196, 199

#### Misdemeanor statutes

US—U S v Perplies, CCA Wis, 165 F 2d 874, 876

#### Highway safety regulations

In some cases the word "willful" connotes an evil purpose, but it does not require this element in cases relating to important safety regulations on the public highway

US—U S v Reid, D C Md, 110 F Supp 253, 257

60. US—U S v Illinois Cent R Co, Ill, 58 S Ct 533, 535, 303 US 239, 82 L Ed 773

Trenton Chemical Co v U S, C A Mich, 201 F 2d 776, 780—Nabob Oil Co v U S, C A Okl, 190 F 2d 478, 479—Kempe v U S, C C A Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Miss, 142 F 2d 132, 137

U S v Beatty, D C Iowa, 88 F Supp 646, 649

Cal—Swall v Anderson, App, 140 P 2d 196, 199

61. Cal—Swall v Anderson, supra.

62. US—Nabob Oil Co v U S, C A Okl, 190 F 2d 478, 479  
NY—People, on Complaint of Weber v Keane, 47 NYS 2d 347, 349, 181 Misc 592

63. US—Schmeller v U S, CCA Ohio, 143 F 2d 544, 553

D C—Dennis v U S, 171 F 2d 986, 990, 84 US App DC 31—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354—Townsend v U S, 95 F 2d 352, 358, 68 App DC 223

Wash—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 883  
68 CJ p 277 note 51

64. Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347.

In re Francis, Prob, 75 NE 2d 700, 704

65. NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 NYS 2d 53, 55

#### Ready to act

Ky—Gatewood v Commonwealth, 285 SW 193, 215 Ky 360

66. US—Bowles v Arcade Inv Co, D C Minn, 64 F Supp 577, 580

NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 NYS 2d 53, 55

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

In re Francis, Prob, 75 NE 2d 700, 704

67. Cal—Swall v Anderson, App, 140 P 2d 196, 199

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

68 CJ p 286 note 64

#### Willingly done

Iowa—State v Windahl, 64 NW 420, 421, 95 Iowa 470, 472

68. Ky—Gatewood v Commonwealth, 285 SW 193, 215 Ky 360

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

69. Ohio—In re Adoption of Shaw, supra

In re Francis, Prob, 75 NE 2d 700, 704

70. Ky—Gatewood v Commonwealth, 285 SW 193, 215 Ky 360

71. Ky—Gatewood v Commonwealth, supra.

72. Ark—New Union Coal Co v Walker, 31 SW 2d 753, 755, 182 Ark 460

68 CJ p 286 note 57

73. Ill—Eldorado Coal & Coke Co v Swan, 81 NE 691, 692, 227 Ill 586

68 CJ p 267 note 65.

74. Tex—State v Alcorn, 14 SW 663, 664, 78 Tex 387  
68 CJ p 267 note 66

#### Similarly defined

(1) Doing of one's own will without regard to the will of others. Pa—Matthews v Park Bros & Co, 23 A 208, 209, 146 Pa 384

(2) What a man wills to do  
NJ—State v Orecchio, 99 A 2d 595, 598, 27 NJ Super 484

State v Scott, 142 A 7, 8, 104 NJ Law 544

(3) Of his own will

NJ—State v Scott, supra.

(4) Full of will

Okl—Wick v Gunn, 169 P 1087, 1088, 66 Okl 316, 4 ALR 107

(5) Resulting from the exercise of one's own will

Tex—Indemnity Ins Co of North America v Scott, Civ App, 278 S W 347, 349

75. Neb—Minkler v State, 15 NW 330, 331, 14 Neb 181

68 CJ p 267 note 67

76. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Iowa—Everts v Jorgensen, 289 NW 11, 15, 227 Iowa 818

La—State v Kelley, 73 So 2d 437, 440, 225 La 495

NC—State v McDay, 61 SE 2d 86, 87, 232 NC 388

Ohio—In re Francis, Prob, 75 NE 2d 700, 704

68 CJ p 267 note 72, p 286 note 60

#### Due to one's own will

Ill—La Cerra v Woodrich, 52 NE 2d 461, 466, 321 Ill App 107

#### Due to one's will

Sask—Anderson v Canadian Northern R Co, 10 Sask L 325, 342, 35 Dom L R 473

77. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

68 CJ p 293 note 95

78. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

Iowa—Everts v Jorgensen, 289 NW 11, 15, 227 Iowa 818.

ing from a conscious motion of the will;<sup>79</sup> free activity inspired by conscious motion of the will;<sup>80</sup> spontaneous;<sup>81</sup> by choice;<sup>82</sup> contrary to one's own conviction;<sup>83</sup> voluntary;<sup>84</sup> not accidental;<sup>85</sup> in-

cidental;<sup>86</sup> or involuntary;<sup>87</sup> the voluntary act of a party<sup>88</sup> as distinguished from coercion.<sup>89</sup>

The terms are also defined as meaning deliberate;<sup>90</sup> deliberately;<sup>91</sup> knowing;<sup>92</sup> knowingly;<sup>93</sup>

La.—State v Kelley, 73 So 2d 437, 440, 225 La 495

NC.—State v McDay, 61 SE 2d 86, 87, 232 NC 388

Ohio.—In re Francis, Prob, 75 NE 2d 700, 704

68 CJ p 277 note 44

#### Similarly expressed

(1) Government by the will, without yielding to reason

US.—Roberts v U S, Tex, 126 F 897, 903, 61 CCA 427

(2) Controlled by the will in contradistinction to reason

Mich.—Highway Com'rs v Ely, 19 N W 940, 944, 54 Mich 173

Wis.—State v Smith, 8 NW 870, 871, 52 Wis 134

79. Ariz.—Shumway v Farley, 203 P 2d 507, 511, 68 Ariz 159

Colo.—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

NC.—State v McDay, 61 SE 2d 86, 87, 232 NC 388

68 CJ p 267 note 75

80. US.—Meyer v Dollar S S Line, DC Wash, 43 F 2d 425, 426

68 CJ p 267 note 70

81. Ill.—La Cerra v Woodrich, 52 NE 2d 461, 466, 321 Ill App 107

68 CJ p 267 note 77

82. Colo.—Pettingell v Moede, 271 P 2d 1038, 1042, 129 Colo 484

83. NY.—Cunningham v. Bucklin, 8 Cow 178, 185, 18 Am D 432

Ont.—Wilson v Manes, 28 Ont 419, 435

84. US.—Nicastro v. U S, CA Utah, 206 F 2d 89, 92—Kemme v U S, CCA Iowa, 151 F 2d 680,

688—Zimberg v U S, CCA Mass, 142 F 2d 132, 138

R F C v Foust Distilling Co, DCPa, 103 F Supp 167, 171—Walnut St Co v Glenn, DCKy, 83 F Supp 945, 948—Connor v Wheeler, DCPa, 77 F Supp 875, 879—Haber v Garthly, DCPa, 67 F Supp 774, 776—Bowles v Ward, DCPa, 65 F Supp 880, 890—Bowles v Arcade Inv Co, DC Minn, 64 F Supp 577, 580—Bowles v. Batson, DCSC, 61 F Supp 839, 844—Bowles v Ammon, DCNeb, 61 F Supp 106, 117—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 F Supp 581, 583

Ariz.—Shumway v Farley, 203 P 2d 507, 511, 68 Ariz 159

Colo.—Pettingell v Moede, 271 P 2d 1038, 1042, 129 Colo 484

Ill.—La Cerra v Woodrich, 52 NE 2d 461, 466, 321 Ill App 107

NJ.—Wegiel v Hogan, 100 A 2d 349, 351, 28 NJ Super 144.

NY.—Monahan v Jacobs & Politi, 66 NYS 2d 207, 213, 187 Misc 332

NC.—State v McDay, 61 SE 2d 86, 87, 232 NC 388

Ohio.—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347—Tighe v Diamond, 82 NE 2d 99, 102, 82 Ohio App 487

In re Francis, Prob, 75 NE 2d 700, 704

Pa.—Commonwealth v O'Leary, 79 A 2d 789, 792, 168 Pa Super 569—Commonwealth v Hubbs, 8 A 2d 618, 621, 137 Pa Super 244

Wash.—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

68 CJ p 267 note 79

85. Ariz.—Shumway v Farley, 203 P 2d 507, 511, 68 Ariz 159

Neb.—Sall v State, 61 NW 2d 256, 261, 157 Neb 688

86. W Va.—State ex rel Koontz v Smith, 62 SE 2d 548, 551, 134 W Va 876

87. Ariz.—Shumway v Farley, 203 P 2d 507, 511, 68 Ariz 159

Neb.—Sall v State, 61 NW 2d 256, 261, 157 Neb 688

W Va.—State ex rel Koontz v Smith, 62 SE 2d 548, 551, 134 W Va 876

88. Ohio.—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347

68 CJ p 267 note 78

89. Ohio.—In re Adoption of Shaw, supra.

90. US.—R F C v Foust Distilling Co, DCPa, 103 F Supp 167, 171—Connor v Wheeler, DCPa, 77 F Supp 875, 879—Haber v Garthly, DCPa, 67 F Supp 774, 776—Bowles v Ammon, DCNeb, 61 F Supp 106, 117

DC—Fields v U S, 164 F 2d 97, 100, 82 US App DC 354

Ill.—LaCerra v Woodrich, 52 NE 2d 461, 466, 321 Ill App 107

NY.—Monahan v Jacobs & Politi, 66 NYS 2d 207, 213, 214, 187 Misc 332

Schenectady Homes Corporation v Greenside Painting Corporation, 37 NYS 2d 53, 55

SC—Reeves v Carolina Foundry & Machine Works, 9 SE 2d 919, 921, 194 SC 403

68 CJ p 269 note 9

Done deliberately

Iowa.—State v Lightfoot, 78 NW 41, 107 Iowa 344, 348

91. US.—U S v George F Fish, Inc, CCANY, 154 F 2d 798, 801

Bowles v Batson, DCSC, 61 F Supp 839, 844—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 F Supp 581, 583

Colo.—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

Iowa.—Nelson v Deering Implement Co, 42 NW 2d 522, 527, 241 Iowa 1248

Tex.—Jones v. Traders & General Ins Co, Civ App, 144 SW 2d 689, 693—Corpus Juris cited in J S Curtiss & Co v White, Civ App, 90 SW 2d 1095, 1100

68 CJ p 288 note 88

92. US.—Nicastro v U. S, CA Utah, 206 F 2d 89, 92—Kemme v U S, CCA Iowa, 151 F 2d 680, 688—Zimberg v U S, CCA Mass, 142 F 2d 132, 138

R F C v Foust Distilling Co, DCPa, 103 F Supp 167, 171—Gutman v Lawton Estates, DCNY, 102 F Supp 724, 725—Walnut St Co v Glenn, DCKy, 83 F Supp 945, 948—Connor v Wheeler, DC Pa, 77 F Supp 875, 879—Haber v Garthly, DCPa, 67 F Supp 774, 776—Bowles v Ward, DCPa, 65 F Supp 880, 890—Batson v Bowles, DCSC, 61 F Supp 839, 844—Bowles v Ammon, DCNeb, 61 F Supp 106, 117—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 F Supp 581, 583

NY.—Monahan v Jacobs & Politi, 66 NYS 2d 207, 213, 214, 187 Misc 332

Wash.—State v James, 221 P 2d 482, 494, 495, 496, 36 Wash 2d 882

93. US.—U S v George F Fish, Inc, CCANY, 154 F 2d 798, 801—Powell v U S, CCANC, 112 F 2d 764, 767—U S. v Capitol Meats, CCANY, 106 F 2d 537, 538. In re Poliner, DCNY, 87 F Supp 995, 996—Scheide v Forstmann, DCMd, 66 F Supp 483, 488—Bowles v Batson, DCSC, 61 F Supp 839, 844—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 F Supp 581, 583

Cal.—People v Darcy, 139 P 2d 118, 123, 59 Cal App 2d 342—Corpus Juris cited in Schnender v Brecht, 44 P 2d 662, 665, 6 Cal App 2d 379

DC—Maragon v U S, 187 F 2d 79, 80, 87 US App DC 349

Mo.—State v Foster, 197 SW 2d 313, 324, 355 Mo 577

Miss.—Mason v State, 32 So 2d 140, 141

NY.—Sanders v Kibrick Realty Corp, 99 NYS 2d 56, 61—Milgrim v Marie Dore, Inc, 98 NYS 2d 187, 189—Howland v Firoz Realty Corp, 72 NYS 2d 734, 735

Tex.—Corpus Juris cited in J S Curtiss & Co v White, Civ App, 90 SW 2d 1095, 1100.

68 CJ p 270 note 16, p 289 note 91

knowingly and of stubborn purpose;<sup>94</sup> knowledge<sup>95</sup> design, intent, and purpose, and thus they are defined as meaning design;<sup>96</sup> designed,<sup>97</sup> designedly,<sup>98</sup> by<sup>99</sup> or with<sup>1</sup> design, and are further defined as meaning intent,<sup>2</sup> intentional,<sup>3</sup> and also as mean-

It is stated supra p 624 note 8 that the words "willful" and "willfully" imply such elements as

- 94.** US—Beatty v U S, CA Iowa, 191 F2d 317, 318  
Iowa—Nelson v Deering Implement Co, 42 NW2d 522, 527, 241 Iowa 1248  
NC—Lamm v Lamm, 49 SE2d 403, 404, 229 NC 248  
68 CJ p 275 note 13
- 95.** US—Carson Naval Stores Co v U S, DCGa, 29 FSupp 818, 821  
Miss—E L Bruce Co v Edwards, 3 So2d 846, 847, 192 Miss 1  
Mo—Plant v Thompson, 221 SW2d 834, 839  
Tex—City of Baird v West Texas Utilities Co, Civ App, 145 SW2d 965, 968  
68 CJ p 271 note 35
- Express or implied knowledge of probable consequences**  
Cal—Anderson v Newkirk, 225 P2d 247, 249, 101 CalApp2d 171
- 96.** NC—State v McDay, 61 SE2d 86, 87, 232 NC 388  
Okl—Shields v State, 89 P2d 756, 761, 184 Okl 618  
State v McMains, 241 P2d 976, 983, 95 OklCr 176  
Tex—Moore v Moore, Civ App, 142 SW2d 270, 272  
68 CJ p 269 note 11
- Showing design**  
Iowa—State v Williams, 29 NW801, 70 Iowa 52, 54  
68 CJ p 290 note 99
- 97.** Ariz—Shumway v Farley, 203 P2d 507, 511, 68 Ariz 159  
Okl—Bohannon v State, Cr, 271 P2d 739, 743—State v McMains, 241 P2d 976, 983, 95 OklCr 176  
W Va—State ex rel Koontz v Smith, 62 SE2d 548, 551, 134 W Va. 876  
68 CJ p 271 note 34.
- 98.** US—U S v Saghetto, DC Va, 41 FSupp 21, 28  
Cal—Swall v Anderson, App, 140 P2d 196, 199  
Colo—Johnson v Denver Tramway Corp, 171 P2d 410, 414, 115 Colo 214  
NJ—Duro Co v Wishnevsky, 16 A2d 64, 66, 126 NJ Law 7  
Tex—**Corpus Juris** cited in J S Curtiss & Co v White, Civ App, 90 SW2d 1095, 1100  
68 CJ p 270 note 14, p 288 note 89
- 99.** Ind—Cooprider v State, 31 NE2d 53, 56, 218 Ind. 122, 132 ALR 553  
Ohio—State v Harland, Com Pl, 105 NE2d 293, 298  
Vt—State v Sylvester, 22 A2d 505, 508, 112 Vt. 202  
Wash—State v Bixby, 177 P2d 689, 698, 27 Wash2d 144  
68 CJ p 269 note 8, p 287 note 87
- 1.** US—Schmeller v U S, CCA Ohio, 143 F2d 544, 553  
Tex—Jones v Traders & General Ins Co, Civ App, 144 SW2d 689, 693  
68 CJ p 287 note 87
- 2.** Ill—Tharp v Breitowich, 55 NE2d 392, 393, 323 Ill App 261—Gardner v Kelly, 31 NE2d 278, 279, 308 Ill App 6  
Miss—E L Bruce Co v Edwards, 3 So2d 846, 847, 192 Miss 1  
Ohio—Tighe v Diamond, 80 NE2d 122, 127, 149 Ohio St 520  
68 CJ p 268 note 89
- With deliberate intent**  
Colo—McNeil Coal Corporation v Industrial Commission, 96 P2d 889, 890, 105 Colo 263  
68 CJ p 271 note 33
- Used as meaning "intended"**  
Ark—Blevins v State, 107 SW 393, 394, 85 Ark 195  
68 CJ p 270 note 21
- Common use**  
"The common use of the word 'willfully' in the English language is in a sense denoting with intention"  
Ind—Chicago, St L & P R Co v Nash, 27 NE 564, 1 Ind App 298
- 3.** US—Nicastro v U S, CA Utah, 206 F2d 89, 92—Zimberg v U S, CCA Mass, 142 F2d 132, 138  
R F C v Foust Distilling Co, DCPa, 103 FSupp 167, 171—Gutman v Lawton Estates, DCNY, 102 FSupp 724, 725—Walnut St Co v Glenn, DCKy, 83 FSupp 945, 948—Connor v Wheeler, DCPa, 77 FSupp 875, 879—Bowles v Ward, DCPa, 65 FSupp 880, 890—Bowles v Arcade Inv Co, DC Minn, 64 FSupp 577, 580—Bowles v Ammon, DCNeb, 61 FSupp 106, 117—Bowles v Krasno Bros Glove & Mitten Co, DC Wis, 59 FSupp 581, 583  
Ala—Day v Downey, 56 So2d 656, 657, 256 Ala 587  
Ariz—Shumway v Farley, 203 P2d 507, 511, 68 Ariz 159  
Cal—Murrill v State Bd of Accountability of Dept of Professional and Vocational Standards, 218 P2d 569, 572, 97 Cal App 2d 709—**Corpus Juris** cited in People v McNutt, 105 P2d 657, 659, 40 Cal App 2d 835  
Colo—Pettingell v Moede, Colo, 271 P2d 1038, 1042  
DC—Fields v U S, 164 F2d 97, 100—82 US App DC 354  
Sherman v U S, Mun App, 36 A2d 556, 564  
Fla—Jackson v Edwards, 197 So 833, 835, 144 Fla 187.  
Ill—La Cerra v Woodrich, 52 NE2d 461, 466, 321 Ill App 107.
- Ind—Cooprider v State 31 NE2d 53, 56, 218 Ind 122, 132 ALR 553  
Iowa—State v Hofer, 28 NW2d 475, 483, 238 Iowa 820  
La—Matthews v Franklin, App, 74 So2d 309, 315—Piazza v Zimmermann, App, 49 So2d 491, 494  
Me—Thibodeau v Martin, 35 A2d 653, 654, 140 Me 179  
Mass—Sheehan v Goriansky, 72 NE2d 538, 541, 321 Mass 200, 173 ALR 497—New England Trust Co v Paine, 59 NE2d 263, 269, 317 Mass 542  
Mich—Tudryck v Mutch, 30 NW2d 512, 516, 320 Mich 86  
Mo—State v Stringer, 211 SW2d 925, 929, 357 Mo 978—State v Holiday, 182 SW2d 553, 554, 353 Mo 397  
Neb—Sall v State, 61 NW2d 256, 261, 157 Neb 688  
NJ—Wegiel v Hogan, 100 A2d 349, 351, 28 NJ Super 144—State v Orecchio, 99 A2d 595, 598, 27 NJ Super 484  
NY—Monahan v Jacobs & Politi, 66 NYS2d 207, 213, 187 Misc 332  
Schenectady Homes Corporation v Greenside Painting Corporation, 37 NYS2d 53, 55  
NC—State v McDay, 61 SE2d 86, 87, 232 NC 388  
Ohio—In re Adoption of Shaw, 108 NE2d 236, 239, 91 Ohio App 347—Tighe v Diamond, 82 NE2d 99, 102, 82 Ohio App 487—Panchula v Kaya, 18 NE2d 1003, 1005, 59 Ohio App 556  
State v Harland, Com Pl, 105 NE2d 293, 298—In re Francis, Prob, 75 NE2d 700, 704  
Okl—Shields v State, 89 P2d 756, 761, 184 Okl 618  
Bohannon v State, Cr, 271 P2d 739, 743—State v McMains, 241 P2d 976, 983, 95 OklCr 176  
Pa—Commonwealth v O'Leary, 79 A2d 789, 792, 168 Pa Super 569—Commonwealth v Gallagher, 69 A2d 432, 434, 165 Pa Super 553—Commonwealth v Hubbs, 8 A2d 618, 621, 137 Pa Super 244  
SC—Reeves v Carolina Foundry & Machine Works, 9 SE2d 919, 921, 194 SC 403  
Utah—Peterson v Peterson, 189 P2d 961, 962, 112 Utah 542  
Utah—Kidman v Kidman, 164 P2d 201, 202, 109 Utah 81  
Wash—State v James, 221 P2d 482, 494, 495, 496, 36 Wash2d 882  
W Va—State ex rel Koontz v Smith, 62 SE2d 548, 551, 134 W Va 876  
68 CJ p 270 note 23
- Intentional and deliberate**  
US—Thompson v Hays, CCA Mo, 11 F2d 244, 248.

ing intentionally,<sup>4</sup> intending the result which actually comes to pass,<sup>5</sup> pursuant to intention or design<sup>6</sup>

The terms are also defined as meaning purpose,<sup>7</sup> purposely,<sup>8</sup> on purpose,<sup>9</sup> with set purpose,<sup>10</sup> of

stubborn purpose,<sup>11</sup> but not of,<sup>12</sup> or with,<sup>13</sup> malice.

"Willful" and "willfully" are further defined as meaning stubborn,<sup>14</sup> stubbornly;<sup>15</sup> determined;<sup>16</sup> self-determined,<sup>17</sup> formed,<sup>18</sup> and also as meaning

DC—U S v Barsky, DC, 7 FRD 38, 40

#### Intentional and wrongful

Mich—Ernst v Grand Rapids Engraving Co, 138 NW 1050, 1051, 173 Mich 254

#### Intentional and purposeful violation of orders

Tenn—American Mut Liability Ins Co v Gart, 125 SW 2d 140, 141, 174 Tenn 297

4. US—Inland Freight Lines v U S, CA Utah, 191 F2d 313, 316—Delaware & H R Corporation v Bonzik, CCA Pa, 105 F2d 341, 343 In re Schnabel, DCMinn, 61 F Supp 386, 394

Ariz—Shumway v Farley, 203 P2d 507, 511, 68 Ariz 159

Cal—Chan v Title Ins & Trust Co, App, 237 P2d 53, 57—Swall v Anderson, App, 140 P2d 196, 199—People v Darcy, 139 P2d 118, 123, 59 Cal App2d 342—Lowen v Finnila, App, 93 P2d 257, 260—**Corpus Juris cited in** Schneider v Brecht, 44 P2d 662, 665, 6 Cal App2d 379 Colo—Johnson v Denver Tramway Corp, 171 P2d 410, 413, 115 Colo 214

DC—Maragon v U S, 187 F2d 79, 80, 87 US App DC 349

Ga—Thornton v State, 10 SE 2d 714, 715, 63 Ga App 255

Iowa—Nelson v Deering Implement Co, 42 NW 2d 522, 527, 241 Iowa 1248

Mo—State v Foster, 197 SW 2d 313, 321, 355 Mo 577

NJ—Duro Co v Wishnevsky, 16 A 2d 64, 66, 126 NJ Law 7

NC—State v Chambers, 78 SE 2d 209, 211, 238 NC 373—State v Ellison, 52 SE 2d 9, 230 NC 59—State v Hayden, 32 SE 2d 333, 334, 224 NC 779

Tex—Jones v Traders & General Ins Co, Civ App, 144 SW 2d 689, 693—**Corpus Juris cited in** J S Curtiss & Co v White, Civ App, 90 SW 2d 1095, 1100

Vt—State v Sylvester, 22 A 2d 505, 508, 112 Vt 202

68 CJ p 270 note 15, p 288 note 90, p 289 note 92.

#### In ordinary parlance

Ky—Jones v Mobile & O R Co, 127 SW 144, 145

5. US—Kemp v U S, CCA Iowa, 151 F2d 680, 688

Ariz—Shumway v Farley, 203 P2d 507, 511, 68 Ariz 159

NC—State v McDay, 61 SE 2d 86, 87, 232 NC 388.

W Va—State ex rel Koontz v Smith, 62 SE 2d 548, 551, 134 W Va 876 68 CJ p 270 note 22

#### Similarly expressed

Done with a set purpose to accomplish the results which followed the act

Ohio—De Shetler v Kordt, 183 NE 85, 87, 43 Ohio App 236

6. Okl—Bohannon v State, Cr, 271 P2d 739, 743—State v McMains, 241 P2d 976, 983, 95 Okl Cr 176 68 CJ p 271 note 30, p 290 note 98

7. Ill—Tharp v Breitowich, 55 NE 2d 392, 393, 323 Ill App 261—Gardner v Kelly, 31 NE 2d 278, 279, 308 Ill App 6 68 CJ p 268 note 90, p 271 note 36

#### With the purpose of

US—Von Bank v U S, CC AND, 253 F 641, 642

#### With design and purpose

Minn—State v Smith, 199 NW 427, 429, 159 Minn 511

8. US—Boston & Me R R v U S, CCA Mass, 117 F2d 428, 431 U S v Schneiderman, DCCal, 106 F Supp 906, 935

Colo—Johnson v Denver Tramway Corp, 171 P2d 410, 413, 414, 115 Colo 214

68 CJ p 270 note 20, p 289 note 97

Done of a purpose  
SC—Talbert v Charleston & W C R Co, 55 SE 138, 139, 75 SC 136

#### Purposeful

Colo—Pettingell v Moede, 271 P2d 1038, 1042, 129 Colo 484

Tenn—Jones v First State Bank, 13 SW 2d 326, 328, 158 Tenn 356

9. Fla—Jackson v Edwards, 197 So 833, 835, 144 Fla 187

Utah—Peterson v Peterson, 189 P2d 961, 962, 112 Utah 542—Kidman v Kidman, 164 P2d 201, 202, 109 Utah 81

68 CJ p 270 note 19, p 271 note 28, p 289 note 96

#### With purpose

Tex—Jones v Traders & General Ins Co, Civ App, 144 SW 2d 689, 693

10 US—Rowe v Gatke Corporation, CCA Ind, 126 F2d 61, 66

Cal—Swall v Anderson, App, 140 P 2d 196, 199

Colo—Johnson v Denver Tramway Corp, 171 P2d 410, 414, 115 Colo 214.

Okl—State v McMains, 241 P2d 976, 983, 95 Okl Cr 176

Tex—Moore v Moore, Tex Civ App, 142 SW 2d 270, 272

Wash—State v Bixby, 177 P2d 689, 698, 27 Wash 2d 144

68 CJ p 271 note 27, p 290 note 5

#### Of set purpose

US—Roberts v U S, Tex, 126 F 897, 902, 61 CCA 427

Iowa—State v Williams, 29 NW 80, 70 Iowa 52

11. US—North Carolina v Vanderford, CCNC, 35 F 282, 287

68 CJ p 269 note 2, p 270 note 17, p 287 note 70

12 NC—Bailey v North Carolina R Co, 62 SE 912, 914, 149 NC 169

68 CJ p 269 note 2, p 287 note 71

13. Miss—Ousley v State, 122 So 731, 732, 154 Miss 451, 456

Neb—Bundy v State, 206 NW 21, 22, 114 Neb 121

14 Colo—Johnson v Denver Tramway Corp, 171 P2d 410, 413, 115 Colo 214

NC—State v McDay, 61 SE 2d 86, 87, 232 NC 388

Ohio—In re Francis, Prob, 75 NE 2d 700, 704

68 CJ p 276 note 23

#### Stubbornness

US—Rowe v Gatke Corporation, CCA Ind, 126 F2d 61, 66

15. Colo—Johnson v Denver Tramway Corp, 171 P2d 410, 414, 115 Colo 214

68 CJ p 292 note 67

16. Okl—Wick v Gunn, 169 P 1087, 1088, 66 Okl 316, 4 ALR 107

17 US—Roberts v U S, Tex, 126 F 897, 902, 61 CCA 427

Bowles v Arcade Inv Co, DC Minn, 64 F Supp 577, 580

Ariz—Shumway v Farley, 203 P2d 507, 511, 68 Ariz 159

Ill—La Cerra v Woodrich, 52 NE 2d 461, 466, 321 Ill App 107

NY—Schenectady Homes Corporation v Greenside Painting Corporation, 37 NYS 2d 53, 55.

NC—State v McDay, 61 SE 2d 86, 87, 232 NC 388

Ohio—In re Adoption of Shaw, 108 NE 2d 236, 239, 91 Ohio App 347—

Tighe v Diamond, 82 NE 2d 99, 102, 82 Ohio App 487

In re Francis, Prob, 75 NE 2d 700, 704

Pa—Commonwealth v O'Leary, 79 A 2d 789, 792, 168 Pa Super 569—Commonwealth v Hubbs, 8 A 2d 618, 621, 137 Pa Super 244

18 SC—Reeves v Carolina Foundry & Machine Works, 9 SE 2d 919, 921, 194 SC 403.



fixed<sup>19</sup> It has also been said to mean obstinate;<sup>20</sup> obstinately;<sup>21</sup> capriciously,<sup>22</sup> inflexible,<sup>23</sup> reckless,<sup>24</sup> persistently,<sup>25</sup> refractory;<sup>26</sup> selfishly,<sup>27</sup> and the word "willfully" has been defined as meaning in a willful manner<sup>28</sup>

It is stated supra p 630 notes 42, 43 that the words "willful" and "willfully" may be used in a bad sense, or with a darker shade of meaning, and in this sense they are defined to mean malevolently;<sup>29</sup> malicious,<sup>30</sup> wrongfully,<sup>31</sup> unlawfully,<sup>32</sup> wanton;<sup>33</sup> wantonly,<sup>34</sup> perverse,<sup>35</sup> perversely;<sup>36</sup> corruptly,<sup>37</sup> and in this same sense they are defined to mean accomplished purposely and deliberately in violation of law<sup>38</sup>

"Willful" has been held to be equivalent to, or synonymous with "deliberate" see 26 C.J.S. p 690 note 81, and "intentional" see 46 C.J.S. p 1106 note 20.

"Willful" has been compared with, or distinguished from, "absence of intention or design" see 46 C.J.S. p 1106 note 15, "careless" see 12 C.J.S. p 1147 note 83.2, "casual and involuntary" see 14 C.J.S. p 29 note 38, "deliberate" see 26 C.J.S. p 690 note 84, "gross" see 38 C.J.S. p 1081 note 36, "in-

advertent" see 42 C.J.S. p 496 note 3, "indifferent" see 42 C.J.S. p 1363 note 8, "in good faith" see 35 C.J.S. p 490 note 6, "intentional" see 46 C.J.S. p 1106 note 24, "involuntary" see 48 C.J.S. p 766 note 91, "malicious" see 54 C.J.S. p 929 note 7, "negligent" see Negligence § 1 e, "premeditated" see 72 C.J.S. p 483 note 96, "thoughtless" see 86 C.J.S. p 783 note 99, and "wrongful."<sup>39</sup>

"Willfully" has been held to be equivalent to, or synonymous with, "intentionally" see 46 C.J.S. p 1107 note 33, "knowingly" see 51 C.J.S. p 464 notes 44, 45, and "maliciously" see 54 C.J.S. p 932 note 66.

"Willfully" has been compared with, or distinguished from, "corruptly" see 20 C.J.S. p 240 note 19, "designedly" see 26 C.J.S. p 1241 note 86, "falsely" see 35 C.J.S. p 627 note 9, "feloniously" see 36 C.J.S. p 634 note 14, "fraudulently" see 37 C.J.S. p 1368 note 11, "in good faith" see 35 C.J.S. p 490 note 7, "intentionally" see 46 C.J.S. p 1107 notes 34, 35, "involuntarily" see 48 C.J.S. p 766 note 76, "knowingly" see 51 C.J.S. p 464 notes 42, 43, "malice" see 54 C.J.S. p 927 note 64, "maliciously" see 54 C.J.S. p 932 note 69, "mistake" see 58 C.J.S. p 831 note 26, "purposely" see 73 C.J.S. p 1262 note 12, "rudely" see 77 C.J.S. p 543 note 41, "through

19 Okl.—Wick v Gunn, 169 P 1087, 1088, 66 Okl 316, 4 A L R 107

20. US—Gutman v Lawton Estates, D C N Y, 102 F Supp 724, 725—Bowles v Ammon, D C Neb, 61 F Supp 106, 117

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

N Y—Monahan v Jacobs & Politi, 66 N Y S 2d 207, 213, 187 Misc 332

N C—State v McDay, 61 S E 2d 86, 87, 232 N C 388

Ohio—In re Francis, Prob, 75 N E 2d 700, 704

68 C J p 275 note 19

#### In an obstinate manner

Ind—Chicago, St L & P R Co v Nash, 27 N E 564, 1 Ind App 298

#### Obstinacy

US—Rowe v Gatke Corporation, C C A Ind, 126 F 2d 61, 66

21 US—Boston & M R R v U S, C C A Mass, 117 F 2d 428, 431

Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

68 C J p 292 note 62

22. US—Kellems v U. S, D C Conn, 97 F Supp 681, 682

23 Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

68 C J p 275 note 8½

#### Inflexibility

Ind—Pennsylvania Co v Reesor, 108 N E 983, 986, 60 Ind App 636

68 C J p 292 note 55.

24. US—Heller v New York, N H & H R Co, C C A N Y, 265 F 192, 197

68 C J p 276 note 21

Degree of recklessness so gross as to constitute willfulness

Miss—E L Bruce Co v Edwards, 3 So 2d 846, 847, 192 Miss 1

25 NC—Brown v Brown, 32 S E 320, 321, 124 N C 19, 70 Am S R 574

26. Del—Lobdell Car Wheel Co v Subielski, 125 A 462, 463, 32 Del 462

68 C J p 276 note 22

27. Ind—Pennsylvania Co v Reesor, 108 N E 983, 987, 60 Ind App. 636

28. Ind—Pennsylvania Co v Reesor, supra

68 C J p 285 note 49

29. US—Zimberg v U S, C C A Mass, 142 F 2d 132, 137

Ga—Thornton v State, 10 S E 2d 714, 715, 63 Ga App 255

N Y—McDougall v Service Garage, 69 N Y S 2d 176, 180, 187 Misc 950

68 C J p 275 note 14.

30. Ind—Coopridge v State, 31 N E 2d 53, 56, 218 Ind 122, 132 A L R 553

N C—State v McDay, 61 S E 2d 86, 87, 232 N C 388

68 C J p 275 note 16.

31. US—Roberts v U S, Tex, 126 F 897, 903, 61 C C A 427

68 C J p 293 notes 84, 96

32. Or—Wong v Astoria, 11 P 295, 296, 13 Or 538

68 C J p 292 note 68

33. Pa—Petrovski v Philadelphia & R R Co, 107 A 381, 382, 263 Pa 531

68 C J p 276 note 24

34. N Y—In re Mallon's Estate, 97 N Y S 23, 25, 110 App Div 61

68 C J p 292 note 69

35. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 413, 115 Colo 214

N C—State v McDay, 61 S E 2d 86, 87, 232 N C 388

Ohio—In re Francis, Prob, 75 N E 2d 700, 704

68 C J p 275 note 20

36. Colo—Johnson v Denver Tramway Corp, 171 P 2d 410, 414, 115 Colo 214

68 C J p 292 note 63

37. Cal—Murrill v. State Bd of Accountancy of Dept of Professional and Vocational Standards, 218 P 2d 569, 572, 97 Cal App 2d 709

68 C J p 292 note 51

38. N C—Truelove v Parker, 132 S E 295, 299, 191 N C 438

68 C J p 274 note 88

39. Minn—McLean v Burbank, 12 Minn 530, 533 (Gilf 438).

inadvertence" see 42 CJS p 496 note 98, "willingly,"<sup>40</sup> and "wrongfully."<sup>41</sup>

**WILLFULNESS.** It has been said that "willfulness," which in the law of torts has a well-established meaning,<sup>42</sup> is a state<sup>43</sup> or condition<sup>44</sup> of the mind. It is the quality of being willful,<sup>45</sup> and arises from the spontaneous action of the will.<sup>46</sup>

"Willfulness" is an appropriate word to describe an act done purposely,<sup>47</sup> or one which proceeds from the will so as to make the act a purpose act,<sup>48</sup> and it implies an act done intentionally and designedly,<sup>49</sup> and necessarily involves an omission, or the performance of a deliberate or intentional act, regardless of consequences.<sup>50</sup> The word "willfulness" is sometimes employed to characterize a thing done without ground for believing it is lawful,<sup>51</sup> and

it is sometimes employed to denote conduct marked by careless disregard of whether or not one had the right so to act.<sup>52</sup>

"Willfulness" means something more than mere carelessness,<sup>53</sup> neglect,<sup>54</sup> negligence,<sup>55</sup> oversight, or even shiftlessness,<sup>56</sup> and something more than a failure to exercise ordinary care.<sup>57</sup>

Willfulness necessarily involves, or rests upon, knowledge,<sup>58</sup> and to constitute willfulness there must be the element of intent<sup>59</sup> or intention,<sup>60</sup> purpose,<sup>61</sup> or design,<sup>62</sup> and these may be either actual or constructive.<sup>63</sup> "Willfulness" also involves premeditation<sup>64</sup> and deliberation,<sup>65</sup> and includes some element of evil motive and want of justification,<sup>66</sup> and it sometimes embodies the element of malice,<sup>67</sup> either express or implied.<sup>68</sup> Willfulness signifies

40. Ind.—Chicago, St L & P R Co v Nash, 27 NE 564, 1 Ind App 298

41. La.—State v Pellerin, 43 So 159, 161, 118 La 547  
71 CJ p 1644 note 33

42. Ind.—Dierickx v Davis, 137 NE 685, 690, 80 Ind App 71

43. DC—U S v Barsky, DC, 7 F RD 38, 40

Ind.—Barr v Chicago, St L & P R Co, 37 NE 814, 815, 10 Ind App 433

**Phrases** employing the word "willfulness" and of which more recent adjudications have not been found see 68 CJ p 302 notes 85-90

44. Ind.—Barr v Chicago, St L & P R Co, 37 NE 814, 815, 10 Ind App 433

45. Ind.—Southern Ry Co v McNeeley, 88 NE 710, 711, 44 Ind App 126

68 CJ p 300 note 28

46. Ind.—Huff v Chicago, I & L R Co, 56 NE 932, 934, 24 Ind App 492, 79 Am SR 274

47. Mo.—Cramer v Springfield Traction Co, 87 SW 24, 27, 112 Mo App 350

48. SC—Talbert v Charleston & W C R Co, 55 SE 138, 139, 75 SC 136

49. Utah—Jensen v Denver & R G R Co, 138 P 1185, 1189, 44 Utah 100

50. Cal.—Porter v Hofman, 85 P 2d 447, 448, 12 Cal 2d 445

Woodson v Everson, 142 P 2d 338, 340, 61 Cal App 2d 204—Marchi v Virone, 108 P.2d 469, 471, 42 Cal App 2d 124—Norton v Puter, 32 P 2d 172, 174, 138 Cal App 253

Minn.—Sohm v Sohm, 3 NW 2d 496, 497, 212 Minn 316

51. US—Bowles v Jung, DC Cal, 57 F Supp. 701, 709.

52. US—Bowles v Jung, supra.

53. US—Baltimore & O R Co v Felgenhauer, CCA Mo, 168 F 2d 12, 16

Iowa—Claus v Chicago Great Western Ry Co, 111 NW 15, 16, 136 Iowa 7

54. Iowa—Claus v Chicago Great Western Ry Co, supra

55. Iowa—Claus v Chicago Great Western Ry Co, supra  
68 CJ p 300 note 34

56. Iowa—Claus v Chicago Great Western Ry Co, supra

57. Ill.—Cook v Big Muddy-Carterville Mining Co, 94 NE 90, 94, 249 Ill 41

58. Ohio—Haacke v. Lease, App, 41 NE 2d 590, 597

W Va.—Young v State Compensation Com'r, 14 SE 2d 774, 776, 123 W Va 299

68 CJ p 301 note 54

#### **Imports knowledge of the facts**

Ill.—Rajak v Cummings, 41 NE 2d 969, 971, 314 Ill App 465

59. NJ—State v Diamond, 83 A 2d 799, 801, 16 NJ Super 26—State v Gooze, 81 A 2d 811, 814, 14 NJ Super 277

W Va.—Young v. State Compensation Com'r, 14 SE 2d 774, 776, 123 W Va 299

68 CJ p 301 note 43

#### **Intent on part of wrongdoer**

NY—People v Baylison, 206 NY S 804, 808, 211 App Div 40

60. Wis.—Rideout v Winnebago Traction Co, 101 NW 672, 675, 123 Wis 297, 69 LRA 601

68 CJ p 300 note 32

61. NJ—State v Diamond, 83 A 2d 799, 801, 16 NJ Super 26—State v Gooze, 81 A 2d 811, 814, 14 NJ Super 277

Va.—Thomas v Snow, 174 SE 837, 839, 162 Va. 654

W Va.—Spence v Browning Motor Freight Lines, Inc, 77 SE 2d 806, 810—Kelly v Checker White Cab, 50 SE 2d 888, 892, 131 W Va 816—Stone v Rudolph, 32 SE 2d 742, 749, 127 W Va 335

68 CJ p 301 notes 44, 55

62. Va.—Thomas v Snow, 174 SE 837, 839, 162 Va. 654

W Va.—Spence v Browning Motor Freight Lines, Inc, 77 SE 2d 806, 810—Kelly v Checker White Cab, 50 SE 2d 888, 892, 131 W Va 816—Stone v Rudolph, 32 SE 2d 742, 749, 127 W Va 335

68 CJ p 301 note 42

#### **Similarly expressed**

Willfulness cannot exist without purpose or design

Del.—Gallagher v Davis, 183 A 620, 622, 7 W WHarr 380

68 CJ p 301 note 42 [a] (2)

63. Va.—Thomas v Snow, 174 SE 837, 839, 162 Va. 654

W Va.—Spence v Browning Motor Freight Lines, Inc, 77 SE 2d 806, 810—Kelly v Checker White Cab, 50 SE 2d 888, 892, 131 W Va 816—Stone v Rudolph, 32 SE 2d 742, 749, 127 W Va 335

64. Ohio—Haacke v Lease, App, 41 NE 2d 590, 597

W Va.—Young v State Compensation Com'r, 14 SE 2d 774, 776, 123 W Va 299

65. Ohio—Payne v Vance, 133 NE 85, 87, 103 Ohio St 59

66. US—Spies v U S, NY, 63 S. Ct 364, 368, 317 US 492, 87 L Ed 418

Tex.—Paddock v Siemoneit, 218 SW. 2d 428, 434, 147 Tex 571

67. Ill.—La Cerra v Woodrich, 52 N. E 2d 461, 466, 321 Ill App 107

68 CJ p 301 note 58

68. SC—Hull v. Seaboard Air Line R Co, 57 SE 28, 76 SC 278, 10 LRA, NS, 1213

68 CJ p 300 note 36.

the evil mind,<sup>69</sup> and involves conduct which is quasi-criminal in nature<sup>70</sup>

The exact meaning of the word "willfulness" has often been defined by the courts,<sup>71</sup> and one of the accepted definitions of the word is the intentional doing of a wrongful act.<sup>72</sup> The term denotes a wrongful act, done intentionally, without just cause,<sup>73</sup> intentional wrongdoing,<sup>74</sup> a criminal and willful intent to do wrong;<sup>75</sup> a design, intent, or purpose to do wrong<sup>76</sup> or inflict injury.<sup>77</sup> However, it is not always necessary that there be an actual intent to cause injury,<sup>78</sup> there may be merely a desire or intent to produce a certain result<sup>79</sup> or a conscious failure to observe due care,<sup>80</sup> but there must be at least a willingness to inflict injury or harm<sup>81</sup> or a conscious indifference to the perpetration of the wrong.<sup>82</sup> Thus "willfulness" may be defined as meaning a conscious disregard of conse-

quences,<sup>83</sup> disregard of,<sup>84</sup> or indifference to,<sup>85</sup> consequences; and if there is a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, it will amount to willfulness although there is no direct proof of an actual intention to inflict the injury complained of.<sup>86</sup> It has frequently been held that an intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person, or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness.<sup>87</sup>

In a number of cases "willfulness" has been judicially construed to characterize conduct which is intentional, knowing, voluntary, deliberate, or obstinate, as distinguished from malevolent, or specifically designed to be violative of law,<sup>88</sup> but willful-

69 US—Chicago, St P, M & O R Co v U S, Minn, 162 F. 835, 840, 90 CCA 211

70 Ind—Pittsburgh, C, C & St L R Co v Ferrell, 78 NE 988, 989, 39 Ind App 515

71 Ind—Huff v Chicago, I & L R Co, 56 NE 932, 934, 24 Ind App 492, 79 Am SR 274

72 Iowa—State v Willing, 105 N W 355, 356, 129 Iowa 72

#### Similarly defined

"Willfulness" is the intentional doing of some act or the failure to do some act, according to one's own will, regardless of the right of others, when the person knows, or is under legal obligation to know, that the doing or the failing to do such act might cause injury to other persons SC—Geddings v Atlantic Coast Line R Co, 75 SE 284, 91 SC 477

73 Mo—Dickensheet v Chouteau Mining Co, 202 SW 624, 627, 200 Mo App 150

68 CJ p 302 note 70

74 US—Harzfeld's, Inc v Otis Elevator Co, DCMo, 116 F Supp 512, 514

Mo—State ex rel Kurn v Hughes, 153 SW2d 46, 51, 348 Mo 177—Evans v Illinois Cent R Co, 233 SW 397, 399, 289 Mo 493

75 US—Chicago, St P, M & O R Co v U S, Minn, 162 F. 835, 841, 90 CCA 211

76 NJ—State v Diamond, 83 A2d 799, 801, 16 NJ Super 26—State v Gooze, 81 A2d 811, 814, 14 NJ Super 277

68 CJ p 301 note 56.

77 NJ—State v Diamond, 83 A2d 799, 801, 16 NJ Super 26—State v Gooze, 81 A2d 811, 814, 14 NJ Super 277

68 CJ p 301 notes 42-44.

#### Actual intent to cause injury

Del—Tyndall v Rippon, Del Super, 61 A2d 422, 424, 5 Terry 458

Law v Gallagher, 197 A 479, 482, 9 WW Harr 189—Gallagher v Davis, 183 A 620, 622, 7 WW Harr 380

#### Consciousness injury will result from act done

Ohio—Haacke v Lease, App, 41 NE 2d 590, 597

78. Pa—Allen v Unemployment Compensation Bd of Review, 77 A 2d 889, 890, 168 Pa Super 295—Sabatelli v Unemployment Compensation Bd of Review, Dept of Labor & Industry, 76 A2d 654, 656, 168 Pa Super 85

79. Ind—Pittsburgh, C, C & St L R Co v Ferrell, 78 NE 988, 989, 39 Ind App 515

80 SC—Tinsley v Western Union Tel Co, 51 SE 913, 914, 72 SC 350

81. Pa—Allen v Unemployment Compensation Bd of Review, 77 A 2d 889, 890, 168 Pa Super 295—Sabatelli v Unemployment Compensation Bd of Review, Dept of Labor & Industry, 76 A2d 654, 656, 168 Pa Super 85

68 CJ p 302 note 65

82. Pa—Allen v Unemployment Compensation Bd of Review, 77 A 2d 889, 890, 168 Pa Super 295—Sabatelli v Unemployment Compensation Bd of Review, Dept of Labor & Industry, 76 A2d 654, 656, 168 Pa Super 85

83 SC—Driggers v Southern Ry Co, 168 SE 185, 186, 169 SC 157—Ford v Atlantic Coast Line R Co, 168 SE 143, 159, 169 SC 41.

84. Ill—Lakeshore & M S. R Co v.

Bodemer, 29 NE 692, 695, 139 Ill 596, 32 Am SR 218

68 CJ p 301 note 46

85. US—In re Cunningham, D CN Y, 253 F 663, 665

68 CJ p 301 note 47

#### Indifference to attendant consequences

Mo—Moore v East St Louis & S Ry Co, App, 54 SW2d 767, 771

86. Ga—Southern Ry Co v Chatman, 53 SE 692, 695, 124 Ga 1026, 6 LRA NS, 283

Brady v Glosson, Ga App, 74 SE2d 253, 256, 87 Ga App 476

87. US—Robins v. Pitcairn, CCA Ill, 124 F2d 734, 738—Storck v Northwestern Nat Casualty Co, CCA Wis, 115 F2d 889, 891

Ill—Mower v Williams, 84 NE2d 435, 437, 402 Ill 486—Clarke v Shorchak, 52 NE2d 229, 237, 384 Ill 564—Bartolucci v. Palletti, 46 NE2d 980, 983, 382 Ill 168—Streeter v Humrichouse, 191 NE 684, 686, 357 Ill 234—Jeneary v Chicago & I Traction Co, 138 NE 203, 206, 306 Ill 392

Countryman v Sullivan, 100 NE 2d 799, 802, 344 Ill App 371—Anderson v Brown, 92 NE2d 495, 499, 340 Ill App 613—Barnhart v Martin, 64 NE2d 743, 327 Ill App 551—Clark v. Hasselquist, 25 NE 2d 900, 904, 304 Ill App 41—Bellomy v Bruce, 25 NE2d 428, 432, 303 Ill App 349

Ind—Bedwell v De Bolt, 50 NE2d 875, 878, 221 Ind 600

Mo—Taylor v Laderman, 161 SW 2d 253, 255, 349 Mo 415

68 CJ p 301 note 47 [a]

88. US—Woods v Cobleigh, DC NH, 75 F Supp 125, 130—Bowles v Weitz, DCPa, 64 F Supp 829, 833—Bowles v Pechersky, DCPa, 64 F Supp 641, 645.

ness may signify a conscious violation of law,<sup>89</sup> or it may mean a deliberate unwillingness to discover and obey the law,<sup>90</sup> and when the word is used to characterize an act in the realm of the criminal law,<sup>91</sup> or when it is used in statutes dealing with crime<sup>92</sup> or in penal statutes,<sup>93</sup> it means more than voluntariness,<sup>94</sup> and more is required than the mere doing of the act proscribed.<sup>95</sup> Generally, in such statutes the term implies a purposeful design to do a thing with evil or illegal design,<sup>96</sup> and it means an act done with a bad purpose,<sup>97</sup> stubbornly, obstinately, and perversely,<sup>98</sup> and without justifiable excuse,<sup>99</sup> but when it is used in a statutory prohibition involving no moral turpitude it means no more than that the person charged with the duty knows what he is doing, and it does not mean that, in addition, he must suppose that he is breaking the law.<sup>1</sup> When willfulness is a necessary element of a crime arising by failure to obey an administrative officer or directive, it means an act done without justifiable excuse or in stubborn or obstinate disregard of the plain meaning of such order.<sup>2</sup>

"Willfulness" is variously defined as meaning obstinacy; perverseness,<sup>3</sup> set purpose;<sup>4</sup> stubborn-

ness,<sup>5</sup> recklessness,<sup>6</sup> voluntariness,<sup>7</sup> wantonness.<sup>8</sup>

"Willfulness" has been held to be equivalent to, or synonymous with, "recklessness" see 76 C.J.S. p 71 note 95, and it has been compared with, or distinguished from, "carelessness" see 12 C.J.S. p 1148 note 24, "failure to observe" see 35 C.J.S. p 481 note 75, "inadvertence" see 42 C.J.S. p 496 note 97, "malice" see 54 C.J.S. p 927 note 65, "mistake" see 58 C.J.S. p 831 note 27, "negligence" see Negligence § 9, and "recklessness" see 76 C.J.S. p 71 note 97

**WILLING.** Desirous; inclined or favorably disposed in mind, ready<sup>9</sup> "Willing" has been compared with "justified" see 51 C.J.S. p 421 note 31

**WILLINGLY.** The word "willingly" relates to the will,<sup>10</sup> and it is defined to mean freely;<sup>11</sup> readily,<sup>12</sup> voluntarily;<sup>13</sup> of free choice,<sup>14</sup> with one's free choice or consent;<sup>15</sup> with a mind inclined or favorably disposed to an act;<sup>16</sup> in the manner of being ready to do an act,<sup>17</sup> without reluctance;<sup>18</sup> without legal excuse,<sup>19</sup> aggressively.<sup>20</sup>

"Willingly" has been compared with, or distinguished from, "willfully" see ante p 637 note 40, and "wittingly"<sup>21</sup>

89. US—Stein v U S, CCA Cal, 153 F 2d 737, 742

90. US—Stein v U S, supra

91. US—Bowles v Jung, DCCal, 57 F Supp 701, 709

92. US—Bowles v Jung, supra

93. US—Dearing v U S, CCA Colo, 167 F 2d 310, 312

94. US—Bowles v Jung, DCCal, 57 F Supp 701, 709

95. US—Dearing v U S, CCA Colo, 167 F 2d 310, 312

96. US—Bowles v Jung, DCCal, 57 F Supp 701, 709

97. US—Dearing v U S, CCA Colo, 167 F 2d 310, 312  
Bowles v Jung, DCCal, 57 F Supp 701, 709

DC—Watkins v District of Columbia, Mun App, 60 A 2d 227, 230

98. US—Bowles v Jung, DCCal, 57 F Supp 701, 709

99. US—Dearing v U S, CCA Colo, 167 F 2d 310, 312

1. US—Schmeller v U S, CCA

Ohio, 143 F 2d 544, 553  
DC—Watkins v District of Columbia, Mun App, 60 A 2d 227, 230

#### Violation of regulatory statute

"Willfulness" in violating a regulatory statute implies, not so much a malevolent design, as action with knowledge that one's acts are proscribed or with careless disregard for their lawfulness or unlawfulness.

US—Mercado v Brannan, CA Puerto Rico, 173 F 2d 554, 555

2. US—Stein v U S, CCA Cal, 153 F 2d 737, 742

3. Ind—Dull v Cleveland, C, C & St L R Co, 52 NE 1013, 1014, 21 Ind App 571

4. Ohio—Payne v Vance, 133 NE 85, 87, 103 Ohio St 59

5. Ind—Dull v Cleveland, C, C & St L R Co, 52 NE 1013, 1014, 21 Ind App 571

6. SC—Hull v Seaboard Air Line Ry, 57 SE 28, 76 SC 278, 10 LR A, NS, 1213—Pickett v Southern R Co, Carolina Division, 48 SE 466, 469, 69 SC 445—Proctor v Southern R Co, 39 SE 351, 358, 61 SC 170

7. Ind—Dull v Cleveland, C, C & St L R Co, 52 NE 1013, 1014, 21 Ind App 571

68 C J p 301 note 63

8. Ill—Walldren Express & Van Co v Krug, 126 NE 97, 99, 291 Ill 472

68 C J p 302 note 64.

9. Webster New Int D

**Phrases** employing the word "willing" and of which more recent adjudications have not been found see 68 C J p 303 notes 95-98

10. Miss—Harrington v State, 54 Miss 490, 493

11. Ala—Edwards v State, 108 So 639, 640, 21 Ala App 375.

Miss—Harrington v. State, 54 Miss 490, 493

**Phrases** employing the word "willingly" and of which more recent adjudications have not been found see 68 C J p 303 notes 16-23

12. Ala—Edwards v State, 108 So 639, 640, 21 Ala App 375

Ind—Chicago, St L & P R Co v Nash, 27 NE 564, 1 Ind App 298

13. Ala—Edwards v State, 108 So 639, 640, 21 Ala App 375

14. Ala—Edwards v State, supra  
Ind—Chicago, St L & P R Co v Nash, 27 NE 564, 1 Ind App 298

15. Ala—Edwards v State, 108 So 639, 640, 21 Ala App 375

Ind—Chicago, St L & P R Co v. Nash, 27 NE 564, 1 Ind App 298

16. Ind—Chicago, St L & P R Co. v Nash, supra  
68 C J p 303 note 9

17. Ala—Edwards v State, 108 So. 639, 640, 21 Ala App 375

Ind—Chicago, St L & P R Co v. Nash, 27 NE 564, 1 Ind App 298

18. Ala—Edwards v State, 108 So. 639, 640, 21 Ala App 375

Ind—Chicago, St L & P R Co v. Nash, 27 NE 564, 1 Ind App 298

19. NC—State v Evans, 138 SE 518, 519, 194 NC 121.

20. NC—State v Evans, supra

21. Miss—Harrington v. State, 54 Miss 490, 493.

**WILLINGNESS.** The word "willingness" signifies a mental state,<sup>22</sup> a condition or state of the mind,<sup>23</sup> and "willingness" may be evidenced by consent<sup>24</sup> The relation between "willingness" and "consent" is stated in 15 C J S p 981 note 24.

The antithesis of "willingness" is "compulsion" see 15 C.J S. p 790 note 21

<sup>22</sup> Idaho—Ambergris Min Co v Day, 85 P 109, 113, 12 Idaho 108 68 C J p 304-380 note 31. | <sup>23</sup> Ohio—State v. Schwab, 143 NE 29, 31, 109 Ohio St 532. | <sup>24</sup> Ohio—State v Schwab, supra. 68 C J p 304-380 note 33.

# WILLS

This Title includes instruments in writing making dispositions of property to take effect at death; nature, requisites, validity, incidents, construction, operation, and effect of such instruments, evidence relating thereto, probate, establishment, and contest thereof; estates or interests created, and conditions or restrictions imposed thereon, and rights and liabilities of devisees and legatees

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

## *Analysis*

### **I. INTRODUCTORY, §§ 1-2**

### **II. RIGHT AND CAPACITY TO MAKE A WILL, §§ 3-75**

- A EXISTENCE OF RIGHT IN GENERAL, §§ 3-5
- B LEGAL DISABILITIES, §§ 6-14
- C MENTAL AND PHYSICAL DISABILITIES, §§ 15-30
- D EVIDENCE, §§ 31-75
  - 1 *Presumptions and Burden of Proof*, §§ 31-39
  - 2 *Admissibility*, §§ 40-57
  - 3 *Weight and Sufficiency*, §§ 58-75

### **III. WHAT MAY PASS BY WILL, §§ 76-90**

### **IV. WHO MAY TAKE UNDER A WILL, AND RESTRICTIONS ON TESTAMENTARY DISPOSITION, §§ 91-110**

### **V. CONTRACTS FOR TESTAMENTARY OR SIMILAR DISPOSITION OF PROPERTY, §§ 111-126**

### **VI. NATURE, REQUISITES, AND VALIDITY, §§ 127-261**

- A. GENERAL NATURE AND ESSENTIALS OF WILL, §§ 127-154
- B. FORM AND CONTENTS, §§ 155-166
- C. EXECUTION, §§ 167-199
- D. HOLOGRAPHIC, MYSTIC, AND NUNCUPATIVE WILLS, §§ 200-218
- E. SOLDIERS' OR MARINERS' WILLS, §§ 219-220
- F. FRAUD, MISTAKE, AND UNDUE INFLUENCE, §§ 221-261

### **VII. REVOCATION, §§ 262-297**

- A. IN GENERAL, §§ 262-263
- B. BY ACT OF TESTATOR, §§ 264-286
- C. BY OPERATION OF LAW, §§ 287-295
- D. OPERATION AND EFFECT OF REVOCATION, §§ 296-297

### **VIII. REVIVAL AND REPUBLICATION, §§ 298-303**

### **IX. WILLS AFTER EXECUTION AND BEFORE PROBATE, §§ 304-306**

### **X. PROBATE, ESTABLISHMENT, AND ANNULMENT, §§ 307-585**

- A. PROBATE IN GENERAL, §§ 307-325
- B. ACTIONS TO ESTABLISH OR DETERMINE VALIDITY IN GENERAL, §§ 326-334
- C. PROBATE OR ESTABLISHMENT OF LOST OR DESTROYED WILL, §§ 335-339
- D. PROBATE OR RECORD OF FOREIGN WILL AND ORIGINAL PROBATE OF WILL OF RESIDENT MADE IN FOREIGN JURISDICTION, §§ 340-350

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See also descriptive word index for Title "Wills" in Volume 95

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued**

- E. JURISDICTION AND VENUE, §§ 351–355
- F. TIME FOR PROBATE, LIMITATIONS, AND LACHES, §§ 356–360
- G. PARTIES, §§ 361–368
- H. CITATION OR NOTICE AND APPEARANCE, §§ 369–371
- I. PLEADING, §§ 372–382
- J. EVIDENCE, §§ 383–421
  - 1 *Presumptions and Burden of Proof*, §§ 383–388
  - 2 *Admissibility*, §§ 389–408
  - 3 *Weight and Sufficiency*, §§ 409–421
- K. HEARING OR TRIAL, §§ 422–489
  - 1 *In General*, §§ 422–441
  - 2 *Conduct of Hearing or Trial*, §§ 442–454
  - 3 *Questions of Law and Fact*, §§ 455–467
  - 4 *Instructions*, §§ 468–479
  - 5 *Verdict, Findings, and Declarations of Law*, §§ 480–486
  - 6 *Objections and Exceptions, and Waiver of Cure of Irregularities and Errors*, §§ 487–489
- L. NEW TRIAL, §§ 490–492
- M. JUDGMENT, ORDER, OR DECREE, §§ 493–513
- N. REVIEW, §§ 514–557
  - 1 *Of Probate Proceedings*, §§ 514–545
  - 2 *Actions Relating to Wills or Probate*, §§ 546–557
- O. COSTS AND EXPENSES, §§ 558–572
- P. OPERATION AND EFFECT, §§ 573–584
- Q. RECORD, § 585

**XI. CONSTRUCTION, §§ 586–1096**

- A. IN GENERAL, §§ 586–588
- B. GENERAL PRINCIPLES OF CONSTRUCTION, §§ 589–632
- C. EVIDENCE IN AID OF CONSTRUCTION, §§ 633–642
- D. DESIGNATION OF BENEFICIARIES AND THEIR SHARES, §§ 643–718
  - 1 *General Principles*, §§ 643–649
  - 2 *Particular Designations*, §§ 650–691
  - 3 *Classes*, §§ 692–696
  - 4 *Shares or Portions of Beneficiaries*, §§ 697–706
  - 5 *Division Per Stirpes or Per Capita*, §§ 707–716
  - 6 *Exclusion from Will or Restriction of Gift*, §§ 717–718
- E. GIFTS OVER ON DEATH, §§ 719–728
- F. SURVIVORSHIP, §§ 729–736
- G. SUBSTITUTION, §§ 737–746
- H. DESCRIPTION OF PROPERTY, §§ 747–801
  - 1 *In General*, §§ 747–760
  - 2 *Real Property and Interests Therein*, §§ 761–777
  - 3 *Personal Property*, §§ 778–794
  - 4 *Cumulative and Substitutional Legacies, and Residuary Clause*, §§ 795–801
- I. ESTATES, §§ 802–973
  - 1 *Creation by Will in General*, §§ 802–808
  - 2 *Fee Simple Absolute*, §§ 809–832
  - 3 *Absolute Interest in Personality*, §§ 833–849
  - 4 *Defeasible Fees and Defeasible Interests in Personality*, §§ 850–857

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****I. ESTATES—Continued**

- 5 *Determinable Fees, Fees Subject to Condition Subsequent, and Fees Simple Conditional*, §§ 858-860
- 6 *Estates Tail, Rule in Shelley's Case, Rule in Wild's Case*, §§ 861-884
- 7 *Life Estates*, §§ 885-900
- 8 *Estates for Years, Annuities, Income, and Support and Maintenance*, §§ 901-904
- 9 *Undivided Interests*, §§ 905-908
- 10 *Future or Executory Estates and Interests*, §§ 909-920
- 11. *Vested or Contingent Estates and Interests Generally*, §§ 921-945
- 12 *Vested or Contingent Remainders*, §§ 946-973

**J. CONDITIONS AND RESTRICTIONS**, §§ 974-1003**K. TESTAMENTARY TRUSTS**, §§ 1004-1061

- 1 *Creation and Existence*, §§ 1004-1022
- 2 *Construction and Operation*, §§ 1023-1039
- 3 *Duration and Termination of Trust*, §§ 1040-1050
- 4 *Limitation Over or Other Disposition of Property on Termination of Trust*, §§ 1051-1059
- 5 *Effect of Failure of Trust*, §§ 1060-1061

**L. TESTAMENTARY POWERS**, §§ 1062-1072**M. ACTIONS TO CONSTRUE WILLS**, §§ 1073-1096**XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES**, §§ 1097-1363

- A NATURE OF TITLE AND RIGHTS IN GENERAL, §§ 1097-1123
- B PARTICULAR CLASSES AND KINDS OF LEGACIES AND DEVISES, §§ 1124-1146
- C. ACCEPTANCE, RENUNCIATION, AND ABANDONMENT OR FORFEITURE OF DEVISE OR LEGACY, §§ 1147-1152
- D ABATEMENT OF LEGACIES, §§ 1153-1171
- E ADEPTION, §§ 1172-1181
- F ADVANCEMENTS, §§ 1182-1196
- G LAPSE OF LEGACIES OR DEVISES, §§ 1197-1222
  - 1. *In General*, §§ 1197-1215
  - 2. *Representation and Prevention of Lapse*, §§ 1216-1222
- H. DEVOLUTION OF PROPERTY ON FAILURE OF TESTAMENTARY DISPOSITION, §§ 1223-1236
- I. ELECTION, §§ 1237-1296
  - 1. *In General*, §§ 1237-1255
  - 2. *Election by Surviving Spouse*, §§ 1256-1267
  - 3 *Method of Making or Signifying Election*, §§ 1268-1284
  - 4 *Effect of Election*, §§ 1285-1296
- J. LEGACIES AS PAYABLE OUT OF, OR CHARGEABLE ON, PROPERTY, ESTATE, OR INTEREST, §§ 1297-1310
- K. DEBTS AND OBLIGATIONS OF TESTATOR, §§ 1311-1328
- L DEBTS OF BENEFICIARIES, §§ 1329-1337
- M. TIME OF PAYMENT OF LEGACIES, §§ 1338-1344
- N. INTEREST ON LEGACIES, §§ 1345-1363

**XIII. JOINT AND MUTUAL WILLS**, §§ 1364-1367

---

See also descriptive word index for Title "Wills" in Volume 95



*Sub-Analysis***I. INTRODUCTORY—p 676**

- § 1. Definitions—p 676
- 2. History—p 679

**II. RIGHT AND CAPACITY TO MAKE A WILL—p 680****A. EXISTENCE OF RIGHT IN GENERAL—p 680**

- § 3. Right dependent on statute—p 680
- 4. What law governs—p 684
- 5. Time at which capacity must exist—p 684

**B. LEGAL DISABILITIES—p 686**

- § 6. Aliens—p 686
- 7. Indians—p 686
- 8. Infants—p 687
- 9. Married women—p 688
- 10. — Separate estate—p 689
- 11. — Requisites and sufficiency of husband's consent—p 689
- 12. Sovereign—p 690
- 13. Spendthrift—p 690
- 14. Suicide—p 690

**C. MENTAL AND PHYSICAL DISABILITIES—p 690**

- § 15. Requisites of testamentary capacity generally; standards or tests—p 690
- 16. Illiteracy—p 706
- 17. Insanity—p 706
- 18. — Insane delusions—p 708
- 19. — Lucid intervals—p 715
- 20. — Adjudication as to insanity or incompetency; guardianship or commitment—p 716
- 21. Imbecility—p 717
- 22. Eccentricity, personal habits and conduct—p 717
- 23. Prejudices and beliefs—p 719
- 24. Moral delinquency—p 720
- 25. Use of intoxicants—p 720
- 26. Use of drugs—p 720
- 27. Old age—p 721
- 28. Impairment of memory; absent-mindedness—p 726
- 29. Sickness, disease, and physical infirmity—p 727
- 30. Deafness, dumbness, and blindness—p 731

**D. EVIDENCE—p 731****1. Presumptions and Burden of Proof—p 731**

- § 31. General rules—p 731
- 32. Suicide—p 739
- 33. Hereditary insanity—p 739
- 34. Use of intoxicants—p 739
- 35. Unjust or unnatural disposition—p 740
- 36. Prior or habitual insanity and lucid intervals—p 741
- 37. Adjudication as to insanity and guardianship—p 742
- 38. Delusions and monomania—p 744
- 39. Physical condition and mental derangement therefrom; old age—p 744

---

See also descriptive word index for Title "Wills" in Volume 95

**II. RIGHT AND CAPACITY TO MAKE A WILL—Continued****D. EVIDENCE—Continued****2. Admissibility—p 746****§ 40 In general—p 746**

41. Suicide of testator—p 747

42. Hereditary insanity—p 747

43. Habits and reputation, use of intoxicants—p 747

44. Unjust or unnatural disposition—p 747

45. Adjudication as to insanity and guardianship—p 748

46. Insane delusions, monomania, and peculiar belief or opinion—p 749

47. Physical condition and mental derangement therefrom, age—p 750

48. Circumstances of execution—p 750

49. Source of testator's property—p 750

50. Mental condition prior and subsequent to execution—p 750

51. Transaction of business—p 752

52. Conduct and declarations of testator in general—p 753

53. Conduct of testator toward friends and relatives—p 754

54. Declarations and inclinations of testator respecting disposition of property—p 754

55. Declarations of testator as to capacity—p 755

56. Execution of other wills—p 755

57. Moral delinquency—p 756

**3. Weight and Sufficiency—p 756****§ 58 In general—p 756**

59. Suicide by testator—p 764

60. Hereditary insanity—p 765

61. Intoxication, habitual drunkenness, and use of drugs—p 765

62. Mode of disposition of property—p 766

63. Lucid intervals—p 768

64. Adjudication as to insanity and guardianship—p 769

65. Insane delusions and monomania—p 771

66. Peculiar belief or opinion and eccentricity—p 772

67. Physical condition and mental derangement therefrom—p 773

68. Old age and accompanying physical and mental weakness—p 774

69. Circumstances of execution—p 775

70. Mental condition prior and subsequent to execution of will—p 776

71. Transaction of business and management of property—p 777

72. Conduct and declarations of testator—p 778

73. Understanding as to property—p 779

74. Nuncupative wills—p 780

75. Testimony of attesting witnesses—p 780

**III. WHAT MAY PASS BY WILL—p 782****§ 76. In general—p 782**

77. What law governs—p 785

78. After-acquired property—p 785

79. Property changed in form—p 786

80. Equitable interests, trusts, and powers—p 787

81. Interests of vendor and purchaser under contract to convey—p 787

82. Interests under land warrants, certificates for purchase money, etc.—p 788

83. Rights of action—p 789

---

**See also descriptive word index for Title "Wills" in Volume 95**

**III. WHAT MAY PASS BY WILL—Continued**

- § 84. Rights of entry—p 789
- 85 Future or contingent estates, interests, or possibilities—p 789
- 86 Proceeds of insurance policy—p 792
- 87 Property in which surviving husband or wife has interest—p 793
- 88 Community property—p 794
- 89 Property payable or transferable to others at testator's death—p 796
- 90 Testator's dead body—p 796

**IV. WHO MAY TAKE UNDER A WILL, AND RESTRICTIONS ON TESTAMENTARY DISPOSITION—p 797**

- § 91 General considerations—p 797
- 92 — Regulation and control by state—p 797
- 93 — Objects or purposes and beneficiaries—p 798
- 94 — Date of capacity—p 799
- 95. — Existence of beneficiary—p 800
- 96 — What law governs—p 801
- 97 Husband and wife—p 802
- 98 Heirs, next of kin, or children—p 807
- 99 Illegitimates and their descendants—p 814
- 100. Paramours, concubines, or parties to invalid marriage—p 815
- 101 Professional, religious, or other confidential adviser, draftsman of will—p 817
- 102 Attesting witness—p 817
- 103 Spouse of attesting witness—p 821
- 104 Slayer of testator or of beneficiary, and persons guilty of other misconduct—p 822
- 105 Unincorporated associations—p 823
- 106 Corporations—p 824
- 107 Other persons or bodies—p 829
- 108 Restrictions on testamentary disposition for charitable, benevolent, or religious purposes—p 831
- 109 — Execution of will within specified time prior to death—p 832
- 110 — Restrictions as to amount of gift—p 842

**V. CONTRACTS FOR TESTAMENTARY OR SIMILAR DISPOSITION OF PROPERTY—p 861**

- § 111 Existence and validity—p 861
- 112 — Mutual assent—p 865
- 113(1) — Consideration—p 866
- 113(2) — Evidence as to existence and terms of contract—p 868
- 114 Construction—p 871
- 115 What law governs—p 873
- 116 Performance or breach—p 873
- 117 Modification, and rescission, abandonment, or other termination—p 876
- 118 Ratification and affirmance—p 880
- 119 Subsequently executed transfers, encumbrances, or wills—p 881
- 120 Rights of surviving spouse—p 882
- 121 Promisee's loss of rights by waiver, estoppel, or abandonment—p 883
- 122 Remedies available in general—p 884
- 123 Actions for goods or services—p 887
- 124. Actions for damages for breach—p 891
- 125. — Right of action, time to sue, and procedure generally—p 891
- 126 — Evidence—p 896

---

See also descriptive word index for Title "Wills" in Volume 95

**VI. NATURE, REQUISITES, AND VALIDITY—p 898****A GENERAL NATURE AND ESSENTIALS OF WILL—p 898**

- § 127(1). In general—p 898
- 127(2) Ambulatory and revocable character—p 899
- 128 Time of taking effect—p 901
- 129 Testamentary intent—p 902
- 130 Knowledge of testator of contents of will—p 906
- 131 Disposition of property—p 907
- 132 — Manner of disposition, unjust and unnatural dispositions—p 907
- 133 Tenure, estate, or interest which may be created—p 912
- 134 Appointment of executor or guardian, and provision for payment of debts—p 912
- 135 Revocation or revival of prior will—p 913
- 136 Will distinguished from other instruments—p 913
- 137 — Deeds—p 915
- 138 — Mortgages—p 919
- 139 — Leases—p 920
- 140 — Contracts—p 920
- 141 — Bills and notes—p 924
- 142 — Bonds—p 924
- 143. — Declarations or deeds of trust—p 925
- 144 — Instruments creating powers—p 928
- 145. — Assignments—p 929
- 146 — Bills of sale—p 929
- 147 — Gifts—p 929
- 148 — Other instruments—p 931
- 149 — Evidence as to character of instrument—p 932
- 150 What law governs—p 934
- 151 Partial invalidity—p 937
- 152 Contingent wills—p 938
- 153 Instructions for, and preparation of, will—p 941
- 154 Statutory requirements—p 941

**B. FORM AND CONTENTS—p 942**

- § 155. In general—p 942
- 156 Writing—p 944
- 157. Certainty required—p 945
- 158 Instrument in form of letter—p 948
- 159 Incomplete instruments—p 949
- 160. Will on both sides of paper—p 950
- 161 Separate instruments—p 950
- 162. One will on separate sheets of paper—p 951
- 163. Incorporation by reference to extrinsic document or occurrence—p 952
- 164. Codicils—p 960
- 165. Instrument operating as will and also as other document—p 963
- 166. Alterations—p 963

**C. EXECUTION—p 964**

- § 167. Statutory requirements—p 964
- 168 Date—p 969
- 169. Signature or subscription by or for testator—p 970
- 170. — Necessity and purpose—p 970
- 171. — Requisites and sufficiency in general—p 971

---

**See also descriptive word index for Title "Wills" in Volume 95**

**VI. NATURE, REQUISITES, AND VALIDITY—Continued****C. EXECUTION—Continued**

- § 172. — Signing by mark—p 972
- 173. — Signing for testator by another—p 975
- 174. — Signing with assistance of another—p 977
- 175. — Seal or stamp as signature—p 978
- 176. — Time of signing—p 978
- 177. — Place of signature—p 979
- 178. Reading of will by or to testator—p 988
- 179. Seal—p 988
- 180. Revenue stamp—p 989
- 181. Acknowledgment—p 989
- 182. Attestation and subscription by witnesses—p 991
- 183. — Necessity and purpose—p 993
- 184. — Number of witnesses—p 995
- 185. — Competency of witnesses—p 995
- 186. — Request of testator for attestation and subscription—p 1007
- 187. — Publication—p 1010
- 188. — Signing or acknowledging signature or will by testator in presence of witnesses—p 1015
- 189. — Subscription by witnesses in presence of testator—p 1021
- 190. — Signing by witnesses in presence of each other—p 1026
- 191. — Requisites and sufficiency of subscription by witnesses in general—p 1027
- 192. — Signing by mark, initials, fictitious name, or description—p 1029
- 193. — Signing of witness' name by third person at his request—p 1029
- 194. — Time of affixing signatures—p 1030
- 195. — Place of signatures—p 1030
- 196. — Attestation clause—p 1033
- 197. — Attestation of erasures, interlineations, and substitutions—p 1035
- 198. Codicils—p 1035
- 199. Delivery—p 1036

**D. HOLOGRAPHIC, MYSTIC, AND NUNCUPATIVE WILLS—p 1036**

- § 200. Holographic wills—p 1036
- 201. — What law governs—p 1038
- 202. — Who may make—p 1038
- 203. — Testamentary intent—p 1038
- 204. — Form—p 1040
- 205. — Execution—p 1041
- 206. — Deposit or custody—p 1048
- 207. — Codicil—p 1048
- 208. Mystic wills—p 1049
- 209. Nuncupative wills—p 1049
- 210. — Definition, nature, and essentials in general—p 1049
- 211. — Persons who may make—p 1051
- 212. — Circumstances and occasion of making—p 1051
- 213. — Property which may pass—p 1051
- 214. — Execution in general—p 1052
- 215. — Publication and request to witnesses—p 1052
- 216. — Number and competency of witnesses—p 1053
- 217. — Reduction to writing—p 1053
- 218. — Nuncupative wills in Louisiana—p 1054

---

See also descriptive word index for Title "Wills" in Volume 95

**VI. NATURE, REQUISITES, AND VALIDITY—Continued****E. SOLDIERS' OR MARINERS' WILLS—p 1057**

- § 219. Oral wills—p 1057
- 220 Written wills—p 1058

**F. FRAUD, MISTAKE, AND UNDUE INFLUENCE—p 1059**

- § 221 In general—p 1059
- 222 What constitutes fraud—p 1061
- 223 What constitutes mistake—p 1063
- 224. What constitutes undue influence—p 1064
- 225. — Advice or suggestions—p 1075
- 226 — Importunity, persuasion, or solicitation—p 1075
- 227. — Kindness and attention, love and affection—p 1077
- 228. — Creation of resentment and false impressions in mind of testator—p 1077
- 229 — Moral or religious teachings and doctrines—p 1078
- 230 — Confidential and personal relations—p 1078
- 231. — Unlawful or improper relations—p 1082
- 232 — Threats—p 1082
- 233 — Mental condition of testator—p 1082
- 234. Subsequent ratification of will—p 1084
- 235 Origin of, and persons chargeable with, undue influence—p 1084
- 236 Operation and effect—p 1084
- 237. Presumptions and burden of proof—p 1085
- 238 — Interest and opportunity to influence in general—p 1090
- 239. — Confidential and personal relations—p 1091
- 240. — Unlawful or improper relations—p 1104
- 241. — Writing or preparation of will by beneficiary or relative of beneficiary—p 1104
- 242. — Unequal, unjust, or unnatural disposition—p 1105
- 243. — Discrepancy between will and prior will or declared intention—p 1106
- 244. — Kindness and attention—p 1106
- 245 Admissibility of evidence—p 1107
- 246. — Physical and mental condition of testator—p 1111
- 247. — Declarations of testator—p 1112
- 248. — Contents of will and unnaturalness of provisions—p 1116
- 249 — Relations between testator and person benefited by, or excluded from, will—p 1118
- 250 — Acts, motive, character, declarations, and opportunity to exercise influence, of proponents and beneficiaries—p 1119
- 251. Weight and sufficiency of evidence—p 1122
- 252. — Personal, confidential, or fiduciary relations between testator and beneficiary—p 1127
- 253. — Unlawful, improper, or meretricious relations between testator and beneficiary—p 1130
- 254. — Direct or indirect benefit to person drawing or assisting in execution of will—p 1130
- 255. — Unjust, unequal, or unnatural provisions—p 1132
- 256. — Opportunity or disposition to exercise undue influence—p 1134
- 257. — Declarations of testator and others—p 1136
- 258. — Physical or mental condition of testator—p 1137
- 259. — Secrecy in execution—p 1138
- 260. — Prior wills—p 1139
- 261. — Indirect or circumstantial evidence—p 1139

---

See also descriptive word index for Title "Wills" in Volume 95

**VII. REVOCATION**

**A. IN GENERAL**

- § 262 Definition
- 263. Statutory provisions generally

**B. BY ACT OF TESTATOR**

- § 264 Capacity to revoke
- 265 Delegation of power to revoke
- 266 Intention to revoke
- 267 — Conditional or dependent relative revocation
- 268 What law governs
- 269 Mode and sufficiency in general
- 270 Revocation by oral declaration
- 271 Revocation by subsequent writing
- 272 — Writing not testamentary
- 273 — By indorsement of revocation on will or codicil
- 274. — By subsequent will.
- 275. — By codicil
- 276. Revocation by mutilation, cancellation, or destruction
- 277. — Statutory provisions
- 278. — By whom act may be committed
- 279 — Partial revocation
- 280. — Act of destruction, mutilation, or cancellation
- 281. — Cancellation or destruction of one of two or more duplicate or identic wills
- 282 Revocation by alterations and additions
- 283 Revocation of will executing power
- 284 Effect of mistake, undue influence, or fraud
- 285 — Inducing revocation
- 286. — Preventing revocation

**C. BY OPERATION OF LAW**

- § 287. In general
- 288. What law governs
- 289. Particular changes in circumstances operating as revocation
- 290 — Marriage and birth of children
- 291. — Marriage
- 292 — Birth of issue
- 293 — Divorce
- 294 — Disposition of property or other alteration of estate
- 295. — Other matters operating as revocation

**D. OPERATION AND EFFECT OF REVOCATION**

- § 296 In general
- 297 Effect of revocation of either will or codicil on the other

**VIII. REVIVAL AND REPUBLICATION**

- § 298 Definitions and distinctions
- 299 Revival or republication generally
- 300 — Will revoked by operation of law
- 301. — Will revoked by subsequent will
- 302. — Effect of revival or republication
- 303. Revival or republication by codicil

**IX. WILLS AFTER EXECUTION AND BEFORE PROBATE**

- § 304. In general
- 305 Deposit or filing of will for safe-keeping
- 306. Compelling production of will

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT****A PROBATE IN GENERAL**

- § 307 Definitions
- 308 Nature and purpose of probate
- 309 Statutory provisions
- 310 Necessity for probate
- 311 Duty to produce and offer will for probate
- 312 Instruments which may or must be admitted to probate
- 313 — Separate instruments or papers
- 314 Fact of death of testator
- 315 Persons entitled to probate
- 316 Mode and scope of proceedings and relief
- 317 — Questions for determination
- 318 — Probate in common and solemn form
- 319 — Partial or limited probate
- 320 — Successive applications for probate
- 321 — Abatement and revival of proceedings; abandonment
- 322 Opposition to probate in general
- 323 Who may oppose probate, estoppel
- 324 Who may or must defend
- 325 Agreements affecting right to oppose probate or contest will

**B. ACTIONS TO ESTABLISH OR DETERMINE VALIDITY IN GENERAL**

- § 326 Action to establish rejected will
- 327. Action to contest probated will
- 328 — Nature, form, scope, and right of action
- 329 — Who may contest will; abatement on death of party
- 330 — Estoppel
- 331. — Who may or must defend contest
- 332. — Effect on probate of action to contest
- 333 Action to set aside unprobated will
- 334 Action to reform will

**C. PROBATE OR ESTABLISHMENT OF LOST OR DESTROYED WILL**

- § 335. In general
- 336. Time, nature, and extent of loss or destruction
- 337 — Partial loss or destruction
- 338. Who may establish or procure probate
- 339 Opposition to probate or establishment

**D. PROBATE OR RECORD OF FOREIGN WILL AND ORIGINAL PROBATE OF WILL OF RESIDENT MADE IN FOREIGN JURISDICTION**

- § 340 "Foreign will" defined
- 341. Ancillary probate or record
- 342 — Necessity
- 343. — Mode of probate or record in general
- 344. — Probate of original will; necessity for foreign probate

---

See also descriptive word index for Title "Wills" in Volume 95



**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued****D. PROBATE OR RECORD OR FOREIGN WILL AND ORIGINAL PROBATE OF WILL  
OF RESIDENT MADE IN FOREIGN JURISDICTION—Continued**

- § 345. — Probate or record of copy of will and probate
- 346. — Partial probate or record
- 347. — Who may apply for probate
- 348. — Nature and scope of proceeding
- 349. — Opposing ancillary probate
- 350. Original probate of will of resident made in foreign jurisdiction

**E. JURISDICTION AND VENUE**

- § 351. Jurisdiction of probate proceedings
- 352. — Jurisdictional facts
- 353. — Particular courts or officers
- 354. Jurisdiction of actions relating to wills
- 355. Venue

**F. TIME FOR PROBATE, LIMITATIONS, AND LACHES**

- § 356. In general
- 357. — Time before which will cannot be probated
- 358. — Time within which will must be probated
- 359. Actions to contest will or probate
- 360. Laches

**✓G. PARTIES**

- § 361. To probate proceedings
- 362. — Proper and necessary parties
- 363. — Addition, intervention, or substitution
- 364. In proceedings to establish lost or destroyed wills
- 365. In actions to contest wills
- 366. — Parties contestant or plaintiff
- 367. — Parties defendant
- 368. — Addition, intervention, or substitution

**H. CITATION OR NOTICE AND APPEARANCE**

- § 369. Citation or other process
- 370. Notice
- 371. Appearance

**I. PLEADING**

- § 372. Probate and opposition proceedings
- 373. — Probate proceedings
- 374. — Opposition proceedings
- 375. Proceeding to establish lost or destroyed will
- 376. Actions to contest probate
- 377. — Petition
- 378. — Plea or answer
- 379. — Demurrers and motions
- 380. — Bill of particulars
- 381. — Amendments
- 382. — Issues, proof, and variance

---

See also descriptive word index for Title "Wills" in Volume 95

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued****J. EVIDENCE****1. *Presumptions and Burden of Proof***

- § 383. In probate proceedings
- 384. — Execution, existence, and genuineness
- 385. — Revocation
- 386. In proceedings to set aside probate
- 387. Right to propound will, or to oppose or contest probate
- 388. Capacity of beneficiaries to take

**2 *Admissibility***

- § 389. In general
- 390. Will, copy or draft thereof, or record of probate
- 391. Parol or extrinsic evidence generally
- 392. Evidence of attesting witnesses
- 393. Impeachment of attesting witnesses
- 394. Evidence other than that of attesting witnesses generally
- 395. Handwriting and signatures
- 396. Intentions, obligations, and relations of testator
- 397. Knowledge by testator of contents of will
- 398. Knowledge by testator or scrivener of legal requirements
- 399. Declarations of testator
- 400. — Existence, genuineness, and execution of will
- 401. — Knowledge, wishes, intention, and state of mind
- 402. — Alterations
- 403. — Revocation and revival
- 404. Declarations and admissions of persons other than testator
- 405. Loss or destruction of will and execution and contents thereof
- 406. Revocation and revival
- 407. Character, conduct, agreements, and financial condition of interested persons
- 408. Other matters

**3. *Weight and Sufficiency***

- § 409. Wills generally
- 410. — General rules
- 411. — Will, attestation clause, and testimony of attesting witnesses
- 412. — Evidence other than that of attesting witnesses generally
- 413. — Handwriting or signature
- 414. — Knowledge by testator of contents of will
- 415. — Codicils
- 416. — Alterations
- 417. — Revocation, republication, and revival
- 418. — Other matters
- 419. Lost or destroyed wills
- 420. Holographic and nuncupative wills
- 421. Foreign wills

**K. HEARING OR TRIAL****1. *In General***

- § 422. In general
- 423. Scope of inquiry and powers of court

---

See also descriptive word index for Title "Wills" in Volume 95

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued****K. HEARING OR TRIAL—Continued****1 *In General*—Continued**

- § 424. Preliminary proceedings generally
- 425. — Consolidation of proceedings
- 426. — Setting case for hearing
- 427. — Continuance or postponement
- 428. — Withdrawal of parties
- 429. Dismissal or voluntary nonsuit
- 430. Award and framing of issues for jury trial
- 431. — Right to jury trial
- 432. — Sufficiency of evidence to require award of issues
- 433. — Time for determination of preliminary issues
- 434. — Nature and form of issues submitted
- 435. — Time for framing issues
- 436. — By whom prepared
- 437. — Court where jury trial held
- 438. — Plaintiffs and defendants in issues
- 439. — Resubmission and successive or additional issues
- 440. — Mode of trial of issues
- 441. — Effect of submission of issues; conclusiveness of findings

**2 *Conduct of Hearing or Trial***

- § 442. In general
- 443. Preliminary examination of subscribing and other witnesses
- 444. Examination of adverse parties
- 445. Reference and commission to take testimony
- 446. Obtaining attendance of witnesses
- 447. Production and reading of will
- 448. Production of papers other than will
- 449. Impaneling and presence of jury
- 450. Right to open and close
- 451. Reception of evidence
- 452. Remarks and conduct of judge
- 453. Argument and conduct of counsel
- 454. Newspaper reports or comments

**3. *Questions of Law and Fact***

- § 455. In general
- 456. Particular questions or issues
- 457. — Animus testandi and testamentary form or character of instrument
- 458. — Execution of will
- 459. — Revocation and alterations
- 460. — Lost or destroyed will
- 461. — Holographic or nuncupative will
- 462. — Testamentary capacity
- 463. — Fraud, duress, and undue influence
- 464. — Miscellaneous
- 465. Demurrer to evidence
- 466. Dismissal and nonsuit at trial
- 467. Direction of verdict

---

See also descriptive word index for Title "Wills" in Volume 95

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued****K. HEARING OR TRIAL—Continued****4. Instructions**

- § 468. In general
- 469 Conformity to pleadings and evidence
- 470 Instructions on particular matters
- 471 — Testamentary capacity
- 472 — Insanity and delusions
- 473 — Fraud and undue influence
- 474 — Disposition of property
- 475 — Execution
- 476 — Revocation and revival
- 477 — Mistake
- 478 — Presumptions and burden of proof
- 479 — Degree of proof and weight of evidence

**5 *Verdict, Findings, and Declarations of Law***

- § 480 Verdict and findings
- 481 — General or special verdicts
- 482 — Consistency
- 483 — Setting aside verdict
- 484 — Findings by court
- 485 — Certification of verdict to probate court
- 486 Declarations of law

**6 *Objections and Exceptions, and Waiver of Cure of Irregularities and Errors***

- § 487. In general
- 488 Waiver by failure to object
- 489 Waiver or correction by affirmative act

**L. NEW TRIAL**

- § 490 In general
- 491. Grounds
- 492 Proceedings to procure new trial

**M. JUDGMENT, ORDER, OR DECREE**

- § 493 In probate proceeding
- 494 — Form and contents in general
- 495. — Where trial by jury; conformity to verdict
- 496 — Consent or agreement of parties
- 497. — Refusal of probate
- 498 — Entry and record
- 499. — Certificate of probate
- 500 As to probate or establishment of lost or destroyed will
- 501. In action or proceeding to contest or set aside will
- 502 Opening, revoking, or vacating
- 503. — Nature and form of remedy
- 504. — Grounds for opening, vacating, or revoking
- 505. — Who may apply
- 506 — Time for application; laches
- 507. — Conditions precedent
- 508 — Application or petition
- 509. — Answer, plea, and replication
- 510. — Parties, citation or notice, and appearance

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued****M. JUDGMENT, ORDER, OR DECREE—Continued**

- § 511. — Hearing and determination
- 512. — Order or decree; relief
- 513. — Effect of vacating probate decree

**N. REVIEW****1. *Of Probate Proceedings***

- § 514. Form of remedy
- 515. Appellate jurisdiction
- 516. Decisions reviewable
- 517. Right of review
- 518. Presentation and reservation in lower court of grounds of review
- 519. Parties
- 520. Requisites and proceedings for transfer of cause
- 521. — Time for taking proceedings
- 522. — Petition, affidavit, application, or demand
- 523. — Bonds, undertakings, and other security
- 524. — Notice or citation
- 525. — Filing and entry or docketing
- 526. Effect of transfer of cause or proceedings therefor
- 527. Assignment of errors or grounds of appeal
- 528. Record or transcript
- 529. Dismissal, withdrawal, or abandonment
- 530. Trial or hearing and scope of review in general
- 531. Questions of fact, verdict and findings
- 532. Trial de novo
- 533. — Pleadings
- 534. — Evidence
- 535. — Mode and conduct of trial de novo in general
- 536. — Award of issues for jury trial and framing thereof
- 537. — Instructions
- 538. — Verdict and findings
- 539. — New trial
- 540. — Change in place of trial
- 541. Presumptions
- 542. Harmless or prejudicial error
- 543. Discretion of lower court
- 544. Time for trial or hearing
- 545. Determination and disposition of cause

**2. *Actions Relating to Wills or Probate***

- § 546. In general
- 547. Form of remedy
- 548. Decisions reviewable
- 549. Right of review
- 550. Parties
- 551. Presentation and reservation in lower court of grounds of review
- 552. Requisites and proceedings for transfer of cause in general
- 553. Effect of transfer of cause or proceedings therefor
- 554. Assignment of errors or grounds of appeal
- 555. Record or transcript

**X. PROBATE, ESTABLISHMENT, AND ANNULMENT—Continued****N. REVIEW—Continued****2. *Actions Relating to Wills or Probate*—Continued**

- § 556. Hearing and scope and mode of review
- 557 Determination and disposition of cause

**Q COSTS AND EXPENSES**

- § 558 Costs in general
- 559. — Power to award
- 560 — To whom awarded, and persons, property, or funds liable
- 561. — By whom taxed and awarded
- 562 — Items allowable
- 563. — Time for award
- 564 — Security for costs
- 565 Counsel fees and expenses in general
- 566 — Power to award
- 567. — To whom awarded, and persons, property, or funds liable
- 568 — Amount
- 569 — Fees to guardian ad litem and administrator ad litem
- 570. — Proceedings for allowance of counsel fees
- 571. Enforcement of payment of costs or counsel fees and expenses
- 572. Costs and expenses on appeal

**P. OPERATION AND EFFECT**

- § 573 Probate
- 574. — Construction and effect in general
- 575 — Custody and ownership of probated will
- 576 — Presumptions as to validity of probate
- 577 — Conclusiveness of proceedings
- 578. — Collateral impeachment
- 579. — Will or copy thereof, probate, and record as evidence
- 580 — Foreign probate
- 581. Adjudication as to validity of will or probate
- 582 — Refusal, revocation, or setting aside of probate
- 583 — Collateral impeachment
- 584. Vacation of decree setting aside probate

**Q RECORD**

- § 585. Necessity, sufficiency, and effect

**XI. CONSTRUCTION—p****A. IN GENERAL**

- § 586 Power and duty of court
- 587. What law governs
- 588 Statutory provisions

**B. GENERAL PRINCIPLES OF CONSTRUCTION**

- § 589. In general
- 590. Intention of testator
- 591. — Ascertainment from will
- 592. — Surrounding facts and circumstances

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****B. GENERAL PRINCIPLES OF CONSTRUCTION—Continued**

- § 593 — Conflict between general and particular intention
- 594. — Use of technical rules of construction
- 595 — Devise or bequest by implication
- 596 — Application of cy pres doctrine
- 597. Language of will
- 598 — Liberal or strict interpretation of words; rational construction
- 599 — Primary or ordinary meaning of words in general
- 600 — Legal and technical words
- 601 — Specific and restrictive words
- 602 — Advisory and precatory words
- 603 — Introductory, declaratory, and explanatory words
- 604 — Words in foreign language
- 605 — Effect of judicial precedents
- 606 — Molding or change of language in general
- 607 — Transposition of words
- 608 — Substitution of words
- 609 — Supplying of omitted words
- 610 — Correction or rejection of false, superfluous, or repugnant words
- 611. — Associated words, and words in different parts of will
- 612 — Grammar, writing, and punctuation
- 613 — Alteration, substitution, and construction of particular words and phrases
- 614 Construction in favor of will
- 615 — Construction as to, and presumptions against, intestacy
- 616 — Construction in favor of heirs or distributees
- 617 — Construction as between beneficiaries
- 618 — Construction in favor of just, natural, or reasonable disposition
- 619 Separate clauses or parts
- 620 — Construction as whole
- 621 — Inconsistent and repugnant provisions
- 622 — Effect of partial invalidity
- 623 Construing instruments together
- 624 — Separate instruments constituting will
- 625 — Will and codicil
- 626 Construction by umpire named by testator
- 627. Practical construction by interested persons
- 628. Operation of will in general
- 629 Time from which will speaks
- 630 — Effect of change in conditions or circumstances
- 631. — Subsequent dealings by testator with his property
- 632 Questions of law and fact

**C. EVIDENCE IN AID OF CONSTRUCTION**

- § 633. Presumptions
- 634 Extrinsic or parol evidence
- 635 — Surrounding facts and circumstances
- 636 — Evidence to show or explain intention in general
- 637 — Declarations and instructions of testator
- 638 — Understanding and intention of attorney, scrivener, or witness
- 639 — Identification of beneficiaries
- 640 — Identification of property

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****C. EVIDENCE IN AID OF CONSTRUCTION—Continued**

- § 641 — Omission, mistake, misnomer, or misdescription
- 642 — Nature of estate or interest created

**D. DESIGNATION OF BENEFICIARIES AND THEIR SHARES****1. General Principles**

- § 643 In general
- 644 Certainty in designation
- 645 Mode of designation
- 646. — Designation by name
- 647. — Designation by description and not by name
- 648 Residuary beneficiaries
- 649 Erroneous designation or description

**2 Particular Designations**

- § 650 Brothers and sisters; brethren
- 651. Child
- 652 Children
- 653 — As including adopted children
- 654 — As including children by different marriages; stepchildren
- 655 — As including children en ventre sa mere
- 656 — As including grandchildren
- 657 — As including illegitimate children
- 658 — Other persons included in word "children"
- 659 Cousins, half cousins
- 660 Descendants, lineal descendants
- 661 Employees or servants
- 662. Family
- 663 Grandchild, grandchildren
- 664 Grandnieces, grandnephews
- 665 Husband or wife
- 666 Issue
- 667 Nephews and nieces
- 668 Offspring
- 669. Parent
- 670 Relations; relatives
- 671 Heirs
- 672 — What law governs
- 673 — Primary and secondary meanings in general
- 674. — As including children
- 675 — As including husband or wife
- 676 — Life tenant as heir
- 677 — As affected by nature of property
- 678 — Heirs of living person
- 679 — Heirs of body
- 680 — Time of ascertaining heirs
- 681 — Word "heirs" as word of purchase or limitation
- 682 Next of kin
- 683 Executors
- 684 Legal or personal representatives, or estate
- 685 Deceased persons or their heirs or representatives

---

See also descriptive word index for Title "Wills" in Volume 95



**XI. CONSTRUCTION—Continued****D. DESIGNATION OF BENEFICIARIES AND THEIR SHARES—Continued****2. Particular Designations—Continued**

- § 686. Corporations or associations
- 687. — Charities
- 688. — Educational objects
- 689. — Religious organizations
- 690. Governmental bodies
- 691. Miscellaneous designations

**3. Classes**

- § 692 "Class gifts" defined
- 693. Whether beneficiaries take individually or as class
- 694. Persons comprehended within description generally
- 695. Time as affecting inclusion or exclusion
- 696. Status of child en ventre sa mere

**4. Shares or Portions of Beneficiaries**

- § 697 In general
- 698. Equal or unequal shares
- 699. Partition and equalization of shares
- 700. Share governed by statutes of descent and distribution
- 701. As affected by nature of property
- 702. Widow's share
- 703. Income
- 704. Right of selection
- 705. Residuary interests
- 706. Mistake or omission

**5. Division Per Stirpes or Per Capita**

- § 707 In general
- 708. Expressions of equality
- 709. Named beneficiaries
- 710. Power or discretion in will
- 711. Heirs, issue, descendants, representatives, and next of kin
- 712. Relatives of equal and unequal degrees
- 713. Survivors of deceased persons
- 714. Relatives of different persons
- 715. Certain persons and relatives of other persons
- 716. One and his children or family

**6. Exclusion from Will or Restriction of Gift**

- § 717. In general
- 718. Heirs or distributees disinherited

**E. GIFTS OVER ON DEATH**

- § 719 In general
- 720. Death as sole contingency
- 721. Death coupled with another contingency
- 722. — Death with or without issue in general
- 723. — Death leaving issue
- 724. — Death without issue

**XI. CONSTRUCTION—Continued****E. GIFTS OVER ON DEATH—Continued**

- § 725 — Dying before time specified or before attaining certain age
- 726 — Death coupled with contingency of marriage
- 727 — Death before payment of share
- 728 Happening of contingency to one or more of several beneficiaries

**F. SURVIVORSHIP**

- § 729. General rules as to construction of words of survivorship
- 730. Existence of survivorship
- 731. Persons included and shares of survivors
- 732 — Issue, heirs, or representatives of deceased beneficiaries
- 733. — To what period survivorship refers
- 734. Survivorship in accrued shares
- 735 Last survivor on failure of issue or like contingency
- 736. Interests and rights of survivors

**G. SUBSTITUTION**

- § 737. Definition and nature
- 738. What gifts are substitutional
- 739 — Effect of use of particular words
- 740. — Gifts over to executors, administrators, or representatives
- 741. — Gifts to classes
- 742. Time to which death referable
- 743 — Before execution of will
- 744 Necessity of survivorship
- 745 Persons entitled to take
- 746 Rights and liabilities of substituted devisees or legatees

**H. DESCRIPTION OF PROPERTY****1. In General**

- § 747. Certainty
- 748. General and specific descriptions
- 749 Repugnant and conflicting descriptions
- 750. Erroneous descriptions
- 751. Interest of testator
- 752 Source or mode of acquisition of property
- 753. — Property acquired by marriage
- 754. — Community property
- 755. Period referred to
- 756. After-acquired property
- 757. — Property to be purchased for beneficiary
- 758 Devise or bequest of property of specified value
- 759. Testator's entire estate; descriptions applicable to realty or personalty
- 760. Exception from general devise or bequest

**2. Real Property and Interests Therein**

- § 761. Words operative to pass real property
- 762. — "Appurtenances"
- 763. Particular description of specific real property
- 764. — Location
- 765. — Possession and occupancy
- 766. Selection by devisee or others

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****H. DESCRIPTION OF PROPERTY—Continued****2. Real Property and Interests Therein—Continued**

- § 767 Rents, profits, income, or right to use and occupation
- 768 — As passing interest in land to which appurtenant
- 769 — As passing under devise of interest in land
- 770 — As passing under particular expressions
- 771. — Nature and extent of use and enjoyment
- 772 Crops
- 773 What interest passes
- 774 — Interest under lease
- 775 — Interest under lien
- 776 — Interest under mortgage or trust
- 777 — Interest under sale or purchase

**3. Personal Property**

- § 778 Words operative to pass personal property
- 779. — Money
- 780 — Stock
- 781 — Bonds, mortgages, and securities
- 782 — Notes
- 783 — Insurance
- 784 — Accounts and account books
- 785 — Interest, income, or produce of personal property
- 786 — Devise of realty as including personalty
- 787 — Miscellaneous words
- 788 Property described by use
- 789 Property described by location
- 790 Selection by legatee
- 791 Deduction of debts and expenses
- 792 Release or extension of debts
- 793 Amount of legacy
- 794 Title or interest of testator

**4. Cumulative and Substitutional Legacies, and Residuary Clause**

- § 795 Cumulative and substitutional legacies
- 796 Residuary clause
- 797 — Residue as general or particular
- 798 — Two or more residuary clauses
- 799 — What passes by residuary clause
- 800. — Amount of residue
- 801 — Gifts of residue to beneficiaries elsewhere mentioned

**I. ESTATES****1. Creation by Will in General**

- § 802 General rules
- 803 Concurrent or successive character of interest
- 804. Technical words
- 805 Beneficial interest, use, or privilege
- 806 Effect of recitals or references
- 807. Estates by implication
- 808. Minerals

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****I. ESTATES—Continued****2. *Fee Simple Absolute***

- § 809 In general
- 810 Language used
- 811 — “Heirs” and technical words of inheritance; “issue,” “children”
- 812 — Devise without words of limitation
- 813 — Effect of various parts of will or codicil
- 814 Fee arising on future contingency
- 815 Interests given
- 816. Fee created by implication
- 817. — Power of disposition
- 818 — Charges
- 819 — Devise in lieu of dower or for separate use of married woman
- 820 — Devise of use, income, or proceeds
- 821 Construction to avoid intestacy
- 822 Effect of limitations or restrictions
- 823 — Gift over on contingency
- 824 — Limitations or restrictions repugnant to fee simple in general
- 825 — Devise over of property remaining after fee
- 826 — Devise over on marriage
- 827. — Limitations by way of trust
- 828 — Postponement of distribution
- 829 — Restraint on alienation
- 830 — Restrictions as to use of property
- 831 — Precatory words
- 832 — To what gift or property limitation or restriction refers

**3. *Absolute Interest in Personality***

- § 833 In general
- 834 Words creating in general
- 835 General or indefinite bequest
- 836 Effect of various parts of will; subsequent language as reducing interest
- 837 Interests given
- 838. — Gift to separate estate of married woman or in lieu of dower
- 839 Creation by implication
- 840 Construction to avoid intestacy
- 841 Repugnant limitations or restrictions in general
- 842 Repugnant gift over after absolute interest
- 843 Substitutional gift over on death
- 844 Void restriction against marriage
- 845 Precatory words
- 846 Restraints on alienation
- 847 Trusts
- 848 Postponement of distribution
- 849. To what gift or property limitations apply

**4. *Defeasible Fees and Defeasible Interests in Personality***

- § 850 Defeasible fees
- 851 — Provisions for defeasance in general
- 852. — Limitation over on death without issue
- 853. — Birth and survivorship of issue

---

See also descriptive word index for Title “Wills” in Volume 95

**XL CONSTRUCTION—Continued****I. ESTATES—Continued****4. *Defeasible Fees and Defeasible Interests in Personality—Continued***

- § 854. — Marriage of devisee
- 855. — Inconsistent limitations
- 856. — Enlargement of defeasible fee into fee simple absolute
- 857. Defeasible interests in personality

**5. *Determinable Fees, Fees Subject to Condition Subsequent, and Fees Simple Conditional***

- § 858. Determinable fees
- 859. Fees subject to condition subsequent
- 860. Fees simple conditional

**6. *Estates Tail; Rule in Shelley's Case; Rule in Wild's Case***

- § 861. Estates tail
- 862. — Language necessary
- 863. — Fee tail created by application of rule in Shelley's case
- 864. — Limitation over on death without issue
- 865. — Estate tail to arise in future
- 866. — Defeasible estate tail
- 867. — Effect of charge or power
- 868. — Language of entailment as applied to personality
- 869. — Statutory abolition or modification
- 870. Rule in Shelley's Case; gift to one for life, remainder to his heirs or the heirs of his body
- 871. — Origin and current status of rule
- 872. — Intention of testator
- 873. — Estate intervening between life estate and remainder
- 874. — Inconsistent limitation over
- 875. — Application to realty and personality
- 876. — Estate of ancestor in general
- 877. — Restraint on alienation
- 878. — Power of disposition or other qualification
- 879. — Estate in remainder
- 880. Rule in Wild's Case, gift to one and his children
- 881. — Application of rule to create estate tail, joint tenancy, or tenancy in common
- 882. — Construction of gift as creating life estate and remainder
- 883. — Construction of devise as creating fee simple or absolute interest
- 884. — Effect of power of appointment

**7. *Life Estates***

- § 885. Language necessary or sufficient to create
- 886. — Effect of various parts of will
- 887. — Loan
- 888. — Gift of use, possession, enjoyment, etc.
- 889. — Gift of rents, profits, or income
- 890. — Gift during widowhood or until marriage
- 891. Creation by implication
- 892. Effect of remainders
- 893. Absence of remainder

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****I. ESTATES—Continued****7. *Life Estates*—Continued**

- § 894 Personal property as subject of life estate
- 895 Duration of estate, conditions
- 896 Successive life estates
- 897 Power given to life tenant
- 898 — Effect of limitation over
- 899 — Effect of disposal under power
- 900 Power in executor or trustee of beneficiary

**8. *Estates for Years, Annuities, Income, and Support and Maintenance***

- § 901. Estate for years
- 902. Annuities
- 903 Income
- 904 Support, maintenance, and education

**9. *Undivided Interests***

- § 905 In general
- 906 Tenancies in common and joint tenancies
- 907. Estates in severalty
- 908 Estates by entirety

**10. *Future or Executory Estates and Interests***

- § 909 Remainders
- 910 — Preceding estate
- 911. — Cross remainders
- 912. — Alternative remainders
- 913. — Collateral limitations
- 914. — Interests in personalty analogous to remainder
- 915. Executory devises
- 916. — Definition, nature, and distinctions
- 917. — Provisions creating executory devises
- 918 — Conditional limitations
- 919. — Shifting and springing devises or uses
- 920. — Executory devises or bequests of personalty

**11. *Vested or Contingent Estates and Interests Generally***

- § 921 Definitions and distinctions
- 922. Postponement, and contingencies as to possession or enjoyment
- 923 Defeasibility and limitations over
- 924 Conditions and charges
- 925. Contingency on which estate or interest depends in general
- 926. Interposition of trustee
- 927. As affected by nature of property devised or bequeathed
- 928. Uncertainty as to kind or amount of property
- 929. Certainty of person
- 930. Sale of property and distribution of proceeds
- 931. Intention of testator and rules of construction
- 932. — Construction in favor of vesting
- 933. — Words of time or contingency

## XI. CONSTRUCTION—Continued

## I. ESTATES—Continued

11 *Vested or Contingent Estates and Interests Generally*—Continued

- § 934 — Only gift in direction to pay or divide, “divide and pay over” rule
- 935 — Severance or intermediate enjoyment by beneficiary
- 936 Application of rules to particular gifts or contingencies
- 937 — Marriage or attainment of certain age
- 938 — Survivorship
- 939 — Gifts charged on property
- 940 — Gifts in trust
- 941 — Gifts of income and annuities
- 942 Opening of vested estates or interests to let in after-born children
- 943 Divesting vested estates or interests
- 944 Contingent estates or interests becoming vested
- 945 Extinguishment of contingent estate or interest

12 *Vested or Contingent Remainders*

- § 946 Defined and distinguished
- 947 Rules of construction in general
- 948 Certainty as to beneficiaries, unborn persons
- 949 Limitations dependent on contingency
- 950 Vesting dependent on several contingencies
- 951 Certainty as to actual enjoyment and time thereof
- 952 Certainty as to amount or value
- 953 Postponement of time of payment or distribution to remaindermen
- 954 Divesting of remainder
- 955 Life tenant as remainderman
- 956 Conditions and restrictions
- 957. Accumulations of income
- 958 Enjoyment of income before payment or distribution
- 959 Power of disposition in first taker
- 960 — Disposition to, or for benefit of, remaindermen
- 961 Sale of property, disposition of proceeds, and interposition of trustee
- 962 Attainment of certain age
- 963 Directions to pay or convey to, or divide among, devisees and legatees
- 964 Limitation over or substitution on death or failure of remaindermen
- 965 Remainder to life tenant's issue, or, in default, to others
- 966 Remainder to life tenant's heirs, or, in default, to others
- 967 Limitation over on death of life tenant without issue or heirs
- 968 Remainder limited on estate tail
- 969 Devise or bequest to class
- 970 Devise or bequest to survivors
- 971 Devise or bequest to person surviving
- 972 Remainder to heirs or persons entitled to take by descent
- 973. Words and phrases indicating time of vesting

## J. CONDITIONS AND RESTRICTIONS

- § 974 Definitions
- 975 Creation
- 976. — By implication
- 977 Validity in general, uncertainty
- 978 Repugnancy to estate

---

See also descriptive word index for Title “Wills” in Volume 95

**XI. CONSTRUCTION—Continued****J. CONDITIONS AND RESTRICTIONS—Continued**

- § 979 Validity of conditions or restrictions as to particular matters
- 980 — Alienation of property
- 981 — Bankruptcy, insolvency, attachment, or execution
- 982 — Claims against estate
- 983 — Contest of will
- 984. — Education, religion, trade, or occupation of beneficiary
- 985 — Marriage or family relation
- 986 — Name of beneficiary
- 987 — Payment or deduction of debts or money
- 988 — Personal qualities or traits of character
- 989 — Possession or use of property
- 990 — Residence of beneficiary
- 991 — Other matters
- 992 Conditions in *terrorem*
- 993 Effect of invalidity
- 994 Construction, operation, and effect
- 995 — Whether conditions are precedent or subsequent
- 996 — Whether conditions are personal or follow estate
- 997 Performance or breach
- 998 — Strict or substantial performance
- 999 — Time of performance
- 1000 — Excuses for nonperformance or delay in performance; discharge by impossibility
- 1001 — Waiver
- 1002 — Enforcement of performance or forfeiture
- 1003 — Conditions or restrictions as to particular matters

**K. TESTAMENTARY TRUSTS****1. *Creation and Existence***

- § 1004. Right to create
- 1005 Nature and purpose of trusts created or creatable
- 1006 — Dry or passive and active trusts
- 1007 — Spendthrift trusts
- 1008 Requisites and essentials
- 1009 — Intention
- 1010 — Language of creation in general
- 1011. — Precatory words
- 1012 — Certainty
- 1013 — Completeness in properly executed instrument or instruments
- 1014 Particular provisions creating or not creating trust
- 1015 — Provisions for maintenance
- 1016 — Repugnant provisions
- 1017. Implied trusts
- 1018 — Authority or directions to executor or guardian
- 1019 — Authority or direction for benefit of others
- 1020 Trusts not appearing in will
- 1021. — Devise or bequest in reliance on promise of devisee or legatee
- 1022. — Admission of devisee or legatee

---

See also descriptive word index for Title "Wills" in Volume 95



**XI. CONSTRUCTION—Continued****K. TESTAMENTARY TRUSTS—Continued****2. Construction and Operation**

- § 1023 General rules
- 1024. — Purposes of trust
- 1025. Trustees
- 1026. — Title or interest
- 1027. Cestuis que trust or beneficiaries
- 1028. — Title or interest
- 1029. Property devised or bequeathed in trust
- 1030. Capital and income
- 1031. — What constitutes
- 1032. — Inclusion in trust
- 1033. — Division generally
- 1034. — Right to, in general
- 1035. — Right to, at, for, or during particular time
- 1036. — Amount or share to which beneficiary entitled
- 1037. — Deductions, deficiency, and reimbursement
- 1038. — Surplus and accumulations of income
- 1039. — Mode of payment or distribution

**3. Duration and Termination of Trust**

- § 1040 In general
- 1041 Effect of certain happenings or events
- 1042. — Attainment of majority or certain age by beneficiary
- 1043. — Marriage of beneficiary
- 1044. — Death of trustee
- 1045. — Death of beneficiary
- 1046. — Other occurrences terminating trust
- 1047. Consent or wish of beneficiaries; acts, agreements, and conveyances
- 1048. Discretionary power in trustee to terminate trust
- 1049. Failure of trustee to exercise trust; removal of trustee
- 1050. Effect of termination

**4. Limitation Over or Other Disposition of Property on Termination of Trust**

- § 1051. In general
- 1052. Rights of particular persons
- 1053. — Beneficiaries of trust
- 1054. — Devisees, heirs, and representatives of beneficiaries
- 1055. — Heirs, representatives, and devisees of remaindermen
- 1056. — Heirs of testator
- 1057. — Residuary devisees or legatees of testator
- 1058. Nature of estate vesting after termination of trust
- 1059. Mode of payment, distribution, or conveyance

**5. Effect of Failure of Trust**

- § 1060 In general
- 1061. Refusal, failure, or incapacity of trustee

**L. TESTAMENTARY POWERS**

- § 1062 Creation and existence
- 1063. — Inconsistent and repugnant provisions

---

See also descriptive word index for Title "Wills" in Volume 95

**XI. CONSTRUCTION—Continued****L. TESTAMENTARY POWERS—Continued**

- § 1064. — Right or interest of donee and beneficiaries
- 1065. Construction of power in general
- 1066. Nature and extent of power granted
- 1067. — Power of sale, use, or disposition
- 1068. — Power of appointment
- 1069. Property subject to power
- 1070. Exercise of power
- 1071. Duration and termination
- 1072. Devolution of property on default in exercise of power

**M. ACTIONS TO CONSTRUE WILLS**

- § 1073. Nature
- 1074. Jurisdiction
- 1075. — Of courts of equity
- 1076. — Of probate courts
- 1077. — Of particular local courts
- 1078. — As dependent on necessity for construction and nature of questions involved
- 1079. — As affected by importance of interests or amounts involved
- 1080. — As affected by provision in will that executors shall define its provisions
- 1081. Venue
- 1082. Persons entitled to construction of will
- 1083. — Personal representatives and trustees
- 1084. — Legatees
- 1085. — Heirs and devisees
- 1086. Defenses
- 1087. Time to sue, limitations, and laches
- 1088. Parties
- 1089. Process
- 1090. Pleading
- 1091. Evidence
- 1092. Trial or hearing and scope of inquiry
- 1093. Dismissal or discontinuance
- 1094. Judgment or decree
- 1095. Review; case reserved, certified, or reported for advice
- 1096. Costs and counsel fees

**XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—p****A. NATURE OF TITLE AND RIGHTS IN GENERAL**

- § 1097. "Devisee" and "legatee" defined and distinguished
- 1098. Title of legatees and devisees
- 1099. — Real property
- 1100. — Personal property
- 1101. — Income and profits as incident to gift
- 1102. Possession, control, and use
- 1103. Option to take property or money
- 1104. Option to purchase property of estate
- 1105. Rights as against executor
- 1106. Revocation of legacies or devises
- 1107. — Effect of revocation of particular gift on other gifts to same beneficiary

---

See also descriptive word index for Title "Wills" in Volume 95

**XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—Continued****A. NATURE OF TITLE AND RIGHTS IN GENERAL—Continued**

- § 1108 Apportionment of income or annual or other stated payments
- 1109 Mutual rights and liabilities of devisees and legatees
- 1110 Contracts of devisees and legatees
- 1111 — Prevention or modification of disposition made by will
- 1112 — Requisites and validity
- 1113 — Construction and operation
- 1114 — Performance and rescission
- 1115. Transfers by legatees or devisees
- 1116 — Before or pending probate or administration
- 1117. — Contingent or expectant estates or interests
- 1118 — Property equitably converted
- 1119 — Requisites and validity in general
- 1120 — Construction and operation in general
- 1121 — Rights and liabilities of transferees
- 1122. — Effect of annulment of will
- 1123. Actions by, against, or between devisees and legatees

**B. PARTICULAR CLASSES AND KINDS OF LEGACIES AND DEVISES**

- § 1124 Specific, general, and demonstrative
- 1125. — Definitions
- 1126. — Presumption that words are used in legal sense
- 1127. — Determining character of legacies in general
- 1128. — Presumptions as to character
- 1129 — Character of particular legacies or designations or descriptions
- 1130. — Devises of real estate
- 1131 Legacies of income
- 1132 — What is income and what is capital
- 1133 — At what time income accrues
- 1134 Legacies of annuities
- 1135 — Time of accrual and payment
- 1136 Legacies of support and maintenance
- 1137 Devise or bequest to creditor
- 1138 — What constitutes
- 1139. — As satisfaction of debt
- 1140. — Election between legacy and debt
- 1141 — Interest on creditor's claim
- 1142 Devise or bequest to debtor
- 1143 — As release of debt
- 1144 — Deduction or set-off of debt against gift
- 1145 Devise or bequest to heir or next of kin
- 1146 Devise or bequest to executor or trustee

**C. ACCEPTANCE, RENUNCIATION, AND ABANDONMENT OR FORFEITURE OF DEVISE OR LEGACY**

- § 1147 Acceptance
- 1148 — Necessity, sufficiency, and presumptions
- 1149. — Estoppel by acceptance
- 1150. — Effect on rights of those claiming under beneficiary
- 1151. Renunciation
- 1152. Abandonment or forfeiture

---

See also descriptive word index for Title "Wills" in Volume 95

**XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—Continued****D. ABATEMENT OF LEGACIES**

- § 1153 In general
- 1154. Intention of testator and presumption of equality
- 1155 How intention may be shown in general
- 1156 Effect of testamentary directions
- 1157 Deficiency resulting from devastavit
- 1158. Deficiency resulting from administration expenses
- 1159 Abatement to provide for after-born or omitted children
- 1160 Legacies in, or affected by, codicil
- 1161 Insufficiency of personalty alone as causing abatement
- 1162 Legacies which abate and order of abatement
- 1163 — Residuary legacies
- 1164 — General legacies in general
- 1165 — Legacy based on valuable consideration
- 1166 — Specific legacies and devises
- 1167. — Demonstrative legacies
- 1168 — Annuities and income
- 1169 — Legacy pursuant to power of appointment
- 1170. Deduction and adjustment
- 1171. Equalization of payments to legatees

**E. ADEMPTION**

- § 1172. Definitions, distinctions, and nature
- 1173. Gifts subject to ademption
- 1174. By whose acts provisions may be adeemed
- 1175 Intention and assent as elements
- 1176 Acts or conduct causing ademption
- 1177. — Change or extinction of subject matter
- 1178 — Satisfaction
- 1179 Operation and effect of ademption
- 1180 Republication or reexecution as revival of adeemed provision
- 1181. Estoppel to assert ademption

**F. ADVANCEMENTS**

- § 1182. In general
- 1183. Form and sufficiency of provisions for deduction, charge, or accounting
- 1184 Discharge, release, or merger of advancement or obligation by will
- 1185. What constitutes advancement and what advancements considered
- 1186 — Debts
- 1187. — Transfer of property other than money
- 1188. — Gifts
- 1189. — Advances or benefits to relative of testamentary beneficiary
- 1190 Method for determination of existence of, and what constitute, advancements
- 1191 — Evidence
- 1192 Amount or valuation of advancements
- 1193 — Evidence
- 1194 Interest on advancement
- 1195. Adjustment and distribution
- 1196 Advances or loans to beneficiaries by executor, trustee, or life tenant

---

See also descriptive word index for Title "Wills" in Volume 95

**XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—Continued****G. LAPSE OF LEGACIES OR DEVISES****1. *In General***

- § 1197 Definition and nature
- 1198 Cause of lapse generally
- 1199 Death of beneficiary
- 1200 — At time of execution of will
- 1201 — Before death of testator in general
- 1202 — After death of testator but before vesting of interest
- 1203 — After vesting of interest
- 1204 — Particular kinds of legacies or devises
- 1205 — Legacy charged on property
- 1206 — Gift to several persons
- 1207. Dissolution or other termination of corporation or association named as beneficiary
- 1208. No person in existence capable of taking
- 1209. Legal incapacity of member of class
- 1210 Change of situation
- 1211. Failure or performance of conditions
- 1212. Failure or impossibility of purpose of gift
- 1213. Renunciation by beneficiary
- 1214. What interest lapses
- 1215. Evidence as to lapse

**2. *Representation and Prevention of Lapse***

- § 1216. In general
- 1217. Statutory provisions
- 1218. — Purpose and effect
- 1219. — Construction in general
- 1220 — Persons entitled to take
- 1221. — Gifts to class
- 1222. — Gifts to persons dead at date of will

**H. DEVOLUTION OF PROPERTY ON FAILURE OF TESTAMENTARY DISPOSITION**

- § 1223. In general
- 1224 — Will wholly ineffective
- 1225. — Partial intestacy where will contains no residuary clause
- 1226 — Partial intestacy where will contains residuary clause
- 1227 Failure of precedent estate
- 1228. Failure of subsequent estate or limitation over
- 1229. Failure to dispose of remainder
- 1230 Failure of legacy charged on devise or other legacy
- 1231. Failure of gift of proceeds of sale
- 1232. Void condition
- 1233. Breach of condition subsequent
- 1234. Suspension of vesting or sale
- 1235. Refusal of legacy or devise charged with payments
- 1236 Testamentary provision in case of lapse or failure

---

See also descriptive word index for Title "Wills" in Volume 95

## XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—Continued

## I ELECTION

1 *In General*

- § 1237 Definition, nature, and statement of principle
- 1238 Right of, and necessity for, election in general
- 1239 — Election between gift by will and adverse claim
- 1240 — Election between gift by will and by nontestamentary act
- 1241 — Election between rights under will and as heir or next of kin
- 1242 — Election by holder of derivative interest
- 1243 — Election by creditor
- 1244 Conditional election
- 1245 By whom election made
- 1246 — Effect of death or disability of person entitled to elect
- 1247 — Physical and mental incapacity
- 1248 Against whom election made
- 1249 Time for making election
- 1250 — Under statutes
- 1251 Relief in equity to person failing to elect
- 1252. Proceedings to compel election
- 1253 Amendment of election
- 1254 Revocation of election
- 1255 — Equitable relief against election

2 *Election by Surviving Spouse*

- § 1256 Widow
- 1257 — Right of, and necessity for, election in general
- 1258 — Statutory provisions
- 1259 — Election between gift by will and adverse claim
- 1260 — Election between rights under will and as heir or next of kin
- 1261 — Determination whether gift by will is in lieu of dower
- 1262. — Widow's allowance or exemption
- 1263. — Provision otherwise than by will
- 1264 — Property as to which election may become necessary
- 1265 — Amount or value of testamentary provision
- 1266 — Release of right to elect
- 1267 Widower

3. *Method of Making or Signifying Election*

- § 1268 In general
- 1269 Statutory requirements
- 1270 — Execution, filing, and recording of written instrument
- 1271 Election by express declaration or agreement
- 1272. Election by acts or conduct in general
- 1273 — Necessity of unequivocal act
- 1274. — Knowledge of facts and legal rights
- 1275 Election by acts or conduct to take under will
- 1276. — Participation in proceedings under will
- 1277 — Acting as executor or trustee
- 1278. — Assertion of rights under will
- 1279. — Acceptance of benefits or enjoyment or use of property
- 1280 — Assumption of ownership and dealing with property
- 1281. — Acquiescence, estoppel, and laches

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See also descriptive word index for Title "Wills" in Volume 95

## XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—Continued

## I. ELECTION—Continued

3. *Method of Making or Signifying Election*—Continued

- § 1282 Election by acts or conduct to take against will
- 1283 Evidence
- 1284 Questions of law and fact and instructions

4. *Effect of Election*

- § 1285 On party electing in general
- 1286 On spouse
- 1287. — Taking under will
- 1288. — Taking against will
- 1289 On other interests
- 1290. — Beneficiaries in general
- 1291. — Remainderman and acceleration of remainders
- 1292. — Holders of residuary estate and heirs
- 1293. — Beneficiaries of trust and donees of power created by will
- 1294. — Donees of income
- 1295. — Compensation to disappointed beneficiaries
- 1296. — Creditors of party electing

## J. LEGACIES AS PAYABLE OUT OF, OR CHARGEABLE ON, PROPERTY, ESTATE, OR INTEREST

- § 1297 \* Property or fund subject to payment of legacies in general
- 1298. Legacies as charge on property, estate, or interest in general
- 1299 Property, estate, or interest charged
- 1300. — Principal or income
- 1301. — Personal property
- 1302. — Real estate in general; intention of testator
- 1303. — Effect of residuary clause
- 1304. — Charge on lands or interest specifically devised
- 1305 Application of rules to particular legacies or charges
- 1306 Effect of sale, encumbrance, or other disposition of property charged
- 1307 Extinguishment of charge
- 1308 Enforcement of charge
- 1309 Right to possession or control of land charged
- 1310 Personal liability of devisee or legatee

## K DEBTS AND OBLIGATIONS OF TESTATOR

- § 1311 Debts preferred to legacies
- 1312 Debts chargeable against estate
- 1313. — Specialty debts
- 1314 Testamentary preferences among creditors
- 1315 Covenants and contracts as to land
- 1316 Liens
- 1317. Property applicable to payment of debts
- 1318. — Rents, profits, or income
- 1319. — Undisposed of property
- 1320. — Residuum
- 1321. — Specific gifts
- 1322. — Real and personal property
- 1323. — Apportionment of liability
- 1324. — Effect of sale by legatee or devisee
- 1325. — Personal liability of devisee or legatee

**XII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—Continued****K. DEBTS AND OBLIGATIONS OF TESTATOR—Continued**

- § 1326 — Contribution
- 1327 Equities between testator and third persons
- 1328 Enforcement of claims

**L. DEBTS OF BENEFICIARIES**

- § 1329 Rights of creditors
- 1330 — Exercise of rights of beneficiary
- 1331 — Testamentary provisions barring creditors
- 1332 — Renunciation and waiver by, or estoppel of, beneficiary
- 1333 Interests subject to debts
- 1334. Priorities
- 1335 — Status of debts due to estate
- 1336 Lien of creditors
- 1337. Remedies

**M. TIME OF PAYMENT OF LEGACIES**

- § 1338. Statutory provisions
- 1339 Provisions of will in general
- 1340 — Will giving executor discretion as to time for payment
- 1341. Legacies charged on land
- 1342 Legacy given by will under power of appointment
- 1343 Acceleration of payment
- 1344. Effect of death of legatee

**N. INTEREST ON LEGACIES**

- § 1345. Nature
- 1346. What law governs
- 1347. Right to interest on general legacies
- 1348. — At what time legacy commences to bear interest
- 1349 — Legacies charged on land, or on person of devisee
- 1350. — Legacies payable from proceeds of property to be sold
- 1351 — Legacies in remainder after termination of life estate
- 1352 — Annuities
- 1353 — Legacies for support and maintenance
- 1354. Right to interest on specific legacies
- 1355 Matters affecting right to interest
- 1356. — Situation or condition of estate in general.
- 1357. — Contest of will
- 1358 — Settlement of estate
- 1359 — Inability or incapacity of legatee to receive legacy
- 1360 — Demand for payment and acceptance of legacy
- 1361 Rate and computation of interest
- 1362 Estoppel or waiver of right to interest, mistake
- 1363. Property or fund from which payable

**XIII. JOINT AND MUTUAL WILLS**

- § 1364. Definition and nature
- 1365. Power to make and validity
- 1366 Revocation
- 1367. Agreements to make mutual wills

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See also descriptive word index for Title "Wills" in Volume 95



## I. INTRODUCTORY

## § 1. Definitions

- a "Will"
- b "Codicil"
- c. "Testament" and related terms

## a. "Will"

A "will" is defined as the legal declaration of a man's intentions, which he wills to be performed after his death, or as an instrument by which a person makes a disposition of his property to take effect after his death

A "will" is the legal declaration of a man's intentions, which he wills to be performed after his

death,<sup>1</sup> touching either the disposition of his property, the guardianship of his children, or the administration of his estate,<sup>2</sup> the legal declaration of a man's mind as to the manner in which he would have his estate<sup>3</sup> or property<sup>4</sup> disposed of after his death, an instrument by which a person makes a disposition of his property to take effect after his death,<sup>5</sup> a written instrument, legally executed, by which a man makes disposition of his estate, to take effect after his death.<sup>6</sup> All definitions of a will include the idea that it is a means of disposing of property to take effect at the death of the testator<sup>7</sup>

1. Ariz—In re Miller's Estate, 92 P 2d 335, 337, 54 Ariz 58

NY—In re Schofield's Will, 49 NY S 2d 341, 342

NC—Corpus Juris cited in Richardson v. Cheek, 193 SE 705, 706, 212 NC 510

Okl—Corpus Juris cited in Johnson v Johnson, 279 P 2d 928, 936

Pa—In re Scutti's Estate, 92 A 2d 188, 189, 371 Pa 536—In re Kauffman's Estate, 76 A 2d 414, 416, 365 Pa 555—In re Burt's Estate, 44 A 2d 670, 672, 353 Pa. 217, 162 A L R 1053

Reynolds v. Maust, 15 A 2d 853, 142 Pa Super 109—In re Lewis' Estate, 11 A 2d 667, 668, 139 Pa Super 83

In re Kemmerling's Estate, Orph., 44 Sch Leg Rec 52—In re Hamilton Case, Orph., 6 Sch Reg 137

Wash—In re Lidston's Estate, 202 P 2d 259, 263, 32 Wash 2d 408  
68 C J p 410 note 2

## Will.

Contingent see infra § 152  
Distinguished from other instruments see infra §§ 136-149

Foreign see infra § 340

Holographic see infra § 200.

Joint see infra § 1364

Meaning of word as used in will see infra §§ 597-612

Mutual see infra § 1364.

Mystic see infra § 208

Nature and essentials of see infra §§ 127-148

Nuncupative see infra § 210

Reciprocal see infra § 1364

"Devisee" and "legatee" defined and distinguished see infra § 1097

"Bequest" and "legacy" defined see infra § 1125

## Similar definitions

(1) A "will" is the declaration of the maker in regard to the disposition of his or her property, and it is his or her testimony upon such subject, and it is the expression of his mind and will in relation thereto

Mo—Littleton v. General Am Life Ins. Co., App, 136 S W 2d 433, 438

(2) Other similar definitions

Cal—In re Moody's Estate, 257 P 2d 709, 713, 118 Cal App 2d 300

Md—O'Hara v O'Hara, 44 A 2d 813, 815, 185 Md 321, 163 A L R 1444  
68 C J p 410 note 2 [a]

2. Ky—Ward v Ward, 48 SW 411, 412, 104 Ky 857  
68 C J p 410 note 3

3. SC—Tomkins v Tomkins, 17 S CL 92, 96, 19 Am D 656

NY—In re Davis' Will, 92 NY S 968, 970, 45 Misc 554  
68 C J p 410 note 4.

## Similar definitions

NC—Rountree v Rountree, 195 S E 784, 785, 213 NC 252  
68 C J p 410 note 4 [a].

4. Va—Smith v Smith, 70 SE 491, 492, 112 Va. 205, 33 L R A, N S, 1018  
68 C J p 410 note 5.

## Similar definitions

(1) A disposition of real and personal property, to take effect after the death of the testator

Pa—In re Kauffman's Estate, 76 A 2d 414, 416, 365 Pa 555—Coulter v Shelmadine, 53 A 638, 204 Pa 120

(2) The affirmative expression of testator's intent respecting administration and disposition of his material possessions on his death

NY—In re Schek's Estate, 14 NY S 2d 946, 951, 172 Misc 235.

(3) Other similar definitions

Ga—Jenkins v Shuffen, 57 SE 2d 283, 387, 206 Ga. 315

Tex—Boyles v Gresham, 263 SW 2d 935, 937

Hinson v. Hinson, Civ App, 273 SW 2d 116, 118, reversed on other grounds, Sup, 280 SW 2d 731—White v White, Civ App, 176 SW 2d 987, reversed on other grounds 179 SW 2d 503, 142 Tex 499  
68 C J p 410 note 5 [a]

5. Ind—Van Orman v Van Orman, 41 NE 2d 693, 112 Ind App 394

Md—Corpus Juris cited in Dietrich v Morgan, 20 A 2d 175, 177, 179 Md 553.

Tenn—Carver v Anthony, 245 SW 2d 422, 425, 35 Tenn App 306

Tex—Maxey v Queen, Civ App, 206 SW 2d 114, 117  
68 C J p 410 note 6.

## Similar definitions

(1) In law a man's will is the instrument by which he expresses his intentions as to the disposition of his property at his death

NH—Loveren v Eaton, 113 A 206, 207, 80 NH 62

Okl—Johnson v Johnson, 279 P 2d 928, 930

(2) A "will" is a disposition of property to take effect at death of testator

Cal—In re Smilie's Estate, 222 P 2d 692, 696, 99 Cal App 2d 794

6. Va—Smith v Smith, 70 SE 491, 492, 112 Va. 205, 33 L R A, N S, 1018  
68 C J p 410 note 7.

## Similar definitions

(1) An instrument in writing, which is executed as prescribed by statute, which makes a disposition of property to take effect after death, and which in its own nature is ambulatory and revocable during lifetime

Tex—Harper v. Meyer, Civ App, 274 SW 2d 904, 906, error refused no reversible error—Williams v Noland, 32 SW 328, 329, 10 Tex Civ App 629

(2) Other similar definitions  
Pa—In re Gibson's Estate, 193 A 302, 304, 128 Pa Super. 44.  
68 C J p 410 note 7 [a].

## Words

A "will" is not a sheet of paper, nor a number of sheets or pages, but consists of the words written thereon

NY—In re Golden's Will, 300 NY S 787, 165 Misc 205, affirmed 3 NY S 2d 886, 253 App Div. 919.

7. Ohio—Holmden v. Craig, 16 Ohio Cir Ct, N S, 157, 163

Wash—In re Lidston's Estate, 202 P 2d 259, 263, 32 Wash 2d 408.

A will, *ex vi termini*, means a voluntary disposition of property to take effect after death,<sup>8</sup> and is so called because it expresses the will of the maker as to the direction which his property shall take.<sup>9</sup> The word "will" has a technical meaning, and implies an instrument executed in conformity with prescribed formalities, but subject to alteration or cancellation at the volition of the maker,<sup>10</sup> but it has been held that an instrument intended by the maker to effect the disposition of his property after his death is his "will" even though it be so defective, because not executed or attested in accordance with statute, that it is not entitled to probate.<sup>11</sup>

\* By "will" is meant the last will and testament, the final disposition of property, speaking as of the time of the testator's death,<sup>12</sup> and it includes every kind of testamentary act taking effect from the mind of a testator and manifested by an instrument in writing executed and attested in conformity with statute.<sup>13</sup> The word, used generically, includes codicils,<sup>14</sup> but the word "will" does not cover or embrace the codicil, where anything appears to show that it was not intended to do so.<sup>15</sup>

A *last will* is a lawful disposing of that which any one would have done after death.<sup>16</sup>

A *last will and testament* is the disposition of one's property to take effect after death.<sup>17</sup> It is the expression most commonly employed to designate the instrument which makes a testamentary disposition of real and personal property.<sup>18</sup>

*Mere will; more will* The term "mere will" has been held to designate a will which takes effect on the death of the testator, and is ambulatory during his lifetime.<sup>19</sup> Such term is distinguished from "more will" which refers to such a will as is a composite and superserviceable instrument, which be-

comes fixed, stationary, and irrevocable in its clause of revocation while the remainder is ambulatory.<sup>20</sup>

*Unnatural will* A will is "unnatural" when it is different from what it might be expected to have been.<sup>21</sup> The expression is usually applied in a case where a testator without apparent reason leaves his estate or a large portion of it to strangers to the exclusion of the natural objects of his bounty.<sup>22</sup> In a legal sense, a will is "unnatural," only when it is contrary to what the testator from his known views, feelings, and intentions would have been expected to make, when it is in accordance with such views it is not "unnatural," however much it may differ from the ordinary actions of men in similar circumstances.<sup>23</sup> A will is not necessarily "unnatural" because of a discrimination between heirs of the same degree, or because of the entire exclusion of a part or all of them.<sup>24</sup>

*Nonintervention or independent will* Where by statute, on the testator indicating that such is his desire, administration independent of the control of courts of probate jurisdiction is authorized, a will containing such provision is termed a "nonintervention will."<sup>25</sup> Accordingly, the term has been defined as a will which authorizes the executor or executrix to settle and distribute the estate without intervention of the court and without the giving of bonds.<sup>26</sup> The term "independent will" does not include a will appointing an executor without bond but failing to provide that no other or further action should be taken in the court having probate jurisdiction than the return of an inventory and appraisal of the property belonging to the estate.<sup>27</sup>

*"Inofficious" or "undutiful" will* In the civil law, an "inofficious" or "undutiful" will is such as substantially departs from the disposition of the estate, as it would be distributed in case of intestacy.<sup>28</sup>

8 Tenn—Morrow v Morrow, 2 Tenn Ch 549, 563.

9 Ala—McRee's Adm'r's v Means, 34 Ala 349, 361  
68 C J p 411 note 10

10 Ohio—Robbins v Smith, 73 NE 1051, 1055, 72 Ohio St 1.  
68 C J p 411 note 11

11 Okl—Johnson v Johnson, 279 P 2d 928

12 N Y—In re Kiltz's Will, 211 N Y S 450, 461, 125 Misc 475  
Tex—Harris v Harris' Estate, Civ App, 276 SW 964, 966

13 Kan—In re Koellen's Estate, 176 P 2d 544, 548, 162 Kan 395

14 Kan—In re Grattan's Estate, 138 P 2d 497, 502, 157 Kan 116  
68 C J p 411 note 13

15 N Y—Sloane v Stevens, 13 NE 618, 107 N Y 122.

16 Ky—Limbach v Bolin, 183 S W 495, 496, 169 Ky 204, L R A 1916D 1059

Tenn—Morrow v Morrow, 2 Tenn.Ch 549, 563

17. Ill—Robinson v Brewster, 30 NE 683, 686, 140 Ill 649, 33 Am SR 265  
68 C J p 411 note 16

18. Ohio—Adams v Foley, 173 NE 197, 198, 36 Ohio App 295  
68 C J p 411 note 17

19. RI—Bates v Hacking, 68 A 622, 628, 28 RI 523, 125 Am SR 759, 14 L R A, N S, 937

20. RI—Bates v Hacking, 68 A 622, 628, 29 RI 1, 14, 14 L R A, N S, 937

21. Cal—In re Wilson's Estate, 49 P 172, 711, 117 Cal 262, 277—Herwick v Langford, 41 P 701, 705, 108 Cal 608

22. Cal—In re Shay's Estate, 237 P 1079, 1083, 196 Cal 355  
68 C J p 411 note 20

23. Pa—In re Ewart's Estate, 92 A 708, 710, 246 Pa 579—In re Morgan's Estate, 68 A 953, 954, 219 Pa 355

24. Ala—Henry v Hall, 17 So 187, 106 Ala 84, 99, 54 Am SR 22  
68 C J p 411 note 22

25. Wash—In re Hanson, 151 P 264, 87 Wash 113—In re Macdonald, 69 P 1111, 29 Wash 422

26. Wash—In re Macdonald, 69 P 1111, 29 Wash 422

27. Tex—Glover v Cort, 81 SW 136, 36 Tex Civ App 104

28. N Y—Stein v Wilzinski, 4 Redf. Surr 441, 450  
32 C J p 576 note 40.

An "inofficious will" is a term of the civil law to designate one in which natural affection and the claims of near relations have been disregarded<sup>29</sup>

**Officious will** A testament by which a testator leaves his property to his family<sup>30</sup>

**Parliamentary will** A term applied to the operation of the statute of distribution<sup>31</sup>

### b. "Codicil"

A "codicil" is a supplement to, or addition to or qualification of, an existing will made by the testator to alter, enlarge, or restrain the provisions of the will

A "codicil," in reality, is a will<sup>32</sup> or testamentary instrument<sup>33</sup> However, it is not a new will,<sup>34</sup> a "codicil" is a supplement to,<sup>35</sup> an addition to or qualification of,<sup>36</sup> an existing will, made by the testator,<sup>37</sup> to alter, enlarge, or restrain the provisions of the will,<sup>38</sup> to explain<sup>39</sup> or republish it,<sup>40</sup> or to revoke it<sup>41</sup> Instruments not falling within this definition are not codicils<sup>42</sup> A codicil is dependent for its life and force on the life and force of the will to which it is an adjunct<sup>43</sup> It does not supersede the will, as an after-made will would

29. N.J.—In re Willford's Will, Pre-rog, 51 A 501, 502  
68 C.J. p 412 note 28

30. Black L.D.

31. N.Y.—Arthur v Arthur, 10 Barb 9, 25  
68 C.J. p 412 note 29

32. Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833  
68 C.J. p 412 note 31.  
"Will" as including "codicil" see supra subdivision a of this section

#### "Disposition" synonymous

La—Oglesby v Turner, 50 So 859, 124 La 1084  
18 C.J. p 1282 note 13 [b]

33. Okl—Johnson v Johnson, 279 P 2d 928  
Wash—In re Whittier's Estate, 176 P 2d 281, 26 Wash 2d 833

34. Ark—**Corpus Juris** cited in Kinnear v Langley, 192 S.W.2d 978, 983, 209 Ark 878  
Ill—Abdill v Abdill, 128 N.E. 741, 295 Ill 40  
N.J.—McGill v Trust Co of New Jersey, 121 A 760, 94 N.J.Eq 657  
Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833  
Va—Hope Natural Gas Co v Shriver, 83 S.E. 1011, 1016, 75 W Va 401

35. Cal—In re Loud's Estate, 161 P 2d 49, 70 Cal App 2d 399—In re Cazaurang's Estate, 110 P 2d 138, 42 Cal App 2d 796

Mass—Joiner v Joiner, 78 So 369, 117 Miss 507

N.Y.—In re Miller's Will, 194 N.Y.S. 843, 119 Misc 4

N.C.—Smith v Mears, 10 S.E.2d 659, 218 N.C. 193, modified on other grounds 12 S.E.2d 649, 218 N.C. 775

Okl—Johnson v Johnson, 279 P 2d 928

Pa.—In re Kemmerling's Estate, Orph, 9 Sch Reg 104

Tenn.—Third Nat Bank v Scribner, 130 S.W.2d 126, 175 Tenn 14, 123 A.L.R. 1385

Wash—**Corpus Juris** quoted in In re

Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833  
68 C.J. p 412 note 33

36. Cal—**Corpus Juris** cited in In re Durand's Estate, 124 P 2d 330, 333, 51 Cal App 2d 206

Iowa—Blackford v Anderson, 286 N.W. 735, 226 Iowa 1138

La—Succession of Patterson, 177 So 692, 188 La 635

La—Succession of Manion, 79 So 409, 143 La 799

Mass—Taft v Stearns, 125 N.E. 570, 234 Mass 273

Miss—Holcomb v Holcomb, 159 So 564, 173 Miss 192

Okl—Johnson v Johnson, 279 P 2d 928

Pa.—In re Bingham's Estate, 127 A 73, 281 Pa 497

In re Kemmerling's Estate, Orph, 9 Sch Reg 104

Tenn—Third Nat Bank v Scribner, 130 S.W.2d 126, 175 Tenn 14, 123 A.L.R. 1385

Va—Fenton v Davis, 47 S.E.2d 372, 187 Va 463—Senger v Senger's Ex'rs, 27 S.E.2d 195, 181 Va 786

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833

68 C.J. p 412 note 34

#### Amendment to original instrument

N.J.—McGill v Trust Co of New Jersey, 121 A 760, 763, 94 N.J.Eq 657

Pa.—In re Carter's Estate, 13 Pa.Co 401

#### Postscript

A codicil is not an entirely new will, but a postscript showing something added to original document without literally obliterating whatever it affects or changes in original will

Ark—Kinnear v Langley, 192 S.W.2d 978, 209 Ark 878

37. N.C.—Spencer v Spencer, 79 S.E. 291, 292, 163 N.C. 83

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833

38. Ill—Abdill v Abdill, 128 N.E. 741, 295 Ill 40

Mass—Taft v Stearns, 125 N.E. 570, 234 Mass 273

Okl—Johnson v Johnson, 279 P 2d 928

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833  
68 C.J. p 412 note 36

39. Okl—Johnson v Johnson, 279 P 2d 928

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833  
68 C.J. p 412 note 37

40. Ky—Spradlin v Adams, 207 S.W. 471, 473, 182 Ky 716

Mass—Taft v Stearns, 125 N.E. 570, 234 Mass 273

Okl—Johnson v Johnson, 279 P 2d 928

Tex—Hohmann v Langehenning, Civ App, 153 S.W.2d 1011, affirmed Langehenning v Hohmann, 163 S.W.2d 402, 139 Tex 452

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833

68 C.J. p 412 note 38

#### Republication or confirmation

A "codicil" differs from a later will in that it is not, prima facie, a revocation of the earlier will, but rather a republication or confirmation with alterations

N.J.—Creech v McVaugh, 54 A 2d 443, 140 N.J.Eq 272.

41. Okl—Johnson v Johnson, 279 P 2d 928

SC—Logan v Cassidy, 50 S.E. 794, 802, 71 S.C. 175

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833

42. Ariz.—In re Yowell's Estate, 285 P 285, 36 Ariz 302

68 C.J. p 645 note 31

A mere reference to a will with no testamentary intent is not a codicil  
Cal—In re Loud's Estate, 161 P 2d 49, 70 Cal App 2d 399

43. N.Y.—In re Nokes' Estate, 130 N.Y.S. 187, 71 Misc 383

Wash—**Corpus Juris** quoted in In re Whittier's Estate, 176 P.2d 281, 288, 26 Wash 2d 833.

do,<sup>44</sup> it is a part of the will;<sup>45</sup> and both the codicil<sup>46</sup> or codicils<sup>47</sup> and the will make only one will

### c. "Testament" and Related Terms

In common usage, "testament" is synonymous with "will," the essence of both being a disposition to take effect after death. A testator is one who makes or has made a testament or will.

In common usage, "testament" is synonymous with "will" and "last will and testament."<sup>48</sup> Accordingly, "testament" has been defined as a just sentence of our will touching that which we would have done after our death.<sup>49</sup> The essence of both "will" and "testament" is a disposition to take effect after death.<sup>50</sup> Strictly speaking, a "testament" is a will of personal property.<sup>51</sup> Accordingly, a "testament" is a disposition of personal property to take place after the owner's decease, according to his desire and direction.<sup>52</sup>

"*Testate*" A deceased person who died leaving a will,<sup>53</sup> the condition of a person who dies leaving a will,<sup>54</sup> or of one who leaves a valid will at his death,<sup>55</sup> the opposite of "intestate" but much less frequently used.<sup>56</sup> A "testate succession" is

one which depends at least in part on provisions of a will.<sup>57</sup>

"*Testamentum*." A Latin term,<sup>58</sup> of the civil law,<sup>59</sup> meaning a last will, a testament,<sup>60</sup> a will.<sup>61</sup>

*Testator, testatrix* A testator is one who makes or has made a testament or will,<sup>62</sup> one who dies leaving a will.<sup>63</sup> As used in statutory provisions, "testator" applies to a testatrix,<sup>64</sup> a "testatrix" is a female testator.<sup>65</sup>

## § 2. History

While the practice of allowing the owner of property to dispose of it after death is of ancient origin, there is no power at common law to devise lands, and the subject is governed by statute.

While the practice of allowing the owner of property to dispose of it after death is of ancient origin,<sup>66</sup> and in the United States such practice was recognized from the earliest colonial times,<sup>67</sup> it did not exist among certain nations.<sup>68</sup> Thus, according to Blackstone, wills were not permitted in Greece, except at Athens, and there not until the time of Solon, in Rome, wills were not permitted until the "Law of the Twelve Tables," and, according to Tacitus, they were unknown among the ancient

44. Wash—*Corpus Juris* quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833 68 C J p 412 note 41

**Probate as "codicil"**

The admission of an instrument to probate as a "codicil" to formal will instead of as "will" was proper, where instrument did not expressly revoke and was not inconsistent with will and merely purported to make some minor modifications

Cal—In re Durand's Estate, 124 P 2d 330, 51 Cal App 2d 206

45. La—Succession of Patterson, 177 So 692, 188 La 635—Succession of Manion, 79 So 409, 143 La 799

Wash—*Corpus Juris* quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833

W Va—De Camp v Logan, 120 SE 915, 95 W Va 84 68 C J p 412 note 42

46. NC—Smith v. Mears, 10 SE 2d 659, 218 NC 193, modified on other grounds 12 SE 2d 649, 218 NC 775

Wash—*Corpus Juris* quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833.

68 C J p 412 note 43

47. Wash—*Corpus Juris* quoted in In re Whittier's Estate, 176 P 2d 281, 288, 26 Wash 2d 833

68 C J p 413 note 44

48. Wash—Occidental Life Ins Co v. Powers, 74 P 2d 27, 32, 192 Wash 475, 114 ALR 531.

68 C J p 413 note 49.

49. Hawaii—In re Nadal's Will, 2 Hawaii 40

Idaho—In re Hengy's Estate, 26 P 2d 178, 53 Idaho 515

SC—White v Helmes, 12 SCL 430, 438

68 C J p 413 note 50

**Similar definitions**

(1) A "testament" is the legal declaration of a man's intentions, which he wills to be performed after his death

SC—Ragsdale v Booker, 21 SCEq 348, 352, note

(2) A "testament" is a testimonial in which is contained and set forth the will of him who makes it, establishing or appointing his heirs, and disposing as he thinks fit of his property after death

US—Pluche v Jones, 54 F 860, 865, 4 CCA 622.

50. Pa—Turner v Scott, 51 Pa 126, 132

Wash—Occidental Life Ins Co v Powers, 74 P 2d 27, 32, 192 Wash 475, 114 ALR 531

51. Mo—Wyers v Arnold, 147 SW 2d 644, 647, 347 Mo 413, 134 ALR 876

68 C J p 413 note 52

52. NJ—In re Lester's Will, 136 A 322, 100 NJ Eq 521

53. Iowa—In re Manatt, 239 NW 524, 526, 214 Iowa 432

54. Iowa—In re Manatt, supra

55. Iowa—In re Manatt, supra

56. Pa—Compher v Compher, 25 Pa 31, 33

57. Ohio—Bauman v Hogue, 116 NE 2d 439, 160 Ohio St 296

58. NY—Hubbard v Hubbard, 12 Barb 148, 153

59. Ohio—Adams v Foley, 173 NE 197, 198, 36 Ohio App 295

62 C J p 827 note 2

60. Black LD

61. NY—Hubbard v Hubbard, 12 Barb 148, 153

62 C J p 827 note 4

62. Black LD

**Term borrowed from civil law**  
Black LD

63. Black LD

64. NJ—Walker v Hyland, 56 A 268, 271, 70 NJ Law 69

65. NJ—Walker v Hyland, supra

66. Ariz—In re Wilkins' Estate, 94 P 2d 774, 54 Ariz 218

Mont—*Corpus Juris* cited in In re Bragg's Estate, 76 P 2d 57, 69, 106 Mont 132

NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

Okl—In re Carothers' Estate, 167 P. 2d 899, 196 Okl 640

68 C J p 413 note 58

67. NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

68. Pa—In re Maginn's Estate, 122 A 264, 267, 278 Pa 89, 30 ALR. 418

Germans<sup>69</sup> In England, until a comparatively recent period, the practice of allowing the owner of property to dispose of it after death was exercised under considerable restriction.<sup>70</sup> There is no power at common law to devise lands, and the subject is governed by statute.<sup>71</sup>

## II. RIGHT AND CAPACITY TO MAKE A WILL

### A. EXISTENCE OF RIGHT IN GENERAL

#### § 3. Right Dependent on Statute

The right to dispose of property by will is not a natural, inherent, or constitutional right, but is dependent solely on legislative authority; and the legislature has power to withhold the right or to make its exercise subject to such regulations and requirements as it pleases.

It has been said that, in the absence of legislative authority, no one may dispose of his property by will,<sup>72</sup> there being no common-law right to make a will,<sup>73</sup> and in a majority of jurisdictions the matter is entirely statutory.<sup>74</sup> The right to make a

69. NC—In re Garland's Will, 76 SE 486, 487, 160 NC 555

70. Pa.—In re Maginn's Estate, 122 A 264, 267, 278 Pa 89, 30 ALR 418

68 CJ p 413 note 61

71. W Va.—Weese v Weese, 58 SE 2d 801, 134 W Va 233

68 CJ p 414 note 62

72. US—Irrving Trust Co v Day, NY, 62 SCt 398, 314 US 556, 86 L Ed 1734, 137 ALR 1093

Cal—In re Burnison's Estate, 204 P 2d 330, 33 Cal 2d 638, affirmed 70 SCt 508, 339 US 87, 94 L Ed 675

Cartwright v Cartwright, 216 P 2d 545, 96 Cal App 2d 932

Idaho—Corpus Juris quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Ky—Ford v Yost, 186 SW 2d 896, 299 Ky. 682, 162 ALR 149

Mo—Wyers v Arnold, 147 SW 2d 644, 347 Mo 413, 134 ALR 876, certiorari denied Arnold v Wyers, 61 SCt. 1112, 313 US. 589, 85 L Ed 1544

Utah—State Tax Commission v Backman, 55 P 2d 171, 88 Utah 424

68 CJ p 414 note 66

Right to receive property by will see infra §§ 91-110

#### No right

Although one has a constitutional right to give, and to receive, property during his lifetime, he has no right, except such as may be given by the state, to direct or control the ownership after his death, of such property as he has acquired during his life

NJ—Renwick v Martin, 10 A 2d 293, 126 NJ Eq 564

#### In England

(1) It has been said that in England the right of making wills and disposing of property after death was established at an early date

Mont—Irrwin v Rogers, 157 P 690, 91 Mont 284, LRA 1916F 1130

68 CJ p 414 note 64

(2) However, even under the English common law, this right was materially modified.

US—U S v Perkins, NY, 16 SCt 1073, 163 US 625, 627, 41 L Ed 287

Pa.—In re Maginn's Estate, 122 A 264, 278 Pa 89, 30 ALR 418

(3) It has been said that under the common law of England, no lands or tenements were devisable

Okl—Corpus Juris cited in In re Carothers' Estate, 167 P 2d 899, 908, 196 Okl 640

68 CJ p 414 note 65 [a]

(4) By English statute, persons were permitted to dispose of their property by will

W Va—Goetz v Old Nat Bank of Martinsburg, 84 SE 2d 759

73 Fla—Corpus Juris cited in In re Sharp's Estate, 133 So 470, 471, 133 Fla 802

Idaho—Corpus Juris quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Me—Appeal of Martin, 179 A 655, 133 Me 422

NY—In re Jackson's Will, 29 NY S 2d 569, 176 Misc 1020

Ohio—In re Fox's Will, 85 NE 2d 585, 84 Ohio App 135

W Va—Weese v Weese, 58 SE 2d 801, 134 W Va 233—Corpus Juris cited in Black v Maxwell, 46 SE 2d 804, 808, 131 W Va 247

68 CJ p 414 note 67

74. US—Irrving Trust Co v Day, NY, 62 SCt 398, 314 US 556, 86 L Ed 1734, 137 ALR 1093

Cal—In re Burnison's Estate, 204 P 2d 330, 33 Cal 2d 638, affirmed U S v Burnison, 70 SCt 508, 339 US. 87, 94 L Ed 675—In re Durlwanger's Estate, 107 P 2d 477, 41 Cal App 2d 750

Fla—Corpus Juris cited in In re Sharp's Estate, 133 So 470, 471, 133 Fla 802

Idaho—Corpus Juris cited in Hull v Cartin, 105 P 2d 196, 207, 61 Idaho 578—Corpus Juris quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Ill—Spangler v. Bell, 60 NE 2d 864, 390 Ill 152—Classen v. Heath, 58 NE 2d 889, 389 Ill 183.

Ind—Granger's Estate v. Gosport Cemetery Ass'n, 118 NE 2d 386, 124 Ind App 686, rehearing denied In re Granger's Estate, 119 NE 2d 437, 124 Ind App 686—Able v Bane, 110 NE 2d 306, 123 Ind App 585

Iowa—Elson v Security State Bank of Allerton, 67 NW 2d 525

Ky—Letcher's Trustee v. Letcher, 194 SW 2d 984, 302 Ky 448—Winn v William, 165 SW 2d 961, 292 Ky 44—Howe v Howe's Ex'r, 155 SW 2d 196, 287 Ky 756

Me—U S Trust Co of NY v Douglass, 56 A 2d 633, 143 Me 150—Appeal of Martin, 179 A 655, 133 Me 422

Minn—In re Crosby's Estate, 15 NW 2d 501, 218 Minn. 149—In re Taylor's Estate, 7 NW 2d 320, 213 Minn 509

Mo—Wyers v Arnold, 147 SW 2d 644, 347 Mo 413, 134 ALR 876, certiorari denied Arnold v Wyers, 61 SCt 1112, 313 US. 589, 85 L Ed 1544—Robertson v Jones, 136 SW 2d 278, 345 Mo 828

Mont—In re Woodburn's Estate, 273 P 2d 391—Galbreath v Armstrong, 167 P 2d 337, 118 Mont 299

NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

NM—Dillard v New Mexico State Tax Commission, 201 P.2d 345, 53 NM 12.

NY—In re Adams' Estate, 45 NYS 2d 494, 182 Misc 937, affirmed 48 NYS 2d 801, 267 App Div 985, appeal denied 50 NYS 2d 673, 268 App Div 849, certiorari denied Adams v City Bank Farmers Trust Co, 65 SCt 914, 324 US 865, 89 L Ed 1421—In re Lavine's Will, 4 NYS 2d 923, 167 Misc 879—In re Waring's Will, 285 NYS 313, 157 Misc 944, affirmed 292 NYS 976, 249 App Div 754, reversed on other grounds 9 NE 2d 754, 275 NY 6—In re Goldberg's Estate, 283 NYS. 72, 157 Misc 49, affirmed 291 NYS 999, 249 App Div. 751, reversed on other grounds 9 NE 2d 829, 275 NY 186—In re Andrus' Will, 281 NYS 831, 156 Misc 268—In re Curley's Will, 272 NYS 489, 151 Misc 664, modified on oth-

will is not a natural,<sup>75</sup> inalienable,<sup>76</sup> inherited,<sup>77</sup> | fundamental,<sup>78</sup> or inherent<sup>79</sup> right; and it is not

er grounds 280 NYS 80, 245 App Div 255, affirmed 199 NE 665, 269 NYS 548

In re Bassford's Will, 127 NYS 2d 653

NC—Wescott v First & Citizens Nat Bank of Elizabeth City, 40 S E2d 461, 227 NC 39—Paul v Davenport, 7 SE2d 352, 217 NC 154

Ohio—In re Miller's Estate, 117 NE 2d 598, 160 Ohio St 529—Sherman v Johnson, 112 NE2d 326, 159 Ohio St 209

In re Fox's Will, 85 NE2d 585, 84 Ohio App 135

Shook v McConnell, Prob, 97 N E2d 111—In re Crowe's Will, 4 Ohio Supp 370

Okl—In re Carothers' Estate, 167 P 2d 899, 196 Okl 640—**Corpus Juris** cited in In re Abrams' Will, 77 P 2d 101, 103, 182 Okl 215

Or—U S Nat Bank of Portland v Snodgrass, 275 P 2d 860, 202 Or 530—In re Lewis' Estate, 85 P 2d 1032, 160 Or 486

Pa—In re Tack's Estate, 191 A 155, 325 Pa 545

In re Crossley's Estate, 7 A 2d 539, 135 Pa Super 524

In re Edge's Estate, Orph, 48 Dauph Co 127, affirmed 14 A 2d 293, 339 Pa 67—In re Karst's Estate, Orph, 65 York Leg Rec 42

SD—Anderson v Anderson, 16 NW 2d 43, 70 SD 165

Tex—Harper v Meyer, Civ App, 274 SW 2d 904, error refused no reversible error—Maxey v Queen, Civ App, 206 SW 2d 114

Utah—In re Mower's Estate, 73 P 2d 967, 93 Utah 390

Wash—In re Phillips' Estate, 74 P 2d 1015, 193 Wash 194

W Va—Weese v Weese, 58 SE2d 801, 134 W Va 233—**Corpus Juris** cited in Black v Maxwell, 46 SE 2d 804, 808, 131 W Va 247  
68 CJ p 414 note 68

#### Organic law

The right of testamentary disposition of property does not emanate from the organic law but is a creature of the law derived solely from statute without constitutional limitation and is at all times subject to regulation and control by legislative authority

Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 254 A LR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing 65 S Ct 113, 323 US 813, 89 L Ed 647

#### Absolute power

The legislature's power over a will is absolute until death of its author  
Cal—In re Davison's Estate, 215 P 2d 504, 96 Cal App 2d 263

#### All-inclusive

Statute of wills is for purpose intended, all inclusive, and self suffi-

cient, and equity may not be used to extend it

Va—Spinks v. Rice, 47 SE2d 424, 187 Va 730

75 Ala—Parker v Foreman, 39 So 2d 574, 252 Ala 77, 9 A LR 2d 505  
Idaho—Hull v Cartin, 105 P 2d 196, 61 Idaho 578—**Corpus Juris** quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Ky—Ford v Yost, 186 SW 2d 896, 299 Ky 682, 162 A LR 149

Ill—In re Bakhaus' Estate, 102 N E2d 818, 410 Ill 578

Ky—Howe v Howe's Ex'r, 155 SW 2d 196, 287 Ky 756

Me—U S Trust Co of N Y v Douglass, 56 A 2d 633, 143 Me 150

Md—Safe Deposit & Trust Co of Baltimore v Bouse, 2 A 2d 906, 181 Md 351

Mass—Merchants Nat Bank of Boston v Merchants Nat Bank of Boston, 62 NE2d 831, 318 Mass 563

Mo—Wyers v Arnold, 147 SW 2d 644, 347 Mo 413, 134 A LR 876, certiorari denied Arnold v Wyers, 61 S Ct 1112, 313 US 589, 85 L Ed 1544—Robertson v Jones, 136 SW 2d 278, 345 Mo 828

Mont—In re Woodburn's Estate, 273 P 2d 391

NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

NM—Dillard v New Mexico State Tax Commission, 201 P 2d 345, 53 NM 12

NY—Rubin v Irving Trust Co, 113 NE2d 424, 305 NY 288

In re Germaine, 280 NYS 460, 244 App Div 374, reversed on other grounds 198 NE 229, 268 NY 475

In re Lavine's Will, 4 NYS 2d 923, 167 Misc 879—In re Andrus' Will, 281 NYS 831, 156 Misc 268

In re Bassford's Will, 127 NYS 2d 653

NC—Paul v Davenport, 7 SE2d 352, 217 NC 154

Ohio—In re Miller's Estate, 121 NE 2d 26, 95 Ohio App 457, affirmed 117 NE2d 598, 160 Ohio St 529

Shook v McConnell, Prob, 97 N E2d 111

Okl—**Corpus Juris** cited in In re Abrams' Will, 77 P 2d 101, 103, 182 Okl 215

Or—U S National Bank of Portland v Snodgrass, 275 P 2d 860, 202 Or 530—In re Lewis' Estate, 85 P 2d 1032, 160 Or 486

Pa—In re Tack's Estate, 191 A 155, 325 Pa 545

In re Crossley's Estate, 7 A 2d 539, 135 Pa Super 524

In re Edge's Estate, Orph, 48 Dauph Co 127, affirmed 14 A 2d 293, 339 Pa 67—In re Karst's Estate, Orph, 65 York Leg Rec. 42

Tenn—**Corpus Juris** cited in Fransio- li v. Podesta, 113 SW 2d 769, 772, 21 Tenn App 577

Vt—First Nat Bank of Boston v Harvey, 16 A 2d 184, 111 Vt 281  
68 CJ p 415 note 69

76. Idaho—**Corpus Juris** quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

ND—Moody v Hagen, 162 NW 704, 36 ND 471, L RA 1918F 947, Ann Cas 1918A 933, affirmed Skarderud v Tax Commission of State of North Dakota, 38 S Ct 133, 245 US 633, 62 L Ed 522

Ohio—In re Miller's Estate, 121 NE 2d 26, 95 Ohio App 457, affirmed 117 NE2d 598, 160 Ohio St 529

Tenn—**Corpus Juris** cited in Fransio- li v Podesta, 113 SW 2d 769, 772, 21 Tenn App 577

77 Iowa—**Corpus Juris** quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

NY—In re Andrus' Will, 281 NYS 831, 156 Misc 268

In re Frazier's Estate, 188 NY S 189

78. Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 A LR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Idaho—**Corpus Juris** quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

NM—Dillard v New Mexico State Tax Commission, 201 P 2d 345, 53 NM 12

68 CJ p 415 note 72

79. Cal—In re Bauer's Estate, 124 P 2d 630, 51 Cal App 2d 636—In re Barnett's Estate, 275 P 453, 97 Cal App 138

Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 A LR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Idaho—**Corpus Juris** quoted in Hedin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Minn—In re Taylor's Estate, 7 NW 2d 320, 213 Minn 509

Mont—In re Woodburn's Estate, 273 P 2d 391

NM—Dillard v New Mexico State Tax Commission, 201 P 2d 345, 53 NM 12

NY—Rubin v Irving Trust Co, 113 NE2d 424, 305 NY 288

In re Waring's Will, 285 NYS 313, 157 Misc 944, affirmed 292 NYS 976, 249 App Div 754, reversed on other grounds 9 NE2d 754, 275 NY 6

In re Bassford's Will, 127 NYS 2d 653.

a right of citizenship,<sup>80</sup> or one guaranteed by the Constitution<sup>81</sup> It is said to be a privilege<sup>82</sup> Under this view, the legislature has power to withhold or grant the right,<sup>83</sup> and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases,<sup>84</sup> provided it respects the pro-

Ohio—In re Miller's Estate, 117 N E 2d 598, 160 Ohio St 529

Okl—**Corpus Juris cited in** In re Abrams' Will, 77 P 2d 101, 103, 182 Okl 215

Or—U S National Bank of Portland v Snodgrass, 275 P 2d 860, 202 Or 530

Pa—In re Edge's Estate, Orph, 48 Dauph Co 127, affirmed 14 A 2d 293, 339 Pa 67

Utah—State Tax Commission v Backman, 55 P 2d 171, 88 Utah 424 68 C J p 415 note 73

#### Matters of grace

Both the power to transmit by will and the power to take are matters of grace and have nothing to do with merits or deserts

Va—Clarkson v Bbley, 38 S E 2d 22, 185 Va 82, 171 A L R 1308

80 Cal—In re Wilkinson's Estate, 298 P 1037, 113 Cal App 645

Idaho—**Corpus Juris quoted in** Hedlin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

81. US—Irving Trust Co v Day, N Y, 62 S Ct 398, 314 US 556, 86 L Ed 1734, 137 A L R 1093

Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 A L R 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Idaho—**Corpus Juris quoted in** Hedlin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Me—Appeal of Martin, 179 A 655, 133 Me 422

N J—Guard Trust Co v Schmitz, 20 A 2d 21, 129 N J Eq 444

N M—Dillard v New Mexico State Tax Commission, 201 P 2d 345, 53 N M 12

Or—U S National Bank of Portland v Snodgrass, 275 P 2d 860, 202 Or 530

68 C J p 415 note 75

82. Cal—In re Bauer's Estate, 124 P 2d 630, 51 Cal App 2d 636—In re Durlwanger's Estate, 107 P 2d 477, 41 Cal App 2d 750

Idaho—**Corpus Juris cited in** Hull v Cartin, 105 P 2d 196, 207, 61 Idaho 578—**Corpus Juris quoted in** Hedlin v Westdala Lutheran Church, 81 P 2d 741, 747, 59 Idaho 241

Me—U S Trust Co of N Y v Douglass, 56 A 2d 633, 143 Me 150

Mass—Merchants Nat Bank of Boston v Merchants Nat Bank of Boston, 62 N E 2d 831, 318 Mass 563

N J—Bottomley v Bottomley, 35 A 2d 475, 134 N J Eq 279

N Y—In re Jackson's Will, 29 N Y S 2d 569, 176 Misc 1020—In re Waring's Will, 285 N Y S 313, 157 Misc 944, affirmed 292 N Y S 976, 249 App Div 754, reversed on other

grounds 9 N E 2d 754, 275 N Y 6—In re Andrus' Will, 281 N Y S 831, 156 Misc 268

Pa—In re Bonsall's Estate, 65 Pa Dist & Co 251

Tenn—**Corpus Juris cited in** Fransio-li v Podesta, 113 S W 2d 769, 772, 21 Tenn App 577

68 C J p 415 note 76

#### Personal right

The right to transmit property by will is civil right or privilege conferred by statute on all persons of sound mind and is strictly a "personal right" in that capacity to make will must exist in testator when he attempts to exercise such privilege

N Y—George v People, 40 N Y S 2d 830, 180 Misc 635, affirmed 47 N Y S 2d 681, 267 App Div 575

83. US—Demorest v City Bank Farmers Trust Co, N Y, 64 S Ct 384, 321 US 36, 88 L Ed 526—Irving Trust Co v Day, N Y, 62 S Ct 398, 314 US 556, 86 L Ed 1734, 137 A L R 1093

Ariz—In re Wilkins' Estate, 94 P 2d 774, 54 Ariz 218

Cal—In re Burnison's Estate, 204 P 2d 330, 33 Cal 2d 638, affirmed U S v Burnison, 70 S Ct 503, 339 US 87, 94 L Ed 675

N J—In re Hoagland's Estate, 105 A 2d 825, 15 N J 592

N M—Dillard v New Mexico State Tax Commission, 201 P 2d 345, 53 N M 12

N Y—Rubin v Irving Trust Co, 113 N E 424, 305 N Y 288

In re Erstein's Estate, 129 N Y S 2d 316, 205 Misc 924—In re Adams' Estate, 45 N Y S 2d 494, 182 Misc 937, affirmed 48 N Y S 2d 801, 267 App Div 985, appeal denied 50 N Y S 2d 673, 268 App Div 849, certiorari denied Adams v City Bank Farmers Trust Co, 65 S Ct 914, 324 US 865, 89 L Ed 1421—In re Andrus' Will, 281 N Y S 831, 156 Misc 268

Pa—In re Bonsall's Estate, 65 Pa Dist & Co 251

68 C J p 415 note 77.

#### Plenary power

State's power over property passing by will is plenary, state's right to direct its disposition being unlimited

Wash—In re Ward's Estate, 49 P 2d 485, 183 Wash 604, 102 A L R 496

84. US—Demorest v City Bank Farmers Trust Co, N Y, 64 S Ct 384, 321 US 36, 88 L Ed 526—Dyett v Title Guarantee & Trust Co, N Y, 64 S Ct 384, 321 US 36, 88 L Ed 526—Irving Trust Co v Day, N Y, 62 S Ct 398, 314 US 556, 86 L Ed 1734, 137 A L R 1093

Allen v Markham, C C A Cal, 156

F 2d 653, affirmed in part and reversed in part on other grounds Clark v Allen, 67 S Ct 1431, 331 US 503, 91 L Ed 1633

Ala—Parker v Foreman, 39 So 2d 574, 252 Ala 77, 9 A L R 2d 505

Ariz—In re Wilkins' Estate, 94 P 2d 774, 54 Ariz 218

Ark—Rockafellow v Rockafellow, 93 S W 2d 321, 192 Ark 563

Cal—In re Burnison's Estate, 204 P 2d 330, 33 Cal 2d 638, affirmed U S v Burnison, 70 S Ct 503, 339 US 87, 94 L Ed 675

In re Durlwanger's Estate, 107 P 2d 477, 41 Cal App 2d 750

Idaho—**Corpus Juris cited in** Hull v Cartin, 105 P 2d 196, 207, 61 Idaho 578

Ill—Spangler v Bell, 60 N E 2d 864, 390 Ill 152—Classen v Heath, 58 N E 2d 889, 339 Ill 183

Ind—Fletcher Trust Co v Morse, 101 N E 2d 658, 230 Ind 44

Ky—Winn v William, 165 S W 2d 961, 292 Ky 44

Md—Harrison v Prentice, 38 A 2d 101, 183 Md 474—Safe Deposit & Trust Co of Baltimore v Bouse, 2 A 2d 906, 181 Md 351

Mass—Merchants Nat Bank of Boston v Merchants Nat Bank of Boston, 62 N E 2d 831, 318 Mass 563

Minn—In re Crosby's Estate, 15 N W 2d 501, 218 Minn 149

N J—In re Hoagland's Estate, 105 A 2d 825, 15 N J 592

N M—Dillard v New Mexico State Tax Commission, 201 P 2d 345, 53 N M 12

N Y—In re Del Drago's Estate, 38 N E 2d 131, 287 N Y 61, reversed on other grounds Riggs v Del Drago, 63 S Ct 109, 317 US 95, 87 L Ed 106, 142 A L R 1131, and reargument denied 40 N E 2d 46, 287 N Y 764—In re Hills' Will, 191 N E 12, 264 N Y 349, 93 A L R 1380

In re Erstein's Estate, 129 N Y S 2d 316, 205 Misc 924—In re Adams Estate, 45 N Y S 2d 494, 182 Misc 937, affirmed 48 N Y S 2d 801, 267 App Div 985, appeal denied 50 N Y S 2d 673, 268 App Div 849, certiorari denied Adams v City Bank Farmers Trust Co, 65 S Ct 914, 324 US 865, 89 L Ed 1421—In re Karlinski's Estate, 43 N Y S 2d 40, 180 Misc 44—In re Jackson's Will, 29 N Y S 2d 569, 176 Misc 1020—In re Andrus' Will, 281 N Y S 831, 156 Misc 268

In re Bassford's Will, 127 N Y S 2d 653—In re King's Estate, 100 N Y S 2d 353

Ohio—Sherman v Johnson, 112 N E 2d 326, 159 Ohio St 209

In re Miller's Estate, 121 N E 2d 26, 95 Ohio App 457, affirmed 117 N E 2d 598, 160 Ohio St 529

visions of the federal Constitution<sup>85</sup> In some jurisdictions, however, it has been held that the right to make a will is a sacred right guaranteed by the Constitution,<sup>86</sup> and although it is subject to statutory regulation in some respects,<sup>87</sup> such regulation or limitation of the right must be of a reasonable nature,<sup>88</sup> and the right cannot be substantially impaired or taken away entirely<sup>89</sup>

In any event, within the limits of permissible statutory regulation, the owner of property has the right to dispose of it by will,<sup>90</sup> in such manner as he sees fit, as discussed *infra* § 132; and such right is a valuable one, assured by law,<sup>91</sup> notwithstanding it is a limited and conditional one, exercisable only in respect of the excess of the avails of the estate over the sums reasonably necessary for expenditure

Shook v McConnell, Prob., 97 N E 2d 111

Or—U S National Bank of Portland v Snodgrass, 275 P 2d 860, 202 Or 530

Pa—In re Bonsall's Estate, 65 Pa Dist & Co 251

In re Edge's Estate, Orph., 48 Dauph Co 127, affirmed 14 A 2d 293, 339 Pa 67—In re Karst's Estate, Orph., 65 York Leg Rec 42

Tenn—Lawrence v Lawrence, 250 S W 2d 781, 35 Tenn App 648—Eshok v Wodicka, 215 S W 2d 12, 31 Tenn App 333—**Corpus Juris** cited in Fransioli v Podesta, 113 S W 2d 769, 772, 21 Tenn App 577

W Va—**Corpus Juris** cited in Black v Maxwell, 46 SE 2d 804, 808, 131 W Va 247

68 C J p 415 note 78

#### Impounding of wealth

Apart from rule against perpetuities, there are reasonable limits to testator's right to impound present-day wealth in hope of being able to project his ideas into unknown conditions of a distant future

Mass—Frazier v Merchants Nat Bank of Salem, 5 NE 2d 550, 296 Mass 298

85. Va—Commonwealth v Goff's Ex'r, 147 SE 471, 152 Va 366, certiorari denied Commonwealth v Marshall & Illsley Bank, 49 S Ct 481, 279 US 867, 73 L Ed 1004

68 C J p 416 note 79

**Federal Constitution does not forbid** legislature of a state to limit, condition or even abolish the power of testamentary disposition over the property within its jurisdiction

N J—In re Hoagland's Estate, 105 A 2d 825, 15 N J 592

N Y—In re Erstein's Estate, 129 N Y S 2d 316, 205 Misc 924

86. Wis—In re Ogg's Estate, 54 N W 2d 175, 262 Wis 181—In re Szperka's Will, 35 N W 2d 209, 254 Wis 153, mandate vacated on other grounds 35 N W 2d 911, 254 Wis 153

68 C J p 415 note 75 [b]

#### Inherent power

The power to make a will is an inherent power assured by the Constitution and not a statutory power

Wis—In re Uihlein's Estate, 68 N W 2d 816, 269 Wis 170

#### Effect given to will

The constitutional right to make

a will includes the right to have a valid will so given effect as to enforce intention of testator

Wis—In re Uihlein's Estate, *supra*

87. Wis—In re Uihlein's Estate, *supra*

88. Wis—In re Ogg's Estate, 54 N W 2d 175, 262 Wis 181

89. Wis—In re Uihlein's Estate, 68 N W 2d 816, 269 Wis 170—Shepard v State, 197 N W 344, 184 Wis 88

90. U S—Greenwood v Greenwood, D C Pa., 16 F R D 366, appeal dismissed, C A., 224 F 2d 318

Ala—Antone v Snodgrass, 14 So 2d 506, 244 Ala 501

Ark—Parette v Ivey, 190 S W 2d 441, 209 Ark 364—Purvey v Puryear, 94 S W 2d 695, 192 Ark 692—Rockafellow v Rockafellow, 93 S W 2d 321, 192 Ark 563

Mich—In re Thayer's Estate, 15 N W 2d 712, 309 Mich 473

Mo—Lastofka v Lastofka, 99 S W 2d 46, 339 Mo 770

N Y—In re Lavine's Will, 4 N Y S 2d 923, 167 Misc 879

Pa—In re Gayman's Estate, Orph., 21 Northumb L J 149

S C—Smith v Whetstone, 39 SE 2d 127, 209 S C 78

S D—In re Rowlands' Estate, 18 N W 2d 290, 70 S D 419

68 C J p 414 note 68 [a].

#### Absolute right

A testator's right to bestow his property by will at death is as absolute as his right to convey it during his lifetime.

Tex—In re Caruthers' Estate, Civ App., 151 S W 2d 946, error dismissed, judgment correct

**A decedent's privilege** to dispose of his property may be exercised by testamentary disposition or by leaving his property to be distributed under the law

N C—Valentine v Gill, 27 SE 2d 2, 223 N C 396

#### Care and sustenance

Right of a person to make a will so as to constitute a means of providing for his care and sustenance in old age or illness is authorized

Ga—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226

#### Family dispute

Effectiveness of exercise of statutory right to execute a will is not de-

pendent on decision of any tribunal or governmental authority as to wherein lies the right of a family dispute

Tex—Taylor v Taylor, Civ App., 281 S W 2d 232, error refused no reversible error

#### Right not infringed

(1) A decree awarding contractual rights to manufacture machines to a certain person, which recited that such rights should pass to his heirs, executors and administrators on his death, was not erroneous as interfering with such person's right to dispose of such rights by will

Cal—Evans v Citizens National Trust & Sav Bank of Riverside, 84 P 2d 218, 29 Cal App 2d 133

(2) Statute providing that emblements of lands of person dying after March 1, which are severed before following December 31 shall be assets in hands of personal representative, does not infringe upon rights of citizen to dispose of his property by will

Ky—Miller's Ex'x v Miller, 221 S W 2d 654, 310 Ky 726

(3) Provisions of adoption statutes do not prevent anyone from disposing of his property by will

Tex—Lange v Schulte, Civ App., 276 S W 2d 889, refused no reversible error

91. Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Hamilton's Estate, 174 P 2d 301, 26 Wash 2d 363—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Phillips' Estate, 74 P 2d 1015, 193 Wash 194

#### Property right

The right to dispose of vested interest in property by will is "property right"

Mass—Warren v Sears, 22 NE 2d 406, 303 Mass 578, 127 A L R 595

#### Close protection

The right of testamentary disposition of one's property as an incident of ownership is absolute and is a valuable right, closely protected by statute and judicial opinion

Wash—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912



in the settlement of the testator's just obligations<sup>92</sup> The object of the law concerning wills is to enable owners of property reasonably to control its disposition at their decease and to cause the real intentions and wishes of such owners to be expressed and preserved in order that they may be ascertained and carried into effect<sup>93</sup> The right to dispose of property by will should be carefully guarded and courts should be reluctant to undo after death what the testator sought to accomplish<sup>94</sup> The right to dispose of one's property by will will be sustained whenever possible,<sup>95</sup> and statutes restricting the right to make a will will be strictly construed<sup>96</sup>

Once the privilege of making a will has been exercised and effectuated by death, it blossoms into a right to have the testator's dispositions carried out free and clear of all subsequent legislative interference,<sup>97</sup> but it has also been held that interests established by a will may be disturbed by a statute enacted under the police power of the state where

the means employed in the statute are reasonably related to the ends sought to be achieved thereby<sup>98</sup>

#### § 4. What Law Governs

Testamentary capacity with respect to personality is controlled by the law of the testator's domicile, and with respect to realty by the law of the place where the realty is situated.

The testamentary capacity of the testator over personality is governed by the law of the domicile of the testator,<sup>99</sup> and over realty by the law of the place where the realty is situated<sup>1</sup>

#### § 5. Time at Which Capacity Must Exist

The mental competency of the testator to make a will, and his legal capacity to do so, is to be determined as of the date of the execution of the will.

The mental competency of the testator to make a will is to be determined as of the date of the execution of the will,<sup>2</sup> particularly where statutes require

92. N.Y.—In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295

93. Tex.—Price v. Taliaferro, Civ. App., 254 S.W.2d 157, refused no reversible error

Va.—Lawless v. Lawless, 47 S.E.2d 431, 187 Va. 511

94. Fla.—In re Donnelly's Estate, 188 So. 108, 137 Fla. 459

The state's public policy is to effectuate testator's express wishes where possible

Wis.—In re Szperka's Will, 35 N.W.2d 209, 254 Wis. 153, mandate vacated on other grounds 35 N.W.2d 911, 254 Wis. 153

95. Wash.—In re Mitchell's Estate, 249 P.2d 385, 41 Wash.2d 326—In re Hamilton's Estate, 174 P.2d 301, 26 Wash.2d 363

96. Okl.—In re Carothers' Estate, 167 P.2d 899, 196 Okl. 640

Wyo.—Burns v. Burns, 224 P.2d 178, 67 Wyo. 314

97. Pa.—In re Bonsall's Estate, 65 Pa. Dist. & Co. 251

98. N.J.—In re Hoagland's Estate, 105 A.2d 825, 15 N.J. 592

99. Ind.—Duckwall v. Lease, 20 N.E.2d 204, 106 Ind. App. 664

Ohio.—In re Parmelee's Estate, 2 Ohio Supp. 78, certiorari dismissed Tax Commission of Ohio v. Wilbur, 58 S.Ct. 1036, 304 U.S. 544, 82 L.Ed. 1518, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433

S.C.—Corpus Juris cited in Collins v. Collins, 63 S.E.2d 811, 814, 219 S.C. 1

Tex.—Singleton v. St. Louis Union Trust Co., Civ. App., 191 S.W.2d 143, error refused no reversible error

68 C.J. p. 416 note 81.

What law governs

Capacity to take under will see infra § 96

Construction of will see infra § 587

Contract to make will see infra § 115

Requisites and validity of Wills generally see infra § 150

Holographic will see infra § 201

Revocation of will by operation of law see infra § 288

1. U.S.—Melon v. Entidad Provincial Religiosa de Padres Mercedarios de Castilla, C.A. Puerto Rico, 189 F.2d 163

Iowa.—In re Barrie's Estate, 35 N.W.2d 658, 240 Iowa 431, 9 A.L.R.2d 1399, certiorari denied Hodge v. First Presbyterian Church of Sterling, Illinois, 70 S.Ct. 550, 338 U.S. 815, 94 L.Ed. 493, rehearing denied 70 S.Ct. 55, 338 U.S. 881, 94 L.Ed. 541

Md.—Roach v. Jurchak, 35 A.2d 817, 182 Md. 646

Tex.—Singleton v. St. Louis Union Trust Co., Civ. App., 191 S.W.2d 143, error refused no reversible error—Simmons v. O'Connor, Civ. App., 149 S.W.2d 1107, error dismissed, judgment correct 68 C.J. p. 416 note 82

2. Ala.—Corpus Juris cited in Towles v. Pettus, 12 So.2d 357, 363, 244 Ala. 192

Ariz.—In re Cook's Estate, 159 P.2d 797, 63 Ariz. 78

Ark.—Yarbrough v. Moses, 267 S.W.2d 289, 223 Ark. 489

Cal.—In re Lingenfelter's Estate, 241 P.2d 990, 38 Cal.2d 571

In re Dunne's Estate, 278 P.2d 733, 130 Cal.App.2d 216—In re Dobrzensky's Estate, 232 P.2d 886, 105 Cal.App.2d 134—In re Frank's

Estate, 226 P.2d 767, 102 Cal.App.2d 126—In re Becker's Estate, 220 P.2d 766, 98 Cal.App.2d 574—Jensen v. Jensen, 192 P.2d 55, 84 Cal.App.2d 754—In re Powers' Estate, 184 P.2d 319, 81 Cal.App.2d 480—In re Russell's Estate, 182 P.2d 318, 80 Cal.App.2d 711—In re Dupont's Estate, 140 P.2d 866, 60 Cal.App.2d 276—In re Worrall's Estate, 127 P.2d 593, 53 Cal.App.2d 243—In re De Graaf's Estate, 93 P.2d 199, 34 Cal.App.2d 120—In re Klopstock's Estate, 88 P.2d 722, 31 Cal.App.2d 568—In re Peterkin's Estate, 73 P.2d 897, 23 Cal.App.2d 597

Conn.—Trella v. Prestoff, 22 A.2d 638, 128 Conn. 337—Jackson v. Waller, 10 A.2d 763, 126 Conn. 294

Fla.—In re Wilmott's Estate, 66 So.2d 465, 40 A.L.R.2d 1399—Miller v. Flowers, 27 So.2d 667, 158 Fla. 51—In re Carnegie's Estate, 13 So.2d 299, 153 Fla. 7—In re Starr's Estate, 170 So. 620, 125 Fla. 536

Ga.—Beman v. Stembridge, 85 S.E.2d 434, 211 Ga. 274—Anderson v. Anderson, 80 S.E.2d 807, 210 Ga. 464—Ware v. Hill, 71 S.E.2d 630, 209 Ga. 214—Whitfield v. Pitts, 53 S.E.2d 549, 205 Ga. 259—Spivey v. Spivey, 44 S.E.2d 224, 202 Ga. 644

—Fehn v. Shaw, 35 S.E.2d 253, 199 Ga. 747—Davis v. Aultman, 33 S.E.2d 317, 199 Ga. 129—Scott v. Gibson, 22 S.E.2d 51, 194 Ga. 503—Boland v. Aycock, 12 S.E.2d 319, 191 Ga. 327—Martin v. Martin, 195 S.E. 159, 185 Ga. 349—Griffin v. Barrett, 187 S.E. 828, 183 Ga. 152—Ellis v. Britt, 182 S.E. 596, 181 Ga. 442

Ind.—Ailes v. Ailes, 11 N.E.2d 73, 104 Ind. App. 302—Peters v. Knight, 8 N.E.2d 401, 103 Ind. App. 453

Iowa.—In re Ruedy's Estate, 66 N.W.2d 387, 245 Iowa 1307—In re

that a testator shall have sound mind and memory at the time of the execution of a will,<sup>3</sup> and not when it is dictated<sup>4</sup> or drawn,<sup>5</sup> or when written by the testator himself.<sup>6</sup> Hence neither the prior<sup>7</sup> nor sub-

Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Kenny's Estate, 10 NW 2d 73, 233 Iowa 600—In re Grange's Estate, 2 NW 2d 635, 231 Iowa 964—In re Hayer's Estate, 299 NW 431, 230 Iowa 880  
 Kan—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210—In re Walter's Estate, 208 P 2d 262, 167 Kan 627—In re Hall's Estate, 195 P 2d 612, 165 Kan 465  
 La—Cormier v Myers, 65 So 2d 345, 223 La 259  
     Succession of Knight, App, 151 So 230  
 Me—In re Cox' Will, 29 A 2d 281, 139 Me 261—Appeal of Martin, 179 A 655, 133 Me 422  
 Mich—In re Antila's Estate, 57 NW 2d 492, 336 Mich 189—In re Shattuck's Estate, 37 NW 2d 555, 324 Mich 568—In re Getchell's Estate, 295 NW 360, 295 Mich 681—In re Rowling's Estate, 289 NW 136, 291 Mich 218  
 Miss—Covart v Cowart, 51 So 2d 775, 211 Miss 459—Fortenberry v Herrington, 196 So 232, 188 Miss 735  
 Mo—Whitacre v Kelly, 134 SW 2d 121, 345 Mo 489—Proffer v Proffer, 114 SW 2d 1035, 342 Mo 184  
     Shearrer v Shearrer, App, 259 SW 2d 705  
 Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Fehrenkamp's Estate, 48 NW 2d 421, 154 Neb 488—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Bose's Estate, 25 NW 319, 136 Neb 156  
 NJ—In re Davis' Will, 101 A 2d 521, 14 NJ 166—In re Livingston's Will, 73 A 2d 916, 5 NJ 65  
     In re Fleming's Estate, 89 A 2d 54, 19 NJ Super 565—In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208  
     In re Phillips' Estate, 50 A 2d 862, 139 NJ Eq 257, affirmed 57 A 2d 387, 141 NJ Eq 362—In re Delaney's Estate, 25 A 2d 901, 131 NJ Eq 454  
     In re Heim's Estate, 39 A 2d 248, 22 NJ Misc 241, reversed on other grounds 40 A 2d 651, 136 NJ Eq 138  
 NY—In re Patterson's Will, 132 NYS 2d 609, 206 Misc 268—George v People, 40 NYS 830, 180 Misc 635, affirmed 47 NYS 2d 681, 267 App Div 575.

In re Alexieff's Will, 94 NYS 2d 32, affirmed 95 NYS 2d 532, 277 App Div 790, appeal denied 98 NYS 2d 582, 277 App Div 901—In re Hill's Will, 73 NYS 2d 258, appeal dismissed 78 NYS 2d 365  
 NC—In re Kestler's Will, 44 SE 2d 867, 228 NC 215—In re Hargrove's Will, 173 SE 577, 206 NC 307  
 ND—Corpus Juris cited in Stormon v Weiss, 65 NW 2d 475, 483  
 Okl—In re Holmes' Estate, 270 P 2d 320—In re Fletcher's Estate, 269 P 2d 349—In re Thompson's Estate, 261 P 2d 577—In re Lamar's Estate, 242 P 2d 727, 206 Okl 244—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—Slater v Phipps, 143 P 2d 133, 193 Okl 267—In re DeVine's Estate, 109 P 2d 1078, 188 Okl 423—In re Austin's Estate, 98 P 2d 47, 186 Okl 360—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464—In re Mason's Estate, 91 P 2d 657, 185 Okl 278  
 Or—In re Fredricks' Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Andersen's Estate, 235 P 2d 869, 192 Or 441—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—McGreal v Culhane, 141 P 2d 828, 172 Or 337  
 Pa—In re Skrtic's Estate, 108 A 2d 750, 379 Pa 95—Williams v McCarrroll, 97 A 2d 14, 374 Pa 281—Farmers Trust Co v Wilson, 63 A 2d 14, 361 Pa 43—In re Weber's Estate, 5 A 2d 550, 334 Pa 216  
     In re Loeper's Estate, Orph, 47 Berks Co 131—In re Meckley's Estate, Orph, 54 Lanc Rev 173—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364  
 Tenn—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592—Cude v Culberston, 209 SW 2d 506, 30 Tenn App 628—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687  
 Tex—Parr v Parr, Civ App, 207 SW 2d 187, refused no reversible error—Garcia v Galindo, Civ App, 199 SW 2d 488, reversed on other grounds 199 SW 2d 499, 145 Tex 507  
 Utah—In re Buttars' Estate, 261 P 2d 171  
 Va—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300—Tate v Chumbley, 57 SE 2d 151, 190 Va 480—Gilmer v. Brown, 44 SE 2d 16,

186 Va 630—Redford v Booker, 185 SE 879, 166 Va 561  
 Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583  
 W Va—Ritz v Kingdon, 79 SE 2d 123—Prichard v Prichard, 65 SE 2d 465, 135 W Va 767—Moore v Moore, 199 SE 257, 120 W Va 468  
 Wis—In re Klagstad's Will, 58 NW 2d 636, 264 Wis 269—In re Williams' Will, 41 NW 2d 191, 256 Wis 338—In re Kesich's Estate, 12 NW 2d 688, 244 Wis 374  
 68 CJ p 416 note 83

#### Execution and attestation

Testatrix must have testamentary capacity at the very time that she executes will and also at the time each witness signs will at her request in her presence

Tex—Venner v Layton, Civ App, 244 SW 2d 852, error refused no reversible error

#### Avoiding cause

In the case of an attack on a will for mental incapacity of the testator, it must appear that the alleged avoiding cause was operative and effective at the time of the execution of the will

Ga—Boland v Aycock, 12 SE 2d 319, 191 Ga 327

The disqualification which deprives one of "testamentary capacity" must exist at time of execution of purported will

Iowa—In re Hayer's Estate, 299 NW 431, 230 Iowa 880

3. Ohio—Stark v Cress, 22 Ohio Cir Ct. NS, 88  
 68 CJ p 417 note 84.

4. DC—In re Hoover's Will, 19 App DC 495

Ky—Irvine v Greenway, 295 SW 445, 220 Ky 388

5. Ill—James White Memorial Home v Haeg, 68 NE 568, 204 Ill 422

NC—In re Ross' Will, 109 SE 365, 182 NC 477

6. DC—In re Hoover's Will, 19 App DC 495

7. Fla—Miller v Flowers, 27 So 2d 667, 158 Fla 51

Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

Mich—In re Rowling's Estate, 289 NW 136, 291 Mich 218

Neb—In re Bose's Estate, 285 NW 319, 136 Neb 156

NJ—In re Delaney's Estate, 25 A 2d 901, 131 NJ Eq 454

Or—In re Scott's Estate, 228 P 2d 417, 191 Or 90

W Va—Moore v Moore, 199 SE 257, 120 W Va 468

68 CJ p 417 note 88.

sequent<sup>8</sup> mental condition determines the capacity, although evidence as to mental capacity at a time prior or subsequent to the execution of the will may be shown to illustrate the condition of the testator's mind at the time of executing the will, as discussed *infra* § 50. So also, in the case of a codicil, the mental capacity of the testator or testatrix to make the codicil is to be determined as of the date of the execution of the codicil.<sup>9</sup>

If there was a lack of legal capacity to make a will at the time of its execution, the subsequent passage of a statute removing such incapacity does not affect such will,<sup>10</sup> and the fact that, after the statute giving testamentary capacity takes effect, the testator retains the will, and treats it and speaks of

it as his will, does not make it a legal will.<sup>11</sup> Testamentary capacity, as prescribed by the legislature, may not be created or destroyed retroactively by events transpiring after exercise of such power,<sup>12</sup> and where legal capacity to make a will existed at the time of its execution, a supervening political or international event imposing a legal status or disability which creates lack of testamentary capacity cannot affect the will and render it invalid.<sup>13</sup> So where testator was an alien friend at the time of executing a will, and entitled under statute to devise property, his devise is valid although he afterwards became an alien enemy by reason of declaration of war between the United States and the country of his origin.<sup>14</sup>

## B. LEGAL DISABILITIES

### § 6. Aliens

Where so authorized by statute, any alien, whether friend or enemy, may make a will, but only a friendly alien may devise realty.

At common law, since the state alone could question the right of an alien to hold land, until action by the state, an alien could devise his land.<sup>15</sup> Where so authorized by state statute, any alien whether friend or enemy may make a will,<sup>16</sup> but only a friendly alien may devise realty to any person, citizen, or alien friend or enemy.<sup>17</sup> By virtue of a federal statute providing that any alien who shall thereafter hold lands in any of the territories of the United States in contravention of its provisions may nevertheless convey his title thereto any time before the institution of escheat proceedings as there-

inbefore provided, an alien may devise land.<sup>18</sup> Also at common law an alien could bequeath his personality,<sup>19</sup> and the same right exists under a treaty so providing, as discussed in Aliens § 31.

### § 7. Indians

Indians may be given authority to devise lands by statutory enactments, and they may make such testamentary dispositions as are authorized by state law with respect to property not subject to restrictions under statutes of the United States.

Among some Indian tribes no such thing as the disposition of property by will was known,<sup>20</sup> and generally Indians had no interest in tribal lands which could be devised.<sup>21</sup> Indians may, however, be given authority to devise lands by statutory enactments,<sup>22</sup> and they may make such testamentary

8. Fla.—*Miller v Flowers*, 27 So 2d 667, 158 Fla 51
- Me.—*In re Cox' Will*, 29 A 2d 281, 139 Me 261
- Neb.—*In re Bose's Estate*, 285 NW 319, 186 Neb 156
- NJ.—*In re Delaney's Estate*, 25 A 2d 901, 131 NJ Eq 454
- Or.—*In re Scott's Estate*, 228 P 2d 417, 191 Or 90—*McGreal v Culhane*, 141 P 2d 828, 172 Or 337
- W Va.—*Moore v Moore*, 199 SE 257, 120 W Va 468
- 68 CJ p 417 note 89
9. Ind.—*Peters v Knight*, 8 NE 2d 401, 103 Ind App 453
- 68 CJ p 417 note 90
10. Tenn.—*Mitchell v Kimbrough*, 41 SW 993, 98 Tenn 535
- 68 CJ p 417 note 91
11. Tenn.—*Mitchell v Kimbrough*, *supra*
12. NY.—*George v People*, 40 NY S 2d 830, 180 Misc 635, affirmed 47 NYS 2d 681, 267 App Div 575
13. NY.—*George v. People*, *supra*

14. NY.—*George v People*, *supra*
15. NY.—*George v People*, 47 NY S 2d 681, 267 App Div 575
- 68 CJ p 417 note 96
16. NY.—*George v People*, 40 NY S 2d 830, 180 Misc 635, affirmed 47 NYS 2d 681, 267 App Div 575
17. NY.—*George v People*, 40 NY S 2d 830, 180 Misc 635, affirmed 47 NYS 2d 681, 267 App Div 575
18. DC.—*Freitag v Freitag*, 47 App DC 1
- 68 CJ p 417 note 97
19. La.—*Richmond v Milne*, 17 La 312, 36 Am D 613
- 68 CJ p 417 note 98
20. NY.—*George v Pierce*, 148 NY S 230, 240, 85 Misc 105
- Attempted will held ineffectual**
- Disposition of property of deceased Onondaga Indian by cian mother at "Dead Feast" in accordance with tribal law and custom should be upheld in ejectment action as against Indian's attempted testamentary disposition

- NY.—*Lyons v Lyons*, 268 NYS 84, 149 Misc 723, affirmed 279 NY S 1020, 244 App Div 759
21. Okl.—*Semple v. Baken*, 135 P 1141, 39 Okl 563
- 68 CJ p 417 note 4
22. US.—*Hanson v Hoffman*, CCA Okl, 113 F 2d 780
- DC.—*Darks v Ickes*, 69 F 2d 230, 63 App DC 56
- Okl.—*Hatcher v Wade's Estate*, 71 P 2d 962, 180 Okl 646
- 68 CJ p 417 note 5

#### Restriction on full-blood Indian

The congressional act providing that the will of a full-blood Indian, devising realty, shall not be valid, if it disinherits the Indian's parent, wife, spouse, or children, unless acknowledged before and approved by federal judge or commissioner, permits a full-blood Indian, who complies with the act, to devise his land free from state statutes, but leaves a devise by a mixed-blood Indian of his lands subject to state stat-

dispositions as are authorized by state law with respect to property not subject to restrictions under statutes of the United States<sup>23</sup> So, an Indian, even though not a citizen of the United States, nevertheless may be a resident of the United States within the meaning of a statute permitting bona fide residents to devise lands<sup>24</sup>

*In the case of lands held by Indians as allotments*, the Indians may devise their interests therein, where permitted by statute,<sup>25</sup> but, as congress may impose restrictions on alienation by Indians of lands so held, and since alienation, within the meaning of such rule, includes disposition by will, congress may properly require that such wills be approved by designated officials,<sup>26</sup> and, under the rule that the contemporaneous construction placed on a statute by the officers or departments charged with the duty of executing it is entitled to weight,<sup>27</sup> where congress has made a clear and comprehensive grant of power to devise allotment land, subject to regulations prescribed by designated officials and approval of the will by such officials, and such regulations clearly show that a state statute is not regarded as controlling, the restriction of such state statute has no effect as to the capacity to make the devise<sup>28</sup> So Indians of the Five Civilized Tribes have power to dispose of their restricted property by will, unhampered by a state statute prohibiting disposition

by will of property which the testator could not alienate, incumber, or convey while living, since the statute is inapplicable to tribe members, because conflicting with an act of congress<sup>29</sup>

## § 8. Infants

Where the age of testamentary capacity is fixed by statute, only persons of the requisite age may dispose of their property by will

Where the particular ages at which males<sup>30</sup> and females<sup>31</sup> are capable of making a testamentary disposition of their property are fixed by statutes, persons of the requisite age, and only such persons, may dispose of their property by will Accordingly, under a statute so providing, only persons twenty-one years of age and over have testamentary capacity,<sup>32</sup> and the requirement applies to soldiers as well as others, so that an infant soldier is incapable of making a will,<sup>33</sup> but under some provisions soldiers in actual military service are exempted from the full age requirement of the statute<sup>34</sup>

It has been said that apart from statute infants have no power of testamentary disposition,<sup>35</sup> and at common law an infant cannot make any valid devise of real estate<sup>36</sup> However, at common law a male infant of fourteen years and upwards is capable of disposing of his personal estate by will,<sup>37</sup> and this is true of a female infant of twelve or up-

utes; such congressional act applies only to devise of realty, and not to a devise of personalty, and only to a devise of realty restricted by federal acts

Okl—Long v Darks, 87 P 2d 972, 184 Okl 449

23. Kan—Hanson v Hoffman, 91 P 2d 31, 150 Kan 121

24. Ind—Paent v. Walmsly's Adm'r, 20 Ind 82  
68 C J p 418 note 7

25. US—U S v Oklahoma Tax Commission, CCA Okl, 131 F 2d 635, vacated on other grounds Oklahoma Tax Commission v U S, 63 S Ct 1284, three cases, 313 US 598, 87 L Ed 1612

DC—First Nat Bank of Holdenville, Okl, v Ickes, 154 F 2d 851, 81 US App DC 61  
68 C J p 418 note 9

26. Kan—Hanson v Hoffman, 91 P 2d 31, 150 Kan 121

Okl—In re Peacock's Will, 212 P 989, 88 Okl 237  
68 C J p 418 note 12

27. US—Blanset v Cardin, CCA Okl, 261 F 309, affirmed 41 S Ct 519, 256 US 319, 65 L Ed 950

28. US—Hanson v Hoffman, CCA Okl, 113 F 2d 780.

Okl—Taylor v Johnson, 218 P 1095, 92 Okl 145  
68 C J p 418 note 15

### Disinheriting of spouse

The congressional act providing that the will of a full-blood Indian, devising realty, shall not be valid, if it disinherits the Indian's parent, wife, spouse, or children, unless acknowledged before and approved by federal judge or commissioner, authorized a full-blood Creek Indian, so far as his restricted lands were concerned, to disinherit his spouse by will executed in accordance with the act, notwithstanding state statute providing that no spouse shall bequeath away from the other so much of the estate that the other spouse would receive through succession by law, since the act would prevail over the state statute

Okl—Long v Darks, 87 P 2d 972, 184 Okl 449

29. Okl—Cornelius v Frank, 48 P 2d 1064, 173 Okl 425

30. Mont—Galbreath v Armstrong, 167 P 2d 337, 118 Mont 299  
68 C J p 419 note 30

31. Ala—Banks v Sherrod, 52 Ala 267  
68 C J p 419 note 30.

32. Tex—Moore v Moore, 23 Tex 637  
68 C J p 419 notes 18, 30, 31

### Exception

The statute providing that a person under 21 years of age cannot make a will except "in pursuance of a power specially given to that effect," by use of the quoted phrase, has reference to a "power of appointment", which is the execution of an express agency conferred by settlor or donor of the power who is a person possessed of testamentary capacity

Ky—Owens v Owens, 204 SW 2d 580, 305 Ky 460

33. Vt—Goodell v Pike, 40 Vt 319  
68 C J p 419 note 18 [b]

34. NJ—In re Knight's Estate, 93 A 2d 359, 11 NJ 83

35. NY—In re Tracy's Will, 3 NY St 239  
Capacity of infant when married woman see *infra* § 9

36. Ga—Shivers v Latimer, 20 Ga 737  
68 C J p 419 note 19

37. NJ—In re Knight's Estate, 93 A 2d 359, 11 NJ 83  
68 C J p 419 note 20.

wards<sup>38</sup> Such ages were fixed by the civil law, adopted by the English ecclesiastical courts having jurisdiction of the subject of wills,<sup>39</sup> but according to some authority, the age of twenty-one has been given as the proper age for testamentary capacity<sup>40</sup>

## § 9. Married Women

While it has been said that under the common law a married woman could not make a will, or devise real estate unless acting under a power of appointment, the modern statutory rule is that a married woman may dispose of her personalty by will as if sole

It has been broadly stated that under the common law, a married woman could not make a will,<sup>41</sup> and that a married woman, unless acting under a power of appointment, had no power to devise real estate,<sup>42</sup> with or without her husband's consent,<sup>43</sup> although such will would be valid if the husband was sole heir and consented<sup>44</sup> General provisions of statutes conferring authority on persons having lands to devise them have been construed as not applying to married women,<sup>45</sup> and some statutory enactments have expressly affirmed such rule,<sup>46</sup> or have prohibited a married woman from devising to her husband<sup>47</sup> A legislative act granting to a married woman, deserted by her husband, the right to dispose of her property by deed does not include a grant of a right to dispose of land by devise<sup>48</sup>

*Personalty* It has also been said that a married woman's will of her personalty is equally invalid at common law<sup>49</sup> However, even at common law such rule has been subjected to modification,<sup>50</sup> and

it has been said that a married woman always had capacity to make a will as to personalty, whether with or without her husband's consent<sup>51</sup> General provisions of statutes as to the capacity of persons to dispose of property by will apply only to the disposition of real estate, and not to personal estate,<sup>52</sup> and hence, with the consent of her husband, a married woman may dispose of her personalty by will<sup>53</sup> The husband's assent to the will of his wife amounts to no more than a waiver of his rights as his wife's administrator<sup>54</sup> The modern statutory rule in many jurisdictions is that a married woman may dispose of her personalty by will as if sole,<sup>55</sup> in some jurisdictions provided the husband consents,<sup>56</sup> but in others even in the absence of such assent,<sup>57</sup> and when authorized by designated courts on joint petition with her husband<sup>58</sup>

*Infancy* Where infants generally may not make devises, discussed supra § 8, neither at common law<sup>59</sup> nor under statutes authorizing married women to make devises<sup>60</sup> may an infant married woman make such devise However, if permitted by statutes relating to bequests by infants generally, an infant married woman may bequeath personalty in instances in which other married women may do so<sup>61</sup>

*In execution of power* A married woman's will may be valid so far as made in pursuance of a power conferred by some previous will or deed when her will is considered rather as an appointment under the previous instrument than as a will in itself<sup>62</sup>

38 SC—Major v Hunt, 41 SE 816, 64 SC 97

68 CJ p 419 note 21

39 SC—Posey v Posey, 34 SCL 167.

Tenn—Davis v Baugh, 1 Sneed 477

40 NC—Williams v Baker, 4 NC 401

41 Nev—In re Walters' Estate, 104 P 2d 968, 60 Nev 172

42 NJ—Miller v Reich, 34 A 2d 143, 134 NJ Eq 28

68 CJ p 419 note 34

### Time of taking effect

Statute providing that wills take effect as if executed immediately before the death of the maker does not validate a will by a married woman executed during coverture Pa—Dallett v Taggart, 72 A 380, 233 Pa 180

43 Mass—Morse v Thompson, 4 Cush 562

68 CJ p 419 note 35

44 Pa—Wagner v Ellis, 7 Pa 411, 47 Am D 515

45 Ky—George v Bussing, 15 B Mon 558

68 CJ p 420 note 38.

### English statute of wills

Ala—Baker v Chastang's Heirs, 18 Ala 417

68 CJ p 420 note 37

46 NY—Wadhams v American Home Missionary Soc, 12 NY 415

68 CJ p 420 notes 39, 40

47. Conn—Fitch v Brainerd, 2 Day 163

68 CJ p 420 note 42

48 Del—Harker v Elliot, 3 Del 51

49 NY—Cotheal v Cotheal, 40 NY 405

68 CJ p 420 note 43

50 Miss—Lee v Bennett, 31 Miss 119

51 Colo—Deutsch v Rohlfing, 126 P 1123, 22 Colo App 543

52 Ky—George v Bussing, 15 B Mon 558

68 CJ p 420 notes 46, 47

53. Mass—Osgood v. Breed, 12 Mass 525

68 CJ p 420 notes 48, 49.

54 Pa—In re Wagner's Estate, 2 Ashm 448

Tenn—Perry v Gill, 2 Humphr 218

55 Wyo—In re Smith's Estate, 97 P 2d 677, 55 Wyo 181

68 CJ p 421 note 51

56 Mass—Kelley v Snow, 70 NE 89, 185 Mass 288

68 CJ p 421 note 52

57. DC—Emmons v Garnett, 18 D C 52

58. Ky—Gregory v Oates, 18 SW 231, 92 Ky 532, 13 Ky L 761

68 CJ p 421 note 54.

59. Tenn—Campbell v. Browder, 7 Lea 240

60. NY—Zimmerman v Schoenfeldt, 3 Hun 692, 6 Thomps & C. 142

68 CJ p 421 note 58

61. NY—In re Bolton, 53 NE 750, 159 NY 129

Strong v Wilkin, 1 Barb Ch 9

62. Wyo—In re Smith's Estate, 97 P 2d 677, 55 Wyo 181

68 CJ p 421 note 61.

*In representative capacity.* At common law if a married woman may appoint her successor in representative capacity, she may dispose of property which she has in representative capacity, without the consent of her husband <sup>63</sup>

## § 10. — Separate Estate

Generally, a married woman has authority to dispose of her separate estate by will, in the absence of a restrictive provision in the instrument creating the estate

Apart from statutory authority in a married woman to dispose of her separate estate by will, in the absence of a restrictive provision in the instrument creating the estate, as a general rule she may dispose of such property by will,<sup>64</sup> independently of her husband's consent <sup>65</sup> More particularly, she may dispose of land,<sup>66</sup> even without her husband's consent,<sup>67</sup> or personalty,<sup>68</sup> and a power of appointment reserved to a married woman before marriage may be exercised by her in an instrument purporting to be her last will, duly executed as such, although otherwise such instrument would have been void<sup>69</sup> or revoked by her marriage <sup>70</sup> However, in jurisdictions holding that a married woman has no powers of alienation over her separate estate except such as have been conferred on her by the instrument creating the estate, a married woman cannot dispose of her separate estate by will unless given the power by the instrument creating the estate <sup>71</sup> So in

jurisdictions limiting the powers and contractual rights which married women may exercise with respect to their statutory separate estates, she may dispose of such estate only when her husband consents<sup>72</sup> Express provision may be made in a marriage settlement empowering the wife to dispose of the property by will<sup>73</sup> In many jurisdictions, either by constitutional<sup>74</sup> or statutory<sup>75</sup> provisions, a married woman may dispose of her separate estate by will In a number of instances the status of property as separate estate within the meaning of the foregoing rules has been determined <sup>76</sup>

## § 11. — Requisites and Sufficiency of Husband's Consent

Where it is required that the husband give his consent to his wife's disposition of personalty by will, such consent may be express, or implied, and written or by parol

Where it is required that the husband consent to his wife's disposition of personalty by will, discussed supra § 9, such consent may be express,<sup>77</sup> or implied,<sup>78</sup> and written<sup>79</sup> or by parol <sup>80</sup> However, the husband's consent required by statutes for the wife's devise of land must be written <sup>81</sup> In the case of personalty, a general consent that the wife may make a will is not sufficient, and it is necessary that the husband should consent to the particular will made by the wife <sup>82</sup> His assent to such disposition

63 Ky—In re Yates' Will, 2 Dana 215

68 C J p 422 note 62

64. Tenn—Woods v Shelton, 150 S W 856, 126 Tenn 607

68 C J p 422 note 64—30 C J p 653 notes 89-92

65. Ala—Wells v Bransford, 28 Ala 200

68 C J p 422 note 65

66. Ind—Noble v Enos, 19 Ind 72

67 Ga—Urquhaart v Oliver, 56 Ga 344

68 Va—Dillard v Dillard's Ex'rs, 21 SE 669

68 C J p 422 note 68

69 Mass—Heath v Withington, 6 Cush 497

30 C J p 654 note 94

70 Mass—Osgood v Bliss, 141 Mass 474, 6 NE 527, 55 Am R 488

30 C J p 654 note 95

71. Pa—Thomas v Folwell, 2 Whart 11, 30 Am D 230

68 C J p 422 note 70

72. Miss—Cain v Bunkley, 35 Miss 119—Lee v Bennett, 31 Miss 119

73. Md—Schley v McCeney, 36 Md 266

30 C J p 654 note 96.

94 C J S—44

74 NC—Freeman v Lide, 97 SE 402, 176 NC 434

68 C J p 422 note 73

75. U S—Awtry's Estate v C I R, CA 8, 221 F 2d 749

Ala—Parker v Foreman, 39 So 2d 574, 252 Ala 77, 9 ALR 2d 505

Wash—Christiansen v Department of Social Security, 131 P 2d 189, 15 Wash 2d 465

Wyo—In re Smith's Estate, 97 P 2d 677, 55 Wyo 181

68 C J p 422 note 74

The purpose of statute authorizing a married woman to dispose of her separate property by will without consent of her husband was to remove the testamentary disability of married women

Nev—In re Walters' Estate, 104 P. 2d 968, 60 Nev 172

Statute preventing disposition

A statute providing that males under eighteen years and upwards and unmarried females of sixteen years and upwards, and no others, may dispose of personal estate by will, was held to prevent a married woman from disposing of her separate estate by will

NY—Wadhams v American Home Missionary Society, 12 NY 415

Moehring v Mitchell, 1 Barb Ch

264, affirmed How A Cas 502, 4 How Pr 292, 3 Den 610

76. NJ—Compton v Pierson, 28 N. J Eq 229

68 C J p 423 note 76

Acquisition from husband

The term "separate estate," as used in statute conferring on a married woman power to make a valid will as to her separate estate, does not include an estate acquired from her husband, except where it was settled upon her by him before marriage or after marriage in pursuance of an antenuptial contract providing for such settlement

Ill—Thompson v Minnich, 81 NE 336, 227 Ill 430

77. SC—Grimke's Ex'r v Grimke's Ex'rs, 1 S CEq 366

78. Tenn—Woods v Shelton, 150 S W 856, 126 Tenn 607

68 C J p 423 note 81

79. Ky—Hughes v Faulkner, 56 S. W 642, 22 Ky L 103

68 C J p 423 note 82

80 NH—Reed v Blaisdell, 16 NH 194, 41 Am D 722

68 C J p 423 note 83

81 Mass—Smith v Sweet, 1 Cush 470

82. Ky—Louisville City Nat. Bank

of the personalty is good only when not revoked at the time of probate as it might be revoked before<sup>83</sup> He may be estopped to withhold his assent as to a will of personalty by a nuptial agreement,<sup>84</sup> or by expressing himself as satisfied on execution of the will<sup>85</sup> Ordinarily the assent may be given after the wife's death<sup>86</sup>

## § 12. Sovereign

The sovereign at common law had no testamentary power

The sovereign at common law had no testamentary power, and statutes relating to wills apply only to subjects of the sovereign<sup>87</sup>

## § 13. Spendthrift

A person under guardianship as a spendthrift is not thereby deprived of legal capacity to make a will.

A person under guardianship as a spendthrift is not thereby incapacitated from making a will<sup>88</sup> A statute providing that all contracts, bargains, and conveyances made by any person under guardianship shall be utterly void does not apply to invalidate a will by the ward<sup>89</sup>

## § 14 Suicide

The will of a person committing suicide is not invalid on the ground of public policy

A will made by a person who is contemplating, and subsequently commits, suicide is not invalid on the ground of public policy<sup>90</sup>

# C MENTAL AND PHYSICAL DISABILITIES

## § 15. Requisites of Testamentary Capacity Generally; Standards or Tests

- a General rules
- b Appreciation of claims
- c Other elements or requirements
- d Standards or tests of capacity

### a. General Rules

Testamentary capacity consists of a mentality and memory sufficient to understand the nature and purpose of the transaction, to comprehend generally the nature, situation, or extent of the property, to recollect the testator's relationship to the objects of his bounty and to those who naturally would have some claim to his re-

membrance, and to understand the manner and effect of the desired disposition

To exercise the right to dispose of one's property by will, one must possess testamentary capacity,<sup>91</sup> and ability to make a will depends on mental competency,<sup>92</sup> a will may be avoided on the ground that the testator did not have testamentary capacity to execute it<sup>93</sup> Testamentary capacity has been defined as capacity to know and understand the business of disposing of one's property by will,<sup>94</sup> but the question as to just what constitutes mental capacity to execute a will is not easy of accurate definition<sup>95</sup> Testamentary capacity relates to

v Wooldridge, 76 SW 542, 116 Ky 641, 25 Ky L 869

68 C J p 423 note 87

83 Ky—Louisville City Nat Bank v Wooldridge, 76 SW 542, 116 Ky 641, 25 Ky L 869

68 C J p 423 note 88

84 NC—Newlin v Freeman, 23 N C 514

85 Pa—In re Osmond's Estate, 29 A 266, 161 Pa 543

86 NJ—Van Winkle v Schoonmaker 15 N J Eq 384

Tenn—Woods v Shelton, 150 SW 856, 126 Tenn 607

87 Eng—Attorney General v Windsor, 8 H L Cas 369, 11 Reprint 472

88 RI—Jenckes v Smithfield Prob Ct, 2 RI 255

68 C J p 424 note 3

89 RI—Jenckes v Smithfield Prob Ct, supra.

68 C J p 424 note 4

90. NY—Roche v Nason, 93 NYS 565, 105 App Div 256, affirmed 77 NE 1007, 185 NY 128.

91 Wash—Dean v Jordan, 79 P 2d 331, 194 Wash 661

Instructions on testamentary capacity see infra § 471

92 Me—Appeal of Martin, 179 A 655, 133 Me 422

An inquiry into the mental sanity of a testator is directed to a determination of his sane comprehension of each of the necessary elements in the test of mental sanity required of one executing his will, which, when answered in the affirmative, meet the requirements of testamentary capacity

Or—In re Boord's Estate, 284 P 2d 348

93. Tex—Michalak v Dzierzanowski, Civ App, 270 SW 2d 276

Capacity and not reasonableness of a will determines its validity

Wash—In re Wiltzius' Estate, 253 P 2d 954, 42 Wash 2d 149

94. Ill—Tidholm v Tidholm, 62 N E 2d 473, 477, 391 Ill 19

Testamentary capacity as question of law or fact see infra § 462

Duress, force, and undue influence are evidence of testamentary capacity and mental weakness

La—Cormier v Myers, 65 So 2d 345, 223 La 259

A codicil merely appointing an executor and one disposing of the assets of a testator, each require the same standard of testamentary capacity

NY—In re Youngling's Estate, 61 NYS 2d 341

95 Iowa—Firestone v Atkinson, 218 NW 293, 206 Iowa 151

Competency of donor of gift see Gifts § 76

"The precise point at which reason is impaired is most difficult of ascertainment"

Wash—In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash. 257

The question is, was the will the free and intelligent product of the testator's mind or not?

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

—In re Johnson's Estate, 91 P 2d 330, 162 Or 97—In re Riggs' Estate, 250 P. 753, 120 Or 38.

soundness of mind,<sup>96</sup> and "sound mind" is a condition precedent to making and executing a valid will,<sup>97</sup> or one of the requisites to capacity to make a will,<sup>98</sup> as are sound mind and memory,<sup>99</sup> disposing mind and memory,<sup>1</sup> or sound and disposing mind and memory.<sup>2</sup> The right to dispose of property by will is one which the law is slow to deny on the ground of lack of testamentary capacity,<sup>3</sup> if such capacity exists, the court will not undertake to measure its degree.<sup>4</sup> The question is not what may have been

the testator's mental state at the time of the testamentary act, but what it actually was.<sup>5</sup>

The quantum of mental capacity requisite to the valid execution of a will has been stated to be knowledge and understanding by the testator of the nature or consequences of his act,<sup>6</sup> or his capacity or ability to understand such nature, consequences, or effect.<sup>7</sup> This has been held to include all other essentials.<sup>8</sup> However, subject to slight variations

96 Ark—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Puryear v Puryear, 94 SW 2d 695, 192 Ark 692  
Pa—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 430—In re Null's Estate, 153 A 137, 302 Pa 64  
In re Henry's Estate, Orph, 52 York Leg Rec 177

#### Synonymous terms

The term "sound mind" is used in the decisions as synonymous with "capacity," "competency," and "testamentary capacity."

Tex—Chambers v Winn, Civ App, 133 SW 2d 279, reversed on other grounds 154 SW 2d 454, 137 Tex 444

#### "Sound mind" and "testamentary capacity" identically defined

Tex—Christner v Mayer, Civ App, 123 SW 2d 715, error dismissed, judgment correct

97. Me—Appeal of Martin, 179 A 655, 133 Me 422

#### Will as not executed instrument

A will executed by a person of unsound mind is not an instrument executed by such person

N Y—In re Anderson's Will, 138 N YS 2d 157, modified on other grounds 138 NYS 2d 700, 285 App Div 971

98. Cal—In re Little's Estate, 72 P 2d 213, 23 Cal App 2d 40

99. Ill—In re Calo's Estate, 115 NE 2d 778, 1 Ill 2d 376

#### Phrase defined

The phrase "sound mind and memory" when applied as a test to determine testamentary capacity, means that degree of mental power and vigor which a testator should possess in order to be able to dispose of his property by will  
Ill—Powell v Weld, 101 NE 2d 581, 583, 410 Ill 198.

1. Pa—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

Disposing capacity and disposing mind are alternative or synonymous phrases in the law of wills for

"sound mind" and "testamentary capacity"

Cal—In re Little's Estate, 72 P 2d 213, 23 Cal App 2d 40

2. Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489

N J—Den v Vancleve, 5 N J Law 589

Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Fitch v American Trust Co, 4 Tenn App 87

3. Iowa—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761  
Pa—In re Hausman's Estate, Orph, 26 Erie Co 26

"To wrest a man's property from the person to whom he has given it, and divert it to others from whom he has desired to withhold it, is a most violent injustice, amounting to nothing less than post-mortem robbery, which no court should sanction unless thoroughly satisfied that the testator was legally incapable of making a will"

La—McCarty v Trichel, 46 So 2d 621, 624, 217 La 444

Kingsbury v Whitaker, 32 La. Ann 1055, 1062, 36 Am R 278

4. Mich—In re Getchell's Estate, 295 NW 360, 295 Mich 681

5. Cal—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512

6. Colo—Corpus Juris quoted in Cunningham v Stender, 255 P 2d 977, 981, 127 Colo 293

Ill—Schnoor v Terlep, 77 NE 2d 140, 399 Ill 101

Minn—In re Luke's Estate, 19 NW 2d 5, 220 Minn 104

Okl—In re Harjo's Estate, 241 P 2d 373, 206 Okl 88—Moore v Glover, 163 P 2d 1003, 196 Okl 177—In re Niley's Estate, 53 P 2d 215, 175 Okl 389

Pa—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58

Tenn—Corpus Juris cited in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 374, 27 Tenn App 342

Wash—Corpus Juris quoted in In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash 257

68 C J p 424 note 10

Knowledge by testator of contents of will see infra § 130

Time at which capacity must exist see supra § 5

Knowledge that will is being executed

Ill—In re Calo's Estate, 115 NE 2d 778, 1 Ill 2d 376

Understanding contents of will

Ala.—Claburn v Matthews, 61 So 2d 83, 258 Ala. 41

Understanding disposition of property

Mich—In re Antila's Estate, 57 NW 2d 492, 336 Mich 189

7. Ariz—In re Walters' Estate, 267 P 2d 896, 77 Ariz 122

La—McCarty v Trichel, 46 So 2d 621, 217 La 444

N J—In re McComb, 177 A 849, 118 N J Eq 119

Okl—Mason v Mohs, 285 P 2d 219

—In re Holmes' Estate, 270 P 2d 320—In re Thompson's Estate, 261 P 2d 577—In re Felgar's Estate, 249 P 2d 455, 207 Okl 10—In re Williams' Estate, 249 P 2d 94, 207 Okl 209—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—Duckwall v Lawson, 172 P 2d 415, 197 Okl 472—Slater v Phipps, 143 P 2d 133, 193 Okl 267—In re Austin's Estate, 98 P 2d 47, 186 Okl 360

Or—McGreal v Culhane, 141 P 2d 828, 172 Or 337

Tenn—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592—Bridges v Agee, 15 Tenn App 351

"The test of testamentary capacity stated in its simplest terms is that the testator must have mind and memory sound enough to enable him to know and understand the business on which he is engaged, that is, the execution of his will at the very time he executes it"

Conn—Atchison v Lewis, 38 A 2d 673, 674, 131 Conn 218

8. Colo—Corpus Juris quoted in Cunningham v Stender, 255 P 2d 977, 981, 127 Colo 293.

68 C J p 424 note 11.



or modifications in the form of expression of the rule by the various cases, testamentary capacity, or a sound mind, as the term is applied to the preparation and execution of a will, may be more fully stated to consist of a mentality and memory sufficient to understand intelligently the nature and purpose of the transaction, to comprehend generally the nature,

situation, or extent of the property to be bequeathed, to recollect the testator's relationship to the objects of his bounty and to those who naturally would have some claim to his remembrance, or in whom he is chiefly interested, and to understand the manner and effect of the desired disposition,<sup>9</sup> broadly, his mind must be clear to that degree which would sup-

9 U S—Taylor v U S, D C Ark, 113 F Supp 143—Cleland v Peters, D C Pa, 73 F Supp 769

Ala.—Wilson v Payton, 37 So 2d 499, 251 Ala. 411—Tucker v Tucker, 28 So 2d 637, 248 Ala. 602—Bulger v Ross, 12 So 803, 98 Ala. 267—Towles v Pettus, 12 So 2d 357, 244 Ala. 192

Ariz.—In re Walters' Estate, 267 P 2d 896, 77 Ariz. 123—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz. 218—In re Westfall's Estate, 245 P 2d 951, 74 Ariz. 131

Ark.—Ebrite v Brookhyser, 244 S W 2d 625, 219 Ark. 676—Petree v Petree, 201 S W 2d 1009, 211 Ark. 654—McKindley v Humphrey, 161 S W 2d 962, 204 Ark. 333—Pledger v Birkhead, 246 S W 510, 156 Ark. 143

Cal.—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584

In re Dunne's Estate 278 P 2d 733, 130 Cal App 2d 216—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Elliot's Estate, 250 P 2d 684, 114 Cal App 2d 747—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—Hughes v Grandy, 177 P 2d 939, 78 Cal App 2d 555—In re Krause's Estate, 163 P 2d 505, 71 Cal App 2d 719—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Simmons' Estate, 151 P 2d 8, 65 Cal App 2d 533—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275—In re Reiss' Estate, 123 P 2d 68, 50 Cal App 2d 398—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449—In re Hansen's Estate, 100 P 2d 776, 38 Cal App 2d 99

—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App

2d 597—In re Grant's Estate, 47 P 2d 508, 8 Cal App 2d 232  
Colo.—Corpus Juris quoted in Cunningham v Stender, 255 P 2d 977, 981, 127 Colo. 293

Fla.—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Neal v Harrington, 31 So 2d 391, 159 Fla. 381—Miller v Flowers, 27 So 2d 667, 158 Fla. 51—Marston v Churchill, 187 So. 762, 137 Fla. 154—Tonneler v Tonneler, 181 So. 150, 132 Fla. 194

Ga.—Northwestern University v Crisp, 88 S E 2d 26, 211 Ga. 636—Whitfield v Pitts, 53 S E 2d 549, 205 Ga. 259—Fowler v Fowler, 28 S E 2d 458, 197 Ga. 53—Morgan v Bell, 5 S E 2d 897, 189 Ga. 432—Ellis v Britt, 182 S E 596, 181 Ga. 442

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Ill.—De Marco v McGill, 83 N E 2d 313, 402 Ill. 46—McGlaughlin v Pickerel, 46 N E 2d 368, 381 Ill. 574—Lewis v Deamude, 33 N E 2d 440, 376 Ill. 219—Gilbert v Oneale, 21 N E 2d 283, 371 Ill. 427—Quathamer v Schoon, 19 N E 2d 750, 370 Ill. 606—Hoskinson v Lovelette, 5 N E 2d 219, 365 Ill. 21—Langwisch v Langwisch, 198 N E 675, 361 Ill. 632

In re Rutledge's Will, 125 N E 2d 683, 5 Ill App 2d 355—Dombrowski v Von Bronk, 76 N E 2d 800, 333 Ill App 161—McGovern v McGovern, 65 N E 2d 583, 328 Ill App 316, appeal transferred, see 61 N E 2d 357, 390 Ill. 516—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

Ind.—Noyer v Ecker, App, 119 N E 2d 902—Potter v Emery, 26 N E 2d 554, 107 Ind App 628

Iowa.—In re Groen's Estate, 62 N W 2d 143, 245 Iowa 634—In re Ransom's Estate, 57 N W 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 N W 2d 818, 242 Iowa 627—In re Hollis' Estate, 12 N W 2d 576, 234 Iowa 761—In re Heller's Estate, 11 N W 2d 586, 233 Iowa 1356—In re Sniff's Estate, 10 N W 2d 550, 233 Iowa 800—In re Hayer's Estate, 299 N W 431, 230 Iowa 880—Walters v Heaton, 271 N W 310, 223 Iowa 405—Firestone v Atkinson, 218 N W 293, 206 Iowa 151—Perkins v Perkins, 90 N W 55, 116 Iowa 253

Kan.—In re Davis' Estate, 259 P 2d 211, 175 Kan. 107—Smith's Estate v. Davis, 212 P 2d 322, 168 Kan.

210—In re Walter's Estate, 208 P 2d 262, 167 Kan. 627—In re Harris' Estate, 201 P 2d 1062, 166 Kan. 368—In re Hall's Estate, 195 P 2d 612, 165 Kan. 465—Kunkle v Urbansky, 109 P 2d 71, 153 Kan. 117  
Ky.—Bickel v Louisville Trust Co., 197 S W 2d 444, 303 Ky. 356—Madden v Cornett, 160 S W 2d 607, 290 Ky. 268—Rueff v Light, 114 S W 2d 506, 272 Ky. 449—Clark v Johnson, 105 S W 2d 576, 268 Ky. 591  
La.—Succession of Moody, 80 So 2d 93, 227 La. 609

Me.—Appeal of Martin, 179 A. 655, 133 Me. 422—In re Loomis' Will, 174 A. 38, 133 Me. 81—In re Chandler's Will, 66 A. 215, 102 Me. 72—In re Randall, 59 A. 552, 99 Me. 396

Md.—Sellers v Qualls, 110 A 2d 73—Doyle v Rody, 25 A 2d 457, 180 Md. 471

Mass.—Santry v France, 97 N E 2d 533, 327 Mass. 174—Goddard v Dupree, 76 N E 2d 643, 322 Mass. 247—Ronan v Moroney, 47 N E 2d 933, 313 Mass. 475

Mich.—In re Sprenger's Estate, 60 N W 2d 436, 337 Mich. 514—In re Carmas' Estate, 41 N W 2d 355, 327 Mich. 235—In re Merrill's Estate, 40 N W 2d 179, 326 Mich. 351—In re Hallitt's Estate, 37 N W 2d 662, 324 Mich. 651—In re Vallender's Estate, 17 N W 2d 213, 310 Mich. 359—In re Thayer's Estate, 15 N W 2d 712, 309 Mich. 473—In re Johnson's Estate, 13 N W 2d 852, 308 Mich. 366—In re Grow's Estate, 299 N W 836, 299 Mich. 133—In re Getchell's Estate, 295 N W 360, 295 Mich. 681—In re Rowling's Estate, 289 N W 136, 291 Mich. 218—In re Walker's Estate, 258 N W 206, 270 Mich. 33

Minn.—In re Rasmussen's Estate, 69 N W 2d 630—In re Healy's Estate, 68 N W 2d 401—In re Palmer's Estate, 57 N W 2d 409, 238 Minn. 549—Appeal of Borstad, 45 N W 2d 823, 232 Minn. 365—In re Olson's Estate, 35 N W 2d 439, 227 Minn. 289—In re Forsythe's Estate, 22 N W 2d 19, 221 Minn. 303, 167 A. L. R. 1—In re Holmstrom's Estate, 292 N W 622, 208 Minn. 19

Miss.—Humes v Krauss, 72 So 2d 737—Wallace v Harrison, 65 So 2d 456, 218 Miss. 153—Coward v Cowart, 51 So 2d 775, 211 Miss. 459—Fortenberry v Herrington, 195 So 232, 188 Miss. 735

Mo.—Glover v Bruce, 265 S W 2d 346—Adams v Simpson, 213 S W

2d 908, 358 Mo 168—Ahmann v Elmore, 211 S W 2d 480—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 21—Hedrick v Hedrick, 168 S W 2d 69, 350 Mo 716—Walter v Alt, 152 S W 2d 135, 348 Mo 53—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827—Callaway v Blankenbaker, 141 S W 2d 810, 346 Mo 383—Lee v Ullery, 140 S W 2d 5, 346 Mo 236—Rex v Masonic Home of Missouri, 108 S W 2d 72, 341 Mo 589—Stevens v Meadows, 100 S W 2d 281, 340 Mo 252—Curtis v Alexander, 257 S W 432  
Shearrer v Shearrer, App, 259 S W 2d 705—Higgins v Smith, App, 150 S W 2d 539, transferred, see 144 S W 2d 149, 346 Mo 1044—Winn v Matthews, 137 S W 2d 632, 235 Mo App 337, transferred, see 130 S W 2d 484  
Mont—In re Cissell's Estate, 66 P 2d 779, 104 Mont 306—In re Carroll's Estate, 196 P 996, 59 Mont 403  
Neb—In re O'Donnell's Estate, 64 N W 2d 116, 158 Neb 583—In re Fehrenkamp's Estate, 48 N W 2d 421, 154 Neb 488—In re Benson's Estate, 46 N W 2d 176, 153 Neb 824—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Hunter's Estate, 39 N W 2d 418, 151 Neb 704—In re Kaiser's Estate, 34 N W 2d 366, 150 Neb 295—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Johnsen's Estate, 30 N W 2d 70, 149 Neb 34—In re Woodward's Estate, 23 N W 2d 75, 147 Neb 270—In re Inda's Estate, 19 N W 2d 37, 146 Neb 179—In re Goist's Estate, 18 N W 2d 513, 146 Neb 1—In re Witte's Estate, 16 N W 2d 203, 145 Neb 295, rehearing denied 17 N W 2d 477, 145 Neb 295—In re Thomason's Estate, 13 N W 2d 141, 144 Neb 300—In re Hagan's Estate, 9 N W 2d 794, 143 Neb 459, 154 A L R 573—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Kajsowski's Estate, 279 N W 185, 134 Neb 485—In re Frazier's Estate, 267 N W 181, 131 Neb 61  
N J—In re Livingston's Will, 73 A 2d 916, 5 N J 65  
Wallhauser v Rummel, 96 A 2d 289, 25 N J Super 358—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208—In re Filo's Will, 75 A 2d 517, 9 N J Super 146  
Den v Vandevle, 5 N J Law 589  
In re Phillips' Estate, 50 A 2d 862, 139 N J Eq 257, affirmed 57 A 2d 387, 141 N J Eq 362—In re Rein's Will, 50 A 2d 380, 139 N J Eq 122—In re Kinane's Estate, 42 A 2d 865, 136 N J Eq 595—In re Heim's Will, 40 A 2d 651, 136 N J Eq 138—In re Lucas' Will, 1 A 2d 929, 124 N J Eq 347  
N.M.—Calloway v Miller, 266 P 2d 365, 58 N.M. 124—In re Armijo's

Will, 261 P 2d 833, 57 N M 649  
N Y—In re Coddington's Will, 118 N Y S 2d 525, 281 App Div 143, affirmed 120 N E 2d 777, 307 N Y 181—In re Morrison's Will, 60 N Y S 2d 546, 270 App Div 552, affirmed 69 N E 2d 814, 296 N Y 652—In re Fahrenbach's Will, 25 N Y S 2d 208, 261 App Div 43, affirmed 34 N E 2d 911, 285 N Y 763—In re Roberts' Will, 283 N Y S 50, 246 App Div 87  
In re Rice's Estate, 19 N Y S 2d 602, 173 Misc 1038—In re Salomon's Estate, 287 N Y S 814, 159 Misc 379, affirmed 297 N Y S 681, 251 App Div 740—In re Kimball's Will, 281 N Y S 605, 156 Misc 338—In re Pratt's Estate, 274 N Y S 417, 152 Misc 560, affirmed In re Pratt's Will, 283 N Y S 1023, 246 App Div 576  
In re Butler's Will, 132 N Y S 2d 198—In re Alexieff's Will, 94 N Y S 2d 32, affirmed 97 N Y S 2d 532, 277 App Div 790, appeal denied 98 N Y S 2d 582, 277 App Div 901—In re Hill's Will, 73 N Y S 2d 258, appeal dismissed 78 N Y S 2d 365—In re Jerrells' Will, 63 N Y S 2d 499, appeal dismissed 70 N Y S 2d 580  
N C—In re Kemp's Will, 67 S E 2d 672, 234 N C 495  
Okla—In re Wadsworth's Estate, 273 P 2d 997—In re Holmes' Estate, 270 P 2d 320—In re Williams' Estate, 249 P 2d 94, 207 Okl 209—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Baker's Will, 248 P 2d 627, 207 Okl 158—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—In re Harjo's Estate, 241 P 2d 373, 206 Okl 88—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—Moore v Glover, 163 P 2d 1003, 196 Okl 177—Amos v Fish, 144 P 2d 967, 193 Okl 406—Jones v Denton, 135 P 2d 53, 192 Okl 234—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464—In re Mason's Estate, 91 P 2d 657, 185 Okl 278—**Corpus Juris** cited in In re Nitey's Estate, 53 P 2d 215, 219, 175 Okl 389—In re Sixkiller, 32 P 2d 936, 168 Okl 302  
Or—In re Boord's Estate, 284 P 2d 348—In re Fredricks' Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Provolt's Estate, 151 P 2d 736, 175 Or 128—In re Bond's Estate, 143 P 2d 244, 172 Or 509—In re Johnson's Estate, 91 P 2d 330, 162 Or 97—In re Dougan's Estate, 53 P 2d 511, 152 Or 235—In re Knutson's Will, 41 P 2d 793, 149 Or 467—In re Fletcher's Estate, 32 P 2d 123, 147 Or 139  
Pa—In re Skrtic's Estate, 108 A 2d 750, 379 Pa 95—In re Glesenkamp's Estate, 107 A 2d 731, 378 Pa 635

—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Franz' Estate, 84 A 2d 292, 368 Pa 618—In re Lewis' Estate, 72 A 2d 80, 364 Pa. 225—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75—Klingner v Dugacki, 51 A 2d 627, 356 Pa. 143—In re Ash's Estate, 41 A 2d 620, 351 Pa 317—In re Thomas' Estate, 36 A 2d 819, 349 Pa 212—In re Otto's Estate, 36 A 2d 797, 349 Pa 205—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420  
In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133—In re Morgan's Estate, 22 A 2d 87, 146 Pa Super 79—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81  
In re Matz' Estate, Orph, 39 Berks Co, 303—In re Hausman's Estate, Orph, 26 Erie Co 26—In re Pelechacz' Estate, Orph, 40 Luz L Reg 345—In re Butler's Estate, Orph, 64 Montg Co 161—In re Dugacki's Will, Com Pl, 31 North Co. 145—In re Kotlar's Estate, Orph, 24 Northumb Leg J 252—In re Kovolowski's Estate, Orph, 16 Som Leg J 122—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Corne's Estate, Orph, 66 York Leg Rec 22—In re Hochberger's Estate, Orph, 63 York Leg Rec 25—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364—In re Henry's Estate, Orph, 52 York Leg Rec 177  
R I—Rynn v Rynn, 181 A 289, 55 R I 310  
Tenn—Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628—Farmers Union Bank of Henning v Johnson, 181 S.W.2d 369, 27 Tenn App 342—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687  
Tex—Rutherford v Robbins, Com App, 298 S W 549  
Venner v Layton, Civ App, 244 S W 2d 852, error refused no reversible error—Jowers v Smith, Civ App, 237 S W 2d 805—Nass v Nass, Civ App, 224 S W 2d 280, affirmed 228 S W 2d 130, 149 Tex 41—Barton v Bailey, Civ App, 202 S W 2d 277, error refused no reversible error—Reiche v Williams, Civ App, 183 S W 2d 587, error refused 185 S W 2d 420, 143 Tex 365—Chambers v Winn, Civ App, 133 S W 2d 279, reversed on other grounds 154 S W 2d 454, 137 Tex 444—Christner v Mayer, Civ App, 123 S W 2d 715, error dismissed, judgment correct—McNaley v Sealy, Civ App, 122 S W 2d 330, error dismissed—Mills v Kellahin, Civ App, 91 S W 2d 1097, error dismissed  
Utah—In re Buttars' Estate, 261 P 2d 171—In re Chongas' Estate, 202

port the finding that he had sufficient knowledge of the testamentary act<sup>10</sup>

*"Testamentary power" and "undue influence" distinguished* Testamentary capacity pertains to the ability to execute a will<sup>11</sup> and is to be distinguished from "testamentary power"<sup>12</sup>

Testamentary capacity has no relation to undue influence,<sup>13</sup> the two terms being separate and distinct,<sup>14</sup> and its existence is not dependent on freedom from undue influence,<sup>15</sup> for testamentary incapacity implies the want of intelligent mental power,<sup>16</sup> while undue influence bespeaks in itself the existence of a mind of strength sufficient to make a valid will if unhindered by the dominant influence, and such a mind as would have produced a valid will but for

the coercion or restraint to which it was subjected<sup>17</sup>

It has been said that very little difference exists with respect to the law which applies to the principles of unsound mind and undue influence affecting the validity of a will<sup>18</sup>

*Distinction as to realty and personality* There is no distinction in the degree of mental capacity requisite for the execution of a will of real estate and that requisite for the execution of a will of personal estate<sup>19</sup>

### b. Appreciation of Claims

A testator must be able intelligently to weigh and appreciate his natural obligations, but the fact that a will disappoints reasonable expectations of prospective

P 2d 711, 115 Utah 95—Burgess v Colby, 71 P 2d 185, 93 Utah 103—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

Va—Tate v Chumbley, 57 S E 2d 151, 190 Va 480—Gilmer v Brown, 44 S E 2d 16, 186 Va 630—Lohman v Sherwood, 26 S E 2d 74, 181 Va 594

Wash—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837—In re Johnson's Estate, 148 P 2d 962, 20 Wash 2d 628—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257—In re Forsman's Estate, 30 P 2d 941, 177 Wash 38

W Va—Ritz v Kingdon, 79 S E 2d 123—Prichard v Prichard, 65 S E 2d 65, 135 W Va 767

Wis—In re Klagstad's Will, 58 N W 2d 636, 264 Wis 269—In re Williams' Will, 41 N W 2d 191, 256 Wis 338—In re Boston's Estate, 33 N W 2d 257, 253 Wis 8—In re Delmady's Will, 28 N W 2d 301, 251 Wis 98—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Butler's Will, 85 N W 678, 110 Wis 70

68 C J p 424 note 13

#### Other statements

(1) The test of competency to make a will is that the testator know and understand what property he has, know about his relatives and others who may be the objects of his bounty, and make disposition of his property with understanding and reason Kan—In re Mead's Estate, 226 P 2d 831, 170 Kan 435—In re Ellis' Estate, 210 P 2d 417, 168 Kan 11—

In re Cross' Estate, 201 P 2d 1052, 166 Kan 318—In re Gereke's Estate, 195 P 2d 323, 165 Kan 249—Anderson v Anderson, 76 P 2d 825, 147 Kan 273

(2) Testamentary capacity exists where testator is able to, and does, have clear understanding of his estate and ability to form rational opinion as to what would be a fair, just, and reasonable division of it among his friends and relatives or others in whom he feels an especial interest Cal—In re Morey's Estate, 171 P 2d 131, 75 Cal App 2d 628

(3) There should be evidence that maker had in his mind at time the details of his business and the items of his property, and the claims of others on him for his favorable consideration, and that, in the contemplation of all these things, with a sound and disposing mind and memory, he directed how his property should be disposed of after his death Fla—In re Sharp's Estate, 183 So 470, 133 Fla 802

(4) Testamentary capacity is testator's ability to retain in memory, without prompting, the extent and condition of his property to be disposed of, comprehend to whom he is giving it, and realize debts and relations to him of those whom he includes in, or excludes from, his will Ark—Yarbrough v Moses, 267 SW 2d 289, 223 Ark 489—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Simpson v Burge, 224 SW 2d 830, 216 Ark 132—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Scott v Dodson, 214 SW 2d 357, 214 Ark 1—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735—Bollinger v Arkansas Valley Trust Co, 151 S W 2d 675, 202 Ark 525—Puryear v

Puryear, 94 SW 2d 695, 192 Ark 692—Phillips v Jones, 18 SW 2d 352, 179 Ark 877—Griffin v Union Trust Co, 266 SW 289, 166 Ark 347

*In Louisiana* testamentary capacity is stated to be the ability to comprehend conditions of one's property and relations to those who may naturally expect to become objects of one's bounty

La—Succession of Edgar, 167 So 438, 184 La 775—Rostrup v Succession of Spicer, 165 So 307, 183 La 1087 68 C J p 424 note 13 [b]

10 Cal—In re Lepori's Estate, 41 P 2d 970, 4 Cal App 2d 761

11. Fla—Mulford v Central Farmers' Trust Co, 126 So 762, 99 Fla 600 68 C J p 429 note 45

12. Fla—Mulford v Central Farmers' Trust Co, supra—Hamilton v Morgan, 112 So 80, 93 Fla 311

13. Kan—Corpus Juris cited in Stayton v Stayton, 81 P 2d 1, 4, 148 Kan 172—Hoff v Hoff, 189 P 613, 106 Kan 542

Tex—Scott v Townsend, 166 SW 1138, 106 Tex 322

Cruz v Prado, Civ App, 239 SW 2d 650

Undue influence generally see infra §§ 224-261

14. Tex—Michalak v Dzierzanowski, Civ App, 270 SW 2d 276

15. Kan—Hoff v Hoff, 189 P 613, 106 Kan 542

Tex—Scott v Townsend, 166 SW 1138, 106 Tex 322

16. Tex—Scott v Townsend, supra Cruz v Prado, Civ App, 239 SW 2d 650

17. Tex—Scott v Townsend, 166 S W 1138, 106 Tex 322

18. Cal—In re Hansen's Estate, 100 P 2d 776, 38 Cal App 2d 99

19. N J—Sloan v Maxwell, 3 N J. Eq 563.

beneficiaries does not establish lack of testamentary capacity.

It is not enough that the testator recollects those who have a claim on his remembrance, but he must be able intelligently to weigh and appreciate his natural obligations,<sup>20</sup> and where some persons are excluded, he must have been able deliberately to form an intelligent purpose of excluding them,<sup>21</sup> but actual knowledge or appreciation of their deserts is not necessary<sup>22</sup>

The testator is not required to remember all next of kin or presumptive heirs at law,<sup>23</sup> or to

recollect at all times the names of intimate acquaintances<sup>24</sup>

The fact that a will disappoints reasonable expectations of prospective beneficiaries does not establish lack of testamentary capacity<sup>25</sup> So, the total exclusion of certain relatives or failure to deal with them generously is not of itself inconsistent with testamentary capacity,<sup>26</sup> regardless of the reason the testator may have for his action,<sup>27</sup> or even in the absence of any reason,<sup>28</sup> if he is not actuated by an insane delusion<sup>29</sup> or monomania<sup>30</sup>

20. Ky—Gay v Gay, 215 SW 2d 92, 308 Ky 539—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352

68 C J p 428 note 36

"In order to possess testamentary capacity, the testator must be capable of bringing in mental review his family relations, and of comprehending the claims and obligations naturally suggested by such review"

Ga—Everitt v LaSpeyre, 24 SE 2d 381, 384, 195 Ga 377

#### Favoring relatives as not evidence of abnormality

It was not evidence of abnormality that testatrix should have favored her widowed sister, who was not in as good financial circumstances as other members of family, and also her nephew, who had lived in her home for many years

Miss—Blalock v Magee, 38 So 2d 708, 205 Miss 209

21. Ind—Ramseyer v Dennis, 116 NE 417, 119 NE 716, 187 Ind 420

68 C J p 428 note 37

22. NJ—In re Haness' Estate, 130 A 655, 658, 98 NJ Eq 645  
68 C J p 428 note 38

23. NY—In re Knight's Will, 150 NYS 137, 87 Misc 577  
68 C J p 428 note 39

24. NJ—Ward v Harrison, 127 A 691, 97 NJ Eq 309  
In re Kull's Estate, 133 A 296, 4 NJ Misc 434

Failure to remember names see *infra* § 28

25. Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167

Md—Sellers v Qualls, 110 A 2d 73  
Or—In re Davis' Will, 142 P 2d 143, 172 Or 354

Admissibility of evidence as to unjust or unnatural disposition see *infra* § 44

Manner of disposition of property generally see *infra* § 132

Weight and sufficiency of evidence as to mode of disposition see *infra* § 62.

#### Small bequest to church

Mich—In re Kenealy's Estate, 59 N W 2d 38, 336 Mich 657

26. Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167

Ill—Quatham v Schoon, 19 NE 2d 750, 370 Ill 606

McGovern v McGovern, 65 NE 2d 583, 328 Ill App 316, appeal transferred, see 61 NE 2d 357, 390 Ill 516

Miss—Gholson v Peters, 176 So 605, 180 Miss 256

NY—In re Pratt's Estate, 274 NYS 417, 152 Misc 560, affirmed In re Pratt's Will, 283 NYS 1023, 246 App Div 576

Or—In re Davis' Will, 142 P 2d 143, 172 Or 354

Tenn—Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 27 Tenn App 342

68 C J p 429 note 41

"The law recognizes as an element of capacity the appreciation of paternal or maternal love or instinct and an obligation to bestow one's property upon those bound by such natural ties But it is simply

the existence of such duty that the law recognizes The mere failure to perform that natural obligation can never be held sufficient to invalidate the bestowal of property upon another it is an important consideration but insufficient in itself"

Kv—Jackson's Ex'r v Semones, 98 SW 2d 505, 508, 266 Ky 352

#### Nieces

(1) Fact that testator did not mention niece, who had been his favorite, but had been committed to mental institution, could not be ascribed to lack of memory of those who might, because of relationship, be remembered by him as beneficiaries

Mich—In re Kenealy's Estate, 59 N W 2d 38, 336 Mich 657

(2) Nieces, who were uncle's only heirs, seeking to set aside his will on ground of mental incapacity, did not have claim on, nor could they expect to be remembered by, uncle as by father, with respect to significance of uncle's almost entirely eliminating them from will

Fla—Henson v Denniston, 169 So 624, 124 Fla 843

#### Collateral kin

A lack of testamentary capacity was not indicated by failure of testator to take into account collateral kin as the natural objects of his bounty, particularly on showing of complete lack of actual friendly relationship for a long period of time  
Me—In re Moran's Will, 28 A 2d 239, 139 Me 178

27. Tenn—Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 27 Tenn App 342  
68 C J p 429 note 42

#### Prejudice

(1) The rule stated in the text applies where the exclusion is because of prejudice

Ill—Quatham v Schoon, 19 NE 2d 750, 370 Ill 606

McGovern v McGovern, 65 NE 2d 583, 328 Ill App 316, appeal transferred, see 61 NE 2d 357, 390 Ill 516

(2) Prejudice generally see *infra* § 23

#### Reasonable actions

Court is not concerned with what prompted testator's actions in disposing of his property as long as they appear reasonable

Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167

28. Ill—Quatham v Schoon, 19 NE 2d 750, 370 Ill 606

McGovern v McGovern, 65 NE 2d 583, 328 Ill App 316, appeal transferred, see 61 NE 2d 357, 390 Ill 516

29. Ill—Quatham v Schoon, 19 NE 2d 750, 370 Ill 606—Bueger v Bueger, 148 NE 274, 317 Ill 401

McGovern v McGovern, 65 NE 2d 583, 328 Ill App 316, appeal transferred, see 61 NE 2d 357, 390 Ill 516

Miss—Gholson v Peters, 176 So 605, 180 Miss 256

Insane delusions as incapacitating testator generally see *infra* § 18

30. Miss—Gholson v Peters, *supra*

## c. Other Elements or Requirements

Among other requirements, testamentary capacity requires ability to understand the ordinary affairs of life, to form a rational judgment as to the matters involved in the will, and to dispose of the testator's property according to some fixed or intelligible purpose or plan of his own, but he need not have perfect and complete understanding of the material facts, or make a wise disposition of his property.

Other elements or requirements, either additional

to those mentioned supra subdivisions a and b of this section or, in effect, reiterative thereof, have been stated, such as that the testator must be able to understand,<sup>31</sup> or act rationally in,<sup>32</sup> the ordinary affairs of life, to deal rationally with, or to form a rational judgment concerning, the matters involved in the will,<sup>33</sup> to make disposition of his property according to some fixed or intelligible purpose, plan, or scheme of his own, or formed in his own mind,<sup>34</sup>

31. Mo—Glover v Bruce, 265 S W 2d 346—Adams v Simpson, 213 S W 2d 908, 358 Mo 168—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 21—Walter v Alt, 152 S W 2d 135, 348 Mo 53—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827—Callaway v Blankenbaker, 141 S W 2d 810, 346 Mo 383—Rex v Masonic Home of Missouri, 108 S W 2d 72, 341 Mo 589

Shearrer v Shearrer, App, 259 S W 2d 705

68 C J p 426 note 14

**Ordinary and not intricate affairs**

The test of testator's mental capacity is his ability to comprehend and understand the ordinary, as distinguished from the intricate and complicated, affairs of life

Mo—Ahmann v Elmore, 211 S W 2d 480—Berkemeier v Reller, 296 S W 739, 317 Mo 614

**Respecting desires of testator**

The desires of testator with respect to disposition of his property should be respected if he knew what he was doing with it and if his actions meet or respond to the test applied to people in the ordinary affairs of life

Tex—Bell v Bell, Civ App, 248 S W 2d 978, refused no reversible error—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, error refused no reversible error

32. Ill—Shevlin v Jackson, 124 N E 2d 895, 5 Ill 2d 43—Quatham v Schoon, 19 N E 2d 750, 370 Ill 606

"A man's ability to meet and successfully contend with problems of life is a most important index to his mental calibre"

Ark—Shippen v Shippen, 211 S W 2d 433, 435, 213 Ark 517

**Less intellectual power required**

However, it has been held that higher intellectual power is required to conduct the continuing affairs of life than to make a will

Pa—Kish v Bakaysa, 199 A 321, 330 Pa 533

33. Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192

Ark—Ebrite v Brookhyser, 244 S W 2d 625, 219 Ark 676—Petree v Petree, 201 S W 2d 1009, 211 Ark

654—McKindley v Humphrey, 161 S W 2d 962, 204 Ark 333—Pledger v Birkhead, 246 S W 510, 156 Ark 443

Cal—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

Fla—Tonnelier v Tonnelier, 181 So 150, 132 Fla 194

Me—Appeal of Martin, 179 A 655, 133 Me 422

Minn—In re Rasmussen's Estate, 69 N W 2d 630—In re Healy's Estate, 68 N W 2d 401—In re Palmer's Estate, 57 N W 2d 409, 238 Minn 549

—Appeal of Borstad, 45 N W 2d 828, 232 Minn 365—In re Olson's Estate, 35 N W 2d 439, 227 Minn 289—In re Forsythe's Estate, 22 N W 2d 19, 221 Minn 303, 167 A L R 1—

In re Luke's Estate, 19 N W 2d 5, 220 Minn 104—In re Holmstrom's Estate, 292 N W 622, 208 Minn 19

NY—Delafield v Parish, 25 NY 9, 1 Redf Surr 130

In re Morison's Will, 60 N Y S 2d 546, 270 App Div 552, affirmed 69 N E 2d 814, 296 NY 652—In re Roberts' Will, 283 N Y S 50, 246 App Div 87

In re Salomon's Estate, 287 N Y S 814, 159 Misc 379, affirmed 297 N Y S 681, 251 App Div 740—In re Kimball's Will, 281 N Y S 605, 156 Misc 338

In re Butler's Will, 132 N Y S 2d 198

Tex—Mills v Kellahan, Civ App, 91 S W 2d 1097, error dismissed

Wis—In re Klagstad's Will, 58 N W 2d 636, 264 Wis 269—In re Williams' Will, 41 N W 2d 191, 256 Wis 338—In re Boston's Estate, 33 N W 2d 257, 253 Wis 8—In re Delmady's Will, 28 N W 2d 301, 251 Wis 98—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Butler's Will, 85 N W 678, 110 Wis 70

68 C J p 426 note 15

34. Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

Ill—Lewis v Deamude, 33 N E 2d 440, 376 Ill 219—Langwisch v Langwisch, 193 N E 675, 361 Ill 632

In re Rutledge's Will, 125 N E 2d 683, 5 Ill App 2d 355—Wilson v

Bell, 43 N E 2d 162, 315 Ill App 418

Ky—Bickel v Louisville Trust Co, 197 S W 2d 444, 303 Ky 356—Madden v Cornett, 160 S W 2d 607, 290 Ky 268—Rueff v Light, 114 S W 2d 506, 272 Ky 449—Clark v Johnson, 105 S W 2d 576, 268 Ky 591

Tenn—Farmers Union Bank of Henning v Johnson, 181 S W 2d 369, 27 Tenn App 342

Tex—McNaley v Sealy, Civ App, 122 S W 2d 330, error dismissed

Utah—In re Buttars' Estate, 261 P 2d 171—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95—Burgess v Colby, 71 P 2d 185, 93 Utah 103—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

68 C J p 427 note 16

Statutory provision see infra subdivision d (4) of this section

"If a testator has sufficient mental capacity to knowingly and understandingly dispose of his property and distribute it to those to whom he intends it to go, he is competent to make a will"

Ill—Wilson v Bell, 43 N E 2d 162, 166, 315 Ill App 418

Meaning of requirement

Requirement that testatrix be capable of disposing of her property in accordance with a "fixed purpose" of her own means that she must be capable of producing document which at the time represents her own will, or that her mind must be capable of producing instrument which is her own and not that of some one else

Ky—Greer's Ex'r v Bishop, 96 S W 2d 851, 265 Ky 352

Unalterable purpose not required

The fact that a will is ambulatory in its nature demonstrates that "a fixed purpose" does not mean an unalterable purpose

Ky—Greer's Ex'r v Bishop, supra

Freedom from undue influence or fraud

(1) Testamentary capacity exists only if testator had mental capacity to take a rational survey of his estate and dispose of it according to a fixed desire and purpose of his own, unimpeded by wrongful undue influence or fraud of others.

Tex—Venner v Layton, Civ App, 244 S W 2d 852, error refused no reversible error.

to collect his mind or understand and retain the necessary facts without prompting<sup>35</sup> or aid from others,<sup>36</sup> although the latter has been held not to be a rule of law,<sup>37</sup> and to retain all the necessary facts in mind long enough to have the will prepared<sup>38</sup> or prepared and executed<sup>39</sup> For a will to be valid, it is essential that no disorder of the mind shall poison the testator's affections, pervert his sense of

right, or prevent the exercise of his natural faculties<sup>40</sup>

The testator need not have perfect and complete understanding of the material facts in all their bearings,<sup>41</sup> nor need he have all material facts in mind at the same time,<sup>42</sup> capacity to know or understand, rather than the actual knowledge or understanding, is sufficient<sup>43</sup>

(2) Fraud and undue influence generally see *infra* §§ 221-261

#### Initiation of making of will

While it may not be necessary for a person to initiate the making of a will, it is necessary that the testator have sufficient strength of mind to understand, appreciate, or approve the terms and provisions thereof, in order to render it valid, regardless of who initiated the making thereof  
Va.—Ferguson v Ferguson, 192 SE 774, 169 Va 77.

35. U.S.—Taylor v U.S., D.C. Ark., 113 F Supp 143

Ala.—Towles v Pettus, 12 So 2d 357, 244 Ala 192

Ark.—Yarbrough v Moses, 267 SW 2d 289, 223 Ark 489—Ebrite v Brookhyser, 244 SW 2d 625, 219 Ark 676—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Simpson v Burge, 224 SW 2d 830, 216 Ark 132—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Scott v Dodson, 214 SW 2d 357, 214 Ark 1—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Petree v Petree, 201 SW 2d 1009, 211 Ark 654—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735—McKindley v Humphrey, 161 SW 2d 962, 204 Ark 333—Bollinger v Arkansas Valley Trust Co., 151 SW 2d 675, 202 Ark 525—Puryear v Puryear, 94 SW 2d 695, 192 Ark 692—Phillips v Jones, 18 SW 2d 352, 179 Ark 877—Griffin v Union Trust Co., 266 SW 2d 289, 166 Ark 347—Pledger v Birkhead, 246 SW 510, 156 Ark 443

Fla.—Tonnelier v Tonnelier, 181 So 150, 132 Fla 194

Idaho.—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Me.—Appeal of Martin, 179 A 655, 133 Me 422—In re Loomis' Will, 174 A 38, 133 Me 81

Mich.—In re Thayer's Estate, 15 NW 2d 712, 309 Mich 473

NY.—Delafield v Parish, 25 NY 9, 1 Redf Surr 130

In re Coddington's Will, 118 NY 52d 525, 281 App Div 143, affirmed 120 NE 2d 777, 307 NY 181—In re Morrison's Will, 60 NYS 2d 546, 270 App Div 552, affirmed 69 NE 2d 814, 296 NY 652—In re Fahrenbach's Will, 25 NYS 2d 208, 261

App Div 43, affirmed 34 NE 2d 911, 285 NY 763—In re Roberts' Will, 283 NYS 50, 246 App Div 87

In re Salomon's Estate, 287 NY S 814, 159 Misc 379, affirmed 297 NYS 681, 251 App Div 740—In re Kimball's Will, 281 NYS 605, 156 Misc 338

In re Butler's Will, 132 NYS 2d 198—In re Alexieff's Will, 94 NY S 2d 32, affirmed 97 NYS 2d 532, 277 App Div 790, appeal denied 98 NYS 2d 582, 277 App Div 901—In re Hill's Will, 73 NYS 2d 258, appeal dismissed 78 NYS 2d 365, 273 App Div 901—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

NC.—In re Kemp's Will, 67 SE 2d 672, 234 NC 495

Wis.—In re Klagstad's Will, 58 NW 2d 636, 264 Wis 269—In re Williams' Will, 41 NW 2d 191, 256 Wis 338—In re Boston's Estate, 33 NW 2d 257, 253 Wis 8—In re Delmady's Will, 28 NW 2d 301, 251 Wis 98—In re Washburn's Will, 22 NW 2d 512, 248 Wis 467—In re Butler's Will, 85 NW 678, 110 Wis 70

68 C.J. p 427 note 17

Undue influence see *infra* §§ 224-261

#### Natural objects of bounty

The testator's mind must be able to apprehend without prompting who are the natural objects of his bounty.  
Or.—In re Walther's Estate, 163 P 2d 285, 177 Or 282

36. Mo.—Ahmann v Elmore, 211 SW 2d 480—Stevens v Meadows, 100 SW 2d 281, 340 Mo 252—Sayre v Trustees of Princeton University, 90 SW 787, 192 Mo 95

Higgins v Smith, 150 SW 2d 539, transferred, Mo App, see 144 SW 2d 149, 346 Mo 1044.

68 C.J. p 427 note 18

37. Ill.—Carnahan v Hamilton, 107 NE 210, 265 Ill 508, Ann Cas 1916C 21

38. Mo.—Schoenhoff v Haering, 38 SW 2d 1011, 327 Mo 837

68 C.J. p 427 note 20

Time at which capacity must exist see *supra* § 5

#### Dictation of will

Mich.—In re Thayer's Estate, 15 NW 2d 712, 309 Mich 473

39. Ind.—Potter v Emery, 26 NE 2d 554, 107 Ind App 628.

68 C.J. p 427 notes 21-22

40. NY.—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

41. Me.—Appeal of Martin, 179 A 655, 133 Me 422  
68 C.J. p 427 note 26

That testator was actuated by erroneous conclusions drawn from existing facts and circumstances does not mean that he lacked testamentary capacity

Ariz.—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

42. Ill.—Norton v Clark, 97 NE 1079, 253 Ill 557

NC.—In re Craven's Will, 86 SE 587, 169 NC 561

"A testator may forget the existence of a part of his estate, or of some one who has natural claims upon him, and yet make a will. What is required is merely that he shall have such mind as to remember the necessary facts, not that he shall remember them all"

Me.—Appeal of Martin, 179 A 655, 133 Me 422

43. Ark.—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Puryear v Puryear, 94 SW 2d 695, 192 Ark 692—Griffin v Union Trust Co., 266 SW 2d 289, 166 Ark 347.

Me.—Appeal of Martin, 179 A 655, 133 Me 422

NY.—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

68 C.J. p 428 note 28

#### Nature and extent of property

To establish testamentary capacity, proponent of will need not show that testator actually had in mind all details concerning his property when he made will, but only that he had capacity to know and comprehend nature and extent of such property

Ark.—Yarbrough v Moses, 267 SW 2d 289, 223 Ark 489

#### Objects of bounty

To make a valid will testator need not actually know or recall the natural objects of his bounty but he must have the capacity to know it

Ill.—George v Moorhead, 78 NE 2d 216, 399 Ill 497—Challiner v Smith, 71 NE 2d 324, 396 Ill 106

Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 NE 2d 144, 340 Ill App 64.

The testator must be able to understand the nature and situation of his property,<sup>44</sup> its character and value,<sup>45</sup> or the approximate amount and extent thereof,<sup>46</sup> but he need not know the exact extent or value of his property,<sup>47</sup> and even though he may be wholly mistaken, he is not necessarily incompetent,<sup>48</sup> nor need he be able to recall to mind the names of his various creditors, with the amount owed each.<sup>49</sup>

He need not make, or have capacity to make, a wise and judicious disposition of his property,<sup>50</sup> and the fact that the disposition may be regarded as foolish or unusual will not invalidate the will as

the product of an incompetent testator,<sup>51</sup> but he must be able to choose with reason and understanding between one disposition and another.<sup>52</sup>

The absence of one or more of the requisites for testamentary capacity renders the testator incompetent,<sup>53</sup> and the will invalid,<sup>54</sup> subject to being set aside, although intestacy results.<sup>55</sup>

*Law at time of execution* The matter of the testator's capacity is determinable according to the law as it exists at the time of the execution of the instrument.<sup>56</sup>

*Understanding of legal terms.* That the testator understand and comprehend the technical meaning

44. Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711

#### **Rational survey**

To make a man competent to take a rational survey of his estate, he must be able to know its character and value

Ky—Bottom v Bottom, 106 SW 216, 32 Ky L 494

45. Ky—Stewart v Douglas, 29 SW 2d 637, 235 Ky 121

46. NY—In re Lynn's Estate, 26 N Y S 2d 96, 261 App Div 513, affirmed In re Lynn's Will, 39 NE 2d 266, 287 NY 627

47. Ky—Teegarden v Webster, 199 SW 2d 728, 304 Ky 18

Me—Appeal of Martin, 179 A 655, 133 Me 422

68 C J p 428 note 34

**Actual knowledge of all the property** one has is not essential to the making of a valid will

Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

#### **Items and value**

(1) The testator need not be able, at the instant, to recall to mind the various items that compose his estate

Mo—Winn v Matthews, 137 SW 2d 632, 235 Mo App 337

(2) Testator's capacity requires that he know his property and the objects of bounty, but it is not necessary that he know every item of his property or the value of his estate, and it is sufficient if he knows of what his property consists and the persons to whom he desires to give it

W Va—Prichard v Prichard, 65 SE 2d 65, 135 W Va 767

48. Kan—Holmes v Campbell College, 125 P 25, 87 Kan 597, 41 L R A, NS, 1126, Ann Cas 1914A 475

49. Mo—Winn v Matthews, 137 SW 2d 632, 235 Mo App 337

50. Tenn—Hammond v. Union Planters Nat Bank, 222 SW 2d 377, 189 Tenn 93.

Wis—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Butler's Will, 85 NW 678, 110 Wis 70

68 C J p 428 note 29

Manner of disposition generally see infra § 132

51. SD—Irwin v Lattin, 135 NW 759, 29 SD 1, Ann Cas 1914C 1044

68 C J p 428 note 30

Admissibility of evidence as to unjust or unnatural disposition see infra § 44

Unjust disposition generally see infra § 132

Weight and sufficiency of evidence as to mode of disposition see infra § 62

52. Ohio—Phillips v Board of Education, 21 Ohio App 194

53. Neb—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270

NC—In re Kemp's Will, 67 SE 2d 672, 234 NC 495

Pa—In re Morgan's Estate, 22 A 2d 87, 146 Pa Super 79

68 C J p 427 note 23

#### **Uses and meaning of property**

If a person has so lost touch with reality as to be unable to understand true uses and meaning of property, such person lacks one essential quality constituting testamentary capacity; there remains no true understanding of the extent of the estate

NM—In re Armijo's Will, 261 P 2d 833, 57 NM 649

#### **Full knowledge of estate and kindred**

Adult, who had mental developments, habits, and intellectual attainments of a child of about five years, and who, according to psychiatrist, had a general knowledge of what property he possessed and his next of kin, but not a full knowledge of his estate and kindred, did not have testamentary capacity

Pa—In re Glesenkamp's Estate, 107 A 2d 731, 378 Pa 635

#### **Inability to remember natural objects of bounty**

(1) Ability of testatrix to comprehend her property interests, determine what disposition she desires to

make of such property, and fully understand and intend to make disposition which she makes of her property is not sufficient, in absence of ability to remember who are the natural objects of her bounty

Colo—Cunningham v Stender, 255 P 2d 977, 127 Colo 293

(2) Where will made provision for testator's wife, daughter, and granddaughter, the fact that ultimate gift was to his nephews and nieces did not establish that he did not know the objects of his bounty, and thereby indicate that he did not have testamentary capacity

Kan—In re Gereke's Estate, 195 P 2d 323, 165 Kan 249

#### **Testatrix' failure to transact business**

(1) Fact that testatrix did not transact her own business would not of itself show mental incapacity, since it is quite a common occurrence for women to leave their business affairs to trusted relatives

Ky—Teegarden v Webster, 199 SW 2d 728, 304 Ky 18

(2) Capacity to transact business see infra subdivision d (3) of this section

54. Colo—Cunningham v Stender, 255 P 2d 977, 127 Colo 293

Kan—In re Gereke's Estate, 195 P 2d 323, 165 Kan 249

Ky—Teegarden v Webster, 199 SW 2d 728, 304 Ky 18

Neb—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270

NM—In re Armijo's Will, 261 P 2d 833, 57 NM 649

NC—In re Kemp's Will, 67 SE 2d 672, 234 NC 495

Pa—In re Glesenkamp's Estate, 107 A 2d 731, 378 Pa 635

In re Morgan's Estate, 22 A 2d 87, 146 Pa Super 79

68 C J p 427 note 24

55. Iowa—In re Crissick's Will, 156 NW 415, 174 Iowa 397

56. Pa—Farmers Trust Co v Wilson, 63 A 2d 14, 361 Pa 43—In re Quinn's Estate, 22 A 965, 144 Pa. 444.



of all legal terms used in the will is not necessary for testamentary capacity <sup>57</sup>

*Legal effect of provisions* A testator is not required to know the precise legal effect of every provision in his will <sup>58</sup>

#### d. Standards or Tests of Capacity

- (1) In general
- (2) Size of estate or complexity of will
- (3) Capacity to contract, transact business, etc
- (4) Statutory requirements

##### (1) In General

No particular degree of mentality constitutes a standard for testamentary capacity, so that its existence must be determined largely from the facts and circumstances of each case. A high order of intelligence, or an absolutely sound mind in all respects, is not required,

nor does mental weakness in itself disqualify a testator; but one may lack testamentary capacity without being insane.

It is futile to attempt to select an arbitrary test or formula of mental capacity by which to measure testamentary capacity,<sup>59</sup> there is no rule by which it may be determined with precision where capacity ends and incapacity begins.<sup>60</sup> It is not medical soundness of mind that governs, but testamentary capacity as legally defined,<sup>61</sup> and not every departure from the normal will destroy an otherwise valid testamentary act.<sup>62</sup>

Other than the requirement that the testator have mind sufficient to know and understand certain facts prescribed as essential, as discussed supra subdivisions a, b, and c of this section, there is no particular degree of mentality constituting a standard for testamentary capacity,<sup>63</sup> so that the existence

57 Mass—Dunham v Holmes, 113 NE 845, 225 Mass 68  
68 C.J. p 429 note 44

58 Me—Appeal of Martin, 179 A 655, 133 Me 422

59 Wash—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

"There is nothing approaching unanimity upon the degree of mental disorder which is required to produce testamentary incapacity"

Ky—Perkins' Guardian v Bell, 172 SW 2d 617, 622, 294 Ky 767

60 Okl—In re Thompson's Estate, 261 P 2d 577—Brummett v King, 251 P 2d 1062, 207 Okl 607—Duckwall v Lawson, 172 P 2d 615, 197 Okl 472—Slater v Phipps, 143 P 2d 133, 93 Okl 267

"It is difficult to devise a standard to measure [testamentary capacity] which will serve as a real guide to the fact trier"

Ky—Perkins' Guardian v Bell, 172 SW 2d 617, 622, 294 Ky 767

"No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases"

Idaho—In re Heazle's Estate, 257 P 2d 556, 558, 74 Idaho 72

#### Degree of soundness or unsoundness

(1) The question of soundness is one of degree

Me—Appeal of Martin, 179 A 655, 133 Me 422

(2) The law does not undertake to test the intelligence and define the exact quality of mind which a testator must possess; soundness is a matter of degree

Me—In re Loomis' Will, 174 A 38, 133 Me 81

(3) The law of wills recognizes degrees of mental unsoundness, not all of which are sufficient to destroy testamentary capacity.

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95

(4) Not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity

Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216

#### Abilities not required

A testator does not have to be a literarian, a financial genius, an athlete, or an expert cook in order to qualify as possessing capacity

Wash—In re Wiltzius' Estate, 253 P 2d 954, 42 Wash 2d 149—In re Bottger's Estate, 129 P 2d 518, 523, 14 Wash 2d 676

61. Neb—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Woodward's Estate, 23 N W 2d 75, 147 Neb 270—In re Inda's Estate, 19 N W 2d 37, 146 Neb 179—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Frazier's Estate, 267 N W 181, 131 Neb 61

"One may lack mental capacity to such an extent that according to medical science he is not of sound mind and memory, and nevertheless retain the mental capacity to execute a will"

N Y—In re Graham's Estate, 63 N Y S 2d 572, 573

"The requirements of mental soundness in the legal sense, so as to constitute testamentary capacity, are not as rigid as those in a medical sense. A mind legally sound may be medically unsound"

Wyo—In re Johnston's Estate, 181 P 2d 611, 617, 63 Wyo 332

The word "sanity," in this connection, is used in its legal, and not in its medical, sense

Me—In re Haley's Estate, 84 A 2d 808, 14 Me 173—In re Chandler's Will, 66 A 215, 102 Me. 72.

62 Cal—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420

#### Not every mental departure

Cal—In re Perkins' Estate, 235 P 45, 195 Cal 699

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

Some mental impairment can occur and still leave the testatrix with a sound mind within the definition of testamentary capacity

Conn—Doolittle v Upson, 88 A 2d 334, 138 Conn 642

Not every discomposure of the mind will render one incapable of making a will, it must be such a discomposure, such a derangement, as to deprive one of the rational faculties common to man

N J—In re Delaney's Estate, 25 A 2d 901, 131 N J Eq 454

63. Wash—Corpus Juris quoted in In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash 257  
68 C.J. p 429 note 53

No particular degree of acumen will serve as the standard for testamentary capacity

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Murray's Estate, 144 P 2d 1016, 173 Or 209—In re Johnson's Estate, 91 P 2d 330, 162 Or 97—In re Riggs' Estate, 250 P 753, 120 Or 38

#### Test in suit for appointment of guardian

The test of mental capacity applied in suit for appointment of guardian should also be applied in those to avoid wills

Minn—Farrish v Peoples, 9 N.W 2d 225, 214 Minn 589.



of capacity must be determined largely from the facts and circumstances of each particular case <sup>64</sup>

It is not necessary that the testator possess a high order of intelligence,<sup>65</sup> or a perfect intelligence,<sup>66</sup>

a high degree of mentality,<sup>67</sup> the highest qualities of mind,<sup>68</sup> extraordinary mental capacity,<sup>69</sup> the greatest mental strength,<sup>70</sup> or an absolutely sound mind in all respects,<sup>71</sup> or a "sound mind" in the

64. Ariz.—In re Westfall's Estate, 245 P 2d 951, 74 Ariz 181

Idaho.—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Okl.—In re Thompson's Estate, 261 P 2d 577—Brummett v King, 251 P 2d 1062, 207 Okl 607—King v Gibson, 249 P 2d 84, 207 Okl 251—American Red Cross v Gumberts, 247 P 2d 735, 207 Okl 96—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—Duckwall v Lawson, 172 P 2d 415, 197 Okl 472—Slater v Phipps, 143 P 2d 133, 93 Okl 267

Iowa.—Gregory v Proffit, 31 NW 2d 899, 239 Iowa 463

Or.—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Johnson's Estate, 91 P 2d 330, 162 Or 97—In re Riggs' Estate, 250 P 753, 120 Or 38

Wash.—Corpus Juris quoted in In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash 257

68 C J p 429 note 54

Testamentary capacity as question of fact see infra § 462

"There is no uniform rule capable of application apart from the facts of each particular case"

Wash.—In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash 257

"There can be no safer rule than that the competency of the mind should be judged by the thing to be done on a consideration of all the circumstances of the case"

Me.—Appeal of Martin, 179 A 655, 659, 133 Me 422

Testator's external acts and appearances

(1) Whether a testator had sufficient mental capacity is determined by a consideration of his external acts and appearances

Md.—Sellers v Qualls, 110 A 2d 73

(2) The soundness of testator's mind is not tested alone by his appearance at one particular moment

Wyo.—Branson v Roelofsz, 70 P 2d 589, 52 Wyo 101

Failure to exhaust subject of conversation does not establish lack of testamentary capacity

Mich.—In re Grow's Estate, 299 N W 836, 299 Mich 133—In re Murray's Estate, 188 NW 381, 219 Mich 70—Leffingwell v Bettinghouse, 115 NW 731, 151 Mich 513

Requiring a repetition of information does not establish incompetency

Tex.—Garcia v Galindo, Civ App, 199 SW 2d 488, reversed on other grounds 199 SW 2d 499, 145 Tex 507—McCannon v McCannon, Civ App, 2 SW 2d 942

Bequest to dead relative

Fact that testatrix made a bequest

to a cousin who had died thirty years ago would not alone establish testamentary incapacity, although it was a material circumstance to be considered in judging her capacity

Fla.—Miller v Flowers, 27 So 2d 667, 158 Fla 51

Use of words "friends and relations" held not, in particular context, to raise any inference of testamentary incapacity

Mo.—Adams v Simpson, 213 SW 2d 908, 358 Mo 168

65. Wash.—Corpus Juris quoted in In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash 257

68 C J p 429 note 55

Capacity of illiterates see infra § 16

The test is not whether the testator was of a high order of intelligence, but whether he knew what he was doing with his property and whether he performed the act of his own free volition, and because he desired to do so

Tex.—Jowers v Smith, Civ App, 237 SW 2d 805—Bell v Bell, Civ App, 237 SW 2d 688—Green v Dickson, Civ App, 208 SW 2d 119, refused no reversible error—Salinas v Garcia, Civ App, 135 SW 588

Subnormal or abnormal persons

(1) Persons distinctly subnormal or abnormal mentally may be competent to make wills

Ky.—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767.

(2) The cases are legion in which wills of persons distinctly subnormal or abnormal have been sustained

Ky.—Greer's Ex'r v Bishop, 96 SW 2d 851, 265 Ky 352

(3) Abnormality, whether it is pronounced eccentricity or extraordinary intellectuality, does not show lack of testamentary capacity

Ky.—Clark v Johnson, 105 SW 2d 576, 263 Ky 591

(4) Eccentricity generally see infra § 22

66 Ky.—Slusher v Blanton, 177 S W 2d 378, 296 Ky 422—Greer's Ex'r v Bishop, 96 SW 2d 851, 265 Ky 352

67. N.Y.—In re Whitmarsh's Estate, 234 NYS 505, 133 Misc 858

In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Or.—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Provolt's Estate, 151 P 2d 736, 175 Or 128

Freedom from undue influence

(1) A high degree of mentality is not required to make a valid will in the event that it is found to be free from undue influence.

Neb.—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re Bose's Estate, 285 NW 319, 136 Neb 156—In re Frazier's Estate, 267 NW 181, 131 Neb 61

(2) Undue influence generally see infra §§ 224–261

68. N.J.—Den v Vancleve, 5 N.J. Law 589

W.Va.—Ritz v Kingdon, 79 SE 2d 123—Nicholas v. Kershner, 20 W Va. 251

69. Md.—Sellers v Qualls, 110 A 2d 73—Mecutchen v Gignous, 132 A 425, 150 Md 79

70. Me.—In re Loomis' Will, 174 A 38, 133 Me 81.

71. Ill.—Powell v Weld, 101 NE 2d 581, 410 Ill 198—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219—Langwisch v Langwisch, 198 N E 675, 361 Ill 632

In re Rutledge's Will, 125 NE 2d 683, 5 Ill App 2d 355—Wilson v Bell, 43 NE 2d 162, 315 Ill App 418

Iowa.—In re Heller's Estate, 11 N W 2d 586, 233 Iowa 1356

Me.—Appeal of Martin, 179 A 655, 133 Me 422

Pa.—In re Gray's Estate, Orph, 12 Fay LJ 175

Wash.—Corpus Juris quoted in In re Larsen's Estate, 71 P 2d 47, 49, 191 Wash 257

68 C J p 429 note 56

"Absolute soundness of mind [is not] the real test of testamentary capacity"

Kan.—In re Hall's Estate, 195 P 2d 612, 615, 165 Kan 465—In re Crump's Estate, 166 P 2d 684, 687, 161 Kan 154

"Testamentary capacity does not necessarily imply a mind wholly unimpaired"

Ala.—Wilson v Payton, 37 So 2d 499, 500, 251 Ala 411—Bulger v. Ross, 12 So 803, 804, 98 Ala 267.

Unsound mind and memory to some extent

A person may be of unsound mind and memory to some extent, but still be capable of making a will

Ill.—Challiner v Smith, 71 NE 2d 324, 396 Ill 106

Wilson v Bell, 43 NE 2d 162, 315 Ill App 418

Full use of mental faculties

A person not having full use of his mental faculties may have ample mental capacity to make a will

Ky.—Nugent v Nugent's Ex'r, 135 SW 2d 877, 281 Ky 263.

broadest sense of the term<sup>72</sup> The expression "sound mind" does not mean a perfectly balanced mind.<sup>73</sup>

Mere weakness of understanding<sup>74</sup> or of mental

power,<sup>75</sup> mental unsoundness,<sup>76</sup> mental confusion,<sup>77</sup> failing mind,<sup>78</sup> impaired intellect,<sup>79</sup> lack of a keen mind,<sup>80</sup> weakening judgment,<sup>81</sup> mental or intellectual feebleness, or weakness of mind,<sup>82</sup> or distress

**Mental disease** does not in itself disqualify a testator

NJ—In re Lucas' Will, 1 A.2d 929, 124 N.J. Eq. 347

**Mental disturbance** may or may not reach the stage where one loses his capacity to make a valid will  
Ill—Logsdon v Logsdon, 104 N.E. 2d 622, 412 Ill. 19

72. Tex—Reiche v Williams, Civ App, 183 S.W.2d 587, error refused, 185 S.W.2d 420, 143 Tex. 365—McCannon v McCannon, Civ App, 2 S.W.2d 942

73. Me—Appeal of Martin, 179 A. 655, 133 Me. 422—In re Loomis' Will, 174 A. 38, 133 Me. 81

#### "Distorted mind"

The ability to make a will does not depend on whether the testator has "a distorted mind"

Miss—Wallace v Harrison, 65 So. 2d 456, 218 Miss. 153

74. Va—Ferguson v Ferguson, 192 S.E. 774, 169 Va. 77

W Va—Ritz v Kingdon, 79 S.E.2d 123—Nicholas v Kershner, 20 W. Va. 251

75. Ky—Sloan v Sloan, 197 S.W. 2d 77, 303 Ky. 180—Kentucky Trust Co v Gore, 192 S.W.2d 749, 302 Ky. 1—Perkins' Guardian v Bell, 172 S.W.2d 617, 294 Ky. 767—McCrocklin's Adm'r v Lee, 56 S.W. 2d 564, 247 Ky. 31

**No mere impairment** of mental powers, as long as testator retains mind and comprehension sufficient to meet test of mental capacity to execute a will, will render his will invalid

Iowa—In re Ransom's Estate, 57 N.W.2d 89, 244 Iowa 343—In re Rogers' Estate, 47 N.W.2d 818, 242 Iowa 627

#### Weakening or deterioration of powers

(1) The mere weakening of mental powers or impairment of the faculties will not invalidate a will  
Iowa—In re Hollis' Estate, 12 N.W.2d 576, 234 Iowa 761—In re Heller's Estate, 11 N.W.2d 586, 233 Iowa 1356—In re Sniff's Estate, 10 N.W.2d 550, 233 Iowa 800

SC—Moorer v. Bull, 46 S.E.2d 681, 212 S.C. 146.

(2) Mere deterioration in mental powers does not destroy testamentary capacity until the mental decline reaches such stage that the person is unable intelligently to comprehend the estate of which he is possessed and the natural objects of his bounty, and intelligently to

exercise judgment and discretion in the disposition of his property

Iowa—In re Behrend's Will, 290 N.W. 78, 227 Iowa 1099

#### Failure to recognize person

(1) Fact that testator failed to recognize some one, does not necessarily indicate a failure of mental power necessary to execute a will  
Ill—Logsdon v Logsdon, 104 N.E. 2d 622, 412 Ill. 19

(2) Failure in connection with old age see *infra* § 27

76. Ky—Madden v Cornett, 160 S.W.2d 607, 290 Ky. 268

77. Cal—In re Ridgway's Estate, 206 P.2d 892, 92 Cal.App.2d 325—In re Selb's Estate, 190 P.2d 277, 84 Cal.App.2d 46

78. Tenn—American Trust & Banking Co v Williams, 225 S.W.2d 79, 32 Tenn.App. 592—Rogers v Hickam, 208 S.W.2d 34, 30 Tenn.App. 504—Melody v Hamblin, 115 S.W.2d 237, 21 Tenn.App. 687—Fitch v American Trust Co., 4 Tenn.App. 87

79. Ill—In re Weedman's Estate, 98 N.E. 956, 254 Ill. 504

Va—Tate v Chumbley, 57 S.E.2d 151, 190 Va. 480—Gilmer v Brown, 44 S.E.2d 16, 186 Va. 630

#### Impairment of mental faculties

Wills have been sustained repeatedly in which the person executing the will had considerable impairment of mental faculties

NJ—In re Herrman's Estate, 3 A.2d 148, 124 N.J. Eq. 542

80. Utah—In re Buttars' Estate, 261 P.2d 171

81. Tenn—Rogers v Hickam, 208 S.W.2d 34, 30 Tenn.App. 504—Melody v Hamblin, 115 S.W.2d 237, 21 Tenn.App. 687—Fitch v American Trust Co., 4 Tenn.App. 87

82. Ala—King v Aird, 38 So.2d 883, 251 Ala. 613—Cox v Martin, 34 So.2d 463, 250 Ala. 401—Wilson v Payton, 37 So. 499, 251 Ala. 411—Bulger v Ross, 12 So. 803, 98 Ala. 267.

Ark—Ehrte v Brookhyser, 244 S.W.2d 625, 219 Ark. 676—Walsh v Fairhead, 219 S.W.2d 941, 215 Ark. 218—Petree v Petree, 201 S.W.2d 1009, 211 Ark. 654—Inman v McEachin, 184 S.W.2d 949, 208 Ark. 102—Brown v Emerson, 170 S.W.2d 1019, 205 Ark. 735—McKindley v Humphrey, 161 S.W.2d 962, 204 Ark. 333—McWilliams v Neill, 155 S.W.2d 344, 202 Ark. 1087—Pernot v King, 110 S.W.2d 539, 194 Ark. 896—Purvey v. Pur-

year, 94 S.W.2d 695, 192 Ark. 692—Pledger v Birkhead, 246 S.W. 510, 156 Ark. 443

Cal—In re Miller's Estate, 60 P.2d 498, 16 Cal.App.2d 154

Ind—Noyer v Ecker, App., 119 N.E.2d 902

Kan—In re Davis' Estate, 259 P.2d 211, 175 Kan. 107—Smith's Estate v Davis, 212 P.2d 322, 168 Kan. 210—In re Hall's Estate, 195 P.2d 612, 165 Kan. 465

Mich—In re Sprenger's Estate, 60 N.W.2d 436, 337 Mich. 514—In re Paquin's Estate, 43 N.W.2d 858, 328 Mich. 293—In re Nickel's Estate, 32 N.W.2d 733, 321 Mich. 519—In re Getchell's Estate, 295 N.W. 360, 295 Mich. 681—In re Rowling's Estate, 289 N.W. 136, 291 Mich. 218

NJ—Den v Vancleve, 5 N.J. Law 589

N.Y.—In re Pratt's Estate, 274 N.Y.S. 417, 152 Misc. 560, affirmed In re Pratt's Will, 283 N.Y.S. 1023, 246 App. Div. 576

Pa—In re Nute, Comp. Pl., 33 Del. Co. 277

Wash—Corpus Juris quoted in In re Larsen's Estate, 71 P.2d 47, 49, 191 Wash. 257

W Va—Ritz v Kingdon, 79 S.E.2d 123—Nicholas v Kershner, 20 W. Va. 251

68 C.J. p. 430 note 57

"Mental weakness is not inconsistent with testamentary incapacity"

Ill—In re Weedman's Estate, 98 N.E. 956, 957, 254 Ill. 504

Va—Gilmer v Brown, 44 S.E.2d 16, 19, 186 Va. 630

"The mind may be sound, although the understanding or mental capacity may be weak"

Tenn—Fitch v American Trust Co., 4 Tenn.App. 87, 94

#### Partial eclipse of the mind

Ark—Yarbrough v Moses, 267 S.W.2d 289, 223 Ark. 489—Toombs v Blankenship, 221 S.W.2d 417, 215 Ark. 551—Blake v Simpson, 215 S.W.2d 287, 214 Ark. 263—Griffin v Union Trust Co., 266 S.W. 289, 166 Ark. 347

#### Partial mental debility

Idaho—In re Heazle's Estate, 257 P.2d 556, 74 Idaho 72.

#### Weakness with partial mental failure

Intellectual weakness with partial failure of mind and memory is not solely an indication of inability to make a will

Me—In re Loomis' Will, 174 A. 38, 133 Me. 81.

of mind<sup>83</sup> does not disqualify a person to make a will, unless it is so great as to render the testator unable to appreciate the nature or consequences of his act,<sup>84</sup> or to act intelligently and voluntarily with respect to the transaction,<sup>85</sup> and provided it appears that the testator's mind was capable of attention and exertion when aroused and was not imposed on.<sup>86</sup> As to the quantum of mentality, the weak have the same rights as the prudent and strong-minded to dispose of their property by will.<sup>87</sup> However, mental weakness is a circumstance to be considered together with all other facts surrounding the execution of a will in determining the testator's testamentary capacity.<sup>88</sup>

The mental capacity requisite for making a will is very<sup>89</sup> low,<sup>90</sup> the right of testamentary disposition may be exercised by a person of very<sup>91</sup> moderate mental capacity,<sup>92</sup> or of slight mental ca-

capacity<sup>93</sup>

Sanity is not necessarily synonymous with capacity to make a testamentary disposition,<sup>94</sup> perfect sanity is not a prerequisite of testamentary capacity,<sup>95</sup> and complete sanity, in a medical sense, is not essential, provided that the power to think rationally exists when the individual's will to act is exercised.<sup>96</sup> A person may be lacking in testamentary capacity and yet not be insane,<sup>97</sup> although it has been held that anything less than a total absence of mind does not destroy that capacity.<sup>98</sup>

In some cases, the fact that a person is *compos mentis* has been stated as an equivalent to his possession of a sound and disposing mind,<sup>99</sup> but the fact that a person is *compos mentis* would alone be misleading as a test of his capacity to make a will.<sup>1</sup>

*Correct reasoning* A will is not to be overturned because the testator has not reasoned correctly,<sup>2</sup>

**83.** Or—In re Davis' Will, 142 P 2d 143, 172 Or 354

**84.** Ark—Walsh v Fairhead, 219 S W 2d 941, 215 Ark 218—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Inman v McEachin, 184 S W 2d 949, 208 Ark 102—Brown v Emerson, 170 S W 2d 1019, 205 Ark 735—McWilliams v Neill, 155 S W 2d 344, 202 Ark 1087—Pernot v King, 110 S W 2d 539, 194 Ark 896—Purvey v Puryear, 94 S W 2d 695, 192 Ark 692—Phillips v Jones, 18 S W 2d 352, 179 Ark 877

#### Inability to remember property or objects of bounty

To invalidate will on ground of testator's mental incompetency, his loss of mentality must be so complete that he can no longer remember his property or objects of his bounty

Cal—In re Becker's Estate, 220 P 2d 766, 98 Cal App 2d 574

**An unsound mind irrespective of extent** is not sufficient to render one incapable of executing a valid will  
Mo—Callaway v Blankenbaker, 141 S W 2d 810, 346 Mo 383

**85.** Ala—King v Aird, 38 So 2d 883, 251 Ala 613—Cox v Martin, 34 So 2d 463, 250 Ala 401

**86.** Mich—In re Paquin's Estate, 43 N W 2d 858, 328 Mich 293—In re Nickel's Estate, 32 N W 2d 733, 321 Mich 519—In re Getchell's Estate, 295 N W 360, 295 Mich 681—In re Rowling's Estate, 289 N W 136, 291 Mich 218

**87.** Ga—Beman v Stembridge, 85 S E 2d 434, 211 Ga 274—Anderson v Anderson, 80 S E 2d 807, 210 Ga 464—Griffin v Barrett, 187 S E 828, 183 Ga 152

Mich—In re Getchell's Estate, 295 N W 360, 295 Mich 681

68 C J p 430 note 57 [a] (1)  
**88.** Cal—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154  
Tenn—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687

**89.** N J—In re Herrman's Estate, 3 A 2d 148, 124 N J Eq 542—In re Lucas' Will, 1 A 2d 929, 124 N J Eq 347—In re McComb, 177 A 849, 118 N J Eq 119—In re Halton's Estate, 161 A 809, 111 N J Eq 143—In re Wilson's Will, 153 A 107, 107 N J Eq 604, affirmed 158 A 342, 110 N J Eq 68

**90.** N J—In re Heim's Estate, 39 A 2d 248, 22 N J Misc 241, reversed on other grounds 40 A 2d 651, 136 N J Eq 138

**91.** N J—In re Lucas' Will, 1 A 2d 929, 124 N J Eq 347—In re Triebe's Will, 168 A 404, 114 N J Eq 227—In re Hanes's Estate, 130 A 655, 98 N J Eq 645

In re Loori's Will, 28 A 2d 281, 20 N J Misc 376, affirmed 28 A 2d 288, 132 N J Eq 316

**92.** N J—In re Livingston's Will, 73 A 2d 916, 5 N J 65  
In re Heim's Will, 40 A 2d 651, 136 N J Eq 138

#### Mentality of child of twelve

(1) An old man with the mentality of a normal child of twelve may have the mentality required to execute a will

Ga—Leventhal v Baumgartner, 61 S E 2d 810, 207 Ga 412

(2) Old age generally see *infra* § 27

#### Absence of fraud or imposition

Pa—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58

**93.** N J—In re Wilson's Will, 153

A 107, 107 N J Eq 604, affirmed 158 A 342, 110 N J Eq 68

**94.** N D—Stormon v Weiss, 65 N W 2d 475  
Insanity see *infra* § 17

**95.** Ky—Perkins' Guardian v Bell, 172 S W 2d 617, 294 Ky 767

**96.** Ark—Thiel v Mobley, 265 S W 2d 507, 223 Ark 167—Scott v Dodson, 214 S W 2d 357, 214 Ark 1  
Pa—In re Gray's Estate, Orph, 12 Fay L J 175

**97.** Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

Okl—Duckwall v Lawson, 172 P 2d 415, 197 Okl 472  
68 C J p 430 note 58

#### Commitment to asylum

(1) A man may be without testamentary capacity, although not a proper subject for commitment to state asylum for insane  
Wash—In re Landgren's Estate, 63 P 2d 438, 189 Wash 33

(2) Adjudication as to insanity see *supra* § 20

**98.** Ga—Beman v Stembridge, 85 S E 2d 434, 211 Ga 274—Griffin v Barrett, 187 S E 828, 183 Ga 152

**99.** Ky—In re Howard's Will, 5 T B Mon 199, 17 Am D 60  
68 C J p 430 note 59

**1.** N Y—Townsend v. Bogart, 5 Redf Surr 93  
Absence of legal disabilities see *supra* §§ 6-14

**2.** Ill—Owen v. Crumbaugh, 81 N E 1044, 228 Ill 380, 119 Am S R 442, 10 Ann Cas 606

Jorn v Tallett, 93 N E 2d 82, 341 Ill App 240

Mich—In re Solomon's Estate, 53 N W 2d 597, 334 Mich 17—In re Barlum's Estate, 215 N. W. 299, 240 Mich 393.

testamentary capacity, and the validity of wills, do not depend on the testator's ability to reason logically<sup>3</sup>

*Lack of strict coherence in conversation* does not render a person incapable of executing a valid will<sup>4</sup>

## (2) Size of Estate or Complexity of Will

Authorities differ as to whether a person may have capacity to dispose of a small, but not of a large, estate, or to make a simple, but not a complicated, will

It has been held that testamentary capacity does not vary with the size of the estate or the character of the disposition,<sup>5</sup> and that if a person has testamentary capacity at all, he may make any will, however complicated,<sup>6</sup> but there is other authority that one may be competent to dispose of a small estate, although incompetent to dispose of a large estate,<sup>7</sup> and may have capacity to make a simple will, al-

though unable to make a complicated or elaborate one<sup>8</sup>

## (3) Capacity to Contract, Transact Business, Etc.

Under most authorities, less mental capacity is required for making a will than for carrying on business transactions generally, or for making a contract or deed, and one who has sufficient mental capacity to transact ordinary business is competent to make a will.

The ability to transact business is not the, or a, true test of testamentary capacity,<sup>9</sup> and the ability to transact important business,<sup>10</sup> or even ordinary business,<sup>11</sup> or to carry on difficult negotiations,<sup>12</sup> is not the legal standard of testamentary capacity. So, it is generally held that less mental capacity is required for the testator to make a will than to carry on business transactions generally,<sup>13</sup> or ordinary

Mo—Fulton v Freeland, 118 SW 12, 219 Mo 494, 131 Am SR 576  
NJ—In re Thomson's Will, 66 A 2d 540, 4 NJ Super 150

Middleditch v Williams, 17 A 826, 45 NJ Eq 726, 4 LRA 738, reversed on other grounds 21 A 200, 47 NJ Eq 585

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95—In re Hansen's Will, 177 P 982, 52 Utah 554

Wis—In re Bickner's Estate, 49 N W 2d 404, 259 Wis 425

3 Ariz—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Perkins' Estate, 235 P 45, 195 Cal 699

NY—In re White's Will, 24 NE 935, 121 NY 406

In re Hargrove's Will, 28 NYS 2d 571, 262 App Div 202, appeal granted 30 NYS 2d 810, 262 App Div 994, affirmed 42 NE 2d 608, 288 NY 604

In re Jerrell's Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

4 Ky—Tye v Tye, 229 SW 2d 973, 312 Ky 812—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1

### Reasonable extent

Lack of strict coherence in conversation to a reasonable extent is not evidence of mental derangement or lack of mental capacity  
Ky.—Compton v. Smith, 150 SW 2d 657, 286 Ky 179

5. SC—Matheson v Matheson, 118 SE 312, 125 SC 165

6. NY.—Delafield v. Parish, 25 NY 9  
68 CJ p 430 note 62.

7. Minn.—In re Holmstrom's Es-

tate, 292 NW 622, 208 Minn 19  
—Hammond v Dike, 44 NW 61, 42 Minn 273, 18 Am SR 503  
68 CJ p 430 note 63

8. Minn.—In re Holmstrom's Estate, 292 NW 622, 208 Minn 19—Hammond v Dike, 44 NW 61, 42 Minn 273, 18 Am SR 503  
68 CJ p 430 note 64

9. Okl.—In re Wadsworth's Estate, 273 P 2d 997—Duckwall v Lawson, 172 P 2d 415, 197 Okl 472—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389

68 CJ p 432 note 74

Admissibility of evidence as to transaction of business see infra § 51

Weight and sufficiency of evidence as to transaction of business see infra § 71

### Ordinary business

Ill—De Marco v McGill, 83 NE 2d 313, 402 Ill 46

### Intricate business transactions

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368—In re Hall's Estate, 195 P 2d 612, 165 Kan 465  
—Kunkle v Urbansky, 109 P 2d 71, 153 Kan 117

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95

10 Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Sexton's Estate, 251 P 778, 199 Cal 759—In re Holloway's Estate, 235 P 1012, 195 Cal 711

In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553

Admissibility of evidence as to transaction of business see infra § 51

11 Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Sexton's Estate, 251 P 778, 199 Cal 759—In re Holloway's Estate, 235 P 1012, 195 Cal 711

In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553

Higher standard than law requires  
Ill—De Marco v McGill, 83 NE 2d 313, 402 Ill 46

12. Iowa—In re Hayer's Estate, 299 NW 431, 230 Iowa 880—Bishop v Scharf, 241 NW 3, 214 Iowa 644

13. Conn—Doolittle v Upson, 88 A 2d 334, 138 Conn 642

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Iowa—In re Ruedy's Estate, 66 N W 2d 387, 245 Iowa 1307—In re Van Dyke's Estate, 65 N W 2d 63, 245 Iowa 942—In re Hollis' Estate, 12 N W 2d 576, 234 Iowa 761—In re Snift's Estate, 10 N W 2d 550, 233 Iowa 800—In re Hayer's Estate, 299 NW 431, 230 Iowa 880  
—Walters v Heaton, 271 NW 310, 223 Iowa 405

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

Ky—Teegarden v Webster, 199 S W 2d 728, 304 Ky 18—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767

Pa—In re Conway's Estate, 79 A. 2d 208, 366 Pa 641

In re Rife's Will, Orph, 59 York Leg Rec 169

Tenn—*Corpus Juris* quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 374, 27 Tenn App 342

68 CJ p 430 note 65

### Business transactions of more exacting nature

Minn—In re Holmstrom's Estate, 292 NW 622, 208 Minn 19—Hammond v Dike, 44 NW 61, 42 Minn 273, 18 Am SR 503

### Difficult negotiations

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95

business, or ordinary business affairs,<sup>14</sup> manage his estate,<sup>15</sup> or make, execute, or enter into, a contract,<sup>16</sup> deed,<sup>17</sup> or any other legal instrument,<sup>18</sup> or other bilateral engagement,<sup>19</sup> or a gift<sup>20</sup>

On the other hand, it has been held that no

greater capacity is required to make a will than a gift,<sup>21</sup> and that the testator must have the ability to execute a valid deed or contract,<sup>22</sup> so, it has been held that contractual capacity and testamentary capacity are the same,<sup>23</sup> and that the rules governing capacity to execute and deliver a deed are, in

**Rule recognized by statute**

Me.—Appeal of Eastman, 194 A 586, 135 Me. 233

**Ability to transact some business**  
is not essential to testamentary capacity

Iowa—In re Grange's Estate, 2 NW 2d 635, 231 Iowa 964

14. Ill.—In re Weedman's Estate, 98 NE 956, 254 Ill 504

Pa.—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—Gressel v Bailey, 70 A 2d 298, 363 Pa 614—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75—In re Olshefsky's Estate, 11 A 2d 487, 337 Pa. 420

In re Tobias' Estate, 67 Pa. Dist & Co 91—In re Prescott's Estate, 20 Pa. Dist & Co 232, 15 Erie Co 252

In re Trump's Estate, Orph. 47 Dauph Co 433—In re Rupert's Estate, Orph. 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Nelson's Estate, Orph. 66 York Leg Rec 161—In re Hochberger's Estate, Orph. 63 York Leg Rec 25—In re Miller's Estate, Orph. 35 West LJ 11—In re Davis' Estate, Orph. 28 West LJ 171

Utah—In re Buttars' Estate, 261 P 2d 171—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

Va.—Gilmer v. Brown, 44 SE 2d 16, 186 Va 630

W Va.—Ritz v Kingdon, 79 SE 2d 123—Nicholas v Kershner, 20 W. Va. 251.

**Holding to other effect**

Mo.—Lee v Ullery, 140 SW 2d 5, 346 Mo 236

15. Ill.—McGlaughlin v Pickerel, 46 NE 2d 368, 381 Ill 574

Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 374, 27 Tenn App 342—Bridges v Agee, 15 Tenn App 351—Fitch v American Trust Co., 4 Tenn App 87.

Va.—Gilmer v. Brown, 44 SE 2d 16, 186 Va 630

68 CJ p 431 note 66

Weight and sufficiency of evidence as to management of property see *infra* § 71.

16. Conn.—Doolittle v Upson, 88 A 2d 334, 138 Conn 642

Ill.—Schnoor v Terlep, 77 NE 2d 140, 399 Ill 101

Iowa.—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307—In re Van Dyke's Estate, 65 NW 2d 63, 245

Iowa 942—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761—In re Sinift's Estate, 10 NW 2d 550, 233 Iowa 800—In re Hayer's Estate, 299 NW 431, 230 Iowa 880

Ky.—Teegarden v Webster, 199 SW 2d 728, 304 Ky 13—Bickel v Louisville Trust Co., 197 SW 2d 444, 303 Ky 356—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767—Moore v Moore, 162 SW 2d 547, 290 Ky 715

Minn.—In re Holmstrom's Estate, 292 NW 622, 208 Minn 19

N Y.—In re Coddington's Will, 118 N YS 2d 525, 281 App Div 143, affirmed 120 NE 2d 777, 307 N Y 181

In re Ernst's Will, 86 NYS 2d 562, 194 Misc 237

In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Or.—In re Walther's Estate, 163 P 2d 285, 177 Or 282

Pa.—In re Hausman's Estate, Orph. 26 Erie Co 26

Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 374, 27 Tenn App 342—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Bridges v Agee, 15 Tenn App 351—Fitch v American Trust Co., 4 Tenn App 87

Tex.—In re Good's Estate, Civ App, 274 SW 2d 900, error refused no reversible error—Garcia v Galindo, Civ App, 199 SW 2d 488, reversed on other grounds 199 SW 2d 499, 145 Tex 507—Rudersdorf v Bowers, Civ App, 112 SW 2d 784, error dismissed

Va.—Gilmer v Brown, 44 SE 2d 16, 186 Va 630

W Va.—Prichard v Prichard, 65 SE 2d 65, 135 W Va 767.

68 CJ p 431 note 67.

**Rule under statute**

Ga.—Beman v Stembridge, 85 SE 2d 434, 211 Ga 274—Anderson v Anderson, 80 SE 2d 807, 210 Ga 464—Smith v Davis, 45 SE 2d 609, 203 Ga 175—Griffin v Barrett, 187 SE 2d 828, 183 Ga 152

**Disposition of property by contract**

Ill.—McGlaughlin v Pickerel, 46 NE 2d 368, 381 Ill 574—In re Weedman's Estate, 98 NE 956, 254 Ill 504

Va.—Gilmer v Brown, 44 SE 2d 16, 186 Va 630

**Complex contracts**

Kan.—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368—In re Hall's

Estate, 195 P 2d 612, 615, 165 Kan 465—Kunkle v Urbansky, 109 P 2d 71, 153 Kan 117

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95

**Full mental contractual capacity**  
is not ordinarily required in order to make a valid will; the criteria are different

SC—McCullum v. Banks, 50 SE 2d 199, 213 SC 476

**Test in ordinary contract cases not followed**

In determining the mental capacity of testatrix, the test in ordinary contract cases is not followed for the reason that on an application to probate a will the maker is dead

Tex.—Venner v Layton, Civ App, 244 SW 2d 852, error refused no reversible error

17. Mo.—Curtis v Alexander, 257 SW 432—Hedrick v Hedrick, 168 SW 2d 69, 350 Mo 716

Or.—In re Walther's Estate, 163 P 2d 285, 177 Or 282

SC—McCullum v Banks, 50 SE 2d 199, 213 SC 476

Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 374, 27 Tenn App 342

W Va.—Ritz v Kingdon, 79 SE 2d 123—Prichard v Prichard, 65 SE 2d 65, 135 W Va 767

68 CJ p 431 note 68

18. Neb.—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Frazier's Estate, 267 NW. 181, 131 Neb 61

19 'Or.—In re Walther's Estate, 163 P 2d 285, 177 Or. 282

20. Pa.—In re Lawrence's Estate, 132 A 786, 286 Pa 58

In re Nute, Com Pl., 33 Del Co 277

Competency of donor of gift generally see Gifts 76

21. Md.—Scheller v. Schindel, 138 A. 415, 153 Md 547—Mecutchen v Gigous, 132 A. 425, 150 Md 79

22. Mont.—Murphy v. Nett, 130 P 451, 47 Mont 38

68 CJ p 431 note 71.

**Requirement under statute**

Md.—Doyle v Rody, 25 A.2d 457, 180 Md 471

23. Colo.—Hanks v. McNeill Coal Corp, 168 P 2d 256, 114 Colo. 578.

general, the same as those governing testamentary capacity<sup>24</sup>

In accordance with the general rule, unless insanity of some nature affects the testamentary disposition, as discussed *infra* § 17, a person who has sufficient mental capacity to transact ordinary business, or ordinary business affairs, is regarded as competent to make a will,<sup>25</sup> but capacity to transact business is held not to constitute testamentary capacity<sup>26</sup>

#### (4) Statutory Requirements

Statutory requirements as to testamentary capacity must be complied with. In the absence of statutory definitions, the terms used in such provisions are construed in accordance with judicial decisions generally.

While a particular statute may impose only an age requirement for making a will,<sup>27</sup> the usual statutory requirements are a "sound," "sane," or "disposing" mind,<sup>28</sup> these are synonymous terms as so used<sup>29</sup>

In the absence, from such a statute, of a definition

of "sound mind," a definition of that term is to be sought in the decisions of the courts<sup>30</sup> "Sound mind," within such a statute, requires only testamentary capacity,<sup>31</sup> and "being of sound mind" means "having testamentary capacity"<sup>32</sup> "Sound mind" comprehends ability to recollect property and beneficiaries and conceive the practical effect of the will,<sup>33</sup> a mind naturally possessing power, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence, is, in legal contemplation, a "sound mind"<sup>34</sup>

"Unsound mind," in this connection, has been held to be equivalent to "insanity"<sup>35</sup> and "non compos mentis,"<sup>36</sup> and means such a degree of mental unsoundness that the testator does not come up to the standard of competency generally recognized by law.<sup>37</sup>

A statutory provision that the amount of intellect necessary to constitute testamentary capacity to enable the party to have a decided and rational desire as to the disposition of his property has been

24. Cal—Hughes v Grandy, 177 P 2d 939, 78 Cal App 2d 555

25. Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584

In re Johanson's Estate, 144 P

2d 72, 62 Cal App 2d 41

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64—Shevlin v Jackson, 124 NE 2d 895, 5 Ill 2d 43—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19—Quathamer v Schoon, 19 NE 2d 750, 370 Ill 606

Me—In re Haley's Estate, 84 A 2d 808, 14 Me 173—In re Chandler's Will, 66 A 215, 102 Me 72

Pa—In re Hochberger's Estate, Orph, 63 York Leg Rec 25

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 374, 27 Tenn App. 342 68 C J p 432 note 73

An important factor in determining competency of testator is proof of his business ability

Or—In re Shanks' Estate, 126 P 2d 504, 168 Or 650

Transaction of business is evidence of testamentary capacity

Pa—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75.

Ability of testatrix to manage her property was an important factor to be considered in determining her mental capacity to execute will

Or—In re Bond's Estate, 143 P.2d 244, 172 Or 509.

26. Ohio—Wadsworth v Purdy, 31 Ohio Cir Ct 110

68 C J p 432 note 75

27. ND—Stormon v. Weiss, 65 N W 2d 475.

28. Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Markham's Estate, 115 P 2d 866, 46 Cal App 2d 307

Tex—McNaley v Sealy, Civ App, 122 SW 2d 330, error dismissed 68 C J p 432 note 77

29. Mass—Lockhart v Ferguson, 137 NE 355, 243 Mass 226 68 C J p 432 note 78

"Sound" and "sane" synonymous

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209—In re Johnson's Estate, 91 P 2d 330, 162 Or 97

30. Tex—Chambers v Winn, Civ App, 133 SW 2d 279, reversed on other grounds 154 SW 2d 454, 137 Tex 444—McNaley v Sealy, Civ App, 122 SW 2d 330, error dismissed

31. Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

32. Tex—Garcia v Galindo, Civ App, 189 SW 2d 12, error refused

33. Me—In re Loomis' Will, 174 A 38, 133 Me 81.

34. Me—In re Loomis' Will, supra Old age generally see *infra* § 27. Illness generally see *infra* § 29

35. Ill—Miller v Ahrbecker, 151 N E 526, 320 Ill 577

Insanity generally see *infra* § 17

36. NY—Stanton v Wetherwax, 16 Barb 259

Compos mentis as test of capacity see *supra* subdivision d (1) of this section

37. Ind—Wiley v Gordan, 104 NE 500, 181 Ind 252

#### Other statements

(1) As used in the statute, the term "unsound mind" relates to the ability of the person to transact business, it is such debility or impairment of mentality as deprives the person affected of competency to manage his estate  
Me—Appeal of Eastman, 194 A. 586, 135 Me 233

(2) With respect to capacity to make a will, a person of "unsound mind" is an adult who, from infirmity of mind, including insanity, idiocy, and imbecility, is incapable of managing himself or his affairs  
Cal—In re Little's Estate, 72 P 2d 213, 23 Cal App 2d 40  
Clements v McGinn, 33 P 920, 4 Cal Unrep Cas 163

(3) The terms "unsound mind" or "of unsound mind", as they pertain to testamentary capacity, include every phase of unsound mind rendering one incapable of caring for himself or his property, and every species of unsoundness of mind, they are of such variable significance that their value in any given case depends entirely on the relation they bear to a particular person in connection with particular act under inquiry.

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209—In re Johnson's Estate, 91 P 2d 330, 162 Or 97.

frequently applied<sup>38</sup> Within such provision, "decided" simply means a mental capacity to frame a desire that is certain, or with distinct limits,<sup>39</sup> and does not connote stubbornness,<sup>40</sup> or even mental strength,<sup>41</sup> and "rational" means that the desire must be consistent with reason,<sup>42</sup> and not that it must spring from a strong intellect<sup>43</sup> The mind of the testator could have been "bad,"<sup>44</sup> or such that he could not "transact business to his advantage,"<sup>45</sup> and still he could have possessed sufficient intelligence to enable him to have the requisite statutory decided and rational desire.

## § 16. Illiteracy

Illiteracy does not, in itself, deprive one of testamentary capacity.

38. Ga.—Northwestern University v Crisp, 88 SE2d 26, 211 Ga. 636 —Beman v Stenbridge, 85 SE2d 434, 211 Ga. 274—Anderson v Anderson, 80 SE2d 807, 210 Ga. 464—Orr v Orr, 67 SE2d 209, 208 Ga. 431—Leventhal v Baumgartner, 61 SE2d 810, 207 Ga. 412—Whitfield v Pitts, 53 SE2d 549, 205 Ga. 259—Espy v Preston, 34 SE2d 705, 199 Ga. 608—Manley v Combs, 30 SE2d 485, 197 Ga. 768 —Fowler v Fowler, 28 SE2d 458, 197 Ga. 53—Morgan v Bell, 5 SE2d 897, 189 Ga. 432—Ellis v Britt, 182 SE 596, 181 Ga. 442—Slaughter v Heath, 57 SE 69, 127 Ga. 747, 27 L.R.A.N.S. 1 Requirement generally see supra subdivision c of this section "A person cannot make a valid will unless he has mental capacity sufficient to form a rational and decided desire that one person should have his property rather than another" Ga.—Smith v Davis, 45 SE2d 609, 615, 203 Ga. 175

The test of mental capacity is whether testator had such mental capacity, when will was actually executed, to have a decided and rational desire as to disposition of his property

Ga.—Bailey v Bailey, 50 SE2d 617, 204 Ga. 556

39. Ga.—Spivey v Spivey, 44 SE 2d 224, 202 Ga. 644—Hill v Deal, 193 SE 858, 185 Ga. 42

40. Ga.—Hill v Deal, 193 SE 858, 185 Ga. 42

41. Ga.—Hill v Deal, supra

42. Ga.—Spivey v Spivey, 44 SE 2d 224, 202 Ga. 644—Hill v Deal, 193 SE 858, 185 Ga. 42

43. Ga.—Hill v Deal, supra

44. Ga.—Spivey v Spivey, 44 SE 2d 224, 202 Ga. 644

45. Ga.—Spivey v Spivey, supra Capacity to transact business gen-

erally see supra subdivision d(3) of this section

46. Wis.—Cutler v Cutler, 79 NW 240, 103 Wis. 258 68 CJ p 432 note 82

### Inability to read or write English

Ill.—Pepe v Caputo, 97 NE2d 260, 408 Ill. 321

47. Mich.—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich. 514 68 CJ p 432 note 82 [b]

Testatrix' inability to read, write, or figure, or to tell denominations of paper currency, was held to have little, if any, bearing on testamentary capacity

Mich.—In re Cummins' Estate, 259 NW 894, 271 Mich. 215

48. Mich.—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich. 514

49. Pa.—Corpus Juris cited in In re Duncan's Will, 23 A 2d 357, 359, 147 Pa. Super. 133 68 CJ p 432 note 84

Chronic alcoholic insanity see infra § 25

Disabilities and privileges of insane persons generally see Insane Persons §§ 98-132

Instructions on insanity see infra § 472

Senile dementia see infra § 27

### "Unsound mind" and "insanity" synonymous

As a general rule, the terms "a person of unsound mind" and "an insane person" are synonymous Ill.—Miller v Ahrbecker, 151 NE 526, 320 Ill. 577

Tex.—Reiche v Williams, Civ App, 183 SW 2d 587, error refused 185 SW 2d 420, 143 Tex. 365

Insanity exists as a matter of law only from the time it is shown to exist

Cal.—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal. 699

In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

If the testamentary requisites exist, as discussed supra § 15, the will may be valid, although executed by one who is illiterate, when it is shown that he knows and understands the contents of the will,<sup>46</sup> illiteracy<sup>47</sup> or lack of education<sup>48</sup> has little, if any, bearing on the mental capacity to make a will.

## § 17. Insanity

In general, a will which is executed under the influence of, and whose provisions are affected by, insanity, in the legal, although not necessarily in the medical, sense, is invalid

In general, a will or codicil executed under the influence of insanity is invalid,<sup>49</sup> and this is true whether the testator is totally<sup>50</sup> or partially<sup>51</sup> in-

50. Ind.—Eggers v Eggers, 57 Ind. 461

68 CJ p 432 note 85

51. Mo.—Bounds v Johnson, 192 S. W. 972

Pa.—In re Nelson's Estate, Orph., 66

York Leg Rec. 161

68 CJ p 432 note 86

"In order to invalidate a will it is not necessary that the intellect should be in total eclipse and oblivion, or that the testator should be generally insane There is a partial insanity, and a total insanity Such partial insanity may exist as respects particular persons, things, or subjects, while as to others the person may not be destitute of the use of reason"

NY.—In re Rice's Estate, 19 NY S 2d 602, 606, 173 Misc. 1038—In re Gannon's Will, 21 NY S 960, 962, 2 Misc. 329

### Nature of partial insanity or monomania

(1) Partial insanity or monomania exists wherever a person conceives something to exist which has no extrinsic evidence whatever, and is incapable of being permanently reasoned out of that conception

Ga.—Bowman v Bowman, 55 SE 2d 298, 205 Ga. 796

(2) The same statement has been made with respect to monomania alone

Ga.—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga. 247

(3) "Monomania" is insanity only on a particular subject and with a single delusion of mind, but it may so limit testamentary capacity as to prevent testator from bringing into mental review matters essential to validity of a will

Ga.—Yarbrough v Yarbrough, 43 S. E 2d 329, 202 Ga. 391

(4) A showing of hallucinations or insane delusions is essential to proving a monomania depriving one of testamentary capacity.

sane To set aside a will for insanity or mental derangement, the abnormalities of mind must have a direct bearing on the testamentary act,<sup>52</sup> and the evidence must establish the fact that the property was devised in a manner which, except for the claimed infirmities, would not have occurred.<sup>53</sup> So, partial insanity will invalidate a testamentary disposition only when shown to affect its provisions.<sup>54</sup>

However, not every form<sup>55</sup> or degree<sup>56</sup> of in-

sanity will destroy an otherwise valid testamentary act. It is not true that no person who is insane may make a valid will,<sup>57</sup> since a testator may be insane in the medical sense and yet have testamentary capacity,<sup>58</sup> there must be either such a complete derangement as denotes utter incapacity or a specific insane delusion or hallucination which affects the making of the will.<sup>59</sup> In other words, the rule is not that no person who is insane may make a valid

Ga.—Whitfield v Pitts, 53 S E2d 549, 205 Ga 259

(5) In describing a testatrix' testamentary capacity, terms "partial insanity" and "monomania," as implying compartment theory of mind that a person may be insane on one subject and sane on another, are objectionable, and "monomania" now means a type of insanity which is manifest only on certain subjects, though it affects the whole mind. Or.—In re Murray's Estate, 144 P 2d 1016, 1022, 173 Or 209

(6) Monomania is not mere dislike of certain person, or unreasonable conduct of a sane person. Ga.—Brumbelow v Hopkins, supra

(7) "Monomania" defined generally see Insane Persons § 2 c

(8) Insane delusions generally see infra § 18

#### Monomania and undue influence

(1) Monomania alone, or acting conjointly with undue influence, or as ancillary or contributing thereto, may paralyze testamentary capacity. Ga.—Bowman v Bowman, 55 S E2d 298, 205 Ga 796

(2) Undue influence generally see infra §§ 224-261

52 Cal.—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420. Effect of insane delusion on will or testamentary disposition see infra § 18 b

53. Cal.—In re Leonard's Estate, supra

54. Iowa.—Corpus Juris cited in Walters v Heaton, 271 N.W. 310, 313, 223 Iowa 405. 68 C J p 433 note 87

#### Partial insanity or monomania

(1) One who is partially insane or a monomaniac may make a valid will, if such insanity does not enter into disposition of his estate. Mo.—Ahmann v Elmore, 211 S W 2d 480

(2) A monomaniac may make a will if it is in no way the result of, or connected with, his monomania. Ga.—Brumbelow v Hopkins, 29 S E2d 42, 197 Ga 247.

(3) For a will to be invalidated on the ground of partial insanity or

monomania, it must be the direct offspring thereof

Pa.—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—Thomas v Carter, 33 A 81, 170 Pa 272

In re Dovci's Estate, 101 A 2d 449, 174 Pa Super 266

In re Nelson's Estate, Orph., 66 York Leg Rec 161

(4) Where testatrix was suffering from senile decay which had developed into a monomania on religion, and will left entire estate to three religious bodies, will was invalid for want of testamentary capacity. Or.—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

(5) Old age generally see infra § 27

55 Cal.—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420

La.—Artigue v Artigue, 26 So 2d 699, 210 La 208

56 Cal.—In re Sexton's Estate, 251 P 778, 199 Cal 759

57 Cal.—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699

In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

68 C J p 433 note 88. Lucid intervals see infra § 19

"Not all insanity is sufficient to set aside a duly executed will"

Ind.—Noyer v Ecker, App., 119 NE 2d 902, 903

"Mere proof of mental derangement is not sufficient to invalidate a will"

Cal.—In re Arnold's Estate, 107 P 2d 25, 32, 16 Cal 2d 573

In re Agnew's Estate, 151 P 2d 126, 130, 65 Cal App 2d 553

If insanity is proved, the effect of such proof on the validity of the will must be determined by the general rule regarding the requisites of testamentary capacity

Cal.—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275

58. Ark.—McWilliams v Neill, 155 S W 2d 344, 202 Ark 1087

Cal.—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

In re Agnew's Estate, 151 P 2d 126 65 Cal App 2d 553—In re Reiss' Estate, 123 P 2d 68, 50 Cal App 2d 398

68 C J p 433 note 89

Medical soundness of mind as not governing see supra § 15d

#### Legal and medical tests of insanity

The legal tests of insanity are simpler than the medical ones, for the reason that, while mental malady may be pronounced enough to need curative treatment, it may not be pronounced enough to denote legal incapacity to make a will

N Y.—In re Hill's Will, 73 N Y S 2d 258, appeal dismissed 78 N Y S 2d 365

#### Medical or moral sanity or insanity

(1) The right to dispose of one's estate by will is not confined to those whose conduct and beliefs are, from a medical viewpoint, sane. Cal.—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

(2) Moral or "medical" insanity, a perversion of the sentiments and affections, manifested in jealousy, anger, hate, or resentment, however violent and unnatural, will not defeat will, unless it was the emanation of a delusion

Ark.—McWilliams v Neill, 155 S W 2d 344, 202 Ark 1087—Pernot v King, 110 S W 2d 539, 194 Ark 896—Taylor v McClintock, 112 S W 405, 87 Ark 243

59 Ariz.—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Cal.—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348

In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—

In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—

In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Dupont's Estate, 140 P 2d 866, 60



will, but rather is that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition of his estate shall be upheld.<sup>60</sup>

On the other hand, insanity may render the testator incompetent although he may have an apparent use of his faculties in many respects,<sup>61</sup> and although he may be capable of transacting ordinary business.<sup>62</sup>

The test of capacity is the same whether the testator's insanity is attributable to dementia or to an insane delusion.<sup>63</sup>

A will is valid if mental capacity exists at the time of the execution thereof notwithstanding complete dementia of the testator before and after execution,<sup>64</sup> a person of pathologically unsound mind may possess testamentary capacity at any given time and lack it at all other times.<sup>65</sup>

A belief is not evidence of insanity because it is illogical or preposterous.<sup>66</sup>

*Likes, dislikes, and mistrusts.* Capricious and ar-

bitrary likes, dislikes, and mistrusts are not evidence of unsoundness of mind,<sup>67</sup> so, the fact that a person dislikes his relatives, with or without reason, is not necessarily proof of such unsoundness.<sup>68</sup>

## § 18. — Insane Delusions

- a In general
- b Effect on will or testamentary disposition

### a. In General

A delusion, to affect testamentary capacity, must be an insane one, that is, an idea or belief with no basis in fact or reason and adhered to by the testator against reason and evidence.

A testator may meet the tests of general testamentary capacity and nevertheless be laboring under one or more insane delusions which may have the effect of making his will a nullity,<sup>69</sup> for this result to follow, the testator must be actually possessed of a delusion.<sup>70</sup> A delusion, to deprive the testator of capacity, must be an insane delusion,<sup>71</sup> not every

Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Reiss' Estate, 123 P 2d 68, 50 Cal App 2d 398—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597—In re Grant's Estate, 47 P 2d 508, 8 Cal App 2d 232 68 C J p 433 note 90

"Derangement, to invalidate a will, must usually be of such broad character as to establish inefficacy generally, or some narrower form of insanity under which testator is hallucinated or deluded, and such abnormality must have been of proximate ascendancy"

Me—In re Loomis' Will, 174 A 38, 41, 133 Me 81

**Fixed mental unsoundness** must be shown

Cal—In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 2d 322

60. Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699—In re Chevallier's Estate, 113 P 130, 159 Cal 161

In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

"It is a question, not whether a testator is sane or insane, but rather whether or not he is mentally competent"

Mont—In re Cissel's Estate, 66 P 2d 779, 782, 104 Mont 306

61. Pa—Reichenbach v Ruddach, 18 A 432, 127 Pa 564 68 C J p 433 note 91

62. Ill—Dowie v Sutton, 81 NE 395, 227 Ill 183, 118 Am SR 266 68 C J p 433 note 92

Ability to transact business as indicative of capacity generally see supra § 15 d (3)

63. Ark—Huffaker v Beers, 128 S W 1040, 95 Ark 158—Taylor v McClintock, 112 S W 405, 87 Ark 243

Insane delusions see infra § 18

Senile dementia see infra § 27 b

64. Or—In re Provolt's Estate, 151 P 2d 736, 175 Or 128 68 C J p 433 note 94

Lucid intervals see infra § 19

Time at which capacity must exist see supra § 5

"What his mental status is at the time he makes and executes the will is the controlling factor"

Va—Western State Hospital of Staunton v Wminger, 83 SE 2d 446, 453, 196 Va 300—Tate v Chumbley, 57 SE 2d 151, 158, 190 Va 480

65. Mass—Wellman v. Carter, 190 NE 493, 286 Mass 237—Daly v Hussey, 174 NE 916, 275 Mass 28

"Many persons have been at times violently insane, while at other times they were mentally sufficiently normal to enjoy testamentary capacity"

Wash—In re Denison's Estate, 162 P 2d 245, 249, 23 Wash 2d 699

66. Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645.

NY—In re White's Will, 24 NE 935, 121 NY 406

In re Hargrove's Will, 28 NYS 2d 571, 262 App Div 202, affirmed 42 NE 2d 608, 288 NY 604

Beliefs generally see infra § 23

67. Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645

68. Cal—In re Alegria's Estate, supra

69. Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—Thomas v Carter, 33 A 81, 170 Pa 272

In re Dovci's Estate, 101 A 2d 449, 174 Pa Super 266

In re Nelson's Estate, Orph., 66 York Leg Rec 161

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583

Insane delusion as evidence of testamentary incapacity see infra §§ 38, 46, 65

Instructions on delusions see infra § 472

Tests of testamentary capacity generally see supra § 15

70. Cal—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

71. Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Ga—Dyar v Dyar, 131 SE 535, 161 Ga 615

Kan—Corpus Juris quoted at length in In re Millar's Estate, 207 P 2d 483, 487, 167 Kan 455

Md—Doyle v Rody, 25 A 2d 457, 180 Md 471

Mo—Higgins v. Smith, App, 150 S W.2d 539.

delusion is an insane delusion,<sup>72</sup> and the holding of delusions does not in and of itself constitute testamentary incapacity<sup>73</sup>

An insane delusion which will render one in-

capable of making a will is difficult to define<sup>74</sup> An insane delusion such as will affect testamentary capacity is an idea or belief which has no basis in fact or reason and to which the testator adheres against reason and evidence,<sup>75</sup> or, in other words, it is a

Tex—**Corpus Juris** cited in In re Good's Estate, Civ App, 274 S W 2d 900, 902, error refused no reversible error—**Corpus Juris** quoted in Navarro v Rodriguez, Civ App, 235 S W 2d 665, 668—**Corpus Juris** quoted in Garcia v Galindo, Civ App, 199 S W 2d 488, 497, reversed on other grounds 199 S W 2d 499, 145 Tex 507

Utah—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

Wis—In re Jacobson's Will, 270 N W 923, 223 Wis 508

68 C J p 433 note 95

"In common parlance one may be considered under a 'delusion' when he labors only under a mistake But to unmake a will a testator's delusion must be an insane delusion and not a mistake in reasoning"

Mo—Ahmann v Elmore, 211 S W 2d 480, 486

#### Delusional trend

Fact that there may be some delusional trend in a testator's mind has no bearing on his testamentary capacity

Tex—Rudersdorf v Bowers, Civ App, 112 S W 2d 784, error dismissed

#### Testator's children believed not his

(1) An insane delusion that testator's children are not his own will avoid a will, induced thereby, which disinherits the children

Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

(2) Belief to this effect, although possibly mistaken, held not entirely without reason or rational basis, so that it was not insane delusion

N Y—In re Hargrove's Will, 28 N Y S 2d 571, 262 App Div 202, affirmed 42 NE 2d 608, 288 N Y 604

72 Cal—In re Perkins' Estate, 235 P 45, 195 Cal 699—In re Kendrick's Estate, 62 P 605, 130 Cal 360

In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46—In re Schwartz's Estate, 155 P 2d 76, 67 Cal App 2d 512

Wyo—In re Johnston's Estate, 181 P 2d 611, 63 Wyo 332

"A delusion and an insane delusion, as that term is defined in law, are altogether different mental conditions"

Tex—Knight v Edwards, 264 S W 2d 692, 695

"The fact that a testator has delusions with reference to any particular person or thing at the time he makes a will is not sufficient of itself to invalidate his act."

RI—Rynn v Rynn, 181 A 289, 294, 55 RI 310

73. N Y—In re Heaton's Will, 120 NE 83, 224 N Y 22

In re Rice's Estate, 19 N Y S 2d 602, 173 Misc 1038

In re Chambers' Will, 20 N Y S 2d 418

"There may coexist delusion and a disposing mind"

N Y—In re Heaton's Will, 120 NE 83, 85, 224 N Y 22

In re Rice's Estate, 19 N Y S 2d 602, 605, 173 Misc 1038

In re Chambers' Will, 20 N Y S 2d 418, 422

#### Temporary or partial hallucinations

There is a decided difference between temporary or partial hallucinations and testamentary incapacity

Wash—In re Denison's Estate, 162 P 2d 245, 23 Wash 2d 699

74. Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64

Mo—Higgins v Smith, App, 150 S W 2d 539

"Delusion" defined generally see Insane Persons § 2 d

"Insane delusion" defined generally see Insane Persons § 2 a (2)

75. Colo—In re Cole's Estate, 226 P 143, 144, 75 Colo 264

Ga—Dyar v Dyar, 131 SE 535, 541, 161 Ga 615

Mich—In re Balk's Estate, 298 NW 779, 298 Mich 303

Mo—Higgins v Smith, App, 150 S W 2d 539

Neb—**Corpus Juris** quoted in In re Wahl's Estate, 30 NW 2d 783, 790, 151 Neb 812

N Y—In re Rice's Estate, 19 N Y S 2d 602, 173 Misc 1038

In re Jerrells' Will, 63 N Y S 2d 499, appeal dismissed 70 N Y S 2d 580

Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Weiss's Estate, 77 A 2d 422, 366 Pa 456—In re Leedom's Estate, 32 A 2d 3, 347 Pa. 180

In re Nelson's Estate, Orph, 66 York Leg Rec 161

Tex—In re Good's Estate, Civ App, 274 S W 2d 900, error refused, no reversible error—**Corpus Juris** quoted in Navarro v Rodriguez, Civ App, 235 S W 2d 665

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re O'Neill's Estate, 212 P 2d 823, 35 Wash 2d 325

68 C J p 433 note 96

#### Leading case

Wash—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456

#### Essence or essential element

(1) The essence of an insane delusion is that it has no basis in reason and cannot be dispelled by reason  
Mo—Higgins v Smith, App, 150 S W 2d 539

(2) The essential element of an insane delusion is that it is created without reason or evidence and is adhered to against reason and evidence  
Cal—In re Hart's Estate, 236 P 2d 884, 107 Cal App 2d 60

#### Similar definitions

(1) "A belief in something impossible in the nature of things or impossible under the circumstances surrounding the afflicted [or affected] individual, and which refuses to yield either to evidence or to reason"

Ala—Hornaday v First Nat Bank of Birmingham, 65 So 2d 678, 686, 259 Ala 26

Ill—Jackman v North, 75 NE 2d 324, 330, 398 Ill 90, 175 ALR 868—Bauchens v Davis, 82 NE 365, 229 Ill 557, 561—Scott v Scott, 72 NE 708, 710, 212 Ill 597

(2) An idea or belief which springs spontaneously from a diseased or perverted mind without reason or foundation in fact

Ky—Prichard v Kitchen, 242 S W 2d 988, 991—Holladay v Holladay, 172 S W 2d 36, 39, 294 Ky 540  
68 C J p 433 note 97 [a] (7)

(3) The conception of a disordered mind which imagines facts to exist of which there is no evidence and the belief in which is adhered to against all evidence and argument to the contrary, and which cannot be accounted for on any reasonable hypothesis

Ariz—In re Cook's Estate, 159 P 2d 797, 802, 63 Ariz 78

Cal—In re Putnam's Estate, 34 P. 2d 148, 153, 1 Cal 2d 162

In re Alegria's Estate, 197 P 2d 571, 576, 87 Cal App 2d 645

(4) "An insane delusion is the spontaneous production of a diseased mind, leading to the belief in the existence of something which either does not exist or does not exist in the manner believed,—a belief which a rational mind would not entertain, yet which is so firmly fixed that neither argument nor evidence can convince to the contrary"

Cal—In re Kendrick's Estate, 62 P. 605, 607, 130 Cal 360

In re Selb's Estate, 190 P 2d 277, 282, 84 Cal App 2d 46

belief in a state of facts that does not exist and which no rational person would believe to exist,<sup>76</sup> a belief which a rational person may entertain, however erroneous, is not an insane delusion<sup>77</sup> A

mere mistaken belief or an erroneous or unjust conclusion is not an insane delusion if there is some foundation in fact or some basis on which the mental operation of the testator may rest,<sup>78</sup> however slight

76. Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64—Jackman v North, 75 NE 2d 324, 398 Ill 90, 175 A L R 868—Ryan v Deneen, 31 NE 2d 582, 375 Ill 452—Snell v Weldon, 90 NE 1061, 243 Ill 496—Nicewander v Nicewander, 37 NE 698, 151 Ill 156

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455

Mich—In re Balk's Estate, 298 N W 779, 298 Mich 303

Mo—Higgins v Smith, App, 150 S W 2d 539

Neb—**Corpus Juris** quoted in In re Wahl's Estate, 30 N W 2d 783, 790, 151 Neb 812

Okla—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Sturtevant's Estate, 180 P 595, 92 Or 269

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Weiss's Estate, 77 A 2d 422, 366 Pa 456—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180

In re Nelson's Estate, Orph, 66 York Leg Rec 161

Tex—In re Good's Estate, Civ App, 274 S W 2d 900, error refused, no reversible error—**Corpus Juris** quoted in Navarro v Rodriguez, Civ App, 235 S W 2d 665, 668

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325—In re Klein's Estate, 183 P 2d 518, 228 Wash 2d 456  
68 C J p 433 note 97

#### Other definitions

(1) "An insane delusion is an unreasoning and incorrigible belief in the existence of facts which are either impossible, absolutely, or, at least, impossible under the circumstances of the individual. It is never the result of reasoning and reflection; it is not generated by them, and it cannot be dispelled by them, and hence it is not to be confounded with an opinion, however fantastic the latter may be"

Mo—Ahmann v Elmore, 211 S W 2d 480, 486—Gaume v Gaume, 102 S W 2d 636, 640, 340 Mo 758—Stevens v Meadows, 100 S W 2d 281, 287, 340 Mo 252—Conner v Skaggs, 111 S W 1132, 1135, 213 Mo 334

(2) "An insane delusion is not only one which is error, but one in favor of the truth of which there is not only no evidence, but regarding which there is the clearest evidence to the contrary. It is a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of his belief or knowledge

of any fact which would in reason or in probability furnish evidence in its support"

Cal—In re Gunther's Estate, 248 P 514, 516, 195 Cal 119  
In re Alegria's Estate, 197 P 2d 571, 577, 87 Cal App 2d 645

(3) A delusion which might incapacitate a person from making a will, is a false belief for which there is no reasonable foundation, a conception of the existence of something which does not exist, of which the mind of the person entertaining it cannot be permanently disabused, and which influences the provisions of the will

Del—In re Barnes' Will, 18 A 2d 433, 434, 2 Terry 206

(4) A "delusion" is a fixed belief in a proposition which has no foundation in evidence and which is so extravagant that a reasonable man would not adhere to it

Ala—Hornaday v First Nat Bank of Birmingham, 65 So 2d 678, 686, 259 Ala 26

Or—In re Sturtevant's Estate, 180 P 595, 92 Or 269

(5) It is a fixed belief where there is no evidence for such belief

Ala—Hornaday v First Nat Bank of Birmingham, supra

(6) Additional definitions

Mich—In re Solomon's Estate, 53 N W 2d 597, 601, 334 Mich 17

68 C J p 433 note 97 [a]

77. Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455

"Insane delusions are not the result of reasoning, however erroneous or unjust the result may be, but must be without any and contrary to all reason"

Mo—Ahmann v Elmore, 211 S W 2d 480, 486—Gaume v Gaume, 102 S W 2d 636, 640, 340 Mo 758—Stevens v Meadows, 100 S W 2d 281, 287, 340 Mo 252—Zorn v Zorn, 64 S W 2d 626, 628

#### Existence of facts

An insane delusion does not mean merely a mistaken belief of a sane mind as to the existence of facts

Ga—Dyar v Dyar, 131 S E 535, 161 Ga 615—Dibble v Currier, 83 S E 949, 142 Ga 855, Ann Cas 1916C 1.

78. Ark—Taylor v McClintock, 112 S W 405, 87 Ark 243

Cal—In re Selb's Estate, 190 P 2d 277, 84 Cal App 46

Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

Ga—Dyar v Dyar, 131 S E 535, 161 Ga 615

Ill—Jorn v Tallett, 93 NE 2d 82, 341 Ill App 240—Owen v Crum-

baugh, 81 NE 1044, 228 Ill 380, 119 Am S R 442, 10 Ann Cas 606

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455

Ky—Prichard v Kitchen, 242 S W 2d 988—Holladay v Holladay, 172 S W 2d 36, 294 Ky 540

Mich—In re Johnson's Estate, 13 N W 2d 852, 308 Mich 366—In re Balk's Estate, 298 N W 779, 298 Mich 303—In re Lacroix's Estate, 251 N W 319, 265 Mich 59—In re Barlum's Estate, 215 N W 299, 240 Mich 393—Leffingwell v Bettinghouse, 115 N W 731, 151 Mich 513

Mo—**Corpus Juris** cited in Ahmann v Elmore, 211 S W 2d 480, 486

N J—In re Thomson's Will, 66 A 2d 540, 4 N J Super 150—In re McDowell's Will, 140 A 281, affirmed 143 A 325, 103 N J Eq 346

N Y—In re White's Will, 24 N E 935, 121 N Y 406

In re Brown's Will, 15 N Y S 2d 387, 171 Misc 1008—In re Kimball's Will, 281 N Y S 605, 156 Misc 338  
In re Jereills' Will, 63 N Y S 2d 499, appeal dismissed 70 N Y S 2d 580

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125

Tex—Knight v Edwards, 264 S W 2d 692—**Corpus Juris** cited in In re Good's Estate, Civ App, 274 S W 2d 900, 902, error refused no reversible error—**Corpus Juris** quoted in Navarro v Rodriguez, Civ App, 235 S W 2d 665, 668—**Corpus Juris** quoted in Garcia v Galindo, Civ App, 199 S W 2d 488, 497, reversed on other grounds 199 S W 2d 499, 145 Tex 507

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95—In re Hansen's Will, 177 P 982, 52 Utah 554

Wis—In re Bauer's Estate, 59 N W 2d 481, 264 Wis 556—**Corpus Juris** quoted in In re Bickner's Estate, 49 N W 2d 404, 408, 259 Wis 425

Wyo—In re Johnston's Estate, 181 P 2d 611, 63 Wyo 332

68 C J p 434 note 98

"One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist

Cal—In re Putnam's Estate, 34 P 2d 148, 153, 1 Cal 2d 162—In re Scott's Estate, 60 P 527, 529, 128 Cal 57

In re Alegria's Estate, 197 P 2d 571, 577, 87 Cal App 2d 645

"In order to be an insane delusion the mistake must be one which is not based upon evidence; or at least without any evidence from which a sane man could draw the conclusion which forms the delusion."

or inconclusive,<sup>79</sup> and even though the basis may be regarded by others, or a court, as wholly insufficient,<sup>80</sup> in essence, an insane delusion must arise spontaneously and without any extrinsic evi-

dence to support it<sup>81</sup>

Mistake<sup>82</sup> and prejudice<sup>83</sup> are not alone insane delusions, an insane delusion is not merely a bias or prejudice<sup>84</sup> So, even though the testator may

Wis—In re Bickner's Estate, 49 N W 2d 404, 408, 259 Wis 425

"No belief that has any evidence for its basis is in law an insane delusion"

Mo—Ahmann v Elmore, 211 SW 2d 480—Sayre v Princeton University, 90 SW 787, 796, 192 Mo 95

Neb—Stull v Stull, 96 NW 196, 202, 1 Neb (Unoff.) 380

There is no such thing as an insane delusion founded on facts, if the idea entertained has for a basis anything substantial, it is not a delusion

Mo—Ahmann v Elmore, 211 SW 2d 480—Fulton v Freeland, 118 SW 12, 219 Mo 494, 131 Am SR 576—Higgins v Smith, App., 150 SW 2d 539

#### Deranged condition of mind

An insane delusion, to establish a lack of testamentary capacity, must be such an aberration as indicates an unsound or deranged condition of the mind or mental faculties as distinguished from a mere belief in the existence or nonexistence of certain supposed facts based on some sort of evidence

Ill—Ryan v Deneen, 31 NE 2d 582, 375 Ill 452—Owen v Crumbaugh, 81 NE 1044, 228 Ill 380, 119 Am SR 442, 10 Ann Cas 606

Jorn v Tallett, 93 NE 2d 82, 341 Ill App 240

#### Particular beliefs

(1) Testator's mistaken belief that he was not the father of the children of his divorced wife held not insane delusion, so as to preclude probate of will making no provision for such children, if there was any rational basis at all for such belief

NY—In re Hargrove's Will, 28 NY S 2d 571, 262 App Div 202, affirmed 42 NE 2d 608, 288 NY 604

(2) Testator's fear that he would die and that designing persons would defraud widow, inducing testator to revoke will leaving entire property to her and execute new will giving her merely income of life trust, was held not to show insane delusion

Cal—In re Hopkins' Estate, 29 P 2d 249, 136 Cal App 590

79. Ark—Taylor v McClintock, 112 SW 405, 87 Ark 243

Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Selb's Estate, 190 P 2d 277, 84 Cal App 46—In re Horton's Estate, 17 P 2d 184, 128 Cal App 249.

Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455.

Ky—Prichard v Kitchen, 242 SW 2d 988

Mich—In re Solomon's Estate, 53 N W 2d 597, 334 Mich 17—In re Balk's Estate, 298 NW 779, 298 Mich 303—In re Barlum's Estate, 215 NW 299, 240 Mich 393

Mo—Ahmann v Elmore, 211 SW 2d 480—Higgins v Smith, App., 150 SW 2d 539

NY—In re White's Will, 24 NE 935, 121 NY 406

In re Hargrove's Will, 28 NY S 2d 571, 262 App Div 202, affirmed 42 NE 2d 608, 288 NY 604

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95—In re Hansen's Will, 177 P 982, 52 Utah 554

Wyo—In re Johnston's Estate, 181 P 2d 611, 63 Wyo 332

"A belief which is based upon reason and evidence, be it ever so slight, cannot be an insane delusion"

Ky—Holladay v Holladay, 172 SW 2d 36, 39, 294 Ky 540

80 Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645

Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

Ill—Owen v Crumbaugh, 81 NE 1044, 228 Ill 380, 119 Am SR 442, 10 Ann Cas 606

Jorn v Tallett, 93 NE 2d 82, 341 Ill App 240

Mich—In re Solomon's Estate, 53 N W 2d 597, 334 Mich 17—In re Balk's Estate, 298 NW 779, 298 Mich 303—In re Barlum's Estate, 215 NW 299, 240 Mich 393

NY—In re White's Will, 24 NE 935, 121 NY 406

In re Jerrell's Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Tex—Corpus Juris cited in In re Good's Estate, Civ App., 274 SW 2d 900, 902, error refused, no reversible error—Corpus Juris quoted in Navarro v Rodriguez, Civ App., 235 SW 2d 665, 668—Corpus Juris quoted in Garcia v Galindo, Civ App., 199 SW 2d 488, 497, reversed on other grounds 199 SW 2d 499, 145 Tex 507

Utah—In re Chongas' Estate, 202 P 2d 711, 115 Utah 95—In re Hansen's Will, 177 P 982, 52 Utah 554

Wis—In re Bauer's Estate, 59 NW 2d 481, 264 Wis 556—Corpus Juris quoted in In re Bickner's Estate, 49 NW 2d 404, 408, 259 Wis 425

68 C J p 434 note 99

81. Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Sturtevant's Estate, 180 P 595, 92 Or 269—In re Walther's Estate, 163 P 2d 285, 177 Or 282

82. Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

A mistake of fact is not an insane delusion which will permit setting aside of will, unless mistake was caused by a mental derangement

Ariz—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Distinction between a mistake and an insane delusion is that a mistake whether of fact or law, moves from some external influence which is weighed by reason, however imperfectly whereas a delusion arises from a morbid internal impulse having no basis in reason

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455

#### Mistaken belief as to financial situation

Testatrix' mistaken belief that financial situation of deceased husband's mother was better than it really was was not such an insane delusion as would permit setting aside of will, even though testatrix would have executed a different will had she known the true facts

Ariz—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

83 Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

Prejudice as affecting testamentary capacity generally see *infra* § 23

#### Prejudice or dislike for relative

A prejudice or dislike that testatrix might have for a relative is not ground for setting aside a will unless such prejudice cannot be explained on any other grounds than that of an insane delusion

Ill—Jackman v North, 75 NE 2d 324, 398 Ill 90, 175 ALR 868

Tex—In re Lockhart's Estate, Civ App., 258 SW 2d 877, reversed on other grounds, Sup., Knight v Edwards, 264 SW 2d 692

84. Wis—In re Bickner's Estate, 49 NW 2d 404, 259 Wis 425

"Prejudices, dislikes, and antipathies, however ill-founded or strongly entertained, cannot be classed as insane delusions"

Cal—In re Kendrick's Estate, 62 P 605, 607, 130 Cal 360

In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 615—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

"Wills cannot be annulled on the theory of insane delusions because they reflect loves, hates, partialities, or caprices of testatrix"

Mo—Higgins v Smith, App., 150 S. W 2d 539, 544.

be in error in his reasoning, undue or unnatural prejudice or aversion, if based on any kind of reasoning, is not an insane delusion,<sup>85</sup> to prove it such it must appear that there was no basis for it and that attempts were made by reasoning to dispel it,<sup>86</sup> if there is no basis for it, it is an insane delusion<sup>87</sup>

One may have a delusion which does not imply or show unsoundness of mind,<sup>88</sup> being merely evidence of insanity<sup>89</sup>

*The justice or injustice of the will* does not determine whether or not it is the result of an insane delusion<sup>90</sup>

*Obsession.* In order for an obsession to invalidate a will, it must be established that it was really an insane delusion<sup>91</sup>

*Erroneous views of the law* are not "delusions" such as to void wills<sup>92</sup>

*A religious belief* having a factual basis, especially where based on a conclusion, whether correct or incorrect, peculiar or eccentric, if reached in a not altogether illogical manner, is not an insane delusion<sup>93</sup>

*Belief in spiritualism* does not ipso facto constitute an insane delusion,<sup>94</sup> but such a belief may be indulged in to such an extent as to indicate insane delusions<sup>95</sup>

*Violent temper.* A person may have a violent temper, and under its influence say and do wrong and unnatural things, and still not labor under an insane delusion as to objects of his hostility<sup>96</sup>

*Other particular matters considered* In determining whether a testator was a victim of delusions which affected his ability to make a valid will, blood relationship<sup>97</sup> and the attention bestowed on the testator by his sister<sup>98</sup> are matters of important, but not controlling, consideration in determining the issues before the court

Statements made in a will, or when the will is made, at variance with alleged prior or subsequent oral statements, cannot be made evidence of mental incapacity by calling them delusions<sup>99</sup>

*Time when effective* Insane delusions, to affect the validity of a will must have existed at the time of the execution of the will<sup>1</sup>

85. Ky—Prichard v. Kitchen, 242 S W 2d 988

Tex—In re Good's Estate, Civ App, 274 S W 2d 900, error refused, no reversible error—Garcia v Galindo, Civ App, 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507

Wis—In re Bauer's Estate, 59 N W 2d 481, 264 Wis 556—Corpus Juris quoted in In re Bickner's Estate, 49 N W 2d 404, 408, 259 Wis 425 68 C.J. p 435 note 1

"No capricious and arbitrary dislikes, unjust suspicions or prejudice against relatives, mistaken beliefs as to their feelings and designs towards [testator] and his property, however visionary, nor beliefs of acts or facts which have any evidential basis do not constitute in law insane delusions"

Mich—In re Solomon's Estate, 53 N W 2d 597, 601, 334 Mich 17—In re Johnson's Estate, 13 N W 2d 852, 857, 308 Mich 366—In re Barlum's Estate, 215 N W 299, 300, 240 Mich 393—In re Haslick's Estate, 161 N W 965, 195 Mich 432, 438

Uncomplimentary opinions about relatives of the testator are not necessarily insane delusions

Mich—In re Johnson's Estate, 13 N W 2d 852, 308 Mich 366

Attitude toward natural objects of bounty

(1) Ill will, dislike, or hatred toward natural object of testator's bounty, to be sufficient to void a will, must amount to insane delusion ex-

isting without any reason or cause, however inadequate or unjust

Mo—Gaume v Gaume, 102 S W 2d 636, 340 Mo 758—Stevens v Meadows, 100 S W 2d 281, 340 Mo 252—Zorn v Zorn, 64 S W 2d 626

(2) The fact that testatrix disliked certain of natural objects of her bounty did not establish an insane delusion, even if such dislike was based on some reason, although it may have been an unjust one Wis—In re Russell's Will, 44 N W 2d 231, 257 Wis 510

86. Cal—In re Kendrick's Estate, 62 P 605, 130 Cal 360

In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645

87. Ala—McLendon v Stough, 118 So 647, 218 Ala 445

88. Mass—Maynard v Tyler, 46 N E 413, 168 Mass 107, 2 Prob Rep Ann 565

Tex—Rodgers v Fleming, Civ App, 295 S W 326, reversed on other grounds Com App, 3 S W 2d 77

89. Pa—O'Neil v Evans, 1 Am L J 522

90. Wis—In re Bickner's Estate, 49 N W 2d 404, 259 Wis 425

91. Kan—In re Walter's Estate, 208 P 2d 262, 167 Kan 627

92. Wis—In re Jacobson's Will, 270 N W 923, 223 Wis 508

Erroneous belief as to cutting off wife Wis—In re Jacobson's Will, supra

93. Okl—In re Elston's Estate, 262 P 2d 148

94. Ind—Steinkuehler v. Wempner, 81 N E 482, 486, 169 Ind 154, 15 L R A, N S, 673

68 C.J. p 437 note 17. Belief as affecting testamentary capacity generally see infra § 23

95. Ky—Compton v Smith, 150 S W 2d 657, 286 Ky 179.

96. Cal—In re Riordan's Estate, 109 P 629, 13 Cal App 313

Mo—Current v Current, 148 S W 860, 244 Mo 429.

97. Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

98. Pa—In re Duncan's Will, supra

99. Md—Grant v. Curtin, 71 A 2d 304, 194 Md 363

1. Ariz—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248

Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Horton's Estate, 17 P 2d 184, 128 Cal App 249

Conn—Boschen v Second Nat Bank of New Haven, 35 A 2d 849, 130 Conn 501

Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—Power v Overholt, 101 A 733, 257 Pa 254—Thomas v Carter, 33 A. 81, 170 Pa. 272

In re Dovci's Estate, 101 A 2d 449, 174 Pa. Super 266

In re Nelson's Estate, Orph., 66 York Leg Rec 161

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

68 C.J. p 437 note 20.

**b. Effect on Will or Testamentary Disposition**

A delusion prevents testamentary capacity only if it actually affects the testamentary act and the testamentary disposition

A delusion, to invalidate a will, must control,<sup>2</sup> enter into,<sup>3</sup> directly<sup>4</sup> influence,<sup>5</sup> furnish the guide to,<sup>6</sup> be the dominating factor in,<sup>7</sup> or be operative

on,<sup>8</sup> the testamentary act; the will must result from,<sup>9</sup> or be the creature,<sup>10</sup> product,<sup>11</sup> or offspring<sup>12</sup> of, the delusion or hallucination. Unless hallucinations or delusions are related to the provisions of the will, they are not material,<sup>13</sup> they must bear directly on,<sup>14</sup> and influence the creation of,<sup>15</sup> the testamentary instrument, and delusions will not

Time at which capacity must exist generally see *supra* § 5

2. Neb—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Frazier's Estate, 267 N W 181, 131 Neb 61—In re Kerr's Estate, 222 N W 63, 117 Neb 630—In re Ayer's Estate, 211 N W 205, 114 Neb 849—McClary v Stull, 62 N W 501, 44 Neb 175

3. Neb—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Frazier's Estate, 267 N W 181, 131 Neb 61

4. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699

In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22

5. Neb—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Estate of Ayer, 211 N W 205, 114 Neb 849

"A delusion affects testamentary capacity only when it enters into or controls in some degree its exercise"

Conn—Boschen v Second Nat Bank of New Haven, 35 A 2d 849, 852, 130 Conn 501

Ill—Pendarvis v Gibb, 159 N E 353, 328 Ill 282, 292

N Y—In re Heaton's Will, 120 N E 83, 86, 224 N Y 22

In re Rice's Estate, 19 N Y S 2d 602, 605, 173 Misc 1038

In re Chambers' Will, 20 N Y S 2d 418, 423

6. Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

7. Miss—Gholson v Peters, 176 So 605, 180 Miss 256

8. Me—In re Loomis' Will, 174 A 38, 133 Me 81.

9. Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216

Md—Doyle v Rody, 25 A 2d 457, 180 Md 471

**Direct result**

Pa—In re Thompson's Estate, 87 A 2d 188, 370 Pa 125—In re Weiss' Estate, 77 A 2d 422, 366 Pa 456—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—In re Alexander's Estate, 91 A 1042, 246 Pa 58, Ann Cas 1916C 33—Thomas v Carter, 33 A 81, 170 Pa 272, 50 Am SR 770

In re Dovci's Estate, 101 A 2d 449, 174 Pa Super 266

10. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699—In re Chevallier's Estate, 113 P 130, 159 Cal 161

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390

Wash—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

11. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Chevallier's Estate, 113 P 130, 159 Cal 161—In re Kendrick's Estate, 62 P 605, 130 Cal 360—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390

Md—Sellers v Qualls, 110 A 2d 73  
Mo—Higgins v Smith, App. 150 S W 2d 539

Okl—In re Williams' Estate, 219 P 2d 94, 207 Okl 209—In re Wheeling's Estate, 175 P 2d 317, 198 Okl 81—

In re Mason's Estate, 91 P 2d 657, 185 Okl 278

Tex—In re Lockhart's Estate, Civ App, 258 S W 2d 877, reversed on other grounds, Sup. Knight v Edwards, 264 S W 2d 692

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

**One or more provisions of will**

R I—Rynn v Rynn, 181 A 289, 55 R I 310

12. Tex—In re Lockhart's Estate, Civ App, reversed on other grounds, Sup. Knight v Edwards, 264 S W 2d 692

**Direct offspring**

(1) Of an unfounded and insane delusion

Kan—In re Walter's Estate, 208 P 2d 262, 167 Kan 627

(2) To affect its soundness, the will must be the direct offspring of delusion controlling the mind

Me—In re Loomis' Will, 174 A 38, 133 Me 81

13. Wash—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

14. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699—In re Chevallier's Estate, 113 P 130, 159 Cal 161

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

**Beating on framing of will**

Mich—In re Walker's Estate, 258 N W 206, 207 Mich 33

15. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Smith's Estate, 91 P 2d 254, 53

destroy testamentary capacity unless they dictate,<sup>16</sup> materially<sup>17</sup> influence,<sup>18</sup> or substantially<sup>19</sup> or materially<sup>20</sup> affect<sup>21</sup> the terms or provisions of the will. The delusion must be a delusion as to, or affecting, some matter necessarily involved in the making of the will<sup>22</sup>

So, a mistaken belief, or an insane delusion, will not render the testator incompetent if it does not affect his testamentary disposition of his property,<sup>23</sup> as where the delusion, although relating to an heir

or next of kin, is not shown to affect the share given to such person,<sup>24</sup> or where the delusion relates to the testator's physical condition,<sup>25</sup> or to his own power or importance<sup>26</sup> A delusion which merely moves the testator to make a will, but does not influence or control him in disposing of his property, does not destroy his testamentary capacity.<sup>27</sup>

A will may be invalidated as the product of an incompetent testator if the insane delusion has materially affected the testamentary disposition,<sup>28</sup> or

Ariz 505—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699—In re Chevallier's Estate, 113 P 130, 159 Cal 161

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

Kan—In re Walter's Estate, 208 P 2d 262, 167 Kan 627

Me—In re Loomis' Will, 174 A 38, 133 Me 81

Tex—In re Lockhart's Estate, Civ App, reversed on other grounds, Sup, Knight v Edwards, 264 SW 2d 692

**The ultimate object of the inquiry** is whether an insane delusion, destitute of all evidential support, spontaneously arising in testator's diseased mind, influenced him and operated directly against the contestant  
Mich—In re Balk's Estate, 298 NW 779, 298 Mich 303—In re Barlum's Estate, 215 NW 299, 240 Mich 393

16. Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

17. Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

18. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Perkins' Estate, 235 P 45, 195 Cal 699—In re Chevallier's Estate, 113 P 130, 159 Cal 161

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41—In re Dupont's Will, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Peterkin's

Estate, 73 P 2d 897, 23 Cal App 2d 597

Neb—In re Bose's Estate, 285 NW 319, 136 Neb 156

NY—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

19. Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

RI—Rynn v Rynn, 181 A 289, 55 RI 310

20. Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Wash—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456

**The test as to validity of will executed by testator laboring under insane delusion** is not whether testator had general testamentary capacity, but whether insane delusion materially affected will  
Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Wash—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456

21. Cal—In re Shay's Estate, 237 P 1079, 196 Cal 355

In re Reiss' Estate, 123 P 2d 68, 50 Cal App 2d 398

Okl—In re Williams' Estate, 249 P 2d 94, 207 Okl 209

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583

Rule as to old age see infra § 27

**Effect on memory and understanding**

Insane delusion does not deprive testator of capacity to make will if delusion does not affect his memory and understanding as to nature and extent of his estate, proper objects of his bounty, and nature of testamentary act

RI—Rynn v Rynn, 181 A 289, 55 RI 310

22. Mo—Rex v Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589—Hall v Mercantile Trust Co, 59 SW 2d 664, 332 Mo 802

Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

**Subject matter**

(1) Insane delusions which do not touch the subject matter of a will do not affect the testamentary capacity of the testator

Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282

(2) A testator suffering from monomania may make a valid will pro-

vided the form taken by the monomania does not touch the subject-matter of the will

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

23. Cal—In re Chevallier's Estate, 113 P 130, 159 Cal 161

Conn—**Corpus Juris cited in** Boschen v Second Nat Bank of New Haven, 35 A 2d 849, 852, 130 Conn 501

Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

Okl—In re Williams' Estate, 249 P 2d 94, 207 Okl 209

Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

68 C J p 435 note 6

**Delusion as to guidance by spirits**

Tex—Reiche v Williams, Civ App, 183 SW 2d 587, error refused 185 SW 2d 420, 143 Tex 365

24. Pa—In re Hemingway's Estate, 45 A 726, 195 Pa 291, 78 Am SR 815

68 C J p 436 note 7

25. Cal—In re Redfield's Estate, 48 P 794, 116 Cal 637

68 C J p 436 note 9

26. Mich—Rice v. Rice, 15 NW 545, 50 Mich 448

68 C J p 436 note 10

27. Ind—Spry v Logansport Loan & Trust Co, 133 NE 827, 191 Ind 522

28. Ariz—In re Wagner's Estate, 252 P 2d 789, 75 Ariz 135—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505—In re Green's Estate, 11 P 2d 947, 40 Ariz 274

Cal—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re Perkins' Estate, 235 P 45, 195 Cal 699

In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Conn—Boschen v. Second Nat Bank of New Haven, 35 A 2d 849, 130 Conn 501

Mass—Santry v France, 97 NE 2d 533, 327 Mass 174—Goddard v Dupree, 76 NE 2d 643, 322 Mass 247—Ronan v Moroney, 47 NE 2d 933, 313 Mass 475

has been the moving cause thereof,<sup>29</sup> or where the testamentary disposition has been the direct consequence and offspring of the delusion<sup>30</sup> This rule has been applied where the delusion is as to the testator's property,<sup>31</sup> or as to the natural objects of his bounty,<sup>32</sup> such as his children,<sup>33</sup> even though he may have been rational on other subjects<sup>34</sup>

## § 19. — Lucid Intervals

A will made by an insane person may be valid if made during a lucid interval

With respect to testamentary capacity, a person may be sane at times and insane at other times<sup>35</sup> So, a will made by an insane person may be valid if made during a lucid interval,<sup>36</sup> if the facts disclose the required elements of capacity at the time in question,<sup>37</sup> and this is true as to one suffering from

N Y—In re Rice's Estate, 19 N Y S 2d 602, 173 Misc 1038

Okl—In re Williams' Estate, 249 P 2d 94, 207 Okl 209—In re Wheeling's Estate, 175 P 2d 317, 198 Okl 81—In re Mason's Estate, 91 P 2d 657, 185 Okl 278

Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—Thomas v Carter, 33 A 81, 170 Pa 272—In re Weiss' Estate, 77 A 2d 422, 366 Pa 456

In re Dovci's Estate, 101 A 2d 449, 174 Pa Super 266

In re Nelson's Estate, Orph, 66 York Leg Rec 161

Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456

68 C J p 436 note 12

29. Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—Thomas v Carter, 33 A 81, 170 Pa 272

In re Dovci's Estate, 101 A 2d 449, 174 Pa Super 266

In re Nelson's Estate, Orph, 66 York Leg Rec 161

30. Md—Doyle v Rody, 25 A 2d 457, 180 Md 471

31. Conn—Boschen v Second Nat Bank of New Haven, 35 A 2d 849, 130 Conn 501

Wash—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456.

68 C J p 436 note 13

32. Conn—Boschen v Second Nat Bank of New Haven, 35 A 2d 849, 130 Conn 501

Pa—In re Weiss' Estate, 77 A 2d 422, 366 Pa 456

Tex—In re Good's Estate, Civ App, 274 S W 2d 900, error refused no reversible error—Stone v Grainger, Civ App, 66 S W 2d 484

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583

68 C J p 436 note 14

### Insensibility to ties of blood and kindred

Neb—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Kerr's Estate, 222 N W 63, 117 Neb 630—McClary v Stull, 62 N W 501, 44 Neb 175

### Right to intestate succession

A will cannot stand that is induced by an insane delusion concerning any one who, but for such will,

would succeed to the property by intestate succession

Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Wash—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456

### Person in relationship of heir

A delusion affects testamentary capacity only when it enters into or controls in some degree exercise of the testamentary will against a person who stands in relationship of an heir

N Y—In re Kimball's Will, 281 N Y S 605, 156 Misc 338

33. Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

34. Md—Doyle v Rody, 25 A 2d 457, 180 Md 471

Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180—Thomas v Carter, 33 A 81, 170 Pa 272

In re Dovci's Estate, 101 A 2d 449, 174 Pa Super 266

In re Nelson's Estate, Orph, 66 York Leg Rec 161

68 C J p 437 note 15

35. Tex—Reiche v Williams, Civ App, 183 S W 2d 587, error refused 185 S W 2d 420, 143 Tex 365

36. Ark—Thiel v Mobley, 265 S W 2d 507, 223 Ark 167

Cal—In re Worrall's Estate, 127 P 2d 593, 53 Cal App 2d 243

Fla—Murrey v Barnett Nat Bank of Jacksonville, 74 So 2d 647—In re Carnegie's Estate, 13 So 2d 299, 153 Fla 7

Minn—In re Olson's Estate, 35 N W 2d 439, 227 Minn 289

Miss—Gholson v Peters, 176 So 605, 180 Miss 256

N Y—In re Hill's Will, 73 N Y S 2d 258, appeal dismissed 78 N Y S 2d 365—In re Schmidt's Will, 139 N Y S 464

Or—Corpus Juris cited in In re Scott's Estate, 228 P 2d 417, 424, 191 Or 90—In re Provolt's Estate, 151 P 2d 736, 175 Or 128—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

Pa—In re Nute, Com Pl, 33 Del Co 277

Tex—Reiche v Williams, Civ App,

183 S W 2d 587, error refused 185 S W 2d 420, 143 Tex 365

Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

68 C J p 437 note 22

### Rule under statute

Ga—Anderson v Anderson, 80 S E 2d 807, 210 Ga 464—Scott v Gibson, 22 S E 2d 51, 194 Ga 503

### Types of insanity

(1) A person afflicted with general insanity or monomania may make a valid will during a lucid interval

Miss—Gholson v Peters, 176 So 605, 180 Miss 256

(2) Person suffering from type of insanity called "mente captus" are habitually insane and are presumed to be incapable of having a lucid interval in which to make a will, and persons suffering from type called "furiosus" are recurrently insane and are capable of having such interval

La—Cormier v Myers, 65 So 2d 345, 223 La 259—Clanton v Shattuck, 30 So 2d 823, 211 La 750—Artigue v Artigue, 26 So 2d 699, 210 La 208

(3) Testator afflicted with senile dementia may have lucid interval during which he is qualified to will

Me—In re Loomis' Will, 174 A 38, 133 Me 81

(4) This is true where testator was suffering from senile dementia in an advanced stage

Or—In re Provolt's Estate, 151 P 2d 736, 175 Or 128

(5) Senile dementia generally see *infra* § 27 b

Although fixed insanity has been established, testator's capacity to make will may be proved by showing that execution of will was during lucid interval

Me—In re Loomis' Will, 174 A 38, 133 Me 81

An interdicted person can make a valid will during a lucid interval

La—Succession of Lanata, 18 So 2d 500, 205 La 915

37. Cal—In re Worrall's Estate, 127 P 2d 593, 53 Cal App 2d 243

Minn—In re Olson's Estate, 35 N W 2d 439, 227 Minn 289

Or—In re Provolt's Estate, 151 P 2d 736, 175 Or 128

Time at which capacity must exist generally see *supra* § 5.



any delusion<sup>38</sup> A lucid interval is not merely a cessation of the violent symptoms of an insane disorder, but a restoration of the mind sufficiently to have a sound and disposing mind<sup>39</sup>

A statute requiring a certification of lucidity by two physicians to enable a demented person to make a will does not apply when the testator has not been legally declared demented<sup>40</sup>

## § 20. — Adjudication as to Insanity or Incompetency; Guardianship or Commitment

In general, a person does not lack testamentary ca-

capacity because he has been adjudicated insane or incapable of handling his affairs, or has been confined in an institution for the insane, or because a guardian has been appointed for him.

A person is not incompetent to make a will because he has been adjudicated to be of unsound mind,<sup>41</sup> or insane,<sup>42</sup> or has been confined in an institution for the insane<sup>43</sup>

This is true where a person has been adjudicated to be incapable of managing his property, or handling his affairs,<sup>44</sup> whether the adjudication of incompetency precedes or follows the execution of the

38. Pa—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

39. Del—In re Miller's Will, 85 A 803, 26 Del 477

Pa—Wuller's Est., 14 Pa Dist 89

### Other statement

A lucid interval is not merely a cooler moment, and abandonment of pain or violence or of higher state of torture, a mind relieved from excessive pressure, but an interval in which the mind, having thrown off the disease, has recovered from its general habit, it is not the mere absence of the subject of the delusion from the mind or a concealment of delusions, but their total absence, their nonexistence in all circumstances, and a recovery from the disease and subsequent relapse

Tenn—Melody v Hablin, 115 SW 2d 237, 21 Tenn App 687

40. Philippine—Hernaes v Hernaesz, 1 Philippine 689

41. Colo—Corpus Juris quoted in In re McCrone's Estate, 101 P 2d 25, 26, 106 Colo 69

Okl—Corpus Juris quoted in Moore v Glover, 163 P 2d 1003, 1005, 195 Okl 646

68 C J p 437 note 25

Conclusiveness and effect of adjudication generally see Insane Persons § 32

### Statute held inapplicable

The statute prohibiting persons judicially determined to be of unsound mind from making conveyance or contract or delegating any power or waiving any right was intended to cover the making of contracts and conveyances, and not to control on the matter of testamentary capacity

Cal—In re Worrall's Estate, 127 P 2d 593, 53 Cal App 2d 243

42. NM—In re Armijo's Will, 261 P 2d 833, 57 NM 649

Adjudication as lunatic from alcoholic dementia see infra § 25

Presumption from adjudication of insanity see infra § 37

"Mental capacity to execute a will may factually exist and be shown though testator has been adjudged insane A party may have been ad-

judged insane yet to make a valid will the law only requires that at the time of composing and executing it, he be factually so far free of his affliction that the ordinary legal consequences of his insanity do not apply to what he is then doing"

Va—Western State Hospital of Staunton v Winger, 83 SE 2d 446, 453, 196 Va 300—Tate v Chumbley, 57 SE 2d 151, 158, 190 Va 480

### Testamentary capacity not in issue; estoppel

Testatrix' testamentary capacity was not an issue in proceedings to have her adjudged insane and a committee appointed for her, and judgment in lunacy proceedings did not estop beneficiary of will to offer it for probate

Va—Tate v Chumbley, supra

43. Colo—Corpus Juris quoted in In re McCrone's Estate, 101 P 2d 25, 26, 106 Colo 69

Mich—In re Nickel's Estate, 32 SW 2d 733, 321 Mich 519

Okl—Corpus Juris quoted in Moore v Glover, 163 P 2d 1003, 1005, 195 Okl 646

Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

68 C J p 437 note 28

The failure to procure an order required by Mental Hygiene Law as a condition precedent to execution of a propounded instrument as a will by one confined to private sanitarium for mentally ill did not vitiate testamentary document otherwise valid, especially where subsequent to execution of will, Department of Mental Hygiene advised sanitarium that it waived provisions to permit party to make a will

NY—In re Alexieff's Will, 94 NYS 2d 32, affirmed 97 NYS 2d 532, 277 App Div 790, appeal denied 98 NYS 2d 582, 277 App Div 901

44. Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1

Colo—Corpus Juris quoted in In re McCrone's Estate, 101 P 2d 25, 26, 106 Colo 69

Kan—In re Hall's Estate, 195 P 2d 612, 165 Kan 465.

Okl—In re Wadsworth's Estate, 273 P 2d 997—Corpus Juris cited in In re Martin's Estate, 188 P 2d 862, 864, 199 Okl 567—Corpus Juris quoted in Moore v Glover, 163 P 2d 1003, 1005, 195 Okl 646

68 C J p 437 note 26

"A person may indeed be incapable of managing and conserving a large estate and yet be perfectly able to understand the nature of a will, to comprehend the extent of his property, and to recall the natural objects of his bounty"

Wash—In re Bottger's Estate, 129 P 2d 518, 527, 14 Wash 2d 676

### Judgment of incompetency in guardianship proceedings

Cal—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754

### Age

(1) Adjudication that ward was mentally incompetent to have care, control, and custody of his property because of age would not render him mentally incompetent in other matters and he might be sufficiently competent to make a will

Mich—In re Johnson's Estate, 281 NW 597, 286 Mich 213

(2) Old age generally see infra § 27

### Interdiction

Fact that testator was under interdiction by judgment of court prior to execution of will would not, ipso facto, incapacitate him from making a will, but would only be evidence of incapacity, to be considered with all other evidence

La—Succession of Schmidt, 53 So 2d 834, 219 La 675—Succession of Lanata, 18 So 2d 500, 205 La 915

### Participation in proceedings as not estoppel

The issues in a proceeding to appoint a committee for aged woman who was incapable of taking proper care of her property were not the same as the issues in a suit to determine her testamentary capacity, therefore, fact that legatee, named in will executed by her on same day that her committee was appointed, participated in proceeding for ap-

will<sup>45</sup> It is also true where a guardian or conservator of one's person or estate has been appointed,<sup>46</sup> in the absence of a controlling statute,<sup>47</sup> and unless the order appointing the guardian is based on an express finding of some mental defect inconsistent with the possession of the capacity required for the execution of a will,<sup>48</sup> and in the particular circumstances the order appointing a guardian may in no sense be an adjudication that the ward is mentally incompetent to handle his own affairs<sup>49</sup>

Conversely, a judgment declaring a person to be of sound mind is not conclusive as to his competency,<sup>50</sup> and a person's restoration to capacity to transact his business in one year does not establish his testamentary capacity in a subsequent year.<sup>51</sup> However, a judicial finding, in a proceeding for the appointment of a guardian, that the testator was competent to handle his own affairs has been

held certainly equivalent to a finding that he was then competent to make a will<sup>52</sup>

## § 21. Imbecility

### Imbecility may establish testamentary incapacity

Imbecility may be sufficient to establish testamentary incapacity,<sup>53</sup> unless the testator possesses an understanding of the essential matters<sup>54</sup>

Resolutions of psychological and education associations requiring expert examination before a person may be classified as a moron are not binding on courts where they have not been given statutory effect by the legislature<sup>55</sup>

## § 22. Eccentricity, Personal Habits and Conduct

Eccentricities or undesirable personal habits or characteristics do not of themselves render a person incompetent to make a will

pointment of committee did not estop the legatee to assert in the suit that she possessed testamentary capacity

Va.—*Gilmer v Brown*, 44 S E 2d 16, 186 Va 630

### Decree prospective only

Pa.—In re Meckley's Estate, Orph, 54 Lanc Rev 173

45. Wash.—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

46. Cal.—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1

In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480

Colo.—*Corpus Juris* quoted in In re McCrone's Estate, 101 P 2d 25, 26, 106 Colo 69

Iowa.—In re Willer's Estate, 281 N W 155, 225 Iowa 606

Me.—Appeal of Eastman, 194 A 586, 135 Me 233

Mich.—In re Vallender's Estate, 17 N W 2d 213, 310 Mich 359—In re Johnson's Estate, 281 N W 597, 286 Mich 213

Okl.—*Corpus Juris* quoted in Moore v Glover, 163 P 2d 1003, 1005, 195 Okl 646—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389

Pa.—In re Kovolowski's Estate, Orph, 16 Som Leg J 122

Wis.—In re Sowka's Will, 19 N W 2d 898, 247 Wis 493

48 C J p 437 note 27.

Presumption from adjudication as to guardianship see *infra* § 37

"A person may require a guardian to supervise his estate and yet be competent to make a valid will disposing of it upon his death"

Wash.—In re Bottger's Estate, 129 P 2d 518, 527, 14 Wash 2d 676

### Practically universal rule

Kan.—In re Hall's Estate, 195 P 2d 612, 165 Kan 465.

### Appointment not conclusive bar

Colo.—In re McCrone's Estate, 101 P 2d 25, 106 Colo 69

### Decree not conclusive of insanity

Vt.—In re Hanrahan's Will, 194 A 471, 109 Vt 108

### Appointment because of age and physical infirmities

Mich.—In re Paquin's Estate, 43 N W 2d 858, 328 Mich 293

### Decree prospective only

Decree adjudging person to be weakminded and appointing guardian for his estate operates prospectively only and cannot nullify his prior will, though executed on day on which guardianship proceedings were begun

Pa.—In re Taylor's Estate, 175 A 540, 316 Pa 557

In re Ryman, 11 A 2d 677, 139 Pa Super 212

### Statute held inapplicable

In will contest on ground of incapacity of testatrix who had been declared incompetent and for whom a guardian had been appointed, statute prohibiting person judicially determined to be of unsound mind from making conveyance or contract, delegating any power, or waiving any right, not being intended to control on testamentary capacity, was inapplicable, and did not prevent an inquiry into the question whether testatrix was of sound and disposing mind and memory at the time of execution of will

Cal.—In re Worrall's Estate, 127 P 2d 593, 53 Cal App 2d 243

47. Va.—*Gilmer v Brown*, 44 S E 2d 16, 186 Va 630

48. Wash.—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676.

49. Wash.—In re Bottger's Estate, *supra*

50. Colo.—*Corpus Juris* quoted in In re McCrone's Estate, 101 P 2d 25, 26, 106 Colo 69

Okl.—*Corpus Juris* quoted in Moore v Glover, 163 P 2d 1003, 1005, 195 Okl 646

68 C J p 437 note 29

Adjudication as to insanity and guardianship as evidence see *infra* §§ 45, 64

### Execution of will after verdict of competency

Where testator purportedly executed will ten days after jury's verdict of competency in incompetency proceeding, but before court had entered order confirming the verdict, the order was not conclusive on issue of testamentary capacity in subsequent proceeding for probate, but under rule of *res judicata* question of mental capacity was to be limited to period from date of verdict to time will was executed

N Y.—In re Ernst's Will, 86 N Y S 2d 562, 194 Misc 237

51. Okl.—In re Martin's Estate, 188 P 2d 862, 199 Okl 567

52. Cal.—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388

53. Pa.—McTaggart v Thompson, 11 Pa 149

54. Ga.—Potts v House, 6 Ga 324, 50 Am D 329

Or.—Chrisman v Chrisman, 18 P 6, 16 Or 127

Requisites for testamentary capacity see *supra* § 15

55. S C.—In re Brazman's Will, 173 S E 623, 172 S C 183.

Eccentricity, or eccentricities, or peculiarities,<sup>56</sup> or deviation or departure from normal conduct,<sup>57</sup> or from normal thought or action,<sup>58</sup> do not of themselves render a person incompetent to make a will, although they may be taken into consideration with other facts in determining whether the testator is of such mental capacity as the law requires for

making a will.<sup>59</sup> Courts guard jealously the rights of all rational people, including the queer, to make wills.<sup>60</sup>

A testator is not incompetent because of stinginess or miserliness,<sup>61</sup> a disagreeable disposition,<sup>62</sup> irritability,<sup>63</sup> unsociability,<sup>64</sup> bad or violent temper,<sup>65</sup> fits of rage,<sup>66</sup> slovenliness or untidiness, as in dress

56. Cal—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46—In re Morey's Estate, 171 P 2d 131, 75 Cal App 2d 628—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41  
Ga—Ehlers v Rheinberger, 49 S E 2d 535, 204 Ga 226  
Ill—Gilbert v Oneale, 21 N E 2d 283, 371 Ill 427—Hoskinson v Lovellette, 5 N E 2d 219, 365 Ill 21  
McGovern v McGovern, 65 N E 2d 583, 328 Ill App 316—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418  
Ky—Sloan v Sloan, 197 S W 2d 77, 303 Ky 180—Perkins' Guardian v Bell, 172 S W 2d 617, 294 Ky 767—Clark v Johnson, 105 S W 2d 576, 268 Ky 591  
Md—Sellers v Qualls, 110 A 2d 73—Lynn v Magness, 62 A 2d 604, 191 Md 674  
Mich—In re Thayer's Estate, 15 N W 2d 712, 309 Mich 473—In re Johnson's Estate, 13 N W 2d 852, 308 Mich 366  
Mo—Proffer v Proffer, 114 S W 2d 1035, 342 Mo 184  
Shearrer v Shearrer, App, 259 S W 2d 705—Minturn v Conception Abbey, 61 S W 2d 352, 227 Mo App 1179  
N Y—In re Hill's Will, 73 N Y S 2d 258, appeal dismissed 73 N Y S 2d 365  
In re Vonhaus' Estate, 4 N Y S 2d 599, 167 Misc 660  
Or—Corpus Juris cited in In re Scott's Estate, 228 P 2d 417, 424, 191 Or 90  
Pa—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58  
R I—Rynn v. Rynn, 181 A 289, 55 R I 310  
Tenn—Rogers v Hickam, 208 S W 2d 34, 30 Tenn App 504—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687—Fitch v American Trust Co., 4 Tenn App 87  
Utah—In re Buttars' Estate, 261 P 2d 171—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580  
W Va—Ritz v Kingdon, 79 S E 2d 123—Nicholas v Kershner, 20 W Va 251  
68 C J p 437 note 32  
Eccentricities accompanying old age see infra § 27.

Eccentricity as evidence of testamentary incapacity see infra § 66  
"There is a decided difference between eccentricity, mental peculiarities, misapprehensions on the one hand and testamentary incapacity on the other"  
"A man's mental capacity must be gauged by something more than his idiosyncrasies and peculiarities"  
Ark—Shippen v Shippen, 211 S W 2d 433, 435, 213 Ark 517  
Wash—In re Denison's Estate, 162 P 2d 245, 249, 23 Wash 2d 699.  
**Rule under statute**  
Ga—Brumbelow v Hopkins, 29 S E 2d 42, 197 Ga 247  
**Extreme eccentricity**  
Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209  
**Gross eccentricities**  
Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Frazier's Estate, 267 N W 181, 131 Neb 61  
**Eccentricities of conduct**  
Pa—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58  
**Peculiarities of speech or manner**  
Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Frazier's Estate, 267 N W 181, 131 Neb 61  
**The tendency of the courts is more and more toward the upholding of wills which are attacked by dissatisfied relatives who are usually able to produce some evidence of peculiarities**  
Ky—Tye v Tye, 229 S W 2d 973, 312 Ky 812  
**Eccentric will**  
Fact that an eccentric will is made by an eccentric person is not sufficient in itself to invalidate the will  
Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125  
**Living in virtual seclusion**  
Ky—Teegarden v Webster, 199 S W 2d 728, 304 Ky 18  
57. Cal—In re Morey's Estate, 171 P 2d 131, 75 Cal App 2d 628  
Mich—In re Johnson's Estate, 13 N W 2d 852, 308 Mich 366  
**Asking idle questions**  
N J—In re Rein's Will, 50 A 2d 380, 139 N J Eq 122  
Pa—In re Conway's Estate, 79 A 2d 208, 366 Pa. 641—In re Lawrence's Estate, 132 A 786, 286 Pa 58

Tex—Garcia v Galindo, Civ App, 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507—McCannon v McCannon, Civ. App, 2 S W 2d 942  
58. Cal—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41  
59. Mo—Proffer v Proffer, 114 S W. 2d 1035, 342 Mo 184  
Shearrer v Shearrer, App, 259 S W 2d 705—Minturn v Conception Abbey, 61 S W 2d 352, 227 Mo App 1179  
Tenn—Melody v Hamblin, 115 S W. 2d 237, 21 Tenn App 687  
60. Ky—Tye v Tye, 229 S W 2d 973, 312 Ky 812—Kentucky Trust Co v. Gore, 192 S W 2d 749, 302 Ky 1.  
61. Ky—Clark v Johnson, 105 S W. 2d 576, 268 Ky 591  
Md—Sellers v Qualls, 110 A 2d 73  
Or—Corpus Juris cited in In re Hill's Estate, 256 P 2d 735, 741, 198 Or 307—Corpus Juris cited in In re Scott's Estate, 228 P 2d 417, 424, 191 Or 90  
Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258  
68 C J p 438 note 33  
62. Cal—In re Collins' Estate, 164 P 1110, 174 Cal 663  
63. Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645  
Pa—In re Catania's Estate, 20 Pa Dist & Co 656  
Utah—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580  
**Irritability ordinarily of little importance**  
Pa—In re Phillips' Estate, 149 A 719, 299 Pa 415  
64. Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258  
**Failure or refusal to converse**  
Testator's failure to make effort to converse with daughter-in-law and his refusal to answer her questions did not indicate mental incapacity  
Md—Acker v. Acker, 192 A 327, 172 Md 477.  
65. Cal—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645  
Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395  
68 C J p 438 note 35  
66. Pa—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58.

or person,<sup>67</sup> or offensive or filthy habits,<sup>68</sup> although evidence of such matters may be admissible, as discussed *infra* §§ 52-57.

### § 23. Prejudices and Beliefs

Unjust prejudices do not deprive a person of testamentary capacity, nor do peculiar beliefs or opinions, unless they prevent the exercise of a rational judgment with respect to the disposition of his property.

A person does not lack testamentary capacity merely because he holds unjust prejudices,<sup>69</sup> or beliefs or opinions generally regarded as peculiar or unsound,<sup>70</sup> or as false,<sup>71</sup> or absurd,<sup>72</sup> or fixed no-

tions and opinions on family or financial matters;<sup>73</sup> but a peculiar belief may be material in connection with other circumstances in determining the question of capacity<sup>74</sup>

A testator may be competent although he is an atheist,<sup>75</sup> or a religious fanatic,<sup>76</sup> or believes in Christian Science,<sup>77</sup> spiritualism,<sup>78</sup> the possibility of communication with departed spirits,<sup>79</sup> Swedenborgianism,<sup>80</sup> or witchcraft,<sup>81</sup> or in the exercise of unnatural powers by himself or others,<sup>82</sup> or in the transmigration of souls of men to animals,<sup>83</sup> or although he has superstitious terrors or beliefs,<sup>84</sup> or

67. Ill—Gilbert v Oneale, 21 NE 2d 283, 371 Ill 427

Mich—In re Grow's Estate, 299 N W 836, 299 Mich 133—In re Littlejohn's Estate, 215 NW 55, 239 Mich 630—In re Murray's Estate, 188 NW 381, 219 Mich 70—Lefingwell v Bettinghouse, 115 NW 731, 151 Mich 513

Neb—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Frazier's Estate, 267 NW 181, 131 Neb 61.

N Y—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Or—**Corpus Juris** cited in In re Scott's Estate, 228 P 2d 417, 424, 191 Or 90

Utah—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

68 C J p 438 note 36  
Slovenliness accompanied by old age see *infra* § 27

68. Cal—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Ill—Gilbert v Oneale, 21 NE 2d 283, 371 Ill 427

Pa—In re Pelechacz' Estate, Orph, 40 Luz Leg Reg 345

Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

68 C J p 438 note 37

69. Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Powell's Estate, 299 P 108, 113 Cal App 670—In re Struve's Estate, 279 P 846, 100 Cal App 255

Neb—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812

Pa—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299

68 C J p 438 note 40

Prejudice as constituting insane delusion see *supra* § 18

"Wills . . . do not depend for their validity upon the testator's . . . freedom from prejudice"

Ariz—In re Smith's Estate, 91 P 2d 254, 256, 53 Ariz 505

Cal—In re Perkins' Estate, 235 P 45, 49, 195 Cal. 699.

N Y—In re White's Will, 24 NE 935, 937, 121 N Y 406

In re Hargrove's Will, 28 NYS 2d 571, 573, 262 App Div 202, affirmed 42 NE 2d 608, 288 N Y 604

In re Jerrells' Will, 63 NYS 2d 499, 513, appeal dismissed 70 N Y S 2d 580

**Prejudices against members of family**  
Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395

**Prejudice against natural object of bounty**  
Testator's unreasonable prejudice against natural object of his bounty is not ordinarily a ground for invalidating will

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19

**Unfounded prejudice towards near relative**  
Unfounded prejudice, or antipathy, or even hatred towards a near relative is not of itself enough to destroy testamentary capacity

Miss—Gholson v Peters, 176 So 605, 180 Miss 256

**Fact that testator was actuated by a mere dislike** does not mean that he lacked testamentary capacity

Ariz—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

70. Neb—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812

Pa—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Henry's Estate, Orph, 52 York Leg Rec 177

68 C J p 438 note 41

**Illogical belief as not evidence of insanity**

(1) A belief may be illogical or preposterous, without being evidence of insanity

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Perkins' Estate, 235 P 45, 195 Cal 699

(2) Insanity generally see *supra* §§ 17-20

71. Cal—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

72. Pa—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

73. RI—Rynn v Rynn, 181 A. 289, 55 RI 310

74. Neb—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812

68 C J p 439 note 52

75. Ky—Woodruff's Ex'r v Woodruff, 26 SW 2d 751, 233 Ky 744

76. Ky—In re Weir's Will, 39 Ky 434

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

77. N Y—In re Brush's Will, 72 N Y S 421, 35 Misc 689

78. Ky—Davis' Ex'r v Laughlin, 133 SW 2d 544, 280 Ky 422

Mass—Donovan v Sullivan, 4 NE 2d 1004, 296 Mass 55

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

68 C J p 438 note 44

Admissibility of evidence as to belief in spiritualism see *infra* § 46

Belief as not constituting insane delusion see *supra* § 18 a

**Normal belief in spiritualism**  
Ky—Compton v Smith, 150 SW 2d 657, 286 Ky 179

79. Mass—Donovan v Sullivan, 4 NE 2d 1004, 296 Mass 55

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

**Communication by physical and material means**

However, a belief in communication with dead people by letters and telephone and other physical and material means goes beyond a normal belief in spiritualism

Ky—Compton v Smith, 150 SW 2d 657, 286 Ky 179

80. Ill—Scott v. Scott, 72 NE 708, 212 Ill 597

81. Ill—Carnahan v Hamilton, 107 NE 210, 265 Ill 508, Ann Cas 1916C 21

68 C J p 439 note 47

82. Ky—McCrocklin's Adm'r v Lee, 56 SW 2d 564, 247 Ky 31

68 C J p 439 note 48

83. N Y—Bonard's Will, 16 Abb Pr, N.S., 128

84. N Y—Thompson v Quimby, 2 Bradf Surr 449, affirmed 21 Barb. 107.

entertains unusual views as to the future life<sup>85</sup>

Piety or devotion to one's church and its institutions,<sup>86</sup> or solicitation for the spiritual welfare of others in whom the testator is interested,<sup>87</sup> does not indicate weak mentality, nor does religious zeal import testamentary incapacity<sup>88</sup>

A testator is incompetent if his mind is so controlled by his peculiar views as to prevent the exercise of a rational judgment touching the disposition of his property,<sup>89</sup> so, a belief in spiritualism may be possessed to the extent that it destroys the will power and overcomes it<sup>90</sup>

## § 24. Moral Delinquency

Moral delinquency alone does not amount to testamentary incapacity.

Moral delinquency alone does not amount to testamentary incapacity<sup>91</sup>

## § 25. Use of Intoxicants

The fact that a person uses, or is addicted to, intoxicants does not deprive him of testamentary capacity unless, at the time he executes the will, they deprive him of judgment, reason, or comprehension

If the testator's mind is capable of understanding those essential matters necessary to the execution of a will, as discussed supra § 15, at the time the

will is made, supra § 5, he has testamentary capacity, even though he is in some degree under the influence of intoxicating liquors,<sup>92</sup> or although he is of intemperate habits and frequently or habitually intoxicated,<sup>93</sup> or has been judicially declared a drunkard<sup>94</sup> or a lunatic from alcoholic dementia<sup>95</sup> This is so even though his mind is so weakened by intoxicants that he cannot take care of his estate<sup>96</sup> To constitute insanity, in this connection, more than dipsomania must be shown<sup>97</sup>

On the other hand, a testator does not have capacity if, at the time the will is executed, he is deprived of judgment and reason,<sup>98</sup> or is prevented from having an independent comprehension of what he is doing,<sup>99</sup> by the use of intoxicants, or if he is suffering from chronic alcoholic insanity.<sup>1</sup>

## § 26. Use of Drugs

The mere fact of using drugs does not deprive a person of testamentary capacity, but the use may be so excessive as to have that effect.

A user of drugs is not incapacitated, by the fact of such use, from making a will,<sup>2</sup> although such use is a factor to be considered,<sup>3</sup> but the general principles as to testamentary capacity, as discussed supra § 15, apply<sup>4</sup> It is possible that a testator may have testamentary capacity even though it is

85. Tenn—Gass' Heirs v. Gass' Ex'rs, 3 Humphr 278

86. Ky—Clark v Johnson, 105 SW 2d 576, 268 Ky 591

87. Ky—Clark v Johnson, supra.

88. Ky—Clark v Johnson, supra.

89. Wis—Smith's Will, 8 NW 616, 9 NW 665, 52 Wis 543, 38 Am R 756

68 C J p 439 note 53

90. Cal—Compton v Smith, 150 SW 2d 657, 286 Ky 179

Belief as indicating insane delusion see supra § 18 a

91. Ill—Daugherty v State Savings, Loan & Trust Co, 126 NE 545, 292 Ill 147

68 C J p 439 note 54

Admissibility of evidence as to moral delinquency see infra § 57

92. Cal—In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 2d 322

68 C J p 439 note 57.

Use of intoxicants as evidence of testamentary incapacity see infra §§ 34, 43, 61

93. Cal—In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 2d 322

Fla—Henson v Denniston, 169 So 624, 124 Fla 843

Iowa—In re Willer's Estate, 281 N W 155, 225 Iowa 606

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455.

Okl—Duckwall v Lawson, 172 P 2d 415, 197 Okl 472—In re DeVine's Estate, 109 P 2d 1078, 188 Okl 423

Pa—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420

Tenn—Hammond v Union Planters Nat Bank, 222 SW 2d 377, 189 Tenn 93

Rogers v Hickam, 208 SW 2d 34, 30 Tenn App 504—Fitch v American Trust Co, 4 Tenn App 87

68 C J p 439 note 58

94. Wis—Slinger's Will, 37 NW 236, 72 Wis 22

68 C J p 440 note 59

95. NY—In re Barlow's Will, 168 NYS 131, 180 App Div 860

Effect of adjudication of insanity generally see supra § 20

96. NY—Matter of Johnson, 27 NYS 649, 7 Misc 220

97. Cal—In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 2d 322.

98. Utah—In re Van Alstine's Estate, 72 P 942, 26 Utah 193

68 C J p 440 note 62

"The intoxication of the testator [if] established on the day of execution of the will, must have been of such a degree as to have deprived him of judgment while executing it It must affirmatively appear that the mind of the testator was totally destroyed, and that he was so far under

the influence of liquor at the instant of its execution that he was incapable of comprehending the nature of his act, the extent of his property, and those who had a claim upon his bounty"

Cal—In re Smethurst's Estate, 59 P 2d 830, 834, 15 Cal App 2d 322

99. Cal—In re Smethurst's Estate, supra

1. NY—Matter of Ely's Estate, 39 NYS 177, 16 Misc 228

Insanity generally see supra § 17

2. Ill—Johnson v First Union Trust & Savings Bank, 273 Ill App 472.

68 C J p 440 note 64

Administration of morphine

Cal—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275.

3. Cal—In re Downey's Estate, supra

Administration of morphine

Cal—In re Downey's Estate, supra

4. Okl—In re Anderson's Estate, 286 P 17, 142 Okl 197

A narcotics addict has testamentary capacity if he has sufficient mind and memory to understand the nature and extent of his property, proper objects of his bounty, and nature of his testamentary act Fla—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399.

proved that he was somewhat under the influence of drugs at the time he executed his will<sup>5</sup>

However, mental unsoundness such as will constitute testamentary incapacity may be produced by the excessive use of drugs,<sup>6</sup> under which circumstances the testator is incompetent.<sup>7</sup>

## § 27. Old Age

### a In general

### b Senility, senile dementia

5. Fla—In re Wilmott's Estate, supra.

#### Narcotics

Ky—Nunn v Williams, 254 S W 2d 698

#### Combination with disease

(1) The same is true where the ravages of disease combine with the effects of drugs

Fla—In re Wilmott's Estate, Fla., 66 So 2d 465, 40 A L R 2d 1399

(2) Disease generally see infra § 29

6. Ill—Johnson v First Union Trust & Savings Bank, 273 Ill App 472

Mo—Naylor v McRuer, 154 S W 772, 248 Mo 423

7. Ill—Johnson v First Union Trust & Savings Bank, 273 Ill App 472

68 C J p 440 note 67

Use of drugs as evidence of testamentary incapacity see infra § 61

8. Ill—Wilson v Bell, 43 NE 2d 162, 315 Ill App 418

Neb—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Bose's Estate, 285 NW 319, 136 Neb 156

N Y—In re Brown's Will, 15 N Y S 2d 387, 171 Misc 1008

Okl—Dunkin v Rice, 169 P 2d 210, 197 Okl 150

Or—McGreal v Culhane, 141 P 2d 828, 172 Or 337

Wis—In re Jacobson's Will, 270 NW 923, 223 Wis 508

Time at which capacity must exist generally see supra § 5

"The law does not put any obstacle in the way of the aged in making disposition of their property by will; provided, only that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument"

Neb—In re O'Donnell's Estate, 64 NW 2d 116, 122, 158 Neb. 583

#### Controlling factors

In determining whether aged testator has sufficient mental capacity, court should be controlled by testamentary acts connected with execution of will, reasonableness of provisions, and ability to detail nature and

extent of his property, and to know objects of his bounty

Tex—Steinkamp v Erwin, Civ App, 249 S W 2d 1012—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, refused no reversible error

9. U S—Cleland v Peters, D C Pa., 73 F Supp 769

Ala—King v Aird, 38 So 2d 833, 251 Ala 613—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Cox v Martin, 34 So 2d 463, 250 Ala 401—Bulger v Ross, 12 So 803, 98 Ala 267

Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489—Toombs v Blankenship, 221 S W 2d 417, 215 Ark 551—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Pernot v King, 110 S W 2d 539, 194 Ark 896

Cal—In re Casarotti's Estate, 192 P 1085, 184 Cal 73

In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

Fla—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Ill—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19—Challner v Smith, 71 NE 2d 324, 396 Ill 106—Tidholm v Tidholm, 62 NE 2d 473, 391 Ill 19—Hoskison v Lovelette, 5 NE 2d 219, 365 Ill 21

Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 NE 2d 144, 340 Ill App 64—McGovern v McGovern, 65 NE 2d 583, 328 Ill App 316

Iowa—In re Sniff's Estate, 10 NW 2d 550, 233 Iowa 800—Walters v Heaton, 271 N.W 310, 223 Iowa 405

## a. In General

Old age does not incapacitate a person from making a will, even though it is accompanied by infirmities of mind or body

A person possessing the requisites of testamentary capacity, as discussed supra § 15, at the time of executing his will,<sup>8</sup> is not incapacitated from making a will by old age,<sup>9</sup> although this is a proper matter, or factor, to be considered in determining

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

Ky—Sloan v Pink, 197 S W 2d 77, 303 Ky 180—Kentucky Trust Co v Gore, 192 S W 2d 749, 302 Ky 1—Perkins' Guardian v Bell, 172 S W 2d 617, 294 Ky 767.

Me—In re Loomis' Will, 174 A 38, 133 Me 81.

Md—Sellers v Qualls, 110 A 2d 73

—Gilbert v Gaybrick, 73 A 2d 482, 195 Md 297—Drury v King, 32 A 2d 371, 182 Md 64—Doyle v Rody, 25 A 2d 457, 180 Md 471—Higgins v Carlton, 48 Md 115, 92 Am D 666

Mich—In re Nickel's Estate, 32 NW 2d 738, 321 Mich 519

Mo—Proffer v Proffer, 114 S W 2d 1035, 342 Mo 184

Shearrer v Shearrer, App, 259 S W 2d 705

Neb—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re

Goist's Estate, 18 NW 2d 513, 146 Neb 1—Corpus Juris quoted in In

re Bose's Estate, 285 NW 319, 327, 136 Neb 156

N J—In re Livingston's Will, 73 A 2d 916, 5 N J 65

In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

In re Herrman's Estate, 3 A 2d 148, 124 N J Eq 542

N Y—In re Streb's Will, 288 N Y S 334, 247 App Div 556

In re Brown's Will, 15 N Y S 2d 387, 171 Misc 1008—In re Von-

haus' Estate, 4 N Y S 2d 599, 167 Misc 660—In re Jones' Estate, 278

N Y S 887, 155 Misc 49—In re

Pratt's Estate, 274 N Y S. 417, 152 Misc 560, affirmed In re Pratt's

Will, 283 N Y S 1023, 246 App Div

576

Okl—Dunkin v Rice, 169 P 2d 210, 197 Okl 150

Or—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Walther's

Estate, 163 P 2d 285, 177 Or 282

—In re Bond's Estate, 143 P 2d 244, 172 Or 509—McGreal v Cul-

hane, 141 P 2d 828, 172 Or 337—

In re Knutson's Will, 41 P 2d 797,

149 Or 467—In re Carr's Will, 256 P 390, 121 Or 574

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Es-

tate, 94 A 2d 780, 373 Pa 7—In re

Higbee's Estate, 75 A 2d 599, 365

whether testamentary capacity existed,<sup>10</sup> the courts guard jealously the right of the aged, when not imposed on, to make wills,<sup>11</sup> and the law puts no obstacle in the way of their doing so<sup>12</sup>

The general rule applies even though advanced years are accompanied by infirmity or infirmities,<sup>13</sup>

Pa 381—In re Phillips' Estate, 149 A 719, 299 Pa 415  
In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Gray's Estate, Orph, 12 Fay L J 175—In re Chylak's Estate, Orph, 55 Lack Jur 129—In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Henry's Estate, Orph, 52 York Leg Rec 177

Tenn—American Trust & Banking Co v Williams, 225 S W 2d 79, 32 Tenn App 592—Rogers v Hickam, 208 S W 2d 34, 30 Tenn App 504—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687—Fitch v American Trust Co, 4 Tenn App 87

Tex—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, error refused no reversible error

Va—Ferguson v Ferguson, 192 S E 774, 169 Va 77

Wash—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

W Va—Ritz v Kingdon, 79 S E 2d 123

Wis—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Jacobson's Will, 270 N W 923, 223 Wis 508—In re Grosse's Will, 243 N W 465, 208 Wis 473

68 C J p 440 note 69  
Advanced years as evidence of incapacity see *infra* § 68

#### Rule under statute

Ga—Norman v Hubbard, 47 S E 2d 574, 203 Ga 530—Brumelow v Hopkins, 29 S E 2d 42, 197 Ga 247—Fowler v Fowler, 28 S E 2d 458, 197 Ga 53

68 C J p 440 note 69 [a]

#### Extreme old age

Ill—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

Me—Appeal of Martin, 179 A 655, 133 Me 422

Mo—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 1—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827

Tenn—Condry v Coffey, 12 Tenn App 1

#### Will from parent to child

Mere old age is not sufficient to invalidate a will from a parent or one in loco parentis to a child  
Md—Henkel v Alexander, 83 A 2d 866, 198 Md 311

This is especially true where the will appears to have been fairly made, is not an unnatural one, and apparently was made under conditions not

inconsistent with the inference that it emanated from a free mind  
Fla—Smith v Clements, 154 So 520, 114 Fla 614

10 Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Pernot v King, 110 S W 2d 539, 194 Ark 896

Cal—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275

Mo—Proffer v Proffer, 114 S W 2d 1035, 342 Mo 184

Shearrer v Shearrer, App, 259 S W 2d 705

Tenn—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687

"While age is not of itself a disqualification, yet it excites vigilance to see if it is accompanied with capacity"

Ark—Pernot v King, 110 S W 2d 539, 545, 194 Ark 896

#### Extreme old age

(1) The fact of extreme old age is not to be ignored

Me—Appeal of Martin, 179 A 655, 133 Me 422

(2) Extreme old age may raise some question of capacity so as to excite the vigilance of the court

Tenn—Condry v Coffey, 12 Tenn App 1

11. Ky—McCrocklin's Adm'r v Lee, 56 S W 2d 564, 247 Ky 31

"The right of the aged to make a will should be guarded the same as that of other rational persons"

Ky—Burgess v Belford, 209 S W 2d 90, 91, 306 Ky 711

"The law looks with tender eyes on the will of an aged person"

N Y—In re Beneway's Will, 71 N Y S 2d 361, 365, 272 App Div 463

#### Reason for rule

It is one of the painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected, the control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities

La—Kingsbury v Whitaker, 32 La Ann 1055, 36 Am R 278

Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Goist's Estate, 18 N W 2d 513, 146 Neb 1—In re Bose's Estate, 285 N W 319, 136 Neb 156

N Y—Van Alst v Hunter, 5 Johns Ch 148

Wills sufficient to withstand attacks  
(1) The courts guard jealously the rights of all rational people, includ-

ing the aged, to make wills sufficient to withstand the attacks of those left out and those dissatisfied with the expressed desires of the departed

Ky—Tye v Tye, 229 S W 2d 973, 312 Ky 812—Kentucky Trust Co v Gore, 192 S W 2d 749, 302 Ky 1

(2) This is still true where one child has been left out and all the other children remembered with benefits under the will

Ky—Kentucky Trust Co v Gore, supra

12. Neb—In re O'Donnell's Estate, 64 N W 2d 116, 158 Neb 583—In re Benson's Estate, 46 N W 2d 176, 153 Neb 824—In re Goist's Estate, 18 N W 2d 513, 146 Neb 1—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Frazier's Estate, 267 N W 181, 131 Neb 61

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381

S D—In re Rowlands' Estate, 18 N W 2d 290, 70 S D 419

13. US—Cleland v Peters, D C Pa., 73 F Supp 769

Cal—In re Prescho's Estate, 238 P 944, 196 Cal 639—In re Casarotti's Estate, 192 P 1085, 184 Cal 73

Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

Ill—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19—Tidholm v Tidholm, 62 N E 2d 473, 391 Ill 19

Iowa—In re Smitt's Estate, 10 N W 2d 550, 233 Iowa 800

Me—In re Loomis' Will, 174 A 38, 133 Me 81

Mich—In re Nickel's Estate, 32 N W 2d 733, 321 Mich 519

Pa—Aggas v Munnell, 152 A 840, 302 Pa 78

In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Gray's Estate, Orph, 12 Fay L J 175—In re Chylak's Estate, Orph, 55 Lack Jur 129—In re Pelechacz' Estate, Orph, 40 Luz Leg Reg 345

Tex—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, error refused, no reversible error.

Wis—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Grosse's Will, 243 N W 465, 208 Wis 473

of mind<sup>14</sup> or body<sup>15</sup>

Not every weakness incident to the ravages of

age unfits a person for making a will<sup>16</sup> So, an aged person is not incapacitated by failing or defective

#### **Infirmities not uncommon incidents of advancing years**

Pa—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299—Wetzel v Edwards, 16 A 2d 441, 340 Pa 121

The tendency of the courts is more and more toward the upholding of wills which are attacked by dissatisfied relatives who are usually able to produce some evidence of the natural infirmities of age

Ky—Tye v Tye, 229 S W 2d 973, 312 Ky 812

14 Ala—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Bulger v Ross, 12 So 803, 98 Ala 267

Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489—Ebrite v Brookhyser, 244 S W 2d 625, 219 Ark 676—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Petree v Petree, 201 S W 2d 1009, 211 Ark 654—McKindley v Humphrey, 161 S W 2d 962, 204 Ark 333—Pernot v King, 110 S W 2d 539, 194 Ark 896—Pledger v Birkhead, 246 S W 510, 156 Ark 443

Cal—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Fla—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Iowa—Firestone v Atkinson, 218 N W 293, 206 Iowa 151—Perkins v Perkins, 90 N W 55, 116 Iowa 253

Mo—Pickett v Cooper, 192 S W 2d 412, 354 Mo 910

Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

N Y—**Corpus Juris** cited in In re Beneway's Will, 71 N Y S 2d 361, 365, 272 App Div 463

In re Vonhaus' Estate, 4 N Y S 2d 599, 167 Misc 660—In re Pratt's Estate, 274 N Y S 417, 152 Misc 560, affirmed In re Pratt's Will, 283 N Y S 1023, 246 App Div 576

Pa—In re Loeper's Estate, Orph, 47 Berks Co 131

68 C J p 441 note 70

Necessity for absolutely sound mind generally see supra § 15 d (1)

"The powers of the mind may be weakened and impaired by old age . . . without destroying testamentary capacity"

N Y—In re Beneway's Will, 71 N Y S 2d 361, 365, 272 App Div 463

#### **Rule under statute**

(1) Generally

Ga—Fowler v. Fowler, 28 S E 2d 458, 197 Ga 53

(2) Under statute, old age and resulting weakness of intellect do not constitute testamentary incapacity

unless the weakness amounts to imbecility

Ga—Norman v Hubbard, 47 S E 2d 574, 203 Ga 530

#### **Failing mentality**

Ky—Greer's Ex'r v Bishop, 96 S W 2d 851, 265 Ky 352

#### **Feeble-mindedness**

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

#### **Intellectual weakness**

Mo—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 1—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827

#### **Mental sluggishness**

Ill—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

68 C J p 441 note 70 [a]

#### **Mental weakness**

Ill—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

Iowa—Walters v Heaton, 271 N W 310, 223 Iowa 405—Albright v Moeckly, 210 N W 813, 202 Iowa 565

Minn—In re Geske's Estate, 1 N W 2d 423, 211 Minn 447—Schmidt v Schmidt, 50 N W 598, 47 Minn 451

#### **Mental debility**

Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523

#### **Partial mental debility**

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

#### **Great distress of mind**

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

Loss of mental vigor due to age, even though accompanied by degree of forgetfulness, does not evidence a want of legal capacity to make a will

Cal—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747

15 Ala—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Bulger v Ross, 12 So 803, 98 Ala 267

Cal—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Ga—Brumbelow v Hopkins, 29 S E 2d 42, 197 Ga 247—Martin v Martin, 195 S E 159, 185 Ga 349

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Me—In re Loomis' Will, 174 A 38 133 Me 81

Md—Gilbert v Gaybrick, 73 A 2d 482 195 Md 297—Doyle v Rody, 25 A 2d 457, 180 Md 471

Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb. 415—**Corpus**

**Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

N J—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

N Y—In re Vonhaus' Estate, 4 N Y S 2d 599, 167 Misc 660—In re Jones' Estate, 278 N Y S 887, 155 Misc 49—In re Pratt's Estate, 274 N Y S 417, 152 Misc 560, affirmed In re Pratt's Will, 283 N Y S 1023, 246 App Div 576

Pa—In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523

Wis—In re Jacobson's Will, 270 N W 923, 223 Wis 508

68 C J p 441 note 71

Physical infirmities generally see infra § 29

#### **Physical debility**

Fla—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614

Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523

#### **Physical weakness**

(1) Generally

Ill—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

Minn—In re Geske's Estate, 1 N W 2d 423, 211 Minn 447—Schmidt v Schmidt, 50 N W 598, 47 Minn 451

Mo—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 1—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827

(2) Resulting from illness, pain, and suffering

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

#### **Feeble health**

Ill—Challiner v Smith, 71 N E 2d 324, 396 Ill 106

Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 N E 2d 144, 340 Ill App 64—Wilson v Bell, 43 N E 2d 162, 315 Ill App. 418

#### **Weakness in energy**

Tex—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, error refused no reversible error

#### **Impairment in senses**

Tex—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, error refused no reversible error

#### **Great distress of body**

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

16. Me—Appeal of Martin, 179 A 655, 133 Me 422

Mo—Byrne v Fulkerson, 162 S W 2d 171, 254 Mo 97.



memory, or partial loss of memory,<sup>17</sup> absent-mindedness,<sup>18</sup> nervousness,<sup>19</sup> failure to recognize old friends, relatives, or members of the testator's family,<sup>20</sup> inability to recognize acquaintances,<sup>21</sup> a liking for dwelling on happenings of the past,<sup>22</sup> pain

and suffering,<sup>23</sup> vacillating judgment,<sup>24</sup> childishness,<sup>25</sup> untidy habits,<sup>26</sup> slovenliness or untidiness in dress,<sup>27</sup> eccentricities or peculiarities, as in habit or speech,<sup>28</sup> even though they may indicate a failing

17 U.S.—Cleland v Peters, D C Pa., 73 F Supp 769

Ark—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Pernot v King, 110 S W 2d 539, 194 Ark 896

Cal—In re Prescho's Estate, 238 P 944, 196 Cal 639

In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46 Fla—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614 Ill—Challiner v Smith, 71 N E 2d 324, 396 Ill 106

Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 N E 2d 144, 340 Ill App 64—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

Iowa—Walters v Heaton, 271 N W 310, 223 Iowa 405

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

Ky—Burgess v Belford, 209 S W 2d 90, 306 Ky 711

Mich—In re Nickel's Estate, 32 N W 2d 733, 321 Mich 519

Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

N J—In re Livingston's Will, 73 A 2d 916, 5 N J 65

In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

In re Rein's Will, 50 A 2d 380, 139 N J Eq 122

Pa—In re Glesenkamp's Estate, 107 A 2d 731, 378 Pa 635—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Franz' Estate, 84 A 2d 202, 368 Pa 618—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75

In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

Pa—In re Loeper's Estate, Orph, 47 Berks Co 131—In re Gray's Estate, Orph, 12 Fay L J 175—In re Chylak's Estate, Orph, 55 Lack Jur 129—In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523—In re Butler's Estate, Orph, 64 Montg Co 161—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Corne's Estate, Orph, 66 York Leg Rec 22—In re Hochberger's Estate, Orph 63 York Leg Rec 25

Tex—Garcia v Galindo, Civ App, 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507—McCannon v McCannon, Civ App, 2 S W 2d 942

Wis—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Grosse's Will, 243 N W 465, 208 Wis 473

68 C J p 442 note 72

Impaired memory generally see infra § 28

18 N J—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

Absent-mindedness generally see infra § 28

19 Mo—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 21

20 Cal—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Ky—Burgess v Belford, 209 S W 2d 90, 306 Ky 711

N J—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

Pa—In re Loeper's Estate, Orph, 47 Berks Co 131

21 U.S.—Cleland v Peters, D C Pa., 73 F Supp 769

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Higbee's Estate, 75 A 2d 599, 265 Pa 381—Aggas v Munnell, 152 A 840, 302 Pa 78

In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Gray's Estate, Orph, 12 Fay L J 175—In re Chylak's Estate, Orph, 55 Lack Jur 129—In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523

Wis—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Grosse's Will, 243 N W 465, 208 Wis 473

22 Ga—Martin v. Martin, 195 S E 159, 185 Ga 349.

23 Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Pain and suffering generally see infra § 29

24 Ark—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Pernot v King, 110 S W 2d 539, 194 Ark 896 Fla—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614 Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156 68 C J p 442 note 73

25 Iowa—Walters v Heaton, 271 N W 310, 223 Iowa 405

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156 68 C J p 442 note 74

26 U.S.—Cleland v. Peters, D C Pa., 73 F Supp 769

Cal—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Mich—In re Nickel's Estate, 32 N W 2d 733, 321 Mich 519—In re Grow's Estate, 299 N W 836, 299 Mich 133—In re Murray's Estate, 188 N W 381, 219 Mich 70—Leffingwell v Bettinghouse, 115 N W 731, 151 Mich 513

N J—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—Aggas v Munnell, 152 A 840, 302 Pa 78

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Gray's Estate, Orph, 12 Fay L J 175—In re Chylak's Estate, Orph, 55 Lack Jur 129

Wis—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Grosse's Will, 243 N W 465, 208 Wis 473

27 Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

N J—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

N Y—In re McDermott's Will, 154 N Y S 923, 90 Misc 526

Slovenliness generally see supra § 22

28 Ark—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Pernot v King, 110 S W 2d 539, 194 Ark 896 Ga—Brumbelow v Hopkins, 29 S E 2d 42, 197 Ga 247

Ky—Slusher v Blanton, 177 S W 2d 378, 296 Ky 422

Neb—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

Wash—In re Larsen's Estate, 71 P 2d 47, 191 Wash. 257.

mentality,<sup>29</sup> or even delusions or hallucinations if they do not affect the execution of the will,<sup>30</sup> and he is not limited to conventional methods of disposition<sup>31</sup>

On the other hand, a will is not valid where an aged person is so enfeebled as not to understand what he is doing,<sup>32</sup> or where his condition of mind and body, at the time of the execution of the will, is such that he is unable to understand the nature and situation of his property and the intelligent disposition thereof<sup>33</sup>

**Disease** A person does not become incompetent in law to make a will even by old age after it has become a disease,<sup>34</sup> the disease must be shown to

have become so acute as to have destroyed the patient's capacity at the time in question<sup>35</sup>

### b. Senility; Senile Dementia

Senility or senile dementia does not necessarily result in testamentary incapacity, there must be such a mental failure as deprives the testator of the power of intelligent action

The existence of senility does not of itself amount to testamentary incapacity<sup>36</sup>

Senile dementia does not necessarily result in mental incapacity to make a will,<sup>37</sup> but there must be such a failure of mind as will deprive the testator of the power of intelligent action<sup>38</sup> The disease is progressive in nature, as discussed in *Insane Per-*

W Va.—Ritz v Kingdon, 79 S E 2d 123

68 C J p 442 note 76

Effect of eccentricity generally see supra § 22

**Eccentricities or peculiarities common to old age**

Iowa.—In re Siniff's Estate, 10 N W 2d 550, 233 Iowa 800

Ky.—Greer's Ex'r v Bishop, 96 S W 2d 851, 265 Ky 352

**Incoherent speech**

US.—Cleveland v. Peters, D C Pa., 73 F Supp 769

Mo.—Morrow v Board of Trustees of Park College, 181 S W 2d 945, 353 Mo 21

Pa.—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—Aggas v. Munnell, 152 A 340, 302 Pa 78

In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

In re Loeper's Estate, Orph., 47 Berks Co 131—In re Gray's Estate, Orph., 12 Fay L J 175—In re Chylak's Estate, Orph., 55 Lack Jur 129—In re Pelchacz' Estate, Orph., 40 Luz Leg Reg 345—In re King's Estate, Orph., 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523

Wis.—In re Washburn's Will, 22 N W 2d 512, 248 Wis 467—In re Grosse's Will, 243 N W 465, 208 Wis 473

29. Ky.—Slusher v Blanton, 177 S W 2d 378, 296 Ky 422

30. Neb.—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W. 319, 327, 136 Neb 156

68 C J p 442 note 77.

Effect of delusions or hallucinations generally see supra § 18 b

31. Neb.—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Es-

tate, 285 N W 319, 327, 136 Neb 156

68 C J p 442 note 78

32. Fla.—Smith v Clements, 154 So 520, 114 Fla 614

Ill.—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19

Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

La.—Cormier v Myers, 65 So 2d 345, 223 La 259

Mo.—Pickett v Cooper, 192 S W 2d 412, 354 Mo 910

68 C J p 442 note 79

"The mental faculties must be so reduced that the afflicted individual is incapable of understanding the nature and effect of the transaction at the time the questioned instrument was executed"

Okl.—Dunkin v Rice, 169 P 2d 210, 211, 197 Okl 150

33. Cal.—In re Llewellyn's Estate, 139 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711.

34. N Y.—In re Brown's Will, 15 N Y S 2d 387, 171 Misc 1008

Disease generally see infra § 29

35. N Y.—In re Brown's Will, supra

The question remains whether the patient, despite such illness or disease, is still able to know what he is about in making last will

N Y.—In re Brown's Will, supra.

36. Or.—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

37. Iowa.—Walters v Heaton, 271 N W 310, 223 Iowa 405—Albright v Moeckly, 210 N W 813, 202 Iowa 565

Kan.—In re Davis' Estate, 259 P 2d 211, 175 Kan 107

Mich.—In re Nickel's Estate, 32 N W 2d 733, 321 Mich 519

Neb.—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Ju-**

**ris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

N Y.—**Corpus Juris** cited in In re Beneway's Will, 71 N Y S 2d 361, 365, 272 App Div 463

Or.—**Corpus Juris** quoted in In re Provolt's Estate, 151 P 2d 736, 737, 175 Or 128

Wash.—**Corpus Juris** quoted in In re Denison's Estate, 162 P 2d 245, 251, 23 Wash 2d 699

68 C J p 442 note 82

Senile dementia defined see *Insane Persons* § 2 d

**Arteriosclerosis not senile dementia.** Pa.—In re Chylak's Estate, Orph., 55 Lack Jur 129

38. Iowa.—In re Meyer's Estate, 37 N W 2d 265, 240 Iowa 1226—In re Johnson's Estate, 269 N W 792, 223 Iowa 787

Mo.—Pickett v Cooper, 192 S W 2d 412, 354 Mo 910

Neb.—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—**Corpus Juris** quoted in In re Bose's Estate, 285 N W 319, 327, 136 Neb 156

N Y.—**Corpus Juris** cited in In re Beneway's Will, 71 N Y S 2d 361, 365, 272 App Div 463

Or.—**Corpus Juris** quoted in In re Provolt's Estate, 151 P 2d 736, 737, 175 Or 128

Wash.—**Corpus Juris** quoted in In re Denison's Estate, 162 P 2d 245, 251, 23 Wash 2d 699

68 C J p 442 note 83

**Insufficient showing**

(1) Senile dementia not shown to render testatrix of insufficient mental capacity to understand the nature of the act, to recollect the extent of her property and the natural objects of her bounty and their claims on her, and to comprehend the manner in which she wishes her property distributed, is not, of itself, sufficient to deprive testatrix of testamentary capacity

Iowa.—Walters v Heaton, 271 N W 310, 223 Iowa 405—Albright v Moeckly, 210 N W 813, 202 Iowa 565

(2) Requisites of testamentary capacity generally see supra § 15

sons § 2 d, and it must be determined whether its progress has so impaired the faculties of the testator that they fall below the mark of legal capacity.<sup>39</sup> This must be determined not alone by the nature and tendency of the disease, but by its effect in the particular case,<sup>40</sup> but it is extremely difficult to determine at just what stage in the progress of senile dementia the mind is incapable of functioning intelligently.<sup>41</sup>

When the testamentary capacity of a testator is challenged on grounds of alleged senile dementia,

this fact is to be determined according to the rules applicable to other forms of insanity<sup>42</sup>

## § 28. Impairment of Memory; Absent-Mindedness

Impairment or failure of memory, forgetfulness, or absent-mindedness does not prevent testamentary capacity, provided the testator can recollect the particulars essential to a valid testamentary disposition.

Failing memory,<sup>43</sup> failure<sup>44</sup> or loss<sup>45</sup> of memory, forgetfulness,<sup>46</sup> or absent-mindedness<sup>47</sup> is not

"The courts guard jealously the rights of all rational people, including the . . . forgetful . . . to make wills"

Ky—Tye v Tye, 229 SW 2d 973, 975, 312 Ky 812—Kentucky Trust Co v Gore, 192 SW 2d 749, 752, 302 Ky 1

### Momentary forgetfulness

Ky—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1—Compton v Smith, 150 SW 2d 657, 286 Ky 179

### Occasional forgetfulness

NJ—In re Rein's Will, 50 A 2d 380, 139 NJ Eq 122  
Utah—In re Butters' Estate, 261 P 2d 171

### Instances of forgetfulness

Mich—In re Grow's Estate, 299 NW 836, 299 Mich 133—In re Murray's Estate, 188 NW 381, 219 Mich 70—Leffingwell v Bettinghouse, 115 NW 731, 151 Mich 513

### Mind capable of attention

Forgetfulness is not sufficient to invalidate a will if it appears that the testator's mind was capable of attention and exertion when aroused and was not imposed on

Mich—In re Paquin's Estate, 43 NW 2d 858, 328 Mich 293—In re Nickel's Estate, 32 NW 2d 733, 321 Mich 519—In re Getchell's Estate, 295 NW 360, 295 Mich 681—In re Rowling's Estate, 289 NW 136, 291 Mich 218—Schneider v Vosburgh, 106 NW 1129, 143 Mich 476

### Intelligibility

Forgetting one's self as far as not to be entirely intelligible, while tending to prove an impaired or weakened mind, does not prove disease and is not irreconcilable with sufficient capacity to control or dispose of property by will

Ill—Children's Home of Rockford v Address, 36 NE 2d 596, 311 Ill App 446, affirmed in part and reversed on other grounds in part 44 NE 2d 437, 380 Ill. 452

37 Cal—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46.

39 Mo—Byrne v Fulkerson, 162 S W 171, 254 Mo 97

Neb—In re Scoville's Estate, 31 NW 2c 284, 149 Neb 415—Corpus Juris quoted in In re Bose's Estate, 185 NW 319, 136 Neb 156

Or—Corpus Juris quoted in In re Provolt's Estate, 151 P 2d 736, 737, 175 Or 128

Wash—Corpus Juris quoted in In re Denison's Estate, 162 P 2d 245, 251, 23 Wash 2d 699

40. Ill—Blackhurst v James, 127 NE 226, 293 Ill 11

Neb—Corpus Juris quoted in In re Bose's Estate, 285 NW 319, 327, 136 Neb 156

Or—Corpus Juris quoted in In re Provolt's Estate, 151 P 2d 736, 737, 175 Or 128

Wash—Corpus Juris quoted in In re Denison's Estate, 162 P 2d 245, 251, 23 Wash 2d 699

41. Or—In re Provolt's Estate, 151 P 2d 736, 175 Or 128

42. Neb—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Bose's Estate, 285 NW 319, 136 Neb 156

Insanity see supra §§ 17-20

43. NY—In re Beneway's Will, 71 NYS 2d 361, 272 App Div 463

Tenn—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592—Rogers v Hickam, 208 SW 2d 34, 30 Tenn App 504—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Fitch v American Trust Co, 4 Tenn App 87

Failing memory accompanied by old age see supra § 27

44. Ky—Tye v Tye, 229 SW 2d 973, 312 Ky 812—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767—McCrocklin's Adm'r v Lee, 56 SW 2d 564, 247 Ky 31

Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn. 365

NJ—In re Livingston's Will, 73 A 2d 916, 5 NJ 65

In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208

Pa—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420.

In re Rife's Will, Orph, 59 York Leg Rec 169—In re Henry's Estate, Orph, 52 York Leg Rec 177

Mere failure of memory on occasion

Pa—In re Roberts' Estate, 94 A 2d 780, 373 Pa. 7

Partial failure

Me—In re Loomis' Will, 174 A 38, 133 Me 81

Pa—In re Rife's Will, Orph, 59 York Leg Rec 169

### Requirements for incapacity

Failure of memory is not incapacity unless it is total or extends to immediate family or to property of testator

Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Lawrence's Estate, 132 A 786, 286 Pa 58

45. Ill—Children's Home of Rockford v Address, 36 NE 2d 596, 311 Ill App 446, affirmed in part and reversed on other grounds in part 44 NE 2d 437, 380 Ill 452

Pa—In re Pelechacz' Estate, Orph, 40 Luz Leg Reg 345

46. Cal—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Iowa—In re Richardson's Will, 202 NW 114, 199 Iowa 1320

Kan—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368.

Ky—Tye v Tye, 229 SW 2d 973, 312 Ky 812—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180

Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514

Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn 365

NJ—In re Livingston's Will, 73 A 2d 916, 5 NJ 65

NY—In re Carpenter's Will, 145 NYS 365

Pa—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252

"The right of the . . . forgetful to make a will should be guarded the same as that of other rational persons"

Ky—Burgess v Rogers, 209 SW 2d 90, 306 Ky. 711

inconsistent with, or does not disclose or constitute a lack of, testamentary capacity, although failing memory is a fact to be considered in determining whether such capacity existed<sup>48</sup> It has been said that the tendency of the courts is more and more toward the upholding of wills which are attacked by dissatisfied relatives who are usually able to produce some evidence of failure of memory<sup>49</sup>

If the testator has sufficient mental capacity to recollect the particulars essential to a valid testamentary disposition, as discussed supra § 15, he has testamentary capacity even though his memory may be feeble or somewhat impaired,<sup>50</sup> and even though he may have lapses of memory<sup>51</sup> or periods of absent-mindedness<sup>52</sup>

*Failure to remember names.* Forgetfulness of the names of persons a testator has known does not establish his incompetency<sup>53</sup> The mere failure to remember a given name correctly is not sufficient to create testamentary incapacity,<sup>54</sup> likewise, a slip of the testator's memory as to the name of the

person to whom he was talking when he appeared sleepy or unconscious is not a test of his testamentary capacity<sup>55</sup>

*Failure to recognize old friends* does not denote mental incapacity to make a will<sup>56</sup>

## § 29. Sickness, Disease, and Physical Infirmary

Sickness, disease, or physical infirmity, while properly considered in determining testamentary capacity, does not of itself incapacitate a person from executing a valid will.

While physical fitness,<sup>57</sup> sickness,<sup>58</sup> disease,<sup>59</sup> physical disability,<sup>60</sup> or physical weakness<sup>61</sup> is a proper matter, or factor, to be considered in an effort to determine one's testamentary capacity, the right of persons who are infirm, but rational, to make wills should be guarded the same as that of other rational persons,<sup>62</sup> and the law does not put any obstacle in the way of their disposing of their property by will,<sup>63</sup> provided only that their mentality

NJ—In re Livingston's Will, 73 A 2d 916, 5 NJ 65

In re Rein's Will, 50 A 2d 380, 139 NJ Eq 122

48 Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687

49 Ky—Tye v Tye, 229 SW 2d 973, 312 Ky 812

50 Ga—Martin v Martin, 195 SE 159, 185 Ga 349

Ill—Challiner v Smith, 71 NE 2d 324, 396 Ill 106

Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 NE 2d 144, 340 Ill App 64

Iowa—Walters v Heaton, 271 NW 310, 223 Iowa 405—Firestone v Atkinson, 218 NW 293, 206 Iowa 151—Perkins v Perkins, 90 NW 55, 116 Iowa 253

NJ—Den v Vancleve, 5 NJ Law 589

Pa—In re Glesenkamp's Estate, 107 A 2d 731, 378 Pa 635

In re Butler's Estate, Orph, 64 Montg Co 161—In re Hochberger's Estate, Orph, 63 York Leg Rec 25—In re Rife's Will, Orph, 59 York Leg Rec 169.

Tex—Garcia v Galindo, Civ App, 199 SW 2d 488, reversed on other grounds 199 SW 2d 499, 145 Tex 507—McCannon v McCannon, Civ App, 2 SW 2d 942

W Va—Ritz v Kingdon, 79 SE 2d 123—Nicholas v Kershner, 20 W Va 251

68 CJ p 442 note 90

Impairment of memory by disease see *infra* § 41.

### Sound and disposing memory

Pa—In re Gayman's Estate, Orph, 21 Northumb Leg J. 149.

51 Cal—In re Presho's Estate, 238 P 944, 196 Cal 639

Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754

Ky—Tye v Tye, 229 SW 2d 973, 312 Ky 812

NY—In re Campbell's Will, 136 NY 1086

68 CJ p 443 note 91

**Lapses ordinarily of little importance**

Pa—In re Phillips' Estate, 149 A 719, 299 Pa 415

52 Ark—Ouachita Baptist College v Scott, 42 SW 536, 64 Ark 349

Okl—McClure v Kerchner, 229 P 589, 107 Okl 28

53. Pa—In re Lawrence's Estate, 132 A 786, 286 Pa 58

Tex—Garcia v Galindo, Civ App, 199 SW 2d 488, reversed on other grounds 199 SW 2d 499, 145 Tex 507—McCannon v McCannon, Civ App, 2 SW 2d 942

Requirement of remembering names see *supra* § 15b

### Residuary legatees

Fact that testator could not remember the names of the surviving members of his uncle's family, who were his residuary legatees and whom he had not seen for many years, did not establish testamentary incapacity

Or—McGreal v Culhane, 141 P 2d 828, 172 Or 387

54. Ohio—Meier v Peirano, 62 NE 2d 920, 76 Ohio App 9

### Remembering surname and address

This is especially true where the testator remembers the surname of the beneficiary and his address  
Ohio—Meier v Peirano, *supra*.

55 Tex—Bell v Bell, Civ App, 237 SW 2d 688

56 Mich—In re Rowling's Estate, 289 NW 136, 291 Mich 218

57. Ark—Yarbrough v Moses, 267 SW 2d 289, 223 Ark 489

58 Mo—Proffer v Proffer, 114 SW 2d 1035, 342 Mo 184

Shearrer v Shearrer, App, 259 SW 2d 705

59. Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687

60 Cal—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275

### Enfeebled physical condition

DC—McCartney v Holmquist, 106 F 2d 855, 70 App DC 334, 126 ALR 375

61 Cal—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154

Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687

62 Ky—Tye v Tye, 229 SW 2d 973, 312 Ky 812—Burgess v Belford, 209 SW 2d 90, 306 Ky 711—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1

"The making of a will does not depend upon a sound body but upon a sound mind"

Fla—In re Wilcott's Estate, 66 So 2d 465, 467, 40 ALR 2d 1399

63 Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Bose's Estate, 285 NW. 319, 136 Neb 156—

conforms to the accepted tests at the time of the execution of the instrument<sup>64</sup> | Physical or bodily infirmity or infirmities, disabilities, or afflictions,<sup>65</sup> sickness,<sup>66</sup> illness,<sup>67</sup> ill,<sup>68</sup>

In re Frazier's Estate, 267 NW 181, 131 Neb 61  
S D—In re Rowlands' Estate, 18 N W 2d 290, 70 S D 419

64. Ill—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19  
Neb—In re O'Donnell's Estate, 64 N W 2d 116, 158 Neb 583—In re Benson's Estate, 46 NW 2d 176, 153 Neb 324—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415  
—In re Goist, 18 NW 2d 513, 146 Neb 1—In re Bose's Estate, 285 NW 319, 136 Neb 156

65. Ala—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Bulger v Ross, 12 So 803, 98 Ala 267  
Ark—Ebright v Brookhyser, 244 S W 2d 625, 219 Ark 676—Petree v Petree, 201 S W 2d 1009, 211 Ark 654—McKindley v Humphrey, 161 S W 2d 962, 204 Ark 333—Pledger v Birkhead, 246 S W 510, 156 Ark 443

Cal—In re Casarotti's Estate, 192 P 1085, 184 Cal 73  
In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Ill—Sterling v Dubin, 126 N E 2d 718, 6 Ill 2d 64—In re Calo's Estate, 115 N E 2d 778, 1 Ill 2d 376—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19—Tidholm v Tidholm, 62 N E 2d 473, 391 Ill 19  
Iowa—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627

Me—In re Loomis' Will, 174 A 38, 133 Me 81

Md—Gilbert v Gaybrick, 73 A 2d 482, 195 Md 297—Doyle v Rody, 25 A 2d 457, 180 Md 471

Mich—In re Thayer's Estate, 15 N W 2d 712, 309 Mich 473—In re Ferguson's Estate, 215 NW 51, 239 Mich 616

N J—In re Herrman's Estate, 3 A 2d 148, 124 N J Eq 543

N Y—In re Beneway's Will, 71 N Y S 2d 361, 272 App Div 463  
In re Jones' Estate, 278 N Y S 887, 155 Misc 49

Ohio—Sterba v Lienhard, App, 95 N E 2d 12.

Okl—Dunkin v Rice, 169 P 2d 210, 197 Okl 150

Pa—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58—In re Lowe's Estate, 178 A 820, 318 Pa 497  
In re Matz' Estate, Orph, 39 Berks Co 303

Tex—Corpus Juris cited in Cruz v Prado, Civ App, 239 S W 2d 650, 652—Jowers v Smith, Civ App, 237 S W 2d 805—Bell v Bell, Civ App, 237 S W 2d 688—Green v Dickson, Civ App, 208 S W 2d 119, error refused no reversible error  
68 C J p 443 note 94

Excessive use of drugs see supra § 26

Intoxication see supra § 25

"Physical ills are not necessarily mental ills"

Mo—Gardine v Cottey, 230 S W 2d 731, 746, 360 Mo 681, 18 A L R 2d 1100

"Physical infirmity and mental soundness, it is common knowledge, may coexist"

Me—Appeal of Martin, 179 A 655, 660, 133 Me 422

"Physical disability does not necessarily establish mental incapacity. Many people who are seriously disabled physically retain their mental capacities to the end"

Minn—In re Smith's Estate, 64 N W 2d 129, 132

#### Physical incapacity

Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489—Toombs v Blankenship, 221 S W 2d 417, 215 Ark 551—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Griffen v Union Trust Co, 266 S W 289, 166 Ark 347

#### Physical weakness

Cal—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154  
Kan—Kunkle v Urbansky, 109 P 2d 71, 153 Kan 117

N Y—In re Beneway's Will, 71 N Y S 2d 361, 272 App Div 463

Pa—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252

Tenn—American Trust & Banking Co v Williams, 225 S W 2d 79, 32 Tenn App 592—Rogers v Hickam, 208 S W 2d 34, 30 Tenn App 504—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687—Fitch v American Trust Co, 4 Tenn App 87

Utah—In re Buttars' Estate, 261 P 2d 171

Wash—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

66. Ill—Sterling v Dubin, 126 N E 2d 718, 6 Ill 2d 64—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19—In re Weedman's Estate, 98 N E 956, 254 Ill 504—Hoskinson v Lovelette, 5 N E 3d 219, 365 Ill 21

McGovern v McGovern, 65 N E 2d 583, 328 Ill App 316—Wilson v Bell, 43 N E 2d 162, 315 Ill App 418

Md—Drury v King, 32 A 2d 371, 182 Md 64—Higgins v Carlton, 48 Md 115, 92 Am Dec 666

Mo—Proffer v Proffer, 114 S W 2d 1035, 342 Mo 184—Thomasson v Hunt, 185 S W 165, 169 Shearer v. Shearer, App, 259 S W 2d 705

Or—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Bond's Estate, 143 P 2d 244, 172 Or 509—McGreal v Culhane, 141 P 2d 828, 172 Or 337—In re Knutson's Will, 41 P 2d 793, 149 Or 467—In re Carr's Will, 256 P 390, 121 Or 574

Pa—In re Matz' Estate, Orph, 39 Berks Co 303—In re Rife's Will, Orph, 59 York Leg Rec 169

Va—Tate v Chumbley, 57 S E 2d 151, 190 Va 480—Gilmer v Brown, 44 S E 2d 16, 186 Va 630—Ferguson v Ferguson, 192 S E 774, 169 Va 77

Wash—In re Larsen's Estate, 71 P. 2d 47, 191 Wash 257

68 C J p 443 note 95

**Mere mental and physical weakness**, caused by sickness, does not amount to mental incapacity which will invalidate a will, provided that the testator is capable of fairly and reasonably understanding the matter in hand

Minn—In re Geske's Estate, 1 N W 2d 423, 211 Minn 447—Schmidt v Schmidt, 50 N W 598, 47 Minn 451

67. N J—In re Delaney's Estate, 25 A 2d 901, 131 N J Eq 454

N Y—In re Jones' Estate, 278 N Y S 887, 155 Misc 49

Or—In re Davis' Will, 142 P 2d 143, 172 Or 354

"A man may be ill unto death, and yet be in possession of sufficient mental capacity to dispose of his property by will"

Mo—Thomasson v. Hunt, 185 S W 165, 169

**Mere infirmity of mind and body** due to illness is not alone sufficient to establish mental incapacity  
W Va—Ritz v. Kingdon, 79 S E 2d 123

**Severe illness**, regardless of its intensity and of the near approach of death, will not of itself prevent one from exercising discretion in disposing of property

Ark—Imier v Williams, 117 S W 2d 1053, 196 Ark 287

68. Neb—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Frazier's Estate, 267 NW. 181, 131 Neb 61.

poor,<sup>69</sup> or feeble<sup>70</sup> health, feebleness,<sup>71</sup> debility,<sup>72</sup> decrepitude,<sup>73</sup> or blunted perception,<sup>74</sup> do not, of themselves, incapacitate an individual from making a testamentary disposition of his property, for physical infirmity to have that effect, the mental faculties must be so reduced that the afflicted individual is incapable of understanding the nature and effect of the transaction<sup>75</sup> at the time the questioned instrument was executed<sup>76</sup>

A sick person may make a valid will even in his last illness,<sup>77</sup> or when he is in a dying condition,<sup>78</sup> unless the surrounding circumstances are such as show that he was not possessed of testamentary capacity<sup>79</sup>

Disease is not of itself a disqualification,<sup>80</sup> but whether the testator's mind was affected thereby must be determined with reference to each particular

Pa.—In re Henry's Estate, Orph., 52 York Leg Rec 177

"Testamentary capacity is not conditioned on sound health"

Fla.—Smith v Clements, 154 So 520, 521, 114 Fla 614

"The law jealously regards the right of a person to dispose of his property by will, whatever his condition of health may be"

N Y.—In re Delmar's Will, 152 NE 448, 449, 243 NY 10

In re Jerrells' Will, 63 NYS 2d 499, 509, appeal dismissed 70 NY S 2d 580

69 Tex.—Bell v Bell, Civ App, 248 SW 2d 978, error refused no reversible error

70. Cal.—In re Casarotti's Estate, 192 P 1085, 184 Cal 73

In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

N Y.—In re Pratt's Estate, 274 NY S 417, 152 Misc 560, affirmed In re Pratt's Will, 283 NYS 1023, 246 App Div 576

Feebleness from age see supra § 27

Feeble health combined with defective memory

Ill.—Challiner v Smith, 71 NE 2d 324, 396 Ill 106

Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 NE 2d 144, 340 Ill App 64

71. Cal.—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Selb's Estate, 190 P 2d 277, 84 Cal App 2d 46

Tex.—Cruz v Prado, Civ App, 239 SW 2d 650—McIntosh v Moore, 53 SW 611, 22 Tex Civ App 22

72 Md.—Sellers v Qualls, 110 A 2d 73

Or.—In re Walther's Estate, 163 P 2d 285, 177 Or 282—McGreal v Culhane, 141 P 2d 828, 172 Or 337

Debility or in body

Ill.—Hoskison v Lovelette, 5 NE 2d 219, 365 Ill 21.

McGovern v McGovern, 65 NE 2d 583, 328 Ill App 316—Wilson v Bell, 43 NE 2d 162, 315 Ill App 418

Md.—Drury v King, 32 A 2d 371, 182 Md 64—Higgins v Carlton, 48 Md 115, 92 Am Dec 666

Or.—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Bond's Estate, 143 P 2d 244, 172 Or 509—McGreal v Culhane, 141 P 2d 828, 172 Or 337—In re Knutson's Will, 41 P 2d 793, 149 Or 467—In re Carr's Will, 256 P 390, 121 Or 574

Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

In re Rife's Estate, Orph., 59 York Leg Rec 169

73 N Y.—In re Streb's Will, 288 N Y S 334, 247 App Div 556

Decrepitude in body

Kan.—In re Davis' Estate, 259 P 2d 211, 175 Kan 107—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210—In re Hall's Estate, 195 P 2d 612, 165 Kan 465

74. Tenn.—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592—Rogers v Hickam, 208 SW 2d 34, 30 Tenn App 504—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Fitch v American Trust Co, 4 Tenn App 87

75 Okl.—Dunkin v Rice, 169 P 2d 210, 197 Okl 150

76 Okl.—Dunkin v Rice, supra

Mere deterioration in physical powers does not destroy testamentary capacity until the mental decline reaches such a stage that the person is unable intelligently to comprehend the estate of which he is possessed and the natural objects of his bounty, and intelligently to exercise judgment and discretion in the disposition of his property

Iowa.—In re Behrend's Will, 290 N W 78, 227 Iowa 1099

77. Fla.—In re Wilmott's Estate, 66 So 2d 465, 40 ALR 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614

68 CJ p 443 note 95

78. Ark.—Imbler v Williams, 117 S W 2d 1053, 196 Ark 287

Fla.—In re Wilmott's Estate, 66 So 2d 465, 40 ALR 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614

68 CJ p 443 note 96

Approaching death

Kan.—Kunkle v Urbansky, 109 P 2d 71, 153 Kan 117

Wash.—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

Death a few hours after execution of will

N Y.—In re Holcomb's Will, 275 N Y S 481, 242 App Div 889

79. N Y.—Matter of Choate's Will, 96 NYS 380, 110 App Div 374

68 CJ p 443 note 97

80. Ala.—King v Aird, 38 So 2d 883, 251 Ala 613

Cal.—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

La.—Succession of Moody, 80 So 2d 93, 227 La 609

N Y.—In re Beneway's Will, 71 N Y S 2d 361, 272 App Div 463

Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

Tenn.—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592—Rogers v Hickam, 208 SW 2d 34, 30 Tenn App 504—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Fitch v American Trust Co, 4 Tenn App 87

Wis.—In re Jacobson's Will, 270 N W 923, 223 Wis 508

68 CJ p 443 note 98

Old age as disease see supra § 27

"The mere fact that a person is shown to have a weak intellect because of disease is not sufficient to take from him the sacred right of disposing of his property by will in such manner as he may desire"

Ga.—Leventhal v Baumgartner, 61 SE 2d 810, 813, 207 Ga 412

"A man may have diseases of the body without having a disease of the mind"

Mo.—Thomasson v Hunt, 185 SW 165, 169

Bodily disease

Me.—In re Loomis' Will, 174 A 38, 133 Me 81

Death soon after execution of will

Fact that decedent died of malignant disease only few months after executing will would in no way affect validity of will

Mich.—In re Greenman's Estate, 52 NW 2d 363, 332 Mich 646

case<sup>81</sup> The testator may be found either competent or incompetent, depending on the surrounding circumstances, when suffering from apoplexy,<sup>82</sup> brain disease,<sup>83</sup> Bright's disease,<sup>84</sup> cancer,<sup>85</sup> consumption or tuberculosis,<sup>86</sup> diabetes,<sup>87</sup> epilepsy,<sup>88</sup> fever,<sup>89</sup> paralysis,<sup>90</sup> or paresis,<sup>91</sup> or if his mind<sup>92</sup> or mem-

ory<sup>93</sup> is somewhat impaired by disease, or when he is lethargic, drowsy, or stupefied from illness,<sup>94</sup> in pain or suffering,<sup>95</sup> or extreme<sup>96</sup> distress,<sup>97</sup> weak physically,<sup>98</sup> or if he is delirious at times, if the will is not made in such a delirious spell.<sup>99</sup>

81. Fla.—In re Wilmott's Estate, 66 So 2d 465, 40 A L R 2d 1399—Smith v Clements, 154 So 520, 114 Fla 614

68 C J p 443 note 99

"Not every weakness incident to ravages of . . . disease unfits man for making a will"

Me—Appeal of Martin, 179 A 655, 660, 133 Me 422

**Mental weakness due to disease** does not deprive a testator of testamentary capacity unless it has progressed to point at which power of intelligent comprehension and action has been destroyed

Iowa.—In re Ruedy's Estate, 66 N W 2d 387, 245 Iowa 1307—In re Hayer's Estate, 299 N W 431, 230 Iowa 880—Wilson v Findley, 275 N W 47, 223 Iowa 1281—Bishop v Scharf, 241 N W 3, 214 Iowa 644

**Mental disease; effect on provisions**

One suffering some degree of mental disease may still execute valid will, unless provisions thereof are affected by such condition

Mich.—In re Thayer's Estate, 15 N W 2d 712, 309 Mich 473—In re Aylward's Estate, 219 N W 697, 243 Mich 9—In re Ferguson's Estate, 215 N W 51, 239 Mich 616

**Arteriosclerosis** may or may not result in mental deterioration

Ill.—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19

82. N Y—Cheney v. Price, 37 N Y S 117, 90 Hun 238

68 C J p 443 note 3

83. N Y—Matter of Loewenstine's Estate, 21 N Y S 931, 2 Misc 323 68 C J p 444 note 8

84. Wis.—In re Jacobson's Will, 270 N W 923, 223 Wis 508 68 C J p 444 note 5

85. N J—In re Cassidy's Estate, 135 A 466, 4 N J Misc 1014 68 C J p 444 note 7

86. N D—Edwardson v Gerwien, 171 N W 101, 41 N D 506 68 C J p 444 note 4

87. Wis.—In re Jacobson's Will, 270 N W 923, 223 Wis 508

88. Ky.—Bodine v Bodine, 44 S W 2d 840, 241 Ky 706 68 C J p 443 note 2

89. Mo.—Sehr v Lindemann, 54 S W 537, 153 Mo 276 68 C J p 444 note 6

90. La.—Ducasse's Heirs v Ducasse, 45 So 565, 120 La 731 68 C J. p 443 note 1.

91. La.—Succession of Moody, 80 So 2d 93, 227 La 609

**Weakness incident to disease** does not necessarily incapacitate a man to make a will, but lack of mental capacity is no less fatal to legal power to make a will because it is a result of disease

Mo.—Pickett v Cooper, 192 S W 2d 412, 354 Mo 910

92. N J—In re Delaney's Estate, 25 A 2d 901, 131 N J Eq 454 68 C J p 444 note 9

**Necessity for absolutely sound mind** generally see supra § 15 d (1)

**Mind debilitated by disease**

Iowa.—Walters v Heaton, 271 N W 310, 223 Iowa 405—Firestone v Atkinson, 218 N W 293, 206 Iowa 151—Perkins v Perkins, 90 N W 55, 116 Iowa 253

**Temporary derangement**

(1) Where testatrix was, prior to execution of will, suffering from pyelonephritis, which could produce toxemia and toxic psychosis, derangement was not insanity, but only temporary derangement creating mental incapacity pending duration of disease

La.—Succession of Schmidt, 53 So 2d 834, 219 La 675

(2) Insanity see supra § 17

93. Pa.—In re Glesenkamp's Estate, 107 A 2d 731, 378 Pa 635—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Franz's Estate, 84 A 2d 292, 368 Pa 618—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75

In re Butler's Estate, Orph, 64 Montg Co 161—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Corne's Estate, Orph, 66 York Leg Rec 22—In re Hochberger's Estate, Orph, 63 York Leg Rec 25

**Impairment of memory** generally see supra § 28

94. Pa.—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252 68 C J p 444 note 10

95. Fla.—Smith v Clements, 154 So 520, 114 Fla 614

Idaho.—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

Kan.—Kunkle v Urbansky, 109 P 2d 71, 153 Kan 117 68 C J p 444 note 11

**Acute pain** is not necessarily inconsistent with testamentary capacity

Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

**Paroxysms of pain**

(1) One in paroxysms of pain is incompetent

Iowa.—Blake v Rourke, 38 N W 392, 74 Iowa 519

(2) Paroxysms of pain do not necessarily discount testamentary capacity

Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

**Requirement for voiding will**

Testator's physical suffering is insufficient to render will void, unless it was so great as to make him incapable of appreciating the nature or consequences of his act, or of properly disposing of his estate

Ark.—Blake v Simpson, 215 S W 2d 287, 214 Ark 263—Inman v McEachin, 184 S W 2d 949, 208 Ark 102—McWilliams v Neill, 155 S W 2d 344, 202 Ark 1087—Pernot v King, 110 S W 2d 539, 194 Ark 896—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692

96. Md.—Drury v King, 32 A 2d 371, 182 Md 64—Higgins v Carlton, 48 Md 115, 92 Am Dec 666

Or.—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Bond's Estate, 143 P 2d 244, 172 Or 509—McGreal v Culhane, 141 P 2d 823, 172 Or 337—In re Knutson's Will, 41 P 2d 793, 149 Or 467—In re Carr's Will, 256 P 390, 121 Or 574

Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

In re Rife's Will, Orph, 59 York Leg Rec 169

**Great distress of body**

Or.—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

97. Or.—In re Davis' Will, 142 P 2d 143, 172 Or 354

98. Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

Tex.—Bell v Bell, Civ App, 248 S. W 2d 978, error refused no reversible error

68 C J p 444 note 12

**Weakness with partial mental failure**

Physical weakness with partial failure of mind and memory is not solely an indication of inability to make a will

Me.—In re Loomis' Will, 174 A 38, 133 Me 81

99. R I.—Lancaster v. Alden, 58 A 638, 26 R I 170

68 C J p 444 note 13.

The fact that a testator understood his serious physical condition and was greatly worried and depressed over it is not an evidence of mental illness<sup>1</sup>

### § 30. Deafness, Dumbness, and Blindness

A person is not incompetent to make a will because

of defective eyesight, total blindness, total or partial deafness, or a combination of such infirmities.

A person is not incompetent to make a will because of defective eyesight or total blindness,<sup>2</sup> or total or partial deafness,<sup>3</sup> nor is he incapacitated by a combination of such infirmities, as where he is wholly or partially deaf and blind,<sup>4</sup> or deaf and dumb<sup>5</sup>

## D. EVIDENCE

### 1. PRESUMPTIONS AND BURDEN OF PROOF

#### § 31. General Rules

- a Presumptions
- b Burden of proof
- c Burden of going forward, prima facie case, shifting of burden

##### a. Presumptions

In the absence of proof to the contrary, a testator

is presumed to be sane and to have sufficient mental capacity to make a valid will

As a general rule, until the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will<sup>6</sup> Accordingly, where a testamentary writing

1 Cal—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

2 Ill—In re Calo's Estate, 115 N E 2d 778, 1 Ill 2d 376

Tex—Corpus Juris cited in Cruz v Prado, Civ App, 239 S W 2d 650, 652

68 C J p 444 note 14

Blindness, whatever its degree, does not affect testamentary capacity

Mass—Kingman v Damon, 195 N E 740, 290 Mass 472

3. Ill—Tidholm v Tidholm, 62 N E 2d 473, 391 Ill 19

Minn—In re Eklund's Estate, 242 N W 467, 186 Minn 129

The effect of deafness is to add to the difficulty of execution

Minn—In re Eklund's Estate, supra

4. Ky—Frazie's Ex'x v Frazie, 217 S W 668, 186 Ky 613

68 C J p 444 note 16

5. Ga—Potts v House, 6 Ga 324, 50 Am D 329

68 C J p 444 note 17

6. US—Metropolitan Life Ins Co v Anderson, D C La., 101 F Supp 808

Ala—Cox v Martin, 34 So 2d 463, 250 Ala 401—Tucker v Tucker, 28 So 2d 637, 248 Ala 602

Ariz—In re Cook's Estate, 159 P 2d 797, 63 Ariz 78—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Ark—Gray v Fulton, 170 S W 2d 384, 205 Ark 675

Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1—In re Flatau's Estate, 76 P 2d 506, 10 Cal 2d 701

In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d

638—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754—

In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Somers' Estate, 187 P

2d 433, 82 Cal App 2d 757—In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d

711—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d

111—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Young's Estate, 101 P 2d 770, 38 Cal App 2d 588—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d

449—In re Hansen's Estate, 100 P 2d 776, 38 Cal App 2d 99—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d

597—In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 322—In re Short's Estate, 47 P 2d 555, 7 Cal App 2d 512

Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

Ga—Marlin v Hill, 15 S E 2d 473, 192 Ga 434

Ill—Johnson v First Union Trust & Savings Bank, 273 Ill App 472

Ind—Kaiser v Happel, 36 N E 2d 784, 219 Ind. 28

Iowa—In re Huston's Estate, 27 N W 2d 26, 238 Iowa 297—Walters v Heaton, 271 N W 310, 223 Iowa 405

Ky—New v Creamer, 275 S W 2d 918

—Bickel v Louisville Trust Co.,

197 S W 2d 444, 303 Ky 356—Ramsey v Howard, 158 S W 2d 981, 289 Ky 389

La—Lebleu v Manning, 74 So 2d 384, 225 La 1087—Cormier v Myers, 65 So 2d 345, 223 La 259—Succession of Schmidt, 53 So 2d 834, 219 La 675—Succession of Pizzati, 50 So 2d 189, 218 La 549—McCarty v Trichel, 46 So 2d 621, 217 La 444—Clanton v Shattuck, 30 So 2d 823, 211 La 750—Artigue v Artigue, 26 So 2d 699, 210 La 208—Landry v Landry, 199 So 401, 196 La 490—Succession of Stafford, 186 So 360, 191 La 855—Succession of Lambert, 169 So 453, 185 La 416—Succession of Edgar, 167 So 438, 184 La 775—Rostrop v Succession of Spicer, 165 So 307, 183 La 1087

Succession of Patterson, App, 22 So 2d 214—Succession of Knight, App, 151 So 230

Md—Sellers v Qualls, 110 A 2d 73—Lynn v Magness, 62 A 2d 604, 191 Md 674—Riggs v Safe Deposit & Trust Co of Baltimore City, 46 A 2d 97, 186 Md 54

Mass—Santry v France, 97 N E 2d 533, 327 Mass 174—Goddard v Dupree, 76 N E 2d 643, 322 Mass 247

Mich—In re Padjan's Estate, 65 N W 2d 743, 340 Mich 277—In re Kuza-wa's Estate, 60 N W 2d 138, 337 Mich 397—In re Solomon's Estate, 53 N W 2d 597, 334 Mich 17—In re Hallitt's Estate, 37 N W 2d 662, 324 Mich 654—In re Shattuck's Estate, 37 N W 2d 555, 324 Mich 568—In re Nickel's Estate, 32 N W 2d 733, 321 Mich 519—In re Johnson's Estate, 13 N W 2d 852, 308 Mich 366—In re Wawrzyniak's Estate, 298 N W 118, 297 Mich 520—In re Walker's Estate, 258 N W 206, 270 Mich 33



is rational on its face,<sup>7</sup> legal in form,<sup>8</sup> and is shown | to have been duly executed,<sup>9</sup> the presumption of

Mo—Weaver v Allison, 102 S W 2d 884, 340 Mo 815, 110 A L R 672—Fields v Luck, 74 S W 2d 35, 335 Mo 765

Mont—In re Choimere's Estate, 156 P 2d 635, 117 Mont 65

N J—In re Davis' Will, 101 A 2d 521, 14 N J 166—In re Livingston's Will, 73 A 2d 916, 5 N J 65

In re Weeks' Estate, 103 A 2d 43, 29 N J Super 533—In re Hoover's Estate, 91 A 2d 155, 21 N J Super 323—In re Fleming's Estate, 89 A 2d 54, 19 N J Super 565—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208—In re Filo's Will, 75 A 2d 517, 9 N J Super 146

In re Delaney's Estate, 25 A 2d 901, 131 N J Eq 454—In re Johnson's Will, 85 A 254, 260, 80 N J Eq 525

In re Heim's Estate, 39 A 2d 248, 22 N J Misc 241, reversed on other grounds 40 A 2d 651, 136 N J Eq 138—In re Looi's Will, 28 A 2d 281, 20 N J Misc 376, affirmed 28 A 2d 288, 132 N J Eq 316

N M—In re Chavez' Will, 46 P 2d 665, 39 N M 304

N Y—Corpus Juris cited in In re Benewey's Will, 71 N Y S 2d 361, 365, 272 App Div 463

In re Chambers' Will, 20 N Y S 2d 418.

N C—In re Franks' Will, 56 S E 2d 668, 231 N C 252, rehearing denied 57 S E 2d 315—In re York's Will, 55 S E 2d 791, 231 N C 70

N D—Stormon v Weiss, 65 N W 2d 475

Ohio—In re Blickensderfer's Will, 13 Ohio Supp 93

Okl—In re Fletcher's Estate, 269 P 2d 349—In re Martin's Estate, 261 P 2d 603—In re Baker's Will, 248 P 2d 627, 207 Okl 158—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—Amos v Fish, 144 P 2d 967, 193 Okl 406—Slater v Phipps, 143 P 2d 133, 193 Okl 267—In re De Vine's Estate, 109 P 2d 1078, 188 Okl 423—In re Mason's Estate, 91 P 2d 657, 185 Okl 278—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Free's Estate, 75 P 2d 476, 181 Okl 564—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389

Or—In re Fredricks' Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—Detsch v Detsch, 205 P 2d 180, 186 Or 1—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75—In re Shank's Estate, 126 P 2d 504, 168 Or 650

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75—In re Ross' Estate, 40 A 2d 392, 355 Pa 112—In re Lauer's

Estate, 41 A 2d 552, 351 Pa 438—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420—In re Weber's Estate, 5 A 2d 550, 334 Pa 216—In re Pusey's Estate, 184 A 844, 321 Pa 248, certiorari denied Lavelly v Young Women's Christian Ass'n of Pittsburgh, 57 S Ct 36, 299 U S 572, 81 L Ed 422, rehearing denied 57 S Ct 114, 299 U S 621, 81 L Ed 458

In re Fay's Estate, 60 A 2d 356, 163 Pa Super 1

In re Schuhmacher's Estate, 58 Pa Dist & Co 561

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Edge's Estate, Orph, 45 Dauph Co 372—In re Smedley's Estate, Orph, 4 Chest Co 186—In re O'Brien's Estate, Orph, 34 Del Co 493—In re Porter's Estate, Orph, 4 Fay L J 37, affirmed 19 A 2d 731, 341 Pa 476—In re Meckley's Estate, Orph, 54 Lanc Rev 173—In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523—In re Gayman's Estate, Orph, 21 Northumb Leg J 149—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Hochberger's Estate, Orph, 63 York Leg Rec 25—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

S C—Cornelson v Vance, 66 S E 2d 421, 220 S C 47

Va—Hall v Hall, 23 S E 2d 810, 181 Va 67—Redford v Booker, 185 S E 879, 166 Va 561

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Johnson's Estate, 148 P 2d 962, 20 Wash 2d 628—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Riley's Estate, 300 P 159, 163 Wash 119—In re Hanson's Estate, 151 P 264, 87 Wash 113

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Johnson's Estate, 148 P 2d 962, 20 Wash 2d 628—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—In re Jolly's Estate, 85 P 2d 267, 197 Wash 349—Dean v Jordan, 79 P 2d 331, 194 Wash 661

Wis—In re Bauer's Estate, 59 N W 2d 481, 264 Wis 556—In re Bickner's Estate, 49 N W 2d 404, 259 Wis 425—Corpus Juris cited in In re Szperka's Will, 35 N W 2d 209, 211, 254 Wis 153, mandate vacated on other grounds 35 N W 2d 911, 254 Wis 153

68 C J p 445 note 20

Conclusionary presumption

(1) There is no conclusive presumption of testator's sanity as matter of law

Mo—Fields v Luck, 74 S W 2d 35, 335 Mo 765

(2) Where a will is sought to be set aside on ground of undue influence alone, testamentary capacity is conclusively presumed

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

7. Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837—In re Johnson's Estate, 148 P 2d 962, 20 Wash 2d 628—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Riley's Estate, 300 P 159, 163 Wash 119—In re Hanson's Estate, 151 P 264, 87 Wash 113

#### Examination of will

When inquiring into the testamentary capacity of the testator, the court can examine the purported will itself, and draw therefrom any inferences as to the mental capacity of the deceased, justified by its contents

Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72

#### Rational act, rationally performed

Where will appears on its face to be a rational act, rationally performed, it is presumed to be valid

Idaho—In re Heazle's Estate, supra

8. Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Johnson's Estate, 148 P 2d 962, 20 Wash 2d 628—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Riley's Estate, 300 P 159, 163 Wash 119—In re Hanson's Estate, 151 P 264, 87 Wash 113

9. Okl—In re Fletcher's Estate, 269 P 2d 349—In re Martin's Estate, 261 P 2d 603—In re Baker's Will, 248 P 2d 627, 207 Okl 158—Amos v Fish, 144 P 2d 967, 193 Okl 406—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Free's Estate, 75 P 2d 476, 181 Okl 564

Or—In re Fredricks' Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—Detsch v Detsch, 205 P 2d 180, 186 Or 1—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75—In re Shank's Estate, 126 P 2d 504, 168 Or 650

Pa—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559—In re Ross' Es-

testamentary capacity arises. The presumption obtains over the entire process of the execution of the will in the absence of credible evidence to the contrary.<sup>10</sup> The presumption is one of fact,<sup>11</sup> and has no greater force than any other rebuttable presumption in any ordinary civil case.<sup>12</sup> While the presumption has been held not to be evidence,<sup>13</sup> where the will appears to be a rational act performed in a rational manner the presumption amounts to evidence of testamentary capacity.<sup>14</sup> It will continue until overcome by evidence.<sup>15</sup> It is rebutted by evidence that the testator was afflicted with insanity of a permanent nature before the execution of the will.<sup>16</sup> In some jurisdictions, however, on proceedings for the probate of a will there is no presumption of testamentary capacity.<sup>17</sup>

**Continued sanity** In the absence of evidence showing that the testator was ever other than sane, a presumption of continued sanity obtains.<sup>18</sup>

**Inability to speak** Fact that the testator could not speak articulately does not raise a presumption of testamentary incapacity.<sup>19</sup>

**Preparation by attorney** The fact that a will is prepared by an attorney at the request of the

testator and in accordance with his directions without interference from anyone, affords an inference that it was properly made by a person of testamentary capacity.<sup>20</sup>

### b. Burden of Proof

- (1) In general, on probate of will
- (2) Actions to set aside will or probate

#### (1) In General, on Probate of Will

The burden of proof on the probate of a will, rests, in many jurisdictions on the proponent of the will to prove testamentary capacity as of the time of the execution of the will, according to the rule announced in some decisions the burden of proof rests on the contestant on the probate of the will to prove testamentary incapacity of the testator at the time the will was executed.

On the probate of a will there is some confusion in the cases on the incidence of the burden of proof as to testamentary capacity.<sup>21</sup> Notwithstanding the presumption of testamentary capacity, the rule in many jurisdictions is that the burden of proof, properly speaking, rests on the proponent of the will to prove testamentary capacity as of the time of the execution of the will.<sup>22</sup> While the burden of

tate, 49 A 2d 392, 355 Pa 112—In re Lauer's Estate, 41 A 2d 552, 351 Pa 438—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420—In re Weber's Estate, 5 A 2d 550, 334 Pa 216

In re Fay's Estate, 60 A 2d 356, 163 Pa Super 1

In re Schuhmacher's Estate, Orph, 58 Pa Dist & Co 561

In re O'Brien's Estate, Orph, 34 Del Co 493—In re Melvin's Estate, Com Pl, 45 Lack Jur 229—In re King's Estate, Orph, 67 Montg Co 185, affirmed 87 A 2d 469, 369 Pa 523—In re Hochberger's Estate, Orph, 63 York Leg Rec 25

68 C J p 445 note 21

10. Cal—In re Dow's Estate, 183 P 794, 181 Cal 106

11. Colo—In re Roeber's Estate, 199 P 481, 70 Colo 196

NH—Perkins v Perkins, 39 NH 163

12. Ark—Bims v Collier, 62 SW 593, 69 Ark 245

Ind—Kaiser v Happel, 36 NE 2d 784, 219 Ind 28

Neb—In re Hunter's Estate, 39 NW 2d 418, 151 Neb 704

13. Neb—In re Hunter's Estate, supra

14. Okl—Runnels v Burton, 214 P 2d 709, 202 Okl 406—In re DeVine's Estate, 109 P 2d 1078, 188 Okl 423—In re Mason's Estate, 91 P 2d 657, 185 Okl 278—In re Free's Estate, 75 P 2d 476, 181 Okl 564.

15. Ind—Kaiser v Happel, 36 NE 2d 784, 219 Ind 28

Ky—Leary v Leary, 262 SW 293, 203 Ky 344

Mass—Santry v France, 97 NE 2d 533, 327 Mass 174

Neb—In re Hunter's Estate, 39 NW 2d 418, 151 Neb 704

16. Ill—James White Memorial Home v Haeg, 68 NE 568, 204 Ill 422

17. Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173

Tex—Bell v Bell, Civ App, 248 SW 2d 978, error refused no reversible error—Jowers v Smith, Civ App, 237 SW 2d 805—Bell v Bell, Civ App, 237 SW 2d 688—Pullen v Russ, Civ App, 226 SW 2d 876, error refused no reversible error—Whitley v McKanna, Civ App, 207 SW 2d 645, refused no reversible error—Fulcher v Young, Civ App, 189 SW 2d 28, refused for want of merit—Kutchinsky v Zillion, Civ App, 183 SW 2d 237, error refused W Va—Powell v Sayres, 60 SE 2d 740, 134 W Va 653

68 C J p 446 note 27

#### Holographic will

Tex—Bogel v White, Civ App, 168 SW 2d 309, error refused

18. Tex—In re Fowler's Estate, Civ App, 87 SW 2d 896, error dismissed

19. Cal—In re Casarotti's Estate, 192 P 1085, 184 Cal 73.

20. Pa—In re Ross' Estate, 49 A 2d

392, 355 Pa 112—In re Brennan's Estate, 168 A 25, 312 Pa 335—In re Morgan's Estate, 68 A 953, 219 Pa 355

In re Melvin's Estate, Com Pl, 45 Lack Jur 229—In re Troyer's Will, Orph, 52 Lanc Rev 151—In re Butler's Estate, Orph, 64 Montg Co 161—In re Maren's Estate, Orph, 42 Sch Leg Rec 5

#### Series of consistent wills

The participation, over a great number of years, of reputable counsel in drafting a series of wills for testatrix, which were consistent in their general testamentary scheme, creates at least a strong inference in favor of the mental capacity of testatrix

Pa—In re Frazier's Estate, 75 Pa Dist & Co 577

21. US—Brosnan v Brosnan, App DC, 44 S Ct 117, 263 US 345, 68 L Ed 332

68 C J p 446 note 31

22. Conn—Trella v Prestoff, 22 A 2d 638, 128 Conn 337

Ga—Langan v Cheshire, 65 SE 2d 415, 208 Ga 107—Whitfield v Pitts, 53 SE 2d 549, 205 Ga 259—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Brazil v Roberts, 32 SE 2d 171, 198 Ga 477—Smoot v Alexander, 3 SE 2d 593, 188 Ga 203

Ind—McCord v Strader, 86 NE 2d 441, 227 Ind 389

Kan—In re Moore's Estate, 203 P 2d 192, 166 Kan 556—In re Peirano's Estate, 122 P 2d 772, 155 Kan 48—

going forward may shift,<sup>23</sup> the burden of proof does not,<sup>24</sup> but remains on the proponent from the beginning to the end of the trial.<sup>25</sup> The presumption of testamentary capacity does not shift the burden of proof.<sup>26</sup> A prima facie case does not shift the burden of proof.<sup>27</sup> If the evidence is balanced, the presumption of capacity has probative

force to turn the scale in favor of capacity.<sup>28</sup> If, on the whole evidence, including the presumption of capacity, the scales are in even balance, the finding must be for the contestant.<sup>29</sup>

*Burden on contestant.* According to the rule announced in some decisions the burden of proof rests on the contestant on the probate of a will to prove

Anderson v Anderson, 76 P 2d 825, 147 Kan 273  
**Me**—In re Haley's Estate, 84 A 2d 808, 147 Me 173—Appeal of Heath, 79 A 2d 810, 146 Me 229—Appeal of MacVeagh, 42 A 2d 903, 141 Me 260—Appeal of Martin, 179 A 655, 133 Me 422—In re Loomis' Will, 174 A 38, 133 Me 81  
**Mass**—Goddard v Dupree, 76 N E 2d 643, 322 Mass 247—Simoneau v O'Brien, 40 N E 2d 1, 311 Mass 68  
**Minn**—In re Rasmussen's Estate, 69 N W 2d 630—In re Healy's Estate, 68 N W 2d 401—Appeal of Boistad, 45 N W 2d 828, 232 Minn 365—In re Forsythe's Estate, 22 N W 2d 19, 221 Minn 303, 167 A L R 1  
**Miss**—Cheatham v Burnside, 77 So 2d 719—Bearden v Gibson, 60 So 2d 655, 215 Miss 218—O'Bannon v Henrich, 4 So 2d 208, 191 Miss 815—Fortenberry v Herrington, 196 So 232, 188 Miss 735  
**Neb**—In re Coons' Estate, 64 N W 2d 301, 158 Neb 630—In re Coon's Estate, 48 N W 2d 778, 154 Neb 690—In re Benson's Estate, 46 N W 2d 176, 153 Neb 824—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Hunter's Estate, 39 N W 2d 418, 151 Neb 704—In re Kaiser's Estate, 34 N W 2d 366, 150 Neb 295—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Rental's Estate, 29 N W 2d 466, 148 Neb 776—In re Woodward's Estate, 23 N W 2d 75, 147 Neb 270—In re Inda's Estate, 19 N W 2d 37, 146 Neb 179—In re Kaup's Estate, 18 N W 2d 63, 145 Neb 729—In re Witte's Estate, 16 N W 2d 203, 145 Neb 295, rehearing denied 17 N W 2d 477, 145 Neb 295—In re Hagan's Estate, 9 N W 2d 794, 143 Neb 459, 154 A L R 573—In re Bose's Estate, 285 N W 319, 136 Neb 156—In re Wotke's Estate, 277 N W 45, 133 Neb 739  
**N M**—Corpus Juris cited in In re Chavez' Will, 46 P 2d 665, 39 N M 304  
**Or**—In re Fredrick's Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Andersen's Estate, 235 P 2d 869, 192 Or 441—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75—In re Southman's Estate, 168 P 2d 572, 178 Or 462—In re Murray's Estate, 144 P 2d 1016, 173 Or 209—In re Bond's Estate, 143 P 2d 244, 172 Or 509—McGreal v Cul-

hane, 141 P 2d 828, 172 Or 337—In re Shanks' Estate, 126 P 2d 504, 168 Or 650—In re Johnson's Estate, 91 P 2d 330, 162 Or 97  
**RI**—Talon v Jackson, 19 A 2d 4, 66 R I 302—Heroux v Heroux, 191 A 265, 68 R I 79—Young v Young, 185 A 901, 56 R I 401—Talbot v Bridges, 173 A 72, 54 R I 337  
**W Va**—Rice v Henderson, 83 S E 2d 762—Ritz v Kingdon, 79 S E 2d 123  
 68 C J p 446 notes 32 [a], 34  
**Re-probate of will**  
 On re-probate of will the proponent has the burden of proving the existence of testamentary capacity  
**Or**—In re Knutson's Will, 41 P 2d 793, 149 Or 467  
 68 C J p 446 note 34 [a]  
**In New York**  
 (1) According to the rule announced in some decisions the burden of proof is on the proponent  
**NY**—In re Morrison's Will, 60 N Y S 2d 546, 270 App Div 552, affirmed 69 N E 2d 814, 296 N Y 652—In re Stegner's Will, 2 N Y S 2d 54, 253 App Div 282  
 In re Stephani's Estate, 288 N Y S 486, 159 Misc 43, reversed in part on other grounds In re Stephani's Will, 294 N Y S 624, 250 App Div 253—In re Chinsky's Will, 270 N Y S 822, 151 Misc 129—In re Chinsky's Will, 268 N Y S 719, 150 Misc 274  
 In re Merolla's Will, 104 N Y S 2d 402—In re Goldin's Will, 90 N Y S 2d 601—In re Levy's Estate, 58 N Y S 2d 5—In re Buckley's Estate, 52 N Y S 2d 292  
 68 C J p 446 note 34 [b] (1), (3)  
 (2) In other decisions the burden of proof was said to rest on the contestant  
**NY**—In re Chambers' Wills, 20 N Y S 2d 418  
 68 C J p 446 note 34 [b] (2)  
**In Texas**  
 (1) In a proceeding to probate a will the burden of proof as to testamentary capacity is on the proponent  
**Tex**—Taylor v Taylor, 281 S W 2d 232, error refused no reversible error—Shadowens v Shadowens, Civ App, 271 S W 2d 165—Burns v Brown, Civ App, 248 S W 2d 1019, error refused—Taylor v Taylor, Civ App, 248 S W 2d 820—Venner v Layton, Civ App, 244 S W 2d 852, error refused no reversible error—

Bell v Bell, Civ App, 237 S W 2d 688—Stenzel v Fischer, Civ App, 195 S W 2d 251—Kutchinsky v Zillion, Civ App, 183 S W 2d 237, error refused—Cheesborough v Corbett, Civ App, 155 S W 2d 942, error refused—Krumb v. Porter, Civ App, 152 S W 2d 495, error refused—Breeding v Naler, Civ App, 120 S W 2d 888, error dismissed  
 68 C J p 446 note 34 [c] (1)  
 (2) Such burden has also been held to be on the protestants  
**Tex**—Idar v Nehlinger, Civ App, 49 S W 2d 998  
**23. Neb**—In re Benson's Estate, 46 N W 2d 176, 153 Neb 824—In re Hunter's Estate, 39 N W 2d 418, 151 Neb 704—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Bayer's Estate, 227 N W 928, 119 Neb 191  
**Tex**—Garcia v Galindo, Civ App, 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507  
**24. Neb**—In re Hunter's Estate, 39 N W 2d 418, 151 Neb 704—In re Bayer's Estate, 227 N W 928, 119 Neb 191  
**Tex**—Garcia v Galindo, Civ App, 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507  
**Va**—Hall v Hall, 23 S E 2d 810, 181 Va 67—Redford v Booker, 185 S E 879, 166 Va 561  
**25. Neb**—In re Hunter's Estate, 39 N W 2d 418, 151 Neb 704  
**Va**—Redford v Booker, 185 S E 879, 166 Va 561—Hall v Hall, 23 S E 2d 810, 181 Va 67  
 68 C J p 447 note 37  
**26. Ind**—Steinkuehler v Wempner, 81 NE 482, 169 Ind 154, 15 L R A, NS, 673  
 68 C J p 447 note 39  
**27. Mass**—Crowninshield v Crowninshield, 2 Gray 524  
**Tex**—Garcia v Galindo, Civ App, 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507  
**28. Conn**—Appeal of Sturdevant, 42 A 70, 71 Conn 392  
**NY**—In re Moyer's Will, 163 N Y S 296, 97 Misc 512  
**29. Colo**—In re Roeber's Estate, 199 P 481, 70 Colo 196  
**Mass**—Clifford v Taylor, 90 NE 862, 204 Mass 358.

testamentary incapacity of the testator at the time | the will was executed <sup>30</sup> The burden does not shift

30. U.S.—Metropolitan Life Ins Co v Anderson, D C La., 101 F Supp 808

Ariz—In re Walters' Estate, 267 P 2d 896, 77 Ariz 122—In re Cook's Estate, 159 P 2d 797, 63 Ariz 78—In re Morrison's Estate, 103 P 2d 669, 55 Ariz 504

Ark—Yarbrough v Moses, 267 SW 2d 289, 223 Ark 489—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167—Jones v National Bank of Commerce in Memphis, 249 SW 2d 105, 220 Ark 665—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Simpson v Burge, 224 SW 2d 830, 216 Ark 132—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—McWilliams v Neill, 155 SW 2d 344, 202 Ark 1037

Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348—In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Volen's Estate, 262 P 2d 658, 121 Cal App 2d 161—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d 111—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449—In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 2d 322

Del—In re Barnes' Will, 18 A 2d 433, 2 Terry 206

La—Landry v Landry, 199 So 401, 196 La 490—Succession of Edgar, 167 So 438, 184 La 775—Rostrup v Succession of Spicer, 165 So 307, 183 La 1087.

Succession of Patterson, App, 22 So 2d 214

Md—Acker v Acker, 192 A 327, 172 Md 477

Mont—In re Benson's Estate, 98 P 2d 868, 110 Mont 25

NJ—In re Weeks' Estate, 103 A 2d 43, 29 NJ Super 533—In re Hoover's Estate, 91 A 2d 155, 21 NJ Super 323

In re Phillips' Estate, 57 A 2d 387, 141 NJ Eq 362—In re Heim's Will, 40 A 2d 651, 136 NJ Eq 138—In re Delaney's Estate, 25 A 2d 901, 131

NJ Eq 454—In re McComb, 177 A 849, 118 NJ Eq 119

In re Looi's Will, 28 A 2d 281, 20 NJ Misc 376, affirmed 28 A 2d 288, 132 NJ Eq 316

NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 736—In re York's Will, 55 SE 2d 791, 231 NC 70—In re West's Will, 41 SE 2d 838, 227 NC 204—In re Harris' Will, 11 SE 2d 310, 218 NC 459

ND—Corpus Juris cited in Stormon v Weiss, 65 NW 2d 475, 500

Wis—In re Bauer's Estate, 59 NW 2d 481, 264 Wis 556—In re Bickner's Estate, 49 NW 2d 404, 259 Wis 425—In re Scherrer's Estate, 7 NW 2d 848, 242 Wis 211

Wyo—In re Lane's Estate, 58 P 2d 415, 50 Wyo 119, rehearing denied 60 P 2d 860, 50 Wyo 119

68 C J p 447 note 43

#### Burden of rebutting presumption

A will contestant has the burden of rebutting the presumption that every person is of sound mind

NJ—In re Weeks' Estate, 103 A 2d 43, 29 NJ Super 533

#### In Alabama

(1) After the proponent has made out a prima facie case by proof of the due execution of the will, the burden of proof is on the contestant to show mental incapacity to make a will

Ala—Houston v Grigsby, 116 So 686, 217 Ala 506—West v Arrington, 76 So 352, 200 Ala 420

(2) The contestants have the burden to prove testamentary incapacity

Ala—King v Aird, 38 So 2d 883, 251 Ala 613—Cox v Martin, 34 So 2d 463, 250 Ala 401—Tucker v Tucker, 28 So 2d 637, 248 Ala 602

68 C J p 447 note 43 [b] (3)

(3) In an earlier case it was held that the onus probandi was on the proponent

Ala—Dunlap v Robinson, 28 Ala 100

#### In Iowa

(1) The burden of proving testamentary incapacity is on the one who contests the will

Iowa—In re Scanlan's Estate, 67 NW 2d 5—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307—In re Groen's Estate, 62 NW 2d 143, 245 Iowa 634—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—Ipsen v Ruess, 35 NW 2d 82, 239 Iowa 1376—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Kirby's Estate, 41 NW 2d 8, 241 Iowa 340—In re Meyer's Estate, 37 NW 2d 265, 240 Iowa 1226—In re Huston's Estate, 27 NW 2d 26, 238 Iowa 297—In re Heller's Estate, 11 NW 2d 586, 233 Iowa 1356—In re Behrend's Will, 10 NW 2d 651, 233 Iowa 812—In re

Cocklin's Estate, 5 NW 2d 577, 232 Iowa 266—In re Hayer's Estate, 299 NW 431, 230 Iowa 880—In re Behrend's Will, 290 NW 78, 227 Iowa 1099—In re Johnson's Estate, 269 NW 792, 222 Iowa 787—In re Fitzgerald's Estate, 259 NW 455, 219 Iowa 988

68 C J p 447 note 43 [d]

(2) The proponent of a will has the burden in the first instance of proving testamentary capacity, but such capacity having been conceded on a date two months prior to the making of the will, the burden is discharged by the presumption of continuity

Iowa—Touhey v Cooney, 166 NW 684, 183 Iowa 1023

#### In Michigan

(1) Since the enactment of a statute in 1915 the burden of proof as to testamentary capacity is on the contestant

Mich—In re Padjan's Estate, 65 NW 2d 743, 340 Mich 277—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Kuzawa's Estate, 60 NW 2d 138, 337 Mich 397—In re Kenealy's Estate, 59 NW 2d 38, 336 Mich 657—In re Hallitt's Estate, 37 NW 2d 662, 324 Mich 654—In re Shattuck's Estate, 37 NW 2d 555, 324 Mich 568—In re Nickel's Estate, 32 NW 2d 733, 321 Mich 519—In re Thayer's Estate, 15 NW 2d 712, 309 Mich 473—In re Johnson's Estate, 13 NW 2d 852, 308 Mich 366—In re Thiede's Estate, 4 NW 2d 47, 301 Mich 658—In re Grow's Estate, 299 NW 836, 299 Mich 133—In re Wawrzyniak's Estate, 298 NW 118, 297 Mich 520—In re Getchell's Estate, 295 NW 360, 295 Mich 681—In re Rowling's Estate, 289 NW 136, 291 Mich 218—Michels v Socall, 275 NW 658, 281 Mich 633—In re Leech's Estate, 269 NW 181, 277 Mich 299—Walker v Hinckley, 258 NW 206, 270 Mich 33

68 C J p 447 note 43 [e] (1)

(2) Prior to the enactment of this statute the burden of proof was on the proponent

Mich—In re Hoyles' Will, 127 NW 284, 162 Mich 275

68 C J p 447 note 43 [e] (2)

(3) In will contest on ground of mental incompetency, proponent's failure to produce available subscribing witnesses as witnesses to prove will did not render inapplicable statute placing burden of proving mental incompetency on contestant

Mich—Paul v Paul's Estate, 286 N. W 680, 289 Mich 452

#### In Oklahoma

(1) Where it has been established that a will was duly executed, the contestants have the burden of proof as to testamentary incapacity.

during the trial<sup>31</sup>

**Establishment of lost or destroyed will** In a suit to establish a lost will the proponent has the burden of showing that the testator had the legal age and mental capacity to make a will<sup>32</sup> In order to establish a canceled will, the proponent has the burden to show that at the time of cancellation the testator

was incompetent<sup>33</sup> Where it is shown that a deceased person made a will which was last seen in his possession, and the will cannot be found on his death, the burden of showing on probate that testator was not of sound mind at, and at all times after, the time he was so last seen is on the proponent<sup>34</sup>

*In action of ejectment* to recover property the bur-

Okl—In re Wadsworth's Estate, 273 P 2d 997—In re Holmes' Estate, 270 P 2d 320—In re Fletcher's Estate, 269 P 2d 349—In re Baker's Will, 248 P 2d 627, 207 Okl 158—In re Lamar's Estate, 242 P 2d 727, 206 Okl 244—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—In re Smith's Estate, 172 P 2d 328, 197 Okl 405—In re Lillie's Estate, 159 P 2d 542, 195 Okl 579—Amos v Fish, 144 P 2d 967, 193 Okl 406—Slater v Phipps, 143 P 2d 133, 193 Okl 267—Barnes v Logston, 88 P 2d 361, 184 Okl 464—Wood v Wood, 32 P 2d 715, 168 Okl 198

(2) The proponent has the burden of proof in a contested will case to show testamentary capacity, or to produce such evidence as will create a presumption thereof

Okl—In re Free's Estate, 75 P 2d 476, 181 Okl 564—In re Sixkiller, 32 P 2d 936, 168 Okl 302

#### In Pennsylvania

(1) Generally the contestant has the burden to prove testamentary incapacity

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re O'Malley's Estate, 88 A 2d 69, 370 Pa 281—In re Ross' Estate, 49 A 2d 392, 355 Pa 112—In re Lauer's Estate, 41 A 2d 552, 351 Pa 438—In re Olsheski's Estate, 11 A 2d 487, 337 Pa 420

Buhan v Keslar, 194 A 917, 328 Pa 312—In re Cookson's Estate, 188 A 904, 325 Pa 81—In re Pusey's Estate, 184 A 844, 321 Pa 248, certiorari denied Lavelly v Young Women's Christian Ass'n of Pittsburgh, 57 S Ct 36, 299 US 572, 81 L Ed 422, rehearing denied 57 S Ct 114, 299 US 621, 81 L Ed 458

In re Dible's Estate, 170 A 440, 112 Pa Super 23, reversed on other grounds 175 A 538, 316 Pa 553

In re Schuhmacher's Estate, 58 Pa Dist & Co 561

In re Smedley's Estate, Orph, 4 Chest Co 186—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, —45 Lanc Rev 585—In re Sassaman's Estate, Orph, 26 North Co 348—In re Gayman's Estate, Orph, 21 Northumb Leg J 149—In re Hochberger's Estate, Orph, 63 York Leg Rec 25—In re Rife's Will, Orph, 59 York Leg Rec 169—In re

Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

68 C J p 447 note 43 [f] (1)

(2) When the proponent establishes a prima facie case, the burden shifts to the contestant to prove incapacity

Pa—In re Lawrence's Estate, 132 A 786, 286 Pa 58

(3) When proponent offered in evidence the record of probate of decedent's will, burden of proof shifted to contestants

Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395

(4) After proof of execution by two witnesses the burden of proof is on the contestant

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75

In re Fay's Estate, 60 A 2d 356, 163 Pa Super 1

In re Meckley's Estate, Orph, 54 Lanc Rev 173—In re Nelson's Estate, Orph, 66 York Leg Rec 161

(5) Where proper execution of will was established by four respectable, disinterested witnesses, burden was on contestants

Pa—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559

(6) Where a will is drawn by testator's lawyer and is proved by the lawyer and subscribing witnesses, burden of proving testamentary incapacity is on the contestants

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381

(7) The proponent, who stood in a confidential relationship to a mentally weak testator, has the burden of proof

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Lauer's Estate, 41 A 2d 552, 351 Pa 438—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Pusey's Estate, 184 A 844, 321 Pa 248, certiorari denied Lavelly v Young Women's Christian Ass'n of Pittsburgh, 57 S Ct 36, 299 US 572, 81 L Ed 422, rehearing denied 57 S Ct 114, 299 US 621, 81 L Ed 458—In re Dible's Estate, 175 A 538, 316 Pa 553

In re Nute, Com Pl, 33 Del Co 277

68 C J p 447 note 43 [f] (3).

#### In Tennessee

(1) The contestants have the burden to prove testamentary incapacity Tenn—Haynes v Mullins, 209 SW 2d 278, 30 Tenn App 615—Burrow v Lewis, 142 SW 2d 758, 24 Tenn App 758

(2) Where the circumstances are such as to excite suspicion as to testamentary capacity the proponent has the burden of proof

Tenn—Bartee v Thompson, 8 Baxt 508—Purvey v Reese, 6 Coldw 21 Haynes v Mullins, supra—Burrow v Lewis, supra.

#### In Virginia

(1) The burden of proof as to testamentary capacity is on the proponent

Va—Hall v Hall, 23 SE 2d 810, 181 Va 67—Redford v Booker, 185 S E 879, 166 Va 561

68 C J p 447 note 43 [g] (2).

(2) Where statutory requirements of due execution of will appear, burden rests on contestants of going forward with their evidence and showing incapacity of testatrix at date of execution

Va—Croft v Snidow, 33 SE 2d 208, 183 Va 649—Redford v Booker, 185 SE 879, 166 Va 561

(3) Those who would impeach a will on the ground that decedent was incompetent must prove clearly that incompetency to exist

Va—Tabb v Willis, 156 SE 556, 155 Va 836

31. Cal—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711

Iowa—Storbeck v Fridley, 38 NW 2d 163, 240 Iowa 879.

Mich—In re Thayer's Estate, 15 NW 2d 712, 309 Mich 473

ND—Corpus Juris cited in Stormon v Weiss, 65 NW 2d 475, 500 68 C J p 448 note 44

32. Mo—McMurtrey v. Kopke, 250 SW 399

Probate or establishment of lost or destroyed wills see infra §§ 335-339

33. SD—In re Thompson's Estate, 205 NW 47, 48 SD 474

34. Miss—Watkins v Watkins, 106 So 753, 142 Miss 210.

NY—In re Sharp's Will, 235 NYS 692, 134 Misc 405, affirmed 243 NYS 818, 230 App Div. 723.

den of proof is on the party alleging insanity of a testator<sup>35</sup>

## (2) Actions to Set Aside Will or Probate

After the probate of a will, one who brings an action or proceeding to contest its validity and to have it set aside on the ground of testamentary incapacity has the burden of proving such incapacity

As a general rule one who, after the probate of a will, brings an action or proceeding to contest its validity and to have it set aside on the ground of testamentary incapacity has the burden of proving such incapacity<sup>36</sup> While in statutory proceedings to contest a will after probate in some jurisdictions the proponent must in the first instance establish testamentary capacity, as considered *infra* subdivision c (2) of this section, the burden of proof on the whole case rests on the contestant to prove by a preponderance of the evidence testamentary incapacity<sup>37</sup> The presumption of capacity is thrown into the scales in favor of proponent,<sup>38</sup> and, in order for contestant to succeed, he must adduce evidence sufficient to overcome the presumption of capacity and affirmative evidence in support of the will<sup>39</sup>

In some jurisdictions statutory proceedings to contest a will after probate are in the nature of appeals from probate in which a trial *de novo* is had, and the proponent of the will, as defendant in the contest, has the burden of proving testamentary capacity<sup>40</sup> Although the burden of going forward

may shift, as discussed *infra* subdivision c of this section, the burden of proof never shifts,<sup>41</sup> but remains on the proponent throughout the entire case<sup>42</sup> A *prima facie* case does not shift the burden of proof<sup>43</sup>

*Revocation of probate.* In a proceeding to revoke the probate of a will, as considered *infra* §§ 502-513, the burden is on the contestant to prove mental incompetency of the testator at the time the will was executed<sup>44</sup> The burden is on the contestant to overcome the primary presumption of testamentary capacity,<sup>45</sup> and also of the order involving an adjudication on probate on presumptively sufficient evidence to justify it<sup>46</sup>

## c. Burden of Going Forward; Prima Facie Case; Shifting of Burden

- (1) On probate of will
- (2) Actions to set aside will or probate

### (1) On Probate of Will

According to some decisions the proponent of the will may not rest solely on the presumption of testamentary capacity, but must prove the testamentary capacity of the deceased at the time the will was written, but in other jurisdictions the proponent need only prove due execution of the will to make a *prima facie* case, and may rely on the presumptive proof of capacity until sufficient evidence to the contrary is produced.

There is a conflict of authority on the question whether the presumption of capacity is sufficient to establish a *prima facie* case of testamentary in-

35. N.J.—*Trumbull v Gibbons*, 22 N J Law 117

N.Y.—*Jones v Jones*, 17 N.Y.S. 905, 63 Hun 630, affirmed 33 N.E. 479, 137 N.Y. 610

36. Ark.—*Werbe v Holt*, 237 S.W.2d 478, 218 Ark 476

Ind.—*Kaiser v Happel*, 36 N.E.2d 784, 219 Ind 28

Iowa.—*Walters v Heaton*, 271 N.W. 310, 223 Iowa 405

Kan.—*In re Birney's Estate*, 281 P.2d 1098, 177 Kan 624

Ky.—*New v Creamer*, 275 S.W.2d 918

—*Bickel v Louisville Trust Co.*, 197 S.W.2d 444, 303 Ky 356—*Jackson's Ex'r v Semones*, 98 S.W.2d 505, 266 Ky 352—*Langford's Ex'r v Miles*, 225 S.W.2d 246, 189 Ky 515

La.—*McCarty v Trichel*, 46 So.2d 621, 217 La 444—*Succession of Stafford*, 186 So.360, 191 La 855

Ohio.—*Spidel v Warrick*, App., 78 N.E.2d 746

Okl.—*In re Martin's Estate*, 261 P.2d 603

Tex.—*Bell v Bell*, Civ App., 248 S.W.2d 978, error refused no reversible error—*Cruz v Prado*, Civ App., 239 S.W.2d 650—*Jowers v Smith*, Civ App., 237 S.W.2d 805—*Walston v.*

*Mabry*, Civ App., 225 S.W.2d 1014—*Stenzel v Fischer*, Civ App., 195 S.W.2d 254

Wash.—*In re Peters' Estate*, 264 P.2d 1109, 43 Wash.2d 846—*In re Larsen's Estate*, 71 P.2d 47, 191 Wash. 257—*In re McGhee's Estate*, 62 P.2d 1336, 188 Wash 550

68 C.J. p. 448 note 55

37. Ill.—*Shevlin v Jackson*, 124 N.E.2d 895, 5 Ill.2d 43—*Innis v Mueller*, 84 N.E.2d 837, 403 Ill. 11—*Langwisch v Langwisch*, 198 N.E. 675, 361 Ill. 632

68 C.J. p. 449 note 58.

38. Ill.—*Huggins v Drury*, 61 N.E. 652, 192 Ill. 528

68 C.J. p. 449 note 59

39. Ill.—*Huggins v Drury*, *supra*

68 C.J. p. 449 note 60

40. Mo.—*Morton v Simms*, 263 S.W.2d 435—*Wipfler v Basler*, 250 S.W.2d 982—*Fletcher v Ringo*, 164 S.W.2d 904—*Weaver v Allison*, 102 S.W.2d 884, 340 Mo. 815, 110 A.L.R. 672—*Fields v Luck*, 74 S.W.2d 35, 335 Mo. 765

68 C.J. p. 449 note 62

41. Mo.—*Foster v Norman*, 143 S.W.2d 248, 346 Mo. 850—*Weaver v*

*Allison*, 102 S.W.2d 884, 340 Mo. 815, 110 A.L.R. 672

68 C.J. p. 449 note 64

42. Mo.—*Foster v Norman*, 143 S.W.2d 248, 346 Mo. 850—*Weaver v Allison*, 102 S.W.2d 884, 340 Mo. 815, 110 A.L.R. 672

68 C.J. p. 449 note 65

43. Mo.—*Weaver v Allison*, *supra*

68 C.J. p. 449 note 66

44. Cal.—*In re White's Estate*, 276 P.2d 11, 128 Cal.App.2d 659—*In re Alegria's Estate*, 197 P.2d 571, 87 Cal.App.2d 645—*In re Downey's Estate*, 124 P.2d 637, 51 Cal.App.2d 275—*In re Mickelson's Estate*, 99 P.2d 687, 37 Cal.App.2d 450—*In re Peterkin's Estate*, 73 P.2d 897, 23 Cal.App.2d 597

Fla.—*In re Carnegie's Estate*, 13 So.2d 299, 153 Fla. 7—*Myers v Pleasant*, 160 So. 204, 118 Fla. 715

68 C.J. p. 449 note 68

45. Cal.—*In re Nolan's Estate*, 78 P.2d 456, 25 Cal.App.2d 738—*In re Campbell's Estate*, 189 P. 812, 46 Cal.App. 612

46. Cal.—*In re Campbell's Estate*, *supra*.

capacity on probate without the introduction of additional evidence on the preliminary proof.<sup>47</sup> This question is distinct from the burden of proof on the whole case.<sup>48</sup> According to some decisions the proponent of the will may not rest solely on the presumption of testamentary capacity<sup>49</sup> but must prove, in addition to the formal execution of the will, as considered *infra* § 383, the testamentary capacity of deceased at the time the will was executed,<sup>50</sup> even, according to some decisions, when no contest is entered.<sup>51</sup> This has been held to be the rule even in jurisdictions where the burden of proof on the whole issue is on the contestant.<sup>52</sup> If the subscribing witnesses testify that the testator was of sound mind when the will was executed it is sufficient to make a *prima facie* case.<sup>53</sup>

In some jurisdictions the proponent need only prove due execution of the will to make a *prima facie* case,<sup>54</sup> and may rely on the presumptive proof

of capacity until sufficient evidence to the contrary is produced.<sup>55</sup> This is true although the burden of proof, properly speaking, rests on the proponent.<sup>56</sup> According to the rule announced in some decisions, where the due execution of the will is proved and it is not irrational in its provisions or inconsistent in its structure with the sanity of the testator, the presumption of capacity establishes for the proponent a *prima facie* case of capacity,<sup>57</sup> but if the will is so irrational or inconsistent as to be incompatible with mental soundness, introduction of evidence of mental soundness is necessary on the preliminary proof for the propounders.<sup>58</sup>

*Shifting of burden* The burden of going forward to show testamentary incapacity shifts to the contestant when due execution of the will is proved to make a *prima facie* case,<sup>59</sup> or, under other authorities, when a *prima facie* case is made out by the introduction of evidence of capacity.<sup>60</sup>

47 Miss—Gathings v Howard, 84 So 240, 122 Miss 355—Martin v Perkins, 56 Miss 204

48. NY—In re Ramsdell, 16 NY St 281, 6 Dem Surr 244, affirmed 3 NYS 499, affirmed 22 NE 1130, 117 NY 636

49. Neb—In re Coons' Estate, 64 NW 2d 301, 158 Neb 620—In re Coons' Estate, 48 NW 2d 778, 154 Neb 690—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re Witte's Estate, 16 NW 2d 203, 145 Neb 295, rehearing denied 17 NW 2d 477, 145 Neb 295

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326  
68 CJ p 449 note 76

50 Ga—Langan v Cheshire, 65 SE 2d 415, 208 Ga 107—Whitfield v Pitts, 53 SE 2d 549, 205 Ga 259—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226

Neb—In re Coons' Estate, 64 NW 2d 301, 158 Neb 620—In re Coons' Estate, 48 NW 2d 778, 154 Neb 690—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Hunter's Estate, 39 NW 2d 418, 151 Neb 704—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re Witte's Estate, 16 NW 2d 203, 145 Neb 295, rehearing denied 17 NW 2d 477, 145 Neb 295

Tex—Cheesborough v Corbett, Civ App, 155 SW 2d 942, error refused

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326  
68 CJ p 450 note 78

51. Neb—Seebrook v Fedawa, 46 N W 650, 30 Neb 424, reheard 50 N W 270, 33 Neb 413, 29 Am SR 488  
68 CJ p 450 note 79

52 Mich—In re Thayer's Estate, 15 NW 2d 712, 309 Mich 473  
68 CJ p 450 note 81

53. Neb—In re Powers' Estate, 113 NW 198, 79 Neb 680  
68 CJ p 450 note 82

54 Ala—Houston v Grigsby, 116 So 686, 217 Ala 506  
68 CJ p 450 note 83

55. Cal—In re Henderson's Estate, 238 P 938, 196 Cal 623  
68 CJ p 450 note 84

56 Or—In re Marley's Estate, 5 P 2d 92, 138 Or 75  
68 CJ p 450 note 86

57. Ark—Gray v Fulton, 170 SW 2d 384, 205 Ark 675  
68 CJ p 450 note 87

"There is some confusion in the reported cases on the adjustment of the burden of proof of insanity in will contests. But we think the weight of authority, both in England and this country, establishes the rule that the production of a paper writing purporting to be the will of a deceased person, which is rational on its face, and which is proved to have been executed and witnessed in accordance with the statute, makes a *prima facie* case, and devolves upon the contestants the onus of showing the testator's incompetency. This rule rests upon the presumption that all men are sane until the contrary is proved."

Ark—Gray v Fulton, 170 SW 2d 384, 205 Ark 675—Schirmer v.

Baldwin, 32 SW 2d 162, 166, 182 Ark 581—Bims v Collier, 62 SW 593, 594, 69 Ark 245—McCulloch v Campbell, 5 SW 590, 592, 49 Ark 367

58. Ky—Holden v Bennett, 49 SW 2d 568, 243 Ky 667—Gernert v Straeffer's Ex'r, 172 SW 1044, 162 Ky 605

59. Cal—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22

Kan—In re Walter's Estate, 208 P 2d 262, 167 Kan 627

Ky—Higgs' Ex'x v Higgs' Ex'x, 150 SW 2d 681, 286 Ky 236

Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

Neb—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812—In re Hunter's Estate, 39 NW 2d 418, 151 Neb 704—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Bucy's Estate, 34 NW 2d 265, 150 Neb 263—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re Witte's Estate, 16 NW 2d 203, 145 Neb 295, rehearing denied 17 NW 2d 477, 145 Neb 295

Pa—In re Melvin's Estate, Com Pl, 45 Lack Jur 229

In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

Va—Hall v Hall, 23 SE 2d 810, 181 Va 67—Redford v Booker, 185 S E 879, 166 Va 561.

68 CJ p 451 note 89

60 Ga—Beman v Stembbridge, 85 S E 2d 434, 211 Ga 274—Orr v Orr, 67 SE 2d 209, 208 Ga 431—Langan v Cheshire, 65 SE 2d 415, 208 Ga



## (2) Actions to Set Aside Will or Probate

While in some jurisdictions in statutory proceedings to contest a will after probate proof of due execution is sufficient to make a prima facie case, and the burden of establishing incapacity passes to the contestant, in other jurisdictions, the proponent may not rely in the first instance on the presumption of capacity, but must prove the testamentary competency of the testator in order to make out a prima facie case

In some jurisdictions in statutory proceedings to contest a will after probate proof of due execution is sufficient to make a prima facie case,<sup>61</sup> and the burden of establishing incapacity passes to the contestant<sup>62</sup> In other jurisdictions the proponent may not rely in the first instance on the presumption of capacity,<sup>63</sup> but must prove, in addition to due execution, the testamentary competency of the testator in order to make out a prima facie case<sup>64</sup> On establishing a prima facie case the burden is shifted to the contestant to introduce sufficient evidence to rebut it<sup>65</sup>

*Action in nature of appeal from probate* In jurisdictions where statutory proceedings to contest a will after probate are in the nature of an appeal from probate, as discussed infra § 332, and in which the burden of proof is on the proponent as defendant, as considered supra subdivision b (2) of this section, in order to make a prima facie case there must be proof by the proponent of due execution, as discussed infra § 386, and testamentary capacity,<sup>66</sup> whether or not the will is attacked on the ground of incapacity<sup>67</sup> On the establishment of a prima facie case by the proponent the burden is shifted to the contestant to produce evidence to the

contrary,<sup>68</sup> but the burden of proof does not shift, as discussed supra subdivision b (2) of this section.

## § 32. Suicide

The death of a testator by suicide, or an attempt at suicide, does not raise a presumption of insanity at the time of execution of the will.

The death of a testator by suicide, or an attempt at suicide, does not raise a presumption of insanity at the time of execution of the will<sup>69</sup>

## § 33. Hereditary Insanity

Testamentary incapacity may not be presumed from the fact that the testator's ancestors or descendants were afflicted with mental disorders

Testamentary incapacity may not be presumed from the fact that the testator's ancestors<sup>70</sup> or descendants<sup>71</sup> were afflicted with mental disorders

## § 34. Use of Intoxicants

In the absence of proof that the intemperate use of intoxicants by the testator has actually destroyed testamentary capacity, no presumption of testamentary incapacity at the time of execution of a will arises by reason of the fact that the testator used intoxicating liquors

In the absence of proof that the intemperate use of intoxicants by the testator has actually destroyed testamentary capacity,<sup>72</sup> no presumption of testamentary incapacity at the time of execution of a will arises by reason of the fact that the testator used intoxicating liquors<sup>73</sup> This rule applies although his use of intoxicants was habitual<sup>74</sup> and long continued,<sup>75</sup> and no matter how excessive<sup>76</sup>

107—Whitfield v Pitts, 53 SE2d 549, 205 Ga 259—Brazil v Roberts, 32 SE2d 171, 198 Ga 477—Smoot v Alexander, 3 SE2d 593, 188 Ga 203

68 C J p 451 note 90

61 Ala.—West v Arrington, 76 So 352, 200 Ala 420

62 Tex.—King v King, Civ App, 242 SW2d 925, reversed on other grounds In re King's Estate, 244 SW2d 660, 150 Tex 662

68 C J p 451 note 92

63 Ill.—Wilbur v Wilbur, 21 NE 1076, 129 Ill 392—Carpenter v Calvert, 83 Ill 62

64 W Va.—Powell v Sayres, 60 S E2d 740, 134 W Va 653

68 C J p 451 note 95

65 Ill.—Wilkinson v Service, 94 NE 50, 249 Ill 146, Ann Cas 1912A 41

68 C J p 451 note 96

66 Mo.—Morton v Simms, 263 S W2d 435—Wipfler v Basler, 250 SW2d 982—Ghidewell v. Ghidewell,

230 SW2d 752, 360 Mo 713—Fletcher v Ringo, 164 SW2d 904—Foster v Norman, 143 SW2d 248, 346 Mo 850—Weaver v Allison, 102 SW2d 884, 340 Mo 815, 110 ALR 672

68 C J p 451 note 1

67 Mo.—Mayes v Mayes, 235 SW 100

68 Mo.—Morton v Simms, 263 S W2d 435—Wipfler v Basler, 250 SW2d 982—Dowling v Luissetti, 173 SW2d 381, 351 Mo 514—Weaver v Allison, 102 SW2d 884, 340 Mo 815, 110 ALR 672

68 C J p 451 note 3

69 Iowa.—In re Grange's Estate, 2 NW2d 635, 231 Iowa 964 La.—Succession of Patterson, App, 22 So 2d 214

68 C J p 452 note 6

70 Ill.—Carnahan v Hamilton, 107 NE 210, 265 Ill 508

68 C J p 452 note 7

71 Ga.—Evans v Arnold, 52 Ga 169

68 C J p 452 note 8.

72 Cal.—In re Fisher's Estate, 259 P 755, 202 Cal 205

In re Shields' Estate, 121 P2d 795, 49 Cal App 2d 293

73. Cal.—In re Shields' Estate, supra—In re Smethurst's Estate, 59 P2d 830, 15 Cal App 2d 322

NC.—In re Harris' Will, 11 SE2d 310, 218 NC 459

68 C J p 452 note 10

74. Cal.—In re Fisher's Estate, 259 P 755, 202 Cal 205

In re Shields' Estate, 121 P2d 795, 49 Cal App 2d 293—In re Smethurst's Estate, 59 P2d 830, 15 Cal App 2d 322

68 C J p 452 note 11

75 Cal.—In re Fisher's Estate, 259 P 755, 202 Cal 205

In re Shields' Estate, 121 P2d 795, 49 Cal App 2d 293—In re Smethurst's Estate, 59 P2d 830, 15 Cal App 2d 322

76. Cal.—In re Fisher's Estate, 259 P 755, 202 Cal 205

In re Smethurst's Estate, 59 P 2d 830, 15 Cal App 2d 322



Proof that the testator was addicted to the habitual use of intoxicating liquors to such an extent that he was occasionally drunk does not place the burden on the proponent to show freedom from incapacitating intoxication at the time of execution, but such burden rests on the contestant who asserts such incapacity.<sup>77</sup>

### § 35. Unjust or Unnatural Disposition

Subject to some exceptions, the fact that a will may be unnatural, unfair, or unjust creates of itself no presumption that the testator was incompetent at the time of its execution. According to some decisions, however, where a will is an unnatural one it is the duty of the proponent on the probate of the will to give some reasonable explanation of its unnatural character.

The fact that a will may be unnatural, unfair, or unjust creates of itself no presumption that the testator was incompetent at the time of its execution.<sup>78</sup> No presumption of mental incapacity arises from the fact that the will makes an unequal distribution of property among the next of kin,<sup>79</sup> or that it gives property to persons other than the natural objects of the testator's bounty.<sup>80</sup> Any de-

parture from the usual course in which a person prompted by ordinary instincts and natural impulses would have his property go is presumed to have been made by the testator because of reasons rationally conceived which were satisfactory to him.<sup>81</sup> It has been held, however, that a will may be so unjust or unnatural that no presumption of testamentary capacity will arise.<sup>82</sup> Where the disposition is so gross or ridiculous as to give rise to a presumption of insanity, the rule that there is no presumption of mental weakness from the fact that a will may be unnatural, unfair, or unjust does not apply.<sup>83</sup> Where a testator, who is shown to be mentally ill, designates as beneficiaries persons but remotely related to him, or names occasional or incidental friends or acquaintances as beneficiaries, an inference that mental illness contributed to the unnatural disposition will arise.<sup>84</sup>

*Burden of proof* On the probate of a will the fact that the will is unnatural does not shift the burden to the proponent.<sup>85</sup> According to some decisions, however, where a will is an unnatural one

77. Ariz.—In re Morrison's Estate, 102 P 2d 689, 55 Ariz 504

Iowa.—Matthewson v Fahnestock, 251 NW 643, 217 Iowa 348

Pa.—In re Fay's Estate, 60 A 2d 356, 163 Pa Super 1

In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

68 CJ p 452 note 12

78. Ariz.—In re Cook's Estate, 159 P 2d 797, 63 Ariz 78

Cal.—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738

Ky.—Hale v Hale, 152 SW 2d 984, 287 Ky 271

La.—Succession of Patterson, App, 22 So 2d 214

Mass.—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429

Mont.—Corpus Juris cited in In re Cissel's Estate, 66 P 2d 779, 782, 104 Mont 306

NC.—In re Redding's Will, 5 SE 2d 544, 216 NC 497

Pa.—Kish v Bakaysa, 199 A 321, 330 Pa 533

In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Chylak's Estate, Orph, 55 Lack Jur 129

Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 373, 27 Tenn App 342

68 CJ p 452 note 14

#### Preference for some children

In will contest, testator's preference for two of his five children over other three raised no presumption of lack of testamentary capacity.

Pa.—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559

#### Devise to religious organizations

Testatrix' will devising entire estate to three religious organizations, and refusing to devise any of estate to grandchildren, was perfectly natural, so that law would presume testamentary capacity in testatrix, where testatrix had not seen her children for more than 20 years, had only heard from them occasionally and not at all during the last four years of her life, her daughters were dead, her sons-in-law had remarried, her son had ignored her since boyhood, and grandchildren, with exception of two of them when they were quite small, had never seen her

Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

#### Devise to niece rather than sister

Fact that testatrix bestowed her estate on the husband of a niece in preference to testatrix' sisters was not an action so unnatural as to warrant the inference that she was incompetent to make a testamentary disposition of her property

ND.—Stormon v. Weiss, 65 NW 2d 475

79. NC.—In re Harris' Will, 11 S E 2d 310, 218 NC 459

Pa.—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58

Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 373, 27 Tenn App 342

68 CJ p 452 note 15

80. NC.—In re Redding's Will, 5 SE 2d 544, 216 NC 497

Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 373, 27 Tenn App 342

Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

68 CJ p 452 note 16

81. Tenn.—Corpus Juris quoted in Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 373, 27 Tenn App 342

68 CJ p 452 note 17

82. Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

*Feebleness of intellect* of testator so great as to establish lack of testamentary capacity may be inferred when it is apparent that he was incapable of appreciating deserts and relations of persons excluded from his estate even though he might have had ability to retain in memory the extent and condition of his property and to comprehend to whom he was giving it

Ark.—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Phillips v Jones, 18 SW 2d 352, 179 Ark 877

83. Pa.—In re Lawrence's Estate, 132 A 786, 286 Pa 58

84. Ark.—Scott v Dodson, 214 SW 2d 357, 214 Ark 1

Pa.—In re Dugack's Will, Com Pl, 31 North Co 145

85. Cal.—In re Smith's Estate, 252 P 325, 200 Cal 152

In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711

NC.—In re Redding's Will, 5 SE 2d 544, 216 NC 497.

it is the duty of the proponent on the probate of the will to give some reasonable explanation of its unnatural character.<sup>86</sup>

### § 36. Prior or Habitual Insanity and Lucid Intervals

When it is shown that a testator has been insane and that his insanity was of a constant, and not a temporary, character, a presumption of continued insanity up to the time of the making of the will attaches, and the burden is on the proponent to show a general restoration to sanity, or that the will was executed during a lucid interval.

Under general rules, discussed in Evidence § 124, when it is shown that a testator has been insane and that his insanity was of a general, fixed, progressive, and habitual, and not of a temporary, character, a presumption of continued insanity up to the time of the making of the will attaches.<sup>87</sup> However, no presumption of continuity exists where

the insanity of the testator is the result of a temporary cause.<sup>88</sup> Even proof of insanity without evidence of its continuity down to the date of the execution of the will does not render one incapable of executing his will or destroy the validity thereof.<sup>89</sup> Although a testator may be mentally unfit, the circumstances connected with the execution of the will may raise a presumption that it was made during a lucid interval.<sup>90</sup>

*Presumption as to past insanity.* Proof of subsequent insanity will not create a presumption of its past existence.<sup>91</sup>

*Burden* Where, on the probate of a will, a general and fixed condition of insanity is shown to have existed so as to raise a presumption of continued testamentary incapacity, the burden is on the proponent to show a general restoration to sanity<sup>92</sup> or that the execution of the will was accomplished during a lucid interval.<sup>93</sup> In order for the burden

86. Ky—Pardue v Pardue, 227 S W 2d 403, 312 Ky 370—Berryman v Sidwell, 129 S W 2d 154, 278 Ky 713

Miss—In re Alexander's Estate, 61 So 2d 683, 216 Miss 26

Mo—Corpus Juris Secundum cited in Gurdicy v Gurdicy, 238 S W 2d 380, 384, 360 Mo 1127  
68 C J p 452 note 20

#### In Georgia

(1) The statute providing that, where wife and children are excluded, the will shall be closely scrutinized and probate refused upon slightest evidence of aberration of intellect, collusion, fraud, undue influence or unfair dealing, is applicable alike to a wife and child or children, a child or children where there is no wife, and to wife alone where there is neither child nor children, but only when the party is altogether excluded by the will  
Ga—Smith v Davis, 45 S E 2d 609, 203 Ga 175

(2) In proceeding to probate a will which gave widow one-half of estate in lieu of dower and year's statutory support, a widow's claim that by her application for support she was excluded by the will and therefore entitled to demand refusal of probate as provided by statute in cases of "exclusion" of wife upon slightest evidence of testator's mental aberration or of fraud was properly denied, since election by widow did not constitute "exclusion" within the meaning of the statute  
Ga—Smith v. Davis, supra

(3) Code provision declaring that will of testator should be closely scrutinized where testator bequeaths his entire estate to strangers, to exclusion of his wife or children, has

no application to situation where testator has no children and bequeaths one dollar to his wife

Ga—Beman v Stembridge, 85 S E 2d 434, 211 Ga 274

(4) Other particulars of rule in Georgia see 68 C J p 452 note 20 [b]

87 Ala—King v Aird, 38 So 2d 883, 251 Ala 613—Cox v Martin, 34 So 2d 463, 250 Ala 401—Camp v Dobson, 152 So 38, 228 Ala 32

Cal—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512

Ga—Martin v Martin, 195 S E 159, 185 Ga 349

Ill—Milne v McFadden, 52 N E 2d 146, 385 Ill 11

Iowa—In re Guinn's Estate, 47 N W 2d 243, 242 Iowa 542—Storbeck v Fridley, 38 N W 2d 163, 240 Iowa 879

La—Cormier v Myers, 65 So 2d 345, 223 La 259

N J—In re Rein's Will, 50 A 2d 380, 139 N J Eq 122

Tenn—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687—Bank of Commerce & Trust Co v Stavros, 103 S W 2d 593, 20 Tenn App 662—Bridges v Agee, 15 Tenn App 351

Tex—Corpus Juris Secundum cited in Bogel v White, Civ App, 168 S W 2d 309, 311

Wash—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846

68 C J p 453 note 22

88 Ala—King v Aird, 38 So 2d 883, 251 Ala 613—Cox v Martin, 34 So 2d 463, 250 Ala 401

Ga—Martin v Martin, 195 S E 159, 185 Ga 349

La—Succession of Schmidt, 53 So 2d 834, 219 La 675

Tenn—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687.

68 C J p 453 note 23

#### Rational periods

Where testatrix was, prior to execution of will, suffering from pyelonephritis, an infection of the kidneys which could produce toxemia and toxic psychosis, the temporary derangement was one which admitted of rational periods, and in view of fact that she did have rational periods it would be presumed that will was written during one such period

La—Succession of Schmidt, 53 So 2d 834, 219 La 675

#### Recurrently insane

Unless there is strong evidence to show otherwise, a will executed by a person recurrently insane is presumed to have been made during a lucid interval

La—Clanton v Shattuck, 30 So 2d 823, 211 La 750

89 Ky—Sloan v Sloan, 197 S W 2d 77, 303 Ky 180—Pfuehl v Pfuehl, 122 S W 2d 128, 275 Ky 588

90 La—Succession of Ford, 92 So 61, 151 La 571

68 C J p 453 note 24

91 Cal—In re Perkins' Estate, 235 P 45, 195 Cal 699

In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 203

Iowa—In re Meyer's Estate, 37 N W 2d 265, 240 Iowa 1226

N J—In re Rein's Will, 50 A 2d 380, 139 N J Eq 122

92 Wash—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846

68 C J p 453 note 29

93 Ala—Tucker v Tucker, 28 So 2d 637, 248 Ala 602—Ross v Washington, 171 So 893, 233 Ala 292—Camp v Dobson, 152 So 38, 228 Ala 32

Iowa—In re Guinn's Estate, 47 N W 2d 243, 242 Iowa 542.

to rest on the proponent, the contestant must establish habitual and fixed insanity<sup>94</sup> When there is a material conflict in the evidence, the general burden of showing insanity at the time of execution remains on the contestant in some jurisdictions<sup>95</sup>

Where, in an action to set aside a will after probate, general insanity is shown, the burden is on the proponent to prove that the testator's sanity was restored<sup>96</sup> or that the will was executed during a lucid interval<sup>97</sup> The contestant, in order for the burden to rest on the proponent, must establish habitual and fixed insanity<sup>98</sup>

*Remote period* Where the contestants show that the testator was abnormal at a remote period before the will was written, they have the burden to prove that he was incapacitated at or about the time the will was written<sup>99</sup>

## § 37. Adjudication as to Insanity and Guardianship

- a Presumptions
- b Burden

### a. Presumptions

An adjudication of insanity raises a presumption of testamentary incapacity, which continues until the contrary is established.

An adjudication of insanity raises a presumption of testamentary incapacity,<sup>1</sup> which continues until the contrary is established<sup>2</sup> A subsequent adjudication of a restoration to sanity by competent authority restores the presumption of sanity until the contrary is made to appear.<sup>3</sup> A testator under a guardianship as a person of unsound mind is presumed to lack testamentary capacity<sup>4</sup> The presumption is one of fact,<sup>5</sup> and may be rebutted<sup>6</sup> It may be shown that the derangement of testator's mind was limited and not general, or that the will was executed during a lucid interval at which time the testator possessed capacity<sup>7</sup> Where the inquisition

Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282

Pa—In re Schuhmacher's Estate, 58 Pa Dist & Co 561

Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Bank of Commerce & Trust Co v Stavros, 103 SW 2d 593, 20 Tenn App 662—Bridges v Agee, 15 Tenn App 351  
Wash—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846  
68 CJ p 453 note 30

94. Ala—Hubbard v Moseley, 75 So 2d 658, 261 Ala 683—Tucker v Tucker, 28 So 2d 637, 248 Ala 602—Camp v. Dobson, 152 So 38, 228 Ala 32

Iowa—In re Gunn's Estate, 47 N W 2d 243, 242 Iowa 542

La—Succession of Schmidt, 53 So 2d 834, 219 La 675

Pa—In re Davis' Estate, Orph, 28 West Co 171  
68 CJ p 454 note 31.

### Narcotics

Where will contestant merely showed that testator was, at times, mentally unsound because of narcotics administered to ease pain from cancer operation, burden of establishing lack of mental capacity to execute will rested on contestant throughout

Ala—Camp v Dobson, 152 So 38, 228 Ala 32

95. Ala—Council v Mayhew, 55 So 314, 172 Ala 295

96. Ala—Cummings v McDonnell, 66 So 717, 189 Ala 96  
68 CJ p 454 note 33

97. Iowa—Storbeck v Fridley, 38 NW 2d 163, 240 Iowa 879  
68 CJ p 454 note 34.

98. Cal—In re Mickelson's Estate, 99 P 2d 687, 37 Cal App 2d 450  
Iowa—Storbeck v Fridley, 38 NW 2d 163, 240 Iowa 879

99. Ky—Pfuehl v Pfuehl, 122 S W 2d 128, 275 Ky 588

### Four years

In will contest, it was incumbent on contestants, after showing that testator was abnormal four years before the will was written, to prove that he was incapacitated at or about the time the will was written  
Ky—Pfuehl v Pfuehl, 122 SW 2d 128, 275 Ky 588

1. Ga—Belk v Colleas, 61 SE 2d 464, 207 Ga 328—Martin v Martin, 195 SE 159, 185 Ga 349

NM—In re Armijo's Will, 261 P 2d 833, 57 NM 649

NY—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

NC—Sutton v Sutton, 22 SE 2d 553, 222 NC 274

Ohio—Potts v First-Central Trust Co, App, 47 NE 2d 823

Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

Tex—Corpus Juris Secundum cited in Bogel v White, Civ App, 168 SW 2d 309, 311, error refused

Va—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300—Tate v Chumbley, 57 SE 2d 151, 190 Va 480

Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—Dean v Jordan, 79 P 2d 331, 194 Wash 661  
68 CJ p 454 note 36

2. NY—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

NC—Sutton v Sutton, 22 SE 2d 553, 222 NC 274

Ohio—Potts v First-Central Trust Co, App, 47 NE 2d 823

Pa—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

Tex—Corpus Juris Secundum cited in Bogel v White, Civ App, 168 SW 2d 309, 311, error refused

Va—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300

Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—Dean v Jordan, 79 P 2d 331, 194 Wash 661  
68 CJ p 454 note 36½

3. Va—Rust v Reid, 97 SE 324, 124 Va. 1

4. Or—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—In re Southman's Estate, 168 P 2d 572, 178 Or 462—In re Provolt's Estate, 151 P 2d 736, 175 Or 128  
68 CJ p 454 note 38

5. Iowa—Brogan v Lynch, 214 N W 514, 204 Iowa 260

6. Or—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—In re Southman's Estate, 168 P 2d 572, 178 Or 462—In re Provolt's Estate, 151 P 2d 736, 175 Or 128  
68 CJ p 454 note 40

7. Or—In re Southman's Estate, 168 P 2d 572, 178 Or 462  
68 CJ p 454 note 41

in lunacy finds a lucid interval the law implies a capacity to make a will during such lucid interval.<sup>8</sup> An adjudication of testator's incompetency to manage his property and the appointment of a guardian under some statutes raise a presumption of testamentary incapacity,<sup>9</sup> but such an adjudication under other statutes raises no such presumption.<sup>10</sup>

*Presumption as to past insanity.* The presumption of incapacity arising from an adjudication of mental incompetence and the appointment of a guardian does not relate back to a time antedating the proceeding.<sup>11</sup>

*Drunkenness.* It has been held that the appointment of a guardian because of intoxication does not create a presumption of mental incapacity.<sup>12</sup> A commitment to a state hospital for drunkenness raises no presumption that the habit persisted thereafter.<sup>13</sup>

*Mental disorder.* A prior adjudication of mental disorder bordering on insanity is merely evidence to rebut the presumption of sanity.<sup>14</sup>

*Adjudication of competency.* The presumption of sound mental condition of the testator established

by the verdict in incompetency proceedings, which found the deceased mentally competent, may be rebutted<sup>15</sup> by proof of a change in the testator's mental condition between the time he was declared competent and the time when the will was executed.<sup>16</sup>

### b. Burden

Where by a prior adjudication a testator is declared to be insane, weak-minded, or unable to manage his property, the burden is on the proponent to establish testamentary capacity at the time of the execution of the will.

Where by a prior adjudication a testator is declared to be insane,<sup>17</sup> weak-minded,<sup>18</sup> or unable to manage his property,<sup>19</sup> the burden is on the proponent to establish testamentary capacity at the time of the execution of the will. Where there is no adjudication of mental incompetency there is no presumption created such as to shift the burden to the proponent.<sup>20</sup> It has been held, however, that the fact of the creation of a presumption of the continuance of mental incapacity does not change the statutory duty of the contestant to go forward with the evidence.<sup>21</sup>

8. Pa.—*Mifflin v Smedley*, 3 Del Co 143

9. Or.—In re Lambert's Estate, 114 P 2d 125, 166 Or 529

Pa.—*Denner v Beyer*, 42 A 2d 747, 352 Pa 386

In re Koslosky's Estate, Orph, 2 Fiduciary 570—In re Kovolowski's Estate, Orph, 16 Som Leg J 122

68 C J p 454 note 43

10. Cal.—In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480

Okl.—In re Shipman's Estate, 85 P 2d 317, 184 Okl 56—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389

Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

68 C J p 454 note 44

#### Tendency to show weakness of mind

The appointment of a conservator has the tendency to show weakness of mind

Mass.—*Santry v France*, 97 NE 2d 533, 327 Mass 174—*Clifford v Taylor*, 90 NE 862, 204 Mass 358

68 C J p 454 note 44 [a]

11. Iowa.—In re Meyer's Estate, 37 NW 2d 265, 240 Iowa 1226—In re Johnson's Estate, 269 NW 792, 222 Iowa 787—In re Howe's Estate, 154 NW 1001, 172 Iowa 723—*Spiers v Hendershott*, 120 NW 1058, 142 Iowa 446

#### Appointment two months after execution of will

Appointment of guardian of the person and estate of elderly woman

less than two months after she executed a will did not have the effect of an adjudication that she lacked testamentary capacity when will was executed

Or.—In re Perry's Estate, 181 P 2d 783, 181 Or 332

12. Pa.—*Leckey v Cunningham*, 56 Pa 370

68 C J p 455 note 46

13. Cal.—In re Fisher's Estate, 259 P 755, 202 Cal 205

14. Cal.—In re Young's Estate, 101 P 2d 770, 38 Cal App 2d 588

15. NY.—In re Ernst's Will, 101 NYS 2d 277, 277 App Div 589, reargument denied 103 NYS 2d 671, 278 App Div 742—*Rintelen v Schaefer*, 143 NYS 631, 158 App Div 477, 11 Mills Surr 422

16. NY.—In re Ernst's Will, 101 NYS 2d 277, 277 App Div 589, reargument denied 103 NYS 2d 671, 278 App Div 742

17. Fla.—*Kuehmsted v Turnwall*, 155 So 847, 115 Fla 692

NY.—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

Pa.—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299

In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—*Dean v Jordan*, 79 P 2d 331, 194 Wash 661

68 C J p 455 note 49

18. Pa.—In re Griffin's Estate, 167 A 613, 109 Pa Super 594

In re Koslosky's Estate, Orph, 2 Fiduciary 570—In re Kovolowski's Estate, Orph, 16 Som Leg J 122

19. NY.—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Or.—In re Lambert's Estate, 114 P 2d 125, 166 Or 529

68 C J p 455 note 51

20. Iowa.—In re Moore's Will, 181 NW 763, 191 Iowa 135

#### Appointment of guardian for estate

(1) The appointment of a guardian for the testator's estate, not of his person, is not an adjudication that the testator is insane, so as to place the burden on proponent of will to overcome the presumption that testator was incompetent

Cal.—In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480

Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

(2) Proponent of will, executed by person adjudged to be incompetent to manage his estate, and for whom a guardian was appointed, is not required to establish change in mental condition of such person from that which obtained at time of the adjudication, and is not required to offer evidence of restoration to capacity at time of execution of will

Okl.—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389

21. Ohio.—*Potts v First-Central Trust Co*, App, 47 NE 2d 823.

§ 38. Delusions and Monomania

Where the fact that the testator has been subject to an insane delusion is established, a will should be regarded with great distrust, and every presumption should, in the first instance, be made against it. As a general rule the burden is on the contestant to prove the existence of insane delusions or monomania, and that the will made was a result thereof.

Where the fact that the testator has been subject to an insane delusion is established, a will should be regarded with great distrust, and every presumption should, in the first instance, be made against it.<sup>22</sup> The presumption becomes additionally strong where the will is one in which natural affection and the claims of near relationship have been disregarded.<sup>23</sup>

While there is authority to the contrary,<sup>24</sup> on the probate of a will the burden is on the contestant to prove the existence of insane delusions or monomania,<sup>25</sup> and that the will made was a result thereof.<sup>26</sup> The contestant must show that the delusions had no existence in fact<sup>27</sup> and that there was no evidence of any fact on which the belief could be founded.<sup>28</sup> Proof of an insane delusion by the opponent of the will shifts the burden to the proponent to prove that the disposition by will was not affected by the insane delusion.<sup>29</sup>

In an action to set aside a will or the probate thereof the burden is on contestant to prove insane delusions,<sup>30</sup> and that they affected the disposition of the testator's property.<sup>31</sup> The contestant must prove that there was no evidence of any fact on which the belief could be based.<sup>32</sup> When the contestant makes a prima facie case the burden of evidence, not the burden of proof, shifts to the proponent to show the existence of some such evidence or information.<sup>33</sup> Proof that the testator was a monomaniac requires defendant to adduce only sufficient evidence to prevent the preponderance from being in favor of plaintiff.<sup>34</sup>

§ 39. Physical Condition and Mental Derangement Therefrom; Old Age

- a. Presumptions
- b. Burden

a. Presumptions

The fact that the testator was advanced in years, or was physically or mentally infirm raises no presumption of testamentary incapacity.

No presumption of testamentary incapacity arises by reason of the fact that the testator was advanced in years,<sup>35</sup> or was physically or mentally infirm,<sup>36</sup>

- 22. Ind—Jarrett v Ellis, 141 NE 627, 193 Ind 687  
68 C J p 455 note 54
- 23. Fla—Newman v. Smith, 82 So 236, 77 Fla 633
- 24. Tex—Lanham v Lanham, 146 S W 635, 62 Civ App 431
- 25. Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Volen's Estate, 262 P 2d 658, 121 Cal App 2d 161
- Iowa—In re Ransom's Estate, 57 N W 2d 89, 244 Iowa 343
- Md—Sellers v Qualls, 110 A 2d 73
- Mich—In re Solomon's Estate, 53 N W 2d 597, 334 Mich 17—In re Rowling's Estate, 289 NW 136, 291 Mich 218—Jackson City Bank & Trust Co v Townley, 256 NW 345, 268 Mich 340
- Okl—Wood v Wood, 32 P 2d 715, 168 Okl 198
- Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180  
68 C J p 455 note 59
- 26. Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216
- Md—Sellers v Qualls, 110 A 2d 73
- Mich—In re Solomon's Estate, 53 N W 2d 597, 334 Mich 17—In re Rowling's Estate, 289 NW 136, 291 Mich 218—Jackson City Bank & Trust Co v Townley, 256 NW 345, 268 Mich 340
- Okl—Wood v Wood, 32 P 2d 715, 168 Okl 198  
68 C J. p 455 note 60.

- 27. Kan—In re Walter's Estate, 208 P 2d 262, 167 Kan 627
- Mich—In re Solomon's Estate, 53 NW 2d 597, 334 Mich 17—Jackson City Bank & Trust Co v Townley, 256 NW 345, 268 Mich 340  
68 C J p 455 note 61
- 28. Cal—In re Allen's Estate, 171 P 686, 177 Cal 688
- Mich—In re Solomon's Estate, 53 NW 2d 597, 334 Mich 17
- 29. Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258  
68 C J p 455 note 64
- 30. Cal—In re Mickelson's Estate, 99 P 2d 687, 37 Cal App 2d 450—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709
- Mo—Ahmann v Elmore, 211 S W 2d 480—Gaume v Gaume, 102 S W 2d 636, 340 Mo 758  
68 C J p 455 note 65
- 31. Cal—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709  
68 C J p 455 note 66
- 32. Cal—In re Mickelson's Estate, 99 P 2d 687, 37 Cal App 2d 450  
68 C J p 455 note 67
- 33. Cal—In re Russell's Estate, 210 P 249, 189 Cal 759
- 34. Ind—Young v Miller, 44 NE 757, 145 Ind 652, 1 Prob Rep Ann 372
- 35. Ill—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219

- Mo—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827
- Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Ash's Estate, 41 A 2d 620, 351 Pa 317  
In re Loeper's Estate, Orph, 47 Berks Co 131—In re Schartel's Estate, Orph, 39 Berks Co 249—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Miller's Estate, Orph, 35 West Co 11—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364
- Tex—Cruz v Prado, Civ App, 239 S W 2d 650  
68 C J p 456 note 72
- 36. Ill—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219
- Mo—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827
- N J—In re Looori's Will, 28 A 2d 281, 20 N J Misc 376, affirmed 28 A 2d 288, 132 N J Eq. 816
- Pa—In re King's Estate, 87 A 2d 469, 369 Pa 526—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Higbee's Estate,

or suffered from partial failure of memory,<sup>37</sup> or entertained peculiar beliefs or opinions,<sup>38</sup> or was distressed,<sup>39</sup> or was unable to transact business<sup>40</sup> Proof of a temporary incapacity because of physical reasons does not raise a presumption of its continuance<sup>41</sup> A showing that a person was delirious at any given period of time raises no presumption that such condition existed either at an antecedent<sup>42</sup> or subsequent<sup>43</sup> time, but on the contrary, the presumption of sanity prevails<sup>44</sup> The presumption, if any, of the lack of testamentary capacity raised by the execution of two new wills by an aged testator during his last illness naming new beneficiaries, some of whom were strangers and all of whom were at the testator's bedside, is rebuttable<sup>45</sup>

### b. Burden

Where physical incapacity at the time of the execution of the will is shown, it is incumbent on the proponent to show the existence of testamentary capacity at that time

Where physical incapacity at the time of the execution of the will is shown, it is incumbent on the proponent to show the existence of testamentary capacity at that time.<sup>46</sup> However, where the testator's physical condition is not such as to render him habitually incompetent, the burden of proof is on the contestant to show testamentary incapacity at the time of executing the will<sup>47</sup> The fact that the testator was of extreme old age cannot be deemed as casting an additional burden of proof on the proponent<sup>48</sup>

75 A 2d 599, 365 Pa 381—In re Ash's Estate, 41 A 2d 620, 351 Pa 317

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Scharrel's Estate, Orph, 39 Berks Co 249—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Nute, Com Pl, 33 Del Co 277—In re Miller's Estate, Orph, 35 West Co 11—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

Tex—Cruz v Prado, Civ App, 239 SW 2d 650  
68 C J p 456 note 73

### Epilepsy

Evidence of periodical epileptic seizures is not of itself such proof as will justify presumption of insanity or lunacy of testator

Ill—Eschmann v Cawi, 192 NE 226, 357 Ill 379

68 C J p 456 note 73 [a]

37. Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Lawrence's Estate, 132 A 786, 286 Pa 58

In re Loeper's Estate, Orph, 47 Berks Co 131—In re Scharrel's Estate, Orph, 39 Berks Co 249—In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

38. Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Lawrence's Estate, 132 A 786, 286 Pa 58—Buchanan v Pierie, 54 A 583, 205 Pa 123

In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

39. Ill—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Ash's Estate, 41 A 2d 620, 351 Pa 317

In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364  
68 C J p 456 note 74

40. Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Lawrence's Estate, 132 A 786, 286 Pa 58

In re Rupert's Estate, Orph, 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In

re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

41. Ill—Taylor v Pegram, 37 NE 837, 151 Ill 106

68 C J p 456 note 76

42. Del—In re Sharpley's Will, 120 A 586, 32 Del 154

Mo—Schoenhoff v Haering, 38 SW 2d 1011, 327 Mo 837

43. Mo—Schoenhoff v Haering, supra

44. Mo—Schoenhoff v Haering, supra

45. Tex—Davidson v Gray, Civ App, 97 SW 2d 488

46. NY—In re Costos' Will, 25 N YS 2d 306

Wyo—In re Lane's Estate, 58 P 2d 415, 50 Wyo 119, rehearing denied 60 P 2d 360, 50 Wyo 119

68 C J p 456 note 81

47. Cal—In re Vollen's Estate, 262 P 2d 658, 121 Cal App 2d 161

68 C J p 456 note 82

### Disease or medicine tending to render testator unconscious

If disease from which testator was suffering, or medicine administered to him, would tend to render him unconscious, contestants who sought to set aside will executed at such time, on ground of mental incapacity, had burden of offering some proof thereof

Mo—Whitacre v Kelly, 134 SW 2d 121, 345 Mo 489

48. Me—Appeal of Martin, 179 A 655, 133 Me 422

## 2 ADMISSIBILITY

## § 40. In General

In will contests involving the question of testamentary capacity, although the evidence is permitted to take a wide range, and every fact throwing light on the issue is admissible, the evidence must be material in order to be admissible.

In will contests involving the question of testamentary capacity, the evidence is permitted to take a wide range<sup>49</sup> covering a long space of time in each direction<sup>50</sup> How wide a range is permissible in

a particular case depends on the character of the alleged unsoundness of mind and other circumstances, and rests largely in the discretion of the trial court<sup>51</sup> The evidence must relate to the date of the execution of the will<sup>52</sup> Every fact throwing light on the issue is admissible<sup>53</sup> However, evidence on the question of testator's capacity must be material<sup>54</sup> and not hearsay<sup>55</sup> or rumors<sup>56</sup> Capacity may be shown by evidence that the testator was "rational"<sup>57</sup> Incapacity may be shown by evidence

49. Ala—Little v Sugg, 8 So 2d 866, 243 Ala 196

Ark—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735—Puryear v Puryear, 94 SW 2d 695, 192 Ark 692

Ky—Teegarden v Webster, 199 SW 2d 728, 304 Ky 18—Welch's Adm'r v Clifton, 172 SW 2d 221, 294 Ky 514, 148 ALR 1220

Tex—Davis v Williams, Civ App, 144 SW 2d 445, error dismissed 146 SW 2d 982, 136 Tex 27 68 CJ p 456 note 84

50. Cal—In re Allen's Estate, 171 P 686, 177 Cal 668 68 CJ p 457 note 85

51. Tex—Davis v Williams, Civ App, 144 SW 2d 445, error dismissed 146 SW 2d 982, 136 Tex 27 68 CJ p 457 note 86

52. Md—Cronin v Kimble, 144 A 698, 156 Md 489

53. Mo—Rock v Keller, 278 SW 759, 312 Mo 458 68 CJ p 457 note 88

#### Evidence held admissible

(1) Generally  
Colo—In re Koch's Estate, 136 P 2d 673, 110 Colo 562

NY—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Pa—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

Va—Tate v Chumbley, 57 SE 2d 151, 190 Va 480 68 CJ p 457 note 88 [a]

(2) Affidavit of notary to holographic will

Miss—In re Alexander's Estate, 61 So 2d 683, 216 Miss 26

(3) Contents of will

Ark—Inman v McEachin, 184 SW 2d 949, 208 Ark 102—Pernot v King, 110 SW 2d 539, 194 Ark 896—Puryear v Puryear, 94 SW 2d 695, 192 Ark 692

Ky—Rueff v Light, 114 SW 2d 506, 272 Ky 449

Tenn—Hammond v Union Planters Nat Bank, 222 SW 2d 377, 189 Tenn 93

Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 287.

(4) Evidence of existence of senility, extreme eccentricity, and great distress of mind or body

Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

(5) Findings and judgments in actions by guardian at instance of proponents to set aside deeds and contract executed by decedent

Cal—In re Krause's Estate, 163 P 2d 505, 71 Cal App 2d 719

(6) Marked change in a person's habits and thoughts

Or—In re Johnson's Estate, 91 P 2d 330, 162 Or 97

Tenn—Cude v Culbertson, 209 SW 2d 506, 30 Tenn App 628—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 287—Bridges v. Agee, 15 Tenn App 351

(7) Testimony tending to show that decedent could be seen only with certain person's permission, and that he needed some one to take care of him and his business

NY—In re Roche's Will, 278 NYS 929, 244 App Div 756

(8) Testimony as to what work witness saw testatrix' husband do around premises at time witness was at testatrix' home

Ind—Griffith v Thrall, 29 NE 2d 345, 109 Ind App 141

(9) Testimony as to amount of testator's bank account at time of death

Tex—McNaley v Sealy, Civ App, 122 SW 2d 330, error dismissed

(10) Value of estate  
Conn—Buck v Robinson, 23 A 2d 157, 128 Conn 376

(11) Widow's construction of will  
Ky—Hopkins v Taylor, 68 SW 2d 787, 253 Ky 142

54. NC—In re McGowan's Will, 70 SE 2d 189, 235 NC 404 68 CJ p 457 note 89

#### Evidence held inadmissible

(1) Generally  
Ga—McGahee v Phillips, 84 SE 2d 19, 211 Ga 118

Ill—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041

Mich—In re Merrill's Estate, 40 N W 2d 179, 326 Mich 351.

Ohio—Spidel v Warrick, App, 78 NE 2d 746

Pa—In re Dichter's Estate, 47 A 2d 691, 354 Pa 444

Tex—Shadowens v Shadowens, Civ App, 271 SW 2d 165—Bell v Bell, Civ App, 248 SW 2d 978, error refused no reversible error 68 CJ p 457 note 89 [a]

(2) Contents of power of attorney executed by testator some seven days prior to execution of will  
Mich—In re Sprenger's Estate, 60 N W 2d 436, 337 Mich 514

(3) Conversations of third persons in testator's presence

Tex—Bell v Bell, Civ App, 248 SW 2d 978, error refused no reversible error

(4) Decedent's request for permission to pay his taxes by installments  
Ala—Little v Sugg, 8 So 2d 866, 243 Ala 196

(5) Divorce decree between decedent and beneficiary of the will  
Ind—Johnson v Bennett, 69 NE 2d 899, 395 Ill 389

(6) Evidence that deceased had said he had no relatives or that he had no relatives other than principal beneficiary of purported will  
Ill—George v Moorhead, 78 NE 2d 216, 399 Ill 497

(7) Evidence concerning payment of building and loan certificate to executor

Mo—Fields v Luck, 74 SW 2d 35, 335 Mo 765

(8) Financial condition of testator's children  
Va—Ferguson v Ferguson, 192 SE 774, 169 Va 77

(9) Signature cards given to bank by a beneficiary and inventory filed in administration of estate  
Ill—De Marco v McGill, 83 NE 2d 313, 402 Ill 46

55. Vt—In re Blood's Estate, 19 A 770, 62 Vt 359 68 CJ p 458 note 90

56. Mo—Brinkman v. Rueggiesick, 71 Mo 553

57. Ill—In re Arrowsmith's Estate, 69 NE 77, 206 Ill 352.

that the testator was very weak-minded and wholly incompetent to contract<sup>58</sup>

### § 41. Suicide of Testator

Evidence of suicide on the part of the testator is admissible to prove testamentary incapacity

The fact that a testator committed suicide is admissible to prove testamentary incapacity<sup>59</sup>

### § 42. Hereditary Insanity

On the issue of insanity, evidence of the facts of insanity in the testator's family, and of its inheritable nature, are admissible

Under general rules, considered in *Insane Persons* § 5, on questions of sanity, proof of hereditary tendency is competent,<sup>60</sup> and it may be shown that other members of the testator's family were afflicted with insanity,<sup>61</sup> or with a mental disease like that of the testator and of a nature to be inherited,<sup>62</sup> but only after direct proof of the testator's insanity has been offered.<sup>63</sup> Evidence of a nonhereditary mental affliction of a member of testator's family has been held inadmissible<sup>64</sup>

### § 43. Habits and Reputation; Use of Intoxicants

Evidence of the habits of the testator is admissible on the issue of testamentary capacity, but evidence as to his reputation for sanity or insanity is inadmissible

On the issue of testamentary capacity, evidence of the habits of the testator is admissible<sup>65</sup> Evidence as to the testator's reputation for sanity<sup>66</sup> or insanity<sup>67</sup> is inadmissible.

*Use of intoxicants* Evidence that the testator habitually used intoxicating liquors<sup>68</sup> or narcotics<sup>69</sup> is admissible on the issue of testamentary capacity Exclusion of evidence that the testator was drunk on a particular occasion is not error<sup>70</sup> Where a will is contested on the ground of insanity, proponent may show that the insanity was temporarily caused by the use of intoxicants and that at the time of execution the testator was not intoxicated<sup>71</sup>

### § 44. Unjust or Unnatural Disposition

Evidence with respect to the reasonableness or unreasonableness of the will is admissible on the question of testamentary capacity, such evidence includes the value of the estate, as well as the financial condition of legatees and of those relatives who are not beneficiaries.

Evidence with respect to the reasonableness or unreasonableness of the provisions of a will is admissible<sup>72</sup> In order to prove testamentary capacity, it may be shown that according to the circumstances, the provisions of the will are reasonable and just<sup>73</sup> In order to establish incapacity, it may be shown that the will is unnatural, unjust, or unreasonable<sup>74</sup> If there are provisions of the will which might appear, without explanation, to be unnatural or inequitable,

58. Mo—Rock v Keller, 278 S.W. 759, 312 Mo 458  
68 C.J. p 458 note 93

59. Cal—In re Wasserman's Estate, 148 P 931, 170 Cal 101  
68 C.J. p 458 note 94

**Testamentary capacity not destroyed**  
Evidence that testatrix committed suicide was admissible as tending to establish insanity, but such fact did not destroy testamentary capacity  
Cal—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22

60. Ky—Woodruff's Ex'r v Woodruff, 26 S.W. 2d 751, 233 Ky 744  
68 C.J. p 458 note 96

61. Tenn—Melody v Hamblin, 115 S.W. 2d 237, 21 Tenn App 687—  
Bridges v Agee, 15 Tenn App 351

#### Degree of relationship

(1) Blood relations  
Tenn—Melody v Hamblin, 115 S.W. 2d 237, 21 Tenn App 687—  
Bridges v Agee, 15 Tenn App 351

(2) Immediate collateral relatives, such as brothers, sisters, uncles, or aunts

Ind—Conner v First Nat Bank in Wabash, 76 N.E. 2d 262, 118 Ind App 173, rehearing denied 77 N.E. 2d 598, 118 Ind App 173.

62. Tex—In re Ramon's Estate, Com App, 42 S.W. 2d 1010  
68 C.J. p 458 note 97

63. Md—Mitchell v Slye, 111 A 814, 137 Md 89  
68 C.J. p 458 note 98

64. N.C.—In re Kemp's Will, 73 S.E. 2d 906, 236 N.C. 680

65. Cal—In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—  
In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154—  
In re Hartley's Estate, 31 P 2d 240, 137 Cal App 630

Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607  
66 C.J. p 458 note 99

#### Perverted sexual impulses

Tex—Cheesborough v Corbett, Civ App, 155 S.W. 2d 942, error refused

66. Mo—Thompson v Ish, 12 S.W. 510, 99 Mo 160, 17 Am S.R. 552  
68 C.J. p 458 note 1

67. Okl—In re Wah-kon-tah-he-um-pah's Estate, 234 P 210, 109 Okl 126

Pa—In re Lawrence's Estate, 132 A 786, 286 Pa 58

68. Ala—Price v Marshall, 52 So 2d 149, 255 Ala 447

Ark—Inman v McEachin, 184 S.W. 2d 949, 208 Ark 102.

68 C.J. p 458 note 5  
Adjudication or confinement for drunkenness see supra § 45

69. Ala—Price v Marshall, 52 So 2d 149, 255 Ala 447  
Ark—Inman v McEachin, 184 S.W. 2d 949, 208 Ark 102

70. Iowa—In re Diver's Estate, 240 N.W. 622, 214 Iowa 497

71. Ala—Sharpe v Hughes, 80 So. 797, 202 Ala 509

72. Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659  
68 C.J. p 459 note 9

#### Examination of contents of will

Pa—In re Loeper's Estate, Orph., 47 Berks Co 131

73. Minn—Jensen v Molgaard, 240 N.W. 656, 185 Minn 284

74. Mo—Norris v Bristow, 236 S.W. 2d 316, 361 Mo 691, 26 A.L.R. 2d 366

N.C.—In re West's Will, 41 S.E. 2d 838, 227 N.C. 204—  
In re Redding's Will, 5 S.E. 2d 544, 216 N.C. 497.  
68 C.J. p 459 note 11

Weight of evidence of an unjust disposition on question of testamentary capacity see infra § 62



it is proper to rebut any inference of incapacity that might be drawn therefrom<sup>75</sup>

*Value of testator's estate* On the issue of the reasonableness of a will, evidence is admissible as to the value of the testator's estate<sup>76</sup> at the time of the execution of the will,<sup>77</sup> but not as of the time of death<sup>78</sup> Evidence of property not disposed of by the will is also admissible<sup>79</sup>

*Reasons for disposition* Where a testator makes an apparently unnatural disposition of his property, testamentary capacity may be shown by evidence of the reasons for the disposition made,<sup>80</sup> and of which the testator had knowledge<sup>81</sup> Thus, it may be shown that the testator in his lifetime advanced certain money or property to the persons neglected in the will,<sup>82</sup> that the testator considered such persons to be bad,<sup>83</sup> or that the testator disliked those neglected in his will,<sup>84</sup> or had great affection for those to whom he devised his property to the exclusion of the natural objects of his bounty<sup>85</sup>

*Financial condition of heirs and legatees* On the question whether a will was reasonable, it may be shown that the natural objects of the testator's bounty were in poor financial circumstances,<sup>86</sup> provided it is shown that the testator at the time of

executing the will was aware of their condition,<sup>87</sup> but such evidence is inadmissible where the testator had mistakenly believed the other's financial condition to be good<sup>88</sup> Evidence of the good financial condition of the beneficiaries of the will is admissible to prove incapacity,<sup>89</sup> if it appears that the testator had knowledge of such fact<sup>90</sup> Evidence of the financial condition of certain persons not shown to have had any claim on the testator's bounty is inadmissible<sup>91</sup> Capacity may be shown by the fact that those neglected in the will who were the natural objects of a testator's bounty were in a good financial condition<sup>92</sup>

## § 45. Adjudication as to Insanity and Guardianship

Although evidence of the appointment of a conservator for the testator or of an adjudication of insanity prior to the execution of the will is admissible, there is a conflict of authority on the admissibility of evidence of an adjudication of insanity after the execution of the will.

An adjudication of insanity prior to the execution of a will has been held admissible<sup>93</sup> While, according to some decisions, evidence of an adjudication of unsoundness of mind after the execution of a will has been held admissible,<sup>94</sup> under other

75 Ill.—Barnes v Odum, 136 NE 700, 304 Ill 624

76 Ark.—Inman v McEachin, 184 S W 2d 949, 208 Ark 103—Pernot v King, 110 S W 2d 539, 194 Ark 896—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692

Mo.—Corpus Juris quoted in Wipfler v Basler, 250 S W 2d 982, 987

Tex.—Cheesborough v Corbett, Civ App, 155 S W 2d 942, error refused 68 C J p 459 note 14

*Nature and extent of estate*  
Miss—Norman v Norman, 18 So 2d 130, 196 Miss 597

77. Iowa—Ipsen v Ruess, 35 NW 2d 82, 239 Iowa 1376

78. Iowa—Ipsen v Ruess, supra

79 Ga.—Whiddon v Salter, 86 SE 243, 144 Ga 77

Mo.—Corpus Juris quoted in Wipfler v Basler, 250 S W 2d 982, 987

80. Iowa—Reed v Reed, 281 NW 444, 225 Iowa 773  
68 C J p 459 note 17

### Identity of deceased legatee's heirs

In will contest, the trial court in its discretion could permit testimony to identify deceased legatee's heirs who were strangers to testatrix to aid the jury in determining mental capacity of testatrix

Minn.—In re Forsythe's Estate, 22 NW 2d 19, 221 Minn 303, 167 A L R 1

### Improper use of another's funds

In will contest by son, where jury

was allowed to consider nominal legacy to son as evidence of unnatural and unjust discrimination in disposition of property, conversations in which mother gave reasons for such nominal bequest and application by testatrix when administratrix of father's estate for citation charging son with improper use of funds of father were admissible as explanation and to show that apparent discrimination was not result of mental incapacity.

Mo.—Guidicy v Guidicy, 238 S W 2d 380, 361 Mo 1127

81. Mich.—Cooper v Harlow, 128 NW 259, 163 Mich 210

82 Ill.—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 A L R 1041

68 C J p 459 note 19

83. Ill.—Brownlie v Brownlie, supra

84. Ill.—Brownlie v Brownlie, supra

68 C J p 459 note 20

85 Iowa—Denning v Butcher, 59 NW 69, 91 Iowa 425

86 Mo.—Norris v Bristow, 236 S W 2d 316, 361 Mo 691, 26 A L R 2d 366

68 C J p 459 note 22

87. Mo.—Corpus Juris cited in Norris v Bristow, 236 S W 2d 316, 320, 361 Mo 691, 26 A L R 2d 366

68 C J p 460 note 23

88 Ariz.—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

89. Iowa—Diesing v Spencer, 266 NW 567, 221 Iowa 1143

Mont.—In re Williams' Estate, 156 P 1087, 52 Mont 192

90. Tex.—McDonald's Estate v McDonald, Civ App, 150 SW 593

91 Mich.—Cooper v Harlow, 128 NW 259, 163 Mich 210

68 C J p 460 note 26

92. Ky.—Race v Stevens, 276 SW 2d 439

68 C J p 460 note 27

93. Ga.—Belk v Colleas, 61 SE 2d 464, 207 Ga 328

Ind.—Lasher v Gerlach, 23 NE 2d 296, 107 Ind App 572

Ohio—Heath v Kosier, 61 NE 2d 728, 76 Ohio App 89

68 C J p 460 note 30

### Void proceedings

Evidence of a certified copy of lunacy proceedings against testator approximately a year before execution of will was properly excluded where adjudication in lunacy proceedings was void and adjudication had been set aside

Ga.—Brazil v Roberts, 32 SE 2d 171, 198 Ga 477

94. Cal.—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390

N Y.—In re Kramel's Will, 35 N Y S 2d 151

Ohio—Heath v Kosier, 61 NE 2d 728, 76 Ohio App 89.

decisions the record of an adjudication of lunacy<sup>95</sup> or of mental unsoundness in a proceeding to set aside an instrument executed by the testator<sup>96</sup> subsequent to the execution of the will is inadmissible, at least where the statute regulating inquiries into insanity makes no provision for retroactive findings<sup>97</sup> Likewise, an adjudication after the execution of a will that the testator was incompetent to make a deed has been held inadmissible<sup>98</sup> The appointment of a conservator prior to the execution of a will has been held admissible<sup>99</sup> and inadmissible<sup>1</sup>

Where a restoration of the testator's sanity has been declared prior to the date of execution, a former adjudication of incompetency to manage his affairs is inadmissible<sup>2</sup> Evidence of an appointment of a guardian over the testator subsequent to the execution of the will has been held admissible on the issue of testamentary capacity<sup>3</sup> at the time of the appointment of a guardian<sup>4</sup> When there is testimony tending to show that the mental condition of the testator has not changed between the date of execution and the adjudication, the adjudication, although later in time, is admissible on the issue of testamentary capacity at the date of execution<sup>5</sup> However, according to other decisions, the appointment of a guardian<sup>6</sup> or conservator<sup>7</sup> after the date of execution is inadmissible

**Drunkenness** A commitment to a hospital for drunkenness prior to the execution of a will has been held admissible<sup>8</sup>

**Findings of unsoundness of mind** in an action brought by the guardian on behalf of the testator are inadmissible where the parties to the action are not the same as those to the will contest, and the pleadings in the action did not present the issue of soundness of the testator's mind<sup>9</sup>

**Adjudication of sanity.** Evidence that the testator was declared sane prior to the execution of the will is competent<sup>10</sup> Evidence that a testator, subsequent to the execution of a will, was adjudged of sound mind on an inquisition of lunacy<sup>11</sup> or in guardianship proceedings<sup>12</sup> is admissible

**Dismissal of insanity proceeding** The finding of a court dismissing an application to have the testator adjudged an incompetent is admissible<sup>13</sup>

## § 46. Insane Delusions, Monomania, and Peculiar Belief or Opinion

On the question of testamentary capacity, it is proper to show that the testator had insane delusions, but a belief in certain doctrines or religions may not be shown.

On the question of testamentary capacity, it is proper to show that the testator had insane delusions,<sup>14</sup> and for this purpose evidence that the particular beliefs claimed to be insane delusions were groundless is admissible<sup>15</sup> Evidence of an insane delusion must approximate the date of the will<sup>16</sup> Evidence for the purpose of showing that a particular belief of the testator conformed to the facts and was not an insane delusion is admissible,<sup>17</sup> provided it is shown that the testator had knowledge

Pa.—In re Meckley's Estate, Orph., 54 Lanc L Rev 173  
68 C J p 460 note 31

95 Ga.—Terry v Buffington, 11 Ga 337, 56 Am D 423  
68 C J p 460 note 32

### One and a half years

Mich.—In re Nickel's Estate, 32 NW 2d 733, 321 Mich 519

### Nine years

Ky.—Teegarden v Webster, 199 S W 2d 728, 304 Ky 18

96 Iowa.—Spiers v Hendershott, 120 NW 1058, 142 Iowa 446  
68 C J p 460 note 33

97. Ind.—Taylor v Taylor, 93 NE 9, 174 Ind 670  
68 C J p 460 note 34

98. Wis.—In re Weber's Will, 220 NW 380, 196 Wis 377

99 Ill.—Dombrowski v Von Bronk, 76 NE 2d 800, 333 Ill App 161  
68 C J p 460 note 36

1 Mich.—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514

2. NY.—Rintelen v Schaefer, 143 N.Y.S 631, 158 App Div 477

3. Mich.—Rice v Rice, 15 NW 545, 50 Mich 448  
68 C J p 461 note 38

4. Cal.—In re Loveland's Estate, 123 P 801, 162 Cal 595  
68 C J p 461 note 39

5. Cal.—In re Loveland's Estate, supra  
In re Ehle's Estate, 2 P 2d 398, 115 Cal App 656

6 Neb.—In re Gahagen's Estate, 167 NW 412, 102 Neb 404  
68 C J p 461 note 41

7. Ill.—In re Weedman's Estate, 98 NE 956, 254 Ill 504  
68 C J p 461 note 42

8 Cal.—In re Fisher's Estate, 259 P 755, 202 Cal 205.  
68 C J p 461 note 45

9. Ind.—Lasher v Gerlach, 23 NE 2d 296, 107 Ind App 572

10. NJ.—In re Freeman's Will, 127 A 802, 97 N J Eq 347, 1 N J Misc 642  
68 C J p 461 note 46

11. Ga.—Adams v Cooper, 96 SE 858, 148 Ga 339  
68 C J p 461 note 47

12 Iowa.—In re Van Houten's Will, 124 NW 886, 147 Iowa 725, 140 Am SR 340  
68 C J p 461 note 48

13 Ohio.—Rutledge v Inlow, 200 NE 204, 51 Ohio App 207

14. Iowa.—Walters v Heaton, 271 NW 310, 223 Iowa 405  
Ky.—Davis' Ex'r v Laughlin, 133 S W 2d 544, 280 Ky 422

Okl.—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582  
Tex.—Galindo v Garcia, 199 S W 2d 499, 145 Tex 507

Peareson v McNabb, Civ App, 190 S W 2d 402, refused for want of merit  
68 C J p 461 note 50

15. Mich.—Thayer v Thayer, 154 NW 32, 188 Mich 261  
68 C J p 462 note 51

16 Ky.—Wigginton's Ex'r v Wigginton, 239 S W. 455, 194 Ky 383

17. Colo.—In re Cole's Estate, 226 P 143, 75 Colo 264.  
68 C J p 462 note 53

of such facts on which to base the belief<sup>18</sup> Such evidence, in order to be admissible, must have a tendency to prove the foundation for the testator's belief<sup>19</sup>

*Religious beliefs.* The testator's belief in certain doctrines or religions may not be offered as evidence on the question of testamentary capacity,<sup>20</sup> as, for example, his belief in spiritualism<sup>21</sup> However, insane delusions and abnormal beliefs about any religion are competent<sup>22</sup>

## § 47. Physical Condition and Mental Derangement Therefrom; Age

Evidence of the testator's physical condition and of his age are admissible on the issue of testamentary capacity

On the issue of testamentary capacity, evidence of the physical condition<sup>23</sup> and of the age<sup>24</sup> of the testator is admissible However, where a guardian is appointed for the testatrix after the execution of the will, solely on the allegation and finding of physical incapacity, such appointment is not evidence of mental incapacity<sup>25</sup>

## § 48. Circumstances of Execution

It is proper to show the circumstances attending the execution of the will on the issue of testamentary capacity.

On the issue of testamentary capacity, it is proper to show the circumstances attending the execution of the will,<sup>26</sup> such as the words and conduct of the testator at the time,<sup>27</sup> which are of more or less weight according to the circumstances, as considered *infra* § 69

## § 49. Source of Testator's Property

There is a conflict of authority on the admissibility of evidence as to the source of testator's property disposed of by the will.

The source from which the property disposed of by will came into the testator's possession has been held admissible<sup>28</sup> and inadmissible<sup>29</sup>

## § 50. Mental Condition Prior and Subsequent to Execution

Evidence of the testator's mental condition either before or after the execution of the will, but near that date, may, depending on the circumstances of each case, be material and admissible.

Although a testator's capacity to make a will is to be determined by his condition at the time of its execution, as considered *supra* § 5, evidence of his capacity near that date either before or after execution may, depending on the circumstances of each case, be material and admissible,<sup>30</sup> especially

18 Conn—Devereux v Armstrong, 121 A 173, 99 Conn 158 68 C J p 462 note 54

19. NY—In re Stoll's Will, 153 N Y S 362, 90 Misc 266 68 C J p 462 note 55

20 Ky—Davis' Ex'r v Laughlin, 133 SW 2d 544, 280 Ky 422 68 C J p 462 note 57

21. Ky—Davis' Ex'r v. Laughlin, supra 68 C J p 462 note 58

22. Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209 68 C J p 462 note 59

### Embracing disliked religion

In proceeding to contest will on ground of lack of testamentary capacity, evidence that testatrix in latter months of her life embraced a religion which had been an anathema to her for years, was admissible, since such a change without any explanation or reason therefor may be some evidence of lack of mental capacity

Ky—Davis' Ex'r v Laughlin, 133 S W 2d 544, 280 Ky 422

23. Ind—Peters v Knight, 8 NE 2d 401, 103 Ind App 453

Md—Willis v Willis, 188 A 217, 171 Md 144

NY—In re Carhart's Estate, 15 N Y S 2d 17, 258 App Div 734

Pa—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

Tenn—Bridges v Agee, 15 Tenn App 351 68 C J p 462 note 61

24. Pa—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

Tex—Walston v Mabry, Civ App, 225 S W 2d 1014 68 C J p 462 note 62

25 Cal—In re Dopkins' Estate, 212 P 2d 886, 34 Cal 2d 568

26. Ark—Inman v McEachin, 184 S W 2d 949, 208 Ark 102—Pernot v King, 110 S W 2d 539, 194 Ark 896—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692

Mo—Norris v Bristow, 219 S W 2d 367, 358 Mo 1177, 11 A L R 2d 725 68 C J p 463 note 63

27. Ga—Manley v Combs, 30 SE 2d 485, 197 Ga 768 68 C J p 463 note 64

28. Ga—Shaw v Fehn, 27 SE 2d 406, 196 Ga 661

Tex—Cheesborough v Corbett, Civ App, 155 S W 2d 942, error refused 68 C J p 463 note 66

29. Ill—Britt v Darnell, 146 NE 510, 315 Ill 385—Gregory v Rich-ey, 138 NE 669, 307 Ill 219 68 C J p 463 note 67

### Justice of will

Where the source of testator's property does not affect the justice of the will, evidence with reference thereto is inadmissible

Miss—Norman v Norman, 18 So 2d 130, 196 Miss 597

30 Ala—Price v Marshall, 52 So 2d 149, 255 Ala 447—Tucker v Tucker, 28 So 2d 637, 248 Ala 602 Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489

Cal—In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Klopstock's Estate, 88 P 2d 722, 31 Cal App 2d 568—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 630

Conn—Jackson v Waller, 10 A 2d 763, 126 Conn 294

Ga—Beman v Stenbridge, 85 SE 2d 434, 211 Ga 274—Anderson v Anderson, 80 SE 2d 807, 210 Ga 464—Ware v Hill, 71 SE 2d 630, 209 Ga 214—Norman v Hubbard,

in case of a progressive<sup>31</sup> or permanent<sup>32</sup> disease | showing the condition of the testator's mind at the  
Such evidence is admissible only for the purpose of | precise date when the will was executed<sup>33</sup> Since

- 47 SE 2d 574, 203 Ga 530—Spivey v Spivey, 44 SE 2d 224, 202 Ga 644—Fehn v Shaw, 35 SE 2d 253, 199 Ga 747—Boland v Aycock, 12 SE 2d 319, 191 Ga 327—Martin v Martin, 195 SE 159, 185 Ga 349—Ellis v Britt, 182 SE 596, 181 Ga 442
- Ill—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160—Milne v McFadden, 52 NE 2d 146, 385 Ill 11—Ergang v Anderson, 38 NE 2d 26, 378 Ill 312, 137 ALR 984—Peters v Peters, 33 NE 2d 425, 376 Ill 237
- Ind—Bell v Bell, 29 NE 2d 358, 108 Ind App 436—Lasher v Gerlach, 23 NE 2d 296, 107 Ind App 572—Ailes v Ailes, 11 NE 2d 73, 104 Ind App 302—Peters v Knight, 8 NE 2d 401, 103 Ind App 453
- Iowa—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Ring's Estate, 22 NW 2d 777, 237 Iowa 953, amended on other grounds and rehearing denied 24 NW 2d 121
- Kan—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210
- Ky—Pardue v Pardue, 227 SW 2d 403, 312 Ky 370—McComas v Hull, 145 SW 2d 841, 284 Ky 654
- Md—Willis v Willis, 188 A 217, 171 Md 144
- Mass—Simoneau v O'Brien, 40 NE 2d 1, 311 Mass 68
- Mich—In re Balk's Estate, 287 NW 351, 289 Mich 703, 124 ALR 431
- Mo—Ambruster v Sutton, 244 SW 2d 65, 362 Mo 740—Rothwell v Love, 241 SW 2d 893—Adams v Simpson, 213 SW 2d 908, 358 Mo 168—Smith v Fitzjohn, 188 SW 2d 832, 354 Mo 137—Walter v Alt, 152 SW 2d 135, 348 Mo 53—Hennings v Hallar, 149 SW 2d 338, 347 Mo 827—Whitacre v Kelly, 134 SW 2d 121, 345 Mo 489—Proffer v Proffer, 114 SW 2d 1035, 342 Mo 184
- Shearrer v Shearrer, App, 259 SW 2d 705—Klaus v Zimmerman, App, 174 SW 2d 365—Higgins v Smith, App, 150 SW 2d 539
- Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270
- NJ—In re Phillips' Estate, 50 A 2d 862, 139 NJ Eq 257, affirmed 57 A 2d 387, 141 NJ Eq 362
- NC—In re McDowell's Will, 52 SE 2d 807, 230 NC 259
- Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607
- Or—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—In re Provolt's Estate, 151 P 2d 736, 175 Or 128—In re Murray's Estate, 144 P 2d 1016, 173 Or 209
- Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—**Corpus Juris quoted in** In re Dichter's Estate, 47 A 2d 691, 693, 354 Pa 444
- In re Loeper's Estate, Orph, 47 Berks Co 131—In re Meckley's Estate, Orph, 54 Lanc L Rev 173—In re Gayman's Estate, Orph, 21 Northumb Leg J 149—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364
- Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Bridges v Agee, 15 Tenn App 351
- Tex—Ridgeway v Keene, Civ App, 225 SW 2d 647, error refused no reversible error
- Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583
- 68 C J p 463 note 70
- Kleptomania**
- Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192
- If testator was of sound mind when he executed his will**, his previous and subsequent condition is immaterial on an issue of his mental capacity
- Ind—Peters v Knight, 8 NE 2d 401, 103 Ind App 453
- 68 C J p 463 note 70 [b]
- 31 Minn—In re Forsythe's Estate, 22 NW 2d 19, 221 Minn 303, 167 ALR 1
- Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607
- Pa—**Corpus Juris quoted in** In re Dichter's Estate, 47 A 2d 691, 693, 354 Pa 444
- 68 C J p 464 note 71
- 32 Ga—Terry v Buffington, 11 Ga 337, 56 Am D 423
- 33 Ariz—In re Walters' Estate, 267 P 2d 896, 77 Ariz 122—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248
- Cal—In re Lungenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571
- In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Schwartz's Estate, 155 P 2d 76, 67 Cal App 2d 512—In re Dupont's Estate, 140 P 2d 868, 60 Cal App 2d 276—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Klopstock's Estate, 88 P 2d 722, 31 Cal App 2d 568—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 2d 630
- Conn—Jackson v Waller, 10 A 2d 763, 126 Conn 294
- Ill—Shevlin v Jackson, 124 NE 2d 895, 5 Ill 2d 43—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160—Milne v McFadden, 52 NE 2d 146, 385 Ill 11—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219—Peters v Peters, 33 NE 2d 425, 376 Ill 237—Hoskinson v Lovelette, 5 NE 2d 219, 365 Ill 21—Eschmann v Cawi, 192 NE 2d 226, 357 Ill 379
- Ind—Bell v Bell, 29 NE 2d 358, 108 Ind App 436—Ailes v Ailes, 11 NE 2d 73, 104 Ind App 302
- Iowa—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307—In re Roger's Estate, 47 NW 2d 818, 242 Iowa 627—Bailey v Cherokee State Bank of Cherokee, 277 NW 129, 208 Iowa 1265
- Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455
- Ky—Pfuehl v Pfuehl, 122 SW 2d 128, 275 Ky 588
- Me—In re Loomis' Will, 174 A 38, 133 Me 81
- Md—Willis v Willis, 188 A 217, 171 Md 144
- Mo—Ambruster v Sutton, 244 SW 2d 65, 362 Mo 740—Rothwell v Love, 241 SW 2d 893—Adams v Simpson, 213 SW 2d 908, 358 Mo 168—Smith v Fitzjohn, 188 SW 2d 832, 354 Mo 137—Walter v Alt, 152 SW 2d 135, 348 Mo 53—Hennings v Hallar, 149 SW 2d 338, 347 Mo 827—Whitacre v Kelly, 134 SW 2d 121, 345 Mo 489—Proffer v Proffer, 114 SW 2d 1035, 342 Mo 184
- Shearrer v Shearrer, App, 259 SW 2d 705—Klaus v Zimmerman, App, 174 SW 2d 365
- Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270
- ND—Stormon v Weiss, 65 NW 2d 475
- Okl—In re Fletcher's Estate, 269 P 2d 349—Brummett v King, 251 P 2d 1062, 207 Okl 607—In re Lamar's Estate, 242 P 2d 727, 206 Okl 244
- Or—In re Andersen's Estate, 235 P 2d 869, 192 Or 441—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75
- Pa—**Corpus Juris quoted in** In re Dichter's Estate, 47 A 2d 691, 693, 354 Pa 444
- 68 C J p 464 note 73.

such evidence is apt to produce a false impression on the minds of the jurors, when offered, it is important that the time be as clearly shown as possible<sup>34</sup>

No general rule exists as to the period within which evidence of testamentary capacity is to be limited,<sup>35</sup> but the matter rests very largely within the discretion of the trial court according to the circumstances of the particular case<sup>36</sup> While it has been said that much latitude should be allowed in the admission of this evidence,<sup>37</sup> such evidence must be sufficiently near in point of time to aid in determining the testator's condition at the time of execution,<sup>38</sup> and if the evidence is too remote in point of time, it may be excluded<sup>39</sup> Where the evidence tends to show that insanity developed

early in life, and was of a fixed and permanent character, the period during which the insanity may be shown is greatly extended<sup>40</sup> Instances in which evidence of the testator's mental condition before<sup>41</sup> and after<sup>42</sup> the date of execution has been admitted or excluded are given in the footnotes

## § 51. Transaction of Business

Evidence that the testator had business ability, or that he showed business acumen in transactions at or near the time of the execution of the will, is admissible on the question of testamentary capacity

Evidence that the testator had business ability in general,<sup>43</sup> or that in particular transactions at or near the date of the will he showed business acumen,<sup>44</sup> is competent Since the competency to make

34. Md—*Harris v Hipsley*, 89 A 852, 122 Md 418  
Mich—*In re Hayes' Estate*, 238 N W 245, 255 Mich 338

35. Cal—*In re Baker's Estate*, 168 P 881, 176 Cal 430

Mich—*In re Sprenger's Estate*, 60 N W 2d 436, 337 Mich 514—*In re Nickel's Estate*, 32 N W 2d 733, 321 Mich 519

Minn—*In re Forsythe's Estate*, 22 N W 2d 19, 221 Minn 303, 167 A L R 1

N C—*In re Hargrove's Will*, 173 S E 577, 206 N C 307

36. Ind—*Griffith v Thrall*, 29 N E 2d 345, 109 Ind App 141—*Ailes v Ailes*, 11 N E 2d 73, 104 Ind App 302

Me—*In re Moran's Will*, 28 A 2d 239, 139 Me 178

Mich—*In re Sprenger's Estate*, 60 N W 2d 436, 337 Mich 514—*In re Nickel's Estate*, 32 N W 2d 733, 321 Mich 519

S C—*In re Washington's Estate*, 46 S E 2d 287, 212 S C 379  
68 C J p 464 note 76

### Limitation held arbitrary

In will contest, limiting testimony as to testator's mental capacity and insane delusions to a period six months prior and six months subsequent to date of execution of will was error

Mich—*In re Balk's Estate*, 287 N W 351, 289 Mich 703, 124 A L R 431

### Discretion held not abused

Utah—*In re McCoy's Estate*, 63 P 2d 620, 91 Utah 212

68 C J p 464 note 76 [a]

### Trial action practically final

In will contest, whether evidence of a progressive and gradual mental deterioration of testator over a period of years is so remote as to affect the weight of such evidence depends on the circumstances of each case, and the determination of the trial judge is practically final.

Minn—*In re Forsythe's Estate*, 22 N W 2d 19, 221 Minn 303, 167 A L R 1

37. Ind—*Taylor v Taylor*, 93 N E 9, 174 Ind 670

38. Ga—*Boland v Aycock*, 12 S E 2d 319, 191 Ga 327

Ill—*Shevlin v Jackson*, 124 N E 2d 895, 5 Ill 2d 43—*Knudson v Knudson*, 46 N E 2d 1011, 382 Ill 492.  
68 C J p 464 note 78

39. Ala—*Corpus Juris* cited in *Towles v Pettus*, 12 So 2d 357, 363, 244 Ala 192

Ill—*Eschmann v Cawi*, 192 N E 226, 357 Ill 379

Mich—*In re Sprenger's Estate*, 60 N W 2d 436, 337 Mich 514

N Y—*In re Halliday's Will*, 285 N Y S 964, 246 App Div 441

Tex—*In re Gray's Estate*, Civ App, 279 S W 2d 936, error refused no reversible error  
68 C J p 464 note 79

40. Cal—*In re Baker's Estate*, 168 P 881, 176 Cal 430

Iowa—*In re Ring's Estate*, 22 N W 2d 777, 237 Iowa 953, amended on other grounds and rehearing denied 24 N W 2d 121

### 41. Evidence held admissible

Idaho—*In re Brown's Estate*, 15 P 2d 604, 52 Idaho 286  
68 C J p 464 note 81 [a]

### Evidence held inadmissible

(1) One and a half years  
Cal—*In re Schwartz' Estate*, 155 P 2d 76, 67 Cal App 2d 512

(2) Eleven years

Tex—*In re Gray's Estate*, Civ App, 279 S W 2d 936, error refused no reversible error

(3) Other periods of time see 68 C J p 464 note 81 [b]

### Previously cured illness

(1) In will contest, evidence as to testator's condition prior to his commitment to sanitarium had no probative force on issue of testator's

mental capacity some six years later when will was executed, where testator's mentality was restored prior to execution of will

Md—*Acker v Acker*, 192 A 327, 172 Md 477

(2) Other periods of time see 68 C J p 464 note 81 [c]

### 42. Evidence held admissible

(1) Two years

Tenn—*Melody v Hamblin*, 115 S W 2d 237, 21 Tenn App 687

(2) Four years

N C—*In re McDowell's Will*, 52 S E 2d 807, 230 N C 259

(3) Other periods of time see 68 C J p 464 note 82 [a]

### Evidence held inadmissible

(1) Two years

Ill—*Hoskinson v Lovelette*, 5 N E 2d 219, 365 Ill 21

Minn—*Collins v Dowlan*, 136 N W 854, 118 Minn 214

Mo—*Gee v Bess*, App, 176 S W 2d 516

S C—*Corpus Juris* cited in *In re Washington's Estate*, 46 S E 2d 287, 289, 212 S C 379

(2) Three years

Mich—*In re Sprenger's Estate*, 60 N W 2d 436, 337 Mich 514

(3) Six years

Tex—*Burgess v Sylvester*, Civ App, 177 S W 2d 271, affirmed 182 S W 2d 358, 143 Tex 25

(4) Nineteen years

N C—*In re Hargrove's Will*, 173 S E 577, 206 N C 307

(5) Other periods of time see 68 C J p 464 note 82 [b]

43. Iowa—*Ipsen v Ruess*, 35 N W 2d 82, 239 Iowa 1376

Pa—*In re Nelson's Estate*, Orph, 66 York Leg Rec 161

68 C J p 465 note 84

Admissibility of contracts and business papers see *infra* § 52

44. Ill—*Maher v Maher*, 170 N E 221, 338 Ill 102

68 C J p 465 note 85.

a will, rather than to transact business, is the issue, as considered supra § 15, evidence that he lacked business ability in general is not competent,<sup>45</sup> or that he lacked business ability in certain particulars,<sup>46</sup> unless the acts proved are apparently inconsistent with a sound mind<sup>47</sup>

## § 52 Conduct and Declarations of Testator in General

If sufficiently close in point of time to the execution of the will, and if it tends to show the testator's mental condition, evidence of his appearance, conduct, writings, conversations, and declarations is admissible

On the issue of testamentary capacity, all facts connected with the personal history of the testator which tend to shed any light on the question are admissible<sup>48</sup> If sufficiently near in point of time and it tends to show the testator's mental condition, evidence is admissible of the testator's appearance,<sup>49</sup> conduct,<sup>50</sup> habits, considered supra § 43, letters or written declarations contained in them,<sup>51</sup> diaries,<sup>52</sup> telegrams,<sup>53</sup> documents,<sup>54</sup> memoranda,<sup>55</sup> contracts and other business papers,<sup>56</sup> depositions,<sup>57</sup> and declarations or conversations<sup>58</sup> after, as well as before, the execution of the will, provided such facts are

45. Ind—Brackney v Fogle, 60 NE 303, 156 Ind 535, 6 Prob Rep Ann 538

68 C J p 465 note 87

46. Mich—Prentiss v Bates, 50 NW 637, 88 Mich 567, modified on other grounds 53 NW 153, 93 Mich 234, 17 L R A 494

68 C J p 465 note 88

47. Neb—In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915

68 C J p 465 note 89

48. Iowa—Mileham v Montagne, 125 NW 664, 148 Iowa 476

68 C J p 465 note 91

49. Cal—In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 2d 630

Ind—Griffith v. Thrall, 29 NE 2d 345, 109 Ind App 141

Iowa—In re Roger's Estate, 47 NW 2d 818, 242 Iowa 627

Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607

Tenn—Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 287—Bridges v. Agee, 15 Tenn App 351

68 C J p 465 note 92

50. Ala—Price v Marshall, 52 So 2d 149, 255 Ala 447

Cal—In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 2d 630

Conn—Jackson v Waller, 10 A 2d 763, 126 Conn. 294

Ill—Heideman v Kelsey, 111 NE 2d 538, 414 Ill 453—Nadenik v Nadenik, 24 NE 2d 346, 372 Ill 408

Ind—Griffith v Thrall, 29 NE 2d 345, 109 Ind App 141

Iowa—In re Roger's Estate, 47 NW 2d 818, 242 Iowa 627

Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

N Y—In re Carhart's Estate, 15 N Y S 2d 17, 258 App Div 734

In re Frank's Estate, 1 N Y S 2d 482, 165 Misc 411

N C—In re Hargrove's Will, 173 SE 577, 206 N C 307

Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607—In re Mason's Estate, 91 P 2d 657, 185 Okl 278

Tenn—Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 287—Bridges v Agee, 15 Tenn App 351

68 C J p 465 note 93

### Suffering of default judgment

Evidence that three or four years previous to the execution of alleged will the testator, who had ample means, suffered a default judgment to go against him was competent for jury to consider on issue of testamentary capacity

Ala—Tucker v Tucker, 28 So 2d 637, 248 Ala 602

51. N Y—In re Miller's Will, 236 N Y S 529, 134 Misc 671

68 C J p 466 note 95

A photostatic copy of holographic instructions sent by testator to his attorney before the drafting of his will by attorney was competent in a suit to contest the will as bearing on the question of testator's mental capacity

Ohio—Fifth-Third Union Trust Co v Davis, 1 Ohio Supp 251, affirmed 10 NE 2d 4, 55 Ohio App 377

52. Ohio—Gillespie v. Gray, App, 49 NE 2d 108

53. Mass—Jenkins v Weston, 86 N E 955, 200 Mass 488

54. N Y—In re Green's Will, 220 N Y S 329, 219 App Div 528

### Application for old age pension

Court erred in excluding from evidence a certified copy of testator's application for old age pension which was made during month in which testator executed a codicil and in which testator died, which application stated that testator had no realty or personalty, where inventory showed that testator left over four thousand dollars, since such evidence was material to question whether testator

had mental capacity to understand the nature and extent of his property

Tex—McNaley v Sealy, Civ App, 122 S W 2d 330, error dismissed

55. Ala—Batson v Batson, 117 So 10, 217 Ala 450

68 C J p 466 note 98

56. Iowa—Mileham v Montagne, 125 NW 664, 148 Iowa 476

68 C J p 466 note 99

### Deed made by testator is admissible

Colo—In re Koch's Estate, 136 P 2d 673, 110 Colo 562

68 C J p 466 note 99 [a]

57. Ky—McConnell's Ex'r v McConnel, 129 S W 106, 138 Ky 783

68 C J p 466 note 1

58. Ala—Price v Marshall, 52 So 2d 149, 255 Ala 447—Tucker v Tucker, 28 So 2d 637, 248 Ala 602

Ark—Floyd v Dillaha, 256 S W 2d 48, 221 Ark 805

Cal—In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—Jorgensen v Dahlstrom, 127 P 2d 551, 53 Cal App 2d 322—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 2d 630

Ga—Allen v Heys, 51 SE 2d 417, 204 Ga 635

Ill—Nadenik v Nadenik, 24 NE 2d 346, 372 Ill 408

Bennett v Thompson, 82 NE 2d 493, 335 Ill App 541

Ind—Allman v Malsbury, 65 NE 2d 106, 224 Ind 177—Barger v Barger, 48 NE 2d 813, 221 Ind 530

Griffith v Thrall, 29 NE 2d 345, 109 Ind App 141—Sager v Moltz, 139 NE 687, 80 Ind App 122

Iowa—In re Roger's Estate, 47 NW 2d 818, 242 Iowa 627—Diesing v Spencer, 266 NW 567, 221 Iowa 1143

Ky—Welch's Adm'r v Clifton, 172 S W 2d 221, 294 Ky 514, 148 A L R 1220

Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

N Y—In re McCarthy's Will, 54 N Y S 2d 591, 269 App Div 145, reargument denied 56 N Y S 2d 514, one case, 269 App Div 836, affirmed 73 NE 2d 566, 296 N Y 987

proved by legal evidence<sup>59</sup> This evidence is admissible not to prove the truth of the facts stated, but for the purpose of showing testamentary capacity or incapacity<sup>60</sup> Much must be left to the discretion of the trial court in excluding declarations of a testator that are too remote in time,<sup>61</sup> trivial in importance,<sup>62</sup> or merely cumulative<sup>63</sup> Illustrations of evidence of the conduct and declarations of the testator prior<sup>64</sup> and subsequent<sup>65</sup> to the date of the execution of will which has been admitted or excluded are given in the footnotes

### § 53 Conduct of Testator toward Friends and Relatives

On the issue of testamentary capacity, evidence is admissible of the testator's relations with friends and relatives

On the issue of testamentary capacity, evidence

is admissible of the testator's relations with friends and relatives,<sup>66</sup> unless the evidence is too remote to the issue of capacity<sup>67</sup> To prove capacity, evidence of the ill-feeling between the testator and a contestant relative is admissible<sup>68</sup> To prove testamentary incapacity, evidence is admissible of kindly relations existing between the testator and members of his family excluded from the will in whole or in part,<sup>69</sup> evidence is admissible to show that the testator, once kind and friendly to members of his family and relatives, took a dislike to them without reason<sup>70</sup>

### § 54 Declarations and Inclinations of Testator Respecting Disposition of Property

On the issue of testamentary capacity, evidence is admissible of the testator's declarations of his testa-

- In re Frank's Estate, 1 N Y S 2d 482, 165 Misc 411  
 N C—In re Kestler's Will, 44 S E 2d 867, 228 N C 215—In re Hargrove's Will, 173 S E 577, 206 N C 307  
 Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607  
 Tenn—Hickey v Beeler, 171 S W 2d 277, 180 Tenn 31  
     Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628—Melody v Hamblin, 115 S W 2d 237, 21 Tenn App 687—Bridges v Agee, 15 Tenn App 351  
 Tex—Bell v Bell, Civ App, 248 S W 2d 978, error refused no reversible error—Scott v McKibban, Civ App, 110 S W 2d 72, reversed on other grounds McKibban v Scott, 114 S W 2d 213, 131 Tex 182, 115 A L R 1421  
 Wyo—In re Lane's Estate, 60 P 2d 360, 50 Wyo 119  
 68 C J p 466 note 2  
 59. Cal—Crozier's Estate, 15 P 618, 74 Cal 180  
 68 C J p 467 note 3  
 60. Iowa—Diesing v Spencer, 266 N W 567, 221 Iowa 1143  
 Ky—Welch's Adm'r v Clifton, 172 S W 2d 221, 294 Ky 514, 148 A L R 1220  
 N Y—In re McCarthy's Will, 54 N Y S 2d 591, 269 App Div 145, reargument denied 56 N Y S 2d 514, one case, 269 App Div 836, affirmed 73 N E 2d 566, 296 N Y 987  
 Ohio—Gillespie v Gray, App, 49 N E 2d 108  
 68 C J p 467 note 4  
 61. Cal—In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666  
 N Y—In re McCarthy's Will, 54 N Y S 2d 591, 269 App Div 145, reargument denied 56 N Y S 2d 514, one case, 269 App Div 836, affirmed 73 N E 2d 566, 296 N Y 987  
 68 C J p 467 note 5  
 62. Md—Wood v Hankey, 105 A 430, 133 Md 389  
 68 C J p 467 note 6  
**Silence of testator**  
 In will contest, where it was not developed in connection with any specific conversation that there was a duty of the testator to speak, evidence of testator's silence, on issue of his mental incompetency, was properly excluded  
 Mo—Wipfler v Basler, 250 S W 2d 982  
 63. Mass—Holbrook v Seagrave, 116 N E 889, 228 Mass 26  
**64. Evidence held admissible**  
 (1) Three months  
 Tex—Davis v Williams, Civ App, 144 S W 2d 445, error dismissed 146 S W 2d 982, 136 Tex 27  
 (2) About a year  
 Ga—Shankle v Crowder, 163 S E 180, 174 Ga 399  
 (3) Three or four years  
 Ala—Tucker v Tucker, 28 So 2d 637, 248 Ala 602  
 (4) Six years  
 Cal—In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666  
**Evidence held inadmissible**  
 Ill—Kimber v Kimber, 148 N E 293, 317 Ill 561  
 68 C J p 467 note 8 [b]  
**65. Evidence held admissible**  
 (1) One day  
 Ga—Allen v Heys, 51 S E 2d 417, 204 Ga 635  
 (2) Three weeks  
 Conn—Cullum v Colwell, 83 A 695, 85 Conn 459  
 N Y—In re McCarthy's Will, 54 N Y S 2d 591, 269 App Div 145, reargument denied 56 N Y S 2d 514, one case, 269 App Div 836, affirmed 73 N E 2d 566, 296 N Y 987

- (3) Five months  
 Ill—Heideman v Kelsey, 111 N E 2d 538, 414 Ill 453  
 (4) Seven months  
 Cal—In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666  
 (5) Other periods of time see 68 C J p 467 note 9 [a]  
**Evidence held inadmissible**  
 Ark—Gray v Fulton, 170 S W 2d 384, 205 Ark 675  
 68 C J p 467 note 9 [b]  
 66. Ala—Slagle v Halsey, 15 So 2d 740, 245 Ala 198  
 Ark—Inman v McEachin, 184 S W 2d 949, 208 Ark 102—Pernot v King, 110 S W 2d 539, 194 Ark 896—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692  
 Ind—Griffith v Thrall, 29 N E 2d 345, 109 Ind App 141  
 68 C J p 467 note 11  
**Gift to beneficiary's son**  
 In contest over will allegedly procured by undue influence of principal beneficiary's son, evidence concerning a large gift of money from decedent to son was material and competent on the question of testamentary capacity  
 Ala—Little v Sugg, 8 So 2d 866, 243 Ala 196  
 67. Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192  
**Thirty-three years**  
 Cal—In re Lefranc's Estate, 214 P 2d 420, 95 Cal App 2d 885  
 68. Me—In re Moran's Will, 28 A 2d 239, 139 Me 178  
 68 C J p 468 note 12  
 69. Ill—Mitchell v Van Scoyk, 115 N E 2d 226, 1 Ill 2d 160  
 68 C J p 468 note 13  
 70. Ala—Batson v Batson, 117 So 10, 217 Ala 450  
 68 C J p 468 note 14.

mentary intentions prior or subsequent to the execution of the will

On the issue of testamentary capacity, evidence is admissible of the testator's declarations of his testamentary intentions prior or subsequent to the execution of the will.<sup>71</sup> Evidence of declarations of the testator as to his testamentary intentions made before or after the date of the will is admissible to prove capacity,<sup>72</sup> or, in connection with other evidence of incapacity,<sup>73</sup> such evidence is admissible to prove mental unsoundness to execute a will.<sup>74</sup> Evidence is admissible to prove erroneous statements in a will that the testator had advanced to legatees the sums designated.<sup>75</sup> Since the admission of such evidence is largely discretionary with the trial court, it may exclude remote declarations which occurred prior<sup>76</sup> or subsequent<sup>77</sup> to the time of execution.

### § 55. Declarations of Testator as to Capacity

The testator's subsequent declarations by words or writing on the issue of his testamentary capacity are admissible

71 Ill—*De Marco v McGill*, 83 NE 2d 313, 403 Ill 46—*Knudson v Knudson*, 46 NE 2d 1011, 382 Ill 492

Minn—*In re Forsythe's Estate*, 22 N W 2d 19, 221 Minn 303, 167 ALR 1

Mo—*Klaus v Zimmerman*, App, 174 S W 2d 365

NY—*In re Roberts' Will*, 283 NYS 50, 246 App Div 87

Tex—*Corpus Juris* quoted in *Scott v McKibban*, Civ App, 110 S W 2d 72, 75, reversed on other grounds *McKibban v Scott*, 114 S W 2d 213, 131 Tex 182, 115 ALR 1421

Utah—*In re McCoy's Estate*, 63 P 2d 620, 91 Utah 212

Wash—*In re Landgren's Estate*, 63 P 2d 438, 189 Wash 33

68 C J p 468 note 16  
Execution of other wills see *infra* § 56

#### Inadmissible where capacity shown

Declarations of testator as to manner in which he disposed of his property were incompetent to show mental incapacity where evidence in proceeding to set aside order for probate of will showed that testator had mental capacity

Ark—*Burcher v Casey*, 83 S W 2d 73, 190 Ark 1055

72 Tex—*Corpus Juris* quoted in *Scott v McKibban*, Civ App, 110 S W 2d 72, 75, reversed on other grounds *McKibban v Scott*, 114 S W 2d 213, 131 Tex 182, 115 ALR 1421

68 C J p 468 note 17.

73 Ill—*Knudson v Knudson*, 46 N E 2d 1011, 382 Ill 492—*Hurley v Caldwell*, 91 NE 654, 244 Ill 448

Tex—*Corpus Juris* quoted in *Scott v McKibban*, Civ App, 110 S W 2d 72, 75, reversed on other grounds *McKibban v Scott*, 114 S W 2d 213, 131 Tex 182, 115 ALR 1421  
68 C J p 468 note 18

#### Agreement to make will

In action to contest will, brought by testator's son against sole beneficiary under will, agreement between testator and his son whereby testator was to make a will in favor of son, was relevant on issue of mental capacity

Tex—*Gunlock v Greenwade*, Civ App, 280 S W 2d 610

74 DC—*Duckett v Duckett*, 134 F 2d 527, 77 US App DC 303

Ill—*Knudson v Knudson*, 46 NE 2d 1011, 382 Ill 492

Tex—*Corpus Juris* quoted in *Scott v McKibban*, Civ App, 110 S W 2d 72, 75, reversed on other grounds *McKibban v Scott*, 114 S W 2d 213, 131 Tex 182, 115 ALR 1421  
68 C J p 468 note 19

75 Ind—*Lamb v Lamb*, 5 NE 171, 105 Ind 456

#### 76. Evidence held admissible

Ill—*Anlicker v Brethorst*, 160 NE 197, 329 Ill 11

#### Evidence held inadmissible

Minn—*In re Olson's Estate*, 180 N W 1009, 181 NW 569, 148 Minn 122

68 C J p 469 note 22 [b]

On the issue of testamentary capacity, the testator's subsequent declarations by words<sup>78</sup> or writing<sup>79</sup> are admissible. Where a testator, while sane and subsequent to the execution of his will, states that in the past and prior to the date of execution he was of unsound mind, such declaration is admissible.<sup>80</sup>

*Conduct of testator when sanity is questioned*  
Evidence of how a testator acted when his mental condition was spoken of in his presence and hearing is admissible.<sup>81</sup>

### § 56. Execution of Other Wills

For the purpose of proving testamentary capacity, other wills made at a time when the testator's mental condition was sound are admissible

On the question of testamentary capacity, other wills are admissible,<sup>82</sup> but only when proved to have been drawn by the testator.<sup>83</sup> For the purpose of showing that the testator was of sound mind at the time of execution of the will in question, other wills which were made when the testator's capacity was not questioned<sup>84</sup> and which conform to the pro-

#### 77 Evidence held admissible

Ill—*Holliday v Shepherd*, 109 NE 976, 269 Ill 429

68 C J p 469 note 23 [a]

#### Evidence held inadmissible

NY—*La Bau v Vanderbilt*, 3 Redf Surr 384

78 Tenn—*Bank of Commerce & Trust Co v Stavros*, 103 S W 2d 593, 20 Tenn App 662

68 C J p 469 note 24

79 Iowa—*Manatt v Scott*, 76 NW 717, 106 Iowa 203, 68 Am SR 293  
68 C J p 469 note 25

80 Iowa—*Ross v McQuiston*, 45 Iowa 145

#### Held inadmissible without other evidence

Pa—*In re Sites' Estate*, Orph, 60 Dauph Co 377

81 Iowa—*In re Fenton's Will*, 66 N W 99, 97 Iowa 192

68 C J p 469 note 27

82 Me—*In re Loomis' Will*, 174 A 38, 133 Me 81

Minn—*In re Forsythe's Estate*, 22 N W 2d 19, 221 Minn 303, 167 ALR 1

NC—*In re Franks' Will*, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315

Tex—*Burkett v Slauson*, Civ App 256 S W 2d 179, error dismissed

Va—*Redford v Booker*, 185 SE 879 166 Va 561

68 C J p 469 note 28

83 Tex—*Brown v Mitchell*, 26 S W 1059, 87 Tex 140

84 Iowa—*Storbeck v Fridley*, 38 N W 2d 163, 240 Iowa 879



visions of the contested will,<sup>85</sup> are admissible. However, other wills are inadmissible for such purpose if the provisions are not in substantial conformity,<sup>86</sup> and are executed at times when the testator is not conceded to have been of sound mind and memory.<sup>87</sup> A former will executed while the testator was admittedly insane is admissible to rebut the presumption of sanity arising from the form or character of the will in dispute.<sup>88</sup> A prior will is admissible where limited to the issue of the tes-

tator's capacity at the time of its execution.<sup>89</sup>

### § 57. Moral Delinquency

Evidence which merely tends to show moral delinquency on the part of the testator is not admissible on the question of testamentary capacity.

Evidence which merely tends to show moral delinquency on the part of the testator has no bearing on his testamentary capacity and is not admissible on that question.<sup>90</sup>

## 3 WEIGHT AND SUFFICIENCY.

### § 58. In General

On the probate of a will or in an action to set aside a will or to revoke the probate thereof, the evidence must be sufficient to support a finding of testamentary capacity or incapacity, and each case must depend on, and be determined by, its own evidentiary showing, and all of the testimony must be considered together.

On the probate of a will or in an action to set

aside a will or to revoke the probate thereof, the evidence must be sufficient to support a finding of testamentary capacity or incapacity, and each case must depend on, and be determined by, its own evidentiary showing,<sup>91</sup> and all of the testimony must be considered together.<sup>92</sup> In considering the question of the sufficiency of the evidence the jury

- Ky—Trivette v Johnson, 79 S W 2d 6, 257 Ky 681
- Neb—In re Wahl's Estate, 39 N W 2d 783, 151 Neb 812—In re Bose's Estate, 285 N W 319, 136 Neb 156 68 C J p 469 note 30
85. Iowa—Storbeck v Fridley, 38 N W 2d 163, 240 Iowa 879 68 C J p 469 note 31
86. Ill—Pollock v Pollock, 159 N E 305, 328 Ill 179 68 C J p 469 note 32
87. Ill—Wright v Upson, 135 N E 209, 303 Ill 120 68 C J p 469 note 33
88. Iowa—Ross v McQuiston, 45 Iowa 145
89. Ill—Aftalion v Stauffer, 119 N E 981, 284 Ill 54
90. Tex—In re Boultinghouse's Estate, Civ App, 267 S W 2d 614, error dismissed 68 C J p 470 note 37
91. Me—Appeal of Martin, 179 A 655, 133 Me 422
- Wash—In re Denison's Estate, 162 P 2d 245, 23 Wash 2d 699
92. Wyo—Branson v Roelofs, 70 P 2d 589, 52 Wyo 101
- Evidence held sufficient to show capacity**
- Ala—King v Aird, 38 So 2d 883, 251 Ala 613
- Ark—Yarbrough v Moses, 267 S W 2d 289, 223 Ark 489—In re McConnell's Estate, 257 S W 2d 34, 222 Ark 4—Werbe v Holt, 237 S W 2d 478, 218 Ark 476—Fitzgerald v Fitzgerald, 196 S W 2d 765, 210 Ark 532—Parette v Ivey, 190 S W 2d 441, 209 Ark 364—McWilliams v Neill, 155 S W 2d 344, 202 Ark 1087—Bollinger v Arkansas Valley Trust Co, 151 S W 2d 675, 202 Ark 525
- Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573
- In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720—In re Arnold's Estate, 273 P 2d 587, 127 Cal App 2d 256—In re Gill's Estate, 244 P 2d 724, 111 Cal App 2d 486—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22—In re Mokey's Estate, 171 P 2d 131, 75 Cal App 2d 628—In re Benson's Estate, 145 P 2d 668, 62 Cal App 2d 866—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Lepori's Estate, 41 P 2d 970, 4 Cal App 2d 761
- Colo—In re Piercen's Estate, 195 P 2d 725, 118 Colo 264—Scott v Leonard, 184 P 2d 138, 117 Colo 54—In re Stitzer's Estate, 68 P 2d 561, 100 Colo 521—Jeffreys v International Trust Co, 48 P 2d 1019, 97 Colo 188
- Fla—In re Baldridge's Estate, 74 So 2d 658—In re Eberhardt's Estate, 60 So 2d 271—Miller v Flowers, 27 So 2d 667, 158 Fla 51—In re Carnegie's Estate, 13 So 2d 299, 153 Fla 7—In re Eustis' Estate, 5 So 2d 254, 148 Fla 665—In re Aldrich's Estate, 3 So 2d 856, 148 Fla 121—In re Niernsee's Estate, 2 So 2d 737, 147 Fla 388—Wartmann v Burleson, 190 So 789, 139 Fla 458
- Ga—Bassett v Hunter, 53 S E 2d 909, 205 Ga 417—Allen v Heyes, 51 S E 2d 417, 204 Ga 635—Ehlers v Rheinberger, 49 S E 2d 535, 204 Ga 226—Smith v Davis, 45 S E 2d 609, 203 Ga 175—Spivey v Spivey, 44 S E 2d 224, 202 Ga 644—Watkins v Jones, 193 S E 889, 184 Ga 831
- Ill—Sterling v Dubin, 126 N E 2d 718, 6 Ill 2d 64—Downey v Lawley, 36 N E 2d 344, 377 Ill 298—Hoskinson v Lovelette, 5 N E 2d 219, 365 Ill 21—Langwisch v Langwisch, 198 N E 675, 361 Ill 632—Brownlie v Brownlie, 191 N E 268, 357 Ill 117, 93 A L R 1041
- In re Rutledge's Will, 125 N E 2d 683, 5 Ill App 2d 355—Jorn v Tallett, 93 N E 2d 82, 341 Ill App 240—Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 N E 2d 144, 340 Ill App 64—Johnson v First Union Trust & Savings Bank, 273 Ill App 472—Capner v Holbrook, 273 Ill App 199
- Ind—Potter v Emery, 26 N E 2d 554, 107 Ind App 628
- Kan—Amerine v Amerine, 280 P 2d 601, 177 Kan 481—In re Davis' Estate, 259 P 2d 211, 175 Kan 107—In re Regle's Estate, 228 P 2d 722, 170 Kan 558—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210—In re Ellis' Estate, 210 P 2d 417, 168 Kan 11—In re Cross' Estate, 201 P 2d 1052, 166 Kan 318—In re Gereke's Estate, 195 P 2d 323, 165 Kan 249—Wittman's Estate v Dickerson, 168 P 2d 541, 161 Kan 398—Walker v Anderson, 163 P 2d 359, 160 Kan 461—In re Horton's Estate, 118 P 2d 527, 154 Kan 269—Anderson v Anderson, 76 P 2d 825, 147 Kan 273—Pierce v Pierce, 64 P 2d 576, 145 Kan 14—Bradley v Hill, 42 P 2d 580, 141 Kan 602.

is warranted in believing all of the evidence in | support of contestant's claims, unless it is inherently

Ky—Race v Stevens, 276 SW 2d 439—Madison v Whittle, 272 SW 2d 48—Schmiedt v Eicher, 241 SW 2d 995—Lynn v Stratton, 218 SW 2d 962, 309 Ky 721

La—Succession of Moody, 80 So 2d 93, 227 La 609—Succession of Davis v Richardson, 77 So 2d 524, 226 La 887—Lebleu v Manning, 74 So 2d 384, 225 La 1087—Finck v Delmore, 188 So 15, 193 La 317—Succession of Edgar, 167 So 438, 181 La 775

Succession of Knight, App, 151 So 230

Me—In re Paradis' Will, 87 A 2d 512, 147 Me 347—In re Haley's Estate, 84 A 2d 808, 147 Me 173—In re Moran's Will, 28 A 2d 239, 139 Me 178—In re Loomis' Will, 174 A 38, 133 Me 81

Md—Smith v Biggs, 189 A 256, 171 Md 528

Mass—Roginska v Silverio, 109 N E 2d 836, 329 Mass 672—Fierimonte v Bontempo, 77 N E 2d 2, 322 Mass 742—Bray v Story, 65 N E 2d 920, 319 Mass 723—Greene v Cronin, 50 N E 2d 36, 314 Mass 336—Knowles v Newhall, 21 N E 2d 942, 303 Mass 385

Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Getchell's Estate, 295 NW 360, 295 Mich 681

Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn 365—In re Luke's Estate, 19 NW 2d 5, 220 Minn 104—In re Cunningham's Estate, 17 NW 2d 85, 219 Minn 80

In re Bergquist's Estate, 1 NW 2d 418, 211 Minn 380—In re Osbon's Estate, 286 NW 306, 205 Minn 419

Miss—In re Atkinson's Estate, 80 So 2d 12—Hutchins v Barlow, 74 So 2d 870—Bearden v Gibson, 60 So 2d 655, 215 Miss 218—Fountain v Reid, 58 So 2d 666, 214 Miss 269—Cowart v Cowart, 51 So 2d 775, 211 Miss 459—Phinizee v Alexander, 49 So 2d 250, 210 Miss 196

Mo—Gardine v Cottey, 230 SW 2d 731, 360 Mo 681, 18 A L R 2d 1100

Mont—In re Choiniere's Estate, 156 P 2d 635, 117 Mont 65

Neb—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Bucy's Estate, 34 NW 2d 265, 150 Neb 263—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1

In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified 18 NW 2d 68, 144 Neb 915—In re Bose's Estate, 285 NW 319, 136 Neb 156—In re Alexander's Estate, 258 NW 655, 128 Neb 334

NJ—In re Livingston's Will, 73 A 2d 916, 5 N J 65

In re Kinane's Estate, 42 A 2d 865, 136 N J Eq 595

NY—In re McChesney's Will, 102 NYS 2d 33, 278 App Div 607, affirmed 103 N E 2d 58, 303 NY 696, motion denied 103 N E 2d 548, 303 NY 769—In re Phillips' Will, 93 NYS 2d 651, 276 App Div 821, affirmed in part and appeal dismissed in part 95 N E 2d 52, 301 NY 696—In re Cooper's Will, 78 NYS 2d 357, 273 App Div 975—In re Boyle's Will, 67 NYS 2d 348, 271 App Div 614, appeal denied 69 NYS 2d 354, 271 App Div 1053—In re Yates' Will, 58 NYS 2d 883, 269 App Div 1009—In re Hemmingway's Will, 40 NYS 2d 51, 266 App Div 697—In re Stone's Estate, 29 NYS 2d 395, 262 App Div 937, affirmed 43 N E 2d 82, 288 NY 684—In re Fahrenbach's Will, 25 NYS 2d 208, 261 App Div 43, affirmed 34 N E 2d 911, 285 NY 763—In re Kraft's Will, 18 NYS 2d 17, 258 App Div 1088—In re Shay's Estate, 8 NYS 2d 696, 255 App Div 933, reargument denied in re Shay, 9 NYS 2d 894, 256 App Div 938—In re Stephani's Will, 294 NYS 624, 250 App Div 253

In re Waltory's Estate, 135 NYS 2d 690, 206 Misc 908—In re Patterson's Will, 132 NYS 2d 609, 206 Misc 268—Petition of McGowan, 125 NYS 2d 489, 204 Misc 690—In re Richard's Will, 102 NYS 2d 984, 200 Misc 230—In re Lindemann's Will, 80 NYS 2d 276, 191 Misc 285—In re Le Collen's Will, 72 NYS 2d 467, 190 Misc 272—In re Kaufman's Will, 67 NYS 2d 249, 187 Misc 637—In re Thomson's Will, 41 NYS 2d 416, 181 Misc 385—In re Mortensen's Will, 284 NYS 420, 157 Misc 717—In re Kimball's Will, 281 NYS 605, 156 Misc 338—In re Pratt's Estate, 274 NYS 417, 152 Misc 560, affirmed in re Pratt's Will, 283 NYS 1023, 246 App Div 576

In re Charap's Will, 140 NYS 2d 92, affirmed Petition of Eakun, 145 NYS 2d 311—In re Goldberg's Will, 139 NYS 2d 71—In re Butler's Will, 132 NYS 2d 198—In re Hall's Estate, 131 NYS 2d 639—In re Gallagher's Will, 123 NYS 2d 912—In re Coddington's Will, 112 NYS 2d 4, modified on other grounds 118 NYS 2d 525, 281 App Div 143, affirmed 120 N E 777, 307 NY 181—In re Connor's Will, 100 NYS 2d 879—In re Alexieff's Will, 94 NYS 2d 32, affirmed 97 NYS 2d 532, 277 App Div 790, appeal denied 98 NYS 2d 582, 277 App Div 901—In re Fiske's Will, 69 NYS 2d 655—In re Graham's Estate, 63 NYS 2d 572—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580—In re Schik's Will, 53 NYS 2d 669—In re Woehrl's Will, 53 NYS 2d 412

NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 763—In re Cooper's Will, 25 SE 2d 166, 223 NC 34—In re Redding's Will, 5 SE 2d 544, 216 NC 497

Ohio—Board of Ed of Lynchburg Local School Dist of Highland County v Pendleton, 75 N E 2d 182, 80 Ohio App 249—Gillespie v Gray, App, 49 N E 2d 108—Potts v First-Central Trust Co, App, 47 N E 2d 823

Okl—In re Hicks' Estate, 276 P 2d 259—In re Fletcher's Estate, 269 P 2d 349—In re Martin's Estate, 261 P 2d 603—In re Williams' Estate, 249 P 2d 94, 207 Okl 209—Parnacher v Mount, 248 P 2d 1021, 207 Okl 275—In re Lamar's Estate, 242 P 2d 727, 206 Okl 244—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—Hicks v Cravatt, 235 P 2d 936, 205 Okl 105—Runnels v Burton, 214 P 2d 709, 202 Okl 406—In re Martin's Estate, 188 P 2d 862, 199 Okl 567—In re Smith's Estate, 172 P 2d 328, 197 Okl 405—Moore v Glover, 163 P 2d 1003, 196 Okl 177—Jones v Denton, 135 P 2d 53, 192 Okl 234—Harden v Harden, 134 P 2d 351, 192 Okl 131—In re Austin's Estate, 98 P 2d 47, 186 Okl 360—In re Mason's Estate, 91 P 2d 657, 185 Okl 278—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389—In re Davis' Estate, 43 P 2d 115, 171 Okl 575—Wood v Wood, 32 P 2d 715, 168 Okl 198

Or—In re Boord's Estate, 284 P 2d 348—In re Fredricks' Estate, 232 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75—In re Perry's Estate, 181 P 2d 783, 181 Or 332—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Wade's Estate, 149 P 2d 947, 174 Or 531—In re Davis' Will, 142 P 2d 143, 172 Or 354—McGreal v Culhane, 141 P 2d 828, 172 Or 337—In re Shanks' Estate, 126 P 2d 504, 168 Or 650—In re Lilly's Estate, 78 P 2d 567, 159 Or 236—In re Rupert's Estate, 54 P 2d 274, 152 Or 649—In re Knutson's Will, 41 P 2d 793, 149 Or 467

Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Griffith's Estate, 57 A 2d 893, 358 Pa 474—In re Ross' Estate, 49 A 2d 392, 355 Pa 112—In re Royer's Estate, 13 A 2d 923, 339 Pa 423—In re Taylor's Estate, 175 A 540, 316 Pa 537

In re Rash's Estate, 20 Pa Dist & Co 299

- In re Ledonne's Estate, Orph, 30 Erie Co 315—In re McFadden's Will, Orph, 3 Fiduciary 611—In re Koslosky's Estate, Orph, 2 Fiduciary 570—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364
- RI—Deighan v Hanaway, 14 A 2d 811, 65 R I 322—Rynn v Rynn, 181 A 289, 55 R I 310
- SD—In re Thorpe's Estate, 64 N W 2d 296
- Tenn—Hammond v Union Planters Nat Bank, 222 SW 2d 377, 189 Tenn 93
- Solar v Albertine, 193 SW 2d 111, 29 Tenn App 61—Fitch v American Trust Co, 4 Tenn App 87—Cofer v Cofer, 1 Tenn App 538
- Tex—In re Gray's Estate, Civ App, 279 SW 2d 936, error refused no reversible error—In re Hardwick's Estate, Civ App, 278 SW 2d 258, refused no reversible error—Smith v Smith, Civ App, 275 SW 2d 148, refused no reversible error—In re Good's Estate, Civ App, 274 SW 2d 900, error refused no reversible error—Pullen v Russ, Civ App, 226 SW 2d 876, error refused no reversible error—Barton v Bailey, Civ App, 202 SW 2d 277, error refused no reversible error—De La Garza v Gonzalez, Civ App, 186 SW 2d 845, refused for want of merit—Reeche v Williams, Civ App, 183 SW 2d 587, error refused 185 SW 2d 420, 143 Tex 365—Cameron v Houston Land & Trust Co, Civ App, 175 SW 2d 468, error refused—Krumb v Porter, Civ App, 152 SW 2d 495, error refused—Pratt v Hayward, Civ App, 151 SW 2d 874—Crook v Studdard, Civ App, 101 SW 2d 1068—Taylor v Small, Civ App, 71 SW 2d 895, error dismissed
- Va—Tate v Chumbley, 57 SE 2d 151, 190 Va 480—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581—Gilmer v Brown, 44 SE 2d 16, 186 Va 630
- Wash—In re Wiltzius' Estate, 253 P 2d 954, 42 Wash 2d 149—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—Thilman v Thilman, 193 P 2d 674, 30 Wash 2d 743—In re Whittier's Estate, 176 P 2d 281, 26 Wash 2d 833—In re Sinclair's Estate, 113 P 2d 65, 8 Wash 2d 611—In re Jolly's Estate, 85 P 2d 267, 197 Wash 349—Dean v Jordan, 79 P 2d 331, 194 Wash 661
- W Va—Ritz v Kingdon, 79 SE 2d 123—Prichard v Prichard, 65 SE 2d 65, 135 W Va 767
- Wis—In re Knierim's Will, 68 NW 2d 545, 268 Wis 596—In re Draheim's Will, 66 NW 2d 172, 267 Wis 382—In re Blued's Estate, 51 NW 2d 482, 261 Wis 32—In re Bickner's Estate, 49 NW 2d 404, 259 Wis 425—In re Schultz' Will, 36 NW 2d 698, 254 Wis 490—In re Bernhard's Will, 34 NW 2d 664, 253 Wis 521—In re Kintopp's Will, 27 NW 2d 481, 250 Wis 381—In re Peterson's Estate, 26 NW 2d 553, 250 Wis 158—In re Kaebisch's Will, 26 NW 2d 268, 249 Wis 629—In re Kerwin's Estate, 24 NW 2d 609, 249 Wis 248—In re Washburn's Will, 22 NW 2d 512 248 Wis 467—In re Kesich's Estate, 12 NW 2d 688, 244 Wis 374
- Wyo—In re Johnston's Estate, 181 P 2d 611, 63 Wyo 332
- 68 C J p 470 note 41 [a]
- Evidence held sufficient to show incapacity**
- Ala—Claburn v Mathews, 61 So 2d 83, 258 Ala 41
- Ark—Simpson v Burge, 224 SW 2d 830, 216 Ark 132—Boylard v Boyland, 203 SW 2d 192, 211 Ark 925—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735—Whiteley v Lehman, 80 SW 2d 71, 190 Ark 1178—Coop v Moore, 76 SW 2d 675, 190 Ark 32
- Cal—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 520
- In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666—In re Krause's Estate, 163 P 2d 505, 71 Cal App 2d 719—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390—In re Wolleb's Estate, 132 P 2d 864, 56 Cal App 2d 488—In re Downey's Estate, 124 P 2d 637, 51 Cal App 2d 275—In re Reiss' Estate, 123 P 2d 68, 50 Cal App 2d 398—In re Hansen's Estate, 100 P 2d 776, 38 Cal App 2d 99—In re Cashion's Estate, 81 P 2d 628, 27 Cal App 2d 689—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154—In re Gill's Estate, 58 P 2d 734, 14 Cal App 2d 526—In re Mullen's Estate, 47 P 2d 746, 8 Cal App 2d 684
- Colo—In re Porter's Estate, 240 P 2d 516, 125 Colo 16
- Conn—Trella v Prestoff, 22 A 2d 638, 128 Conn 337—Caldwell v Danforth, 200 A 577, 124 Conn 468
- DC—Fowler v Guschewsky, C A, 221 F 2d 878—Obold v Obold, 163 F 2d 32, 82 US App DC 268
- Fla—Vignes v Weiskopf, 42 So 2d 84—In re Walther's Estate, 6 So 2d 391, 149 Fla 431—Kuehmsted v Turnwall, 155 So 847, 115 Fla 692
- Ga—Ware v Hill, 71 SE 2d 630, 209 Ga 214—Belk v Collea, 61 SE 2d 464, 207 Ga 328—Thompson v Mitchell, 16 SE 2d 540, 192 Ga 750—Morgan v Bell, 5 SE 2d 897, 189 Ga 432
- Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72—In re Brown's Estate, 101 P 2d 11, 61 Idaho 320
- Ill—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160—Ergang v Anderson, 38 NE 2d 26, 378 Ill 312, 137 A L R 984—Sulzberger v Sulzberger, 23 NE 2d 46, 372 Ill 240
- Dombrowski v Von Bronk, 76 N E 2d 800, 333 Ill App 161—Wilson v Bell, 43 NE 2d 162, 315 Ill App 418—Blum v Buesking, 15 NE 2d 878, 296 Ill App 651
- Ind—McCord v Strader, 86 NE 2d 441 227 Ind 389
- Haas v Haas, 96 NE 2d 116, 121 Ind App 335, rehearing denied 98 NE 2d 232, 121 Ind App 335—Cynthiana State Bank of Cynthiana v Murphy, 88 NE 2d 252, 119 Ind App 685—Griffith v Thrall, 29 NE 2d 345, 109 Ind App 141
- Kan—In re Mead's Estate, 236 P 2d 831, 170 Kan 435—In re Crump's Estate, 166 P 2d 684, 161 Kan 154—In re Casida's Estate, 131 P 2d 644, 156 Kan 73—Gorman v Hickey, 64 P 2d 587, 145 Kan 54—Gibbons v Redmond, 49 P 2d 1035, 142 Kan 417, 103 A L R 893—Geopfert v Geopfert, 41 P 2d 741, 141 Kan 454
- Kv—Hollon's Ex'r v Graham, 280 S W 2d 544—Connors v Eble, 269 S W 2d 716—Baker v Murray, 160 S W 2d 27, 289 Ky 733—Compton v Smith, 150 S W 2d 657, 286 Ky 179—Kelly's Ex'r v Kelly, 149 S W 2d 17, 285 Ky 715
- La—Cormier v Myers, 65 So 2d 345, 223 La 259—Artigue v Artigue, 26 So 2d 699, 210 La 208
- Mass—Goddard v Dupree, 76 NE 2d 643, 322 Mass 247
- Mich—In re Antila's Estate, 57 N W 2d 492, 336 Mich 189
- Minn—In re Boese's Estate, 7 N W 2d 355, 213 Minn 440—In re Dahn's Estate, 292 N W 776, 208 Minn 86
- Miss—Cheatham v Burnside, 77 So 2d 719—Kirk v Kirk, 40 So 2d 548, 206 Miss 668—Bialock v Magee, 38 So 2d 708, 205 Miss 209
- Mo—Ambruster v Sutton, 244 SW 2d 65, 362 Mo 740
- Neb—In re Hunter's Estate, 39 N W 2d 418, 151 Neb 704
- NJ—In re Kuhn's Estate, 172 A 513, 116 N J Eq 94
- NM—In re Armijo's Will, 261 P 2d 833, 57 N M 649
- NY—In re Budziejko's Will, 97 N Y S 2d 307, 277 App Div 829—In re O'Donnell's Will, 90 N Y S 2d 31, 275 App Div 982—In re Noding's Will, 76 N Y S 2d 603, 273 App Div 849, affirmed 80 NE 2d 662, 298 N Y 517—In re Morrison's Will, 60 N Y S 2d 546, 270 App Div 552, affirmed 69 NE 2d 814, 296 N Y 652—In re Neish's Will, 289 N Y S 164, 248 App Div 798
- In re Youngling's Estate, 64 N Y S 2d 341—In re O'Connor's Estate, 48 N Y S 2d 651
- ND—In re Bratcher's Estate, 34 N W 2d 825, 76 ND 194
- Okla—Mason v Mohs, 285 P 2d 219—In re Thompson's Estate, 261 P 2d 577—Brummett v King, 251 P 2d 1062, 207 Okl 607—In re Felgar's Estate, 249 P 2d 455, 207 Okl 310—American Nat Red Cross v Gumberts, 247 P 2d 735, 207 Okl 96—Loftin v Yancey, 77 P 2d 107,

182 Okl 313—Alarcon v Dick, 62 P 2d 475, 178 Okl 247—In re Worrell's Estate, 29 P 2d 94, 167 Okl 172

Or—In re Person's Will, 272 P 2d 616, 202 Or 6—In re Lambert's Estate, 114 P 2d 125, 166 Or 529—In re Johnson's Estate, 91 P 2d 330, 162 Or 97

Pa—In re Imbrie's Estate, 37 A 2d 520, 349 Pa 158

R I—Nelson v Blake, 173 A 625  
Tenn—Bridges v Agee, 15 Tenn App 351—Nobles v Farmer, 9 Tenn App 6

Tex—Woods v Townsend, 192 SW 2d 884, 144 Tex 594

Lee v Daugherty, Civ App, 281 SW 2d 192, error refused no reversible error—Shadowens v Shadowens, Civ App, 271 SW 2d 165—Michalak v Dzierzanowski, Civ App, 270 SW 2d 276—Steinkamp v Erwin, Civ App, 249 SW 2d 1012—Birmingham v Coleman, Civ App, 211 SW 2d 245, refused no reversible error—Jowers v Smith, Civ App, 237 SW 2d 805—Montgomery v Willbanks, Civ App, 202 SW 2d 851, error refused no reversible error—Adamson v Burtle, Civ App, 186 SW 2d 388, refused for want of merit—Bogel v White, Civ App, 168 SW 2d 309, error refused—Treme v Thomas, Civ App, 161 SW 2d 124—Cheesborough v Corbett, Civ App, 155 SW 2d 942, error refused—Breeding v Naler, Civ App, 120 SW 2d 888, error dismissed

Utah—In re McCoy's Estate, 63 P 2d 620, 91 Utah 212

Va—Bruce v Elliott, 191 SE 654, 168 Va 490—Redford v Booker, 185 SE 879, 166 Va 561

Wash—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837—In re Ney's Estate, 48 P 2d 924, 183 Wash 503—In re Johanson's Estate, 35 P 2d 52, 178 Wash 628

Wis—In re Wright's Will, 62 NW 2d 409, 266 Wis 89—In re Bodus' Will, 36 NW 2d 926, 254 Wis 428—In re Mueller's Will, 28 NW 2d 367, 251 Wis 196—In re Delmady's Will, 28 NW 2d 301, 251 Wis 98—In re Lee's Will, 23 NW 2d 405, 249 Wis 59

Wyo—Branson v Roelofs, 70 P 2d 589, 52 Wyo 101  
68 C J p 470 note 41 [b]

#### Evidence held insufficient to show capacity

Minn—In re Luke's Estate, 19 NW 2d 5, 220 Minn 104

Mo—Ghidewell v Ghidewell, 230 SW 2d 752, 360 Mo 713

Neb—In re Coons' Estate, 64 NW 2d 301, 158 Neb 620

N J—In re Zalesky's Estate, 68 A 2d 174, 4 N J Super 544

In re Heim's Will, 40 A 2d 651, 136 N J Eq 138

N Y—In re Burchard's Will, 6 N Y S 2d 924, 255 App Div 785

In re Chinsky's Will, 270 NYS 822, 151 Misc 129  
Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

68 C J p 470 note 41 [c]

#### Evidence held insufficient to show incapacity

Ala—Locke v Sparks, 81 So 2d 670—Shelton v Gordon, 40 So 2d 95, 252 Ala 187—Hyde v Norris, 35 So 2d 181, 250 Ala 518

Ariz—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248—In re Cook's Estate, 159 P 2d 797, 63 Ariz 78—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167—Jones v National Bank of Commerce in Memphis, 249 SW 2d 105, 220 Ark 665—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Inman v McEachin, 184 SW 2d 949, 208 Ark 102—Gray v Fulton, 170 SW 2d 384, 205 Ark 675—Pernot v King, 110 SW 2d 539, 194 Ark 896—Purvey v Puryear, 94 SW 2d 695, 192 Ark 692

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

In re Dunne's Estate, 278 P 2d 733, 133 Cal App 2d 216—In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Wellauer's Estate, 236 P 2d 906, 107 Cal App 2d 268—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d 111—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re McCollum's Estate, 140 P 2d 176, 59 Cal App 2d 744—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738—In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709—In re Grant's Estate, 47 P 2d 508, 8 Cal App 2d 232

Fla—In re Kiggins' Estate, 67 So 2d 915—In re Garrett's Estate, 60 So 2d 281—Thomas v Eakins, 194 So 249, 141 Fla 802—In re James' Estate, 191 So 830, 140 Fla 463—Marston v Churchill, 187 So 762, 137 Fla 154—Henson v Denniston, 169 So 624, 124 Fla 843

Ga—Bowles v Bowles, 86 SE 2d 318, 211 Ga 461—Beman v Stenbridge, 85 SE 2d 434, 211 Ga 274—Orr v Orr, 67 SE 2d 209, 208 Ga 431—Leventhal v Baumgartner, 61 SE 2d 810, 207 Ga 412—Spivey v Spivey, 44 SE 2d 224, 202 Ga 644—Lyons v Bloodworth, 33 SE 2d 314, 199 Ga 44—Orr v Blalock, 25

SE 2d 668, 195 Ga 863—Griffin v Barrett, 187 SE 828, 183 Ga 152  
Ill—Heideman v Kelsey, 111 NE 2d 538, 414 Ill 453—Innis v Mueller, 84 NE 2d 837, 403 Ill 11—Smith v Peters, 75 NE 2d 341, 398 Ill 108—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576

Ind—Ludwick v Banet, App, 124 NE 2d 214—Noyer v Ecker, App, 119 NE 2d 902

Iowa—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307—In re Meyer's Estate, 37 NW 2d 265, 240 Iowa 1226—Hoover v Hoover, 26 NW 2d 98, 238 Iowa 88—In re Wilber's Estate, 281 NW 155, 225 Iowa 606

Kan—In re Arney's Estate, 254 P 2d 314, 174 Kan 64—In re Walter's Estate, 208 P 2d 262, 167 Kan 627—In re Harris' Estate, 201 P 2d 1062, 166 Kan 368

Ky—New v Creamer, 275 SW 2d 918—Tate v Tate's Ex'r, 275 SW 2d 597—Nunn v Williams, 254 SW 2d 698—Bennett v Kissinger, 231 SW 2d 74, 313 Ky 417—Rice v Pack, 209 SW 2d 327, 306 Ky 777—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180—Leach v Alger, 194 SW 2d 164, 302 Ky 149—Greer's Ex'r v Bishop, 96 SW 2d 851, 265 Ky 352—Thompson v Jordan, 2 SW 2d 640, 222 Ky 788

La—Succession of Schmidt, 53 So 2d 834, 219 La 675—Succession of Pizati, 50 So 2d 189, 218 La 549—Succession of Yeates, 35 So 2d 210, 213 La 541—Succession of Buck, 23 So 2d 215, 208 La 556—Succession of Beals, 187 So 275, 192 La 153—Succession of Lambert, 169 So 453, 185 La 416—Renfrow v McCain, 168 So 753, 185 La 135  
Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

Md—Koppal v Soules, 56 A 2d 48, 189 Md 346—Finch v Lee, 40 A 2d 371, 184 Md 98—Acker v Acker, 192 A 327, 172 Md 477—Smith v Biggs, 189 A 256, 171 Md 528

Mass—Boston Safe Deposit & Trust Co v Blaisdell, 127 NE 2d 796

Mich—In re Padjan's Estate, 65 NW 2d 743, 340 Mich 277—In re Kenealy's Estate, 59 NW 2d 38, 336 Mich 657—In re Solomon's Estate, 53 NW 2d 597, 334 Mich 17—In re Shuttuck's Estate, 37 NW 2d 555, 324 Mich 568—In re Johnson's Estate, 13 NW 2d 852, 308 Mich 366—In re Thiede's Estate, 4 NW 2d 47, 301 Mich 658—In re Rowling's Estate, 289 NW 136, 291 Mich 218—In re Leech's Estate, 269 NW 181, 277 Mich 299—In re Miller's Estate, 268 NW 792, 277 Mich 11—In re Snider's Estate, 267 NW 579, 275 Mich 610  
Miss—Summer v Summer, 80 So 2d 35—Norman v Norman, 18 So 2d 130, 196 Miss 597.

Mo—Glover v Bruce, 265 SW 2d 316—Whitacre v Kelly, 134 SW 2d 121, 345 Mo 489.

unprobable, and in disregarding as untrue all the evidence of proponent which is in any way contradicted or otherwise impeached<sup>93</sup>

On the probate of a will it has been held that capacity must be proved by a preponderance of the

evidence<sup>94</sup> A preponderance of the evidence is sufficient,<sup>95</sup> and it is not necessary that capacity be clearly shown,<sup>96</sup> or proved to the satisfaction of the jury<sup>97</sup> According to other decisions capacity must be shown by clear and convincing proof<sup>98</sup>

Shearrer v Shearrer, App, 259 S W 2d 705—Gee v Bess, App, 176 S W 2d 516

Mont—In re Sales' Estate, 89 P 2d 1043, 108 Mont 203

Neb—In re Witte's Estate, 16 N W 2d 203, 145 Neb 295, rehearing denied 17 N W 2d 477, 145 Neb 295

N J—In re Weeks' Estate, 103 A 2d 43, 29 N J Super 533—In re Fleming's Estate, 89 A 2d 54, 19 N J Super 565—In re Filo's Will, 75 A 2d 517, 9 N J Super 146

In re Phillips' Estate, 57 A 2d 387, 141 N J Eq 362—In re Rein's Will, 50 A 2d 380, 139 N J Eq 122—In re Delaney's Estate, 25 A 2d 901, 131 N J Eq 454—In re McCormb, 177 A 849, 118 N J Eq 119

N M—Calloway v Miller, 266 P 2d 365, 58 N M 124

N Y—In re White's Will, 114 N Y S 2d 431, 280 App Div 454—In re Swing's Will, 93 N Y S 2d 232, 276 App Div 844, affirmed 95 N E 2d 404 301 N Y 716—In re Nowak's Estate, 63 N Y S 2d 848, 270 App Div 1075—In re Herskowitz' Will, 24 N Y S 2d 722, 260 App Div 1033—In re Spear's Will, 16 N Y S 2d 138, 258 App Div 892—In re Potter's Will, 289 N Y S 770, 248 App Div 808, affirmed 10 N E 2d 542, 274 N Y 544

In re Brown's Will, 15 N Y S 2d 387, 171 Misc 1008

In re Buttikofer's Will, 79 N Y S 2d 252, affirmed 93 N Y S 2d 920, 226 App Div 863—In re Jerrells' Will, 63 N Y S 2d 499, appeal dismissed 70 N Y S 2d 580

N D—Stormon v Weiss, 65 N W 2d 475

Ohio—Green v Green, 90 N E 2d 170, 86 Ohio App 285—Dinnie v Schiele, 22 N E 2d 917, 61 Ohio App 511

Okl—In re Wadsworth's Estate, 273 P 2d 997—In re Harjo's Estate, 241 P 2d 373, 206 Okl 88—In re Heit-holt's Estate, 213 P 2d 865, 202 Okl 351—In re Wheeling's Estate, 175 P 2d 317, 198 Okl 81—Slater v Phipps, 143 P 2d 133, 193 Okl 267—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Shipman's Estate, 85 P 2d 317, 184 Okl 56—In re Harney's Estate, 46 P 2d 503, 172 Okl 580

Or—In re Comegys' Estate, 284 P 2d 758—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Murray's Estate, 144 P 2d 1016, 173 Or 209—In re Mitchell's Estate, 76 P 2d 283, 158 Or 375

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Ross' Estate, 49

A 2d 392, 355 Pa 112—In re Plege's Estate, 17 A 2d 331, 340 Pa 529

In re Schuhmacher's Estate, 58 Pa Dist & Co 561

In re Secondino's Estate, Orph, 4 Fiduciary 337—In re Sower's Estate, Orph, 27 Wash Co 141—In re Rife's Will, Orph, 59 York Leg Rec 169

RI—Talbot v Bridges, 173 A 72, 54 RI 337

Tex—Burgess v Sylvester, 182 S W 2d 358, 143 Tex 25

Bell v Bell, Civ App, 248 S W 2d 978, error refused no reversible error—Cruz v Prado, Civ App, 239 S W 2d 650—In re Fowler's Estate, Civ App, 87 S W 2d 896, error dismissed

Utah—In re Buttars' Estate, 261 P 2d 171

Va—Mullins v Coleman, 7 SE 2d 877, 175 Va 235

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Mikelson's Estate, 247 P 2d 540, 41 Wash 2d 97—In re Kinssies' Estate, 214 P 2d 693, 35 Wash 2d 723—In re Kessler's Estate, 211 P 2d 496, 35 Wash 156—In re Kane's Estate, 145 P 2d 893, 20 Wash 2d 76—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Swan's Estate, 74 P 2d 207, 192 Wash 627—In re Bernhard's Estate, 74 P 2d 197, 192 Wash 546—In re McGhee's Estate, 62 P 2d 1336, 188 Wash 550—In re Bradley's Estate, 59 P 2d 1129, 187 Wash 221

Wis—In re Williams' Will, 41 N W 2d 191, 256 Wis 338—In re Szperka's Will, 35 N W 2d 209, 254 Wis 153, mandate vacated 35 N W 2d 911, 254 Wis 153—In re King's Will, 29 N W 2d 69, 251 Wis 269—In re Radel's Estate, 22 N W 2d 475, 248 Wis 558—In re Scherrer's Estate, 7 N W 2d 848, 242 Wis 211—In re Sawall's Estate, 3 N W 2d 373, 240 Wis 265—In re Truehl's Will, 264 N W 254, 220 Wis 134

68 C J p 470 note 41 [d]

93. Cal—In re Gill's Estate, 58 P 2d 734, 14 Cal App 2d 526

94. Ind—Kaiser v Happel, 36 N E 2d 784, 219 Ind 28

Me—In re Loomis' Will, 174 A 38, 133 Me 81

Mass—Santry v France, 97 N E 2d 533, 327 Mass 174

Neb—In re Coons' Estate, 64 N W 2d 301, 158 Neb 620—In re Kaiser's Estate, 34 N W 2d 366, 150 Neb 295—In re Inda's Estate, 19 N W 2d 37, 146 Neb 179—In re Witte's Estate, 16 N W 2d 203, 145 Neb 295,

rehearing denied 17 N W 2d 477, 145 Neb 295

N Y—In re Gedney's Will, 142 N Y S 157

Or—In re Lambert's Estate, 114 P. 2d 125, 166 Or 529

RI—Nelson v Blake, 173 A 625

Tex—In re Boultinghouse's Estate, Civ App, 267 S W 2d 614, error dismissed—Golaz v Golaz, Civ App, 77 S W 2d 879

#### Burden same as in other civil cases

Notwithstanding that setting aside a will is not a light matter, burden of proving testamentary capacity is neither less nor greater than in other civil cases involving fact issues

Minn—In re Forsythe's Estate, 22 N W 2d 19, 221 Minn 303, 167 A. L R 1

Weight of evidence depends, not necessarily on the greater number of witnesses, even though there be a cloud of them, but on witnesses who exhibit more intimate and competent knowledge of testator's mental condition at the time involved and therefore speak with greater probative value

Tex—Lord v Hatcher, Civ App, 83 S W 2d 758, error dismissed

#### Prima facie case

Where proponent has made out a prima facie case of testamentary capacity at time will was executed, and contestant has not destroyed such case by evidence introduced, will should be admitted to probate

Tex—Taylor v Taylor, Civ App, 281 S W 2d 232, error refused no reversible error.

#### Duty to weigh evidence

In will contest on ground of mental incapacity of testatrix, trial court has duty of weighing and giving effect to opinions of friends, relatives, and attending physician as to whether testatrix was of sound and disposing mind and was capable of understanding purpose or nature of business being transacted and knew what was being done when will was made

Utah—In re McCoy's Estate, 63 P 2d 620, 91 Utah 212

95. Tex—Reinhardt v. Nehring, Com App, 291 S W 873

Earl v Mundy, Civ App, 227 S. W 716, error refused

96. Tex—Earl v Mundy, supra

97. Tex—Reinhardt v. Nehring, Com App, 291 S W 873

In re Bartels' Estate, Civ App, 164 S W 859

98. Or—Snyder v De Remer, 22 P. 2d 877, 143 Or 414.

The same substantial proof of testamentary capacity is required in the case of a codicil merely appointing an executor as in the case of a codicil disposing of the assets of the testator.<sup>99</sup> Evidence tending to prove testamentary capacity may be direct<sup>1</sup> or circumstantial.<sup>2</sup>

According to some decisions, on the probate of a will incapacity must be proved by a preponderance of the evidence.<sup>3</sup> Incapacity need be established only to the reasonable satisfaction of the jury.<sup>4</sup> Under other authorities proof of incapacity on probate must be convincing,<sup>5</sup> clear and convincing,<sup>6</sup> compelling,<sup>7</sup> clear and strong,<sup>8</sup> clear and strong or compelling,<sup>9</sup> or clear, convincing, and satisfactory,<sup>10</sup> and a mere

preponderance is insufficient,<sup>11</sup> and so are opinions or suspicions not based on evidence.<sup>12</sup> It has also been held that on probate incapacity must be clearly established,<sup>13</sup> in a positive manner,<sup>14</sup> by substantial evidence,<sup>15</sup> by the manifest weight of the evidence,<sup>16</sup> or by testimony sufficient to sustain a reasonable inference that the testator was incompetent,<sup>17</sup> and a verdict that a will is invalid for lack of testamentary capacity must be supported by the testimony as a whole.<sup>18</sup> Proof of incapacity must be irresistible.<sup>19</sup> Where the attack on the will is based on both mental incapacity and undue influence, the evidence is not required to be as convincing as where only a charge of mental incapacity is made.<sup>20</sup> The

- 99 N.Y.—In re Youngling's Estate, 64 N.Y.S.2d 341
1. R.I.—Talbot v Bridges, 173 A.72, 54 R.I. 337
2. R.I.—Talbot v Bridges, *supra*
3. Cal.—In re Lungenfelter's Estate, 241 P.2d 990, 38 Cal.2d 571  
In re Volen's Estate, 262 P.2d 658, 121 Cal.App.2d 161—In re Greenhill's Estate, 221 P.2d 310, 99 Cal.App.2d 155—In re Alegria's Estate, 197 P.2d 571, 87 Cal.App.2d 645—In re Llewellyn's Estate, 189 P.2d 822, 83 Cal.App.2d 534, hearing denied 191 P.2d 419, 83 Cal.App.2d 534—In re Rich's Estate, 179 P.2d 373, 79 Cal.App.2d 22—In re Schwartz' Estate, 155 P.2d 76, 67 Cal.App.2d 512—In re Ewan's Estate, 153 P.2d 782, 67 Cal.App.2d 111—In re Agnew's Estate, 151 P.2d 126, 65 Cal.App.2d 553—In re Garvey's Estate, 101 P.2d 551, 38 Cal.App.2d 449—In re Peterkin's Estate, 73 P.2d 897, 23 Cal.App.2d 597
- Ill.—Auerbach v Continental Ill. Nat. Bank & Trust Co. of Chicago, 91 N.E.2d 144, 340 Ill.App. 64
- Me.—In re Haley's Estate, 84 A.2d 808, 147 Me. 173—Appeal of Martin, 179 A. 655, 133 Me. 422
- Mont.—In re Cissel's Estate, 66 P.2d 779, 104 Mont. 306
- N.J.—In re Heim's Estate, 39 A.2d 248, 22 N.J. Misc. 241, reversed on other grounds 40 A.2d 651, 136 N.J. Eq. 138
- N.C.—In re York's Will, 55 S.E.2d 791, 231 N.C. 70
- S.C.—McCollum v Banks, 50 S.E.2d 199, 213 S.C. 476
- Tenn.—*Corpus Juris* cited in Pierce v Pierce, 127 S.W.2d 791, 792, 174 Tenn. 508
- Utah.—In re Buttars' Estate, 261 P.2d 171  
68 C.J. p. 473 note 47
4. Ala.—Johnston v Johnston, 57 So. 450, 174 Ala. 220
- Satisfactory proof required**  
Cal.—In re Nolan's Estate, 78 P.2d 456, 25 Cal.App.2d 738.
5. Or.—In re Hill's Estate, 256 P.2d 735, 198 Or. 307
6. N.J.—In re Hoover's Estate, 91 A.2d 155, 21 N.J. Super. 323
7. Pa.—In re King's Estate, 87 A.2d 469, 369 Pa. 523—In re Olshefski's Estate, 11 A.2d 487, 337 Pa. 420
8. Pa.—In re Lauer's Estate, 41 A.2d 552, 351 Pa. 438
9. Pa.—Williams v McCarroll, 97 A.2d 14, 374 Pa. 281—In re Johnson's Estate, 87 A.2d 188, 370 Pa. 125—In re Higbee's Estate, 75 A.2d 599, 365 Pa. 381  
In re Meckley's Estate, Orph., 54 Lanc. Rev. 173—In re Gayman's Estate, Orph., 21 Northumb. Leg. J. 149—In re Nelson's Estate, Orph., 66 York Leg. Rec. 161—In re Corne's Estate, Orph., 66 York Leg. Rec. 22
10. Wis.—In re Bauer's Estate, 59 N.W.2d 481, 264 Wis. 556—In re Wright's Will, 62 N.W.2d 409, 266 Wis. 89—In re Bickner's Estate, 49 N.W.2d 404, 259 Wis. 425—In re Williams' Will, 41 N.W.2d 191, 256 Wis. 338—In re King's Will, 29 N.W.2d 69, 251 Wis. 269—In re Delmady's Will, 28 N.W.2d 301, 251 Wis. 98—In re Lee's Will, 23 N.W.2d 405, 249 Wis. 59—In re Scherrer's Estate, 7 N.W.2d 848, 242 Wis. 221—In re Sawall's Estate, 3 N.W.2d 373, 240 Wis. 265—In re Olson's Guardianship, 295 N.W. 24, 236 Wis. 301  
68 C.J. p. 473 note 49
11. Wis.—In re Emerson's Will, 198 N.W. 441, 183 Wis. 437
12. Pa.—In re Lauer's Estate, 41 A.2d 552, 351 Pa. 438
13. N.Y.—In re Benjamin's Will, 136 N.Y.S. 1070
14. Pa.—In re McNitt's Estate, 78 A. 32, 229 Pa. 71  
68 C.J. p. 473 note 52.
15. Cal.—In re Greenhill's Estate, 221 P.2d 310, 99 Cal.App.2d 155—In re Leonard's Estate, 207 P.2d 66, 92 Cal.App.2d 420—In re Schwartz' Estate, 155 P.2d 76, 67 Cal.App.2d 512
- Kan.—In re Harris' Estate, 201 P.2d 1062, 166 Kan. 368
- Ky.—New v Creamer, 275 S.W.2d 918—Tate v Tate's Ex'r, 275 S.W.2d 597—Bickel v Louisville Trust Co., 197 S.W.2d 444, 303 Ky. 356—Bodine v Bodine, 44 S.W.2d 840, 241 Ky. 706
- Pa.—In re Nelson's Estate, Orph., 66 York Leg. Rec. 161
16. Pa.—Buhan v Keslar, 194 A. 917, 328 Pa. 312—In re Cookson's Estate, 188 A. 904, 325 Pa. 81  
In re Brooks' Estate, Orph., 27 Del. Co. 140—In re Melvin's Estate, Orph., 45 Lack. Jur. 229—In re Singer's Estate, Orph., 45 Lanc. Rev. 585—In re Lauer's Estate, Orph., 58 York Leg. Rec. 157, affirmed 41 A.2d 552, 351 Pa. 438—In re Rife's Will, Orph., 59 York Leg. Rec. 169  
68 C.J. p. 473 note 54
17. Neb.—In re O'Donnell's Estate, 64 N.W.2d 116, 158 Neb. 583—In re Benson's Estate, 46 N.W.2d 176, 153 Neb. 824—In re Scoville's Estate, 31 N.W.2d 284, 149 Neb. 415—In re Inda's Estate, 19 N.W.2d 37, 146 Neb. 179—In re Witte's Estate, 16 N.W.2d 203, 145 Neb. 295, rehearing denied 17 N.W.2d 477, 145 Neb. 295
18. Pa.—In re Cookson's Estate, 188 A. 904, 325 Pa. 81  
In re Rife's Will, Orph., 59 York Leg. Rec. 169—In re Lauer's Estate, Orph., 58 York Leg. Rec. 157, affirmed 41 A.2d 552, 351 Pa. 438—In re Hollinger's Estate, Orph., 58 York Leg. Rec. 17, affirmed 41 A.2d 554, 351 Pa. 364
19. N.Y.—In re Hock's Will, 129 N.Y.S. 196, 74 Misc. 15, 8 Mills Surr. 415
20. Ky.—Smith v Ridner, 168 S.W.2d 559, 293 Ky. 66
- Evidence held sufficient to support finding against will**  
Ky.—Smith v Ridner, 168 S.W.2d 559, 293 Ky. 66

degree of proof needed to prove incapacity depends on the type of insanity from which testator was suffering <sup>21</sup>

In an action to set aside the will or revoke the probate thereof it has been held that the proof of incapacity must preponderate,<sup>22</sup> and it is not sufficient if it merely raises a doubt as to testator's capacity <sup>23</sup> According to other decisions evidence of incapacity must be strong,<sup>24</sup> substantial,<sup>25</sup> clear,<sup>26</sup> or cogent, satisfactory, and convincing,<sup>27</sup> and a citizen should not be deprived of the right to dispose of property by will on slight, remote, and wholly unsubstantial and nonprobative testimony <sup>28</sup> Evidence against the will must outweigh both the evidence for the will and the presumption arising from the probate court order admitting the will to probate <sup>29</sup> In weighing the sufficiency of the contestant's case the testimony of the proponent's witnesses must be taken into account <sup>30</sup> It must be shown that the mental incapacity of the testator was of such a nature as to affect his testamentary capacity <sup>31</sup>

Testimony as to testamentary capacity must be based on facts sufficiently definite to permit a witness to be able to give a correct opinion <sup>32</sup> Incapacity to make a will may be established by circumstantial evidence,<sup>33</sup> and need not be proved by direct evidence <sup>34</sup> Incapacity may be shown by many witnesses, testifying as to slight circumstances, which although inconsequential when standing alone, present convincing proof when taken together <sup>35</sup> The mere act of making a will is some evidence as an assertion of capacity <sup>36</sup> Where a will appears to be a rational act performed in a rational manner, the presumption of capacity and such apparently rational act amount to evidence of testamentary capacity <sup>37</sup>

Proof that the testator thoroughly understood the character and extent of his property, the natural objects of his bounty, and what disposition he was making of the property is sufficient to establish testamentary capacity <sup>38</sup> Lack of testamentary capacity may be proved by evidence of any one of three

21. La.—Artigue v Artigue, 26 So 2d 699, 210 La 208

22. Ariz.—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Cal.—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d 111

Fla.—In re Kiggins' Estate, 67 So 2d 915

Tex.—Bell v Bell, Civ App, 248 S W 2d 978, error refused no reversible error—Jowers v Smith, Civ App, 237 S W 2d 805  
68 C J p 473 note 57

23. Ill.—Millage v Noble, 166 NE 50, 334 Ill 315  
68 C J p 473 note 58

24. La.—Clanton v Shattuck, 30 So 2d 823, 211 La 750

Wash.—In re Kinssies' Estate, 214 P 2d 693, 35 Wash 2d 723

25. Mo.—Berkemeier v Reller, 296 S W 739, 317 Mo 614

26. Va.—Wooddy v Taylor, 77 SE 498, 114 Va 737

27. La.—Succession of Mithoff, 122 So 886, 168 La 624

Wash.—In re Geissler's Estate, 177 P 330, 104 Wash 452

#### Cogent and convincing

Wash.—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Ney's Estate, 48 P 2d 924, 183 Wash 503—In re Johanson's Estate, 35 P 2d 52, 178 Wash 628—In re Jones' Estate, 34 P 2d 1111, 178 Wash 433

#### Clear, cogent, and convincing

Wash.—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846—In re Wiltzius' Estate, 253 P 2d 954, 42 Wash 2d 149—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Johnson's Estate, 148 P 2d 962, 20 Wash 2d 628—In re Jolly's Estate, 85 P 2d 267, 197 Wash 349

28. Ky.—Jackson Ex'r v Semones, 98 S W 2d 505, 266 Ky 352

#### Suspicion or surmise

The right to dispose of property by will is not to be denied upon evidence amounting to little more than suspicion or surmise of testamentary incapacity

Tex.—Cruz v Prado, Civ App, 239 S W 2d 650

#### Mere inference

A person cannot by mere inference be deprived of his legal right to dispose of property as he sees fit

Tex.—Reiche v Williams, Civ App, 183 S W 2d 587, error refused 185 S W 2d 420, 143 Tex 365

29. Ohio.—Kennedy v Walcutt, 161 NE 336, 118 Ohio St 442  
Spidel v Warrick, App, 78 NE 2d 746

Operation and effect of probate see infra §§ 573–580

30. Cal.—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754  
68 C J p 473 note 64

31. Cal.—In re Burns' Estate, 1 P 2d 995, 115 Cal App 408  
68 C J p 473 note 65

32. Kan.—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210—In re Cross' Estate, 201 P 2d 1052, 166 Kan 318

33. Tex.—In re Boultinghouse's Estate, Civ App, 267 S W 2d 614, error dismissed

**Proof of facts from which mental incapacity may reasonably and naturally be inferred may be sufficient**  
Colo.—In re Porter's Estate, 240 P 2d 516, 125 Colo 16

34. Cal.—In re Lenci's Estate, 288 P 841, 106 Cal App 171

35. Cal.—In re Lenci's Estate, supra  
Iowa.—Bokelman's Will v Smith, 159 NW 975

36. Mass.—Haddock v Boston, etc., R Co, 15 NE 495, 146 Mass 155, 4 Am SR 295

37. Okl.—In re Riddle's Estate, 25 P 2d 763, 65 Okl 248

68 C J p 473 note 69  
Presumption of capacity see supra § 31

38. Cal.—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388  
68 C J p 488 note 57

Weight and sufficiency, as affecting testamentary capacity, of evidence relating to

Mode and disposition of property see infra § 62

Natural objects of testator's bounty see infra § 62 b

Understanding as to property see infra § 73

#### Evidence held sufficient

(1) To establish that testator was capable of knowing extent of his property and natural objects of his



facts, namely, that the testator did not have mental capacity sufficient to know the extent of his property, or sufficient to know and comprehend in a general way the natural objects of his bounty, or sufficient to know the distribution of his estate that he wished to make,<sup>39</sup> and in order to prove that testator did not have testamentary capacity, any one of those facts must be established,<sup>40</sup> but if the cumulative effect of all the evidence is such as to leave no doubt in any juror's mind that at least one of such facts was established, then testamentary capacity has been established even though there would not be unanimous concurrence in the findings as to the evidentiary facts<sup>41</sup>

Testamentary incapacity is not sufficiently proved by evidence merely showing that a testator made a will instead of permitting his property to pass under the statutes of descent and distribution,<sup>42</sup> that the testator could not read or write English,<sup>43</sup> that he violated dict restrictions,<sup>44</sup> or that the will was dated several days prior to the date on which it was actually executed<sup>45</sup> Testimony tending to show feebleness of intellect is not in itself sufficient to establish lack of testamentary capacity unless it was so great as to render the testator incapable of appreciating the nature and consequences of his

act<sup>46</sup> Mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question<sup>47</sup> The claimed infirmities of mind or body must be shown to have had a direct bearing on the testamentary act, and the evidence must establish the fact that the deceased devised or bequeathed his property in a manner which, except for the claimed infirmities, he would not have done<sup>48</sup>

The fact that a nonattesting witness who has testified that the testator was incompetent to make a will did business with him about the time the will was made and took his acknowledgment to important contractual papers bears directly on the credibility of the testimony.<sup>49</sup>

*Attending physicians and nurses* In determining the mental capacity of the testator, great weight is to be attached to testimony of attending physicians<sup>50</sup> Strong testimony is required to overcome it,<sup>51</sup> and it may not lightly be brushed aside

bounty and nature and effect of the act of executing his will

Ill—Gilbert v Oneale, 21 NE 2d 282, 371 Ill 427—Szaist v Schuerr, 20 NE 2d 587, 371 Ill 289

Tex—Jones v Selman, Civ App., 109 SW 2d 1003, error dismissed 68 CJ p 488 note 57 [a]

(2) To show that testator had sufficient active memory to comprehend, without prompting, his relatives' situation and relation and condition and extent of his property

Wis—In re Klagstad's Will, 58 N W 2d 636, 264 Wis 269

(3) To warrant conclusion that testator could no longer remember his property or objects of his bounty

Cal—In re Becker's Estate, 220 P 2d 766, 98 Cal App 2d 574

(4) To sustain finding that decedent did not possess sufficient active memory to be able to collect and comprehend without prompting, the condition of his property, his relations to those persons who might properly be his beneficiaries and the scope and bearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other and be able to form a rational judgment in relation to them

Wis—In re Delmady's Will, 28 NW 2d 301, 251 Wis 98.

#### Evidence held insufficient

(1) To show that testatrix did not know extent of her property or natural objects of her bounty

Kan—Steward v Marker, 57 P 2d 75, 143 Kan 860 68 CJ p 488 note 57 [b]

(2) To show that testator did not know effect of will on rights of widow

Kan—In re Gereke's Estate, 195 P 2d 323, 165 Kan 249

(3) To show testator's lack of sufficient mental capacity to know natural objects of his bounty, his obligations to them, and character and size of his estate and to dispose thereof according to fixed purpose of his own at time of executing will

Ky—Middleton v Skaggs, 91 SW 2d 1016, 263 Ky 81

Pa—In re Morris' Estate, Orph., 21 Wash Co 120

68 CJ p 488 note 57 [b]

39 Iowa—Ipsen v Ruess, 41 NW 2d 658, 241 Iowa 730

40. Kan—In re Walter's Estate, 208 P 2d 262, 167 Kan 627

41. Iowa—Ipsen v Ruess, 41 NW 2d 658, 241 Iowa 730

42 Mich—In re McCarbery, 219 N W 707, 243 Mich 39

43. Ill—In re Calo's Estate, 115 NE 2d 778, 1 Ill 2d 376

44. Md—Sellers v Qualls, 110 A 2d 73

45 Okl—In re Smith's Estate, 172 P 2d 328, 197 Okl 405

46. Ark—McWilliams v Neill, 155 SW 2d 344, 202 Ark 1087—Puryear v Puryear, 94 SW 2d 695

47 Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Klopstock's Estate, 88 P 2d 722, 31 Cal App 2d 568

48. Cal—In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720 —In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512

49. W Va—Prichard v Prichard, 65 SE 2d 65, 135 W Va 767

50 Va—Hall v Hall, 23 SE 2d 810, 181 Va 67

W Va—Prichard v Prichard, 65 SE 2d 65, 135 W Va. 767

51. Pa—In re Franz' Estate, 84 A 2d 292, 368 Pa 618—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75

In re Loeper's Estate, Orph., 41 Berks Co 131



or permitted to be outweighed by circumstances which give rise merely to suspicions<sup>52</sup> Testimony of nurses to the effect that testatrix was mentally incompetent should be considered in the light of the fact that the testatrix was a most unsatisfactory, difficult, and uncooperative patient<sup>53</sup>

*Testimony of attorney or draftsman* The testimony of the attorney or draftsman who drew the will is entitled to considerable weight,<sup>54</sup> and strong testimony is required to overcome it<sup>55</sup> The testimony of an attorney who had served a testator and had become familiar with his habits of thought and conduct and who had declined to prepare his will is entitled to serious consideration as proof of the testator's incompetency<sup>56</sup>

*Testimony of beneficiaries* receiving small sums under the will is entitled to credit in the absence of a challenge other than a minor interest<sup>57</sup>

*Expert testimony* The trial court is not bound to accept as true the opinion evidence of an expert witness as to the competency of the testator where lay witnesses have testified to the contrary<sup>58</sup> Expert testimony of physicians who had medical, and not legal, standards of insanity in view will not be

allowed to prevail against a mass of evidence showing competency to make a will<sup>59</sup>

*Rebutting presumption of sanity* Contestants must produce evidence sufficient to rebut the presumption of testamentary capacity<sup>60</sup> A mere scintilla of evidence is not sufficient to overcome the presumption of sanity,<sup>61</sup> to rebut the presumption the evidence must be substantial,<sup>62</sup> or cogent, satisfactory, and convincing<sup>63</sup> In rebutting the presumption of sanity, the testator need not be proved to be notoriously insane, but merely to have had such mental capacity at the time of the making of the will that he was not of sufficiently sound mind fully to understand the nature of the testamentary act and appreciate its effects<sup>64</sup>

## § 59. Suicide by Testator

Testamentary incapacity is not established by the mere fact that the testator committed suicide or attempted to do so, but that fact is to be considered with other evidence.

Testamentary incapacity is not established by the mere fact that the testator committed suicide<sup>65</sup> or attempted to do so<sup>66</sup> The fact of suicide alone is not sufficient to overcome the presumption of sanity<sup>67</sup> It is a fact to be considered with other evi-

52. Wis—In re Kesich's Estate, 12 NW 2d 688, 244 Wis 374

53. Wash—In re Denison's Estate, 162 P 2d 245, 23 Wash 2d 699

54. Ky—Martine v Roadcap, 136 S W 2d 16, 281 Kv 389

Tex—Barton v Bailey, Civ App, 202 SW 2d 277, error refused no reversible error

Va—Hall v Hall, 23 SE 2d 810, 181 Va 67

W Va—Prichard v Prichard, 65 S E 2d 65, 135 W Va 767

Weight accorded to testimony of attorney who drew will and became witness thereto see infra § 75

55. Pa—In re Franz' Estate, 84 A 2d 292, 368 Pa 618—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa 75

In re Loeper's Estate, Orph, 47 Berks Co 131

56. Cal—In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666

57. Ky—Martine v Roadcap, 136 S W 2d 16, 281 Ky 389

58. Kan—Mingle v Hubbard, 293 P 513, 131 Kan 844

Ky—Nugent v Nugent's Ex'r, 135 S W 2d 877, 281 Ky 263

Pa—In re Maren's Estate, Orph, 42 Sch Leg Rec 5

Expert testimony held entitled to no weight against uncontroverted

testimony that testatrix actually dictated will

Mich—In re Aylward's Estate, 219 NW 697, 243 Mich 9

59. Cal—In re Guilbert's Estate, 188 P 807, 46 Cal App 55

Pa—In re Davis' Estate, Orph, 28 West LJ 171

60. Ariz—In re Walters' Estate, 267 P 2d 896, 77 Ariz 122

Cal—In re Rich's Estate, 179 P 2d 373, 79 Cal App 2d 22

61. NY—In re Spang's Will, 188 NYS 754, 197 App Div 310

In re Burnham's Will, 189 NY S 182, 115 Misc 588, reversed on other grounds 194 NYS 811, 201 App Div 621

Presumption of sanity see supra § 31

62. Cal—In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638—In re Llewellyn's Estate, 189 P 2d 822,

83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480

63. La—Lebleu v Manning, 74 So 2d 384, 225 La 1087—Succession of Schmidt, 53 So 2d 834, 219 La 675

Similarity to criminal case

The degree of proof required has been likened to that necessary in criminal cases to overcome the presumption of innocence.

La—Succession of Lambert, 169 So 453, 185 La 416

Succession of Knight, App, 151 So 230

64. La—Clanton v Shattuck, 30 So 2d 823, 211 La 750—Artigue v Artigue, 26 So 2d 699, 210 La 208

65. Cal—In re Lungenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

Iowa—Corpus Juris cited in In re Grange's Estate, 2 NW 2d 635, 641, 231 Iowa 964

68 CJ p 474 note 73

66. NJ—In re Rein's Will, 50 A 2d 380, 139 NJ Eq 122

68 CJ p 474 note 72

Suicide as affecting capacity in general see supra § 14

Presumption arising from suicide see supra § 32

Evidence held sufficient

To establish that near asphyxiation of testator by illuminating gas seven and one half months after execution of will was an accident and not an unsuccessful attempt at suicide

NJ—In re Rein's Will, supra.

67. Iowa—Corpus Juris cited in In re Grange's Estate, 2 NW 2d 635, 641, 231 Iowa 964

68 CJ p 474 note 74

Presumption of sanity see supra § 31

denge,<sup>68</sup> although it is not conclusive<sup>69</sup>

## § 60. Hereditary Insanity

In the absence of proof of insane conduct, the existence of insanity in the testator cannot be inferred from evidence that his ancestors or relatives were insane, and proof of hereditary tendency to insanity will not of itself suffice to show that any mental disorder exists.

In the absence of any proof of insane conduct on the part of a testator, the existence of insanity in him cannot be inferred from evidence that his ancestors or relatives were insane.<sup>70</sup> Proof of hereditary tendency to insanity will not of itself suffice to show that any mental disorder exists.<sup>71</sup>

## § 61. Intoxication, Habitual Drunkenness, and Use of Drugs

Testamentary incapacity is not established by mere proof of the testator's use of intoxicants or drugs, al-

though incapacity is established if the use of intoxicants or drugs deprives the testator of the requisite mentality for the execution of a will

Testamentary incapacity is not established by mere proof of the testator's use of intoxicants<sup>72</sup> or drugs,<sup>73</sup> and proof that as a result of chronic alcoholism testator had sustained loss of memory and impairment of other mental faculties does not establish incapacity to make a will.<sup>74</sup> Incapacity is established, however, if the use of intoxicants or drugs deprives the testator of the requisite mentality for the execution of a will.<sup>75</sup>

*An adjudication that the testator was a habitual drunkard* is only prima facie evidence of testamentary incapacity,<sup>76</sup> and not conclusive.<sup>77</sup> A commitment to an institution for inebriety is not prima facie evidence of permanent impairment of mental faculties.<sup>78</sup>

68 Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571  
—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 520

Ill—Wilkerson v Service, 94 NE 50, 249 Ill 146, Ann Cas 1912A 41

Iowa—*Corpus Juris* cited in In re Grange's Estate, 2 NW 2d 635, 641, 231 Iowa 964

69 La—Godden v Burke's Ex'rs, 35 La Ann 160

Mass—Brooks v Barrett, 7 Pick 94

70 NY—Pringle v Burroughs, 78 NE 150, 185 NY 375, 7 Ann Cas 264

Presumptions see supra § 33

### Insanity of son

The fact that testator's son by first of testator's three wives was of unsound mind did not afford material evidence of testator's mental incompetency to make will, though insanity is heritable, where none of testator's nine children by his other wives showed any signs of insanity and testator was capable and successful business man, amassed considerable estate, and lived to age of eighty-five years without any question being raised as to his sanity  
Tenn—Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 27 Tenn App 342

*Suicide of father while insane, and insanity of brother*, were not of themselves sufficient to show that testatrix was without mental capacity to execute will  
Wyo—Branson v Roelofs, 70 P 2d 589, 52 Wyo 101

71. NY—Pringle v Burroughs, 78 NE 150, 185 NY 375, 37 NY Civ Proc 223, 7 Ann Cas 264

72. Ill—Gilbert v. Oneale, 21 NE 2d 283, 371 Ill 427

68 C J p 474 note 81

Use of intoxicants or drugs as af-

fecting capacity in general see supra §§ 25, 26

Presumption arising from use of intoxicants see supra § 34

### Evidence held sufficient

To show that the testator was mentally capable of making a will at the time of execution, despite some addiction to drink

Ga—Dutton v Nash, 197 SE 637, 186 Ga 292

RI—Killian v Mulligan, 124 A 97

Ky—Martine v Roadcap, 136 SW 2d 16, 281 Ky 389

Or—Vantine v Heilig, 76 P 2d 1122, 159 Or 183

Pa—In re De Maio's Estate, 70 A 2d 339, 363 Pa. 559—In re Revercomb's Estate, 172 A 850, 315 Pa 424

68 C J p 474 note 81 [a]

### Evidence held insufficient to establish incapacity

Cal—In re Putnam's Estate, 34 P 2d 148, 1 Cal 2d 162

In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449

Ill—Shevlin v Jackson, 124 NE 2d 895, 5 Ill 2d 43

Iowa—Matthewson v Fahnestock, 251 NW 643, 217 Iowa 348

Pa—In re De Maio's Estate, 70 A 2d 339, 363 Pa. 559—Kish v Bakaysa, 199 A 321, 330 Pa 533

In re Pelechacz' Estate, Orph, 40 Luz Leg Reg 345

68 C J p 474 note 81 [b]

73. Mich—In re Walz's Estate, 183 NW 754, 215 Mich 118

68 C J p 474 note 82

### Administration before execution of will

(1) Evidence that narcotics were given testator to alleviate his pain shortly before the execution of his will was not of itself proof or even

weighty evidence of testamentary incapacity

Wash—In re Mikelson's Estate, 247 P 2d 540, 41 Wash 2d 97—In re Kinssies' Estate, 214 P 2d 693, 35 Wash 2d 723

(2) Evidence was sufficient to show that testator to whom had been administered opiates to deaden his constant pain before execution of will had mental competency to make will

Wis—In re King's Will, 29 NW 2d 69, 251 Wis 269

74. Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

75. Ill—Gilbert v Oneale, 21 NE 2d 283, 371 Ill 427

### Evidence held sufficient

To show mental impairment or testamentary incapacity

Fla—In re Wilmott's Estate, 66 So 2d 465, 40 ALR 2d 1399—In re Palmer's Estate, 48 So 2d 732—Saliba v James, 196 So 832, 143 Fla 404

Ky—Osborn v Paul, 114 SW 2d 1134, 272 Ky 694

Okl—Duckwall v Lawson, 172 P 2d 415, 197 Okl 472

68 C J p 474 note 84

76. NY—Lewis v Jones, 50 Barb 645

68 C J p 479 note 40

Adjudication as to insanity and guardianship see infra § 64

77. Pa—In re Dugan's Estate, 6 Pa Dist 222

Hannum v Worrall, 2 Del Co 49

78. Cal—In re Fisher's Estate, 259 P 755, 82 Cal App 215

### Evidence held not to establish lack of testamentary capacity

Evidence that testator was an inebriate until seven years before he executed will did not establish lack of testamentary capacity at time he

§ 62. Mode of Disposition of Property

- a. In general
- b. Unjust or unnatural will

a. In General

On the question of testamentary capacity, the contents of the will are to be considered, and the fact that the provisions of the will are just and reasonable is evidence of capacity requiring strong evidence of mental incapacity to nullify the will

On the question of testamentary capacity, the contents of the will are to be considered,<sup>79</sup> although the fact that the will is ungrammatical or inaccurate does not of itself establish mental incapacity to execute a will<sup>80</sup> The fact that the provisions of a will are just and reasonable is evidence of capacity,<sup>81</sup> especially where written by the testator,<sup>82</sup> or where other evidence on the issue is unsatisfactory<sup>83</sup> Where the will is just and reasonable, it

will require strong evidence of mental incapacity to nullify it<sup>84</sup> Evidence that the testator fully and completely understood the disposition which he wanted to make and the persons to whom the property was to be devised and the amounts each was to receive is sufficient to prove capacity<sup>85</sup>

b. Unjust or Unnatural Will

The fact that the will is unjust or unnatural does not of itself establish testamentary incapacity, but it is a circumstance which may be considered in connection with other evidence, and which may have weight in determining the capacity of the testator, and an unnatural or unjust disposition coupled with other evidence indicating incapacity may justify a verdict against the will.

Since a person may dispose of his property by will in such manner as he chooses, the fact that the will is unjust or unnatural does not of itself establish testamentary incapacity,<sup>86</sup> as where the testator disinherits relatives,<sup>87</sup> or makes an unequal division

executed will, even though he had been committed to an institution to break him of the habit, and such treatment did not have the desired effect

Ky—Bickel v Louisville Trust Co., 197 SW 2d 444, 303 Ky 356

79 Cal—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 520

Md—Sellers v Qualls, 110 A 2d 73  
Minn—In re Forsythe's Estate, 22 NW 2d 19, 221 Minn 303, 167 A L R 1

Neb—In re Bose's Estate, 285 NW 310, 136 Neb 156

Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687

68 C J p 474 note 86

Circumstances of execution see *infra* § 69

Insane delusions and monomania see *infra* § 65

**Bequest to previously disinherited son**

(1) Act of testatrix, who had executed an earlier will disinheriting her only son and child, in executing a new will giving her estate to her son, was merely evidence tending to show that testatrix was mentally competent to execute the new will, and was required to be considered in light of all other evidence

Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607

(2) Where beneficiary of earlier will, in which testatrix disinherited her son and only child, and testatrix had been closely associated in business and in their personal lives, and had lived together for a number of years until testatrix' health became too bad, and relation between testatrix and son had been strained, and son had been separated from testatrix since early childhood, act of testatrix in executing a new will giving her estate to son was not strong evidence that at time of exe-

cution of new will testatrix was mentally competent to do so  
Okl—Brummett v King, *supra*

80 Ga—McGahee v Phillips, 84 S E 2d 19, 211 Ga 118  
68 C J p 474 note 86

81 Ky—Berryman v Sidwell, 129 SW 2d 154, 278 Ky 713

NJ—In re Filo's Will, 75 A 2d 517, 9 NJ Super 146

NY—In re Wood's Will, 300 NYS 1268, 253 App Div 78

Okl—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389

Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687

68 C J p 475 note 87

82 Alaska—In re Holland's Estate, 10 Alaska 557

La—Succession of Schmidt, 53 So 2d 834, 219 La 675

68 C J p 475 note 88

Effect of writing by testator in general see *infra* § 69

83. Wis—In re Emerson's Will, 198 NW 441, 183 Wis 437

84 Wis—In re Gunderson's Estate, 152 NW 157, 160 Wis 468

85. Or—Clark v Clark, 267 P 534, 125 Or 333

86 Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738

Ga—Anderson v Anderson, 80 SE 2d 807, 210 Ga 464—Watkins v Jones, 193 SE 889, 184 Ga 831

Ind—Potter v Emery, 26 NE 2d 554, 107 Ind App 628

Iowa—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103

Ky—New v Creamer, 275 SW 2d 918

Md—Grant v Curtin, 71 A 2d 304, 194 Md 363

Mass—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429

Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514

Minn—In re Forsythe's Estate, 22 NW 2d 19, 221 Minn 303, 167 A L R 1

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153

Mo—Kaddery v Vossbrink, 149 SW 2d 869

Carl v Ellis, App, 110 SW 2d 805

Pa—In re Hochberger's Estate, Orph, 63 York Leg Rec 25

Tenn—Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 27 Tenn App 342

W Va—Ritz v Kingdon, 79 SE 2d 123

Wyo—Branson v Roelofs, 70 P 2d 589, 52 Wyo 101

68 C J p 475 note 94

Right to make unjust or unnatural will see *infra* § 132

Presumption arising from unjust or unnatural disposition see *supra* § 35

**Will not in accord with court's conception of justice**

Mere fact that will is not exactly according to court's own conception of justice is not of itself sufficient to invalidate will

Colo—Cunningham v Stender, 255 P 2d 977, 127 Colo 293

**Unusual provisions in a will alone** are not generally sufficient to show mental incapacity of testator

Okl—Sporn's Estate v Herndon, 121 P 2d 602, 190 Okl 149

87. Ark Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—

Scott v Dodson, 214 SW 2d 357, 214 Ark 1

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

Ky—New v Creamer, 275 SW 2d 918

Md—Smith v Biggs, 189 A 256, 171 Md 528.

of property among his heirs<sup>88</sup> The fact that a will is unjust or unnatural is a circumstance which may be considered<sup>89</sup> in connection with other evidence,<sup>90</sup> and which may, according to the circumstances, have weight in determining the capacity of the testator,<sup>91</sup> but it is not to be considered until doubt as to the testator's capacity to make a will has been first created by other evidence<sup>92</sup> An unnatural or unjust disposition coupled with other evidence

indicating incapacity may justify a verdict against the will<sup>93</sup> Where there is an unaccountable gross inequality, there should be clear and satisfactory proof of capacity<sup>94</sup> In determining the weight to be given, the controlling motives influencing the testator should be taken into consideration,<sup>95</sup> and, when there appears a sufficient reason for the disposition, the fact that the will is apparently unnatural is of no consequence<sup>96</sup>

Mich—In re Briner's Estate, 266 N W 394, 275 Mich 396—In re La Liberte's Estate, 262 NW 278, 272 Mich 424  
Mo—Hennings v Hallar, 149 SW 2d 338, 347 Mo 827  
NC—In re Holmes' Will, 32 SE 2d 614, 224 NC 830  
Tenn—Hammond v Union Planters Nat Bank, 222 SW 2d 377, 189 Tenn 93  
Tex—Garcia v Galindo, Civ App, 189 SW 2d 12, error refused  
68 CJ p 475 note 95

88 Ill—In re Calo's Estate, 115 NE 2d 778, 1 Ill 2d 376—Langwisch v Langwisch, 198 NE 675, 361 Ill 632  
Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 NE 2d 144, 340 Ill App 64  
Ind—Powell v Ellis, 105 NE 2d 348, 122 Ind App 700—Potter v Emery, 26 NE 2d 554, 107 Ind App 628  
Iowa—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—Walters v Heaton, 271 NW 310, 223 Iowa 405  
Ky—New v Creamer, 275 SW 2d 918—Bickel v Louisville Trust Co, 197 SW 2d 444, 303 Ky 356—Parks v Moore's Ex'r, 97 SW 2d 579, 265 Ky 678  
Mass—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429  
Mo—Smith v Fitzjohn, 188 SW 2d 832, 354 Mo 137—Gaume v Gaume, 102 SW 2d 636, 340 Mo 758  
Okl—In re Smith's Estate, 172 P 2d 328, 197 Okl 405  
Tenn—Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 27 Tenn App 342  
Tex—Redersdorf v Bowers, Civ App, 112 SW 2d 784, error dismissed  
68 CJ p 476 note 96

89 Ala—Tucker v Tucker, 28 So 2d 637, 248 Ala 602  
Ark—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735  
Colo—Cunningham v Stender, 255 P 2d 977, 127 Colo 293  
Ga—Shaw v Fehn, 27 SE 2d 406, 196 Ga 661  
Idaho—In re Heazle's Estate, 257 P 2d 556, 74 Idaho 72  
Iowa—In re Kenny's Estate, 10 NW 2d 73, 238 Iowa 600

Mass—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429  
Mo—Hennings v Hallar, 149 SW 2d 338, 347 Mo 827—Proffer v Proffer, 114 SW 2d 1035, 342 Mo 184  
Mont—Corpus Juris cited in In re Cissel's Estate, 66 P 2d 779, 782, 104 Mont 306  
Neb—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812  
Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687  
W Va—Ritz v Kingdon, 79 SE 2d 123  
Wyo—Branson v Roelofsz, 70 P 2d 589, 52 Wyo 101  
68 CJ p 476 note 97

**Exclusion of lawful heirs** may properly be considered by jury as an indication of lack of recollection, showing incompetence to make a will

Mont—In re Mickich's Estate, 136 P 2d 223, 114 Mont 258

90. Ark—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735  
Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573  
In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738  
Ga—Griffin v Barrett, 187 SE 828, 183 Ga 152  
Ky—Hale v Hale, 152 SW 2d 984, 287 Ky 271

Minn—In re Forsythe's Estate, 22 NW 2d 19, 221 Minn 303, 167 A L R 1

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153  
Mo—Wade v Kirksville College of Osteopathy and Surgery, 270 SW 2d 811—Guidicy v Guidicy, 238 SW 2d 380, 361 Mo 1127—Norris v Bristow, 219 SW 2d 367, 358 Mo 1177, 11 A L R 2d 725—Smith v Fitzjohn, 188 SW 2d 832, 354 Mo 137—Kadlerly v Vossbrink, 149 SW 2d 869  
Carl v Ellis, App, 110 SW 2d 805

NY—In re Wood's Will, 300 NYS 1268, 253 App Div 78  
NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied  
57 SE 2d 315

Okl—In re Smith's Estate, 172 P 2d 328, 197 Okl 405  
Pa—In re Hochberger's Estate, Orph, 63 York Leg Rec 25  
Tenn—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687—Haley v Agilvie, 2 Tenn App 607  
Tex—Hickman v Hickman, Civ App, 244 SW 2d 681, error refused no reversible error  
68 CJ p 476 note 98

91 Ky—Berryman v Sidwell, 129 SW 2d 154, 278 Ky 713  
Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687  
68 CJ p 477 note 99

#### **Weight dependent on extent of injustice**

The weight of evidence of an unnatural disposition upon question of testamentary capacity depends in part on the extent to which injustice and violation of natural duty is carried, and it is of great weight when violation of natural duty is extreme

Ark—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735  
92 Ga—Griffin v Barrett, 187 SE 828, 183 Ga 152

93. Cal—In re Gill's Estate, 58 P 2d 734, 14 Cal App 2d 526  
Tex—Grimes v Mulry, Civ App, 280 SW 2d 343  
68 CJ p 477 note 1

#### **Evidence held sufficient**

To show testamentary incapacity  
Ark—Brown v Emerson, 170 SW 2d 1019, 205 Ark 735  
RI—Di Orto v Cenci, 173 A 537, 54 RI 441  
Tex—Hickman v Hickman, Civ App, 244 SW 2d 681, error refused no reversible error  
68 CJ p 477 note 1 [a]

94. Ky—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352—Mullins v Mullins, 16 SW 2d 788, 229 Ky 103

95. SD—In re Whitman's Estate, 184 NW 975, 45 SD 14

96. Colo—In re Rentfro's Estate, 79 P 2d 1042, 102 Colo 400  
Ky—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352  
68 CJ p 477 note 4

*What is unjust or unnatural will* Whether a will is natural or unnatural is a question to be determined in each case as warranted by the facts<sup>97</sup> The unnaturalness or want of equity of a will is not to be deemed as self evident on the face thereof<sup>98</sup> In determining whether a will is unnatural the history of the testator's family is to be considered, and the moral equities and obligations appearing therefrom<sup>99</sup> A will is unnatural only when it is contrary to what the testator from his known views, feelings, and intentions would have been expected to make<sup>1</sup> When it is in accordance with such views, it is not unnatural, however much it may differ from the ordinary actions of men in similar circumstances<sup>2</sup>

## § 63. Lucid Intervals

Where habitual insanity on the part of the testator is proved so as to raise a presumption of its continuance, clear and convincing proof is required to establish the execution of the will during a lucid interval, and it is not sufficient to show merely a cessation of the violent symptoms of the disorder

Although proof that testator suffered from a mental condition which was progressive and for which there could not be any permanent restoration of mental capacity does not conclusively establish that there could not be periods of testamentary capacity in the legal sense,<sup>3</sup> where habitual insanity on the part of the testator is proved so as to raise a presumption of its continuance, clear and convincing proof is required to establish the execution of the will during a lucid interval<sup>4</sup> The evidence should be as

97. Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258  
Wyo—In re Johnston's Estate, 181 P 2d 611, 63 Wyo 332

98 Iowa—In re Fousek's Estate, 175 NW 29, 188 Iowa 700  
68 CJ p 477 note 5

### Discrimination between, or exclusion of, heirs

A will is not necessarily unnatural because of a discrimination between heirs of the same degree, or because of the entire exclusion of part or all of them

Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192—Henry v Hall, 17 So 187, 106 Ala 84, 54 Am SR 22

99. Wash—Corpus Juris cited in In re Miller's Estate, 116 P 2d 526, 531, 10 Wash 2d 258  
68 CJ p 477 note 6

### Wills held not unnatural or unjust

(1) Disposition by testatrix of her property in favor of her friends, rather than in favor of her collateral relatives

Wyo—In re Johnston's Estate, 181 P 2d 611, 63 Wyo 332

(2) Will whereunder testator with an estate of two hundred thirty-five thousand dollars bequeathed only one hundred dollars to his adopted son, and which contained provisions referring to possible commitment of testator's widow to an institution for insanity

Wis—In re Dawley's Estate, 49 N W 2d 432, 259 Wis 516

(3) Will omitting estranged half-sister

Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584

(4) Will preferring one with whom testatrix had been in close and affectionate relationship for many years over testatrix' next of kin  
Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282

(5) Other wills  
Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571  
Ga—Fehn v Shaw, 35 SE 2d 253, 199 Ga 747

Ky—Bickel v Louisville Trust Co., 197 SW 2d 444, 303 Ky 356—Higgs' Ex'x v Higgs' Ex'x, 150 SW 2d 681, 286 Ky 236

NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315

Okl—In re Wadsworth's Estate, 273 P 2d 997—In re Martin's Estate, 188 P 2d 862, 199 Okl 567

Or—In re Beer's Estate, 222 P 2d 1005, 190 Or 15

Tenn—Rogers v Hickam, 208 SW 2d 34, 30 Tenn App 504

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326

W Va—Ritz v Kingdon, 79 SE 2d 123

68 CJ p 477 note 6 [b]

### Natural objects of testator's bounty

(1) The natural objects of the testator's bounty are his descendants, surviving spouse, and parents  
Cal—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738

(2) Testator's nephews, nieces, brothers, sisters, and other collateral heirs have been held not natural or normal objects of his bounty because of such relationship alone  
Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584

In re Nolan's Estate, supra.  
ND—Stormon v Weiss, 65 NW 2d 475

(3) Ordinarily, however, the natural objects of testator's bounty are those who, in absence of will, would inherit his property, but question of who comes within range of testator's bounty depends largely upon the circumstances surrounding testator

Mo—Norris v Bristow, 219 SW 2d 367, 358 Mo 1177, 11 ALR 2d 725

(4) Persons who were testatrix' next of kin were natural objects of her bounty

Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282

(5) The only child of a sister with whom testatrix had always maintained the closest relationship was a natural object of testatrix' bounty  
Ky—Madison v. Whittle, 272 SW 2d 48

1. Pa—In re Morgan's Estate, 68 A 953, 219 Pa 355

Wash—Corpus Juris cited in In re Miller's Estate, 116 P 2d 526, 531, 10 Wash 2d 258

Wyo—Corpus Juris cited in In re Johnston's Estate, 181 P 2d 611, 616, 63 Wyo 332

2. Pa—In re Morgan's Estate, 68 A 953, 219 Pa 355

Wash—Corpus Juris cited in In re Miller's Estate, 116 P 2d 526, 531, 10 Wash 2d 258

Wyo—Corpus Juris cited in In re Johnston's Estate, 181 P 2d 611, 616, 63 Wyo 332

3. Wash—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846

4. Or—In re Murray's Estate, 144 P 2d 1016, 173 Or 209

68 CJ p 478 note 12

Burden of proving that execution of will was accomplished during a lucid interval see supra § 36

Lucid intervals as affecting capacity in general see supra § 19

Presumption of continued insanity see supra § 36

### Evidence held sufficient

To show that, although the testator was at times irrational, he was not so at the time of the execution of the will

NY—In re Hill's Will, 73 NYS 2d 258, appeal dismissed 78 NYS 2d 365—In re Schmidt's Will, 139 NYS 464.

strong and demonstrative of such fact as when the object of such proof is to show insanity<sup>5</sup> It is not sufficient to show merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the testator to judge of his act must be established<sup>6</sup> It is incumbent on the proponent to prove the existence of a lucid interval at the very time the will was executed<sup>7</sup> Mere proof of a subsequent lucid interval is insufficient<sup>8</sup> When an insane person writes his own will in his natural manner, and the provisions are sensible, proper, and judicious, the will itself proves that it was written during a lucid interval<sup>9</sup>

### § 64. Adjudication as to Insanity and Guardianship

A judgment in proceedings for the purpose of adjudicating the mental status of a person is not conclusive evidence on the question of such person's incompetency for the purpose of testamentary disposition, although an adjudication of insanity or of unsoundness of mind and the appointment of a guardian may be prima facie evidence of testamentary incapacity

A judgment in proceedings for the purpose of adjudicating the mental status of a person is not conclusive evidence on the question of such person's incompetency for the purpose of testamentary disposition<sup>10</sup> Although there is some authority to the

effect that an adjudication of insanity or imbecility does not make a prima facie case of testamentary incapacity,<sup>11</sup> other authority holds that an adjudication of insanity or lunacy of a testator is prima facie evidence of the want of testamentary capacity,<sup>12</sup> but not conclusive<sup>13</sup> An adjudication of insanity is conclusive only as to the time of the inquisition, and not anterior or subsequent thereto,<sup>14</sup> but clear and convincing proof that capacity existed at the time the will was executed is required to overcome the prima facie presumption of lack of testamentary capacity arising from a prior adjudication of insanity,<sup>15</sup> and that character of proof may not be supplied by indulgence in conjecture, surmise, or speculation<sup>16</sup> The prima facie effect of such an adjudication is overcome by evidence that for many years following the adjudication and prior to the execution of the will the testator acted normally<sup>17</sup> An adjudication of insanity such as to require treatment is of less probative force on the question of testamentary capacity than an adjudication that the person is incapable of caring for his property and requires a guardian<sup>18</sup>

An adjudication of unsoundness of mind and the appointment of a guardian is prima facie evidence of testamentary incapacity,<sup>19</sup> as long as the guardianship continues,<sup>20</sup> but it is not conclusive evidence of incapacity,<sup>21</sup> although the guardianship existed

5 Del.—In re Miller's Will, 85 A 803, 26 Del 477

6 Ga.—Lucas v Parsons, 27 Ga 593

La—Succession of Tyler, 190 So 651, 193 La 480

7 Ala.—Saxon v Whitaker's Ex'r, 30 Ala 237  
68 C J p 478 note 15

8 Ala.—Saxon v Whitaker's Ex'r, supra

9 La.—Succession of Schmidt, 53 So 2d 834, 219 La 675  
68 C J p 478 note 19

10 Cal.—In re Young's Estate, 101 P 2d 770, 38 Cal App 2d 588

NJ—American Nat Red Cross v Lester, 18 A 2d 295, 129 N J Eq 28

Pa.—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381.

11. Ohio—Potts v. First-Central Trust Co., App., 47 N E 2d 823

12. Pa.—In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133

Tex.—Corpus Juris cited in Bogel v. White, Civ App., 168 SW 2d 309, 311

Va.—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300—Tate v. Chumbley, 57 SE 2d 151, 190 Va 480  
68 C J p 478 note 21.

Adjudication as to insanity and guardianship

As affecting capacity in general see supra § 20

Burden of proof and presumptions see supra § 37

Conclusiveness of judgments generally see Judgments §§ 686-736

Effect of:

Adjudication of sanity or insanity generally see Insane Persons § 32

Appointment of guardian generally see Guardian and Ward § 38, Insane Persons § 41

Weight of evidence of adjudication that testator was a habitual drunkard see supra § 61

13 NJ.—In re Rule's Will, 5 A 2d 64, 125 N J Eq 255

Okl.—Moore v Glover, 163 P 2d 1003, 196 Okl 177

Pa.—In re Sterrett's Estate, 150 A 159, 300 Pa 116

In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133.

68 C J p 478 note 22

Evidence held sufficient to show testamentary incapacity

Va.—Tate v. Chumbley, 57 SE 2d 151, 190 Va 480

68 C J p 478 note 22 [a]

14. Ala.—Houston v Grigsby, 116 So 686, 217 Ala 506

15. Va.—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300

Satisfactory evidence required

NY.—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

Showing of capacity at other times or on other days would not suffice to overcome presumption

Va.—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300.

Evidence held insufficient to overcome presumption

NY.—In re Rice's Estate, 19 NYS 2d 602, 173 Misc 1038

16. Va.—Western State Hospital of Staunton v Wininger, 83 SE 2d 446, 196 Va 300

Evidence held to support finding that presumption had not been overcome

Va.—Western State Hospital of Staunton v Wininger, supra

17. Iowa—Waters v Waters, 207 N W 598, 201 Iowa 586

18. Iowa—Waters v Waters, supra

19. Iowa—Waters v Waters, supra 68 C J. p 478 note 25

20. Iowa—Waters v Waters, supra

21. Colo.—Corpus Juris quoted in In re McCrone's Estate, 101 P 2d 25, 26, 106 Colo 69.

at the time the will was executed<sup>22</sup> The effect of a guardianship may be overcome by proof that the testator was mentally competent at the time the will was executed,<sup>23</sup> but clear and satisfactory proof is required.<sup>24</sup>

A judgment in proceedings to declare testator incompetent to manage his property or care for himself is evidence of the mental condition of the testator at the time of the adjudication,<sup>25</sup> and is to be considered in the determination of his testamentary capacity,<sup>26</sup> but such evidence is not conclusive proof thereof,<sup>27</sup> and it has been denied that such adjudication is prima facie evidence of testamentary incapacity.<sup>28</sup> So, where there was nothing contained in the petition or order appointing a guardian which would indicate that the guardian was being appointed because of the then insanity of the ward, the appointment of the guardian is not evidence that the ward lacked capacity to make a will<sup>29</sup> A finding in a guardianship proceeding that by reason of old

age, disease, and physical infirmity an alleged mental incompetent was unable, unassisted, properly to care for himself and his property, and appointing as guardian a person requested by the alleged incompetent is strong evidence of the mental capacity of the alleged incompetent to make a will<sup>30</sup> The fact of guardianship is not conclusive on the issue of testamentary capacity,<sup>31</sup> nor is the appointment of a conservator conclusive<sup>32</sup>

*Adjudication of sanity* An adjudication that testator was sane and capable of handling his own affairs is weighty evidence of his capacity to make a will a short time thereafter,<sup>33</sup> but not conclusive<sup>34</sup> A discharge from a hospital for the insane is evidence of a change in mental condition,<sup>35</sup> but is not conclusive<sup>36</sup> Restoration to capacity to transact business does not establish testamentary capacity thereafter,<sup>37</sup> and an adjudication in proceedings to set aside a guardianship over testator declaring

Okl—*Corpus Juris* cited in *In re Martin's Estate*, 188 P 2d 862, 199 Okl 567  
68 C J p 478 note 27

22. Or—*In re Beer's Estate*, 222 P 2d 1005, 190 Or 15

Colo—*Corpus Juris* quoted in *In re McCrone's Estate*, 101 P 2d 25, 26, 106 Colo 69

Vt—*Williams v Robinson*, 39 Vt 267

23. Colo—*Corpus Juris* quoted in *In re McCrone's Estate*, 101 P 2d 25, 26, 106 Colo 69  
68 C J p 479 note 29

**Evidence held sufficient to overcome presumption**

Or—*In re Beer's Estate*, 222 P 2d 1005, 190 Or 15

24. Wash—*Dean v Jordan*, 79 P 2d 331, 194 Wash 661

25. Colo—*Corpus Juris* quoted in *In re McCrone's Estate*, 101 P 2d 25, 26, 106 Colo 69  
68 C J p 479 note 30

26. Okl—*Toombs v Matthesen*, 241 P 2d 937, 206 Okl 139—*In re Wheeling's Estate*, 175 P 2d 317, 198 Okl 81—*In re Shipman's Estate*, 85 P 2d 317, 184 Okl 56—*In re Nitey's Estate*, 53 P 2d 215, 175 Okl 389

Va—*Gilmer v Brown*, 44 S E 2d 16, 186 Va 630

27. Okl—*Toombs v Matthesen*, 241 P 2d 937, 206 Okl 139—*In re Wheeling's Estate*, 175 P 2d 317, 198 Okl 81—*In re Shipman's Estate*, 85 P 2d 317, 184 Okl 56

28. Mich—*In re Sprenger's Estate*, 60 N W 2d 436, 337 Mich 514—*In re Cummins' Estate*, 259 N W 894, 271 Mich 215

Va—*Gilmer v Brown*, 44 S E 2d 16, 186 Va 630  
68 C J p 479 note 32

**Fact that decedent was under conservatorship at time of making of will was not prima facie evidence of incapacity to make a will**  
Mass—*Lusis v Kaminski*, 108 N E 2d 567, 329 Mass 766

#### **Guardianship remote in time**

(1) Fact that in 1917 a guardian was appointed for the estate of the testatrix, and that in 1918 the probate court found that the testatrix was mentally incompetent to have charge, custody, and management of her estate and appointed a general guardian for her estate had no probative force in will contest proceeding, on issue of the testatrix' mental capacity to make a will in 1936  
Mich—*In re Merritt's Estate*, 281 N W 546, 286 Mich 83

(2) The purported appointment of a guardian on January 24, 1936, was insufficient to show testator's mental condition at time of making his will on November 1, 1935

Mo—*Gee v Bess*, App, 176 S W 2d 516

#### **In Iowa**

(1) It was said that an adjudication of incompetency or the appointment of a permanent guardian for the testator would make a prima facie case for the contestants but that proceedings without adjudication is not sufficient to establish a prima facie case  
Iowa—*In re Moore's Will*, 181 N W 763, 191 Iowa 135

(2) Fact that testator was under guardianship at the time he made a will did not establish that testator lacked mental capacity to make will,

where testator was placed under guardianship because of his weakness in respect to excessive drinking  
Iowa—*In re Willer's Estate*, 281 N W 155, 225 Iowa 608

29. Or—*In re Christofferson's Estate*, 190 P 2d 928, 183 Or 75

**Recommitment to mental hospital and appointment of guardian of person and property were without weight on question of testamentary capacity where there was not at either time an adjudication of insanity**  
Utah—*In re Chongas' Estate*, 202 P 2d 711, 115 Utah 95

30. Cal—*In re McCollum's Estate*, 140 P 2d 176, 59 Cal App 2d 744

31. Minn—*In re Marsden's Estate*, 13 N W 2d 765, 217 Minn 1

**Evidence held sufficient to overcome any presumption of incompetency that might arise from fact of appointment of guardian**  
Wash—*In re Miller's Estate*, 116 P 2d 526, 10 Wash 2d 258

32. Colo—*Corpus Juris* quoted in *In re McCrone's Estate*, 101 P 2d 25, 26, 106 Colo 69  
68 C J p 479 note 33

#### **Same day**

Iowa—*In re Haga's Estate*, 271 N W 296, 222 Iowa 1313

#### **Nine days**

Pa—*Kish v Bakaysa*, 199 A 321, 330 Pa 533

34. Pa—*Kish v Bakaysa*, supra

35. Iowa—*Mileham v Montagne*, 125 N W 664, 148 Iowa 476

36. Iowa—*Mileham v. Montagne*, supra  
68 C J p 479 note 36

37. Okl—*In re Martin's Estate*, 188 P 2d 862, 199 Okl 567.

him to be of sound mind is not conclusive evidence of mental capacity up to the date of its entry.<sup>38</sup>

### § 65. Insane Delusions and Monomania

To invalidate a will on the ground of insane delusions or monomania the evidence must be sufficient to show their existence and that such delusions or monomania

had a direct influence on the execution of the will; but such proof may be supplied by circumstantial evidence.

To invalidate a will on the ground of insane delusions or monomania the evidence must be sufficient to show their existence<sup>39</sup> and that such delusions or monomania had a direct influence on the execution of the will<sup>40</sup> The proof need not be di-

38. Iowa—In re Fenton's Will, 66 N W 99, 97 Iowa 192

39. Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325 68 C J p 479 note 45

Insane delusions as affecting capacity in general see supra § 18

#### Evidence held sufficient

(1) To sustain finding that testator was not operating under insane delusion when will was executed

Cal—In re Vollen's Estate, 262 P 2d 658, 121 Cal App 2d 161.

Kan—In re Wille's Estate, 240 P 2d 121, 172 Kan 293

Mich—In re Lake's Estate, 260 N W 779, 271 Mich 675

N J—In re Thompson's Will, 66 A 2d 540, 4 N J Super 150

Okl—In re Elston's Estate, 262 P 2d 114.

Or—Detsch v Detsch, 205 P 2d 180, 186 Or 1

Tex—Knight v Edwards, 264 S W 2d 692

Wis—In re Bauer's Estate, 59 N W 2d 481, 264 Wis 556—In re Bickner's Estate, 49 N W 2d 404, 259 Wis 425.

68 C J p 479 note 45 [a]

(2) To establish that testator notwithstanding delusion and eccentricity, possessed sufficient testamentary capacity

Cal—In re Finkler's Estate, 46 P 2d 119, 3 Cal 2d 584.

(3) To sustain verdict that will was invalid because testator was afflicted with monomania

Ga—Yarbrough v Yarbrough, 43 S E 2d 329, 202 Ga 391.

(4) To sustain finding that testator was under insane delusion when he made will

Ill. Sterling v Dubin, 126 N E 2d 718, 6 Ill 2d 64.

Tex—Garcia v Galindo, Civ App, 199 S W 2d 499, 145 Tex 507—Stone v Grainger, Civ App, 66 S W 2d 484.

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456.

Wis—In re Ribert's Will, 11 N W 2d 626, 244 Wis 175

68 C J p 479 note 45 [a], [c]

(5) To sustain finding of lack of testamentary capacity.

Kan—In re Boyce's Estate, 127 P 2d 424, 155 Kan 549

N Y—In re Hewett's Will, 70 N Y S

2d 3, 271 App Div 1054, affirmed 74 N E 2d 482, 297 N Y 565

Pa—In re Leedom's Estate, 32 A 2d 3, 347 Pa 180

Tex—Peareson v McNabb, Civ App, 190 S W 2d 402, refused for want of merit—Stone v Grainger, Civ App, 66 S W 2d 484

(6) To sustain verdict in favor of propounder

Ga—Tinnerman v Baldwin, 87 S E 2d 65, 211 Ga 532—Culpepper v Bower, 48 S E 2d 369, 203 Ga 784

(7) To show that delusion was not so extravagant as to indicate that it was the product of a deranged mind

Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282

#### Evidence held insufficient

(1) To establish insane delusion on part of testator at time of execution of will

Ala—Hornaday v First Nat Bank of Birmingham, 65 So 2d 678, 259 Ala 26.

Cal—In re Putnam's Estate, 34 P 2d 148, 1 Cal 2d 162

In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

Ill—Ryan v Dencen, 31 N E 2d 582, 375 Ill 452

Kan—Steward v Marker, 57 P 2d 75, 143 Kan 860

La—Succession of Tyler, 190 So 651, 193 La 480

Mass—Kingman v Damon, 195 N E 740, 290 Mass 472

Mo—Ahmann v Elmore, 211 S W 2d 480—Frank v Greenhall, 105 S W 2d 929, 340 Mo 1228

Higgins v Smith, App, 150 S W 2d 539

N J—In re Hoover's Estate, 91 A 2d 155, 21 N J Super 323

N Y—In re Graham's Estate, 63 N Y S 2d 572

Okl—In re Wheeling's Estate, 175 P 2d 317, 198 Okl 81

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307

Tenn—Hammond v Union Planters Nat Bank, 222 S W 2d 377, 189 Tenn 93

Utah—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583

68 C J p 479 note 45 [b], [c], [d], [e], [f]

(2) To support finding of testamentary incapacity or lack of testamentary capacity.

Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709

N J—In re Hoover's Estate, 91 A 2d 155, 21 N J Super 323

N Y—In re Hargrove's Will, 28 N Y S 2d 571, 262 App Div 202, appeal granted 30 N Y S 2d 810, 262 App Div 994, affirmed 42 N E 2d 608, 288 N Y 604

Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

68 C J p 479 note 45 [b]

(3) To support finding that testator was not suffering from an insane delusion when he drew will

Okl—In re Robertson's Estate, 189 P 2d 615, 199 Okl 582

Wis—In re McGovern's Will, 3 N W 2d 717, 241 Wis 99

68 C J p 479 note 45 [b]

(4) To authorize verdict for contestants

Miss—Gholson v Peters, 176 So 605, 180 Miss 256

(5) To compel a finding of want of testamentary capacity

Cal—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388

40. Ariz—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Cal—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276—In re Hansen's Estate, 100 P 2d 776, 33 Cal App 2d 99

Okl—In re Holmes' Estate, 270 P 2d 320—In re Mason's Estate, 91 P 2d 657, 185 Okl 278

Wash—In re Torstensen's Estate, 184 P 2d 265, 28 Wash 2d 837

68 C J p 480 note 46

Evidence held sufficient

(1) To warrant finding that will was product of testator's insane delusion

Cal—In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666

Mich—In re Kaven's Estate, 272 N W 696, 279 Mich 334

Pa—In re Weiss' Estate, 77 A 2d 422, 366 Pa 456

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583—In re Klein's Estate, 183 P 2d 518, 28 Wash 2d 456

Wyo—Branson v Roelofsz, 70 P 2d 589, 52 Wyo 101

68 C J p 480 note 46 [a]

(2) To establish that will was product of sound disposing mind, free from, and uninfluenced by, any delusions.



rect in order to prove that the hallucinations and delusions affected the making of the will, but circumstantial evidence may supply the proof, and if the evidence as a whole shows that a testator did not know the extent of his property, or the natural objects of his bounty, his will cannot be sustained <sup>41</sup>

It is not enough to show an erroneous belief on the part of the testator in order to establish an insane delusion,<sup>42</sup> but the evidence must show that the belief had no foundation in fact.<sup>43</sup> It is not for a jury to appraise the impressions which a testator receives from personal conflict and controversy and hold them insane delusions, without knowing all the facts as they appeared to the testator, and not then if there was basis for the impressions, however exaggerated they may be <sup>44</sup> An insane delusion is not established when the court is able to understand how a person situated as the testator was might have believed all that the evidence shows that he did believe and still have been in full possession of his senses <sup>45</sup>

The fact that the testator distributes his property unequally among the natural objects of his bounty because of prejudice or unfriendliness does not establish that he labored under an insane delusion toward relatives as to whom slight provision or no provision at all is made,<sup>46</sup> but it is a circumstance to be considered,<sup>47</sup> and when unexplained tends to show a delusion <sup>48</sup> A mere groundless belief manifested under suddenly aroused emotions and which lacks persistence and continuity affords no evidence of mental delusion.<sup>49</sup>

## § 66. Peculiar Belief or Opinion and Eccentricity

Testamentary incapacity is not established by proof that the testator entertained peculiar beliefs or opinions, or by evidence of eccentricities

Testamentary incapacity is not established by proof that the testator entertained peculiar beliefs or opinions <sup>50</sup> Evidence of eccentricities does not establish testamentary incapacity <sup>51</sup>

Iowa—In re Ransom's Estate, 57 N W 2d 89, 244 Iowa 343

Kan—In re Millar's Estate, 207 P 2d 433, 167 Kan 455  
68 C J p 480 note 46 [a].

### Evidence held insufficient

(1) To warrant conclusion that the provisions of the will were prompted by an insane delusion  
Ark—Jones v National Bank of Commerce in Memphis, 249 SW 2d 105, 220 Ark 665

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

In re Peterkin's Estate, 73 P 2d 897, 23 Cal App 2d 597

Mich—In re Rowling's Estate, 289 NW 136, 291 Mich 218

Mo—Stevens v Meadows, 100 SW 2d 281, 340 Mo 252

NJ—In re Ratti's Will, 15 A 2d 616, 128 N J Eq 15

Or—In re Jackson's Estate, 220 P 2d 96, 189 Or 328

Wash—In re O'Neil's Estate, 212 P 2d 823, 35 Wash 2d 325

Wis—In re Williams' Will, 41 NW 2d 191, 256 Wis 338—In re Week's Estate, 19 NW 2d 184, 247 Wis 197

68 C J p 480 note 46 [b]

(2) To show that will was the result of monomania

Ga—Brumelow v Hopkins, 29 S E 2d 42, 197 Ga 247

(3) To support finding that obsessions amounting to insane delusions did not affect will as drawn

Wis—In re McGovern's Will, 3 NW 2d 717, 241 Wis 99

68 C J p 480 note 46 [b]

41. Wash—In re Torstensen's Estate, 184 P 2d 255, 28 Wash 2d 837

42. Iowa—In re Henry's Estate, 149 NW 605, 167 Iowa 557

43. Ill—Jackman v North, 75 NE 2d 324, 398 Ill 90, 175 A L R 868  
68 C J p 480 note 48

Evidence held sufficient to furnish a substantial basis for the testator's belief

Cal—In re Alegria's Estate, 197 P 2d 571, 37 Cal App 2d 645

68 C J p 480 note 48 [a]

Evidence held to make prima facie case for contestants

Tenn—Melody v Hamblin, 115 SW 2d 237, 21 Tenn App 687

68 C J p 480 note 48 [d]

44. Mich—Jackson City Bank & Trust Co v Townley, 256 NW 345, 268 Mich 340

45. Ky—Burris v Burris, 276 SW 820, 210 Ky 731

46. Ill—Farmer v Davis, 124 NE 640, 289 Ill 392

68 C J p 480 note 50  
Right to make unjust or unnatural will see infra § 132

47. Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571  
In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738—In re Sandman's Estate, 8 P 2d 499, 121 Cal App 9

48. Cal—In re Sandman's Estate, supra

49. Ark—Schweitzer v Bean, 242 S W. 63, 154 Ark 228

50. Iowa—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307

Pa—In re Johnson's Estate, 87 A. 2d 188, 370 Pa. 125—In re Conway's Estate, 79 A 2d 208, 366 Pa. 641—

In re Higbee's Estate, 75 A 2d 599, 365 Pa. 381

In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

68 C J p 481 note 55

Prejudices and beliefs as affecting capacity in general see supra § 23

Beliefs of militant feminist held to show incapacity

Evidence sustained finding that militant feminist who regarded men as a class with an insane hatred, and who looked forward to the day when women would bear children without the aid of men and all males would be put to death at birth, lacked testamentary capacity, requiring the setting aside of probate of will leaving her estate to the National Women's Party

NJ—In re Strittmater's Estate, 53 A 2d 205, 140 N J Eq 94

51. Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Wright's Estate, 60 P 2d 434, 7 Cal 2d 348

In re Teed's Estate, 247 P 2d 54, 112 Cal App 2d 638

Ga—Brumelow v Hopkins, 29 S E 2d 42, 197 Ga. 247

Ill—Gilbert v Oneale, 21 NE 2d 283, 371 Ill 427

Ind—Potter v Emery, 26 NE 2d 554, 107 Ind App 628

Ky—Bickel v Louisville Trust Co., 197 SW 2d 444, 303 Ky 356

NJ—In re Lucas' Will, 1 A 2d 929, 124 N J Eq 347—In re McComb, 177 A 849, 118 N J Eq 119

Pa—In re Weber's Estate, 5 A 2d 550, 334 Pa. 216.

*Religious beliefs* Mere religious fervor or belief, regardless of the character of the religion, is not evidence of mental incapacity.<sup>52</sup> Belief in spiritualism is not evidence of an unsound mind,<sup>53</sup> unless the testator's mind is controlled by such belief so as to prevent a rational disposition of his property.<sup>54</sup>

## § 67 Physical Condition and Mental Derangement Therefrom

Testamentary incapacity is not established by proof of the mere fact that the testator was not in sound health at the time the will was executed, or by evidence of his ailing or weakened physical condition, or that he was

suffering from disease, or dying, but the fact that he was in an enfeebled condition at the time of the execution of the will is entitled to consideration, and is of marked significance where there is also evidence tending directly to show his enfeebled mental condition.

Testamentary incapacity is not established by proof of the mere fact that the testator was not in sound health at the time his will was executed,<sup>55</sup> or by evidence of his ailing or weakened physical condition,<sup>56</sup> or that he was dying.<sup>57</sup> Accordingly, incapacity is not established by the mere fact that the testator suffered from disease<sup>58</sup> such as apoplexy,<sup>59</sup> Bright's disease,<sup>60</sup> cancer,<sup>61</sup> cholera,<sup>62</sup> diabetes,<sup>63</sup> disease of the brain,<sup>64</sup> or by the fact that

Wash—In re Denison's Estate, 162 P 2d 245, 23 Wash 2d 699

68 C J p 481 note 57

Eccentricities resulting from old age see *infra* § 68

**Evidence that testator had become seedy, unkempt, and dirty**, that such appearance caused embarrassment and humiliation to his relatives, would not establish lack of testamentary capacity, in the absence of other proof of mental disturbance Ky—Bickel v Louisville Trust Co., 197 SW 2d 444, 303 Ky 336

52. Mo—Minturn v Conception Abbey, App., 61 SW 2d 352

68 C J p 481 note 59

**Truth of religious views held not subject for judicial inquiry**

Okl—In re Elston's Estate, 262 P 2d 148

53. Ky—Nalty's Adm'r v Franzman's Ex'r, 299 SW 585, 221 Ky 709

68 C J p 481 note 60

54. Cal—In re Willitt's Estate, 165 P 537, 175 Cal 173

68 C J p 481 note 61

55. Cal—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711

Mich—In re La Liberté's Estate, 262 NW 278, 272 Mich 424

Minn—In re Holmstrom's Estate, 292 NW 622, 208 Minn 19

Mo—Higgins v. Smith, App., 150 SW 2d 539

Pa—In re Conway's Estate, 79 A 2d 208, 366 Pa 641

In re Rupert's Estate, Orph., 32 Del Co 338, affirmed 36 A 2d 500, 349 Pa 58

Tex—In re Boultinghouse's Estate, Civ App., 267 SW 2d 614, error dismissed

68 C J p 481 note 63

Old age, impairment of memory, and physical condition as affecting capacity in general see *supra* §§ 27-30

Presumption arising from physical condition see *supra* § 39

**Evidence held sufficient to show that testator, although physically ill,**

was mentally competent on day will was executed

Or—In re Southman's Estate, 168 P 2d 572, 178 Or 462

68 C J p 481 note 63 [a]

56. Okl—In re Martin's Estate, 261 P 2d 603—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Baker's Will, 248 P 2d 627, 207 Okl 158—In re Wheeling's Estate, 175 P 2d 317, 198 Okl 81—In re Smith's Estate, 172 P 2d 328, 197 Okl 405—Amos v Fish, 144 P 2d 967, 193 Okl 406—In re Shipman's Estate, 85 P 2d 317, 181 Okl 56

**Evidence held sufficient**

(1) To show that testatrix, although physically weak, had mental capacity to execute will

Cal—In re Leahy's Estate, 54 P 2d 704, 5 Cal 2d 301

68 C J p 481 note 63 [a]

(2) To show that impairment of testator's eyesight or of his hearing at time of making wills was so slight that it did not interfere with his making a will

La—Succession of Feitel, 175 So 72, 187 La 596

57. Ariz—In re Walters' Estate, 267 P 2d 896, 77 Ariz 122

Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449

Kan—**Corpus Juris cited in** Kunkle v Urbansky, 109 P 2d 71, 74, 153 Kan 117

La—McCarty v Trichel, 46 So 2d 621, 217 La 444

68 C J p 482 note 75

58. Cal—In re Hopkins' Estate, 29 P 2d 249, 136 Cal App 590

Fla—In re Willmott's Estate, 66 So 2d 465, 40 ALR 2d 1399

La—Succession of Angers, 17 So 2d 247, 205 La 190.

Md—Smith v Biggs, 189 A 256, 171 Md 528—Sellers v Qualls, 110 A 2d 73—Plummer v Livesay, 44 A 2d 919, 185 Md 450

Mich—In re Burwitz' Estate, 261 N W 121, 272 Mich 16

Minn—In re Rasmussen's Estate, 69 NW 2d 630

Mo—Whitacre v Kelly, 134 SW 2d 121, 345 Mo 489—Nute v Fry, 111 SW 2d 84, 341 Mo 1138

Mont—In re Benson's Estate, 98 P 2d 868, 110 Mont 25

N Y—In re Silverman's Will, 97 N Y S 2d 490, 198 Misc 274

Pa—In re Johnson's Estate, 87 A 2d 183, 370 Pa 125—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381

In re Nelson's Estate, Orph., 66 York Leg Rec 161—In re Lauer's Estate, Orph., 53 York Leg Rec, 157, affirmed 41 A 2d 552, 351 Pa 438

68 C J p 482 note 64

59. Ky—Rueff v Light, 114 SW 2d 506, 272 Ky 449

68 C J p 482 note 65

60. Cal—In re Short's Estate, 47 P 2d 555, 7 Cal App 2d 512

Wis—In re Jacobson's Will, 270 N W 923, 223 Wis 508

68 C J p 482 note 66

61. Kan—**Corpus Juris cited in** Kunkle v Urbansky, 109 P 2d 71, 74, 153 Kan 117

68 C J p 482 note 67

62. Philippine—Galvez v Galvez, 26 Philippine 243

68 C J p 482 note 68

63. N J—In re Castellano's Will, 171 A 139, 115 N J Eq 356

Or—In re Provolt's Estate, 151 P 2d 736, 175 Or 128

Wis—In re Jacobson's Will, 270 N W 923, 223 Wis 508

64. La—McCarty v Trichel, 46 So 2d 621, 217 La 444

**Speech difficulty following cerebral seizure**

Evidence that testator stuttered or had difficulty in speech immediately after a cerebral seizure, which was limited to the portion of the brain that governed speech, did not establish lack of testamentary capacity, particularly where testator improved and was relieved from that difficulty during the two years following

N Y—In re Wood's Will, 43 N Y S 2d 734, 368 App Div 776, 751.

the testator suffered from dropsy,<sup>65</sup> epilepsy,<sup>66</sup> influenza,<sup>67</sup> paralysis,<sup>68</sup> paresis,<sup>69</sup> pneumonia,<sup>70</sup> or tuberculosis<sup>71</sup> The fact that a testator was in an enfeebled condition at the time of the execution of the will is, however, entitled to consideration,<sup>72</sup> and is of marked significance where there is also evidence tending directly to show his feeble mental condition<sup>73</sup> In order to constitute proof of testamentary incapacity, the ailing or weakened physical condition must be shown to have rendered the testator incapable of understanding the nature and consequences of his acts at the time he made the will<sup>74</sup>

## § 68. Old Age and Accompanying Physical and Mental Weakness

Testamentary incapacity is not established by evidence that at the time of the execution of the will the testator was advanced in years, even though the will was executed while he was physically infirm or suffering from arteriosclerosis or senile dementia; but proof of the advanced age of the testator in connection with other evidence may aid in supporting a finding of testamentary incapacity.

Testamentary incapacity is not established by evidence that at the time of the execution of the will the testator was advanced in years,<sup>75</sup> although the

65. Tex.—Hill v Crow, Civ App, 241 SW 184  
68 CJ p 482 note 69
66. Wis.—In re Derousseau's Will, 184 NW 705, 175 Wis 140, 16 ALR 1412  
68 CJ p 482 note 70
67. Tex.—Adkins v Henson, Civ App, 256 SW 967  
68 CJ p 482 note 71
68. Pa.—In re Morris' Estate, Orph, 21 Wash Co 120  
68 CJ p 482 note 72
69. La.—McCarty v Trichel, 46 So 2d 621, 217 La. 444
70. Cal.—In re Casarotti's Estate, 192 P 1085, 184 Cal 73  
NY.—In re Brown's Estate, 257 NYS 864, 143 Misc 688  
68 CJ p 482 note 73
71. Ky.—Bailey v Bailey, 212 SW 595, 184 Ky 455  
68 CJ p 482 note 74
72. Ark.—Yarbrough v Moses, 267 SW 2d 289, 223 Ark 489  
Cal.—In re Short's Estate, 47 P 2d 555, 7 Cal App 2d 512  
DC.—McCartney v Holmquist, 106 F 2d 855, 70 App DC 334, 126 ALR 375
- Ill.—Dombrowski v Von Bronk, 76 NE 2d 800, 333 Ill App 161  
Tex.—Walston v Mabry, Civ App, 225 SW 2d 1014  
68 CJ p 482 note 76
73. Cal.—In re Doolittle, 94 P 240, 153 Cal 29
- Evidence held sufficient to show want of mental capacity**  
Cal.—In re Doolittle, supra  
In re Frank's Estate, 226 P 2d 767, 102 Cal App 2d 126—In re Albertson's Estate, 87 P 2d 883, 31 Cal App 2d 211
- Ill.—In re Plummer's Estate, 30 NE 2d 189, 307 Ill App 378
- Ind.—Ailes v Ailes, 11 NE 2d 73, 104 Ind App 302
- Ky.—Loving's Adm'r v Williamson, 119 SW 2d 651, 274 Ky 571
- La.—Clanton v Shattuck, 30 So 2d 823, 211 La. 750.
- Pa.—In re Skritic's Estate, 108 A 2d 750, 379 Pa. 95—Klingner v Dugacki, 51 A 2d 627, 356 Pa 143
- Tex.—Grimes v Mulry, Civ App, 280

- SW 2d 343—Hickman v Hickman, Civ App, 244 SW 2d 681, error refused no reversible error
- Wash.—In re Johnson's Estate, 148 P 2d 962, 20 Wash.2d 628
74. Okl.—In re Martin's Estate, 261 P 2d 603—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Wheeling's Estate, 175 P 2d 317, 198 Okl 81—In re Smith's Estate, 172 P 2d 328, 197 Okl 405—Amos v Fish, 144 P 2d 967, 193 Okl 406—In re Shipman's Estate, 85 P 2d 317, 184 Okl 56
75. Cal.—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Schwartz' Estate, 155 P 2d 76, 67 Cal App 2d 512
- Ga.—Fehn v Shaw, 35 SE 2d 253, 199 Ga 747
- Iowa.—In re Siniff's Estate, 10 NW 2d 550, 233 Iowa 800
- Ky.—New v Creamer, 275 SW 2d 918—Hurley v Blankinship, 229 SW 2d 963, 313 Ky 49, 21 ALR 2d 817
- Me.—Appeal of Martin, 179 A 655, 133 Me 422
- Mich.—Michels v Socall, 275 NW 658, 281 Mich 633
- Neb.—In re Dnright's Estate, 271 NW 152, 132 Neb 111
- NY.—In re Jones' Estate, 278 NYS 887, 155 Misc 49
- Okl.—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464—In re Sixkiller, 32 P 2d 936, 168 Okl 302
- Pa.—In re Johnson's Estate, 87 A 2d 188, 370 Pa. 125—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Higbee's Estate, 75 A 2d 599, 365 Pa. 381—In re Ash's Estate, 41 A 2d 620, 351 Pa 317—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58—Kish v Bakaysa, 199 A 321, 330 Pa 533
- In re Loeper's Estate, Orph, 47 Berks Co 131—In re Burns' Estate, Orph, 34 West Co 245—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa. 438

- Wis.—In re Jacobson's Will, 270 NW 923, 223 Wis 508  
68 CJ p 482 note 79
- Age as affecting capacity in general see supra § 27
- Marriage at advanced age see infra § 72
- Presumption arising from old age see supra § 39
- Evidence held to show testamentary capacity**  
Fla.—In re Starr's Estate, 170 So 620, 125 Fla 536
- La.—Succession of Prejean, 71 So 2d 328, 224 La. 921—Landry v Landry, 199 So 401, 196 La. 490—Rostrup v Succession of Spicer, 165 So 307, 183 La. 1087
- Me.—Appeal of Eastman, 191 A 586, 135 Me 233
- Minn.—In re Geske's Estate, 1 NW 2d 423, 211 Minn 417
- Neb.—In re Hagan's Estate, 9 NW 2d 794, 143 Neb 459, 154 ALR 573
- NY.—In re Greff's Will, 77 NYS 2d 903, 273 App Div 925, motion denied 79 NYS 2d 865, 273 App Div 1035, motion dismissed 80 NE 2d 659, 298 NY 510
- In re Vonbaus' Estate, 4 NYS 2d 599, 167 Misc 660
- Or.—In re Andersen's Estate, 235 P 2d 869, 192 Or 411
- Pa.—In re Cressman's Estate, 31 A 2d 109, 346 Pa. 400
- Tex.—Davidson v Gray, Civ App, 97 SW 2d 488
- Va.—Croft v Snidow, 33 SE 2d 208, 183 Va. 649
- Wash.—In re Chapin's Estate, 135 P 2d 445, 17 Wash 2d 196
- Wis.—In re Boston's Estate, 33 NW 2d 257, 253 Wis 8—In re Ehlke's Will, 18 NW 2d 490, 246 Wis 651, vacated on other grounds 19 NW 2d 888, 247 Wis 534
- Wyo.—In re Lane's Estate, 58 P 2d 415, 50 Wyo 119, rehearing denied 60 P 2d 360, 50 Wyo 119  
68 CJ p 482 note 79 [a].
- Evidence held insufficient to prove aged testator's testamentary capacity**  
NY.—In re Levy's Estate, 58 N.Y. S 2d 5.

will was executed while he was physically infirm,<sup>76</sup> or suffering from arteriosclerosis,<sup>77</sup> or senile dementia,<sup>78</sup> and proof of eccentricity incident to old age is not of itself sufficient evidence to show lack of capacity of the testator to make a will.<sup>79</sup> Failure of memory of an aged person does not prove incapacity<sup>80</sup> unless it was so total or so extended as to make incapacity practically certain,<sup>81</sup> and neither does the fact that he required repetition of questions<sup>82</sup> The advanced age of the testator at the time of making the will is a circumstance not to be ignored, however,<sup>83</sup> and in connection with other evidence may aid in supporting a finding of testamentary incapacity,<sup>84</sup> but in the absence of

the clearest and most convincing proof of invalidity the courts will uphold the will of an aged person.<sup>85</sup>

### § 69. Circumstances of Execution

On the issue of testamentary capacity the facts and circumstances connected with the execution of the will may be considered.

On the issue of testamentary capacity the facts and circumstances connected with the execution of the will may be considered<sup>86</sup> Where the lawyer attending the execution of the will is of unquestioned ability and integrity, it is some evidence of capacity<sup>87</sup>

76. Cal—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711

Mich—In re Brner's Estate, 266 N W 394, 275 Mich 396—In re La Liberte's Estate, 262 NW 278, 272 Mich 424

NJ—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

Ohio—Caswell v Lermann, 88 NE 2d 405, 85 Ohio App 200

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—Kish v Bakaysa, 199 A 321, 330 Pa 533

In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

68 C J p 483 note 80

77 Cal—In re Simmons' Estate, 151 P 2d 8, 65 Cal App 2d 533

Mass—Ronan v Moroney, 47 NE 2d 933, 313 Mass 475

NY—In re Coddington's Will, 118 NYS 2d 525, 281 App Div 143, affirmed 120 NE 2d 777, 307 NY 181

Ohio—Brown v Jacoby, 9 NE 2d 693, 55 Ohio App 250

Okl—In re Holmes' Estate, 270 P 2d 320

Va—Hall v Hall, 23 SE 2d 810, 181 Va 67

Wash—In re Chapman's Estate, 235 P 2d 883, 37 Wash 2d 682

68 C J p 483 note 80 [c]

**Arteriosclerosis complicated with nephritis**

Ill—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19

78. Kan—In re Regle's Estate, 228 P 2d 722, 170 Kan 538

Okl—In re Williams' Estate, 249 P 2d 94, 207 Okl 209

Or—In re Provolt's Estate, 151 P 2d 736, 175 Or 128

Wash—In re Chapman's Estate, 225 P 2d 883, 37 Wash 2d 682

68 C J p 483 note 81

**Evidence held sufficient to sustain conclusion that testator was in advanced stage of senile dementia.**

Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

79 Pa—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—Kish v Bakaysa, 199 A 321, 330 Pa 533—In re Catania's Estate, 20 Pa Dist & Co 656

In re Loeper's Estate, Orph, 47 Berks Co 131

W Va—Prichard v Prichard, 65 SE 2d 65, 135 W Va 767

68 C J p 483 note 82

Eccentricities in general see supra § 66

80. Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—Jensen v Jensen, 192 P 2d 55, 84 Cal App 2d 754

Mich—In re Cotcher's Estate, 264 N W 325, 274 Mich 154

Mo—Walter v Alt, 152 S W 2d 135, 318 Mo 53—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827

NJ—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

Okl—In re Wilkins' Estate, 185 P 2d 213, 199 Okl 249

Pa—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381

In re Schaffer's Estate, Orph, 48 Dauph Co 378—In re Lockard's Will, Orph, 50 Lanc L Rev 455—

In re Sassaman's Estate, Orph, 26 North Co 348—In re Miller's Estate, Orph, 35 West Co 11—In re Burns' Estate, Orph, 34 West Co 245—In re Nelson's Estate, Orph, 66 York Leg Rec 161—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

68 C J p 483 note 83.

**Occasional failures to recognize old acquaintances**

Ky—New v Creamer, 275 S W 2d 918—Middleton v Skaggs, 91 S W 2d 1016, 263 Ky 81

Pa—In re Loeper's Estate, Orph, 47 Berks Co 131

68 C J p 483 note 83 [b].

81. Cal—In re Langley's Estate, 73 P 824, 140 Cal 126

Pa—In re Lawrence's Estate, 132 A 786, 286 Pa 58

82. Mo—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827

83. Ark—Yarbrough v Moses, 267 S W 2d 289

68 C J p 483 note 85

84 Cal—In re Dupont's Estate, 140 P 2d 866, 60 Cal App 2d 276

Iowa—In re Kenny's Estate, 10 N W 2d 73, 233 Iowa 600

**Evidence held to show incapacity**

Cal—In re Johnson's Estate, 193 P 2d 782, 85 Cal App 2d 760—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 630

Ill—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321—Crescio v Crescio, 6 NE 2d 628, 365 Ill 393

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Ky—Keller v Williams, 140 S W 2d 827, 283 Ky 127

Minn—In re Healy's Estate, 68 NW 2d 401—In re Palmer's Estate, 57 NW 2d 409, 238 Minn 519

NY—In re Morey's Will, 4 NYS 2d 125, 254 App Div 713

In re Forsyth's Estate, 9 NYS 2d 642, 169 Misc 1042—In re Lasher's Estate, 2 NYS 2d 204, 165 Misc 592

Tenn—Haley v Agilvie, 2 Tenn App 607

Tex—King v King, Civ App, 242 S W 2d 925, reversed on other grounds In re King's Estate, 241 S W 2d 660, 150 Tex 662—Oglesby v Harris, Civ App, 130 S W 2d 449, error dismissed, judgment correct—Mills v Kellahin, Civ App, 91 S W 2d 1079, error dismissed

Wash—In re Forsman's Estate, 30 P 2d 941, 177 Wash 38

68 C J p 484 note 86 [a]

85. NY—In re Benewav's Will, 71 NYS 2d 361, 272 App Div 463

86 Mich—In re Walz's Estate, 183 NW 754, 215 Mich 118

68 C J p 484 note 87.

37. Pa—In re Brennan's Estate, 168 A 25, 312 Pa 335

68 C J p 484 note 88.

**Subscribing witnesses** When the subscribing witnesses are above suspicion, fully aware of their duty, and competent to perform it, an imputation of incapacity may be sustained only by strong evidence.<sup>88</sup> The fact that an alienist became a witness to the will at the instance of the beneficiaries is not a suspicious circumstance.<sup>89</sup> The mere circumstance that the testator himself did not formulate words of request that others witness the execution of his will does not tend to prove incapacity.<sup>90</sup>

**Testator's signature to will.** Where the signature of the testator to the will is in his natural hand in conformity with his normal handwriting, it is evidence of mental and physical soundness.<sup>91</sup> If the testator's name is signed differently from his usual mode of writing it, such circumstance may be considered on the question of testamentary capacity,<sup>92</sup> but it is not conclusive that the testator was incompetent.<sup>93</sup> The fact that the signature on the will was scrawling and illegible compared to earlier exemplars of the testator's signature constitutes no substantial evidence of incompetency.<sup>94</sup>

**Dictated or written by testator** When a will is

sensible and especially where it provides for a just and reasonable disposition of his property, the fact that it was dictated<sup>95</sup> or written by the testator<sup>96</sup> is evidence of testamentary capacity.

## § 70. Mental Condition Prior and Subsequent to Execution of Will

Before evidence can be held legally sufficient to overthrow the presumption of testamentary capacity, it must be directed to the date of the execution of the will, and while evidence of the testator's mental condition before or after the execution of the will is not conclusive, and weakens as time lengthens in either direction, it is evidence to be weighed and considered.

Before evidence can be held to be legally sufficient to overthrow the presumption of testamentary capacity it must be directed to the date of the execution of the will.<sup>97</sup> Evidence of the testator's mental condition before or after the execution of the will is not conclusive,<sup>98</sup> but serves only as an aid to determine the primary question.<sup>99</sup> The state of the testator's mind at other times can have no probative force except as it may tend to show his mental condition at the time the will was executed.<sup>1</sup>

88. SC—Means v Means, 36 SCL 167

89. NY—Matter of Journeay, 44 NYS 548, 15 App Div 567, affirmed 57 NE 1113, 162 NY 611  
In re Benjamin's Will, 136 NYS 1070

90. Cal—In re Holloway's Estate, 235 P 1012, 195 Cal 711  
Necessity and sufficiency of request see infra § 186

91. Tex—Corpus Juris quoted in Scott v McKibban, Civ App, 110 SW 2d 72, 75, reversed on other grounds McKibban v Scott, 114 SW 2d 213, 131 Tex 182, 115 A LR 1421  
68 CJ p 484 note 93

92. Pa—In re Fay's Estate, Orph, 31 Erie Co 353

Tex—Corpus Juris quoted in Scott v McKibban, Civ App, 110 SW 2d 72, 75, reversed on other grounds McKibban v Scott, 114 SW 2d 213, 131 Tex 182, 115 A LR 1421  
68 CJ p 484 note 94

93. Cal—In re Little's Estate, 189 P 818, 46 Cal App 776  
68 CJ p 484 note 95

**Use of different middle initial** does not raise inference of lack of testamentary capacity where it was done on the advice of her attorney, because testatrix so held the title to certain real estate  
Pa—In re Mills' Estate, 79 Pa Dist & Co 417

94. Cal—In re Powers' Estate, 184 P 319, 81 Cal App 2d 480.

### Reason for rule

The fact was as readily attributable to physical as mental weakness  
Cal—In re Powers' Estate, 184 P 2d 319, 81 Cal App 2d 480

95. Mich—In re Aylward's Estate, 219 NW 697, 243 Mich 9  
68 CJ p 484 note 97

### Personally instructing draftsman

A will is sustained as a general rule where the evidence shows that testator personally instructed the draftsman as to the will's preparation, especially when no one else was present

Tex—Barton v Bailey, Civ App, 202 SW 2d 277, error refused no reversible error  
68 CJ p 484 note 97 [c]

### Change

Fact that testator on hearing the will read had a change made so as to incorporate a bequest to children of his sister was strong evidence of testamentary capacity.

Ky—Higgs' Ex'x v Higgs' Ex'x, 150 SW 2d 681, 286 Ky 236

96. La—Wilcox v Hammond, 112 So 375, 163 La. 489  
68 CJ p 484 note 98

Evidence of execution during lucid interval see supra § 63

97. Kan—In re Hall's Estate, 195 P 2d 612, 165 Kan 465

Md—Lynn v Magness, 62 A 2d 604, 191 Md 674—Bell v Wolfkill, 137 A 35, 152 Md 407

Mo—Baker v Spears, 210 SW 2d 13, 357 Mo 601.

SC—McCollum v Banks, 50 SE 2d 199, 213 SC 476.

Conduct and declarations before and after execution see infra § 72

Presumption of testamentary capacity see supra § 31

"Testimony of mental incapacity must bear a reasonable relation to the time of the execution of the will"  
Kan—Baker v Murray, 160 SW 2d 27, 28, 289 Ky 733

98. Cal—In re Sandman's Estate, 8 P 2d 499, 121 Cal App 9

Pa—In re Lewis' Estate, 72 A 2d 80, 364 Pa. 225

Tenn—American Trust & Banking Co v Williams, 225 SW 2d 79, 32 Tenn App 592

**As against positive testimony of subscribing witnesses**

(1) Evidence of mental condition before or after execution of the will does not controvert positive testimony of subscribing witnesses unless it would be proof of testamentary incapacity at time will was signed

Ga—Beman v Stembridge, 85 SE 2d 434, 211 Ga. 274—Anderson v Anderson, 80 SE 2d 807, 210 Ga. 464—Ware v Hill, 71 SE 2d 630, 209 Ga. 214—Norman v Hubbard, 47 SE 2d 574, 203 Ga. 530—Fehn v Shaw, 35 SE 2d 253, 199 Ga. 747

(2) Weight accorded testimony of subscribing witnesses generally see infra § 75

99. Kan—In re Hall's Estate, 195 P 2d 612, 165 Kan 465.

1. Mo—Glover v Bruce, 265 SW. 2d 346—Morton v Simms, 263 SW 2d 435—Walter v Alt, 152 SW 2d 135, 348 Mo 53—Hennings v Hallar, 149 SW 2d 338, 347 Mo 827.

If decedent knew and understood the business in which he was engaged at the time of execution, evidence as to his state of mind at other times becomes of no importance.<sup>2</sup> Evidence of incompetency before or after the execution of the will is, however, evidence to be weighed and considered,<sup>3</sup> and incapacity may, according to the particular circumstances, be established by evidence of the testator's condition before or after the execution,<sup>4</sup> as where there is no evidence to the effect that testator had normal periods, and it was shown that his condition was one that grew progressively worse.<sup>5</sup> Testimony of witnesses who were present at the time of the execution of the will is not conclusive against testimony of others who saw the testator within a few days of the execution of the will.<sup>6</sup> The remoteness of time bears on the weight of the evidence,<sup>7</sup> which weakens as time lengthens in either direction.<sup>8</sup>

In view of the fact that on proof of general, fixed, and habitual insanity a presumption of continuity is raised, as discussed supra § 36, it is

not necessary in case of permanent insanity to prove insanity at the exact time the will was executed.<sup>9</sup> If general insanity is established and the whole evidence leaves the issue in doubt, probate of the will should be denied.<sup>10</sup> Where there is no claim of permanent mental derangement, it must be shown that at the very time the will was executed the testator had not sufficient testamentary capacity.<sup>11</sup> Proof of testator's insanity will justify a finding of incapacity at some prior date only where the condition must have existed for some time, as where the disease is progressive and has arrived at an advanced stage.<sup>12</sup>

### § 71. Transaction of Business and Management of Property

Mere proof that the testator was incapable of transacting ordinary business does not prove testamentary incapacity, but evidence that he was mentally incapable of transacting any kind of business is sufficient to establish incapacity. The fact that the testator transacted his own business and managed his property is strong evidence of testamentary capacity, but not conclusive.

Mere proof that the testator was incapable of

Klaus v Zimmerman, App. 174 S W 2d 365

Neb—In re Fehrenkamp's Estate, 48 N W 2d 421, 154 Neb 488

Pa—In re Ross' Estate, 49 A 2d 392, 355 Pa 112

SC—McCollum v Banks, 50 S E 2d 199, 213 SC 476

Tex—Bell v Bell, Civ App., 248 S W 2d 978, error refused no reversible error—Bell v Bell, Civ App., 237 S W 2d 688—Kutchinsky v Zillion, Civ App., 183 S W 2d 237, error refused—Navarro v Garcia, Civ App., 172 S W 723

**Proof of incompetency previous to execution of will held insufficient to establish incompetency at time of execution**

Ala—Hubbard v Moseley, 75 So 2d 658, 261 Ala 683

Cal—In re Watkins' Estate, 181 P 2d 192, 81 Cal App 2d 465—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

Ky—Bickel v Louisville Trust Co., 197 S W 2d 444, 303 Ky 356—Kentucky Trust Co v Gore, 192 S W 2d 749, 302 Ky 1

**Proof of incompetency after execution of will held not controlling**

NJ—In re Rule's Will, 5 A 2d 64, 125 N J Eq 255

NY—In re Patterson's Will, 132 N Y S 2d 609, 206 Misc 268

Okl—Moore v Glover, 163 P 2d 1003, 196 Okl 177.

**Senile dementia**

(1) Evidence that a person was afflicted with senile dementia before a will was made is not conclusive of his continued incapacity to make a will at a considerably later date

Kan—In re Hall's Estate, 195 P 2d 612, 165 Kan 465

(2) Proof of senile dementia several years after the will was made is not evidence of lack of testamentary capacity at the time of the execution of the will

Or—In re Periy's Estate, 181 P 2d 783, 181 Or 332

2. Pa—In re Phillips' Estate, 149 A 719, 299 Pa 415

3. Cal—In re McCollum's Estate, 140 P 2d 176, 59 Cal App 2d 741

Mont—In re Cissel's Estate, 66 P 2d 779, 104 Mont 306

Okl—Brummett v King, 251 P 2d 1062, 207 Okl 607—Moore v Glover, 163 P 2d 1003, 196 Okl 177—Porter v Porter, 35 P 2d 938, 168 Okl 645

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583

4. Mich—Spencer v Terry's Estate, 94 N W 372, 133 Mich 39

**Evidence of incompetency after execution of will held sufficient to establish incompetency at time of execution**

Cal—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390

5. Ga—Leventhal v Baumgartner, 61 S E 2d 810, 207 Ga 412

6. Cal—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154

7. Mich—In re Balk's Estate, 287 N W 351, 289 Mich 703, 124 A L R 431

Minn—In re Forsythe's Estate, 22 N W 2d 19, 221 Minn 303, 167 A L R 1

Wash—In re Gwinn's Estate, 219 P 2d 591, 36 Wash 2d 583

**Probative force dependent on time relation**

Probative force of evidence depends on relation in time between statements or conduct of testatrix and date of execution of the will

Or—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75

8. Conn—Jackson v Waller, 10 A 2d 763, 126 Conn 294

Tex—Garcia v Galindo, Civ App., 199 S W 2d 488, reversed on other grounds 199 S W 2d 499, 145 Tex 507.

68 C J p 485 note 8

**Evidence held of little, if any, weight where relating to a time three years after the will was executed**

Iowa—Walters v Heaton, 271 N W 310, 223 Iowa 405

9. SC—McCollum v Banks, 50 S E 2d 199, 213 SC 476

68 C J p 485 note 10

10. NY—In re Chauque's Will, 145 N Y S 364, 83 Misc 684, 11 Mills Surr 516

11. Iowa—Casad v Ripley, 124 N W 196, 145 Iowa 544

68 C J p 485 note 12

12. Iowa—Wendt v Foss, 140 N W 881, 161 Iowa 122

**Permanent insanity**

Evidence to support caveat on issue of insanity must ordinarily show either that testator was of unsound mind at time of execution of will or that he was affected with permanent insanity prior to its execution, in which case burden of proof of capacity is shifted to executor

Md—Acker v Acker, 192 S W 2d 337, 172 Md 477.

transacting ordinary business does not prove testamentary incapacity,<sup>13</sup> and proof that he was assisted in the management of his business affairs does not indicate lack of testamentary capacity.<sup>14</sup> So, the fact that a testator intrusted his business affairs to the judgment of a confidential agent is not evidence of incapacity.<sup>15</sup> Evidence that the testator was mentally incapable of transacting any kind of business is, however, sufficient to establish incapacity.<sup>16</sup> Capacity to acquire and preserve property is evidence of testamentary capacity, but not conclusive,<sup>17</sup> and the fact that a testator transacted his own business and managed his property is strong evidence of testamentary capacity,<sup>18</sup> but it is not conclusive.<sup>19</sup>

## § 72. Conduct and Declarations of Testator

On the issue of testamentary capacity, the conduct, acts, and statements of the testator, both before and after the execution of the will may be considered, but isolated, detached, trivial, and inconsequential incidents in the life of the testator are of little weight

On the issue of testamentary capacity, the conduct, acts, and statements of the testator both before and after the execution of the will may be

considered.<sup>20</sup> Written declarations of the testator have far greater weight than testimony of witness as to oral declarations.<sup>21</sup> The acts and words at and nearest to the time of execution may have the greater weight as evidence diminishing in weight as time lengthens in either direction.<sup>22</sup> Conversations, acts, and conduct of the testator subsequent to the execution of the will are not generally of the same relative assistance as are similar matters occurring before the execution of the will.<sup>23</sup> The best proof of insanity is a demonstrated failure of the testator to react to the common facts and events of life.<sup>24</sup> Isolated, detached, trivial, and inconsequential incidents in the life of the testator, especially where their occurrence is remote from the date of the execution of the will, are of little weight on the issue of testamentary capacity.<sup>25</sup> A marked change in the testator's habits and thoughts may indicate incapacity.<sup>26</sup>

In the absence of other evidence to connect it with some phrase of unsoundness of mind to prove incapacity, it is insufficient to show that the testator was changeable,<sup>27</sup> irritable,<sup>28</sup> thrifty,<sup>29</sup> miserly, dishonest, or profane,<sup>30</sup> dissipated,<sup>31</sup> slovenly,<sup>32</sup>

13. Kan—*Corpus Juris* cited in *Kunkle v Urbansky*, 109 P 2d 71, 74, 153 Kan 117

Pa.—In re Johnson's Estate, 87 A 2d 188, 370 Pa. 125—In re Conway's Estate, 79 A 2d 208, 366 Pa. 641—In re Higbee's Estate, 75 A 2d 599, 365 Pa. 381

In re Nelson's Estate, Orph., 66 York Leg Rec 161—In re Lauer's Estate, Orph., 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa. 438

68 C J p 485 note 15

Adjudication of incompetency to manage property see supra § 64  
Capacity to transact business as affecting testamentary capacity generally see supra § 15

### Proof of spendthrift tendency

Evidence that testator spent the \$3,500 per year income received by him from spendthrift trust, together with some \$15,000 from the sale of stocks left to him outright, that he borrowed several thousand dollars from friends and spent all the money over a period of twenty years and was always in debt and made no effort to pay any of his financial obligations did not establish lack of testamentary capacity

Ky—*Bickel v Louisville Trust Co*, 197 SW 2d 444, 303 Ky 356

14. Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Cummins' Estate, 259 NW 894, 271 Mich 215

15. Ill—*Buerger v Buerger*, 148 N E 274, 317 Ill 401.

16. Ill—*Hurley v Caldwell*, 91 N E 654, 244 Ill 448  
68 C J p 485 note 17

17. Tenn—*Melody v Hamblin*, 115 SW 2d 237, 21 Tenn App 687

18. Ill—*Quathamer v Schoon*, 19 NE 2d 750, 370 Ill 606

NY—In re Kimball's Will, 281 NY S 605, 156 Misc 338

In re Graham's Estate, 63 NYS 2d 572

Pa.—In re Griffith's Estate, Orph., 63 Montg Co 275

68 C J p 485 note 18

**Testimony of testator's banking transactions** consisting mainly of routine deposits and transactions handled mainly by bank employees, was entitled to careful consideration by the trier of facts

Cal—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390

### Sufficient proof

Evidence that testatrix was capable of transacting her ordinary business affairs made a prima facie case as to her testamentary capacity and was sufficient proof thereof in absence of introduction of any evidence by contestant on that issue

Neb—In re Wotke's Estate, 277 NW 45, 133 Neb 739

19. Cal—In re Pessagno's Estate, 136 P 2d 644, 58 Cal App 2d 390  
68 C J p 486 note 19

20. Cal—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 520  
68 C J p 486 note 21

Mental condition prior and subsequent to execution see supra § 70

21. NY—In re Stern's Estate, 244 NYS 250, 137 Misc 668, affirmed 256 NYS 54, 235 App Div 60, affirmed 185 NE 762, 261 NY 617

22. Conn—*Bishop v Copp*, 114 A 682, 96 Conn 571  
68 C J p 486 note 23.

23. Conn—*Bishop v Copp*, supra

24. NY—In re Gedney's Will, 142 NYS 157

25. Or—In re Heaverne's Estate, 246 P 720, 118 Or 308  
68 C J p 486 note 26

26. Cal—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 630  
68 C J p 486 note 27

27. La—*Succession of Jacob*, 34 So 59, 109 La 1012  
68 C J p 486 note 28

28. Pa—*Kish v Bakaysa*, 199 A 321, 330 Pa 533  
68 C J p 486 note 29

29. Ky—*Dossenbach v Reidhar's Ex'x*, 53 SW 2d 731, 245 Ky 419

30. NY—In re Cutter's Will, 162 NYS 545, 175 App Div 647.  
68 C J p 486 note 31

31. NY—In re Halbert's Will, 37 NYS 757, 15 Misc 308  
Wash—In re Gorkow's Estate, 56 P 385, 20 Wash 563

As to effect of intoxicants on testamentary capacity see supra § 61

32. Kan—In re Regle's Estate, 228 P 2d 722, 170 Kan 558.

weak-minded,<sup>33</sup> childish,<sup>34</sup> licentious in his talk or actions,<sup>35</sup> or rambling in his talk,<sup>36</sup> or that he talked to himself,<sup>37</sup> acted strangely,<sup>38</sup> or resented efforts to have himself declared incompetent.<sup>39</sup>

*Conduct toward friends and relatives* On the issue of testamentary capacity it is proper to consider the conduct of the testator toward friends and relatives.<sup>40</sup> The fact that the testator with or without reason disliked his relatives or friends,<sup>41</sup> or even his wife,<sup>42</sup> or did not talk to certain relatives,<sup>43</sup> does not establish testamentary incapacity.

*Conformity of will to expressed intentions* If a will is made in conformity to a fixed determination entertained and expressed for some time, it is strong proof of capacity,<sup>44</sup> as where the will is in substantial conformity with prior wills.<sup>45</sup> If the will is not in harmony with the testator's expressions of his intended disposition, it may, in connection with other evidence,<sup>46</sup> be considered as evidence of testamentary incapacity.<sup>47</sup> Inconsistency with expressed testamentary intention is not, however, controlling<sup>48</sup> or of great importance,<sup>49</sup> particularly where a valid reason for the change in testamentary intention exists.<sup>50</sup>

*Cruelty* Whether or not cruelty is evidence of

insanity depends on the nature of the cruelty, the existence or nonexistence of a cause or reason for cruel acts and the circumstances generally.<sup>51</sup>

*Declarations as to capacity* A declaration that the testator did not remember anything that occurred during his illness, at which time the will was executed, is not sufficient to prove mental incapacity.<sup>52</sup> Declarations made at a time when the testator was insane, if admissible at all, would possess no weight as proving or tending to prove the truth of the matters declared by him.<sup>53</sup>

*Marriage at an advanced age* is not of itself evidence of testamentary incapacity.<sup>54</sup>

### § 73. Understanding as to Property

If a testator cannot comprehend ordinary affairs or is in ignorance of his ownership of property, such facts permit an inference that he is of unsound mind, and the disposition by the testator of property not his own may be considered in connection with other facts tending to impeach his competency in determining his mental capacity.

If a testator cannot comprehend ordinary affairs or is in ignorance of his ownership of property, such facts permit an inference that he is of unsound mind.<sup>55</sup> Reference in the will that certain property

Pa.—In re Loeper's Estate, Orph., 47 Berks Co 131  
68 C J p 486 note 34

33 Ky.—Schrodt's Ex'r v Schrodt, 203 SW 1051, 181 Ky 174  
68 C J p 486 note 35

34 Kan.—In re Regle's Estate, 228 P 2d 722, 170 Kan 558  
68 C J p 486 note 36

35 NY.—Matter of Jones' Will, 25 NYS 109, 5 Misc 199

Pa.—In re Rupert's Estate, 36 A 2d 500, 349 Pa 58

36 Pa.—In re Voglesong's Appcal, 46 A 424, 136 Pa 194

37 N J.—Errickson v Fields, 30 N J Eq 634

38 Ky.—Hoskins v Hoskins, 7 SW 546, 9 Ky L 915

39 NY.—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

40 Mo.—Adams v Kendrick, 11 SW 2d 16, 321 Mo 310  
68 C J p 487 note 45

Insane delusions and monomania see supra § 65

Mode of disposition of property see supra § 62

41 Cal.—In re Schwarz's Estate, 155 P 2d 76, 67 Cal App 2d 512

Tenn.—Farmers Union Bank of Henning v Johnson, 181 SW 2d 369, 27 Tenn App 342

68 C J p 487 note 46.

42 Ariz.—In re Greene's Estate, 11 P 2d 947, 40 Ariz 274.

43 Mo.—Hennings v Hallar, 149 SW 2d 338, 347 Mo 827

44 Ala.—McKinney v Weatherford, 7 So 2d 259, 242 Ala 493  
68 C J p 487 note 49

45 Cal.—In re Bacigalupi's Estate, 261 P 470, 202 Cal 450  
68 C J p 487 note 50

46 Ill.—Hurley v Caldwell, 91 NE 654, 244 Ill 448  
68 C J p 487 note 51

47 Ill.—Hurley v Caldwell, supra  
68 C J p 487 note 52

48 Mass.—Boston Safe Deposit & Trust Co v Blaisdell, 127 NE 2d 796

68 C J p 488 note 53

49 Ill.—Kellan v Kellan, 101 NE 614, 258 Ill 256

Pa.—Guarantee Trust & Safe Deposit Co of Shamokin v Heidenreich, 138 A 764, 290 Pa 249

*Purported statements* of testator to the effect that he had not devised and did not intend to devise any of his estate to beneficiary actually designated, but intended to pay her for her services to him while in his home and to will all his property to sisters and brother did not of themselves tend to show unsoundness of mind of testator

Tex.—Chambers v. Winn, Civ App, 133 SW 2d 279, reversed on other grounds 154 SW 2d 454, 137 Tex 444.

50 Iowa.—Smith v James, 34 NW 309, 72 Iowa 515  
68 C J p 488 note 55

51 Ky.—Pfuehl v Pfuehl, 123 SW 2d 128, 275 Ky 588

**Evidence held to show mental incapacity**

Evidence of testator's cruelty to family and unusual acts such as striking wife's corpse in coffin  
Ky.—Pfuehl v Pfuehl, supra.

52 Ala.—Henry v Hall, 17 So 187, 106 Ala. 84, 54 Am SR 22  
68 C J p 487 note 41

53 Cal.—Lang's Estate, 2 P 491, 65 Cal 19

54 Iowa.—Perkins v Perkins, 90 N W 55, 116 Iowa 253, 7 Prob Rep Ann 690  
68 C J p 487 note 43

55 Cal.—In re Lenci's Estate, 288 P 841, 106 Cal App 171  
68 C J p 488 note 58

*Testamentary capacity proved by evidence of testator's understanding of character and extent of his property, natural objects of his bounty, and what disposition he was making of his property* see supra § 58

**Evidence held sufficient**

(1) To establish that testatrix fully comprehended nature and situation of her property

Cal.—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

(2) To show to some extent that



belongs to the testator when in fact he did not own it,<sup>56</sup> or merely owned it in part,<sup>57</sup> is not sufficient to show mental incapacity when due explanation for the testator's claim is given.<sup>58</sup> The fact that the testator devised property which he had previously agreed to sell,<sup>59</sup> or which the devisee already owned,<sup>60</sup> does not denote mental incapacity when explained in the light of accompanying circumstances.<sup>61</sup> The disposition by the testator of property not his own may, however, be considered in connection with other facts tending to impeach such competency in determining a testator's mental capacity.<sup>62</sup>

#### § 74. Nuncupative Wills

In the case of nuncupative wills much greater strictness is required in proving testamentary intent and capacity than is necessary in the proof of written wills; and capacity must appear by the clearest and most indisputable testimony.

In the case of nuncupative wills much greater strictness is required in proving testamentary intent and testamentary capacity than is necessary in the proof of written wills.<sup>63</sup> Testamentary capacity of the deceased must appear by the clearest and most indisputable testimony.<sup>64</sup>

#### § 75. Testimony of Attesting Witnesses

- a. Necessity of examining witnesses
- b. Weight accorded testimony

##### a. Necessity of Examining Witnesses

Except as such testimony may be required by statute, if there is sufficient other evidence to show the testator's competency to execute a will, that fact need not be established by the subscribing witnesses.

If there is sufficient other evidence to show the testator's competency to execute a will, such fact

need not be established by the subscribing witnesses to establish its validity<sup>65</sup> so as to warrant admitting the will to probate.<sup>66</sup> Where required by statute, however, before a will may be admitted to probate, the subscribing witnesses must swear that they believed the testator or testatrix to be of sound mind and memory at the time of signing and acknowledging the will.<sup>67</sup> Under such statute the belief as to the testator's capacity is that entertained by the subscribing witnesses at the time the will was executed,<sup>68</sup> so that the will should be admitted to probate, although the subscribing witnesses also testify that since the execution of the will they have come to the conclusion that the testator was not sane when he made the will.<sup>69</sup> The testimony of the witnesses need not be in the words of the statute as long as they declare in legal effect that the testator was of sound mind and memory at the time of execution.<sup>70</sup> In a statutory action to set aside a will after probate where the execution and probate of the will are admitted by the bill and the only issue is the testator's soundness of mind, it is not essential, it has been held, that the subscribing witnesses should be called to prove the capacity of the testator.<sup>71</sup>

##### b. Weight Accorded Testimony

Testimony of the subscribing witnesses tending to prove the testator's competency is generally entitled to great weight, and may not lightly be brushed aside or permitted to be outweighed by circumstances which give rise merely to suspicion, but its value depends on the opportunity of the witness for observation, his skill and care in observing, his intelligence, and powers of discernment and memory.

Testimony of the subscribing witnesses tending to prove the testator's competency is to be considered.<sup>72</sup> Courts do not entirely agree as to the weight to be given such testimony.<sup>73</sup> According to some deci-

testatrix lacked comprehension of full extent and nature of her property

Iowa—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627

56. Ky—Newman v Dixon Bank & Trust Co., 265 SW 456, 205 Ky 31 68 CJ p 488 note 59

57. Mo—Platt v Platt, 236 SW 35, 290 Mo 686

58. Ky—In re Weir's Will, 9 Dana 434 68 CJ p 488 note 61

59. Ill—Beemer v Beemer, 96 NE 1058, 252 Ill 452 68 CJ p 488 note 62

60. Iowa—Blake v Rourke, 38 NW 392, 74 Iowa 519 Mo—Winn v Grier, 117 SW 48, 217 Mo 420

61. Mo—Winn v Grier, supra. 68 CJ p 488 note 64.

62. Mich—Shepard v Shepard, 126 NW 640, 161 Mich. 441

63. Md—Biddle v Biddle, 36 Md 630 68 CJ p 488 note 68

Nuncupative wills in general see infra §§ 209-218

64. Md—Biddle v Biddle, supra. 68 CJ p 488 note 69

65. La—Landry v Landry, 199 So 401, 196 La. 490 68 CJ p 489 note 71

Attestation as assertion of testator's mental capacity generally see infra § 182

66. La—Landry v Landry, supra. 68 CJ p 489 note 72

67. Ill—In re Lewicki's Estate, 282 Ill App 192 68 CJ p 489 note 73

68. Ill—Maine Missionary Soc v Ingalls, 35 NE 743, 148 Ill 287. 68 CJ p 489 note 74

69. Ill—Maine Missionary Soc v Ingalls, supra.

70. Ill—In re Rutledge's Will, 125 NE 2d 683, 5 Ill App 2d 355 68 CJ p 489 note 76

71. Ill—McCune v Reynolds, 123 NE 317, 288 Ill 188

72. Or—In re Fredricks' Estate, 282 P 2d 352 68 CJ p 489 note 78

##### Attorney and office associate

In will contest, testimony of subscribing witnesses who were the attorney who drew will for testatrix and his office associate, each of whom had an excellent reputation as a citizen and professionally, was entitled to weight

Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash.2d 258.

73. Minn—Jensen v Molgaard, 240 NW 656, 185 Minn. 284.

sions the testimony of the subscribing witnesses is very persuasive,<sup>74</sup> and is entitled to great weight,<sup>75</sup> peculiar weight,<sup>76</sup> great consideration,<sup>77</sup> or great respect<sup>78</sup> Other things being equal, it is the most reliable<sup>79</sup> It may not lightly be brushed aside or permitted to be outweighed by circumstances which give rise merely to suspicion,<sup>80</sup> and strong testimony is required to overcome it<sup>81</sup> The value of the testimony of the subscribing witness is to be determined with reference to the opportunity of the witness for observation, his skill and care in observing, his intelligence, and powers of discernment and memory,<sup>82</sup> but in order to give probative value to his testimony it is not necessary that he catechize the testator at the time of the execution of the will concerning whether he knew what he was doing, what properties he had, who his heirs were, and what disposition he was making of his estate<sup>83</sup>

In some jurisdictions such testimony is accorded greater weight than that of other witnesses,<sup>84</sup> espe-

cially witnesses who were not present at the time of executing the will and who did not see the testator the day of its execution<sup>85</sup> Thus, where expert testimony as to the testator's capacity is in conflict with that of the subscribing witnesses, the testimony of the subscribing witnesses should prevail,<sup>86</sup> particularly where one of the witnesses is a physician who had unusual opportunities for diagnosis, examination, and observation of the testator<sup>87</sup> In other jurisdictions it has no such greater weight,<sup>88</sup> at least, under all circumstances,<sup>89</sup> for example, as to witnesses who had equal or superior opportunities for observation<sup>90</sup> At any rate, the testimony of the subscribing witnesses is not conclusive,<sup>91</sup> except in the absence of countervailing proof,<sup>92</sup> and the subscribing witnesses are not always the best to prove the sanity of the testator.<sup>93</sup>

*Testimony impeaching capacity.* Testimony of an attesting witness impeaching the testator's capacity to execute a will is not to be disregarded,<sup>94</sup> but it

74. Or.—In re Boord's Estate, 284 P 2d 348

75. N.J.—In re Delaney's Estate, 25 A 2d 901, 131 N.J. Eq. 454

Or.—In re Hill's Estate, 256 P 2d 735, 198 Or. 307—In re Scott's Estate, 228 P 2d 417, 191 Or. 90—McGreal v Culhane, 141 P 2d 828, 172 Or. 337

Va.—Hall v Hall, 23 S.E.2d 810, 181 Va. 67

W.Va.—Pritchard v Pritchard, 65 S.E.2d 65, 135 W.Va. 767

68 C.J. p 489 note 80

**Evidence held sufficient to make out prima facie case**

Ga.—Beman v Stenbridge, 85 S.E.2d 434, 211 Ga. 274

**Testimony of subscribing witnesses, aided by presumption of sanity which follows proof of due execution, is entitled to great weight**

Or.—In re Fredricks' Estate, 282 P 2d 352—In re Beer's Estate, 222 P 2d 1005, 190 Or. 15—In re Walther's Estate, 163 P 2d 285, 177 Or. 282

76. Va.—Thornton v. Thornton's Ex'rs, 126 S.E. 69, 141 Va. 232

68 C.J. p 489 note 81

77. Wis.—In re Williams' Estate, 202 N.W. 314, 186 Wis. 160

78. Pa.—McTaggart v Thompson, 14 Pa. 149

In re Hochberger's Estate, Orph., 63 York Leg. Rec. 25

79. Or.—McCracken v McCracken, 219 P. 196, 109 Or. 83

68 C.J. p 489 note 84

80. Wis.—In re Scherrer's Estate, 7 N.W.2d 848, 242 Wis. 221

**Testimony of reputable and experienced practicing attorney, who drew will, and signed as witness as to**

testator's mental competency, may not be lightly brushed aside or permitted to be outweighed by circumstances giving rise merely to suspicions

Wis.—In re Kesich's Estate, 12 N.W. 2d 638, 244 Wis. 374—In re Scherrer's Estate, 7 N.W.2d 848, 242 Wis. 211

81. Pa.—In re Franz' Estate, 84 A 2d 292, 368 Pa. 618—In re Sturgeon's Estate, 53 A 2d 139, 357 Pa. 75

In re Loeper's Estate, Orph., 47 Berks Co. 131

82. Me.—Appeal of Martin, 179 A. 655, 133 Me. 422

Pa.—In re Schwartz' Estate, Orph., 88 Pittsb. Leg. J. 295, affirmed 16 A. 2d 374, 340 Pa. 170

**Facts on which conclusion based**

The weight to be given to an attesting witness' testimony concerning a testator's mental capacity depends on the facts on which the attesting witness arrived at his conclusion

Wis.—In re Zych's Will, 28 N.W.2d 316, 251 Wis. 108

83. Or.—In re Hill's Estate, 256 P. 2d 735, 198 Or. 307

84. N.Y.—In re Moyer's Will, 163 N.Y.S. 296, 97 Misc. 512

**Testimony of attorney who drew will and became witness thereto that testator appeared to be of sound mind and memory is entitled to serious consideration, and may be entitled to more consideration than that of a mere relative, friend, or acquaintance**

Cal.—In re Hansen's Estate, 100 P. 2d 776, 38 Cal. App. 2d 99.

85. Miss.—Fortenberry v Herrington, 196 So. 232, 188 Miss. 735.

86. N.Y.—In re Tiff's Will, 106 N.Y.S. 362, 55 Misc. 151, 20 N.Y. Ann.

Cas. 34—In re Connor's Will, 61 N.Y.S. 910, 29 Misc. 391

Evidence of mental condition before or after execution of will as not controverting positive testimony of subscribing witness see supra § 70

87. N.Y.—In re Tiff's Will, 106 N.Y.S. 362, 55 Misc. 151, 20 N.Y. Ann. Cas. 34

88. D.C.—Thompson v Smith, 103 F. 2d 936, 70 App. DC 65, 123 A.L.R. 76

68 C.J. p 489 note 88

89. D.C.—Thompson v Smith, supra

90. Conn.—Appeal of Crandall, 28 A. 531, 63 Conn. 365, 38 Am. S.R. 375

Miss.—King v Rowan, 34 So. 325, 82 Miss. 1

91. Cal.—In re Hansen's Estate, 100 P. 2d 776, 38 Cal. App. 2d 99

68 C.J. p 489 note 90

92. Pa.—McTaggart v Thompson, 14 Pa. 149

Wis.—In re Williams' Estate, 202 N.W. 314, 186 Wis. 160

93. Pa.—McTaggart v Thompson, 14 Pa. 149

94. Colo.—Davis v Davis, 170 P. 208, 64 Colo. 62

**Testimony held not to stultify witness**

Where the woman in charge of hospital in which testatrix was a patient signed as a subscribing witness only after questioning testamentary capacity of testatrix, and being erroneously assured by scrivener that attending physician had pronounced her competent, witness did not stultify herself by testifying in will context that testatrix was partially irrational at the time will was executed

Cal.—In re Downey's Estate, 124 P. 2d 637, 51 Cal. App. 2d 275

should be viewed with caution and suspicion,<sup>95</sup> is entitled to little weight,<sup>96</sup> and may be insufficient to overcome the presumption of sanity<sup>97</sup> So testimony of a subscribing witness that he could not say that testator was capable at the time of executing a valid deed or contract has been held insufficient to overcome the presumption of capacity<sup>98</sup> Notwithstanding positive evidence of one or all of the sub-

scribing witnesses that the testator was incompetent, probate will not be denied if testamentary capacity is established by other evidence,<sup>99</sup> and this is true in jurisdictions in which such testimony is accorded considerable weight<sup>1</sup> Testimony of attesting witnesses in conjunction with other evidence against the will may, however, justify a verdict that the testator lacked testamentary capacity.<sup>2</sup>

### III. WHAT MAY PASS BY WILL

#### § 76. In General

That which one owns he can dispose of by will, but a testator can convey only such property or interest as he has

Whatever is descendible is devisable<sup>3</sup> That which

one owns he can dispose of by will,<sup>4</sup> and it is immaterial from what source the property was acquired<sup>5</sup> However, the testator by will can convey only such property as he has,<sup>6</sup> and only such interest as he has in property<sup>7</sup> Thus, in the absence of a

95. Wis—In re Szperka's Will, 35 NW 2d 209, 254 Wis 153, mandate vacated on other grounds 35 NW 2d 911, 254 Wis 153  
68 C J p 489 note 94

**Testimony of lawyer, who drafted will and signed attestation clause, that he had great doubts as to testator's mental capacity, without reciting any facts that would raise such doubts in any unbiased person's mind, must be viewed with caution and suspicion**

Wis—In re Szperka's Will, supra.

96. Wis—In re Szperka's Will, supra.  
68 C J p 490 note 95

97. Wis—In re Szperka's Will, supra.

98. Md—Woodstock College of Baltimore County v Hankey, 99 A 962, 129 Md 675

99. Wis—In re Zych's Will, 28 NW 2d 316, 251 Wis 108  
68 C J p 490 note 97

1. NY—In re Johnson's Will, 223 NYS 843, 130 Misc 514  
68 C J p 490 note 98

2. Ky—Snyder's Ex'r v Cunningham, 16 SW 130, 13 Ky L 24  
68 C J p 490 note 99

3. Ky—**Corpus Juris** quoted in Murphy v Boling, 117 SW 2d 962, 965, 273 Ky 827, 117 A L R 1373  
Or—Brown v Hilleary, 32 P 2d 584, 147 Or 185  
68 C J p 490 note 2

Property subject to descent and distribution see Descent and Distribution § 8

Restrictions on amount which may be disposed of to charity or away from immediate family see infra § 110

Right of parent to dispose of custody of child by will see Parent and Child § 11 d (2)

**Estate for years, unless restricted by the terms of the creating instrument, may be devised.**

Kan—Kimberlin v Hicks, 94 P 2d 335, 150 Kan 449

4. U S—Wilhoit v Peoples Life Ins Co, CA Ind, 218 F 2d 887  
Ark—Martin v Martin, 198 SW 2d 408, 210 Ark 904

Fla—Williams v Williams, 6 So 2d 275, 149 Fla 454

Ill—Miller v Ridgley, 117 NE 2d 759, 2 Ill 2d 223—Jilek v Chicago, Wilmington & Franklin Coal Co, 47 NE 2d 96, 382 Ill 241, 146 A L R 871

Ky—Miller's Ex'x v Miller, 221 SW 2d 654, 310 Ky 726—**Corpus Juris** quoted in Murphy v Boling, 117 SW 2d 962, 965, 273 Ky 827, 117 A L R 1373

NY—First Trust & Deposit Co v Phoenix, 84 NYS 2d 301

W Va—Goetz v Old Nat. Bank of Martinsburg, 84 SE 2d 759  
68 C J p 490 note 3

Mineral estate, granted or reserved, as devisable see Mines and Minerals § 156

Property which may pass by nuncupative will see infra § 213

#### Unregistered deed of gift

Where deed of gift, though executed more than eight years previously, had not been registered at time of death of grantor, title to realty described therein was in grantor at death and passed to devisees in accordance with provisions of her will  
NC—Justice v Mitchell, 78 SE 2d 122, 238 NC 364

5. NY—In re Fricke's Will, 19 NYS 315, 64 Hun 639, affirmed 32 NE 648, 135 NY 659  
68 C J p 490 note 4

#### Child held to have fee simple interest

Where will devised parcels of realty to each of testator's children and provided that in case of any child dying without leaving surviving lawful issue the portion devised to such child should be distributed among the children then surviving

share and share alike, and last surviving child died without surviving issue, the share of such child was a fee simple interest subject to disposal by will of such child

Ill—McGlothlin v McElvain, 95 NE 2d 68, 407 Ill 112

**Heir may make testamentary disposition of his inheritance**

Cal—In re Meyer's Estate, 238 P 2d 597, 107 Cal App 2d 799

6. Ohio—Aubry v Aubry, 45 NE 2d 892, 70 Ohio App 298

Tenn—Crocker v Crocker, 11 Tenn App 354

#### Option to purchase subject to other option

Where testator leased portion of lot including option to purchase that portion, and subsequently by will, devised first option to purchase entire lot to beneficiary subject to option existing in favor of lessees, such beneficiary received potential right to acquire title to whole lot, subject to option of lessees, and having given notice of her intention to so purchase, she was entitled to receive, or be credited with, proceeds paid by lessees upon exercise of their rights under option

Pa—In re Siegel's Estate, 115 A 2d 843, 178 Pa Super 532

7. Ark—Refeld v Bollette, 14 Ark 148

Ill—Alcorn v Alcorn, 32 NE 2d 982, 309 Ill App 267

NY—In re Petersen's Estate, 89 NYS 2d 586

Ohio—Cox v Boulger, 62 NE 2d 913, 78 Ohio App. 527, motion denied 65 NE 2d 95

Pa—In re Williams' Estate, 37 A 2d 584, 349 Pa 568

In re Williams' Estate, Com Pl, 45 Lack Jur 170, 12 Som Leg J. 101

Tex—Wipff v Wipff, Civ App, 209 SW 2d 947—Martin v Swank, Civ App, 194 SW 2d 155, error refused no reversible error

Wash—Ness v Bender, 138 P.2d 864, 18 Wash 243.

valid power,<sup>8</sup> he cannot devise or bequeath property to which he has no title<sup>9</sup> Stated otherwise, a decedent cannot by will pass the title of property which would not pass by descent without a will,<sup>10</sup> and a legatee's rights as to specific property do not vest when without the will the property would

not become part of decedent's estate<sup>11</sup>

It follows from the above that, in the absence of facts creating an estoppel on the part of the transferee,<sup>12</sup> a will cannot pass title to property which the testator has transferred,<sup>13</sup> as where it has been

Wis—In re Emmerick's Will, 67 N W 2d 374, 268 Wis 186

**Executor or administrator cannot bequeath the property of decedent**

Fla—Brown v Indian River Orange Lands, 179 So 759, 131 Fla 466

8. NY—In re Van Winkle's Will, 86 NYS 2d 597

9 Ala—Corpus Juris cited in Carter v First Nat Bank, 185 So 361, 363, 237 Ala 47

DC—Central Dispensary and Emergency Hospital v Saunders, 165 F 2d 626, 83 US App DC 52

Ga—Bright v Cudahy Packing Co., 15 SE 2d 880, 192 Ga 581

Idaho—Stone v Fisher, 139 P 2d 479, 65 Idaho 52

Ky—Slack's Ex'r v Barrett, 160 S W 2d 595, 290 Ky 251

Mo—Mizell v Osmon, 189 SW 2d 306, 351 Mo 321

NJ—Ratti v Ratti, 71 A 2d 381, 6 NJ Super 352

NY—In re Petersen's Estate, 89 NYS 2d 586—In re Van Winkle's Will, 86 NYS 2d 597

Ohio—Stevens v Hill, 2 Ohio Supp 220—Harrison v Hillegas, 1 Ohio Supp 160

Or—Morse v Paulson, 186 P 2d 394, 182 Or 111

Tenn—West v Moore, 246 SW 2d 74, 193 Tenn 431

Tex—C C Young Memorial Home for Aged Women v Nelms, Civ App, 223 SW 2d 302, error refused no reversible error—Paris v Paris, Civ App, 138 SW 2d 810, error refused

68 C J p 490 note 6.

**Legal matters of attorney and unprobated wills in his files cannot pass by attorney's will**

NY—In re Trybom's Estate, 6 NYS 2d 29, 168 Misc. 484

**Third party's chose in action**

A testator could not dispose of any chose in action which a third party had against testator's son Ohio—Muller v. Muller, 6 Ohio Supp 246

**Sugar rationing rights**

A check entitling lawful holder to secure sugar thereunder may not become the property of anyone except the Office of Price Administration, regardless of whether it has been used, and it may not be transferred or acquired by inheritance or will La—Barkett v. Barkett, App, 27 So. 2d 638.

**Power of sale held not to include power to devise**

Although widow to whom proper-

ty has been set aside as a year's support is entitled, after children reach majority, to possession of entire property for her support and maintenance and has power of sale for that purpose, the power of sale does not include power to give children's share of property to another by will Ga—Walden v Walden, 12 SE 2d 345, 191 Ga 182

10. Ala—Carter v First Nat Bank, 185 So 361, 237 Ala 47

11. Ala—Carter v First Nat Bank supra

**12. Facts held not to constitute estoppel**

The rights of beneficiaries under a will purporting to give testator's wife a life estate in land, which testator had previously conveyed to wife in fee simple, with fee in remainder to beneficiaries, in so far as doctrine of "estoppel" was concerned, were to be measured according to rights of testator, and where testator executed a deed conveying land to wife in fee simple and thereafter executed a will, in wife's presence and with her consent, attempting to devise to wife a life estate in land with the fee in remainder to testator's children, and testator was not misled at time of execution of will but had full knowledge respecting deed, testator could not have asserted the doctrine of "estoppel" to divest wife of fee-simple title under deed, and hence the doctrine did not apply to permit children to claim that wife's heirs at law were precluded from claiming any interest in land after wife's death

SC—Hubbard v Beverly, 15 SE 2d 740, 197 SC 476, 135 ALR 1206

13. US—Adkins v Adams, DC Ill, 54 F Supp 914, affirmed, CCA, 152 F 2d 489

Ark—Blackburn v White, 147 SW 2d 7, 201 Ark 663

Cal—Miller v Miller, 130 P 2d 438, 55 Cal App 2d 199

Mo—Potts v Patterson, 195 SW 2d 454, 335 Mo 154

Ohio—Aubry v Aubry, 45 NE 2d 892, 70 Ohio App 298

Tex.—Ragland v Kelner, 221 SW 2d 357, 148 Tex 132

68 C J. p 490 note 7

"True estate" is that property which actually passes directly from the testator either by operation of law of state or under testator's will, and does not include property contained in separate irrevocable inter vivos trusts or property passing by

virtue of exercise of the power of appointment

RI—Industrial Trust Co v Budlong, 76 A 2d 600, 77 RI 428

**Transfers held to preclude testamentary disposition**

(1) Where common pleas court approved private sale of incompetent's real estate and directed that guardian convey it to purchasers, sale was binding though incompetent died before consummation thereof and provision in incompetent's will granting one of the purchasers an option to take such real estate at a much lower price never became operative Pa—In re Bidelman's Estate, 61 A 2d 355, 360 Pa 195

(2) Where pledgee transferred note and ring securing note to transferee, and transferee redelivered ring to pledgor, so that transferee had no title to the ring, and so that pledge ceased to exist, transferee could not bequeath any interest in the ring

Ala—Hooper v Britt, 51 So 2d 547, 35 Ala App 612

(3) Where testator had made valid gift of government bonds to two nephews during his lifetime, and nephews thereafter placed bonds in custody of testator but did not part with title of bonds, testator's attempt in his will to restrict nephews in enjoyment of the bonds and directions for payment of income in form of a trust and remainder dispositions were void

NY—In re Owens' Estate, 32 NYS 2d 717, 177 Misc 1006

(4) Where husband conveyed to his wife an undivided one half of certain premises for life and provided that on wife's death estate should revert to husband if he were then alive and that, if not, it should revert to his two sons, a legal life estate of an undivided one half of entire premises was conveyed to the wife, and husband's attempt to restrict conveyance of such undivided one half to a definite portion of premises by his will was void NY—In re Petersen's Estate, 89 NYS 2d 586

(5) Other cases

Mass—Briggs v Merchants Nat Bank of Boston, 81 NE 2d 827, 31 Mass 261

Ohio—Huntington Nat Bank of Columbus v Roan, App, 43 NE 2d 76 68 C J p 490 note 7 [a]

**Transfer held ineffective**

Attempted gift causa mortis

transferred to a trust,<sup>14</sup> or which has passed from him by operation of law,<sup>15</sup> nor can he transfer by will property which he has agreed, by a valid and binding agreement, to devise or bequeath in a certain manner, as discussed *infra* § 119. A statute authorizing the executor or administrator of a fraudulent grantor to sue to set aside the fraudulent conveyance for the benefit of the grantor's heirs, saving the rights of creditors and purchasers without notice, does not vest the grantor with any additional right to control or dispose of the granted premises, so as to enable him to transfer them by will after the conveyance.<sup>16</sup> A mere wrongdoer who has only color of title cannot pass any estate by will to his devisees.<sup>17</sup>

**Possession** Where the testator has title, the fact that he does not have possession of the property,<sup>18</sup> either at the time of the execution of the will<sup>19</sup> or at the time of his death,<sup>20</sup> does not render the property inalienable by will. However, where delivery

of certain property is essential to the establishment of title in the testator, the lack thereof will prevent such property from passing by the will.<sup>21</sup>

**Restriction on power to alienate** A valid restriction on the testator's power to sell or dispose of the property does not make it inalienable by his will.<sup>22</sup>

**Undivided interest.** The owner of an undivided interest in property cannot bequeath or devise the entire property to a third person,<sup>23</sup> nor can such person bequeath or devise a particular item or plot or his interest in a particular item or plot out of the entire property so held.<sup>24</sup> However, one holding such an interest in property can bequeath or devise his own interest,<sup>25</sup> and it has been held that, in case one holding such an interest in property bequeaths the entire property to some third person, the disposition to the extent of the testator's ownership is valid,<sup>26</sup> unless the disposition is so worded as to prevent its being executed in part.<sup>27</sup>

cotton by delivery of deed thereto was held not valid "gift causa mortis" because property itself was not delivered and donor had not surrendered all dominion over it, and hence cotton passed under terms of will executed prior to attempted gift. *Miss—Gidden v Gidden*, 167 So 785, 176 Miss 98.

#### When transfer effective

Deed reserving possession and rents of land during grantor's lifetime, delivered to grantor's executor with directions to deliver deed to grantee on grantor's death, which was done, was held to vest title in grantee as of date of delivery to executor, precluding disposition of lands by grantor's will.

*Pa—In re Hartman's Estate*, 182 A. 232, 320 Pa 331.

**14** *NJ—Fidelity Union Trust Co v Hall*, 6 A 2d 124, 125 NJ Eq 419.

*RI—Industrial Trust Co v Budlong*, 76 A 2d 600, 77 RI 428. 68 CJ p 491 note 8.

#### 15. After testator's discharge in bankruptcy

Where testator was discharged in bankruptcy, any interest he may have had in community property as an heir of deceased mother, and others, which was not claimed to be exempt from forced sale, passed to the trustee in bankruptcy, even though bankruptcy schedule did not list any real property or interest therein as owned or claimed by testator, and therefore, devise of testator's property received no interest in the land.

*Tex—Idrup v Estep*, Civ App, 237 SW 2d 617.

**16** *Ark—Moore v Waldstein*, 85 S W 410, 74 Ark 273.

**17.** *NC—Smith v Bryan*, 34 NC 11.

**18** *Ala—Puryear v Beard*, 14 Ala 121. 68 CJ p 491 note 11.

**19** *NJ—In re Cooper's Estate*, 123 A 45, 95 NJ Eq 210, 30 ALR 673. 68 CJ p 491 note 12.

**20** *W Va—Smith v Ledsome*, 121 SE 484, 95 W Va 429. 68 CJ p 491 note 13.

#### Distributive shares

Subject to the claims of creditors and to administration expenses, the right of next of kin or legatees to share in the personal property of the decedent may be disposed of before settlement of the estate, so that daughter as sole heir of her mother could by will effectively dispose of her interest in savings bank account standing in the name of her mother, though mother's estate had not been administered prior to daughter's death.

*Mass—Harrison v Stevens*, 26 NE 2d 351, 305 Mass 532.

#### 21. Making of will held not constructive delivery

Where deceased's widow during her lifetime was entitled to net income of a trust set up by will, and widow was also residuary legatee, residuary devisee and sole executrix of will, and proof showed that widow, since deceased, never made a physical delivery from deceased's estate to herself as legatee of securities claimed by widow's stepdaughter under widow's will, the making of will by widow did not constitute a "constructive delivery" of securities, so as to establish that securities

were beneficially owned by widow at time of her death.

*NY—In re Strebeigh's Estate*, 27 NYS 2d 569, 176 Misc 381.

**22** *Conn—Hemingway v Hemingway*, 22 Conn 462. 68 CJ p 491 note 11.

**23.** *Fla—Spitzer v Branning*, 190 So 516, 139 Fla 250.

*La—Succession of Munon*, 112 So 667, 163 La 734.

**24** *Ill—Fredrick v Fredrick*, 76 NE 856, 219 Ill 568. 68 CJ p 491 note 16.

#### Partnership property

*Md—Ottaviano v Lorenzo*, 179 A 530, 169 Md 51.

68 CJ p 491 note 16 [b].

**25.** *Fla—Spitzer v Branning*, 190 So 516, 139 Fla 250.

*Kan—Householter v. Householter*, 164 P 2d 101, 160 Kan 614.

*Tenn—Watts v Stanton*, 190 SW 2d 617, 28 Tenn App 381.

**26** *Ga—McDaniel v Bagby*, 51 SE 2d 805, 204 Ga. 750.

*Md—Van Reuth v Mayor and City Council of Baltimore*, 170 A 199, 165 Md 651.

68 CJ p 492 note 17.

#### Deed signed by one joint tenant

Where one joint tenant intended to reconvey property to her grantor and signed deed, and grantor subsequently made will and included property therein, notwithstanding that deed was lost and other joint tenant had never signed, interest of joint tenant who signed was vested in grantor and passed under her will.

*Del—Shockley v Halbig*, 75 A 2d 512, 31 Del Ch 400.

**27.** *La—Succession of Marlon*, 112 So 667, 163 La 734.

68 CJ p 492 note 18.

**Joint tenancy** In those jurisdictions in which the interest of a joint tenant does not descend on his death but accrues immediately to the survivor, as discussed in Joint Tenancy § 1 b, the interest of the joint tenant who dies first is not devisable, or bequeathable,<sup>28</sup> except in so far as there may have been agreement or acquiescence in the will so as to change the character of the joint tenancy property,<sup>29</sup> but the interest of the survivor can be so disposed of<sup>30</sup>

**Estate per autre vie** Estates of freehold per autre vie are subject to disposition by the will of the life tenant<sup>31</sup>

## § 77. What Law Governs

The law governing what property may be passed by will is that of the state where realty to be devised is situated, or, in the case of personalty, where the testator is domiciled, and the law at the time of testator's death controls

What law governs the determination of what property may be passed by will depends on the nature of the property to be so transferred<sup>32</sup> Thus, the extent of the power of the testator to dispose of real property must be determined by the law of the state where the land is situated,<sup>33</sup> but the extent

of the power of the testator to dispose of personal property is governed by the law of the domicile of the testator regardless of whether the property is situated within his domicile or elsewhere<sup>34</sup> Accordingly, the question of the application of the will of a nonresident testator to include assets originating within the state but now located in the state of the testator's residence is for the courts of the latter state<sup>35</sup>

**Time as of which law in force.** The law in force at the time of the death of the testator from whom the right arose controls,<sup>36</sup> except that, in respect of community property, the law in force at the time such community property was acquired and not that in force at the time of the wife's death determines whether the wife has a devisable interest therein<sup>37</sup>

## § 78. After-Acquired Property

- a. Personalty
- b. Real property

### a. Personalty

After-acquired personal property may pass by will.

In the absence of any statute providing otherwise,<sup>38</sup> it has always been the rule that after-acquired personal property may pass by will,<sup>39</sup> wheth-

28. Ill.—Hoeffner v Hoeffner, 59 N E2d 681, 389 Ill 253

Ky.—Giltner's Trustee v Talbott, 69 SW2d 981, 253 Ky 471

Mont.—In re Sullivan's Estate, 118 P2d 383, 112 Mont 519

N D.—In re Kaspar's Estate, 71 N W2d 558

Or.—Manning v U S Nat Bank of Portland, 148 P2d 255, 174 Or 118, 153 A LR 922

Wis.—In re Mechler's Will, 16 NW 2d 373, 246 Wis 45—Wanek v Kott, 280 NW 304, 228 Wis 314

68 CJ p 492 note 20—33 CJ p 915 note 65

### Property bequeathed to joint tenant

Where testator, holding property in joint tenancy with another, bequeaths such property to his joint tenant, the joint tenant takes title thereto by survivorship and not by virtue of the will

Wis.—In re Skilling's Estate, 260 N W 660, 218 Wis 571—In re Staver's Estate, 260 NW. 655, 218 Wis 114.

### Government bonds

Where testatrix after making will bequeathing all her bonds to named beneficiaries purchased government bonds payable to testatrix and another jointly, which provision under governmental regulations made bonds payable to survivor on death of testatrix, on death of testatrix bonds did not pass by will but be-

came property of the surviving payee

Colo.—In re Stanley's Estate, 80 P 2d 332, 102 Colo 422

### Checks drawn on joint account

Checks payable to order of another, drawn on joint account but not presented to bank for payment until after drawer's death, were not payable out of such account over surviving joint tenant's objections, even though drawer requested by will that they be honored, since deceased joint tenant could not, by will, control disposition of funds in such account or direct payment of moneys therefrom

N J.—Straut v Hollinger, 50 A 2d 478, 139 N J Eq 206

29. Cal.—Opp v Frye, 161 P 2d 235, 70 Cal App 2d 478

30. Cal.—In re Dow's Estate, 186 P 2d 977, 82 Cal App 2d 675

68 CJ p 492 note 21

31. N J.—Stoffels v Stoffels, 86 A 2d 806, 18 N J Super 300

68 CJ p 492 note 22

32. Tex.—Singleton v St Louis Union Trust Co, Civ App, 191 S W2d 143, error refused no reversible error.

What law governs as to

Contracts for testamentary or similar disposition of property see infra § 115

Nature, requisites, and validity of wills generally see infra § 150

Right and capacity to make will see supra § 4

Who may take under will, and restrictions on testamentary disposition generally see infra § 96

33. Tex.—Singleton v St Louis Union Trust Co, supra—Simmons v O'Connor, Civ App, 149 S W2d 1107, error dismissed, judgment correct

34. Tex.—Singleton v St Louis Union Trust Co, Civ App, 191 S W 2d 143, error refused no reversible error

35. Md.—Johns Hopkins University v Uhrig, 125 A 606, 145 Md 114

36. Puerto Rico—Delgado v Bernal, 7 Puerto Rico Fed 666

37. Cal.—McKay v Lauriston, 269 P 519, 201 Cal 537

38. S C.—Dennis v Dennis, 26 S C Eq 468

68 CJ p 492 note 28

39. Ga.—Linson v Crapps, 49 SE 2d 523, 204 Ga. 264—Evans v Pennington, 169 SE 349, 177 Ga 56

Idaho.—In re Hartwig's Estate, 211 P 2d 399, 70 Idaho 77

Iowa.—Benz v Paulson, 70 N W 2d 570

Ohio.—Corpus Juris cited in Fitzgerald v Bell, 6 Ohio Supp 119, 123, affirmed, App, 39 N E 2d 186—

er it actually does so pass in any case depending on the terms of the will and the intention of the testator, as appears *infra* § 756

*Property partly paid for* A general bequest of all the testator's stock in a given railroad company must be construed as including that which is only in part paid for, as well as that which has been fully paid for and certified, since in either case it is stock, belonging to him, and capable of being transferred by his conveyance.<sup>40</sup>

### b. Real Property

While the rule is otherwise apart from statute, under statutes to that effect a testator may devise lands acquired after the execution of his will.

Under the provisions of statutes to that effect, a testator may make a devise of lands acquired by him after the execution of the will,<sup>41</sup> whether after-acquired real property will actually pass by devise depending on the terms of the will and the intention of the testator, as discussed *infra* § 756.

In the absence of, or prior to, statute changing the rule, it has uniformly been held that a devise of lands can operate only on those lands which the testator owned at the time of executing and publishing his will,<sup>42</sup> and that no after-purchased lands can pass under such devise, unless subsequent to the purchase, the devisor republishes his will,<sup>43</sup> and this is so notwithstanding the language of the will may be such as would show clearly the intention of the testator that it should pass<sup>44</sup>

*Application of statutes to preexisting wills.* In accordance with the general rule that statutes shall not be construed retrospectively, unless, by their express terms or otherwise, such appears to be the manifest intent of the legislature, as discussed in Statutes § 414, such statutes have usually been held

inoperative as to wills made before their enactment, although they were enacted before the testator's death<sup>45</sup> There are, however, decisions, which hold, perhaps because of the peculiar wording of the statutes, that the statutes are operative as to wills made before their passage where the testator dies after they go into effect<sup>46</sup> Manifestly, if such statutes contain an express provision to that effect, they will have no application to wills made before their enactment<sup>47</sup> Certainly, the statutes have no application where the testator died before the enactment thereof<sup>48</sup>

*Property disposed of and again acquired* At common law a will has been held to be inoperative on real estate of which the testator was owner at the time of the making of the will, and afterward sold, repurchased, and died seized<sup>49</sup> This rule, however, has very generally been changed by statute and the prevailing doctrine now is that such property may pass by will.<sup>50</sup>

## § 79. Property Changed in Form

A change in the form of property will not prevent its passing under a general devise or bequest, although it may in some instances prevent its passing under a specific devise or bequest.

Under a general devise or bequest a change, subsequent to the making of the will, in the form of property devised or bequeathed, does not prevent the operation of the provisions of the will, and the property, in its changed form, passes to the devisee or legatee<sup>51</sup>

*Specific devise or bequest.* In the case of a specific devise or bequest, a change, subsequent to the execution of the will, in the form of the property bequeathed or devised has, in some instances, prevented its passing to the legatee or devisee specified,<sup>52</sup> and, in other instances, it has been held not

Fifth-Third Union Trust Co v Davis, 1 Ohio Supp 251, affirmed 10 NE2d 4, 55 Ohio App 377 68 CJ p 492 note 29

40. Mass—Emery v. Wason, 107 Mass 507

41. DC—Fairclaw v Forrest, 130 F2d 829, 76 US App DC 197, 143 ALR 1154, certiorari denied 63 SCt 531, 318 US 756, 87 LEd 1130

Miss—Milton v Milton, 10 So2d 175, 193 Miss 563

NJ—Fidelity-Philadelphia Trust Co v Harloff, 30 A2d 57, 133 N JEq 41

68 CJ p 493 note 36

42. DC—Fairclaw v Forrest, 130 F2d 829, 76 US App DC 197, 143 ALR 1154, 63 SCt 531, 318 US 756, 87 LEd 1130.

Idaho—In re Hartwig's Estate, 211 P2d 399, 70 Idaho 77

Tenn—Howell v Moore, 14 Tenn App 594

68 CJ p 492 note 31

43. NC—Battle v Speight, 31 NC 288

68 CJ p 493 note 32

44. Mass—Hays v Jackson, 6 Mass 149

68 CJ p 493 note 33

45. NC—Battle v Speight, 31 NC 288

68 CJ p 494 note 38

46. SC—Welborn v Townsend, 10 SE 96, 31 SC 408

68 CJ p 494 note 39—69 CJ p 370 note 70

47. Va—Rains v. Barker, 13 Gratt 128, 54 Va 128, 67 Am D 762.

48. Tenn—McGavock v Pugsley, 12 Heisk 689

49. Cal—Hopper's Estate, 4 P 984, 66 Cal 80

NH—Morey v Sohler, 3 A 636, 63 NH 507, 56 Am R 538

50. NH—Morey v Sohler, supra 68 CJ p 494 note 43

Revocation and revival of legacy as resulting from disposition and reacquisition of previously devised property see *infra* § 294

51. La—Succession of Marks, 35 La Ann 1054

68 CJ p 494 note 45.

Ademption by change in form of property devised or bequeathed see *infra* §§ 1172-1181.

52. NY—McNaughton v. McNaughton, 34 NY 201

68 CJ p 494 note 46.

to prevent its passing <sup>53</sup>

## § 80. Equitable Interests, Trusts, and Powers

An equitable interest may be devisable unless it is by its nature nonalienable, and the sole owner of corporate stock has an equitable interest in the corporate property which is devisable

An equitable interest,<sup>54</sup> such as an equity of redemption,<sup>55</sup> or the interest of a beneficiary under a trust,<sup>56</sup> may be devisable, unless it is by its nature nonalienable,<sup>57</sup> or where the beneficiary's interest in the trust terminates at his death <sup>58</sup> The trustee of a personal trust cannot continue it by will,<sup>59</sup> nor can a trustee of an unexecuted trust terminate it by a devise to the beneficiaries,<sup>60</sup> but one taking property in trust as security may pass by will all his rights <sup>61</sup>

An equitable owner in fee of trust property, which trust, by the terms of its creation, ceases at the death of such owner, is entitled to devise it free of the trust <sup>62</sup> Where there is both an estate and a power in the same individual, such individual may elect as to whether he will dispose under the power or devise as owner <sup>63</sup> Where a testator, who holds

land as trustee, and as such has power by his to direct the sale of it by his executors, direct his will that such land shall be sold by his executors along with his own property, the bulk of which given to residuary legatees, who are the same persons as the cestuis que trust under the original trust the executor has a power to sell coupled with a trust or a power coupled with an interest, and the residuary legatees take by devise and not by descent

*Corporate property* Although there is authority to the contrary,<sup>65</sup> it has been held that the owner of all the stock in a corporation is the owner of an equitable interest in property owned by the corporation, which interest is the subject of devise and pass under his will <sup>66</sup> However, a testator who calls all but a small percentage of the shares of stock corporation cannot devise realty owned by corporation <sup>67</sup>

## § 81. Interests of Vendor and Purchaser Under Contract to Convey

The interests of the vendor and the purchaser under a contract for the sale of property are each subject to devise

53 Ill—Decker v Decker, 12 NE 750, 121 Ill 341

68 CJ p 495 note 47

54 US—Doing v Riley, CA Fla., 176 F 2d 449

Del—Wilmington Trust Co v Wilmington Soc of Fine Arts, 34 A 2d 308, 27 Del Ch 213, affirmed

Bird v Wilmington Soc of Fine Arts, 43 A 2d 476, 28 Del Ch 419

NJ—Ochs v Ochs, 192 A 502, 122 NJ Eq 143, affirmed 192 A 507, 122 NJ Eq 143

Ohio—Ford v Ford, App., 118 NE 2d 235

Or—Brown v Hilleary, 32 P 2d 584, 147 Or 185

Pa—In re Zimmerman's Estate, 53 Pa Dist & Co 287, 46 Lack Jur 245, 61 Montg Co 85, 58 York Leg Rec 205

68 CJ p 495 note 48

Right of partner under agreement to dissolve

Although unsold portion of partnership realty and purchase money bond and mortgage for portion of realty sold remained in name of partnership, at least equitable ownership of unsold realty and bond and mortgage was in partner in whom such property was to vest under agreement to dissolve partnership and distribute its assets, and such property must be deemed part of such partner's estate subject to distribution under his will.

NY—In re Gordon's Will, 141 N.Y S 2d 331, 208 Misc. 19.

55 D.C.—Dollar v Land, DC, 82 F.Supp 919, reversed on other

grounds 184 F 2d 245, 87 US App DC 214, certiorari denied 71 S Ct 198, 340 US 884, 95 L Ed 641, rehearing denied 71 S Ct 530, 340 US 948, 95 L Ed 684, certiorari denied 71 S Ct 533, 340 US 948, 95 L Ed 684

56 Fla—Pattillo v Glenn, 7 So 2d 328, 150 Fla 73

Ill—Creighton v Elgin, 69 NE 2d 501, 395 Ill 87

Minn—Corpus Juris cited in First & American Nat Bank of Duluth v Higgins, 293 NW 585, 596, 208 Minn 295

Pa—LaFayette Trust Co v Schoch, Orph., 31 North Co., 290

68 CJ p 495 note 49

### Resulting trusts

One in whose favor a resulting trust is created has a devisable interest

Ark—Dabbs v. Dabbs, 276 SW 2d 73

68 CJ p 495 note 49 [b]

57 Pa—Steinmetz's Estate, 31 A 1092, 168 Pa 175

68 CJ p 495 note 50

58 Minn—First & American Nat Bank of Duluth v Higgins, 293 NW 585, 208 Minn 295

68 CJ p 502 note 35 [b] (4)

Property payable or transferable to others at testator's death generally see *infra* § 89

59 Me—Hinckley v. Hinckley, 9 A 897, 79 Me 320

Termination of trust by death of trustee see Trusts § 94 a.

60 NJ—Wills v Cooper, 25 Law 137

### Substitution of trustee's will

The trustee of a testamentary fund, the corpus of which is distributed on the death of a beneficiary, cannot dispose of fund by his own will on his death though it is bequeathed to the persons in the same proportions an attempt to do so will not affect the right of a beneficiary to take under the first will

US—Ormsby v. Finney, CCA 281 F 840

61 Ill—Stewart v Fellows, 20 657, 128 Ill 480

Va—Hughes v Caldwell, 11 Va 355, 38 Va 355

62 NC—Freeman v Lide, 97 402, 176 NC 434

68 CJ p 496 note 54

63 Del—Equitable Trust Co Paschall, 115 A 356, 13 Del C

64 US—Taylor v Benham, 5 How 233, 12 L Ed 130

65 NJ—Fidelity Union Trust v Vander Koest, 166 A 91 NJ Eq 368

68 CJ p 496 note 56

66 NY—In re Dillon's Will NYS 2d 541, 200 Misc 117—Browning's Estate, 16 N.Y.S 172 Misc 1088

68 CJ p 496 note 57

67 Ala—Thompson v. Bank of Kegee, 74 So 37, 199 Ala

68 CJ p 496 note 58.



Since, under a valid contract to purchase land, the vendee is, in equity, the real owner, and the purchase money is treated as a mere encumbrance on the land, as appears in Vendor and Purchaser § 106, this equitable interest which the purchaser has may be devised.<sup>68</sup> So, also, the vendor in a contract of sale,<sup>69</sup> or an option to sell,<sup>70</sup> may devise his interest, and the devisee will take the land subject to the same obligation as the testator, the right of the owner of the equitable title to the land not being affected by the vendor's will.<sup>71</sup> Where, under a valid contract to purchase land, the purchaser holds merely as trustee for another, the vendor and the purchaser cannot rescind the contract and the vendor devise the land to a stranger.<sup>72</sup>

*Purchase price due on land transferred by deed*  
The unpaid portion of the purchase price for land deeded to another may be disposed of by the grantor by will.<sup>73</sup>

## § 82. Interests under Land Warrants, Certificates for Purchase Money, Etc.

The interest conferred by a land warrant or certificate for the purchase money of public lands is devisable, as is the interest of a homestead entryman.

The interest conferred by a land warrant,<sup>74</sup> or certificate for the purchase money of public lands,<sup>75</sup> or royal proclamation for military services rendered before warrant obtained,<sup>76</sup> is devisable. So one who by statute is entitled to a patent for military services may devise the land, although the patent issues after his death.<sup>77</sup>

*Homestead entry* An entryman on public lands of the United States in whom the right to a patent has not yet accrued has no interest in the land which can pass by will.<sup>78</sup> Under a homestead act which provides, in effect, that, where a homestead entryman dies before obtaining a patent, his widow, or, if he leaves no widow, his minor children, or, if he leaves neither widow nor minor children, his heirs or devisees, may succeed to his rights as entryman and on compliance with the requirements of the homestead law obtain a patent therefor, a homestead entryman has a devisable interest in the land or in his entry which he can pass by will,<sup>79</sup> and, if he dies before obtaining his patent, leaving no widow or minor children, a devisee to whom he has devised his interest in the homestead succeeds thereto to the exclusion of his heirs and is entitled to a patent on completion of the requirements of the Homestead Act.<sup>80</sup>

*Timber culture entry* A timber culture entryman under the Timber Culture Act of the United States does not, prior to obtaining his patent, have a devisable interest in the land.<sup>81</sup>

*In Texas* Where a testator is entitled to an unconditional patent to land at the time of his death, but has not yet received it, the fact that after his death a patent issues to his heirs cannot affect the right of devisees under his will to recover the land.<sup>82</sup> A widow obtained an equity in land sufficient to pass it by devise where she, being entitled as the head of a family to a grant of land, made application therefor, and, by a valid order of survey, land was surveyed and thereby segregated from the public do-

68 Cal—In re Reid's Estate, 79 P 2d 451, 26 Cal App 2d 362

NJ—Righter v First Reformed Church of Boonton, 86 A 2d 305, 17 NJ Super 407—Courtney v Hanson, 65 A 2d 530, 3 NJ Super 47, affirmed 71 A 2d 192, 3 NJ 571

Hanson v Levy, 56 A 2d 411, 141 NJ Eq 103—Siesel v Mandeville, 55 A 2d 167, 140 NJ Eq 490

Okl—Leedy v Ellis County Fair Ass'n, 110 P 2d 1099, 188 Okl 343 68 CJ p 496 note 60

Right of purchaser's devisees to maintain bill for specific performance of contract of sale see Specific Performance § 23 c (2)

### Contract for devise of property to purchaser

Where testator contracted by what was essentially a contract of purchase and sale to devise farm to purchaser, purchaser became equitable owner of property, subject to obligation to make further payments, and had right to dispose of equitable interest by his will though purchaser predeceased testator who there-

after executed a will which failed to devise farm

NJ—Ochs v Ochs, 192 A 502, 122 NJ Eq 143, affirmed 192 A 507, 122 NJ Eq 143

69. NY—First Methodist Church of Penn Yan v Putnam, 72 NYS 2d 70, 189 Misc 519

Tex—Corpus Juris quoted in Andrews v Lary, Civ App, 224 SW 2d 770, 771

68 CJ p 496 note 61

70. RI—McCanna v Hanan, 142 A 609, 49 RI 349

Tex—Corpus Juris quoted in Andrews v Lary, Civ App, 224 SW 2d 770, 771

71. Ind—Ault v Muller, App, 157 NE 7

Tex—Corpus Juris quoted in Andrews v Lary, Civ App, 224 SW 2d 770, 771

72. SC—Taylor v James, 4 SCEq 1

73. Wis—Luedtke v Luedtke, 195 NW 382, 181 Wis 471.

68 CJ p 496 note 65

74. Pa—Duer v Boyd, 1 Serg & R 203

68 CJ p 496 note 66

75. Ind—Brockway v. Nugent, 5 Blackf 110

76. Ky—Gist's Heirs v Robinet, 3 Bibb 2

77. NY—Smith v Van Dusen, 15 Johns 343

78. Kan—Chapman v Price, 4 P 807, 32 Kan 446

79. Idaho—Daniels v Isham, 235 P 902, 40 Idaho 614

68 CJ p 497 note 72

80. Neb—Cole v Cole, 154 NW 218, 98 Neb. 674

68 CJ p 497 note 73  
Right of devisee to complete entry see Public Lands § 51

81. Cal—Cooper v. Wilder, 43 P. 591, 111 Cal 191, 52 Am SR 163

82. Tex—Dean v. Jagel, 103 S.W. 195, 46 Tex Civ App. 389.

68 CJ p 497 note 75.

main for her and she went into possession but died without having obtained a patent.<sup>83</sup>

### § 83 Rights of Action

Rights of action which do not cease with the death of the owner may be disposed of by will

Rights of action, of such a character that they do not cease with the death of the owner, may be disposed of by will<sup>84</sup> A statutory right of action for damages for death which does not come into existence until his death cannot be disposed of by the will of the person wrongfully killed<sup>85</sup>

### § 84. Rights of Entry

A right of entry, even as to lands in the adverse possession of another, is devisable

Under some statutes so providing, a right of entry,<sup>86</sup> including a right of entry to lands in the adverse possession of another,<sup>87</sup> may be devised, although, in the absence of statutory authority, this could not be done<sup>88</sup>

## § 85. Future or Contingent Estates, Interests, or Possibilities

- a In general
- b. Contingent interests; possibility of reverter

### a. In General

Estates in reversion and vested remainders may be devised or bequeathed.

In general, estates in reversion<sup>89</sup> and vested remainders<sup>90</sup> may be devised or bequeathed

### b. Contingent Interests; Possibility of Reverter

In general, contingent estates are devisable if the person to take is ascertained and only the event is uncertain, and whether a contingent estate is devisable where the person to take is uncertain or in the case of a bare possibility of reverter depends on the provisions of applicable statutes

A possibility coupled with an interest is devis-

83 Tex—Houston Oil Co v Gal-lup, 109 S W 957, 50 Tex Civ App 369

84 US—Patton v Baltimore & O R Co, C A Pa., 197 F 2d 732 68 C J p 497 note 77

Actions which survive see Abatement and Revival §§ 132-159

#### Right to recover possession of property

The right of owner of property who has been ousted or dispossessed of property by any unlawful means to recover possession in a court of law or equity is inheritable and devisable, and property to be recovered would pass under residuary clause of will

Tenn—Ledbetter v Ledbetter, 216 S W 2d 718, 188 Tenn 44

#### Uncollected judgment

Devisees of judgment creditor's community estate became owners of uncollected judgment, and possessed right to procure issuance of executions in effort to enforce judgment

Tex—Blanks v Radford, Civ App, 188 S W 2d 879, refused for want of merit

85. Ariz—In re Lister's Estate, 195 P 1113, 22 Ariz 185

Right of action for death see Death §§ 13-20

86. Va—Carrington v Goddin, 13 Gratt. 587, 54 Va. 587

Right of entry for breach of condition subsequent see *infra* § 85 b.

#### Rule against assignment of rights of entry

In a few jurisdictions it has been held that the rule against the assignment of rights of entry does not forbid their transfer by devise. Mass—Clapp v Wilder, 57 N E. 692, 176 Mass. 332, 50 L R A. 120. 5 C J. p 858 note 70.

87. NH—Whittemore v Bean, 6 NH 47 68 C J p 497 note 84

88. Mass—Poor v Robinson, 10 Mass 131 68 C J p 497 note 85

89. DC—Stoner v National Metropolitan Bank of Wash., DC, 84 F Supp 726, affirmed 177 F 2d 37, 85 US App DC 157

Ark—Hutchison v Sheppard, 279 S W 2d 33

Ga—Byrd v Goodman, 25 SE 2d 34, 195 Ga 621

Ill—Gridley v Gridley, 77 NE 2d 146, 399 Ill 215—Carter v Lewis, 4 NE 2d 853, 364 Ill 434, 108 A L R 458

Ky—Murphy v Boling, 117 S W 2d 962, 273 Ky 827, 117 A L R 1373

Mo—Riesmeyer v St Louis Union Trust Co, 180 S W 2d 60—Davis v Austin, 156 S W 2d 903, 348 Mo 1094

Miss—Ricks v Merchants Nat. Bank & Trust Co of Vicksburg, 2 So 2d 344, 191 Miss 323

NJ—Fidelity-Philadelphia Trust Co v Harloff, 30 A 2d 57, 133 NJ Eq 44

NY—Morgan v Keyes, 99 NYS 2d 820, 198 Misc 984, affirmed 101 NYS 2d 939, 277 App Div 1114, affirmed 99 NE 2d 230, 302 NY 439

Tenn—Cochran v Frierson, 258 S W 2d 748, 195 Tenn 174

Bedford v Bedford, App, 274 S W 2d 538.

Va—Braswell v Braswell, 81 SE 2d 560, 195 Va 971

68 C J p 498 note 86

#### Reversion existing after contingent remainder

A testator may, under the statute of wills, devise the reversion left

in him after the devise of contingent remainders

Ill—Matthews v Andrews, 124 NE 871, 290 Ill 103

La—In re Hantzman's Estate, 58 Dauph Co 147

#### Undivided reversionary interest

Where father conveyed certain land to one son and his bodily heirs and died intestate leaving five children, one-fifth of reversionary interest passed to such son, and upon son's death without bodily heirs, his widow, under his will leaving all of his property to her, acquired one-fifth interest in fee

Mo—Baker v Baker, 251 S W 2d 31, 363 Mo 318, 33 A L R 2d 1431

90. US—Hodam v Jordan, D C Ill, 82 F Supp 183

Cal—In re Norris' Estate, 177 P 2d 299, 78 Cal App 2d 152

Ga—Schriber v Anderson, 53 SE 2d 490, 205 Ga 343

Ky—Dills v Deavors, 266 S W 2d 788.

Me—Merrill Trust Co v Perkins, 53 A 2d 260, 142 Me 363

Md—Reese v Reese, 58 A 2d 643 190 Md 311—Myers v Myers, 41 A 2d 455, 185 Md 210

NY—In re Laidlaw's Estate, 3 NY S 2d 725, 167 Misc 172—In re Rosenstein's Estate, 274 NYS 126, 152 Misc 777

In re Clonney's Will, 63 NYS 2d 705

Ohio—Jones v Lewis, 44 NE 2d 735, 70 Ohio App 17.

Wis—In re Bray's Will, 49 N W 2d 716, 260 Wis 9.

68 C J p 498 note 87

Alienability of vested remainder generally see Estates § 83 b.

able<sup>91</sup> This characterization includes,<sup>92</sup> and the rule of devisability applies to,<sup>93</sup> all contingent possible estates such as contingent remainders, contingent estates in fee simple by way of executory devise, executory devises, and springing uses, and in some jurisdictions it has been held, sometimes under statute so providing, that all expectant estates are devisable.<sup>94</sup> Thus, while it has been held that whether a contingent remainder is devisable depends on the particular language employed in creating the estate and the intent of the grantor,<sup>95</sup> contingent

remainders are generally devisable where the person to take is ascertained and only the event is uncertain,<sup>96</sup> that is, where an individual is named or definitely described as the party to take when the contingency happens<sup>97</sup>

On the other hand, in the absence of some statutory provision providing otherwise, a contingent remainder is not devisable where the contingency relates to the person who is to take and not to the event,<sup>98</sup> there being only a bare possibility in that

91. SC—Lemmon v Wilson, 28 S E2d 792, 204 SC 50

68 CJ p 498 note 89

Alienability of contingent remainders generally see Estates § 88 c

92. NJ—Manners v Manners, 20 N JLaw 142

68 CJ p 498 note 90.

93. Md—In re Clayton's Estate, 74 A2d 1, 195 Md 622—R S Const Co v Nihiser, 197 A 793, 174 Md 170

Miss—White v Inman, 54 So2d 375, 212 Miss 237, 30 ALR2d 380

NJ—Wallhauser v Rummel, 96 A2d 289, 25 NJ Super 358

King v First Nat Bank of Morristown, 38 A2d 445, 135 NJ Eq 319

Fidelity-Philadelphia Trust Co v Harloff, 30 A2d 57, 133 NJ Eq 44

NY—In re Weaver's Estate, 1 NY S2d 167, 253 App Div 24, affirmed McNary v McNary, 16 NE2d 121, 278 NY 605

In re Hornblower's Estate, 40 NYS2d 712, 180 Misc 517

Ohio—Jones v Lewis, 44 NE2d 735, 70 Ohio App 17

**Life insurance renewal commissions** which testator would have become entitled to receive if living were transferable by will

NY—In re Keller's Will, 86 NYS 2d 315

**Devise dependent on survival of remainderman**

Contingent remainder of any kind is subject of devise, but devisee will receive nothing unless contingent remainderman survives until event occurs on which his estate vests

Ky—Caperton v Smith's Trustee, 104 SW2d 440, 268 Ky 223

94. NY—In re Weisbecker's Estate, 125 NYS2d 217

Guaranty Trust Co of New York v Curry, 234 NYS 329, 134 Misc 99

Ohio—Jones v Lewis, 44 NE2d 735, 70 Ohio App 17

95. Mo—Byrd v Allen, 171 SW2d 691, 351 Mo 99

96. Del—Huxley v. Security Trust Co, 33 A2d 679, 27 Del.Ch 206

Ga—Gilmore v Gilmore, 29 SE2d 74, 197 Ga 303

Ill—Hull v Adams, 77 NE2d 706, 399 Ill 347

Md—Willoughby v Trevisonno, 97 A2d 307, 202 Md 442—Ringgold v Carvel, 76 A2d 327, 196 Md 262—

In re Clayton's Estate, 74 A2d 1, 195 Md 622—Walker v Safe Deposit & Trust Co of Baltimore, 65 A2d 311, 192 Md 695—Simon v

Safe Deposit & Trust Co of Baltimore, 59 A2d 199, 190 Md 468—

Hammond v Piper, 44 A2d 756, 185 Md 314

Mo—Corpus Juris cited in Tapley v Dill, Mo., 217 SW2d 369, 374

NJ—Corpus Juris cited in King v First Nat Bank of Morristown, 38 A2d 445, 448, 135 NJ Eq 319

NY—Barker v Sutherland, 6 Dem Surr NY. 227

Security Trust Co of Rochester v Bradley, 38 NYS2d 918, 179 Misc 338, affirmed 46 NYS2d 222, 266 App Div 943

Pa—In re Herr's Estate, 48 Dauph Co 92

SC—Lemmon v. Wilson, 28 SE2d 792, 204 SC 50

W Va—National Bank of Commerce of Charleston v Wehile, 20 SE2d 112, 124 W Va 268

68 CJ p 498 note 91

**Particular remainders held devisable**

(1) Under testamentary trust to incompetent widow for life and as to certain stock remainder to designated persons unless widow regained mental faculties, that remainderman survived testator but predeceased widow did not defeat gift to him of his share of remainder, his interest being devisable and passing under his will

NY—In re Moore's Estate, 271 NY S 928, 151 Misc 658

(2) A remainder to second daughter, should first daughter die without issue, is transmissible because the contingency does not affect capacity of second daughter to take, since the contingency is whether first daughter leaves issue and not whether second daughter is living or dead

Pa—McCreary's Estate v. Pitts, 47 A2d 235, 354 Pa 347

(3) Where decedent devised certain property to daughter with remainder

over in event daughter died without issue, and life tenant was still living at time of death of remainderman, interest of remainderman was a transmissible interest, and was part of residue to be set apart in trust under remainderman's will

NC—Wachovia Bank & Trust Co v Waddell, 67 SE2d 651, 234 NC 454

(4) Other cases

68 CJ p 498 note 91 [a]

**Transfer of interests back to original grantor**

Where grantee, holding a life estate in property, effective after termination of a life estate reserved by grantor, allegedly executed a deed back to the original grantor, in which he was joined by three of the six remaindermen, original grantor became vested with a one-half undivided interest in the fee, and an estate for the life of the grantee, in all of the property, and such estates could be devised by will

Ga—McDaniel v. Baghy, 51 SE2d 805, 204 Ga 750

97. Md—Simon v Safe Deposit & Trust Co of Baltimore, 59 A2d 199, 190 Md 468

68 CJ p 499 note 92

98. Del—Huxley v Security Trust Co, 33 A2d 679, 27 Del.Ch 206

DC—Jewell v Graham, 24 F2d 257, 57 App DC 331, certiorari denied 48 S Ct 559, 277 US 596, 72 LEd 1006

Ill—Gehlbach v Briegel, 194 NE 591, 359 Ill 316

Me—Merrill Trust Co v Perkins, 53 A2d 260, 142 Me 363—Trott v Kendall, 130 A 878, 125 Me 85

Mo—Tevis v Tevis, 167 SW 1003, 259 Mo 19, Ann Cas 1917A 865

NY—U S Trust Co of New York v Peters, 167 NYS 620, 180 App Div 186, dismissal of appeal denied U S Trust Co v De Chefdehuen, 119 NE 1083, 223 NY 657, and affirmed U S Trust Co v Peters, 121 NE 895, 224 NY. 626

Ohio—Gill v. Alcorn, 19 Ohio App 122

Pa—In re Herr's Estate, 48 Dauph. Co 92

SC—Lemmon v Wilson, 28 SE2d 792, 204 SC 50.

case and not a possibility coupled with an interest, as appears in the CJS title Estates § 88 c. However, in some jurisdictions, under statutory provisions abrogating the common-law doctrine, a contingent remainder may be conveyed or devised, although the contingency is as to the person who is to take.<sup>99</sup>

Executory devises or bequests are not naked possibilities but are in the nature of contingent remainders,<sup>1</sup> and are devisable.<sup>2</sup> However, an ex-

pectancy of what may be realized from the estate of another on his death has been held not to be devisable.<sup>3</sup>

*Possibility of reverter; right of entry for breach of condition* Ordinarily, apart from statute, a possibility of reverter,<sup>4</sup> which is a possibility not coupled with an interest,<sup>5</sup> or a right of entry for breach of a condition subsequent,<sup>6</sup> is not devisable. In some jurisdictions, however, under the statutes in force therein, a possibility of reverter,<sup>7</sup> whether a possibil-

W Va—Stephenson v Kuntz, 49 SE 2d 235, 131 W Va 599  
68 C.J. p 499 note 93

#### Disposition of corpus of trust

Where will bequeathed property to trustees with income to named beneficiaries and, upon death of any beneficiary leaving no issue, corpus of share to beneficiary was to be transferred to residuary estate, the passing of corpus of trust fund into residuary estate was a contingency involving uncertainty of beneficiaries, and no interest could vest in beneficiary of trust which would be disposable by will.

NC—Van Winkle v Berger, 16 SE 2d 305, 228 N.C. 473

99 Va—Young v Young, 17 SE 470, 89 Va 675, 23 L.R.A. 612  
68 C.J. p 499 note 95

1. NJ—Manners v Manners, 20 N.J. Law 112

2. Va—Copenhaver v Pendleton, 155 SE 802, 155 Va. 463, 77 A.L.R. 321

68 C.J. p 499 note 97

#### Executory devise held not to have vested

Where executory devise in favor of testator's son did not vest until death of mother and son predeceased mother, son's interest under devise did not pass under son's will, but vested in his heirs, since during lifetime of mother he had no estate which he could alienate by deed or will.

Ohio—Smith v Rees, 81 N.E.2d 537

3. Md—Laughlin v McGee, 101 A. 682, 131 Md 156  
68 C.J. p 499 note 98

#### Predecease of legatee or devisee

(1) A devisee or legatee dying before the testator cannot devise or bequeath what he would have received under the testator's will, if he had survived him.

NY—In re Penrose's Estate, 299 N.Y.S. 844, 161 Misc 388  
68 C.J. p 499 note 98 [a].

(2) Testator's daughter, dying childless before testator's death, acquired no vested right which she could devise by will to surviving husband under her father's contract to devise fourth of his estate to her and carry out will as to her and her deceased sister's children.

Tex—Bomar v Carstairs, Com App. 79 SW 2d 811, 124 Tex 192

4. Colo—Union Colony Co of Colorado v Gallie, 88 P.2d 120, 101 Colo 16

Del—Addy v Short, 81 A.2d 300, 7 Terry 178, reversed on other grounds 89 A.2d 136, 8 Terry 157

Cookman v Silliman, 2 A.2d 166, 22 Del.Ch. 303

Ill—Deverick v Blaine, 89 N.E.2d 43, 404 Ill. 302—Regular Presbyterian Baptist Church of Pleasant Grove v Parker, 27 N.E.2d 522, 371 Ill. 607, 137 A.L.R. 635

Mo—Davis v Austin, 156 SW 2d 903, 318 Mo. 1091—University City v Chicago, R. I. & P. Co., 119 SW 2d 321, 317 Mo. 814

Farmer's High School Consol Dist No. 3, Johnson County v Parker, 203 SW 2d 516, 240 Mo. App. 331

SC—Waller v Waller, 66 S.E.2d 876, 220 SC 212

68 C.J. p 499 note 1

Base, qualified, or determinable fee as devisable see Estates § 10  
Estate in fee conditional as devisable see Estates § 11

5. SC—Deas v Horry, 11 S.C.Eq. 211

68 C.J. p 500 note 2

6. Mo—Farmer's High School Consol Dist No. 3, Johnson County v Parker, 203 SW 2d 516, 210 Mo. App. 331

NY—Simms v Folts Mission Institute, 276 N.Y.S. 145, 154 Misc 381, affirmed 289 N.Y.S. 918, 218 App. Div. 668, affirmed 8 N.E.2d 33, 273 N.Y. 640

68 C.J. p 500 note 3

Rights of entry generally as devisable see supra § 81

7. Ark—Fletcher v Ferrill, 227 S.W. 2d 418, 216 Ark. 583, 16 A.L.R. 2d 1240

Tex—Watts v. City of Houston, Civ. App. 196 SW 2d 573, error refused

Va—Sanford v Sims, 66 S.E.2d 495, 192 Va. 644—County School Bd of Scott County v. Dowell, 58 S.E.2d 38, 190 Va. 676

68 C.J. p 500 note 5

#### Otherwise at common law

Md—Ringgold v Carvel, 76 A.2d 327, 196 Md. 202—Evans v Safe Deposit

& Trust Co of Baltimore, 58 A.2d 649, 190 Md 332

Miss—Ricks v Merchants Nat Bank & Trust Co of Vicksburg, 2 So.2d 341, 191 Miss 323

N.J.—Riverton Country Club v Thomas, 58 A.2d 89, 111 N.J.Eq. 435, affirmed 64 A.2d 317, 1 N.J. 508

Tex—James v Dalhart Consol Independent School Dist, Civ. App., 254 SW 2d 826

#### Statute as merely removing common-law ban

A possibility of reverter is a reversionary interest, not created but left undisposed of by will or deed which disposes of other interests in property, and application of statute making possibilities of reverter transferable by will to such interests existing at time of effective date of statute does not change the interest but merely removes the common law ban and permits transfer by will.

Md—Evans v Safe Deposit & Trust Co of Baltimore, 58 A.2d 619, 190 Md 332

#### Statute held applicable to wills

The statute providing that any interest in land may be conveyed to vest immediately or in future by writing signed and delivered cannot be construed to prohibit alienation by will of a possibility of reverter on ground that statute does not apply to a will and that a will is not a "writing signed and delivered" within statute, since a will is a writing signed under an authorization for delivery upon happening of event which is to vest title in devisee.

Miss—Ricks v Merchants Nat Bank & Trust Co of Vicksburg, 2 So.2d 341, 191 Miss 323

#### Wills effective prior to statute

The statute making all lands, etc. which would descend and all rights and possibilities of reverter subject to disposition by will does not apply to wills that became effective before the statute, but it is operative as to devises after effective date of statute of possibilities of reverter which existed before such date.

Md—Evans v Safe Deposit & Trust Co of Baltimore, 58 A.2d 619, 190 Md 332.

ity dependent on a base, qualified, or determinable fee,<sup>8</sup> or a right of entry on breach of a condition subsequent,<sup>9</sup> may be devised; and it has been said that this rule obtains in the great majority of American jurisdictions,<sup>10</sup> and particularly under statutes empowering a testator to devise real property "and all interest therein"<sup>11</sup>

## § 86. Proceeds of Insurance Policy

In general, testator may dispose by will of the proceeds of a life insurance policy payable to him, or his estate, or his representatives or assigns.

In general, an insurance policy, in legal contemplation, is property which may be bequeathed by the owner thereof<sup>12</sup> Thus, except in so far as the

policy may expressly designate a beneficiary, as discussed in the CJS title Insurance § 1176, or in so far as the policy provisions may provide otherwise,<sup>13</sup> the testator may dispose by will of the proceeds of an insurance policy on his life payable to him, or his estate, or his executors, administrators, or assigns,<sup>14</sup> including a contingent, equitable, reversionary interest therein,<sup>15</sup> even though the legatee has no insurable interest in the testator's life<sup>16</sup> It has also been held that a testamentary disposition of unmatured installments of a federal war risk insurance policy by the beneficiary thereof is valid and effective<sup>17</sup>

While it has been held that the rule that the proceeds of insurance policies may be devised applies only as to policies made payable to the testator's

8. Iowa—Reichard v Chicago, B & Q R Co, 1 NW 2d 721, 231 Iowa 563

W Va—Dingess v Drake, 64 SE 2d 601, 135 W Va. 502  
68 CJ p 500 note 5

9. Me—First Nat Bank v De Wolfe, 188 A. 283, 134 Me 487

Mass—Dyer v Siano, 11 NE 2d 451, 298 Mass 537

Tex—Watts v City of Houston, Civ App, 196 SW 2d 553, error refused  
Va—Sanford v Sims, 66 SE 2d 495, 192 Va 644  
68 CJ p 500 note 6

10. Ark—Fletcher v Ferrill, 227 S W 2d 448, 216 Ark 583, 16 ALR 2d 1240

11. Ark—Fletcher v Ferrill, supra  
Miss—Ricks v Merchants Nat Bank & Trust Co of Vicksburg, 2 So 2d 344, 191 Miss 323

12. Cal—Cook v Cook, 111 P 2d 322, 17 Cal 2d 639—Sullivan v Union Oil Co of California, 105 P 2d 922, 16 Cal 2d 229—Blethen v Pacific Mut Life Ins Co of California, 243 P 431, 198 Cal 91

Chase v Lester, 215 P 2d 756, 96 Cal App 2d 439

Change by will of member of mutual benefit society of beneficiary of certificate see Insurance § 1571

Designation by will of member of mutual benefit society of beneficiary of certificate see Insurance § 1560

13. Pa—In re Dahringer's Estate, Orph, 36 Del Co 282

14. Cal—Cook v Cook, 111 P 2d 322, 17 Cal 2d 639

Iowa—In re Clemens' Estate, 282 N W 730, 226 Iowa 31

Ky—Parks' Ex'rs v Parks, 156 SW 2d 480, 288 Ky 435—U S Trust Co v Winchester, 126 SW 2d 814, 277 Ky 434

ND—Anderson v Northern & Dakota Trust Co, 274 NW 127, 67 N D 458—Jorgensen v. De Viney, 222

NW 464, 57 ND 63—Hill v Hanna, 222 NW 459, 57 ND 412

Tenn—American Trust & Banking Co v Twinam, 216 SW 2d 314, 187 Tenn 570

68 CJ p 500 note 9—37 CJ p 587 notes 83, 84

Disposition is not merely change of beneficiary

Iowa—Miller v Miller, 205 NW 870, 200 Iowa 1070, 43 ALR 567

Insured who has paid premiums and kept control of a life policy may dispose of proceeds thereof by will  
Wis—In re Kamba's Estate, 282 N W 570, 230 Wis 246, 119 ALR 1383

### Statutory authority

The statutory power of insured to bequeath proceeds of policies payable to estate "to any person whatsoever or for any uses in like manner as he may bequeath any other property or effects" is not to be restricted or denied by technically inharmonious language in policy unless it clearly appears that it was intent of insured and insurer to restrict or destroy such power

US—New York Ins Co v Valz, CC A Fla, 141 F 2d 1014

Fla—Penn Mut Life Ins Co v Roberts, 162 So 881, 120 Fla 392

### Statutory exemption from debts of insured

(1) Statutes exempting the avails of life insurance from the debts of deceased do not limit insured's right to dispose by will of life policies payable to estate, executor, or administrator

Tenn—Malone v Shoffner, 4 Tenn App 538

68 CJ p 500 note 9 [a]

(2) Where, under Florida statute, insured had power to dispose of proceeds of life policies payable to his estate by will free from liability for debts, and insured, by will, provided for payment of proceeds to trustees, when time for widow's election to

take dower passed, neither executor, creditors, widow nor children could contest right of trustees, and insurer was required to pay proceeds of policies in accordance with terms of will

US—New York Life Ins Co v Valz, CC A Fla, 141 F 2d 1014

(3) Florida statute exempting proceeds of life policy from attachment, garnishment or any legal process, providing that the proceeds of the insurance may be bequeathed by the insured to any person or for any uses in like manner as he may bequeath or devise any other property, is a statutory recognition not only that insured has a property interest in life policy proceeds, but that when such proceeds are bequeathed they pass by will and not by statute

Va—Capers v White, 81 SE 2d 597, 195 Va 1123

(4) Notwithstanding such exemption, the right of insured to dispose of life policies payable to his estate, administrator, or executor carries with it the right to set the same aside for the payment of his debts

Iowa—In re Caldwell's Estate, 215 N. W 615, 204 Iowa 606

La—Michiels v Succession of Gladden, 183 So 217, 190 La 917

15. RI—Sherman v. Howes, 97 A. 16, 39 RI 26

68 CJ p 501 note 10

16. Cal—Cook v Cook, 111 P 2d 322, 17 Cal 2d 639

68 CJ p 501 note 11

17. Pa—In re Bellak's Estate, 22 Pa Dist. & Co 523

### Beneficiary as distributee

Where a beneficiary in a war risk policy also has the status of a distributee of the insured's estate, the beneficiary may, as distributee, bequeath his interest in the insurance fund

Wash—In re Verchot's Estate, 104 P 2d 490, 4 Wash. 2d 574.

estate or his representatives,<sup>18</sup> the rule has also been held applicable in the case of industrial policies notwithstanding a beneficiary is named,<sup>19</sup> and to other policies designating a beneficiary, where such beneficiary has predeceased the testator,<sup>20</sup> and in any case such disposition in a will is not invalid in so far as the named beneficiary of the policy may elect to take under the will and be bound by it.<sup>21</sup> The power of disposition of the proceeds of an insurance policy is subject to any valid assignment made of the policy,<sup>22</sup> and, in the absence of statutory provisions providing otherwise, to the dower rights of a widow.<sup>23</sup>

While a statute may provide that a life insurance policy shall, in the absence of an agreement or assignment to the contrary, inure to the separate use of the husband or wife and children of said individual, a specific disposition of the insurance proceeds by will constitutes an assignment to satisfy the statutory requirement.<sup>24</sup> The intention to dispose of the proceeds must be expressly declared in clear terms in the will.<sup>25</sup>

## § 87. Property in Which Surviving Husband or Wife Has Interest

While a spouse may devise property as he or she desires, the property or rights of the other spouse cannot be thereby disposed of or impaired. Land owned by the entirety cannot be devised by either spouse.

While a different rule may have prevailed under the common law as to personal property,<sup>26</sup> one spouse cannot by will dispose of the property of the other.<sup>27</sup> Thus, while a husband may devise his property as he desires,<sup>28</sup> such devise is subject to any rights which his wife may have therein, if any,<sup>29</sup> and he cannot cut off her rights by any testamentary disposition he may make.<sup>30</sup> So, also, a husband cannot by his will deprive his widow of her right to a certain share in his estate under statute.<sup>31</sup> Similarly, the wife cannot cut off the husband's rights in her property by testamentary disposition.<sup>32</sup>

A husband who makes advances for improvements on his wife's property, even though he thereby acquires a lien on such property, cannot convert that lien, without further proceedings, into a title to the property, either legal or equitable, which he may devise.<sup>33</sup>

18. Wash.—In re Towey's Estate, 155 P 2d 273, 22 Wash 2d 212

19. Mo.—Plummer v Metropolitan Life Ins Co, 81 SW2d 453, 229 Mo App 638

20. Cal.—Cook v Cook, 111 P 2d 322, 17 Cal 2d 639

21. Wis.—In re Schaeck's Will, 31 NW 2d 611, 252 Wis 299, rehearing denied 33 NW 2d 319, 252 Wis 299

Acceptance of legacy or devise see infra §§ 1147-1150

22. U.S.—New York Life Ins Co v Valz, CCA Fla, 141 F 2d 1014  
Ill.—Penn Mut L Ins Co v Forbes, 200 Ill App 411

23. U.S.—New York Life Ins Co v Valz, CCA Fla, 141 F 2d 1014  
Fla.—Milam v Davis, 123 So 668, 97 Fla 916, certiorari denied 50 S Ct 82, 280 US 601, 71 L Ed 816

24. Iowa.—In re Clemens' Estate, 282 NW 730, 226 Iowa 31

25. N.D.—Hill v Hanna, 222 NW 459, 57 N D 412

Will does not operate as substitution of legatees as beneficiaries in policy payable to testator's executors, administrators, or assigns  
Miss.—Magee v Bank of Hattiesburg & Trust Co., 98 So 511, 134 Miss. 126

Fact that will purports to dispose of all property and estate does not justify inference that insured intended to bequeath proceeds of policy  
N.D.—Jorgensen v. De Viney, 222 N W. 464, 57 N.D. 63.

Will directing use of insurance in payment of mortgages did not manifest intention on part of decedent to dispose of proceeds  
N.D.—Hill v Hanna, 222 NW 459, 57 N D 412.

26. Personalty as property of husband

At common law personalty of the wife reduced to possession belonged to husband and he could dispose of it by will

Ariz.—Blackman v Blackman, 43 P 2d 1011, 45 Ariz 374

Mo.—State ex rel George v Mitchell, App, 230 SW 2d 116

27. N.Y.—In re Seaman's Will, 90 NYS 2d 336, 275 App Div. 484, affirmed 92 NE 2d 460, 300 NY 756  
Ohio.—Thomas v Johnson, 10 Ohio Cir Ct NS, 351, 30 Ohio Cir Ct 214 68 C J p 501 note 16

Right of homesteader to devise homestead with respect to rights of surviving children see Homesteads § 257 b

Surviving husband see Homesteads § 259

Surviving wife see Homesteads § 243 c

Power of surviving spouse to dispose of homestead property by will see Homesteads §§ 281, 285

Bequest of joint property to wife

Husband had right to bequeath to wife his share of jointly acquired property

Okl.—Beamer v Ashby, 231 P 2d 668, 204 Okl. 530.

28. Utah.—Greener v Greener, 212 P 2d 194, 116 Utah 571.

29. Ind.—Dean v Lyon, 8 Ind 71  
Utah.—In re Little, 61 P 899, 22 Utah 201

30. Ga.—Joseph v Citizens & Southern Nat Bank, 78 SE 2d 193, 210 Ga 111

N.Y.—In re Curley's Estate, 290 NY S 822, 160 Misc 844  
68 C J p 501 note 18

Joint property

A husband had no power to make binding disposition of his wife's interest in their joint property, whether in trust or otherwise, by instrument offered for probate as part of his prior will

Tex.—Hohmann v Langehenning, Civ App, 153 SW 2d 1011, affirmed Langehenning v Hohmann, 163 SW 2d 402, 139 Tex 152

Will held operative only as to jewelry

Will giving testator's wife "jewelry, wearing apparel, personal effects, furniture and household furnishings" was held operative only as to jewelry  
N.Y.—In re Jacobs' Will, 277 NYS 131, 154 Misc 362

31. Mo.—In re Dean's Estate, 169 SW 2d 529, 350 Mo 491

32. Mo.—Waters v Harborth, 77 S W 305, 178 Mo 166

N.H.—Hayes v. Seavey, 46 A 189, 69 NH 308

Widower's one-third share in personalty cannot be devised to another  
Iowa.—In re Duhos' Estate, 70 N W. 2d 519.

33. D.C.—Fly v National Sav & Trust Co, 249 F 359, 33 At 191.

**Land owned by entirety** Land owned by husband and wife as tenants by the entirety cannot be devised by either of them,<sup>34</sup> and a surviving spouse cannot be deprived of his or her right by the testamentary provisions of the deceased spouse<sup>35</sup> However, both spouses together may by prior agreement make joint testamentary disposition of an estate by the entirety;<sup>36</sup> and by agreement and joint act, the two by will may devise a remainder over after life enjoyment by the surviving spouse<sup>37</sup>

As appears supra § 78 b, under statutes authorizing the passing by will of after-acquired property, a will by either spouse disposing of property held in the entirety will be given effect when the other spouse dies first and the will remains unchanged until the death of the survivor

**After divorce or separation.** The property of a divorced wife does not pass by the will of her former husband<sup>38</sup> Also, a wife may dispose by will, and deprive her husband of any interest therein, of property set aside to her with full power of disposal, by a separation decree<sup>39</sup> All property rights granted a spouse by a divorce decree vest, on such spouse's death prior to the time when the decree becomes absolute, in his devisees,<sup>40</sup> subject to the statutory limitations of the decree itself and applicable probate procedures<sup>41</sup>

**Interest of widow** In general, property acquired by the surviving widow by inheritance from her deceased husband is subject to devise by her with the rest of her property<sup>42</sup> Under a statute which provides that a widow who shall marry again cannot alienate real estate held in virtue of her previous marriage, a woman who holds title to land by virtue of her former marriage cannot devise it<sup>43</sup> A widow cannot bequeath specific property which belonged to her husband, the possession of which she obtained as administratrix of his estate, where she never filed an account as such<sup>44</sup> Where a widow, who is the sole devisee under her husband's will, waives her right under the will by failing to probate it, she has no right, title, or interest in his estate under the will which she can bequeath<sup>45</sup> Property which is set aside as a year's support for the benefit of a widow, under statute, vests absolutely in her and she can dispose of any unconsumed portion thereof by her will<sup>46</sup>

## § 88. Community Property

In general, either spouse may dispose of his or her interest in community property by will, but neither has the right so to dispose of the interest of the other in community property

In those jurisdictions wherein the community property system prevails, as discussed in Husband and Wife §§ 462-590, the husband<sup>47</sup> and gen-

34 Fla.—Hunt v Covington, 200 So 76, 145 Fla 706

Ind.—Hoff v Hoffman, 192 NE 329, 99 Ind App 317

Mo.—Shackleford v Edwards, 278 S W 2d 775—Stewart v Shelton, 201 S W 2d 395, 356 Mo 258

N Y—In re Litter's Estate, 13 N Y S 2d 968, 171 Misc 803—In re Rich-ichi's Estate, 3 N Y S 2d 722, 167 Misc 191—In re Curley's Estate, 290 N Y S 822, 160 Misc 844

Pa.—In re Williams' Estate, 37 A 2d 584, 349 Pa 568

Sholtz v Drane, Com Pl, 33 Del Co LJ 261—In re Williams' Estate, Com Pl, 45 Lack Jur 170, 12 Som Leg J 101

Tenn.—Spicer v Kimes, 156 S W 2d 334, 25 Tenn App 247

68 C J p 501 note 21

Estates by entirety generally see Husband and Wife § 34

### Holding held not by entirety

Real estate standing in name of wife was not under Florida law held as an estate by the entireties and it passed under the wife's will even though husband had contributed to accumulation thereof, and the mere purchase of personalty out of a joint bank account of husband and wife and from contributions from each out of their separate funds, and fact

that furniture for hotel property was billed to the hotel which stood in wife's name and that some of the invoices were made out to the husband and wife were insufficient, in the absence of any showing of any specific intent, to set up an "estate by the entireties" in such furniture, so as not to be devisable under the wife's will

US—Doing v Riley, C A Fla, 176 F 2d 449

35 Fla.—Bailey v Smith, 103 So 838, 89 Fla 303—Hall v Roberts, 1 So 2d 579, 146 Fla 444

Ind.—Lawrence v Ashba, 59 NE 2d 568, 115 Ind App 485

N Y—In re Strong's Will, 12 N Y S 2d 544, 171 Misc 445

36. Mo.—Hart v Hines, 263 S W 2d 13—Ghidewell v Ghidewell, 230 S W 2d 752, 360 Mo 713—Stewart v Shelton, 201 S W 2d 395, 356 Mo 258

37. Mo.—Stewart v. Shelton, supra  
Wills held ineffective as to simultaneous death

Where each of spouses who died simultaneously in a common disaster left a will wherein provision was made for other spouse and for third persons, and where each will purported to dispose of entire estate but did not provide for simultaneous death,

property for which husband paid entire consideration, but which was held by the spouses as tenants by the entirety, became property of husband's heir as in intestacy

N Y—In re Strong's Will, 12 N Y S 2d 544, 171 Misc 445

38 N Y—In re Snowden's Estate, 252 N Y S 485, 140 Misc 870, modified on other grounds 257 N Y S 389, 235 App Div 862  
68 C J p 501 note 22

39. Kan.—Wulf v Fitzpatrick, 261 P 838, 124 Kan 642

40 Utah—In re Harper's Estate, 265 P 2d 1005, 1 Utah 2d 296

41. Utah—In re Harper's Estate, supra

42. Tex.—McClain v Holder, Civ App, 279 S W 2d 105, error refused no reversible error

43. Ind.—Davis v Thompson, 101 NE 1012, 179 Ind 539

44. Mass.—Keefe v Cogswell, 111 NE 858, 223 Mass 364

45. Tex.—Faris v Faris, Civ App, 138 S W 2d 830, error refused

46. Ga.—Hiers v Striplin, 79 SE 2d 539, 210 Ga 293

47. Mont.—Chadwick v Tatem, 23 P 729, 9 Mont 354

N M—Brown v Brown, 208 P 2d 1081, 53 NM 379.

erally either spouse<sup>48</sup> may dispose by will of his or her interest in the community property. On the other hand, except when necessary for the payment of debts,<sup>49</sup> neither spouse has the right to dispose of the interest of the other in the community property by will; and any testamentary disposition of more than one half of such property is inoperative to that extent,<sup>50</sup> except in so far as the circumstances may invoke the doctrine of estoppel<sup>51</sup>

*Right of testamentary disposition by surviving spouse.* Under a statute providing that, where prop-

erty is acquired by the joint industry of husband and wife during coverture and there is no issue, the whole estate shall go to the survivor at whose death, if any of such property remain, one half of such property shall go to the heirs of the husband and one half to the heirs of the wife, the surviving spouse may dispose by will of all such estate remaining at his or her death, the provision in the statute as to the property remaining at the death of the survivor being merely a general rule of descent, applicable in the event that the survivor dies intestate<sup>52</sup> Without

48. US—Shields v Barton, CCA Ill, 60 F 2d 351, applying Washington statute

Wiener v Fernandez, DCLa, 60 F Supp 169, reversed on other grounds Fernandez v Wiener, 66 S Ct 178, 326 US 340, 90 L Ed 116, rehearing denied 66 S Ct 525, 327 US 814, 90 L Ed 1038—Rompel v U S, DCTex, 59 F Supp 483, reversed on other grounds U S v Rompel, 66 S Ct 191, 326 US 367, 694, 90 L Ed 137, rehearing denied 66 S Ct 526, 327 US 814, 90 L Ed 1038—Land v Acadian Production Corporation of Louisiana, DCLa, 57 F Supp 338, reversed on other grounds, CCA, 153 F 2d 151

Scott v Scott, DC Idaho, 247 F 976

Idaho—Davenport v Simons, 189 P 2d 90, 68 Idaho 21—Amonson v Amonson, 37 P 2d 228, 55 Idaho 42—Peterson v Peterson, 207 P 425, 35 Idaho 470—Ewald v Hufton, 173 P 247, 31 Idaho 373—Kohny v Dunbar, 121 P 544, 21 Idaho 258, 39 LRA, NS, 1107, 7 Ann Cas 1913D 492

La—Succession of Wiener, 14 So 2d 475, 203 La 649, appeal dismissed Flournoy v Wiener, 64 S Ct 548, 321 US 253, 88 L Ed 708

Tex—Baker v Johnson, Civ App, 64 S W 2d 1037

Wash—In re Tovey's Estate, 155 P 2d 273, 22 Wash 2d 212—Stafford v Stafford, 117 P 2d 753, 10 Wash 2d 619

68 CJ p 501 note 29

#### In California

(1) Prior to 1923, under statutes then in force, the surviving husband took the whole of the community property and only the husband could dispose of any portion of the community estate by will

Cal—In re Dargie's Estate, 177 P 165, 179 Cal 418—Lauricella v Lauricella, 118 P 430, 161 Cal 1—Burdick's Estate, 44 P 734, 112 Cal 387

(2) Under Probate Code § 201, formerly Civ Code § 1401, as amended in 1923 to provide that on the death of either spouse one half of the community property belongs to the sur-

viving spouse and that the other half is subject to testamentary disposition of decedent, either spouse may make a testamentary disposition of one half of the community property, not merely such part thereof as may remain undisposed of at the death of the other

Cal—Henry v Hibernia Savings & Loan Soc, 42 P 2d 395, 5 Cal App 2d 141

68 CJ p 501 note 29 [d]

(3) Such provision is applicable only to property acquired after its enactment

Cal—Trimble v Trumble, 26 P 2d 477, 219 Cal 340

Williamson v Kinney, 125 P 2d 920, 52 Cal App 2d 98

68 CJ p 501 note 29 [d] (3)

(4) Where community property had been originally acquired in 1909, the wife was powerless to dispose of it by will, and when she predeceased husband, full title vested in husband so as to render immaterial her prior deed to husband

Cal—Williamson v Kinney, supra

68 CJ p 501 note 29 [d] (4) (5)

(5) The statutes providing that childless decedent's property, which was community property of decedent and previously deceased spouse or separate property of such spouse, goes to such spouse's children or their descendants, do not limit surviving spouse's right to dispose of such property by will

Cal—In re Flood's Estate, 130 P 2d 811, 55 Cal App 2d 410

49. Idaho—Davenport v Simons, 189 P 2d 90, 68 Idaho 21

68 CJ p 502 note 30

50. US—Shields v Barton, CCA Ill, 60 F 2d 351, applying Washington statute

Rompel v U S, DCTex, 59 F Supp 483, reversed on other grounds U S v Rompel, 66 S Ct 191, 326 US 367, 694, 90 L Ed 137, rehearing denied 66 S Ct 526, 327 US 814, 90 L Ed 1038

Ariz—Nowland v Vinyard, 29 P 2d 139, 43 Ariz 27—La Tourette v La Tourette, 137 P 426, 15 Ariz 200, 206

Cal—Spreckels v Spreckels, 48 P

228, 116 Cal 339, 344, 58 Am SR 170, 36 LRA 497—Spreckels v Spreckels, 158 P 537, 172 Cal 775—Godey v Godey, 39 Cal 157—Scott v Ward, 13 Cal 458

Martinez v Hudson, 57 P 2d 970, 14 Cal App 2d 42

Idaho—Davenport v Simons, 189 P 2d 90, 68 Idaho 21

La—Succession of Haydel, 177 So 695, 188 La 646—Succession of Geddes, 36 La Ann 53, 56

Tex—Langehenning v Hohmann, 163 SW 2d 402, 139 Tex 452—Schelb v Sparenberg, 124 SW 2d 322, 133 Tex 17—Mitchell v Mitchell, 15 SW 705, 80 Tex 101, 109—Moss v Helsley, 60 Tex 426, 435

C C Young Memorial Home for Aged Women v Nelms, Civ App, 223 SW 2d 302, error refused no reversible error—Logan v Logan, Civ App, 112 SW 2d 515, error dismissed

Wash—In re Tovey's Estate, 155 P 2d 273, 22 Wash 2d 212—Stafford v Stafford, 117 P 2d 753, 10 Wash 2d 619

68 CJ p 502 note 31

**Testator and devisees are charged with knowledge** that testator could not devise more than half of community property

Wash—Scott v Stanley, 270 P 110, 149 Wash 29

#### Bequest in partnership to partner

Will by which husband bequeathed interest in partnership to partner did not convey any interest of widow in community property of herself and husband in partnership

Wash—In re McGovern's Estate, 42 P 2d 796, 181 Wash 231, modified on other grounds 46 P 2d 1118, 181 Wash 231

51. Tex—Moss v Helsley, 60 Tex 426

52. Cal—In re Brady's Estate, 151 P 275, 171 Cal 1

68 CJ p 502 note 33—31 CJ p 173 note 67

Statute as not establishing community property see Descent and Distribution § 48 b

Statute as merely providing rule of succession which does not restrict surviving spouse's power of dis-



reference to statute it has been held that where a husband and wife acquired property, and attempted gifts thereof were not completed to anyone at the time of the death of the wife, her interest passed to her husband and would pass by his will<sup>53</sup>

On the other hand, where a surviving husband is vested with title to only one half of the community property, as where there are children, considered in Husband and Wife § 558 b (2) (b), he cannot by will partition the undivided community property<sup>54</sup> or devise his deceased wife's share so as to bind her heirs,<sup>55</sup> although he may by will dispose of his undivided interest<sup>56</sup> and provide for a partition with the consent of the heirs of the wife<sup>57</sup>

### § 89. Property Payable or Transferable to Others at Testator's Death

Property payable or transferable to others at the death of the testator, as where the testator has a life estate, may not be disposed of by his will

Property payable or transferable to others at the

death of the testator may not be disposed of by his will<sup>58</sup> Thus, a life estate is not devisable,<sup>59</sup> nor does a life estate with power to use or dispose of the principal entitle the life tenant to devise such estate or the remaining principal by will<sup>60</sup> However, where an employees' annuity and benefit fund act requires that any refund be paid to the administrator or executor of the deceased employee, the refund is the property of the employee, and will pass as testate property at his death.<sup>61</sup>

### § 90. Testator's Dead Body

Authorities differ as to whether one can by will dispose of his own dead body

While some American decisions follow the English doctrine that a man cannot by will dispose of his own dead body,<sup>62</sup> the weight of authority seems to be to the contrary<sup>63</sup>

The effect of a preference by decedent with respect to the disposition of his remains is discussed in Dead Bodies § 3.

posol see Husband and Wife § 558 a (2)

53. Tex—Armington v Gilcrease Oil Co, Civ App, 190 SW 2d 587

54. Tex—Perry v Rogers, 114 SW 897, 52 Tex Civ App 594

55. Tex—Tomlinson v Drought, Civ App, 127 SW 262—Perry v Rogers, 114 SW 897, 52 Tex Civ App 594

56. Tex—Perry v Rogers, supra

57. Tex—Perry v Rogers, supra

58. NY—Webb v Meyers, 18 NYS 711, 64 Hun 11

68 C J p 502 note 35

Devisability of interest of beneficiary of a trust terminating at beneficiary's death see supra § 80

Conveyance effective at grantor's death

A general warranty deed, whereby husband and wife conveyed wife's separate realty to her minor relative gratuitously on condition, added after its execution, that it should not take effect until after grantors' deaths, became absolute on wife's death, so that inclusion of such realty in her estate and distribution thereof to husband as sole devisee under wife's will were nullities and his subsequent devise thereof by will was nugatory

Okl—Green v Votaw, 134 P 2d 367, 192 Okl 136

Property passing to testator's heirs and representatives

Where nephews and nieces took a

vested remainder in the residuum of testator's estate, the share of any one of them dying before the death of the life tenant to pass to his heirs and representatives, the interests of those dying before the life tenant were not devisable by them

Del—In re Nelson's Estate, 74 A 851, 9 Del Ch 1

59. Kan—Phillipson v Watson, 87 P 2d 567, 149 Kan 395

Pa—In re Merkel's Estate, Orph, 35 Del Co 215

SC—Rogers v Rogers, 70 SE 2d 637, 221 SC 360

Tenn—Russell v Jackson, 113 SW 2d 76, 21 Tenn App 512

Tex—Elliott v Elliott, Civ App, 120 SW 2d 631, error dismissed

68 C J p 502 note 35 [b]

60. Cal—In re Mayne's Estate, 82 P 2d 504, 28 Cal App 2d 340

NY—In re Stevens' Will, 272 NYS 64, 241 App Div 490, affirmed 193 NE 303, 265 NY 524, appeal dismissed

In re Stevens' Ex'r, 193 NE 304, 265 NY 526

Pa—Degenkolv v Daube, 18 A 2d 464, 143 Pa Super 579

Vt—In re Curtis' Estate, 192 A 13, 109 Vt 44

68 C J p 502 note 35 [b] (2)

Failure to exercise absolute right during lifetime

Under will devising home to grandniece subject to later item of will providing that whatever remained of share of grandniece dying leaving no

issue should be divided between named nieces and nephews, grandniece had the right to convey during her lifetime, but, since she failed to exercise such right, she could not dispose of property by will if condition occurred which brought executory devise into effect, she not having in that event an absolute "fee-simple" title

Pa—Davenport v Graham, 23 A 2d 482, 343 Pa 497

61. Ill—In re Weldon's Estate, 85 NE 2d 840, 337 Ill App 270

62. Cal—Enos v Snyder, 63 P 170, 131 Cal 68, 82 Am SR 330, 53 LR A 221, 6 Prob Rep Ann 314

NY—In re Scheck's Estate, 14 NY S 2d 946, 172 Misc 236

Right to direct performance of autopsy

Testator had right to direct that an autopsy be performed on his body on his decease

NY—In re Pennock's Estate, 14 NYS 2d 131, 172 Misc 10, reversed on other grounds 20 NYS 2d 811, 260 App Div 181, reargument denied 23 NYS 2d 204, 260 App Div 847, reversed on other grounds In re Pennock's Will, 35 NE 2d 177, 285 NY 475, reargument and motion denied 37 NE 2d 58, 286 NY 690, reargument denied 40 NE 2d 39, 287 NY 753

63. Md—Painter v U S Fidelity, etc, Co, 91 A. 158, 123 Md. 301. 68 C J. p 503 note 41.

#### IV. WHO MAY TAKE UNDER A WILL, AND RESTRICTIONS ON TESTAMENTARY DISPOSITION

##### § 91. General Considerations

The right to take property under a will is not a natural right, but is a creature of the law, a privilege accorded by the state

The right to take property under a will is not a natural right,<sup>64</sup> but is a creature of the law,<sup>65</sup> a privilege accorded by the state.<sup>66</sup> Such right is not guaranteed by the federal Constitution<sup>67</sup> or by the state constitutions in some states at least.<sup>68</sup> It has been laid down as a general rule, however, that testamentary dispositions are required to be enforced unless contrary to public policy or a rule of positive law.<sup>69</sup> Testamentary directions or dispositions may not be enforced contrary to public policy.<sup>70</sup> Thus, a testamentary direction which would deprive the government of a sovereign right will not be given effect.<sup>71</sup>

64. Cal—In re Atwell's Estate, 193 P 2d 519, 85 Cal App 2d 454

Md—Safe Deposit & Trust Co of Baltimore v Bouse, 29 A 2d 906, 181 Md 351

Or—In re Lewis' Estate, 85 P 2d 1032, 160 Or 486

Vt—First Nat Bank of Boston v Harvey, 16 A 2d 184, 111 Vt 281

68 C J p 503 note 46

Capacity of particular persons or entities to take:

Aliens:

In general see Aliens §§ 15 b, 29

Alien enemies see War § 26

Corporations see *infra* § 106

Counties see Counties § 166, Charities § 33

Municipal corporations see Municipal Corporations § 957, Charities § 33

School districts see Schools and School Districts, § 241, Charities § 33

Slaves see Slaves §§ 7, 10

States see States § 104, Charities § 33

Towns see Towns § 92, Charities § 33

United States see United States § 71, Charities § 33

Estates which may be created see *infra* §§ 802-973

Who may make will see *supra* §§ 3-30

65. Cal—In re Atwell's Estate, 193 P 2d 519, 85 Cal App 2d 454

Ohio—Ramsdell v Bonser, App, 34 NE 2d 460

Or—In re Lewis' Estate, 85 P 2d 1032, 160 Or 486

68 C J p 503 note 47.

66. Md—Safe Deposit & Trust Co of Baltimore v Bouse, 29 A 2d 906, 181 Md 351.

Vt—First Nat Bank of Boston v Harvey, 16 A 2d 184, 111 Vt 281

67 ND—Moody v Hagen, 162 N W 704, 36 ND 471, L R A 1918 F 947, Ann Cas 1918A 933, affirmed Skardrud v Tax Commission of State of North Dakota, 38 S Ct 133, 245 US 533, 62 L Ed 522

68 ND—Moody v Hagen, 162 N W 704, 36 ND 471, L R A 1918 F 947, Ann Cas 1918A 933, affirmed Skardrud v Tax Commission of State of North Dakota, 38 S Ct 133, 245 US 533, 62 L Ed 522

69. NJ—Alper v Alper, 65 A 2d 737, 2 NJ 105, 7 A L R 2d 350

70 Pa—In re Thee's Estate, 49 Pa Dist & Co 362

##### Dower rights

Provision of will that if devisees marry, their husband or wife shall have no share or control of property devised was void, since the right of dower and curtesy attaches as a matter of law to all lands of which husband and wife respectively are seized during coverture

NC—Morris v Waggoner, 183 SE 353, 209 NC 183

71 Pa—In re Thee's Estate, 49 Pa Dist & Co 362

##### Seizure of alien enemy property

A testamentary direction that funds which cannot legally be transmitted to foreign beneficiaries because of the existence of a state of war shall continue to be held by the executors until they can legally be transmitted will not be given effect so as to deprive the government of its sovereign right to seize and hold property, the title to which is vested in alien enemies

Pa.—In re Thee's Estate, *supra*.

##### § 92. — Regulation and Control by State

The right of persons to take under a will is subject to state regulation and control.

The general rule that the right of testamentary disposition is dependent on statute and is subject to regulation and control by the legislature, discussed *supra* § 3, applies so as to permit the legislature to impose restrictions in respect of the rights of persons named as beneficiaries,<sup>72</sup> and it has been laid down in general terms that the legislature has the exclusive power to designate those whom the testator may make the objects of his bounty.<sup>73</sup> The authority which confers the right to take under a will may impose conditions on it,<sup>74</sup> and, according to some cases, may foreclose or take away the right or privilege entirely.<sup>75</sup> Thus, in some jurisdictions at least, the right to take property under a will exists only by virtue of statute,<sup>76</sup> and is entirely

72 Cal—In re Graham's Estate, 218 P 84, 63 Cal App 41

Iowa—*Corpus Juris* cited in Decker v American University, 20 NW 2d 466, 470, 236 Iowa 895

73. Mont—In re Beck's Estate, 121 P 784, 1057, 44 Mont 561

74. Md—Safe Deposit & Trust Co. of Baltimore v Bouse, 29 A 2d 906, 181 Md 351

Or—In re Lewis' Estate, 85 P 2d 1032, 160 Or 486

68 C J p 503 note 48

Rule as basis for imposition of inheritance, succession, or estate tax see Taxation § 1113

##### Scope of authority

In making laws relating to who can take under a will, and other subjects over which it has plenary power, the legislature is not bound to shape the enactment to fit any particular pattern or limit its right to impose such conditions as it deems appropriate in the distinct fields

Cal—In re Burnison's Estate, 204 P 2d 330, 33 Cal 2d 638, affirmed U S v. Burnison, 70 S Ct 503, 339 US 87, 94 L Ed 675

75. Iowa—*Corpus Juris* cited in Decker v American University, 20 NW 2d 466, 470, 236 Iowa 895

68 C J p 503 note 49

76. Ill—Jahnke v Selle, 13 NE 2d 980, 368 Ill 268

Iowa—*Corpus Juris* cited in Decker v American University, 20 NW 2d 466, 470, 236 Iowa 895

Ohio—Ramsdell v Bonser, App, 34 NE 2d 460

68 C J p 504 note 52

##### Right to take property by devise

Or—In re Moore's Estate, 223 P 2d 393, 190 Or 63—In re Leet's Es-

subject to the provisions of the statutes<sup>77</sup> and to regulation and control by the legislature,<sup>78</sup> except insofar as rights may have vested under previous legislative acts,<sup>79</sup> and even, it has been said, to the extent of a limitation to a particular class, of the right or privilege to take<sup>80</sup> and to the denial absolutely of the right of anyone to take<sup>81</sup> Statutory provisions fixing rights as to succession in the case of intestacy do not apply to provisions in a will<sup>82</sup>

### § 93. — Objects or Purposes and Beneficiaries

In general, a person who has testamentary capacity may dispose of his property to any person and for any object that is not prohibited by statute, or is not otherwise illegal, immoral, or against public policy.

Subject to the power of the state and the legislature to regulate and control the right, considered supra §§ 3, 92, and to particular limitations imposed by statute, considered infra §§ 97-110, or established rules of law, a person who has testamentary capacity

may dispose of his property in any manner<sup>83</sup> and to any person<sup>84</sup> he may desire, or to any person capable of taking the property,<sup>85</sup> where such disposition is not prohibited by law<sup>86</sup> It is the general rule that, in the absence of some special disability declared by statute, any person may be a legatee or devisee,<sup>87</sup> and this includes those who stood in a fiduciary relationship to the giver<sup>88</sup> In some jurisdictions a resident may not make a testamentary transfer of property to a foreign government<sup>89</sup>

A will may dispose of property for any object that is not illegal, immoral, or against public policy,<sup>90</sup> and it has broadly been laid down that a devise must be sustained unless the object is contrary to settled principles of law or to a statute<sup>91</sup> Thus, a bequest may be valid when for a monument<sup>92</sup> or mausoleum,<sup>93</sup> for the erection of a memorial to the testator and certain of his relatives,<sup>94</sup> for the improvement or construction of highways,<sup>95</sup> for carrying on a business,<sup>96</sup> for payment of an indebtedness which had prescribed,<sup>97</sup> or for other worthy

- tate, 202 P 414, 104 Or 32, reheard 206 P 548, 104 Or 32
- 77 Iowa—*Corpus Juris* cited in *Decker v American University*, 20 NW 2d 466, 470, 236 Iowa 895 68 CJ p 504 note 53
- Statute relating to terms of bequest  
A statute which relates to the terms of bequests does not relate to, or affect the power of, a legatee to take
- NY—In re *Idem's Will*, 8 NYS 2d 970, 256 App Div 124, affirmed 21 NE 2d 522, 280 NY 756
78. Ill—*Jahnke v Selle*, 13 NE 2d 980, 368 Ill 268
- Ohio—*Ramsdell v Bonser*, App, 34 NE 2d 460
- 68 CJ p 504 note 54
79. Ohio—*Ramsdell v Bonser*, supra
80. Va—*Eyre v Jacob*, 14 Gratt 422, 55 Va 422, 73 Am D 367
81. Iowa—*Corpus Juris* cited in *Decker v American University*, 20 NW 2d 466, 470, 236 Iowa 895 68 CJ p 504 note 56
- 82 Ky—*Baldwin v Cook*, 23 SW 2d 601, 232 Ky 365
83. Ill—*Congress Hotel Co v Martin*, 143 NE 838, 312 Ill 318, 33 ALR 562
- 68 CJ p 504 note 61
- Unjust or unnatural disposition see infra § 132
84. NY—In re *Hughes Will*, 232 NYS 84, 225 App Div 29, affirmed in re *Kelley*, 168 NE 415, 251 NY 529
- Pa—In re *Troyer's Will*, Orph, 52 Lanc L Rev 151—McAlarney v *Ziegler*, Com Pl, 33 Luz Leg Reg 361.

- Wash—*Roy v Roy*, 194 P 590, 113 Wash 609
- 68 CJ p 504 note 62
- Defeating share of  
Heir or next of kin see infra § 98
- Surviving spouse see infra § 97
- Unjust and unnatural disposition affecting validity see infra § 132
- 85 Mont—In re *Doyle's Estate*, 80 P 3d 374, 107 Mont 64
86. Miss—*Parker v Broadus*, 91 So 394, 128 Miss 690
- NY—In re *Smith*, 184 NYS 696, 113 Misc 48
87. Mont—In re *Beek's Estate*, 121 P 784, 1057, 44 Mont 561
- 68 CJ p 504 note 64
- 88 Pa—In re *Mohler's Estate*, 22 A 2d 680, 343 Pa 299
89. Cal—In re *Barter's Estate*, 184 P 2d 305, 30 Cal 2d 549
- 90 Neb—*Thomas v National Christian Assoc*, 88 NW 683, 63 Neb 585
- Pa—In re *Smith's Estate*, 18 Pa Co 209, affirmed 37 A 114, 181 Pa 109
- Bequest held not against public policy  
(1) Evidence sustained finding that purpose of nonprofit publishing corporation was not to support distribution of writings or other activities hostile to religion, law, or morals nor was it a device for destruction or overthrow of United States government so as to invalidate bequest to such corporation on ground of public policy
- Cal—In re *Mealy's Estate*, 204 P 2d 971, 91 Cal App 2d 371
- (2) Testamentary gift of use of

- apartment to married woman would not be invalid as against public policy on ground that it would interfere with husband's right to select family domicile
- Tex—*First Church of Christ, Scientist v Snowden*, Civ App, 276 SW 2d 571, error refused no reversible error
- 91 Neb—*Elliott v Quinn*, 189 NW 173, 109 Neb 5
- 92 Cal—In re *Koppikus' Estate*, 81 P 732, 1 Cal App 84
- 68 CJ p 504 note 67
- Care, maintenance and the like of burial grounds and monuments as charitable purpose see *Charities* § 14
- Repair of monument in church as charitable purpose see *Charities* § 18
93. Pa—In re *Reimel's Estate*, 10 Pa Dist & Co 465
94. N.J.—*Wendell v Hazel Wood Cemetery*, 67 A 2d 219, 3 NJ Super 457, affirmed 72 A 2d 383, 7 NJ Super 117
95. Iowa—*Blackford v Anderson*, 286 NW 735, 226 Iowa 1138
- 96 Ill—*Moore v McFall*, 105 NE 723, 263 Ill 596, Ann Cas 1915C 364
- 68 CJ p 504 note 69
- Assets liable for debts incurred in carrying on business see *Executors and Administrators* § 196
- Right or authority of executor to engage in business in general see *Executors and Administrators* §§ 193-197
97. La—*Succession of Aurianne*, 53 So 2d 901, 219 La 701.

purposes<sup>98</sup> A testator may direct that payment be made from his estate for an autopsy which he has directed be performed on his body on his decease<sup>99</sup>

Testamentary provisions will not be held void as against public policy unless it clearly appears that they were intended to bring about that which is, in morals, bad,<sup>1</sup> and unless they contravene some positive and well defined expression of the settled will of the people of the state or nation, as an organized body politic,<sup>2</sup> and such expression must be looked for, and found in, the constitution, statutes, or judicial decisions of the state or nation<sup>3</sup> The courts, however, will not enforce the payment of bequests which are against public policy<sup>4</sup> Any testamentary disposition will be held void which is against good morals,<sup>5</sup> or which is designed to carry into effect a purpose which the law regards as immoral, illegal, indiscreet, or impolitic<sup>6</sup> Thus, provisions in wills have been held void which tend to disrupt the family,<sup>7</sup> or which provide for payment for the typing, editing, and distribution of papers of the testator which are of no scientific or other

value<sup>8</sup> A testator may not, by will, modify or prevent the application of a federal statute<sup>9</sup>

The incapacity of a legatee to receive a legacy must be pleaded in order to be available<sup>10</sup> Under some statutes testamentary dispositions in favor of a person incapable of receiving are null and void, even though they are disguised under the form of an onerous contract, or made under the name of persons interposed<sup>11</sup>

## § 94. — Date of Capacity

As a general rule, the capacity of a devisee or legatee to take a present vested interest is to be judged as of the time of the death of the testator, and must exist at that time in order for the gift to be valid

The capacity of a devisee or legatee to take a present vested interest is to be judged as of the time of the death of the testator, and must exist at that time<sup>12</sup> Generally, capacity existing at the date of the death of the testator is not affected or destroyed by a prior<sup>13</sup> or subsequent<sup>14</sup> incapacity, or by incapacity for a period intermediate between the making of the will and the death of the testator<sup>15</sup>

98. NY—Wood v Wood, 5 Paige 596, 28 Am D 451  
68 C J p 505 note 70

Charitable purposes see Charities §§ 12-23

99. NY—In re Pennock's Estate, 14 NYS 2d 181, 172 Misc 10, reversed on other grounds 20 NY S 2d 811, 260 App Div 181, reargument denied 23 NYS 2d 204, 260 App Div 847, reversed on other grounds In re Pennock's Will, 35 NE 2d 177, 285 NY 475, reargument and motion denied 37 NE 2d 58, 286 NY 690, reargument denied 40 NE 2d 39, 287 NY 753

1. US—Jenkins v First Nat Bank, DCTex, 26 FSupp 312, affirmed, CCA, 107 F 2d 764

### Inference

An inference that the trust is against public policy will not be drawn when a legitimate purpose is just as apparent

US—Jenkins v First Nat. Bank, supra

2. Mo—In re Rahn's Estate, 291 S W 120, 316 Mo 492, 51 ALR 877, certiorari denied Martin v Ahrens, 47 S Ct 591, 274 US 745, 71 L Ed 1325

3. Mo—In re Rahn's Estate, 291 S W 120, 316 Mo 492, 51 ALR 877, certiorari denied Martin v Ahrens, 47 S Ct 591, 274 US 745, 71 L Ed 1325

68 C J p 505 note 72

### Mode of determination

Ordinarily, the decision as to whether a bequest contravenes recognized interests of society rests on

determination of whether bequest conflicts with expressions or clear implications of the state's organic law, or its statutes, or judicial decisions, and, in a case of first impression where there are no such guides, a judicial determination of the question becomes an expression of public policy, provided it is so plainly right as to be supported by the general will

Pa—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299

4. NY—Hollis v Drew Theological Seminary, 95 NY 166  
Tenn—Richmond v. Richmond, 227 S W 2d 4, 195 Tenn 704

Invalidity of particular testamentary conditions as being against public policy see *infra* §§ 979-992

### Beautification of cemetery lot

Testamentary direction to beautify testator's cemetery lot by erection of some statuary, preferably bronze, at a cost of \$3,000 was held against public policy and void, in view of inability to determine testator's intention with respect to such direction and having in mind the rights of other owners of cemetery lots

Ohio—Murr v. Youse, Prob, 80 NE 2d 788

5. NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

6. NY—In re Hughes' Will, 232 N YS 84, 225 App Div 29, affirmed In re Kelley, 168 NE 415, 251 NY 529

68 C J p 505 note 74

7. NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444.

8. NJ—Wilber v Asbury Park Nat Bank & Trust Co, 59 A 2d 570, 142 NJ Eq 99

9. US—Woolley v Malley, CCA Mass, 30 F 2d 73, certiorari denied 49 S Ct 418, 279 US 860, 73 L Ed 1000

10. La—Jung v Doriocourt, 4 La 175

11. La—Lee v Hunter, 23 So 2d 61, 208 La 248

### Purpose of statute

The purpose of statute relating to dispositions in favor of persons incapable of receiving is to prevent a person incapable of receiving a disposition from inheriting through a person interposed for that purpose

La—Lee v Hunter, supra

### "Reputed" persons interposed

The word "reputed," as used in statute providing that certain relatives of a person incapable of receiving under will are reputed persons interposed, means considered or generally supposed or accepted by general or public opinion

La—Lee v Hunter, supra

12. La—Carr v Hart, 57 So 2d 739, 220 La 833

68 C J p 505 note 79

Time as of which will speaks see *infra* §§ 629-631

13. US—Adams v Wilbur, CCR I, 1 FCas No 70, 2 Sumn 266

Ga—Hargroves v Redd, 43 Ga 142

14. NY—In re McClyment, 16 Abb N Cas 262

15. Ga—Fehn v. Shaw, 40 SE 2d 547, 201 Ga 517—Hargroves v. Redd, 43 Ga 142

Incapacity existing at the time of the death of the testator is final and not affected by a subsequent acquirement of capacity,<sup>16</sup> as, for example, by legislative<sup>17</sup> or constitutional<sup>18</sup> removal of the disqualification, or by incorporation of an unincorporated society, discussed *infra* § 105. The mere fact that the time of distribution is deferred does not prevent the capacity of the beneficiary from being judged as of the date of the death of the testator, where his rights were intended to be fixed and vested at that time.<sup>19</sup> Where, however, the interest given is conditional and not intended to vest until a time subsequent to the testator's death, the date of the actual vesting of the interest is the time for the determination of the capacity of the devisee or legatee.<sup>20</sup>

A statute prohibiting any devise or bequest to a foreign country, subdivision thereof, city or corporation located therein, or to any trustee or agent thereof, enacted after a will is executed and before the death of the testator, will invalidate such a devise or bequest, and the fact that the testator became insane after the execution of the will and prior to the effective date of the statute will not make the statute inapplicable.<sup>21</sup>

## § 95. — Existence of Beneficiary

In general, in order to take by will, the donee or

beneficiary must be in existence either at the time of the death of the testator or when the gift would vest under the will.

In general, in order to take by will, the donee or beneficiary must be in existence either at the time of the death of the testator or when the gift would vest under the will.<sup>22</sup> A devise or bequest of property to an estate has been held void on the ground that an estate is not a person or legal entity, capable of taking a devise or bequest,<sup>23</sup> or on the ground that the intention of the testator could not be determined,<sup>24</sup> but other authority has held that such a devise or bequest is not necessarily void, and that it may be made effective where the testator's intent can be determined.<sup>25</sup> A purported gift to a specified person at the death of such person is void.<sup>26</sup>

*Person dead at time of execution of will.* In the absence of statutory provision to the contrary, a testamentary gift to one who is dead at the date of the making of the will is usually regarded as void,<sup>27</sup> even though the testator knew when the will was made that the legatee was dead.<sup>28</sup>

*Child en ventre sa mère.* A child en ventre sa mère is capable of taking a devise,<sup>29</sup> and a devise to such a child is good,<sup>30</sup> although he is born after

16. La—Carr v Hart, 57 So 2d 739, 220 La 833—Succession of Hardesly, 22 La Ann 332.

17. La—New Orleans First Cong Church v Henderson, 4 Rob 209.

18. Ga—Cobb v Battle, 34 Ga 458.

19. La—New Orleans First Cong Church v Henderson, 4 Rob. 209. N.Y.—Wait v. Political Study Soc., 123 N.Y.S. 637, 68 Misc 245.

20. N.Y.—Longhead v Dykeman's Baptist Church, 29 N.E. 249, 129 N.Y. 211, 14 L.R.A. 410. 68 C.J. p 505 note 87.

As to incorporation of unincorporated association see *infra* § 105. Validity of devise or bequest to corporation to be organized in the future see *infra* § 106.

21. Kan—In re Weeks' Estate, 114 P.2d 857, 154 Kan 103.

Validity of testamentary gift to sovereign government see *infra* § 107.

22. N.Y.—In re Korzeniewska's Estate, 297 N.Y.S. 997, 163 Misc 323. 68 C.J. p 505 note 89.

As to gift by will to unborn illegitimate child see *infra* § 99.

Gift to corporation to be organized see *infra* § 106.

Time of ascertainment of:

Classes named in will in general see *infra* § 695.

Heirs see *infra* § 680.

23. Tenn—Martin v Hale, 71 S.W. 2d 211, 167 Tenn 438. 68 C.J. p 505 note 90.

24. Mont—In re Doyle's Estate, 80 P.2d 374, 107 Mont 64.

25. Me—Rogers v. Walton, 39 A.2d 409, 141 Me 91. Mass—Leary v Liberty Trust Co., 171 N.E. 828, 272 Mass 1, 69 A.L.R. 1239.

N.J.—Bottomley v Bottomley, 35 A.2d 475, 134 N.J.Eq. 279.

Devise or bequest to estate of another as construed to mean heirs see *infra* § 684.

26. Wis—In re Ritchie's Will, 208 N.W. 880, 190 Wis 116. 68 C.J. p 506 note 92.

27. Mont—In re Doyle's Estate, 80 P.2d 374, 107 Mont 64. 69 C.J. p 1066 note 61.

Lapse of legacy or devise to person dead at time of execution of will. Generally see *infra* § 1200. Representation and prevention of lapse see *infra* § 1222.

**Life estate**

Mother's devise of life estate in property to daughter presumptively deceased because of absence for period of time in excess of seven years, with remainder to nephew, passed to nephew or his legal heirs in fee simple, as against contention that,

daughter being presumptively deceased when will was executed, devise was void and interest must pass by inheritance to mother's other heirs at law.

Tex—Goldsmith v Mitchell, Civ App, 96 S.W.2d 313, affirmed Goodson v Goldsmith, 115 S.W.2d 1100, 131 Tex 418.

28. Mont—In re Doyle's Estate, 80 P.2d 374, 107 Mont 64. 69 C.J. p 1067 note 63.

29. Ill—Tomlin v Laws, 134 N.E. 24, 301 Ill 616, 26 A.L.R. 606.

**When child stirs**

When a child is able to stir in the mother's womb it can have a legacy. Ga—Tucker v. Howard L. Carmichael & Sons, 65 S.E.2d 909, 208 Ga 201. Ill—Amann v Faidy, 114 N.E.2d 412, 415 Ill 422.

30. Ind—Swain v Bowers, 158 N.E. 598, 91 Ind App 307. 68 C.J. p 506 note 94.

Gift to. "Child" as including child en ventre sa mere see *infra* § 651.

"Children" as including those en ventre sa mere see *infra* § 655.

"Grandchild" as including any grandchild en ventre sa mere see *infra* § 663.

"Grandnieces" and "grandnephews" as including those en ventre sa mere see *infra* § 664.

the death of the testator <sup>31</sup>

## § 96. — What Law Governs

The capacity to take testamentary gifts of realty and restrictions on testamentary disposition thereof is governed by the law of the state where the land is situated, but where a gift of personal property is involved, the law of the testator's domicile governs in some jurisdictions and the law of the legatee's domicile in other jurisdictions

Subject to the rules as to what law governs with respect to the capacity of the testator in general, considered supra § 4, and to the validity of testamentary gifts in general, considered infra § 150, and to the capacity of particular persons or entities to take under a will, discussed infra §§ 97-107, there is authority for the view that the extent of the testator's power to dispose of real property<sup>32</sup> and the capacity to take testamentary gifts of real property<sup>33</sup> depend on the law of the jurisdiction in which the land is situated. The rule as to what law governs is not varied by the mere fact that the devise runs to a trustee rather than to beneficiaries di-

rectly,<sup>34</sup> or by the fact that the courts of the state where the testator was domiciled have acted first in the matter.<sup>35</sup> However, the courts of the jurisdiction wherein the land is situated, by reason of their ultimate power over lands situated within the jurisdiction, have the jurisdictional authority in a given case to vary the rule and apply the domiciliary law in preference to the *lex rei sitae*, if they should find compelling reasons to do so,<sup>36</sup> but the rule which normally governs will not be waived merely because the land happens to be of less value than the rest of the property, or because all of the contending parties happen to reside beyond the state of situs.<sup>37</sup>

In respect of the capacity to receive a testamentary gift of personal property, the view has been taken that, under certain circumstances, the law of the domicile of the legatee will govern,<sup>38</sup> but that the testator may control the governing law by express declaration in his will that his testamentary dispositions are to be construed and regulated by the laws of a particular state.<sup>39</sup> Other

31. Ill.—*Tomlin v Laws*, 134 NE 24, 301 Ill 616, 26 ALR 606 68 CJ p 506 note 95

Application of statutes intended to prevent lapse where legatee or devisee dead at date of will see infra § 1222

Construction of will to prevent intestacy in general see infra § 615  
Lapsed devises and void devises distinguished see infra § 1201

32. NY.—In re *Schneider's Estate*, 96 NYS 2d 652, 198 Misc 1017, opinion adhered to 100 NYS 2d 371, 198 Misc 1017

68 CJ p 506 note 1

Codicil as bringing will within statute enacted after execution of will see infra § 303

What law governs in respect of limitations on testamentary capacity to make benevolent or charitable gifts

Share of estate see infra § 110

Time of executing will see infra § 109

33. NY.—*Empire Trust Co v Sample*, 50 NYS 2d 5

Or.—In re *Moore's Estate*, 223 P 2d 393, 190 Or 63

Tex.—*Toledo Soc for Crippled Children v Hickok*, 261 SW 2d 692, 158 Tex 578, certiorari denied *Hickok v Toledo Soc for Crippled Children*, 74 S Ct 631, 347 US 936, 98 L Ed 1086

68 CJ p 506 note 2

34. Tex.—*Toledo Soc for Crippled Children v Hickok*, 261 SW 2d 692, 158 Tex 578, certiorari denied *Hickok v Toledo Soc for Crippled Children*, 74 S Ct 631, 347 US 936, 98 L Ed 1086

35. Tex.—*Toledo Soc for Crippled Children v Hickok*, 261 SW 2d 692, 158 Tex 578, certiorari denied *Hickok v Toledo Soc for Crippled Children*, 74 S Ct 631, 347 US 936, 98 L Ed 1086

36. NY.—In re *Schneider's Estate*, 100 NYS 2d 371, 198 Misc 1017  
Tex.—*Toledo Soc for Crippled Children v Hickok*, 261 SW 2d 692, 158 Tex 578, certiorari denied *Hickok v Toledo Soc for Crippled Children*, 74 S Ct 631, 347 US 936, 98 L Ed 1086

37. Tex.—*Toledo Soc for Crippled Children v Hickok*, 261 SW 2d 692, 158 Tex 578, certiorari denied *Hickok v Toledo Soc for Crippled Children*, 74 S Ct 631, 347 US 936, 98 L Ed 1086

38. NY.—In re *Merritt's Estate*, 75 NYS 2d 828, 273 App Div 79  
In re *Lamborn's Estate*, 13 NY S 2d 732, 171 Misc 734  
In re *Clark's Will*, 112 NYS 2d 288

68 CJ p 506 note 3

Law governing capacity of unincorporated association to take bequest see infra § 105

### Capacity to take in trust

NY.—In re *Jackson's Estate*, 81 NY S 2d 48, 192 Misc 618

### In absence of statute

The power of a legatee to take depends, in the absence of express limitation of statute law, on the law of the domicile of the recipient of the testamentary donation

NY.—In re *Idem's Will*, 8 NYS 2d 970, 256 App Div 124, affirmed 21 NE 2d 522, 280 NY 756.

### Whether natural or artificial person

"If the legatee, whether a natural or artificial person, and whether he takes in his own right or in trust, is capable, by the law of his domicile, to take the legacy in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained, irrespective of the law of the testator's domicile."

NY.—*Chamberlain v Chamberlain*, 43 NY 424, 433

In re *Hohn's Estate*, 40 NYS 2d 237, 180 Misc 384

39. NY.—In re *Stebbins-Vallois' Estate*, 99 NYS 2d 402

### Statutory authorization

Provision of decedent estate law purporting to permit a nonresident to elect that his testamentary disposition be governed by law of New York, affords residents of other jurisdictions a means of escaping onerous restrictions on testamentary dispositions of property imposed by laws of their own domicile, and when estate left by United States citizen domiciled in Cuba was subjected to control by courts of New York, by selection of New York fiduciary by testamentary transmittal of property to New York, and by direction as to the governing law, validity of will was governed by New York law

NY.—In re *Cook's Estate*, 123 NYS 2d 568, 204 Misc 704, affirmed 131 NYS 2d 882, 283 App Div 1047

### Common law

The concept provided in statute having effect of affording residents of other jurisdictions a means of escaping onerous restrictions on testamen-

authority, however, has held that, while the incapacity of a legatee to take, imposed by the laws of the legatee's domicile may, under certain circumstances, prevail everywhere,<sup>40</sup> in general, the law of the testator's domicile governs<sup>41</sup> It has broadly been stated that, in respect of the disposable power over the estate, the law of the domicile of the testator governs<sup>42</sup> A trust created by will may be valid in one state and invalid in another<sup>43</sup>

## § 97. Husband and Wife

- a In general
- b Express restriction on, and recognition of, testamentary power, consent to disposition

### a. In General

As a general rule, subject to dower, curtesy, or statutory rights and limitations, a husband or wife may make testamentary disposition of his or her property to the exclusion of the other

As a general rule, subject to dower, as discussed in Dower § 48, curtesy, as discussed in Curtesy §

12 b, and statutory rights and limitations, either husband or wife may make such testamentary disposition of his or her property as he or she sees fit, to the exclusion of the other<sup>44</sup> Thus, under varying statutes a husband, in making testamentary disposition of his estate, may exclude his wife from any part thereof,<sup>45</sup> or from a share of his personal property,<sup>46</sup> and a wife, by will, may deprive her husband of any interest whatsoever in her estate,<sup>47</sup> or in her separate estate,<sup>48</sup> or her real estate,<sup>49</sup> or her personal property<sup>50</sup>

On the other hand, by virtue of express or implied prohibition, the right to defeat by testamentary disposition a surviving spouse's right to a share of the property of a deceased spouse has been denied when the attempted disposition is made by a husband<sup>51</sup> and, in some of the jurisdictions, by a wife<sup>52</sup> This denial has been made in respect of a husband's defeat of his wife's taking a share of his personal<sup>53</sup> or real<sup>54</sup> property, and in respect of a married woman's defeating her surviving husband's right to take a share of her personal<sup>55</sup> or

tary disposition of property imposed by the laws of their domiciles, by declarations in will that testator elects that his disposition shall be construed and regulated by law of New York, was not foreign to the common law but is in substance declaratory of the common-law rule as it previously existed  
 NY—In re Cook's Estate, supra  
 40. NJ—In re Pfizer's Estate, 110 A 2d 40, 33 NJ Super 242, affirmed 110 A 2d 54, 17 NJ 40  
 68 CJ p 506 note 4  
 Capacity of foreign corporation to receive bequest governed by law of state of incorporation see infra § 106  
 41. NJ—In re Pfizer's Estate, supra  
 Vt—First Nat Bank of Boston v Harvey, 16 A 2d 184, 111 Vt 281  
 68 CJ p 506 note 5  
 42. NY—Schultz v Dambmann, 3 Bradf Surr 379  
 43. NY—In re Eisenberg's Estate, 31 NYS 2d 380, 177 Misc 655  
 Right to create testamentary trusts generally see infra § 1004  
 44. NY—In re Tracy's Will, 3 NY St 239, affirmed 11 NY St 103  
 Utah—In re Mower's Estate, 73 P 2d 967, 93 Utah 390  
 Disposal of community property in general see supra § 88  
 Election by surviving spouse between testamentary provisions and other rights see infra §§ 1256-1267  
 Limitations on charitable gifts where spouse survives see infra §§ 108-110

Paramours, concubines, and parties to invalid marriages see infra § 100  
 Unjust or unnatural disposition see infra § 132  
 Wife may devise  
 Del—Wilmington Trust Co v Boden, 38 A 2d 168, 28 Del Ch 106  
 45. Ariz—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353  
 Ga—Smith v Davis, 45 SE 2d 609, 203 Ga 175  
 46. Ill—Simons v Corlett, 248 Ill App 453  
 68 CJ p 506 note 11  
 47. Ala—Mindler v Crocker, 18 So 2d 278, 245 Ala 578—Gray v Weatherford, 149 So 819, 227 Ala 324—Williams v Massie, 102 So 611, 212 Ala 389  
 Fla—Ruesga v Diaz, 31 So 2d 396, 159 Fla 236  
 68 CJ p 506 note 12 [a]  
 48. Tenn—Hughey v Warner, 140 SW 1058, 124 Tenn 725, 37 LRA, NS, 582  
 49. Ala—Mindler v Crocker, 18 So 2d 278, 245 Ala 578  
 50. NJ—Stoutenburgh v Hopkins, 12 A 689, 43 NJ Eq 577, affirmed 19 A 622, 45 NJ Eq 890  
 68 CJ p 506 note 12  
 51. Ala—Mindler v Crocker, 18 So 2d 278, 245 Ala 578  
 Ky—Cochran's Adm'x v Cochran, 115 SW 2d 376, 273 Ky 1  
 Md—Pearre v Grossnickle, 114 A 725, 139 Md 1  
 Mo—McLaughlin v Tralle, 274 SW 2d 316—In re Dean's Estate, 166 SW 2d 529, 350 Mo 494.

Nies v Stone, 117 SW 2d 407, 232 Mo App 1226  
 Okl—Appeal of Sim's Estate, 18 P 2d 1077, 162 Okl 35—Ward v Cook, 3 P 2d 728, 152 Okl 234  
 Vt—In re O'Rourke's Estate, 175 A 24, 106 Vt 327  
 68 CJ p 507 note 13  
 Share taken on election by spouse against will see infra § 1288  
 Cannot bar right  
 Widow's right to take under statute and not under will cannot be barred by provision in testator's will  
 Mich—In re Povey's Estate, 261 NW 98, 271 Mich 627, 99 ALR 1183  
 52. Mo—In re Dean's Estate, 166 SW 2d 529, 350 Mo 494  
 68 CJ p 507 note 14  
 53. Mo—In re Dean's Estate, supra  
 Nies v Stone, 117 SW 2d 407, 232 Mo App 1226  
 Vt—In re O'Rourke's Estate, 175 A 24, 106 Vt 327  
 68 CJ p 507 note 15  
 54. Md—Pearre v Grossnickle, 114 A 725, 139 Md 1  
 Okl—Appeal of Sim's Estate, 18 P 2d 1077, 162 Okl 35—Ward v Cook, 3 P 2d 728, 152 Okl 234  
 Utah—In re Mower's Estate, 73 P 2d 967, 93 Utah 390  
 68 CJ p 507 note 16  
 Defeat of dower right by will in general see Dower § 48  
 55. Mo—In re Dean's Estate, 166 SW 2d 529, 350 Mo 494.  
 68 CJ p 507 note 17.

real<sup>56</sup> property It has been recognized that a husband may not dispose, by will, of items of personal property, which, under statute, are to be set aside for the surviving widow<sup>57</sup>

In general, a testator, by will, may freely dispose of the amount of his property in excess of the statutory share to which his wife is entitled as of right<sup>58</sup> A married woman's will which gives her surviving husband less than what he is entitled to of right under the statute usually is not invalid,<sup>59</sup> it is merely subject to the right of the husband to demand and receive his statutory share,<sup>60</sup> and the fact that the will of the wife does not provide for her husband, as well as the fact that the husband does not consent to the will, does not operate to avoid the will entirely, but simply nullifies it to the extent of the legal right of the husband<sup>61</sup>

*Divorce or adultery* The right of a spouse to a legacy bequeathed to such spouse by the other is not affected by their separation and divorce<sup>62</sup> Statutory provisions which bar either party to a divorce from any claim to the property of the other refer to claims arising by reason of the marriage relation, and do not prevent a divorced spouse from claiming property bequeathed to such spouse by the other<sup>63</sup> Also, statutory provisions denying to a person who has voluntarily left his or her spouse and lived in adultery all right and interest in the property and estate of such spouse relate only to cases of intestacy, and have no application to a case where testamentary provision has been made by the spouse for his or her offending wife or husband<sup>64</sup>

*To married person's intended future spouse.* A testamentary disposition by a testator who, at the time of the execution of the will, intended to divorce his wife and marry the beneficiary has been held

not void as against public policy, on the ground that it tended to interfere with, or destroy, an existing marriage, since it was merely an effect, and not a cause, of the contemplated dissolution of the marriage relation<sup>65</sup>

*Nature of taking where will purports to give property to surviving spouse.* There is authority for the view that, where a testator by his will makes the same provision for his surviving wife as she would take under the laws of the state in the absence of a will,<sup>66</sup> as, for example, where a testator bequeaths and devises to his widow all that portion of his real and personal estate to which she would be entitled under the laws of the state as widow,<sup>67</sup> the widow takes by descent and not by purchase or under the will, and the will is inoperative as to her,<sup>68</sup> and a like rule has been recognized in the case of similar provisions for the benefit of her husband, contained in a will by a married woman<sup>69</sup> The rule is otherwise, however, where the widow takes a different interest under the will from what she would take under the statutes,<sup>70</sup> as, for example, where she receives a larger estate under the will than that given her by the statute of descent,<sup>71</sup> or where she takes an estate in real property different in quality<sup>72</sup>

*Necessity for joinder of wife in husband's will* A will is not a "conveyance" wherein the wife must join in order to bar her right to take a specified interest in real property as widow<sup>73</sup>

*Limitation on testamentary provision for spouse where children living* Some statutes place a limitation on the amount of his or her property which a married person may give to the surviving widow or widower where the testator or testatrix has children by a former marriage,<sup>74</sup> or have limited the

56 Neb—Richardson v Johnson, 151 NW 314, 97 Neb 749

68 CJ p 508 note 18

57 Mo—Overfield v Overfield, 30 SW 2d 1073, 326 Mo 83

68 CJ p 508 note 19

58. Okl.—Sims v Billing, 18 P 2d 1084, 162 Okl 51

68 CJ p 508 note 22

59 Iowa—In re Chapman's Will, 188 NW 837, 193 Iowa 1238

60. Iowa—In re Chapman's Will, supra

61. Ill.—Laurence v Balch, 63 NE 506, 195 Ill 626

18 CJ p 551 note 19

62. Okl.—In re Cabaniss' Estate, 129 P 2d 1003, 191 Okl 340

68 CJ p 508 note 26

63 Okl.—In re Cabaniss' Estate, supra

64. Ky—Baldwin v Cook, 23 SW 2d 601, 232 Ky 365

68 CJ p 508 note 27

Devise or bequest to person with whom testator unlawfully cohabited see infra § 100

65. Ariz.—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353

66. Ind.—Dillman v Fulwider, 105 NE 124, 57 Ind App 632

68 CJ p 508 note 29

Capacity in which heir or next of kin takes property devised or bequeathed to him see infra § 98 c

67. Ind.—Thompson v Turner, 89 NE 314, 173 Ind 593, Ann Cas 1912A 740

68. Ind.—Dillman v Fulwider, 105 NE 124, 57 Ind App 632

69. Iowa—Herring v Herring, 174 NW 364, 187 Iowa 593

68 CJ p 508 note 32

70 Ind—Dillman v Fulwider, 105 NE 124, 57 Ind App 632

Iowa—In re Watenpaugh's Will, 186 NW 198, 192 Iowa 1178

71. Iowa—In re Watenpaugh's Will, supra

**All husband's estate**

Where a husband devises all his property to his surviving wife, the wife takes under the will by purchase

Pa—Culbertson v Duly, 7 Watts & S 195

72. Okl.—Taylor v Johnson, 218 P 1095, 92 Okl 145

68 CJ p 508 note 34

73 Ind—Gamble v Rooney, 134 NE 199, 192 Ind 454

74. La—Succession of Bollinger, 30 La Ann 193

68 CJ p 509 note 37.



widow's share to a specified portion, where deceased is survived by lineal descendants, none of whom is also a lineal descendant of the widow <sup>75</sup>

*What law governs* In general, the rights of a surviving spouse are determined by the law in force at the time of the death of the person whose will is under consideration,<sup>76</sup> but a will executed prior to a change of statute in favor of a surviving spouse, without making any provision therein for the testator's wife from whom he was separated, has been held to deprive the wife of any right in his estate <sup>77</sup> The right of a surviving spouse to take real estate against the will of the deceased spouse is governed by the law of the jurisdiction in which the real estate is situated <sup>78</sup>

#### b. Express Restriction on, and Recognition of, Testamentary Power; Consent to Disposition

##### (1) In general

##### Forfeiture of legacy

(1) Prior to its repeal in 1918, it was held, under a statute providing that where a person marries a second time, property bequeathed to him by his first wife becomes, by the second marriage, the property of the children of the first marriage, that the children of the first marriage may claim the property, not by inheritance from the deceased parent, but solely because of the second marriage by operation of law

La.—Liquidators of Prudential Savings & Homestead Soc v Langermann, 100 So 55, 156 La. 76

(2) The property by the second marriage became the property of the children of the preceding marriage, and the spouse who married again had only the usufruct of it

La.—Zeigler v His Creditors, 21 So 666, 49 La. Ann 144

(3) Such property was considered in law to be vested in full and perfect ownership in the surviving spouse prior to the second marriage, and alienations of, or incumbrances on, the property by the surviving parent prior to the second marriage did not invalidate or forfeit the title of the third person

La.—Liquidators of Prudential Savings & Homestead Soc v Langermann, 100 So 55, 156 La. 76, overruling Zeigler v His Creditors, 21 So 666, 49 La. Ann 144.

##### Reduction to usufruct

Where, under the statute, a legacy in full property left by a husband to his widow is reduced to merely one of usufruct, the usufruct embraces one fifth of the husband's whole estate

La.—Succession of Bollinger, 30 La. Ann 193.

75 Fla.—Leffler v Leffler, 10 So 2d 799, 151 Fla 455

##### Will executed prior to statute

The statute controls a will executed prior to passage of the statute, where testator died thereafter

Fla.—Leffler v Leffler, supra

76. Iowa—Ross v Alleghany Theological Seminary, 215 NW 710, 204 Iowa 648

77. NY—In re Griffith's Will, 3 NY S 2d 925, 167 Misc 366

78. Pa.—In re Paul's Estate, 26 Pa Dist 1011

79 Kan.—In re Fawcett's Estate, 183 P 2d 403, 163 Kan 448

Mo.—In re Dean's Estate, 166 S W 2d 529, 350 Mo 494

Okl.—Parnacher v Hawkins, 222 P 2d 362, 203 Okl 387—Hill v Buckholts, 183 P 42, 75 Okl 196

Utah—In re Mower's Estate, 73 P 2d 967, 93 Utah 390

Vt.—In re O'Rourke's Estate, 175 A 24, 106 Vt 327

68 C J p 509 note 38

Provisions for election by surviving spouse between will and statutory rights see *infra* §§ 1256-1267

80. Vt.—In re O'Rourke's Estate, supra

68 C J p 509 notes 41, 42, p 510 note 46

81. Okl.—Crawford v Le Fevre, 61 P 2d 196, 177 Okl 508—Sims v Billing, 18 P 2d 1084, 162 Okl 51

—Appeal of Sims' Estate, 18 P 2d 1077, 162 Okl 35—Ward v Cook, 3 P 2d 728, 152 Okl 234

68 C J p 509 notes 41, 42, p 510 notes 43, 44, 45

##### Share spouse entitled to under law of intestate succession

Okl.—Horton v Cronley, 270 P 2d

(2) Validity, sufficiency, operation, and effect of consent of spouse

##### (1) In General

In numerous jurisdictions, statutes have specifically placed restrictions on the power of testamentary disposition in derogation of the rights of a surviving spouse or have otherwise provided for the protection of such rights

In numerous jurisdictions, statutes have specifically placed restrictions on the power of testamentary disposition in derogation of rights of a surviving spouse or have otherwise provided for the protection of such rights <sup>79</sup> Thus, under varying statutes, unless the surviving spouse consents thereto,<sup>80</sup> a surviving husband or wife is entitled to take and a testator cannot deprive his spouse, by a testamentary disposition, of a specified share or proportion of his estate,<sup>81</sup> or of a definite share or proportion

306—In re Blaydes' Estate, 216 P 2d 277, 202 Okl 558—Dixon v Dixon, 126 P 2d 1020, 191 Okl 139

##### Commissions as part of share bequeathed

Provisions of trust under will bequeathing to testator's daughter in trust amount equal to third of testator's estate for payment of income to his widow for life, with remainder, on her death, to become part of residuary estate, were not invalid as giving daughter greater than two-thirds share of estate because of her right to commissions on execution of trust and provision that she need not give bond, in view of statutory provisions that such facts should not give testator's surviving spouse absolute right of election to take intestate share of estate

NY—In re Hill's Will, 102 NY S 2d 732, 199 Misc 692

##### Testamentary disposition by Indian

(1) Where the authority to do so is granted by a federal statute, a state statute prohibiting a married person from making a testamentary disposition away from his spouse of a specified share or proportion of his estate does not prevent an Indian from disinheriting his or her spouse by a will acknowledged before, and approved by, a specified federal official

Okl.—Parnacher v Hawkins, 222 P 2d 362, 203 Okl 387

(2) Property devised by a full-blood Creek Indian to his wife, also a full-blood Creek Indian, has been held subject to restrictions in the hands of the secretary of the interior under the 1933 statute, notwithstanding under the prior law the will operated to remove the restrictions at the time of the husband's death, when the

of his real property or real estate,<sup>82</sup> or of his personalty,<sup>83</sup> or a man whose estate is less than a specified amount cannot make a testamentary disposition of it away from his widow,<sup>84</sup> or the widow of a childless testator may take a specified portion of his estate,<sup>85</sup> or the husband shall receive a different share where the wife dies testate than where she dies wholly intestate,<sup>86</sup> or the omission of a surviving spouse from a will does not deprive him or her of his or her statutory rights in the testator's estate,<sup>87</sup> or a surviving wife may take a certain portion of her husband's estate in case he shall not provide for her in his will as set forth in the statute,<sup>88</sup> or where a person marries after making a will, and the spouse survives the testator, such surviving spouse shall receive the share in the

estate of the testator which he or she would have received if the testator had died intestate, unless provision has been made for such surviving spouse by marriage contract, or in the will, or the will discloses an intention not to make such provision.<sup>89</sup>

The prohibition against disinheritance in such statutes is absolute on the testator and not dependent on his intention.<sup>90</sup> Under these statutes the surviving spouse is a forced heir of the estate to the extent of the share provided.<sup>91</sup> Such statutory right or interest cannot be devised or bequeathed away from the surviving spouse,<sup>92</sup> and in so far as a will seeks to do so it is a nullity.<sup>93</sup> However, statutory provisions limiting the amount of the estate which one spouse may will away from the other are not mandatory on the surviving spouse,<sup>94</sup> and while he

title passed to the devisee under the will

D C—Darks v Ickes, 69 F 2d 230, 63 App DC 56

(3) Testamentary disposition by competent adult Osage Indian was governed by Oklahoma law prohibiting spouse from bequeathing away from surviving spouse so much of estate that surviving spouse would receive less in value than through succession by law, notwithstanding testatrix executed will and died in New Mexico, where she was residing and where she owned personal property, where estate disposed of by will included real estate in Osage county, interests in Osage Indian headrights, and money to testatrix' credit, as restricted Osage Indian, in treasury of United States

Okl—Soderstrom v Bonner, 71 P 2d 117, 180 Okl 355, certiorari denied 58 S Ct 50, 302 US 718, 82 L Ed 555, certiorari denied 58 S Ct 50

(4) Other cases with respect to right of Indian to disinherit spouse see 68 C J p 510 note 45 [b] (10)—(13)

(5) Testamentary capacity of Indians in general see supra § 7

82. Md—Pearre v Grossnickle, 114 A 725, 139 Md 1

Utah—In re Mower's Estate, 73 P 2d 967, 93 Utah 390  
68 C J p 509 note 40

83. Vt—In re O'Rourke's Estate, 175 A 24, 106 Vt 327

84. Utah—In re Mower's Estate, 73 P 2d 967, 93 Utah 390

85. Mo—In re Dean's Estate, 166 S W 2d 529, 350 Mo 494

#### One-half of his personal estate

Mo—Nies v Stone, 117 S W 2d 407, 232 Mo App 1226

86. Pa—Dickinson v Dickinson, 61 Pa 401

18 C J p 851 note 18.

87. Puerto Rico—Guerrero v Vila Heirs, 34 Puerto Rico 594

88. Fla—Herzog v Trust Co of Easton, 64 So 426, 67 Fla 54, Ann Cas 1917A 201  
68 C J p 509 note 39

89. Fla—Perkins v Brown, 27 So 2d 521, 158 Fla 21

#### Intention

The intention not to make provision for the surviving spouse need not be written into the will in express words, but such result may follow as an unavoidable inference to be drawn from the circumstances of the parties at the time of execution of the will

Fla—Perkins v Brown, 27 So 2d 521, 158 Fla 21

#### Bequest executed during prior marriage

Under statute providing that widow of testator who made his last will before marriage with her, and did not make provision for her by will or otherwise, shall be entitled to that share of his real estate which she would have been entitled to if he had died intestate, where testator during the lifetime of his first wife executed will in which he made bequest to person who afterwards became his second wife, such legatee did not occupy the position of a widow for whom no provision had been made in the husband's will

Del—In re Green's Estate, 142 A 825, 16 Del Ch 470

#### Remarriage after divorce

Where testatrix executed will leaving her entire estate to a minor child subject only to a charge in support of testatrix' mother and niece while testatrix was married to her minor child's stepfather, and thereafter testatrix and husband were divorced and then subsequently remarried, remarriage did not bring the husband after testatrix' death within the operation of the statute permitting a pre-

termitted spouse to take as in intestacy

Fla—Perkins v Brown, 27 So 2d 521, 158 Fla 21

90. Okl—Parnacher v Hawkins, 222 P 2d 362, 203 Okl 387

91. Okl—Parnacher v Hawkins, supra—Sims v Billing, 18 P 2d 1084, 162 Okl 51—Appeal of Sims' Estate, 18 P 2d 1077, 162 Okl 35—Ward v Cook 3 P 2d 728, 152 Okl 234—Scott v Scott, 268 P 245, 131 Okl 144

68 C J p 510 note 45 [b] (1)

92. US—Nail v American Nat. Bank of Bristow, D C Okl, 21 F. Supp 385, rehearing denied Nail v American Nat Bank of Bristow, Okl, 22 F Supp 977, affirmed, CCA, Burgess v Nail, 103 F 2d 37

Okl—Appeal of Sim's Estate, 18 P 2d 1077, 162 Okl 35—Sims v Billing, 18 P 2d 1084, 162 Okl 51—Ward v Cook, 3 P 2d 728, 152 Okl 234

68 C J p 510 note 45 [b] (2)

93. Okl—Crawford v Le Fevre, 61 P 2d 196, 177 Okl 508—Appeal of Sim's Estate, 18 P 2d 1077, 162 Okl 35—Ward v Cook, 3 P 2d 728, 152 Okl 234

68 C J p 510 note 45 [b] (4)

#### Trust

A devise in trust to the testator's spouse of his or her one-third share in the testator's estate is void, as the surviving spouse has a right to the immediate control and possession of his or her interest on the death of the testator. US—Nail v. American Nat Bank of Bristow, D C Okl, 21 F Supp 385, rehearing denied Nail v. American Nat Bank of Bristow, Okl, 22 F Supp 977, affirmed, CCA, Burgess v Nail, 103 F 2d 37

68 C J p 510 note 45 [b] (5)

94. Okl—Odle v Baskins, 126 P. 2d 276, 190 Okl 664

or she may claim the advantages of the statute and become a forced heir to the extent provided by the statute,<sup>95</sup> the survivor is not compelled to accept the statutory share provided, but may waive it.<sup>96</sup> Even in the absence of the wife's consent, it has been recognized that a husband may devise all of a specific property, if in the aggregate the property so devised does not exceed the wife's statutory fractional share of the husband's estate.<sup>97</sup>

A statute specifically providing that any married person having no children may devise a specified fractional share of his or her property to persons other than a husband or wife has been so construed as to confer on a married person who has no children the absolute right, without the consent of his or her spouse,<sup>98</sup> and regardless of an election by the surviving spouse, discussed *infra* §§ 1256-1267, to dispose of the specified fractional share of all his or her property,<sup>99</sup> personal as well as real,<sup>1</sup> and to apply to the operation of wills made prior to, as well as after, marriage.<sup>2</sup> Under some statutes, mere words of exclusion in a testator's will cannot take away his widow's statutory rights to a distributive share of his intestate personal property or her rights in his realty without some action on the part of the widow,<sup>3</sup> although, as appears *infra* §§ 1256-1267, he can put her in a position where she must elect whether to retain her statutory rights or take the benefits given her by the will. A contract to make a testamentary disposition will not prevent the promisor's surviving spouse from taking her statutory share of the deceased spouse's estate.<sup>4</sup>

*Support during settlement of estate* A statute authorizing the probate court to allow support to a widow during the settlement of her deceased hus-

band's estate does not prohibit the testator from making any direct provision by will for his widow's support or maintenance.<sup>5</sup>

## (2) Validity, Sufficiency, Operation, and Effect of Consent of Spouse

A will of a married person may exclude the surviving spouse from all or a portion of the estate of the deceased to which he or she has a statutory right, where a valid consent thereto has been given by the surviving spouse.

Under a statute specifically providing that either spouse may consent in writing to the other's bequeathing from the one so consenting more than a specified share of such other's property, a will of either husband<sup>6</sup> or wife<sup>7</sup> which gives to others than the surviving spouse more than the specified share is given effect, if otherwise valid and operative, where the required consent has been given. Under such a statute, the form<sup>8</sup> or designation<sup>9</sup> of the writing is not important, provided the consent sufficiently shows that the consenting spouse agreed to accept the provision in the will in lieu of the share given by statute<sup>10</sup> and provided also that there is a sufficient witnessing of the consent.<sup>11</sup> An antenuptial contract has been held sufficient to cut off a wife's statutory right in her husband's estate and to enable him to will to others the share given her by statute.<sup>12</sup>

Under some statutes, it is not required that the written consent shall be attached to,<sup>13</sup> or be regarded as a part of,<sup>14</sup> the will, or that the consent shall designate the will to which it applies,<sup>15</sup> or specify the particular property which may be bequeathed or devised.<sup>16</sup> Also, under some statutes, consideration for the consent is not required,<sup>17</sup> and it is not necessary that the execution of the

95. Okl.—Odlé v Baskins, *supra*.

96. Okl.—Odlé v Baskins, *supra*.  
Vt.—In re O'Rourke's Estate, 175 A 24, 106 Vt 327.

97. Kan.—Neuber v Shoel, 55 P 350, 8 Kan App 345.

98. Kan.—Carmen v Knight, 116 P 231, 85 Kan 18.  
68 C.J. p 510 note 48.

99. Kan.—In re Breen's Estate, 146 P 1147, 94 Kan 474, 4 A.L.R. 238.

1. Kan.—In re Breen's Estate, *supra*.  
68 C.J. p 510 note 51.

2. Kan.—Vanek v Vanek, 180 P 240, 104 Kan 624.

3. Del.—Huxley v Security Trust Co., 33 A 2d 679, 27 Del Ch 206.

4. N.Y.—In re Ersten's Estate, 129 N.Y.S.2d 316, 205 Misc 924.

5. Conn.—Weidlich v First Nat Bank & Trust Co of Bridgeport, 96 A 2d 547, 139 Conn 652.

6. Kan.—In re Fawcett's Estate, 183 P 2d 403, 163 Kan 448.

68 C.J. p 510 note 46, p 511 note 55.  
Consent to devise of homestead see Homesteads §§ 243, 259.  
Necessity for consent in general see *supra* subdivision b (1) of this section.

**Consent held sufficient**  
Kan.—In re Fawcett's Estate, *supra*.

7. Kan.—Chilson v Rogers, 137 P 936, 91 Kan 426.

8. Kan.—Weisner v Weisner, 131 P 608, 89 Kan 352.  
68 C.J. p 511 note 57.

9. Kan.—Jack v Hooker, 81 P 203, 71 Kan 652.

10. Kan.—Weisner v Weisner, 131 P 608, 89 Kan 352.  
68 C.J. p 511 note 59.

11. Kan.—Jack v Hooker, 81 P 203, 71 Kan 652.

12. Kan.—In re Schippel's Estate, 218 P 2d 192, 169 Kan 151.

68 C.J. p 510 note 45 [b] (6).  
Rights of surviving spouse under a marriage settlement generally see Husband and Wife § 105.

**Particular statute construed to make will subservient to antenuptial contract in writing**  
Okl.—Talley v Harris, 182 P 2d 765, 199 Okl 47.

13. Kan.—Chilson v Rogers, 137 P 936, 91 Kan 426.

14. Kan.—Chilson v Rogers, *supra*.  
—Keeler v Lauer, 85 P 541, 73 Kan 388.

15. Kan.—Weisner v Weisner, 131 P 608, 89 Kan 352.  
68 C.J. p 511 note 63.

16. Kan.—Weisner v Weisner, 131 P 608, 89 Kan 352.—Keeler v Lauer, 85 P 541, 73 Kan 388.

17. Minn.—Erickson v Robertson, 133 N.W. 164, 116 Minn 90, 37

consent should precede the execution of the will<sup>18</sup> The consent may be given at any time during the life of the testator,<sup>19</sup> but the consent provided for by some statutes cannot be executed after the will is probated<sup>20</sup> In some jurisdictions the written consent by the husband to a devise by the wife of her real property is valid and effective, although given in furtherance of a void agreement between them by which each released all interest in the other's property, where the wife had performed her part of the agreement<sup>21</sup> Where the statute provides merely that the consent shall be executed in the presence of witnesses, it is not necessary that such witnesses shall be subscribing witnesses<sup>22</sup> The signature of the husband to his petition for appointment as executor of his wife's will is not such a formal, express consent in writing as is required by some statutes<sup>23</sup>

Under some statutes, a married person may dispose of all his or her property by will where the required consent has duly been executed by such person's wife<sup>24</sup> or husband,<sup>25</sup> and it is not necessary that the will shall make any provision for the consenting spouse<sup>26</sup> Except as the rule is limited by rules hereinafter stated, under some statutes a consent which has duly been executed is irrevocable,<sup>27</sup> at least it may not arbitrarily be revoked or recalled.<sup>28</sup>

While in some jurisdictions, in order to render effective a consent otherwise in accordance with the requirements of the applicable statute, it is necessary that only the consenting spouse act freely and understandingly,<sup>29</sup> and the mere fact that the estate

disposed of by will is larger than the consenting spouse anticipated does not render the consent ineffective,<sup>30</sup> the view has been taken that there is cast on a husband who takes from his wife a consent to the making of his will the affirmative duty to make to her a fair disclosure of his property and her rights so that her consent will be an actual one based on an intelligent knowledge as to his property and the effect of her consent,<sup>31</sup> and that in the absence of such disclosure the surviving wife may, under certain circumstances, rescind or avoid her consent and take under the statute<sup>32</sup>

A consent will not be valid if it is obtained by undue influence,<sup>33</sup> deception,<sup>34</sup> or fraud of any kind<sup>35</sup> In passing on the questions as to undue influence,<sup>36</sup> mental capacity,<sup>37</sup> or necessity for independent advice,<sup>38</sup> as affecting the validity of a consent, general rules as to such issues apply

## § 98. Heirs, Next of Kin, or Children

- a In general
- b Statutory provision for forced heirship
- c Capacity in which heirs or next of kin take property devised or bequeathed to them

### a In General

As a general rule, a testator, in the absence of statutory provisions to the contrary, may by will exclude his heirs, next of kin, or children from a share of his estate to the extent that he desires.

In the absence of statutory provision to the contrary, in general, heirs<sup>39</sup> or next of kin, as defined

- L.R.A.N.S., 1133, Ann Cas 1913A 493
- 68 C.J. p 511 note 65
- 18 Kan—Gallon v Haas, 72 P 770, 67 Kan 225
19. Kan—Weisner v Weisner, 131 P 608, 89 Kan 352
- 68 C.J. p 507 note 13 [c] (2), p 511 note 67
20. Kan—Sill v Sill, 1 P 556, 31 Kan 248
- 21 Minn—Erickson v Robertson, 133 NW 164, 116 Minn 90, 37 L.R.A.N.S., 1133, Ann Cas 1913A 493
- 22 Kan—White v White, 176 P 644, 103 Kan 816
- 68 C.J. p 512 note 70
23. Mass—Tyler v Wheeler, 35 N E 666, 160 Mass 206
- 24 Kan—In re Fawcett's Estate, 183 P 2d 403, 163 Kan 448
- 68 C.J. p 512 note 72
- Devise or testamentary disposition affecting homestead rights of surviving spouse see Homesteads §§ 243, 259.

- Real property occupied as family residence**
- With his wife's consent, a husband could dispose of realty occupied as a family residence
- Kan—In re Fawcett's Estate, supra
- 68 C.J. p 512 note 72 [b]
25. Kan—Chilson v Rogers, 137 P 936, 91 Kan 426
- 26 Kan—Chilson v Rogers, supra
- 68 C.J. p 512 note 74
27. Kan—Chilson v Rogers, supra
- 68 C.J. p 512 note 75
- 28 Minn—State v Probate Court of Hennepin County, 152 NW 845, 129 Minn 442, L.R.A.1915E 815
- 29 Kan—Weisner v. Weisner, 131 P 608, 89 Kan 352
- 68 C.J. p 512 note 77
30. Kan—Weisner v Weisner, supra
- 68 C.J. p 512 note 78
31. Minn—State v Probate Court of Hennepin County, 152 NW 845, 129 Minn 442, L.R.A.1915E 815.

32. Minn—State v Probate Court of Hennepin County, supra
- 68 C.J. p 512 note 80
- 33 Kan—Weisner v Weisner, 131 P 608, 89 Kan 352
- 68 C.J. p 512 note 81
- 34 Kan—Chilson v Rogers, 137 P 936, 91 Kan 426
- 35 Kan—Chilson v Rogers, supra
- 68 C.J. p 507 note 13 [c] (3)
- 36 Kan—Woodworth v Gideon, 12 P 2d 722, 136 Kan 116
- 68 C.J. p 512 note 84
37. Kan—Woodworth v. Gideon, supra
- 68 C.J. p 512 note 85
38. Kan—Woodworth v Gideon, supra
39. Fla—Milam v Davis, 123 So 668, 97 Fla 916, certiorari denied 50 S Ct 82, 280 U S 601, 74 L Ed 646
- 68 C.J. p 513 note 88
- Operation of law of descent and distribution as defeated only by a legally executed will disposing of

in the law of descent and distribution,<sup>40</sup> as, for example, children,<sup>41</sup> of the testator have no absolute right to a share in his estate and may be excluded by his will to the extent that he desires.<sup>42</sup> The testator may also disinherit completely the children of a son by the son's wife, or leave them as much or as little of his estate as he desires, and such partial or complete disinheritance may be based on disapproval or even hatred of the son's wife, or any other motive.<sup>43</sup> Where a testator makes a testamentary gift to those who would take under the intestate laws of the state, excluding specified individuals, the exclusion is valid.<sup>44</sup> A minor is entitled to take a share of land under a will where such share was acquired by the testator by reason of the intestacy of the testator's father, notwithstanding that the minor is not an heir of the intestate.<sup>45</sup> Property devised by an Indian to his children has been held subject to restrictions in the hands of the secretary of the interior.<sup>46</sup>

The view has been taken that certain statutory provisions giving heirs or next of kin of a deceased spouse a share of the part of the estate of the surviving spouse, on the latter's death, as was community property and all of such part of the estate as was the separate estate of the spouse who died first, are applicable only in cases of intestacy

and do not prevent the surviving spouse from making testamentary disposition of the property covered by the statute.<sup>47</sup> A will of a husband expressly excluding his children by a former wife from participating in his estate has been held ineffective to bar a statutory interest of the children in community property on the subsequent death of the widow.<sup>48</sup>

**Adopted child.** An adoptive parent may by will leave his property to others and disinherit his adopted child.<sup>49</sup> In the absence of statute prohibiting it, a natural parent may bequeath property by will to a child whom he has permitted to be adopted by another.<sup>50</sup>

**Child of another.** A testator may make an absolute gift of support to a minor whose parent is living.<sup>51</sup>

**Small estate.** Under some statutes, a parent whose estate is less than a specified amount cannot make a testamentary disposition of it away from his minor children.<sup>52</sup>

#### b. Statutory Provision for Forced Heirship

In jurisdictions in which the doctrine of forced heirship operates, the power of testamentary disposition is limited to a certain proportion of the testator's estate, and the rights of forced heirs to their legitime cannot be avoided by will.

the property see Descent and Distribution § 2

Presumption as to unintentional omission of children in a will see Descent and Distribution § 45 d (2) (a)

Statutes providing for pretermitted children see Descent and Distribution § 45

Unjust or unnatural disposition see *infra* § 132

40. NY—Rice v Andrews, 217 N Y S 528, 127 Misc. 826

41. Ill.—Budlong v Los Angeles Bible Institute of Los Angeles, Cal., 16 NE2d 810, 296 Ill App 552  
Kan.—In re Hillard's Estate, 241 P 2d 729, 172 Kan 552

Md.—Besche v Murphy, 59 A 2d 499, 190 Md 539

Miss.—L'Hote v Roca, 58 So 655, 102 Miss 121

Mont.—In re Benolken's Estate, 205 P 2d 1141, 122 Mont 425

NJ.—Sisson v Teneff Trust Co., 33 A 2d 298, 133 NJ Eq 497

68 C J p 513 note 90  
Illegitimate child see *infra* § 99

#### Natural or adopted child

A parent may make a will whereby any child, natural or adopted, may take nothing

Va.—Clarkson v Bliley, 38 SE2d 22, 185 Va. 82, 171 ALR 1308

Statutory recognition of rule has been made in some jurisdictions

Ga.—Smith v Davis, 45 SE2d 609, 203 Ga 175

68 C J p 513 note 90 [b]

42. Kan.—In re Hillard's Estate, 241 P 2d 729, 172 Kan 552

Md.—Besche v Murphy, 59 A 2d 499, 190 Md 539

Miss.—L'Hote v Roca, 58 So 655, 102 Miss 121

NJ.—Sisson v Teneff Trust Co., 33 A 2d 298, 133 NJ Eq 497

68 C J p 513 note 91

#### For wrongful conduct

A testatrix who considered that her daughter had done something wrongful had the right to rescind her former action in making gift to daughter by will or to annex a condition to daughter's enjoyment of the provisions made for her by will  
Ill.—Budlong v Los Angeles Bible Institute of Los Angeles, Cal., 16 NE2d 810, 296 Ill App 552

43. NJ.—Sisson v Teneff Trust Co., 33 A 2d 298, 133 NJ Eq 497

44. Pa.—In re Gibbons' Estate, 177 A 50, 317 Pa 465—In re McGovern's Estate, 42 A 705, 190 Pa. 375

45. Ala.—First Nat Bank v Robertson, 127 So 221, 220 Ala 654

68 C J p 513 note 93

46. DC.—Darks v Ickes, 69 F 2d 230, 63 App DC 56

#### Creek Indian

Property devised by a full-blood Creek Indian to his children, also full-blood Creek Indians, has been held subject to restrictions in the hands of the secretary of the interior under the 1933 statute, notwithstanding under the prior law the will operated to remove the restrictions at the time of the father's death, when the title passed to the devisees under the will  
DC.—Darks v Ickes, *supra*.

47. Cal.—In re Hill's Estate, 178 P 710, 179 Cal 683—Estate of Wenks, 154 P 24, 171 Cal 607

48. Cal.—In re Bryant's Estate, 43 P 2d 529, 3 Cal 2d 58

49. Md.—Besche v Murphy, 59 A 2d 499, 190 Md 539

50. Mo.—Wailles v Curators of Central College, 254 SW2d 645, 363 Mo 932, 37 ALR 2d 326

Adoption statute held not to prohibit adopted child from receiving property by will from his natural parent

Mo.—Wailles v Curators of Central College, 254 SW2d 645, 363 Mo 932, 37 ALR 2d 326

51. NY.—In re Keyser's Will, 113 NYS 2d 419

52. Utah.—In re Mower's Estate, 73 P 2d 967, 93 Utah 390.

In civil law jurisdictions in which the doctrine of forced heirship operates, as discussed in Descent and Distribution § 26, statutes restrict the power of testamentary disposition to a certain proportion of the testator's estate, varying in amount according to the number of heirs and their nearness of kinship to him,<sup>53</sup> and forbid the deprivation of the forced heirs of the portion of the estate reserved to them by law.<sup>54</sup> The law establishes the right of

a forced heir to claim the legal portion coming to him out of the estate of the testator, which right needs only to be asserted to be allowed.<sup>55</sup> In general, therefore, the rights of forced heirs, in the absence of their consent,<sup>56</sup> cannot be avoided by will,<sup>57</sup> where an intent to disinherit is not accomplished.<sup>58</sup> Under these statutes, the testator may dispose of the disposable portion of his estate as he sees fit.<sup>59</sup> The disposable portion of the estate is

53. U.S.—Gonzalez v Hobby, D.C. Puerto Rico, 110 F.Supp. 893

La.—Succession of Trahan, 76 So 2d 919, 226 La 653—Roach v Roach, 35 So 2d 597, 213 La 746—Succession of Dancie, 186 So 14, 191 La 518—Succession of Harris, 155 So 446, 179 La 954—Risher v Risher, 153 So 1, 179 La 1—Succession of Barth, 152 So 543, 178 La 847, 91 A.L.R. 408—Hughes v Hughes, 14 La. Ann. 85

Rodriguez v Shroder, App., 77 So 2d 216—Succession of Eastman, App., 6 So 2d 788—Jarel v Moon's Succession, App., 190 So 867  
68 C.J. p 513 note 97

Disinheritance under Codes see Descent and Distribution § 46

Limitation on amount given to second wife where children of first wife survive see supra § 97 a

Restrictions, for the benefit of forced heirs, on the power of gratuitous disposition see Descent and Distribution § 63 d

#### Forced heir defined

(1) "A forced heir is one in whose favor the law has reserved a specific interest in the estate of a decedent" U.S.—Salatch v Hellen, D.C. Cal., 4 F.Supp. 474, 475

(2) "One who perforce of law succeeds to the whole estate of the deceased, with such exceptions only as are especially provided for and regulated by law, whose rights do not depend on the pleasure or will of the testator, but upon the law, independent of and adverse to that will"

Tex.—Hagerty v Hagerty, 12 Tex 456, 457

(3) "What are termed 'forced heirs' are nothing more than certain legal heirs, who by reason of their relationship to the deceased have had reserved to them the right to claim as heirs, if they so elect, a certain proportion of the property of the deceased, and which he may have disposed of to their prejudice"

La.—Miller v Miller, 29 So 802, 804, 105 La 257

(4) Under Spanish law "the share of an estate to which an heir was entitled was called his legitimate portion, and he was denominated a forced heir, having by force of law

a paramount right to his share of the succession"

Tex.—Crain v Crain, 17 Tex 81, 90

(5) Forced heirs are the legitimate children of the disposer left at his decease

La.—Bauman v Pennywell, 107 So 425, 427, 160 La 555

The legitimate consists of the portion of the testator's estate reserved for his forced heirs by law

La.—Bauman v Pennywell, 107 So 425, 427, 160 La 555

#### Separate property of spouse

Property owned by a widow as her separate property forms no part of community existing between her and her deceased husband with respect to determination of amount of deceased husband's disposable estate  
La.—Succession of Elmer, 181 So 477, 189 La 1016

#### Property held not testator's

Evidence held to justify judgment refusing to set aside widow's acquisitions of property before and after her marriage to testator as simulations in fraud of children of testator by a prior marriage, on ground that property represented proceeds of donation by testator in so far as they impinged on legitimate of children

La.—Succession of Elmer, supra

54 La.—Succession of Trahan, 76 So 2d 919, 226 La 653—Roach v Roach, 35 So 2d 597, 213 La 746  
Rodriguez v Shroder, App., 77 So 2d 216—Succession of Eastman, App., 6 So 2d 788

68 C.J. p 513 note 98

Disinheritance under code provisions see Descent and Distribution § 46

#### Personal property

Forced heirs cannot be deprived of their legal share of the testator's personal property by the testator, who can only transfer one-third of his estate to those who are not forced heirs

U.S.—Gonzalez v Hobby, D.C. Puerto Rico, 110 F.Supp. 893

55. La.—Succession of Fertel, 23 So 2d 234, 208 La 614—Succession of Harris, 155 So 446, 179 La 954

56. U.S.—Salatch v Hellen, D.C. Cal., 4 F.Supp. 474

57. U.S.—Gonzalez v Hobby, D.C. Puerto Rico, 110 F.Supp. 893

La.—Roach v Roach, 35 So 2d 597, 213 La 746—Succession of Harris, 155 So 446, 179 La 954

Rodriguez v Shroder, App., 77 So 2d 216—Succession of Eastman, App., 6 So 2d 788  
68 C.J. p 514 note 99

58 La.—Succession of Trahan, 76 So 2d 919, 226 La 653

59 La.—Succession of Elmer, 181 So 477, 189 La 1016

#### "Disposable portion"

The term was used in ancient common law to designate the property of a man's goods which he could dispose of without reference to his wife or children

Tex.—Crain v Crain, 17 Tex 80, 92

18 C.J. p 1279 note 47

#### Freely disposable share

The phrase "freely disposable share", appearing in an Italian will, has reference to distinction made by Italian law between portion of an estate which must be transmitted to "forced heirs" and the portion over which a testator has freedom of disposition

N.Y.—In re O'Connor, 82 N.Y.S.2d 310

#### Collation of advances

A will designating testator's second wife as universal legatee did not encroach on the legitimate of the testator's children by a prior marriage, where, after fictitious return to estate of donations made by testator and deduction of debts to succession, the disposable portion of the estate was more than the disposition to the second wife, notwithstanding entire estate at testator's death may have been community estate

La.—Succession of Elmer, 181 So 477, 189 La 1016

#### To widow

Where a statute gives only the right of usufruct in the portion of the community belonging to the deceased when he has left no will, he can give, by his testament, the usufruct of that portion, which would belong to the surviving widow, without any will, or he can declare that in the event of a particular contingency, his widow shall inherit the portion of his property, which the law authorizes him to bequeath.

determined by the disposing capacity of the testator at the time of his death,<sup>60</sup> which, in turn, is determined by the existence or nonexistence of forced heirs.<sup>61</sup> Thus a testator who leaves no forced heirs is not, in general, required to provide for any particular persons,<sup>62</sup> and is capable of disposing of his entire estate.<sup>63</sup>

**Discrimination among forced heirs** In Louisiana the law favors the equality of forced heirs,<sup>64</sup> and a testator may not so dispose of his estate in favor of one or more heirs as to infringe on the legitimate portion of other heirs.<sup>65</sup> The legitimate, however, is the only portion of an estate that a forced heir can claim as a legal right.<sup>66</sup> The right of a testator or testatrix to discriminate among his or her descendants in making gifts of the disposable portion of the estate has been recognized or upheld,<sup>67</sup> and it is not necessary that there should be a manifestation or express declaration of an intention to give an advantage or extra portion to the favored heirs other than that disclosed by the disposing provisions of the will.<sup>68</sup> The rule permitting such discrimination as to the disposable portion has been applied

even where the testator also attempted to dispose of the nondisposable portion contrary to the applicable statute.<sup>69</sup> All that the testator has to do in the distribution of his estate among his heirs as he sees fit, to be sure that his will shall be carried out, is to avoid impinging on the legitimate which the law reserves to each of his forced heirs.<sup>70</sup> It has been held that the only right of a forced heir who has by will been deprived of all share in the estate is to claim from the other heirs his legitimate.<sup>71</sup>

In determining the rights of the heirs among themselves they may, under certain circumstances, be required to account for, or collate, advances, received from the testator,<sup>72</sup> and where it appears that a forced heir has received property by donation during the testator's lifetime more in amount than his legitimate he is not entitled to receive anything from the testator's succession.<sup>73</sup> The obligation of a forced heir seeking his legitimate to collate does not apply to donations mortis causa.<sup>74</sup> The right of heirs who are also legatees to charge the estate of the testator with the cost of acquiring an outstanding claim to an interest in property disposed

La.—Grayson v Sanford, 12 La Ann 616

60 La.—Succession of Pizzati, 75 So 498, 141 La. 645

61. La.—Succession of Pizzati, supra

62. La.—Succession of Heinemann, 136 So 51, 172 La. 1057

68 C J p 514 note 4

63. La.—Succession of Pizzati, 75 So 498, 141 La. 645

68 C J p 514 note 5

64. La.—Succession of Maltry, 109 So 827, 161 La. 1032

65. La.—Roach v Roach, 35 So 2d 597, 213 La. 746

68 C J p 514 note 7

#### Inference

Where testator does not expressly declare that testamentary disposition is intended to be over and above the legitimate portion, the inference is that it is not so intended

La.—Succession of Ledbetter, 85 So 908, 147 La. 771

66. La.—Succession of Fertel, 23 So 2d 234, 208 La. 614

67. La.—Roach v Roach, 35 So 2d 597, 213 La. 746—Succession of Levy, 134 So 906, 172 La. 602

68 C J p 514 note 8

68. La.—Roach v Roach, 35 So 2d 597, 213 La. 746—Succession of Fertel, 23 So 2d 234, 208 La. 614—Hughes v Hughes, 14 La Ann 85

68 C J p 514 note 9

#### Statutes construed together

Statutes with respect to the manner of donor's declaration of inten-

tion to prefer one child to the prejudice of another were held not conflicting and required to be read together

La.—Succession of Levy, 134 So 906, 172 La. 602

#### Provisions held sufficient

La.—Succession of Levy, supra

68 C J p 514 note 9 [a]

69 La.—Succession of Trahan, 76 So 2d 919, 226 La. 653—Succession of Fertel, 23 So 2d 234, 208 La. 614—Jordan v Filmore, 120 So 275, 167 La. 725

#### Division of disposable portion

Where will gave entire estate to testatrix' two daughters and grandson, subject to usufruct bequeathed to husband and to one hundred dollars monthly legacy bequeathed to son, and the son claimed his legitimate, the grandson's share was one third of the estate after the son's legitimate had been deducted, and it was not limited to one-third of the disposable portion

La.—Succession of Fertel, 23 So 2d 234, 208 La. 614

70. La.—Succession of Fertel, supra—Succession of Smith, 162 So 21, 182 La. 389—Walet v Darby, 120 So 679, 167 La. 1095—Jordan v Filmore, 120 So 275, 167 La. 725

71. La.—Succession of Fertel, 23 So 2d 234, 208 La. 614—Jordan v Filmore, 120 So 275, 167 La. 725

68 C J p 514 note 11

72 La.—Roach v Roach, 35 So 2d 597, 213 La. 746

68 C J p 514 note 12

#### Community property

Where donations have been made to forced heirs during deceased's lifetime from community property or from community funds, one-half of amount to be returned must be collated in father's succession and other half in mother's succession

La.—Roach v Roach, supra

#### Proof of donation

(1) The law does not favor actions by forced heirs to undo transactions of their ancestors as done in fraud of their rights, and such actions can only succeed where proof adduced in support thereof is convincing, if not irresistible

La.—Roach v Roach, supra

(2) In action by forced heir to reduce legacies, wherein defendants alleged inter vivos donations to plaintiff in excess of his legitimate, testimony of defendants and forced heir that at time land was deeded to him forced heir did not have the money stated in the deed as consideration was insufficient to prove that the transfer was not a bona fide sale of the property

La.—Roach v Roach, supra.

**Evidence held sufficient to establish heir's right to legitimate in his parent's estate as against defense that forced heir had received donations inter vivos of property more than his legitimate**

La.—Roach v Roach, supra.

73. La.—Roach v Roach, supra.

74. La.—Roach v Roach, supra.

68 C J p 514 note 12 [a].

of by the will has been denied where the transaction was an individual one on the part of such heirs<sup>75</sup>

**Charges and conditions** Under statutes so providing, charges and conditions cannot be imposed by the testator on the legitimate portion of the forced heirs<sup>76</sup> Under such statutes, where a testator bequeaths to the forced heir nothing beyond his legitime, the only testamentary function he can exercise with reference thereto is that of designating the distinct part of his estate which shall be assigned to the heir in settlement of his legitime,<sup>77</sup> which part so assigned must be accepted by the heir,<sup>78</sup> reserving his right, in case of its deficiency in value to satisfy his claim, to have the deficiency made up out of the estate<sup>79</sup> Where, however, the will bequeaths to the forced heir more than his legitimate portion, the testator may attach to the bequest any lawful conditions,<sup>80</sup> and in such case the forced heir must exercise the option of either accepting the bequest as a whole, with the conditions attached, or of renouncing all testamentary advantage, and claiming his legitime only as secured to him by the law independent of the testament<sup>81</sup>

**Effect of testamentary provisions not in accordance with statute** A will by which the testator attempts to dispose of more than the disposable por-

tion of his estate is not null, or wholly void,<sup>82</sup> and the court will not set aside the will<sup>83</sup> Where a testator disposes of more of his estate than is permitted by law, the proper and ordinary remedy is for the court to make a reduction<sup>84</sup> The remedy of the forced heir is not against the executor of the estate, but it is against the legatees whose legacies he deems excessive to reduce such legacies<sup>85</sup> The right to demand a reduction includes a demand on any donee or legatee<sup>86</sup> whether he is an heir or a stranger<sup>87</sup> This demand may be made, however, only when the donation or legacy exceeds the disposable portion<sup>88</sup> and only such excess may be included in the demand<sup>89</sup> Also, the legitime which each one of several forced heirs may demand, in case of an excessive legacy, is not the whole of the reserved portion, but is only each heir's proportionate share of the reserved portion<sup>90</sup>

Under a statute so providing, property which is the subject of a particular legacy which is entitled to preference will not be reduced to provide for the forced heir unless the value of the residue falls short of the legal reservation<sup>91</sup> Also, under some statutes, forced heirs are given the option, in the case of a donation of a usufruct or of an annuity which exceeds the disposable portion, either to execute the disposition or abandon to the donee the

75 La.—Winbarg v Winbarg, 150 So 21, 177 La 1071  
68 C J p 515 note 13

76 La.—Succession of Turnell, 32 La Ann 1218  
68 C J p 515 note 14

77 La.—Succession of Turnell, supra.

78. La.—Succession of Turnell, supra.

79. La.—Succession of Turnell, supra.

80 La.—Succession of Fertel, 25 So 2d 296, 209 La 655—Succession of Turnell, 32 La Ann 1218

81. La.—Succession of Fertel, 25 So 2d 296, 209 La 655—Succession of Turnell, 32 La Ann 1218

82. La.—Succession of Trahant, 76 So 2d 919, 226 La 653—Succession of Dancie, 186 So 14, 191 La 518—Succession of Harris, 155 So 446, 179 La 954—Succession of Barth, 152 So 543, 178 La 847, 91 A L R 408

Succession of Eastman, App, 6 So 2d 788—Jarel v Moon's Succession, App, 190 So 867  
68 C J p 515 notes 20, 21

#### Effect of disposition

Where a testator disposes of his entire estate to the prejudice of a forced heir, he has done nothing except to make a disposition of property mortis causa affecting the quan-

tum he may legally dispose of to the prejudice of such forced heir  
La.—Roach v Roach, 35 So 2d 597, 213 La 746

**Special legacies** are not null because legacies exceed disposable portion of property to prejudice of forced heirs

La.—Risher v Risher, 153 So 1, 179 La 1  
68 C J p 515 note 21

83 La.—Succession of Trahant, 76 So 2d 919, 226 La 653

84. La.—Succession of Trahant, supra—Succession of Dancie, 186 So 14, 191 La 518—Succession of Vance, 164 So 792, 183 La 760—Succession of Harris, 155 So 446, 179 La 954—Risher v Risher, 153 So 1, 179 La 1—Succession of Barth, 152 So 543, 178 La 847, 91 A L R 408—Succession of Fath, 80 So 659, 144 La 463

Succession of Eastman, App, 6 So 2d 788—Jarel v Succession of Moon, App, 190 So 867  
68 C J p 515 note 22

#### Action by forced heir

A testamentary gift to the prejudice of a forced heir merely subjects such donation mortis causa to an action by the forced heir for reduction thereof and for recovery of his legitime

La.—Roach v. Roach, 35 So 2d 597, 213 La 746

85. La.—Succession of Vance, 164 So 792, 183 La 760

#### Valuation of estate

Forced heir suing for reduction of excessive donation or legacy or for determination of disposable portion of estate can obtain judicial determination of value of each item on inventory, or belonging to estate, or disposed of by testator by donation inter vivos

La.—Succession of Vance, supra

86. La.—Jordan v Filmore, 120 So 275, 167 La 725

87. La.—Jordan v Filmore, supra

88 La.—Jordan v Filmore, supra

89. La.—Jordan v Filmore, supra

#### Legacy in addition to legitime

Where will gave testatrix' husband use of all her property during his life, and at his death gave the property to two daughters and a grandson, and bequeathed son one hundred dollars per month for life, it was not intention of testatrix to give son the legacy of one hundred dollars a month in addition to his legitime

La.—Succession of Fertel, 23 So 2d 234, 208 La 614

90. La.—Jordan v Filmore, 120 So 275, 167 La 725

91. La.—Succession of Jacobs, 29 So 241, 104 La 447.



ownership of the disposable portion<sup>92</sup> A forced heir is not required to claim his legitime, he may waive his right to do so<sup>93</sup> Thus, a forced heir may by his consent to, or ratification of, an excessive donation lose or abandon his right to claim a reduction,<sup>94</sup> and if he fails to claim his legitime within the prescriptive period the ownership conveyed by the will is maintained<sup>95</sup>

**Remunerative donations.** Under the Louisiana civil code a remunerative donation may be made by will notwithstanding there are forced heirs<sup>96</sup> The remunerative donation is designed to recompense for services rendered<sup>97</sup> It is not a real donation, but a dation en paiement, the giving by the testator of his estate to the legatee in payment of his services<sup>98</sup> If a remunerative donation given by will exceeds the disposable portion, the legatee is bound to prove the value of his services<sup>99</sup> No reduction will be made in a remunerative donation if the value of the services is equal to, or greater than, the amount of the legacy,<sup>1</sup> or if the value of the services should be little inferior to that of the gift, not even though the donation infringes on the legitime of the forced heirs<sup>2</sup> If, however, it is not shown that the value of the legatee's services is equal to the amount of the legacy, the legacy will be reduced,<sup>3</sup> but it cannot be reduced below the estimated value of the services rendered<sup>4</sup> If the remunerative donation does not exceed the disposable portion, the declaration of the testator as to

the services rendered and their value is conclusive on the heirs<sup>5</sup> and no proof is required of the legatee<sup>6</sup> One who avers that the remunerative donation exceeds the disposable portion has the burden of showing that such is the case<sup>7</sup>

**Computation of disposable portion and legitime** The method of determining the disposable portion of the estate is sometimes fixed by statute<sup>8</sup> A forced heir and beneficiary under a will, whose share under the will is in excess of his legitime, may not assert that a provision of the will against the collation of donations inter vivos should be disregarded in the computation of his legitime and at the same time demand that he receive the benefit of a provision in the will against the collation of donations inter vivos<sup>9</sup>

**What law governs** In determining whether a statute fixing the disposable portion of the estate in the event that the testator leaves descendants is applicable, the view has been taken that the law of the testator's domicile governs<sup>10</sup> and that such a statute of the testator's domicile is applicable,<sup>11</sup> except where the testator expressly declares in his will that his testamentary dispositions are to be construed and regulated by the laws of another state<sup>12</sup> The rights of forced heirs, however, whether resident or nonresident, to that portion of the testator's estate composed of real estate or immovables are determined by the law of the situs of the proper-

92. La—Clarkson v. Clarkson, 13 La Ann 422

68 C J p 515 note 28

93. La—Succession of Fertel, 23 So 2d 234, 208 La 614

94. La—Succession of Harris, 155 So 446, 179 La 954  
68 C J p 515 note 29

95. La—Succession of Grivaud, 187 So 284, 192 La. 181—Succession of Harris, 155 So 446, 179 La 954

96. La—Kiper v Kiper, 38 So 2d 507, 214 La 733  
68 C J p 515 note 30

**Intent to make remunerative donation held shown**

La—Kiper v Kiper, supra.  
68 C J p 515 note 30 [b]

97. La—Kiper v. Kiper, supra

98. La—Kiper v Kiper, supra

99. La—Winbarg v Winbarg, 150 So 21, 177 La 1071—Succession of Fox, 2 Rob 292

1. La—Kiper v Kiper, 38 So 2d 507, 214 La 733  
68 C J p 515 note 32

**Value of services held equal to donation**

La—Kiper v Kiper, supra.

2. La—Successions of Gilbert, 64 So 2d 192, 222 La 840

3. La—Winbarg v Winbarg, 150 So 21, 177 La 1071  
68 C J p 515 note 33

4. La—Kiper v Kiper, 38 So 2d 507, 214 La 733

5. La—Winbarg v Winbarg, 150 So 21, 177 La. 1071—Succession of Fox, 2 Rob 292

6. La—Succession of Fox, supra.

7. La—Succession of Fox, supra.

8. La—Succession of Elmer, 181 So 477, 189 La 1016  
68 C J p 516 note 38

**Aggregate estate**

(1) To determine whether testator's testamentary disposition to second wife encroached on the legitime of children of prior marriage as being in excess of the disposable portion of the estate, the aggregate amount of the estate was required to be determined  
La—Succession of Elmer, supra.

(2) In determining the aggregate amount of the estate of a testator with respect to question whether disposition in will encroached on legitime of testator's children, donations made by testator would be ac-

tuitiously returned to the estate, after which the debts of the succession would be deducted, and, from the amount remaining after deduction of the debts, the disposable portion would be determined

La—Succession of Elmer, supra

9. La—Succession of Fertel, 25 So 2d 296, 209 La. 655

**Donations to children and grandchildren**

Under will providing that amounts paid during testator's lifetime to children and grandchildren should not be considered in calculating the values of estate and the portion thereof, donations inter vivos made by the testator would not be computed in determining disposable portion of the remaining two-thirds of his estate which he bequeathed in equal portions to his three children  
La—Succession of Fertel, supra

10. N Y—Schultz v. Dambmann, 3 Bradf Surr 379

11. N Y—Schultz v. Dambmann, supra.

12. N Y—In re Cook's Estate, 123 N Y S 2d 568, 204 Misc 704, affirmed 131 N Y S 2d 882, 283 App Div 1047.

ty,<sup>13</sup> but in some jurisdictions, the law of the testator's domicile is applied to real estate therein<sup>14</sup> In its application of the law to a nonresident testator's will, Louisiana will apply it only to immovable property located therein, considered as though it was a separate succession<sup>15</sup>

### c. Capacity in Which Heirs or Next of Kin Take Property Devised or Bequeathed to Them

As a general rule, in the absence of statutory provisions to the contrary, heirs, next of kin, or children who receive by will the same estate or interest as they would take by descent in case of the intestacy of the testator take by descent, and not by purchase or under the will, but where the devise or bequest is different in quality, quantity, or tenure than the beneficiary would take in case of intestacy, he takes by purchase or under the will

In the absence of statutory provisions to the contrary, where a testator attempts to make a devise of land to his heir at law and the estate devised is the same as that which the heir would take by descent in case of intestacy, the designated devisee takes by descent and not by purchase<sup>16</sup> In other words, the designated devisee takes by descent and not under the will<sup>17</sup> or by descent and not by devise,<sup>18</sup> and the devise is void<sup>19</sup> and ineffectual<sup>20</sup> Similarly, the view has been taken that, if without a bequest of personal property the designated bene-

ficiary would have taken exactly the same interest as the will purports to give him, he takes under statute<sup>21</sup> and not by purchase or under the will,<sup>22</sup> and that the bequest is void,<sup>23</sup> but there is authority for the view that a bequest to the father of the testator who is under statute next of kin of the testator may be given effect<sup>24</sup>

Where the devise or bequest is of a different estate or interest,<sup>25</sup> that is to say, different in quality<sup>26</sup> or quantity<sup>27</sup> from that which the devisee or legatee would take in case of intestacy, or according to some cases, where the will effects a conversion of the realty involved into personalty,<sup>28</sup> the devise or gift is valid and the beneficiary takes by purchase The true criterion by which to determine the question here considered is, whether, if there had been no will, or the devise was eliminated from the will, the proposed devisee would have taken precisely the same benefit by descent as is given by the devise,<sup>29</sup> if he would have so taken he is in by descent,<sup>30</sup> otherwise he takes as devisee<sup>31</sup> In this connection the view has been expressed that a contingent remainder or an executory devise is not the equivalent of a vested right either in quantity or quality<sup>32</sup> So a vested remainder in a larger or smaller share of the property than would have come by descent is not the equivalent of a reversion<sup>33</sup>

13 La.—Hughes v Hughes, 14 La Ann 85  
Miss.—L'Hote v Roca, 58 So 655, 102 Miss 121

#### Interest in succession in administration

Where nonresident mother's legitimate in resident son's succession consisting of both movables and immovables, was duly recognized but never reduced to possession before her death, her right of action was for the recovery or partition of the entire succession, and from the object to which it applied was an "immovable" subject to the laws of Louisiana and to the legitimate of her children and grandchildren, notwithstanding attempted contrary disposition of her interest by will was valid in the state of her domicile La.—Succession of Harris, 155 So 446, 179 La. 954

14. N.Y.—In re Schneider's Estate, 96 N.Y.S.2d 652, 198 Misc 1017, opinion adhered to 100 N.Y.S.2d 371, 198 Misc 1017

15. La.—Jarel v Succession of Moon, App, 190 So 867

16. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 202, 23 Tenn App 434 68 C.J. p 516 note 42

Devolution of property on failure of will to dispose of remainder see infra § 1223.

Rule in Shelley's case see infra §§ 870-879

Testamentary provisions for surviving spouse see supra § 97

17. Tenn.—McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 23 Tenn App 434 68 C.J. p 516 note 43

18. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 202, 23 Tenn App 434 68 C.J. p 516 note 44

19. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 202, 23 Tenn App 434 68 C.J. p 516 note 45

20. Ky.—McIlvaine v Robson, 171 S.W. 413, 161 Ky 616

Tenn.—McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 23 Tenn App 434

21. Ind.—Robertson v Robertson, 22 NE 310, 120 Ind 333 68 C.J. p 517 note 47

22. Ind.—Robertson v Robertson, 22 NE 310, 120 Ind 333 Dillman v Fulwider, 105 NE 124, 57 Ind App 632

23. Mass.—Parsons v Winslow, 6 Mass 169, 4 Am D 107

24. Pa.—In re Hough's Estate, 13 Phila 279

25. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134

S.W.2d 197, 202, 203, 23 Tenn App 434

68 C.J. p 517 notes 51, 55

26. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 202, 203, 23 Tenn App 434

68 C.J. p 517 note 52

27. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 202, 203, 23 Tenn App 434

68 C.J. p 517 note 53

28. Cal.—Bank of Ukiah v Rice, 76 P 1020, 143 Cal 265, 101 Am SR 118

N.Y.—Buckley v Buckley, 11 Barb 43

Right of heirs to take by descent where testamentary provision provides for sale of land and division of proceeds among named persons see Descent and Distribution § 44

29. D.C.—Landic v Simms, 1 App D C 507

30. D.C.—Landic v Simms, supra.

31. D.C.—Landic v Simms, supra.

32. D.C.—Landic v Simms, supra. 68 C.J. p 517 note 59

33. Tenn.—Corpus Juris cited in McQuiddy Printing Co v Hirsig, 134 S.W.2d 197, 202, 203, 23 Tenn App. 434

68 C.J. p 517 note 60.

Furthermore, descent through intermediate persons is not the equivalent of descent from a more remote ancestor<sup>34</sup>

*Description of class dependent on contingency*  
The rule that a devise which purports to give to the heirs the same estate as would pass under the statute of descent is void does not apply to the devise of a remainder, which merely describes the devisees as those persons who would be his heirs if the life tenant who was the testator's only heir should predecease him<sup>35</sup>

*Title not in testator.* Where, after the death of testator, the United States government granted land for which he had made a claim, to his heirs and legal representatives, the latter took under the grant, and not under the residuary clause in the will<sup>36</sup>

## § 99 Illegitimates and Their Descendants

In the absence of constitutional or statutory provisions to the contrary, a testator may dispose of his property by will to the exclusion of his illegitimate child, or in favor of his, or other, illegitimate children, but statutes which restrict the amount which may be given to illegitimate children will be given effect

In the absence of statutory or constitutional provisions to the contrary, a testator may dispose of his

property by will to the exclusion of his illegitimate child<sup>37</sup> On the other hand, except in so far as the right may be regulated or restricted by statutory or constitutional provision, a testator may dispose of property to persons who are illegitimate<sup>38</sup> and to a person whose relationship to the testator is established through an ancestor of such person who is an illegitimate<sup>39</sup> Thus, in the absence of constitutional or statutory restrictions, a testator may by will give property to his own illegitimate children,<sup>40</sup> even to the exclusion of his legitimate children<sup>41</sup>

The rule permitting testamentary gifts to illegitimates has been recognized or applied even in respect of illegitimates begotten but not born before the execution of the will<sup>42</sup> On the other hand, it has been held that in order that a child may take under express terms of a will as a natural child, it must have acquired the reputation of being the natural child of a certain person at the time of the making of the will,<sup>43</sup> and hence that a testamentary provision for illegitimates unborn and not in ventre sa mère is illegal and void<sup>44</sup>

Some statutes have been enacted, the purpose and effect of which are to restrict the amount which may be given to illegitimate children by will,<sup>45</sup> or which,

34 DC—Landic v Simms, 1 App DC 507

35 Ill—McCormick v Sanford, 149 NE 476, 318 Ill 544  
68 CJ p 517 note 62

36 Ga—Ware v Trustees of Emory College, 65 Ga 283

37 Iowa—Lepper v Knox, 161 NW 454, 179 Iowa 419, LRA 1918A 43  
68 CJ p 518 note 65

Right of bastard to inherit see Bastards §§ 24-28

### Pretermitted heir

Illegitimate child who was not mentioned in the will of his mother is entitled to a share in her estate as a pretermitted heir

Cal—In re Connors' Estate, 128 P 2d 200, 53 Cal App 2d 484

### Proof of parent

In proceeding by one claiming to be the illegitimate son of deceased, in weighing the testimony of certain members of the family the court was entitled to consider that as beneficiaries under the will they were both testifying against their own interest which tended very much to soften the rule as to the weakness of evidence of declarations as to family relationship, or at least to make its application less rigid

Cal—In re Connors' Estate, supra

38 La—Succession of Haydel, 177 So 695, 188 La 646  
68 CJ p 518 note 66

### Statutes limiting right to inherit

(1) Statutes prohibiting to bastard, adulterous, or incestuous children the right of inheritance or to receive as heirs have been held to preclude such children from taking as beneficiaries under a will

La—Bennett v Cane, 18 La Ann 590  
Succession of Cloud, 7 La App 407

(2) On the other hand, such statutes have been held not to preclude bastard, adulterous, or incestuous children from taking as legatees under the express provisions of a statute authorizing testamentary dispositions in their favor to the extent necessary to their sustenance, or to procure them an occupation or profession by which to support themselves

La—Succession of Haydel, 177 So 695, 188 La 646

39 Wis—In re Sander's Estate, 105 NW 1064, 126 Wis 660, 5 Ann Cas 508, 11 Prob Rep Ann 350

40 La—Succession of Haydel, 177 So 695, 188 La 646  
68 CJ p 518 note 68

41 NY—In re Anna's Estate, 162 NE 473, 248 NY 421

42 Md—Pratt's Lessee v Flamer, 5 Hair & J 10  
68 CJ p 518 note 71

43 Ill—Marsh v Field, 130 NE 753, 297 Ill 251

44 Ill—Marsh v Field, supra  
68 CJ p 518 notes 76, 77

45. US—Bynum v Prudential Ins Co of America, DC SC, 77 F Supp 56

7 CJ p 965 note 46 [b]—68 CJ p 519 note 79

### Acknowledgment

The testator's acknowledgment, in a nuncupative will by public act, that the legatee is his child, is a sufficient acknowledgment to convert an illegitimate legatee from a bastard into a natural child, entitled to receive by the will one fourth of the testator's estate if he leaves only legitimate ascendants or brothers or sisters or descendants of brothers or sisters, or one third of his estate if he leaves only more remote collateral relations

La—Succession of Serres, 67 So 356, 135 La 531

### For sustenance or education

Statutes limiting testamentary dispositions of natural fathers and mothers in favor of their adulterine or incestuous children to the mere amount necessary to their sustenance, or to procure them an occupation or profession by which to support themselves have been given effect

La—Succession of Haydel, 177 So 695, 188 La 646  
68 CJ p 519 note 79 [a] (1), (2)

### Insurance

The statutes prohibiting testamen-

it seems, may prevent a testamentary gift to them<sup>46</sup> Under such statutes, a gift or devise to illegitimate children not in excess of the amount or proportion permitted is valid,<sup>47</sup> and a gift or devise in excess of the amount or proportion permitted is void only as to the excess,<sup>48</sup> and as to the excess, it has been held not absolutely void, but only voidable at the election of those authorized by statute to contest the testamentary disposition<sup>49</sup> Where, however, those entitled so to do contest a testamentary disposition of the testator's entire estate to his illegitimate children, the estate is intestate as to the invalid portion of the testamentary disposition<sup>50</sup> The invalid portion of the testamentary disposition is distributed as provided by law on intestacy, to all lawful heirs, including those not entitled to object to the testamentary disposition, and the illegitimate children are precluded from obtaining any portion thereof, or any more than the statutory portion authorized<sup>51</sup> The legitimate children of an adulterous bastard who is incapable of receiving a testamentary gift may properly receive a disposition by will from the parent of the bastard,<sup>52</sup> except, under some statutes, where they are interposed for the purpose of enabling the incapable bastard to inherit<sup>53</sup>

tary gift of more than fourth of testator's estate to his bastard children affect only property constituting part of testator's estate, and hence are inapplicable to proceeds of policies insuring testator's life in favor of his illegitimate child  
SC—White v White, 48 SE 2d 189, 212 SC 440

46. La—Succession of Cloud, 7 La App 407  
68 CJ p 519 note 80

#### From grandparent

Unacknowledged illegitimate children of legitimate daughter cannot inherit as universal legatees from succession of grandmother  
La—Succession of Cloud, supra

47. La—Succession of Haydel, 177 So 695, 188 La 646  
68 CJ p 519 note 79 [a] (10), (11)

#### Community property

A will attempting to give community realty to testator's adulterine bastard daughter for her sustenance, pursuant to statute, was valid to extent of testator's ownership of property, so as to pass undivided one-half interest, in absence of claim that devise was excessive for daughter's sustenance  
La—Succession of Haydel, supra

48. La—Succession of Haydel, supra  
SC—White v White, 48 SE 2d 189, 212 SC 440  
68 CJ p 519 note 79 [a] (5), (6), (12), (13), [b] (3).

49. SC—White v White, supra.

#### Poisons entitled to contest

Children of testator's predeceased legitimate son have no legal standing under statutes to avoid testamentary gift of testator's property to his illegitimate children, but his lawful widow and son are entitled to have gift in excess of one-fourth of his estate declared void  
SC—White v White, supra

50. SC—White v White, supra

51. SC—White v White, supra.  
68 CJ p 519 note 79 [b] (5)

#### Issue of predeceased legitimate child

(1) All lawful heirs of the testator obtain the benefit of the court's declaration of invalidity of the testamentary gift of the testator's property to his illegitimate children at the instance of his lawful widow and surviving legitimate son, so as to entitle such widow and son and children of testator's predeceased legitimate son thereto according to the law of descent  
SC—White v White, supra

(2) Testator's illegitimate children do not take part of his estate which his previously deceased legitimate son's children would take under the statute of distributions  
SC—White v White, supra

52. La—Lee v Hunter, 23 So 2d 61, 208 La 248

53. La—Lee v Hunter, supra.  
68 CJ p 519 note 80 [a] (2).

*What law governs.* In respect of real property, statutes limiting the amount of his property which a man may by will give to his illegitimate child or children where he leaves a surviving wife or legitimate children apply to,<sup>54</sup> and only to,<sup>55</sup> real property in the jurisdiction in which the statute has been enacted and has operative force.

## § 100. Paramours, Concubines, or Parties to Invalid Marriage

In the absence of statutory provision to the contrary, paramours, concubines, and parties to invalid marriages are not precluded from taking a legacy or devise under the will of the person with whom they engaged in illegal cohabitation, but under some statutes the amount and kind of property which they may receive under the will of a person with whom they have unlawfully cohabited are limited.

In the absence of statutory provisions to the contrary, a devise or bequest is not invalid solely because the beneficiary lived with the maker of the will in illegal cohabitation<sup>56</sup> So the law does not prohibit a man from making a will in favor of his paramour<sup>57</sup> and ignoring his wife<sup>58</sup> if he does so with free, sound, and disposing mind, pursuant to the formalities which the law prescribes, and past illicit cohabitation alone does not render void

#### Presumption

Disposition by nuncupative will in favor of children of testator's adulterous bastard son, even if son were living, would merely create a rebuttable presumption that children were interposed for son, who, by reason of his status, was incapable of taking  
La—Lee v Hunter, supra

#### Where incapable person dead

Disposition in favor of children of testator's adulterous bastard son, who had predeceased testator, was valid, since children could not be considered as persons interposed for one who no longer existed  
La—Lee v Hunter, supra

54. SC—Humphries v Settlemeier, 74 SE 892, 91 SC 389

55. SC—Humphries v Settlemeier, supra.  
68 CJ p 519 note 82

56. Ariz—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353

Kan—Fox v Eaglin, 295 P 662, 132 Kan 395  
Undue influence by partner to illicit relation see *infra* § 231

57. Ariz—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353  
Pa—In re Meyers' Estate, Orph, 62 Montg Co 162  
68 CJ p 519 note 85

58. Ariz—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353.  
68 CJ p 519 note 86.

a testator's gift to his partner in such cohabitation<sup>59</sup> Likewise, the existence of illicit relations with a man does not prevent a woman from making a will in his favor<sup>60</sup>

The fact that a testator was not legally divorced from his wife does not necessarily render invalid testamentary provision by him for another woman whom he had lived with, and treated, as his wife,<sup>61</sup> and a like rule applies to testamentary provision for a woman who had lived with testator as his wife without having obtained a valid divorce from her husband<sup>62</sup> Thus, the testator's knowledge that he was not legally married to the woman with whom he was living does not of itself prevent his making a valid testamentary gift to her,<sup>63</sup> and the fact that the beneficiary under a will is guilty of bigamy in marrying the testatrix does not disqualify him, where the testatrix before executing the will learned

that he had another wife living,<sup>64</sup> or had knowledge of all the facts surrounding the prior marriage even though she was mistaken as to the legal effect of such facts<sup>65</sup>

In some jurisdictions, however, statutes grounded on public policy impose restrictions on the amount and kind of property which a testator or testatrix may give to persons with whom they have unlawfully cohabited,<sup>66</sup> or which a married man having a lawful wife or living children of his own may devise or bequeath to a woman with whom he lived in adultery<sup>67</sup> Under such statutes a gift or devise in excess of the amount or proportion authorized is void only as to the excess,<sup>68</sup> and as to the excess, it has been held not absolutely void, but only voidable at the election of those authorized by statute to contest the testamentary disposition<sup>69</sup> Where, however, the persons authorized to do so contest a tes-

59. Ga.—Smith v Du Bose, 3 SE 309, 78 Ga. 413, 6 Am SR 260

60. NY.—In re Powers, 162 NYS 828, 176 App Div 455  
68 CJ p 520 note 88

61. NY.—Gelston v Shields, 78 NY 275

#### Illegal marriage

Testator's description of a named beneficiary as his "future wife" was held not to make the will invalid because of the fact that his marriage subsequent to the execution of the will to the beneficiary was illegal due to the invalidity of a divorce obtained in another jurisdiction from his widow, since the words "future wife" were descriptive merely and did not impose a condition  
Ariz.—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353

62. Ind.—Wenning v Teeple, 41 NE 600, 144 Ind 189

NY.—Taylor v Higgs, 95 NE 30, 202 NY 65

63. Ill.—McDole v Thurm, 114 NE 542, 276 Ill 200, LRA 1917B 1150

64. Kan.—Fox v Eaglin, 295 P. 662, 132 Kan 395

65. Iowa.—In re Donnelly's Will, 26 NW 23, 68 Iowa 126

66. La.—Succession of Washington, 63 So 2d 610, 222 La. 707  
68 CJ p 520 note 94

#### Concubine

(1) In Louisiana it is provided by statute that "those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables, and if they make a donation of movables, it cannot exceed one-tenth part of the whole value of their estate."

La.—Succession of Lannes, 174 So 94, 187 La. 17

(2) Under this statute a devise of realty or immovable property to one with whom the testator or testatrix lived in open concubinage is void

La.—Succession of Washington, 63 So 2d 610, 222 La. 707

Succession of Bankston, App., 166 So 900

68 CJ p 520 note 94 [b] (3)

(3) The statute applies only in case of open concubinage and does not apply where concubinage is secret and closed

La.—Succession of Lannes, supra

68 CJ p 520 note 94 [b] (9)

(4) "Open concubinage is one that is plain and above board, without secret, reserve, or disguise, and not merely one that is notorious"

La.—Succession of Washington, supra

68 CJ p 520 note 94 [b] (14)

(5) Where parties lived as husband and wife so that their friends, neighbors, acquaintances, tradespeople, and the public regarded them as such, the concubinage was not "open" but "secret" entitling the survivor to take one half of deceased's estate in accordance with deceased's will

La.—Succession of Lannes, supra

(6) The statute does not affect the right of the wife of the testator with whom he had lived in open concubinage prior to their marriage to take under will of testator, which was executed after their marriage  
La.—Succession of Elmer, 181 So 477, 189 La. 1016

(7) Evidence held to show open concubinage

La.—Succession of Washington, supra

(8) Other cases with respect to the right of a testator to make testa-

mentary disposition in favor of his concubine see 68 CJ p 520 note 94 [b]

67. SC.—White v White, 48 SE 2d 189, 212 SC 410

#### Purpose

Statutes of this character, it has been said, are "designed to teach the citizen lessons of virtue and morality"

SC.—Gore v Clarke, 16 SE 614, 37 SC 537, 20 LRA 465

#### Mixed marriage

Where evidence did not show that widow had one eighth or more of negro blood, testator's second marriage was lawful, and provision of will whereby testator, who was survived by lawful child of first marriage, gave more than one fourth of his estate to his widow, was not invalid

SC.—Bennett v Bennett, 10 SE 2d 23, 195 SC 1

#### Valuation of property

In determining whether or not the gift is in excess of the proportion of the testator's estate specified by statute, the time of valuation is when the gift takes effect in possession

US.—Bynum v. Prudential Ins Co of America, DC SC, 77 F Supp 56

68. SC.—White v White, 48 SE 2d 189, 212 SC 440

68 CJ p 520 note 94 [b] (4), (5)

69. SC.—White v White, supra.

#### Issue of predeceased children

Children of testator's predeceased legitimate son have no legal standing to avoid testamentary gift of testator's property to woman with whom he had lived in adultery, but his lawful widow and son are entitled to have gift in excess of the statutory amount permitted declared void.

SC.—White v. White, supra.

tamentary disposition and have it declared void as to such excess, the estate is intestate as to the portion of the testamentary disposition declared void,<sup>70</sup> and is distributed as provided by law on intestacy, the testator's paramour being precluded from obtaining any portion thereof, or any more than the statutory portion authorized<sup>71</sup>

### § 101. Professional, Religious, or Other Confidential Adviser; Draftsman of Will

In the absence of statutory provision to the contrary, an attorney or other confidential adviser of the testator may take as legatee or devisee

In the absence of statutory provision to the contrary, an attorney for,<sup>72</sup> or confidential adviser of,<sup>73</sup> the testator may take as legatee or devisee even though such legatee or devisee drew the will<sup>74</sup> However, an attorney for the testator who used his position to gain benefit for himself may not receive a bequest or devise<sup>75</sup>

Under some statutes doctors, surgeons, and ministers of religious worship who have professionally attended the testator in his last illness are incapacitated to take under his will except as provided by the statute<sup>76</sup> Such a statute, it has been held, does not invalidate a legacy to a minister of worship where the testatrix did not die for more than a year after the will containing the legacy was made<sup>77</sup> Also, it has no application where a minister was called after the will was made, and after the testator had declined spiritual assistance,<sup>78</sup> or to a physician or minister who is the husband of the testatrix, in the absence of a showing that he married the tes-

tatrix in fraud of the law or with the fraudulent design of defeating the incapacity established by law<sup>79</sup> Such statutes apply to the devolution of real property situated in the state,<sup>80</sup> notwithstanding the will was executed in another state where both the testatrix and the beneficiary were resident and where such a disposition was permitted<sup>81</sup>

### § 102. Attesting Witness

- a In general
- b Holographic or nuncupative will
- c Will proved or provable independently of witness benefited
- d Codicils

#### a. In General

As a general rule a testamentary gift to an attesting or subscribing witness to the will is void, unless there are sufficient other witnesses to the will to establish it.

Under some statutes a testamentary gift to an attesting witness to the will has been held valid<sup>82</sup> Generally, however, the rule is to the contrary In some of the states and in the District of Columbia the British statute 25 Geo II, ch 6, invalidating devises and legacies to attesting witnesses, remained in force after the colonies won their freedom from England, so as to render invalid a devise or legacy to an attesting witness to the will<sup>83</sup> In other states there exist, or have existed, statutes which, in express terms and without qualification, avoid a devise or bequest to an attesting or subscribing witness<sup>84</sup> In still other states, under statutes which specifically or in substance so provide, a testamentary gift to an attesting or subscribing witness is void, unless there are a specified or sufficient number of

#### Legitimate children or lawful wife

The devise is voidable only at the election of the lawful wife or legitimate children, and the right of action is personal to them and does not inure to the benefit of any other person

US—Bynum v Prudential Ins Co of America, DC SC, 77 FSupp 56

70. SC—White v White, 48 SE2d 189, 212 SC 440

71. SC—White v White, supra

#### Issue of predeceased lawful child

A testator's paramour to whom testamentary gift in excess of the statutory amount authorized was made does not take portion thereof which his previously deceased legitimate son's children would take under statute of distributions

SC—White v White, supra.

72. NJ—In re Cooper's Will, 71 A 676, 75 NJEq 177, affirmed Har-

rison v Axtell, 75 A 1100, 76 NJ Eq 614

68 CJ p 520 note 1

Undue influence of person in confidential relation to testator see infra § 230

73. NY—In re Weed's Will, 127 NY 966, 143 AppDiv 822, affirmed 97 NE 1118, 204 NY 611

74. NJ—Bennett v Bennett, 26 A 573, 50 NJEq 439

68 CJ p 520 note 3

75. Md—Hughes v McDaniel, 98 A 2d 1, 202 Md 626

76. La—Succession of Herber, 54 So 579, 128 La. 111

68 CJ p 520 notes 4, 5, 6

77. La—Succession of Price, 134 So 907, 172 La 606

78. La—Succession of Villa, 61 So 765, 132 La. 714

79. La—Zerega v Percival, 15 So 476, 46 La Ann 590

80. La—Succession of Herber, 54 So 579, 128 La. 111

81. La—Succession of Herber, supra

68 CJ p 521 note 11

82. Ala—Henry v Hall, 17 So 187, 106 Ala 84, 54 AmSR 22

68 CJ p 521 note 24

83. DC—Elliot v Bient, 17 DC 98

68 CJ p 521 notes 14, 15, 24 [b] (1), p 522 notes 25, 26, 27

Competency of

Attesting witnesses see infra § 185  
Witnesses to oral or nuncupative wills see infra § 216

Number of witnesses required on probate of will see infra § 411

Subscribing or attesting witnesses in general see infra §§ 182-197

84. Ga.—Denmark v Rushing, 67 S E2d 766, 208 Ga 557, 28 ALR2d 793

NJ—In re Rogers' Estate, 83 A 2d 268, 15 NJ Super 189

Browning v Browning, 7 A 2d 816, 126 NJEq 55

68 CJ p 522 note 28.

other witnesses to the will,<sup>85</sup> or unless the will cannot otherwise be proved than by the testimony of such witness,<sup>86</sup> as, for example, where there are not enough witnesses other than the witness who is a beneficiary<sup>87</sup>

Under exceptions contained in some statutes in respect of gifts to an heir at law of the testator, a gift to such an heir who was an attesting or subscribing witness has been upheld<sup>88</sup> Other statutes save to an attesting or subscribing witness, when it is necessary for him to testify in order to establish the will, so much of the share of the testator's estate as would have descended or been distributed to such witness, in case the will were not established, as will not exceed the value of the devise or bequest made to him in the will<sup>89</sup> A statute avoiding a testamentary gift to a witness to a will<sup>90</sup> or to a

subscribing witness<sup>91</sup> applies only to an attesting or subscribing witness, and does not apply to a person, other than such a witness, who testifies when the will is probated<sup>92</sup> There is authority for the view that, notwithstanding a statutory provision avoiding a testamentary gift to an attesting witness, a beneficiary under a will who signs his name to the will at the place for signatures of subscribing witnesses does not thereby avoid his beneficial interest if he signs merely as a witness to the signature of a subscribing witness who is a marksman<sup>93</sup>

**Beneficial interest** Under some statutes the devise, legacy, or interest must be a matter of personal benefit to the recipient, that is, it must be a beneficial or pecuniary one, in order for it to be invalidated by the recipient acting as an attesting or subscribing witness to the will<sup>94</sup>

**85** Cal—In re Reynolds' Estate, 211 P 2d 608, 94 Cal App 2d 851

Mich—In re Baldwin's Estate, 18 N W 2d 827, 311 Mich 288—Bissell v Nerreter, 7 N W 2d 261, 304 Mich 175

Tex—Scandurro v Beto, Civ App, 234 S W 2d 695  
68 C J p 522 note 29

#### Purpose

(1) The statute is designed to prevent attesting witnesses from taking gifts under a will, for establishment of which their attestation is necessary

III—Tolman v Reeve, 65 NE 2d 815, 393 Ill 272

(2) The purpose of the statute is to prevent the subversion of wills which results from the scheming activities of persons in a position to utilize the capacity of attesting witnesses to take advantage of testators by overpersuading them to make wills in favor of the scheming persons

Conn—La Croix v Senecal, 99 A 2d 115, 140 Conn 311

**86.** NY—In re Hohn's Estate, 40 N Y S 2d 237, 180 Misc 384—In re Ehrlich's Estate, 287 N Y S 313, 158 Misc 540

In re Greene's Estate, 104 N Y S 2d 954—In re Baumann's Will, 97 N Y S 2d 478

Ohio—Gudger v McKim, 3 Ohio Supp 116

68 C J p 522 note 30

#### Purpose of statute

(1) To interpose all possible safeguards against fraud or undue influence in preparation and execution of testamentary instrument by preventing a witness to the instrument from benefiting thereunder if his testimony is necessary for its probate  
N Y—In re Hunt's Estate, 122 N Y S 2d 765

(2) To provide for disinterested

witnesses, who by their signatures will attest the validity of the execution and the testator's freedom from restraint and coercion, and to throw such safeguards around those transactions as will prevent fraud and imposition

NY—In re Ackerman's Estate, 90 N Y S 2d 794, 195 Misc 383

(3) To render competent a subscribing witness, who would not have been so otherwise, and to guard against fraud in preparation and execution of wills

NY—In re Walters' Estate, 33 NE 2d 72, 285 N Y 158, 133 A L R 1283, remittitur amended 35 NE 2d 19, 285 N Y 412

#### Statutory change held immaterial

Where prior law read that if devise or bequest was given to witness to will and will could not otherwise be proved, devise or bequest was void, law was not changed by subsequent enactment providing that beneficial devise or bequest made in will to subscribing witness was void, there being no distinction between a devise and a beneficial devise

Kan—In re Williams' Estate, 150 P 2d 336, 158 Kan 734

#### Entire will not invalidated

The testimony of legatee as to execution of will did not invalidate entire will, notwithstanding it may have rendered legacy void

NY—In re Howard's Will, 44 N Y S 2d 640, 266 App Div 1016

**87.** Mich—In re Baldwin's Estate, 18 N W 2d 827, 311 Mich 288—Bissell v Nerreter, 7 N W 2d 261, 304 Mich 175

NY—In re Bauman's Will, 97 N Y S 2d 478

Tex—Scandurro v Beto, Civ App, 234 S W 2d 695

68 C J p 522 note 31

**88** Conn—Fortune v. Buck, 23 Conn 1.

Vt—Clark v Clark's Estate, 54 Vt 489

**89** NY—In re Hunt's Estate, 122 N Y S 2d 765

68 C J p 522 note 33

#### Computation of share

Under statute permitting devisee, who was witness to will, but who would have been entitled to share of estate in case of intestacy, to recover such share not in excess of devise from other devisees named in will, amount of such devisee's share is to be computed by finding ratio between value of share saved to devisee and testator's net estate computed on cash basis

NY—In re Ehrlich's Estate, 287 N Y S 313, 158 Misc 540

#### Widow's share

Where it appeared that legacy to testator's widow, who was also named executrix, might be void because of her signature of will and attestation clause as a subscribing witness, she was restrained from collecting or receiving any funds or property of testator in excess of ten thousand dollars without further order of surrogate's court

NY—In re Weil's Will, 52 N Y S 2d 375

**90.** Kan—Sellards v Kirby, 108 P 73, 82 Kan 291, 28 L R A. N S, 270, 136 Am S R 110, 20 Ann Cas 214

**91.** ND—Keller v Reichert, 189 N W 690, 49 N D 74

**92.** Kan—Sellards v Kirby, 108 P 73, 82 Kan 291, 28 L P A. N S, 270, 136 Am S R 110, 20 Ann Cas 214

ND—Keller v Reichert, 189 N W 690, 49 N D 74

**93.** NC—Boone v Lewis, 9 S E 644, 103 NC 40, 14 Am S R 783

**94.** NJ—In re Rogers' Estate, 83 A 2d 268, 15 N J Super 189

*To parent of witness* A statute invalidating testamentary gifts to attesting or subscribing witnesses to the will has been held not to invalidate a gift to the parent of a subscribing witness, even though, because of the parent's death prior to that of the testator, the witness becomes entitled to the parent's share under a statute preventing the lapse of legacies<sup>95</sup>

*Incidental benefit to attesting or subscribing witness* The view has been expressed that a statute avoiding beneficial devises, legacies, and gifts to a subscribing witness does not avoid a devise to a person other than a subscribing witness, even though the subscribing witness might incidentally receive some benefit from the devise.<sup>96</sup> Thus, the validity of testamentary gifts to various entities or organizations has been recognized or upheld in the face of the alleged incompetency of an attesting or subscribing witness because of some allegedly incidental interest as a member of, or stockholder in, such entity or organization,<sup>97</sup> as, for example, a gift to a fraternal<sup>98</sup> or charitable<sup>99</sup> corporation where a member or members of such corporation were attesting or subscribing witnesses, or a gift to a town in trust for the poor where the subscribing witnesses were taxpayers of the town<sup>1</sup>

*Gift to attesting or subscribing witness as trustee* In general the statutes here considered do not invalidate a testamentary gift to an attesting or subscribing witness as trustee,<sup>2</sup> at least where the statute avoids "beneficial" gifts to such a witness,<sup>3</sup> and the mere fact that he would be entitled to the commissions allowed by statute will not make the gift a beneficial gift to the trustee so as to

invalidate it<sup>4</sup> Regardless of whether or not the gift is held void under the statute in so far as the trustee's interest is concerned, the interest of the beneficiaries under the trust who are not subscribing witnesses may stand<sup>5</sup>

*Gifts for services as executor* A gift by will to an executor as compensation for his services as such over and above his commissions is not invalidated because he was a subscribing witness under a statute voiding "beneficial" testamentary gifts to subscribing witnesses<sup>6</sup>

*Appointment of executor or trustee.* The view has been taken that a statutory provision avoiding a testamentary gift to an attesting or subscribing witness does not invalidate the appointment of an executor<sup>7</sup> who was an attesting or subscribing witness, merely because he would be entitled to the commissions allowed by statute<sup>8</sup> A statute rendering void any beneficial interest which may be given to a subscribing witness, unless the will be otherwise attested by a sufficient number of witnesses other than such subscribing witnesses, has, however, been construed to include the interest of an executor so as to prevent his acting as executor if his testimony is required,<sup>9</sup> and a like rule has been recognized or applied in respect of the appointment of a corporate executor<sup>10</sup> or trustee<sup>11</sup> where a stockholder of the corporation is a subscribing witness.

*What law governs* The question as to whether a witness to a will is qualified to take a share of a trust estate given him is governed by the law of the state of the situs of the trust property<sup>12</sup> The validity of a devise or bequest to an attesting or subscribing witness to the will will be determined

95 NY—In re Ackerman's Estate, 90 NYS 2d 794, 195 Misc 383

96 Mass—Sullivan v Sullivan, 106 Mass 474, 8 Am R 356  
68 CJ p 523 note 39.

97 Me—In re Marston, 8 A 87, 79 Me 25

Competency of member of charitable or religious association as witness in general see *infra* § 185

#### Officer of trust company

Fact that trust company had interest in one of beneficiaries named in deed and will creating life insurance trust and naming trust company trustee did not render trust company's officer, who was subscribing witness, an "interested witness" so as to preclude such beneficiary from taking, where trust company had no discretionary power over distribution of trust funds

Pa.—In re Umble's Estate, 186 A. 75, 323 Pa 170.

98 Kan—Kennett v Kidd, 125 P 36, 87 Kan 652 44 LRA, NS, 544, Ann Cas 1914A 592, affirmed 130 P 691, 89 Kan 4, 44 LRA, NS, 549, Ann Cas 1914C 654

99. Pa.—In re Crozer's Estate, Orph, 31 Del Co 285, affirmed 18 A 2d 323, 341 Pa 75  
68 CJ p 523 note 42

1. Me—In re Marston, 8 A 87, 79 Me 25

Competency of taxpayer as attesting witness to will making gift to municipality see *infra* § 185

2. NJ—In re Rogers' Estate, 83 A 2d 268, 15 NJ Super 189

Ohio—Gudger v McKim, 3 Ohio Supp 116  
68 CJ p 523 note 44

3. Mass—Lord v Miller, 178 NE 649, 277 Mass 308  
68 CJ p 523 note 45

4 NJ—In re Rogers' Estate, 83 A 2d 268, 15 NJ Super 189.

5. Ohio—Gudger v McKim, 3 Ohio Supp 116  
68 CJ p 523 note 46

6. NY—Pruyn v Brinkerhoff, 57 Barb 176, 7 Abb Pr, NS, 400  
68 CJ p 523 note 47

7. Wash—State v Superior Court for Spokane County, 255 P 960, 143 Wash 578

Competency of executor as attesting witness see *infra* § 185

8. NY—McDonough v Loughlin, 20 Barb 238  
68 CJ p 523 note 50

9. Ill—Jones v Grieser, 87 NE 293, 238 Ill 183, 15 Ann Cas 787  
68 CJ p 523 note 51

10. Ill—Olson v Larson, 150 NE 337, 320 Ill 50—Scott v O'Connor-Couch, 111 NE 272, 271 Ill 395, LRA 1916D 179

11. Ill—Olson v Larson, 150 NE 337, 320 Ill 50

12. NY—Empire Trust Co v Sample, 50 NYS 2d 5.



under the statutes as they existed when the will was executed <sup>13</sup>

### b. Holographic or Nuncupative Will

Statutes invalidating testamentary gifts to attesting and subscribing witnesses to wills have been held to apply to nuncupative wills, but not to holographic wills

In jurisdictions in which attestation of a holographic will is not required, as considered infra § 205, the view has been taken that statutes avoiding testamentary gifts to attesting witnesses do not apply to such wills <sup>14</sup> Hence, a gift to a legatee or devisee by a holographic will is not invalidated by his signing the document as a witness, <sup>15</sup> and devisees and legatees may be competent witnesses to prove such a will without losing their devises and legacies, <sup>16</sup> even though they actually attested the will <sup>17</sup> On the other hand, a statute voiding a legacy or devise to a subscribing witness has been held to apply to both oral and written wills, and hence to invalidate a testamentary gift by nuncupative will to one whose testimony is essential to prove the will <sup>18</sup>

### c. Will Proved or Provable Independently of Witness Benefited

As a general rule, statutes invalidating testamentary gifts to attesting and subscribing witnesses to wills do

not invalidate such a gift where there are a sufficient number of other disinterested and competent witnesses to validate and establish the will.

Under a statute providing that no subscribing witness to a will can derive any benefit therefrom unless there are a specified number of disinterested and competent witnesses to the will, a testamentary gift to a subscribing witness may be given effect if there are other witnesses of the required number who are disinterested and competent <sup>19</sup> Also, under statutes invalidating a testamentary gift to an attesting or subscribing witness if the will cannot otherwise be proved than by the testimony of such witness, it has been held that where the will can be proved independently of the testimony of such witness, the fact that he was a witness to the will does not affect the validity of the gift to him, <sup>20</sup> at least where the witnesses, sufficient as to number and competency, other than the beneficiary are not themselves beneficiaries, <sup>21</sup> and it has been held or recognized that this rule applies even where the witness who is a beneficiary actually testifies when the will is offered for probate <sup>22</sup> There is authority, however, for the view that a gift to an attesting witness is void, under a statute of the latter type, where he was needed to make up the number of attesting witnesses required by law even though his testimony was not needed to prove the will <sup>23</sup> Also,

13 N.Y.—In re Ackerina's Estate, 90 N.Y.S.2d 794, 195 Misc 383

#### Subsequent amendment

Where a subscribing witness is not disqualified to take a testamentary gift under the law in force at the time of the execution of the will, a subsequent amendment which is not retroactive will not affect his right to take thereunder

N.Y.—Empire Trust Co. v. Sample, 50 N.Y.S.2d 5

14 Cal.—In re Reynolds' Estate, 211 P.2d 608, 94 Cal.App.2d 851

Ky.—Barnes v Graves, 82 S.W.2d 297, 259 Ky 180

68 C.J. p 523 note 55

15 Cal.—In re Reynolds' Estate, 211 P.2d 608, 94 Cal.App.2d 851

16 N.C.—In re Westfeldt's Will, 125 S.E. 531, 188 N.C. 702

17 Ky.—Barnes v Graves, 82 S.W.2d 297, 259 Ky 180

68 C.J. p 524 note 57

18 Ga.—Denmark v Rushing, 67 S.E.2d 766, 208 Ga. 557, 28 A.L.R.2d 766

Competency of beneficiaries as witnesses to nuncupative will see infra § 216

19 Cal.—In re Montgomery's Estate, 201 P.2d 569, 89 Cal.App.2d 664

Iowa.—Hawkins v Hawkins, 6 N.W. 699, 54 Iowa 443.

Number of witnesses required on probate of will see infra § 411

20 Ky.—Barnes v Graves, 82 S.W.2d 297, 259 Ky 180

N.Y.—In re Walters' Estate, 33 N.E.2d 72, 285 N.Y. 158, 133 A.L.R. 1283, remittitur amended 35 N.E.2d 19, 285 N.Y. 412

68 C.J. p 524 note 61

#### Witness to grandparent's will

Beneficiary, if entitled to receive fund only under wills of father and grandfather, would not be disqualified to receive fund because she was witness to will of grandfather, where only interest devised to her by will of grandfather was remainder interest on death of father, which interest was subject to be defeated by exercise of power of appointment given father

Ky.—Barnes v Graves, 82 S.W.2d 297, 259 Ky 180

21 Tex.—Nixon v. Armstrong, 38 Tex 296

68 C.J. p 524 note 62

22 Ky.—Barnes v Graves, 82 S.W.2d 297, 259 Ky 180

68 C.J. p 524 note 63

23 Va.—Bruce v Schuler, 63 S.E. 973, 108 Va. 670, 35 L.R.A.N.S. 686, 15 Ann.Cas. 887

68 C.J. p 524 note 64

#### In New York

(1) Prior to the amendment in

1942 of § 27 of the New York State Decedent Estate Law, so as to provide that no subscribing witness to a will shall be entitled to receive any beneficial devise, legacy, interest or appointment of any real or personal estate thereunder unless there are two other subscribing witnesses to the will who are not beneficiaries thereunder, it was held that a testamentary gift to a witness to the will was not invalid, even though the will had no more than the required number of witnesses, where he did not testify on the probate proceedings and the will was admitted solely on the testimony of the other witnesses to the will

N.Y.—In re Walters' Estate, 33 N.E.2d 72, 285 N.Y. 158, 133 A.L.R. 1283, remittitur amended 35 N.E.2d 19, 285 N.Y. 412

Empire Trust Co. v Sample, 50 N.Y.S.2d 5

(2) Such a gift was held valid where the will was proved without the testimony of the witness, even though the will had no more than the required number of witnesses and the witness intentionally did not testify on its probate in order to preserve his right to the gift

N.Y.—In re Walters' Estate, supra

(3) However, where the three subscribing witnesses to a will were all legatees and two of such witnesses

it has been held, under a statute which, without qualification, renders null and void a gift to an attesting witness, that such a witness cannot take under the will even though the number of witnesses is in excess of that required by statute and the witness who is benefited need not testify in order to prove the will.<sup>24</sup>

#### d. Codicils

Statutory provisions which expressly invalidate a testamentary gift to an attesting or subscribing witness to a codicil, or which, without mentioning codicils, invalidate such a gift to an attesting or subscribing witness to a will, invalidate a gift in a codicil to a witness thereto, but the gift is invalidated only where the witness has attested the instrument under which he takes

Statutory provisions expressly invalidating a beneficial devise, legacy, or the like to an attesting or subscribing witness to a codicil invalidate such a gift in a codicil to a witness thereto.<sup>25</sup> Also, statutes invalidating a testamentary gift to an attesting or subscribing witness to a will, although not expressly mentioning codicils, have been held applicable thereto,<sup>26</sup> and, under such a statute, a legacy or devise in a codicil to an attesting or subscribing witness to the codicil may be held void for that reason.<sup>27</sup> Likewise, under a statutory provision that if any person shall be a subscribing witness in the execution of any will in which any interest is passed to him and such will cannot be proved without his testimony or without proof of his signature as witness such will shall be void only

as to him and persons claiming under him, a testamentary gift to one of the two subscribing witnesses to a codicil, contained in such codicil, is void,<sup>28</sup> but the provisions for other beneficiaries may be given effect if otherwise valid.<sup>29</sup>

Under these statutes a testamentary gift is invalidated only where the witness has attested the instrument under which he takes.<sup>30</sup> They do not render void a testamentary gift contained in a will because the beneficiary who was not a witness to the will was a subscribing witness to a codicil which made no provision for him,<sup>31</sup> especially where the will alone is proved,<sup>32</sup> or, it has been held, because a beneficiary who was not a witness to the will was a subscribing witness to a codicil which contained a legacy for him, the legacy in the codicil only being declared void in such case.<sup>33</sup> Furthermore, such statutes do not render void a legacy in a codicil to one who is not an attesting witness to the codicil, but who is an attesting witness to, but not a beneficiary of, the will, and whose testimony is necessary to prove the will.<sup>34</sup>

#### § 103. Spouse of Attesting Witness

Under various statutes a testamentary gift to the husband or wife of an attesting or subscribing witness to the will is void

Under statutes expressly so providing a testamentary gift to the husband or wife of an attesting witness is void, except to the extent that the husband or wife would have taken had the testator died

were unavailable at time of probate and third witness identified testator's signature and handwriting in will and testified positively that testator was capable of making a will and third witness identified signatures of the other witnesses, will was not "proved without the testimony of such witness," so that legacies to the third witness were void, notwithstanding such witness gave testimony against the due execution of will

NY—In re Hohn's Estate, 40 NYS 2d 237, 180 Misc 384

24. NY—Patanska v Kuzma, 141 A 88, 102 NJEq 408, affirmed 145 A 921, 104 NJEq 203

25. Conn—La Croix v Senecal, 99 A 2d 115, 140 Conn 311

RI—Roberts v Wright, 136 A. 486, 48 RI 139

Republication by codicil in general see *infra* § 303

26. Mass—Lougée v Wilkie, 95 NE 221, 209 Mass 184

Mich—In re Baldwin's Estate, 18 N W 2d 827, 311 Mich 288

NY—In re Hunt's Estate, 122 NYS 2d 765.

27. NY—In re Hunt's Estate, *supra* 68 CJ p 525 note 76

#### Legacy in payment for services

A testator's desire that his friend and business associate, to whom he bequeathed money in payment for services rendered by codicil to which such legatee was one of only two subscribing witnesses, did not overcome statutory provision declaring legacy in will to subscribing witness void, unless there be two other competent subscribing witnesses

Mich—In re Baldwin's Estate, 18 N W 2d 827, 311 Mich 288

#### Failure to object

Failure of residuary legatees under will to object to executor's payment to himself of sum bequeathed to him by codicil, to which he was one of only two subscribing witnesses, or to demand return of money to testator's estate before probate court's determination of invalidity of such legacy did not validate legacy

Mich—In re Baldwin's Estate, *supra*

28. Ind—Wiley v Gordan, 104 NE 500, 181 Ind. 252

29. Ind—Wiley v Gordan, *supra*.

30. NY—In re Phillip's Will, 6 NYS 2d 108, 168 Misc 549—In re Smith's Estate, 300 NYS 1057, 165 Misc 36

In re Hunt's Estate, 122 NYS 2d 765

31. Ill—Tolman v Reeve, 65 NE 2d 815, 393 Ill 272

NY—In re Johnson's Will, 75 NYS 489, 37 Misc 334, 2 Mills Surr 513

32. NY—In re Johnson's Will, *supra*

33. NY—In re Hunt's Estate, 122 NYS 2d 765

#### Res judicata

Where no appeal was taken from decree adjudging that legacy to residuary beneficiary under will was not affected by her acting as subscribing witness to codicil which revoked specific legacy to another, the decree was binding and conclusive as to such determination.

NY—In re Hunt's Estate, *supra*

34. NY—In re Smith's Estate, 300 NYS 919, 253 AppDiv 731

In re Phillip's Will, 6 NYS 2d 108, 168 Misc 549—In re Smith's Estate, 300 NYS 1057, 165 Misc 36.

intestate,<sup>35</sup> at least in the absence of a sufficient number of other competent witnesses to the will<sup>36</sup> A statute of this latter type does not invalidate a gift to the husband or wife of an attesting witness where the will may duly be proved without the testimony of such witness<sup>37</sup>

Where the statute contains no provision as to the validity of a gift to the husband or wife of a witness to the will, the courts have not been in complete agreement on the question as to whether a statute avoiding a testamentary gift to an attesting or subscribing witness is to have the effect of rendering void a gift to the husband or wife of such witness In some early cases the view has been taken that certain statutes of this type avoid gifts of this character,<sup>38</sup> as, for example, a gift to the wife of a witness to the will<sup>39</sup> and a gift to the husband of a witness to the will,<sup>40</sup> on the theory that husband and wife are in legal intendment one person, and that a gift to one is a gift to both<sup>41</sup> In a number of jurisdictions, however, it is held that a gift to the husband or wife of an attesting witness is not avoided by a statute avoiding a gift to an attesting witness,<sup>42</sup> as, for example, where the husband is a witness and his wife is a beneficiary,<sup>43</sup> or where the wife is a witness and the husband is a beneficiary<sup>44</sup> A denial that this type of statute renders void a

gift to the husband or wife of a witness to the will has left such witness an incompetent witness to the will in some jurisdictions under the common-law, or statutory, rule which renders incompetent as a witness to a will the husband or wife of a person who is a beneficiary under the will, as discussed infra § 185, and, therefore, in some cases has resulted in rendering the whole will void for lack of due attestation where the subscribing witness is the husband<sup>45</sup> or wife<sup>46</sup> of a beneficiary under the will Conversely, a construction that the statute avoids a gift to the husband or wife of a witness to the will may render the will operative in other respects where the subscribing witness is the husband<sup>47</sup> or wife<sup>48</sup> of a beneficiary

# § 104. Slayer of Testator or of Beneficiary, and Persons Guilty of Other Misconduct

A beneficiary under a will who murders the testator in order to make the will operative cannot take under the will, but under some statutes such beneficiary is not precluded from succeeding to the testator's property unless he has been convicted of murder

Under the civil law one cannot take property by inheritance or will from one whom he has murdered<sup>49</sup> The view has been taken that, even in the absence of statutory provisions governing the mat-

35 SC—Davis v Davis, 37 SE 2d 530, 208 SC 182

68 CJ p 525 note 89

Competency of husband or wife of beneficiary as witness see infra § 185

Republication by codicil in general see infra § 303

**Interest of beneficiary** cannot exceed in value the interest which he would be entitled to on failure to establish the will

SC—Davis v Davis, supra.

36 Conn—La Croix v Senecal, 99 A 2d 115, 140 Conn 311

Wis—In re Rosenthal's Estate, 20 NW 2d 643, 247 Wis 555

68 CJ p 525 note 90

## **Purpose**

The statute was designed to prevent the subversion of wills which results from the scheming activities of persons in a position to utilize the capacity of attesting witnesses to take advantage of testators by overpersuading them to make wills in favor of the scheming persons Conn—La Croix v Senecal, 99 A 2d 115, 140 Conn 311

## **In Massachusetts**

(1) Under a statute expressly so providing a testamentary gift to the husband or wife of a subscribing witness to a will is void, unless there are three other subscribing witnesses

to the will who are not similarly benefited thereunder

Mass—Powers v Godwise, 52 NE 525, 172 Mass 425

(2) Prior to the enactment of the statute expressly invalidating a beneficial devise or legacy to the husband or wife of a subscribing witness, it was held that a beneficial legacy or devise to the husband or wife of a subscribing witness was not invalidated by a statute which only declared void legacies or devises to subscribing witnesses

Mass—Sullivan v Sullivan, 106 Mass 474, 8 Am R 356

37 W Va.—Davis v Davis, 27 SE 323, 43 W Va 300

68 CJ p 525 note 92

38 Me—Winslow v Kimball, 25 Me 493

68 CJ p 526 note 94

39 SC—Moore v McWilliams, 24 SCEq 10

68 CJ p 526 note 95

40. Me—Winslow v Kimball, 25 Me 493

NY—Jackson v Woods, 1 Johns Cas 163

41. NY—Jackson v Durland, 2 Johns Cas 314—Jackson v Woods, 1 Johns Cas 163

42 Ga.—Bryant v Bryant, 51 SE 2d 797, 204 Ga 747

Kan—In re Williams' Estate, 150 P 2d 336, 158 Kan 734

68 CJ p 526 notes 1, 2

43 Kan—In re Williams' Estate, supra

68 CJ p 526 note 3

44. Ga.—Bryant v Bryant, 51 SE 2d 797, 204 Ga 747

68 CJ p 526 note 4

45 Ill.—Fisher v Spence, 37 NE 314, 150 Ill 253, 41 Am SR 360

68 CJ p 526 note 6

46. Ill.—Fisher v Spence, supra

Mass—Sullivan v Sullivan, 106 Mass 474, 8 Am R 356

47 NY—Jackson v Durland, 2 Johns Cas 314

SC—Moore v McWilliams, 24 SC Eq 10

48 Me—Winslow v Kimball, 25 Me 493

NY—Jackson v Woods, 1 Johns Cas 163

49. NY—Riggs v Palmer, 22 NE 188, 115 NY 506, 12 Am SR 819, 5 LRA 340 and note, 23 Abb N Cas 452

Right of

Beneficiary who feloniously causes death of insured see Insurance § 1171

Heir or distributee who murders decedent to hasten inheritance see Descent and Distribution §§

47, 59

ter, a beneficiary under a will who murders the testator in order to make the will operative cannot take under the will under the principle that no one can take advantage of his own wrong,<sup>50</sup> and it seems that it is not a necessary condition to the application of the disqualification rule that there should be conviction.<sup>51</sup> A limitation on this view has apparently been made in laying down the rule that the killing of the testator by the devisee for the purpose of obtaining the benefits given by the will does not render the will void but merely authorizes a court of equity to deprive the devisee of the fruits of his iniquity.<sup>52</sup> According to some authorities, any person found guilty of a murder cannot inherit, by will, from the person killed, but should be considered as though he had preceded in death the person whom he killed.<sup>53</sup>

On the other hand, it has been held that in the absence of a statute, one who has feloniously killed his ancestor or testator is not precluded from receiving inheritance or benefits under the will,<sup>54</sup> and that a statute preventing a murderer from participating in the estate of the person killed does not preclude a felonious killer of his benefactor from succeeding to his property, by will, unless he has been convicted of either first or second degree murder.<sup>55</sup> Moreover, a beneficiary committing a crime causing the testator's death may take under the will, if the testator lives a reasonable time thereafter and during such time retains his competency to make a new will or to revoke or modify one already made, but fails to do so.<sup>56</sup> Where a will devises a life estate to one person with a remainder to another, the fact that the remainderman kills the

life tenant has been held not to prevent a fee-simple estate from vesting in the remainderman.<sup>57</sup>

A statutory provision that no person who feloniously takes the life of another shall take by devise or legacy from him any portion of his estate is a public statute governing a particular subject,<sup>58</sup> and the courts may not by judicial interpretation enlarge the legislative intent.<sup>59</sup> Such statute is in effect a penal statute and must be strictly construed.<sup>60</sup> The provision of the civil code, relating to forfeiture of heirs' share in property embezzled or concealed, does not apply to a legatee who is the executrix of the estate.<sup>61</sup> Assuming that, under the civil code, defamation of the testator's memory by a legatee may be such grievous injury as warrants revocation of a bequest at the suit of other legatees or heirs, an attack on the will for unsoundness of mind of the testator is not such grievous injury to the testator's memory as is required.<sup>62</sup>

## § 105 Unincorporated Associations

In a number of jurisdictions an unincorporated society or association, in the absence of statutory permission, does not have the capacity to receive a direct devise or bequest, although a devise or bequest may be made to trustees for the benefit of such a society or association.

According to some cases a devise of land cannot be made to an unincorporated society or association by name,<sup>63</sup> unless there is a statute authorizing it,<sup>64</sup> although such devise may be made to trustees for the benefit of such a society or association.<sup>65</sup> An unincorporated association capable of identification has been held to be capable to take an unconditional bequest of personalty not charged with a permanent

50 Wis—In re Wilkins' Estate, 211 NW 652, 192 Wis 111, 51 A L R 1106

68 C J p 526 notes 12-14

**Purpose of statute**, providing that no person shall acquire by will any interest in estate of another whom he has killed in order to obtain such interest, is to make effective, to limited extent, majority rule that would prevent son, who has killed his father in order to accelerate his inheritance, from acquiring by will any interest in his father's estate. Va.—Blanks v Jiggetts, 64 SE 2d 809, 192 Va. 337, 24 A L R 2d 1114

51 NY—Ellerson v Westcott, 34 NYS 813, 88 Hun 389, 2 NY Ann Cas 118, reversed on other grounds 42 NE 540, 148 NY 149, 2 NY Ann Cas 420, reargument denied 43 NE 986, 148 NY 755  
68 C J p 526 note 15

52. NY—Ellerson v Westcott, 42 NE 540, 148 NY 149, 2 NY Ann

Cas 420, reargument denied 43 N E 986, 148 NY 755

53 Ky—Bates v Wilson, 232 SW 2d 837, 313 Ky 572

Pa.—In re Taylor's Estate, Orph, 34 Del Co 557

54 Conn—Bird v Plunkett, 95 A 2d 71, 139 Conn 491, 36 A L R 2d 951

55 Conn—Bird v Plunkett, supra

56 Wis—In re Wilkins' Estate, 211 NW 652, 192 Wis 111, 51 A L R 1106

57 Va.—Blanks v Jiggetts, 64 SE 2d 809, 192 Va. 337, 24 A L R 2d 1114  
68 C J p 527 note 19 [a]

58. Iowa—In re Emerson's Estate, 183 NW 327, 191 Iowa 900

59 Iowa—In re Emerson's Estate, supra  
68 C J p 527 note 19

60 Iowa—In re Emerson's Estate, supra.

Va.—Blanks v Jiggetts, 64 SE 2d 809, 192 Va. 337, 24 A L R 2d 1114

61 La.—Succession of Drysdale, 57 So 789, 130 La. 167

62 La.—Succession of McDonald, 97 So 262, 154 La. 1

63 NY—In re Storm's Will, 130 NYS 2d 521, 205 Misc 1109

In re Howells' Will, 109 NYS 2d 270—In re Gault's Estate, 48 NYS 2d 928

68 C J p 527 note 23

Acquisition of property by unincorporated religious society see Religious Societies § 50

Capacity of unincorporated association to take testamentary gift as trustee for charitable purpose see Charities §§ 34, 35

Trustee for charitable association see Charities § 36

64. Tenn.—Reeves v. Reeves, 5 Lea 644

65 Tenn.—Cobb v Denton, 6 Baat 235

68 C J p 527 note 30.

trust or use,<sup>66</sup> and statutes in some jurisdictions have permitted unincorporated societies to take bequests.<sup>67</sup> In some jurisdictions, however, in the absence of statutory authorization, an unincorporated association does not have the legal capacity to receive a direct bequest.<sup>68</sup> Even in the jurisdictions which recognize the right of an unincorporated society to take a bequest, the view has been taken that such right does not extend to bequests made on permanent uses.<sup>69</sup> Bequests to trustees for use for the purposes of an unincorporated association have been upheld.<sup>70</sup> While, according to some cases, the question as to whether an unincorporated association may take a bequest is governed by the law of its domicile,<sup>71</sup> there apparently is authority for the view that usually the question is governed by the law of the testator's domicile.<sup>72</sup>

*Subsequent incorporation.* Although there is authority apparently to the contrary,<sup>73</sup> the view has been taken that, where at the time of the death of the testator an association is not incorporated and, therefore, does not have the legal capacity to take a present vested interest in a testamentary gift, subsequent incorporation does not give it capacity to receive such gift.<sup>74</sup> While, however, before the time for vesting of the devise or legacy, after the death of the testator, the association is incorporated,

it may take under the will if otherwise authorized.<sup>75</sup>

## § 106. Corporations

- a In general
- b Who may question validity of gift
- c Foreign corporations

### a. In General

In the absence of statutory restrictions, a testator may give his property to a corporation capable of taking

In the absence of constitutional or statutory restrictions, a testator may by will give his property to a corporation capable of taking,<sup>76</sup> and the authority of a corporation to acquire property by will<sup>77</sup> as, for example, by bequest<sup>78</sup> or by devise,<sup>79</sup> has been recognized. There is authority for the view that express authorization to take by devise is not required in the absence of a statute requiring such authorization,<sup>80</sup> and that a corporation may take by devise if it has general power to acquire,<sup>81</sup> or to hold, purchase, and convey,<sup>82</sup> real property. The view has been expressed that, in general, where the statute authorizes "persons" to take under a will, the word "persons" includes corporations in the absence of any provision limiting its meaning.<sup>83</sup>

Some statutes have placed restrictions on the power of corporations to acquire property by will,<sup>84</sup> as,

- 66 Cal.—In re Winchester's Estate, 65 P 475, 133 Cal 271, 54 L R A 281
- Pa.—In re Lapis' Estate, 88 Pa Dist & Co 303, 13 Law LJ 14
- 68 C J p 527 note 31
- 67 NY—Congregational Unitarian Soc v Hale, 51 NYS 704, 29 App Div 336
- 68 C J p 527 note 32
- 68 NY—In re Howells' Estate, 260 NYS 598, 608, 145 Misc 557, modified on other grounds 261 NYS 859 116 Misc 169—In re Cameron's Estate, 184 NYS 540, 113 Misc 416
- In re Miller's Estate, 139 NY S 2d 5—In re Howells' Will, 109 NYS 2d 270—In re Gault's Estate, 48 NYS 2d 928
- 68 C J p 527 note 33
- 69 Mich.—In re Ticknor's Estate, 13 Mich 44
- 68 C J p 528 note 34
- 70 Mich.—Lounsbury v Trustees of Square Lake Burial Ass'n, 129 N W 36, 137 NW 513, 170 Mich 645
- 71 NY—Congregational Unitarian Soc v Hale, 51 NYS 704, 29 App Div 336
- In re Miller's Estate, 139 NYS 2d 5
- 72 NH—Parker v. Cowell, 16 N H 149
- 68 C J p 528 note 37
- 73 Pa.—Zimmerman v Anders, 6 Watts & S 218, 40 Am D 552
- 68 C J p 528 note 38
- 74 US—Philadelphia Baptist Assoc v Hart, Va, 4 Wheat 1, 4 L Ed 499
- 68 C J p 528 note 39
- 75 NY—Lougheed v Dykeman's Baptist Church, 29 NE 249, 129 NY 211, 14 L R A 410
- 68 C J p 528 note 40
- 76 NY—Hollis v Drew Theological Seminary, 95 NY 166
- Capacity of corporation to acquire property in general see Corporations §§ 1088-1089
- Effect of equitable conversion by will on capacity of corporation see Corporations §§ 1088-1089
- Agency to effectuate intention
- A corporation may be used as an agency to effectuate testamentary intention
- Minn.—In re Koffend's Will, 15 N W 2d 590, 218 Minn 206
- 77 Pa.—In re Stirk's Estate, 20 Pa Dist 314
- 78 NY—In re Keene's Estate, 273 NYS 532, 152 Misc 424
- 68 C J p 528 note 44
- 79 US—Hubbard v Worcester Art Museum, CC Mass, 179 F 406, error dismissed 196 F 871, 116 CCA 433, and 31 S Ct 718, 220 US 605, 55 L Ed 606
- 68 C J p 528 note 45
- "Take and hold"
- The words "take and hold," as used in statute authorizing a corporation to "take and hold" property, do not mean taking by devise when the corporation is unauthorized to take in that manner, but do include acquiring by devise when such a method of acquiring is authorized
- NY—In re Clark's Estate, 7 NYS 2d 299
- 80 Conn.—White v. Howard, 38 Conn 312
- Ohio—American Bible Soc v. Marshall, 15 Ohio St 537
- 81 Ill.—Santa Clara Female Academy v Sullivan, 6 NE 183, 116 Ill 375, 56 Am R 776
- 82 NY—In re McGraw, 19 NE 233, 111 NY 68, 2 L R A 387, affirmed Cornell University v Fiske, 10 S Ct 775, 136 US 152, 34 L Ed 427.
- 68 C J p 529 note 48
83. Mont.—In re Beck's Estate, 121 P 784, 1057, 44 Mont 561
84. SD.—In re Hanson's Estate, 159 NW 399, 38 SD 1
- 68 C J p 529 note 50—14A C J p 512 note 7 [c].

for example, statutes prohibiting their taking real property by devise<sup>85</sup> unless expressly authorized by their charter or by statute<sup>86</sup> Where a devise to a corporation is prohibited, it has been held that such a devise is not void, but voidable only<sup>87</sup> Where there is a constitutional provision invalidating the "gift," "sale," or "devise" of real or personal property for certain purposes without the prior or subsequent authorization of the legislature, legislative authorization to a corporation to take and hold subscriptions or contributions in money or otherwise for such purposes does not authorize such corporation to take under a bequest<sup>88</sup>

Where the estate or interest which a corporation is to take is created at the time of the death of the testator, in general, capacity of the corporation to take by devise must exist at that time,<sup>89</sup> but the validity of a testamentary gift to a corporation not authorized to take has been recognized where the terms of the will show that the testator contemplated that authority to take should subsequently be acquired by statute<sup>90</sup> The view has been taken that there is no objection to a corporation's taking property on a trust not strictly within the expressed purposes of its institution but collateral to them<sup>91</sup> Where a corporation is wholly incapacitated to take by devise and the real property involved is not otherwise disposed of by the will, it descends to the heirs at law of the testator<sup>92</sup>

*Corporation to be created* While there is authority for the view that a devise of a remainder of real property to a corporation to be created after the death of the testator is void because there is no devisee competent to take at the time and the possi-

bility that there might be a corporation competent to take during the life estate is too remote,<sup>93</sup> the validity of a testamentary gift to a corporation to be created or organized has been recognized where the gift is otherwise valid,<sup>94</sup> as, for example, in the case of a testamentary gift for charitable purposes or uses, as discussed in Charities § 32 Subject to rules in respect of illegal postponement of the vesting of estates or interests, discussed in Perpetuities § 66 et seq, the question of validity in such case depends largely on whether the testator contemplated the passing of title or interest immediately on his death to an existing entity or whether he actually contemplated the subsequent creation of a corporation which would take the property bequeathed or devised,<sup>95</sup> in such case, where it was the testator's intention that the estate or interest should vest in the corporation at a date subsequent to his death, within the period allowed for the future vesting of estates, and the corporation in question is then duly organized and capable of taking, the gift will be upheld if otherwise valid<sup>96</sup>

*Limitation on amount* While statutes sometimes impose limitations on the amount of property which a corporation may take or hold under a will, in some jurisdictions a testamentary gift to a corporation, which increases its holdings beyond the permitted amount, is not void as to the excess,<sup>97</sup> and such excess does not pass to the heirs or next of kin of the testator<sup>98</sup> In other jurisdictions, however, statutory restrictions as to the amount of property which may be taken or held render gifts void as to the excess,<sup>99</sup> and such excess passes to the heir<sup>1</sup> or next of kin<sup>2</sup> of the testator, or to the person who may be entitled to take such excess under some

85. NY—*McCartee v Orphan Asylum Soc*, 9 Cow 437, 18 AmD 516  
—*Van Kleeck v Reformed Dutch Protestant Church*, 20 Wend 457

86. NY—*Sherwood v American Bible Soc*, 3 Abb Dec 227, 1 Keyes 561

68 CJ p 529 note 52

87. Tenn—*Bank of Commerce & Trust Co v Banks*, 29 SW 2d 658, 69 ALR 1353

88. Md—*Brown v Tompkins*, 49 Md 423

89. NY—*Leslie v Marshall*, 31 Barb 560.

90. Va—*Literary Fund v Dawson*, 10 Leigh 147, 37 Va. 147  
68 CJ p 529 note 55

91. Vt—*President and Fellows of Middlebury College v Central Power Corporation*, 143 A 384, 101 Vt 325

92. Mo—*Proctor v. Board of Trus-*

tees of M E Church, 123 SW 862, 225 Mo 51, 69

NY—*Van Kleeck v Reformed Dutch Protestant Church*, 20 Wend 457

93. Pa—*Zeisweiss v James*, 63 Pa 465, 3 Am R 558

In re Boulevard, 42 Pa Super 372, affirmed 79 A 716, 230 Pa 491  
68 CJ p 529 note 59

94. La—*H C Drew Manual Training School v Calcasieu Nat Bank in Lake Charles*, 189 So 137, 192 La 790

68 CJ p 529 note 60

95. US—*Inglis v Sailor's Snug Harbour, NY*, 3 Pet 99, 7 LEd 617

NY—*Shipman v Rollins*, 98 NY 311, 15 Abb N Cas 288

96. US—*Inglis v Sailor's Snug Harbour, NY*, 3 Pet 99, 7 LEd 617

68 CJ p 530 note 64

97. Mass—*Hubbard v Worcester Art Museum*, 80 NE 490, 194 Mass

280, 9 LRA NS, 689, 10 Ann Cas 1025

68 CJ p 530 note 66

98. US—*Brigham v Peter Bent Brigham Hospital*, CC Mass, 126 F 796, affirmed 134 F 513, 67 CC A 393

99. NY—In re McGraw, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 SCt 775, 136 US 152, 34 LEd 427

68 CJ p 530 note 69

1. NY—In re McGraw, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 SCt 775, 136 US 152, 34 LEd 427

RI—*Wood v Hammond*, 17 A 324, 18 A 198, 16 RI 98

2. NY.—In re McGraw, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 SCt 775, 136 US 152, 34 LEd 127  
68 CJ. p 530 note 71

provision of the will<sup>3</sup> Usually the gift, if otherwise valid, is valid up to the limit of corporate capacity in this respect<sup>4</sup>

### b. Who May Question Validity of Gift

In some jurisdictions, only the state may question the validity of a gift to a corporation which is in excess of its power to take or hold, but in other jurisdictions heirs at law of the testator are permitted to do so.

According to one view, the question as to the power of a corporation to acquire property by will where its charter imposes restrictions as to the amount of property which such corporation may hold and such acquisition by will would increase its holdings beyond the limits so imposed cannot be raised by private persons<sup>5</sup> but only by the state<sup>6</sup> in a direct proceeding.<sup>7</sup> Thus, the heirs at law<sup>8</sup> or the next of kin<sup>9</sup> of the testator may not successfully attack a bequest or devise on the ground here considered. These rules have been recognized or applied both where the restriction imposed is as to the amount of income which may be received from the corporate holdings<sup>10</sup> and also where the restriction imposed is as to the value of the property held,<sup>11</sup> also where the acquisition is of real property by devise<sup>12</sup> or personal property by bequest.<sup>13</sup> If the heir of the testator who devised land to a corporation is prevented from questioning the power of the corporation to hold, persons claiming through such heir are also precluded from raising the question<sup>14</sup>

In other jurisdictions, however, the view has been taken that heirs at law<sup>15</sup> or next of kin<sup>16</sup> of the testator, or any person who would be entitled to take the property under the will in the event of the incapacity of the corporation,<sup>17</sup> or in general a person whose interests will be affected,<sup>18</sup> may contest the claim of a corporation to take property in excess of the amount which it is permitted by law to hold, on the theory, according to some cases, that the particular statutory restriction is on the power to take as well as to hold,<sup>19</sup> the rule applies where the restriction constitutes a limitation either in respect of the value of the property taken or held<sup>20</sup> or in respect of the income from such property.<sup>21</sup> Even where a person other than the state may raise the question, such person may not raise the question collaterally,<sup>22</sup> and such person must be in a position to claim an interest in the property, if it is adjudged that the corporation may not<sup>23</sup>

*Purpose of acquisition.* Where a corporation is incapacitated to take by devise, for the particular purpose of the devise, others than the state may raise the question,<sup>24</sup> as, for example, heirs at law of the testator.<sup>25</sup> The view has been taken, however, that, where a corporation is authorized to acquire and hold real estate for some purposes, only the state may raise the question as to whether real estate was acquired by devise for an authorized purpose.<sup>26</sup>

- 3 N.Y.—In re McGraw, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 S Ct 775, 136 US 152, 34 LEd 427.
- RI—Wood v Hammond, 17 A 324, 18 A 198, 16 RI 98.
- 4 Ky—Compton v Moore, 181 SW 360, 167 Ky 657.
- 68 CJ p 530 note 74.
- 5 Me—Farrington v Putnam, 37 A 652, 90 Me 405, 38 LRA 339.
- 68 CJ p 530 note 76.
- 6 Tenn—Bank of Commerce & Trust Co v Banks, 29 SW 2d 658, 69 ALR 1353.
- 68 CJ p 530 note 77.
- 7 U.S.—Jones v Habersham, Ga., 2 S Ct 336, 107 US 174, 27 LEd 401.
- Me—Farrington v Putnam, 37 A 652, 90 Me 405, 38 LRA 339.
- 8 Me—Farrington v Putnam, supra.
- 68 CJ p 530 note 79.
- 9 U.S.—Jones v Habersham, Ga., 2 S Ct 336, 107 US 174, 27 LEd 401.
- Me—Farrington v Putnam, 37 A 652, 90 Me 405, 38 LRA 339.
- 10 U.S.—Jones v Habersham, Ga., 2 S Ct 174, 107 US 174, 27 LEd 401.

- Md—Home for Incurables of Baltimore City v Bruff, 153 A 403, 160 Md 156, 78 ALR 8.
- 11 Mass—Hubbard v Worcester Art Museum, 80 NE 490, 194 Mass 280, 9 LRA NS, 689, 10 Ann Cas 1025.
- 68 CJ p 530 note 82.
- 12 Me—Farrington v Putnam, 37 A 652, 90 Me 405, 38 LRA 339.
- 68 CJ p 530 note 83.
- 13 U.S.—Jones v Habersham, Ga., 2 S Ct 174, 107 US 174, 27 LEd 401.
- 68 CJ p 530 note 84.
- 14 Utah—Mansfield v Neff, 134 P 1160, 43 Utah 258.
- 15 N.Y.—In re McGraw's Estate, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 S Ct 775, 136 US 152, 34 LEd 427.
- 68 CJ p 531 note 86.
- 16 N.Y.—In re McGraw's Estate, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 S Ct 775, 136 US 152, 34 LEd 427.
- 68 CJ p 531 note 87.
- 17 RI—Wood v Hammond, 17 A 324, 18 A 198, 16 RI 98.

- 18 N.Y.—Chamberlain v Chamberlain, 43 NY 424.
- 19 N.Y.—In re McGraw's Estate, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 S Ct 775, 136 US 152, 34 LEd 427—Chamberlain v Chamberlain, 43 NY 424.
- 20 N.Y.—In re McGraw's Estate, 19 NE 233, 111 NY 66, 2 LRA 387, affirmed Cornell University v Fiske, 10 S Ct 775, 136 US 152, 34 LEd 427.
- 21 N.Y.—Chamberlain v Chamberlain, 43 NY 424.
- 22 N.Y.—Moskowitz v Hornberger, 46 NYS 462, 20 Misc 558.
- 23 N.Y.—Moskowitz v Hornberger, supra.
- 68 CJ p 531 note 94.
- 24 Mo.—Proctor v Board of Trustees of M E Church, 123 SW 862, 225 Mo 51.
- 68 CJ p 531 note 95.
- 25 Mo.—Proctor v Board of Trustees of M E Church, supra.
- 68 CJ p 531 note 96.
- 26 Ill.—Hamsher v Hamsher, 23 NE 1123, 132 Ill 273, 8 LRA 556.
- Ind.—Hayward v Davidson, 41 Ind 212.

### c. Foreign Corporations

- (1) In general
- (2) Limitation on amount
- (3) Who may question validity of testamentary gift

#### (1) In General

Generally, foreign corporations can take a bequest of property under a will, and, if a foreign corporation has authority under its charter or the statutes of the state of its creation to take and hold land in another state, in the absence of a statute or public policy to the contrary, it may take and hold land by a devise

A foreign corporation may take and hold personal property under a bequest of a testator domiciled in a state other than that of its creation where it has power to do so under its charter or governing statutes of the state of creation and there is no prohibition of, or limitation on, the exercise of such power by the express statutory enactments or other manifestations of a contrary public policy of the state of the testator's domicile<sup>27</sup> A testamentary gift to a corporation to be formed in another state may be given effect if otherwise valid<sup>28</sup>

In determining generally the authority of a foreign corporation to take by devise, the view has been taken that, in the absence of a statute requiring it, express authority to take by devise is not necessary,<sup>29</sup> and that a corporation may take by devise if it has general power under its charter to acquire<sup>30</sup> or to hold and purchase<sup>31</sup> real property Whether a corporation has power under its charter to take land by devise is to be determined by the courts of the state in which the land is situated<sup>32</sup> A foreign corporation which has authority under its charter or governing statutes of the state<sup>33</sup> or

other jurisdiction<sup>34</sup> of its creation to take and hold land situated in a state other than that of its creation, in the absence of an express statutory prohibition or limitation, or other manifestations of a contrary public policy of the domestic state, may take and hold by devise land so situated Some states have enacted statutes authorizing a foreign corporation to take by devise land situated within their limits<sup>35</sup> A foreign corporation cannot, however, take by devise where it has no power under its charter or governing statute to do so,<sup>36</sup> nor can it take contrary to any prohibitions or limitations imposed by the statutes of the state in which the land is situated,<sup>37</sup> or contrary to the otherwise established public policy of such state<sup>38</sup>

While it has been held that if the statute of wills of the state creating the corporation disables it from taking land by devise, this disability will follow it into other states, so that by reason of the disability imposed by the general statute law of the state of its domicile it will not be able so to acquire land in another state,<sup>39</sup> there is authority for the view that a provision of the statute of wills of the state of a corporation's creation prohibiting devises to corporations does not operate outside of the state so as to incapacitate the corporation from taking by devise in another state,<sup>40</sup> where, under its charter, it would be authorized to take in the absence of the prohibition in the statute of wills,<sup>41</sup> and that such corporation may take by devise where the laws of such other state authorize such taking<sup>42</sup> There is, however, authority for the view that a provision of the statute of wills of the state in which the land in question is situated invalidating a devise to a corporation unless it is expressly

27 NJ—*Corpus Juris* quoted in *Guaranty Trust Co of N Y v Catholic Charities of Archdiocese of N Y*, 56 A.2d 483, 489, 141 NJ Eq 170  
68 CJ p 531 note 5

#### Law of state of incorporation

If the legatee is a foreign corporation, it must have capacity to take by the law of the state of incorporation

NJ—*In re Pfizer's Estate*, 110 A.2d 40, 33 NJ Super 242, affirmed 110 A.2d 54, 17 NJ 40

28. NY—*St John v Andrews Inst.*, 83 NE 981, 191 NY 254, 14 Ann Cas 708, rehearing denied 85 NE 143, 192 NY 382, error dismissed 29 S Ct 601, 214 US 19, 53 L Ed 892

29. Ohio—*White v Howard*, 38 Conn 342—*American Bible Soc v Marshall*, 15 Ohio St 537

30. Ill—*Santa Clara Female Acad-*

*emy v Sullivan*, 6 NE 183, 116 Ill 375, 56 Am R 776

31 Conn—*White v Howard*, 38 Conn 342

Ohio—*American Bible Soc v Marshall*, 15 Ohio St 537

32 NY—*Boyce v St. Louis*, 29 Barb 650  
68 CJ p 532 note 11

33. Ill—*Santa Clara Female Academy v Sullivan*, 6 NE 183, 116 Ill 375, 56 Am R 776  
68 CJ p 532 note 12

34. US—*Iglehart v Iglehart*, App DC, 27 S Ct 329, 204 US 478, 51 L Ed 575  
68 CJ p 532 note 13

35 NY—*Farmers' Loan & Trust Co v Shaw*, 107 NYS 337, 56 Misc 201

36 Tex—*House of Mercy v Davidson*, 39 SW 924, 90 Tex 529.  
68 CJ p 532 note 15

37 Neb—*Gould v Board of Home Missions of Presbyterian Church in the United States of America*, 167 NW 776, 102 Neb 526  
68 CJ p 532 note 16

38. Mo—*Proctor v Board of Trustees of M E Church*, 123 SW 862, 225 Mo 51  
68 CJ p 532 note 17

39 Ill—*Stalkweather v American Bible Soc*, 72 Ill 50, 22 Am R 133  
68 CJ p 532 note 18

40 Pa—*Thompson v. Swoope*, 24 Pa 474  
68 CJ p 532 note 19

41 Conn—*White v Howard*, 38 Conn 342  
Ohio—*American Bible Soc v Marshall*, 15 Ohio St 537  
68 CJ p 533 note 20

42. Conn—*White v. Howard*, 38 Conn 342  
Ohio—*American Bible Soc v Marshall*, 15 Ohio St 537.



authorized by its charter or by statute to take by devise applies to a foreign corporation<sup>43</sup> where it is not expressly authorized by statute of such state to take by devise<sup>44</sup>

*Effect of want of capacity; conversion* If a foreign corporation has no power to take a devise of lands, it has been held that the title does not vest at all in the corporation<sup>45</sup> Under this rule, where the will does not by its terms effect a conversion of the real property involved into personalty, the court may not, by the application of the doctrine of equitable conversion, give effect to the will as a valid bequest of personalty to the corporation<sup>46</sup> Where, however, a will so directs or authorizes a sale of real estate by the executor as to create an equitable conversion of it into personalty and gives the proceeds to a foreign corporation, it is a bequest of personalty and valid, if the corporation is authorized to take by bequest, notwithstanding the corporation cannot take by devise<sup>47</sup> Where the foreign corporation has no capacity to take and the property is not otherwise disposed of, the land will descend to the heirs at law of the testator according to the controlling law<sup>48</sup>

*Corporation civilly dead* A devise to a foreign corporation has been held void on the ground that the corporation was civilly dead and had no existence<sup>49</sup>

## (2) Limitation on Amount

A limitation on the amount in value of real property which a corporation may hold, imposed by a statute of the state of its creation, has been given effect in determining the validity of a devise to such corporation in another state

A limitation on the amount in value of real property which a corporation may hold, imposed by a statute of the state of its creation, has been given effect in determining the validity of a devise to such corporation in another state,<sup>50</sup> and the view has been taken that in such case title to real property devised does not vest in the corporation where

it already holds property to the limit of its capacity as to amount,<sup>51</sup> but descends to the heirs at law of the testator if not otherwise disposed of by the will<sup>52</sup> Likewise, a limitation in respect of the income from property held by a foreign corporation by the laws of the state of its creation has been given effect in respect of a bequest to the corporation made by a testator domiciled in another state<sup>53</sup> Where, however, a foreign corporation, which is subject to such limitation, has capacity to take by devise or bequest, it may take by devise or bequest provided the testamentary gift does not increase the corporate holdings to an amount beyond the statutory limit<sup>54</sup> A limitation in a charter of a foreign corporation on the amount of net income which the corporation may have from real or personal property has been held not to be a limitation on the amount of real or personal property which the corporation may take by devise or bequest<sup>55</sup>

## (3) Who May Question Validity of Testamentary Gift

In some jurisdictions only the state may question the validity of testamentary gifts to foreign corporations because of restrictions on the amount of corporate holdings, in others the heirs at law may do so.

The rule recognized in some jurisdictions that private persons may not raise the question as to whether, by the acquisition of property by will, a corporation will obtain holdings in excess in amount of those permitted by its charter or governing statute has been recognized or applied where the question is raised by heirs at law<sup>56</sup> or next of kin<sup>57</sup> of the testator in attacking a devise or bequest to a foreign corporation on the ground that the laws of the state by which such corporation was created impose a restriction as to the income which the corporation may receive from its holdings, and this rule has been applied even where, by the rule of the state of creation, the heirs or next of kin may raise the question<sup>58</sup> In other jurisdictions, however, the view has been taken that heirs at law<sup>59</sup>

43. N.Y.—Boyce v St Louis, 20 Barb 650

44. N.Y.—White v Howard, 46 N.Y. 144

Draper v Harvard College, 57 How Pr 269  
68 C.J. p 533 note 23

45. Ill.—Starkweather v American Bible Soc, 72 Ill 50, 22 Am R 133

46. Ill.—Starkweather v American Bible Soc, supra  
68 C.J. p 533 note 27

47. N.J.—Guaranty Trust Co v Catholic Charities, 56 A 2d 483, 141 N.J.Eq 170  
68 C.J. p 533 note 28.

48. Ill.—Starkweather v American Bible Soc, 72 Ill 50, 22 Am R 133  
68 C.J. p 533 note 29

49. Ill.—Elmore v Carter, 124 N.E. 582, 289 Ill 560

50. Tex.—House of Mercy v Davidson, 39 S.W. 924, 90 Tex 529  
68 C.J. p 533 note 32

51. Tex.—House of Mercy v Davidson, supra  
68 C.J. p 533 note 33

52. Tex.—House of Mercy v Davidson, supra.

53. N.Y.—Chambellain v Chamberlain, 43 N.Y. 424

54. W.Va.—Wilson v Perry, 1 S.E. 302, 29 W.Va 169

55. Conn.—White v. Howard, 38 Conn 342

56. Md.—Congregational Church Bldg Soc v Everett, 36 A 654, 85 Md 79, 35 L.R.A. 693, 60 Am S.R. 308

57. Md.—Congregational Church Bldg. Soc v Everett, supra

58. Md.—Congregational Church Bldg Soc v Everett, supra.

59. Ky.—Cromie v Louisville Orphans' Home Soc, 3 Bush 365  
Tex.—House of Mercy v Davidson, 39 S.W. 924, 90 Tex 529.

or next of kin<sup>60</sup> of the testator may question the validity of testamentary gifts to foreign corporations because of restrictions on the amount of corporate holdings, imposed by the state by which the corporation was created

Where a foreign corporation is wholly incapacitated to take by devise in the state in which the real estate involved is situated, it has been held or recognized that the right to question the validity of a devise to such corporation is not confined to the state,<sup>61</sup> but may be exercised by heirs at law of the testator,<sup>62</sup> and a like rule has been recognized where a foreign corporation is not entitled to take by devise for the particular purpose of the devise.<sup>63</sup> The mere fact that a person has accepted a benefit under a will does not prevent his questioning the validity of a devise to a foreign corporation on the ground that the corporation is civilly dead and has no existence.<sup>64</sup>

## § 107. Other Persons or Bodies

- a In general
- b Religious societies

### a. In General

A person of mixed blood, and, in the absence of statutory or constitutional prohibition, a sovereign government or a governmental body may be beneficiaries under a will

The right to take property under a will is not a natural right, but it is a creature of law. Consequently, the law has power to designate those whom the testator may make the objects of his bounty, as considered supra § 91, and designation of certain persons and societies as beneficiaries has

been recognized. Thus, the right of a child of a marriage between a white person and a free colored person to take land by devise has been recognized.<sup>65</sup> At least in some states in which slavery was legal, a free negro could take by devise,<sup>66</sup> and a bequest or devise for the benefit of free negroes was not invalid.<sup>67</sup>

*Governmental bodies or body politic* In the absence of statutory or constitutional prohibition a sovereign government may be a beneficiary under a will,<sup>68</sup> and bequests of personal property to a body politic are valid,<sup>69</sup> but, in order to take, such government must come within the provisions of the statute with respect to who may take under a will.<sup>70</sup> Consequently, a statute excluding all except enumerated corporations from taking under a will, construed as preventing the United States from being a beneficiary, is not invalid notwithstanding a provision permitting testamentary gifts to the state itself and its subordinate municipalities.<sup>71</sup> In determining the validity of a devise of real property to a sovereign government, the law of the state in which the land is located will govern.<sup>72</sup>

### b Religious Societies

As a general rule, religious corporations may take bequests and devises whenever, by the laws under which they are incorporated, such corporations have authority to acquire property by will

A religious corporation may accept bequests for uses within the scope of its charter or the law under which it was incorporated,<sup>73</sup> to an amount not exceeding that limited by statute,<sup>74</sup> unless the statute expressly prohibits it,<sup>75</sup> but it cannot take land by devise, unless and only to the extent that it is ex-

60 Ky—Cromie v Louisville Orphan's Home Soc., 3 Bush 365

61. Neb—Gould v Board of Home Missions of Presbyterian Church in the United States of America, 167 NW 776, 102 Neb 526

62 Neb—Gould v Board of Home Missions of Presbyterian Church in the United States of America, supra.

63. Mo—Proctor v Board of Trustees of M E Church, 123 SW 862, 225 Mo 51

64. Ill—Elmore v Carter, 124 NE 582, 289 Ill 560

65 SC—Kennington v Catoe, 47 S E 719, 68 SC 470

66 SC—Bowers v Newman, 27 SC L 472

67. Md—Brown's Lessee v Brown, 12 Md 87

68. Miss—Coleman v Whipple, 2 So 2d 566, 191 Miss 287.  
68 C.J. p 527 note 24.

69. Miss—Bell v Mississippi Orphan's Home, 5 So 2d 214, 193 Miss 205—Old Ladies' Home Ass'n v Grubbs' Estate, 199 So 287, 191 Miss 250, suggestion of error overruled 2 So 2d 593, 191 Miss 250

70. Mont—In re Beck's Estate, 121 P 784, 1057, 44 Mont 561  
68 C.J. p 527 note 25

"Corporation" does not include counties

Word "corporation," within statute providing that no corporation can take under will unless expressly authorized to do so by charter or by statute, did not include counties  
Okl—Phillips v Chambers, 51 P 2d 303, 174 Okl 407

71. US—U S v Burnison, Cal, 70 SCt 503, 339 US 87, 94 L Ed 675

72. US—U S v Fox, NY, 94 US 315, 24 L Ed. 192

73 Cal—In re Brehm's Estate, 2 P 2d 402, 116 Cal App 206  
54 C.J. p 51 note 15

**Presumption of statutory compliance**

With respect to religious corporations' capacity to receive bequests and devises, presumption, in absence of contrary evidence, is that binding legal requirements at time of incorporation were fully complied with  
Cal—In re Brehm's Estate, supra

**Corporation with charitable purposes** is not necessarily a religious corporation

Md—Baltzell v Church Home & Infirmary of Baltimore City, 73 A 151, 110 Md 244

74. La—First Congregational Church of New Orleans v Henderson, 4 Rob 209

NY—Williams v Williams, 8 NY. 525

75. Cal—In re Wright, Myr Prob. 213

Del—State v Bates, 2 Del 18

pressly authorized to do so by its charter or by statute,<sup>76</sup> although there are some early decisions to the contrary.<sup>77</sup> Authority to take by devise is not granted by a statute authorizing a religious corporation to acquire property by "conveyance"<sup>78</sup> or by "deed,"<sup>79</sup> nor is a power to take by will conferred by a granted power to receive "subscriptions or contributions in money or otherwise"<sup>80</sup>

Whether a religious corporation can take property by devise in a particular case will depend on the terms of the statute granting the power and the nature of the use for which the property is devised, and where the terms of the charter of the corporation or of the statute under which it was incorporated conflict with the terms of a later general law in this respect, the terms of the charter or earlier incorporating statute control.<sup>81</sup> Under a constitutional provision permitting devises for limited purposes to a "religious sect, order or denomination," a local congregation uncontrolled by any general ecclesiastical organization is capable of receiving a devise.<sup>82</sup> A corporation having authority to take by devise only for its own use cannot take under the statute for any other use,<sup>83</sup> although it has been held that where a religious corporation is prohibited from taking real estate by devise, the prohibition does not invalidate a testamentary trust for purposes personal to the testator, merely because the church was named as trustee in the will.<sup>84</sup> Especially where a taking by devise for the excluded purposes is expressly prohibited, the power to take by

devise is strictly confined to the purposes included in the statute.<sup>85</sup> In jurisdictions where the English statute of charitable uses is not in force as a part of the common law, the power of the religious corporation to accept devises of property or trust is restricted to purposes declared as lawful by the local statute,<sup>86</sup> and on the terms laid down by the local law.<sup>87</sup>

Where the statute expressly provides that no religious corporation, body, or society shall take under a will, both devises and bequests to a religious society are void,<sup>88</sup> and whether the testamentary gift is a devise of real estate or a bequest of the proceeds of real estate is immaterial, both being by will and so prohibited by the law.<sup>89</sup> Where, however, the prohibition extends to devises of real estate only, bequests of personal estate are valid,<sup>90</sup> and inasmuch as a prohibition of devises to religious corporations does not invalidate a devise to such corporation in trust for purposes personal to the testator,<sup>91</sup> a religious corporation prohibited from taking a devise of real estate may take by will an estate including both real and personal estate, where the real estate can be applied under the terms of the will to other than church purposes, and the personal estate appropriated for the church.<sup>92</sup>

A devise of realty,<sup>93</sup> or a bequest of personalty,<sup>94</sup> to an unincorporated religious society has been held to be void. A religious corporation, however, having been incorporated during the life of the heir under a will, by which the devise to the corporation

76. Cal.—In re Brehm's Estate, 2 P 2d 402, 116 Cal App 206.  
SD.—In re Hanson's Estate, 159 N W 399, 38 SD 1  
54 CJ p 51 note 18

#### In New York

Act concerning wills prohibiting devises to bodies politic and corporate does not restrict testamentary disposition of personal property to church incorporated under statute authorizing trustees of incorporated church to take temporalities belonging to church whether real or personal estate, and whether given, granted, or devised, directly to church or to any other person for their use, and under Decedent Estate Law, § 17, and Religious Corporations Law, § 23, limitation on devises to religious corporations are removed.  
NY.—In re Fowler's Estate, 43 NY S 2d 94, affirmed 50 NYS 2d 174, 268 App Div 788

77. NH.—Brown v Langdon, Smith 178

78. W Va.—American Bible Soc v Pendleton, 7 W Va 79.

79. Del.—Phillips v Phillips, 91 A 452, 10 Del Ch 314  
54 CJ p 51 note 22

80. Md.—Brown v Thompkins, 49 Md 423

81. NY.—In re Foley, 58 NYS 201, 27 Misc 77  
54 CJ p 51 note 26

82. Mo.—Boyce v Christian, 69 Mo 492

83. NY.—Levy v Levy, 33 NY 97  
84. Va.—St Stephen's Episcopal Church v Norris, 78 SE 622, 115 Va 225

85. Mo.—First Baptist Church v Robberson, 71 Mo 326  
54 CJ p 51 note 33

86. NY.—Gram v Prussia Emigrated Evangelical Lutheran German Soc, 36 NY 161

87. NY.—Gram v Prussia Emigrated Evangelical Lutheran German Soc, supra  
54 CJ p 51 note 36

88. Cal.—In re Wright, Myr Prob 213

#### Legislative sanction needed

Legacy to a church, part of an institution, authorized by Laws 1888,

c 208, to take bequests, was within Declaration of Rights, art 38, and not effectual and payable until it had received legislative sanction.  
Md.—Gaidner v McNeal, 82 A 988, 117 Md 27, 40 LRA, NS, 553, Ann Cas 1914A 119

89. Del.—State v Bates, 2 Del 18

90. Va.—St Stephen's Episcopal Church v Norris, 78 SE 622, 115 Va 225

91. Va.—St Stephen's Episcopal Church v Norris, supra

92. Va.—St Stephen's Episcopal Church v Norris, supra

93. Ala.—McLean v Church of God, 47 So 2d 257, 254 Ala. 134

NY.—Murray v Miller, 70 NE 870, 178 NY 321

94. NY.—In re Collier, 163 NYS 402, 97 Misc 543, affirmed 165 NYS 1081, 179 App Div 950—In re Pierce's Estate, 136 NYS 323, 76 Misc 85

Kernochan v Farmer's Loan & Trust Co, 170 NYS 850, modified on other grounds 175 NYS 831, 187 App Div 668, affirmed 126 NE 912, 227 NY 658.

was not intended to vest until the death of the heir, has been held competent to take under it, although not incorporated at the time of the testator's death<sup>95</sup>

**Foreign corporations** In the absence of statute in the state of testator's domicile forbidding bequests to foreign religious organizations, such foreign organization may take devises and legacies under the will of a resident of another state, whenever, by the laws under which they are incorporated, such corporations have authority to acquire property by will, unless the devises or legacies are repugnant to the laws of the other state<sup>96</sup> A religious society incorporated by another state can by comity have no better title to take property by devise than domestic corporations in that state<sup>97</sup> A resident, however, can make a legatee a foreign religious corporation not licensed to do business in the state of the testator, notwithstanding constitutional provision requiring foreign corporations to have a resident agent and forbidding greater rights than those possessed by domestic corporations<sup>98</sup> Where a foreign corporation may not hold land, or any interest in land, if a will directs a conversion of the realty into personalty a bequest of the proceeds to foreign religious corporation is valid<sup>99</sup>

### § 108. Restrictions on Testamentary Disposition for Charitable, Benevolent, or Religious Purposes

Restrictions on testamentary dispositions have bearing on the time within which a will must be executed prior to the testator's death, on the amount bequested, or

on the time during which title to the land so devised can be held

Some statutes have been enacted providing in effect that a devise or bequest for religious or charitable purposes or to a religious, charitable, and a like corporation or other organization must, in order to be valid, be made by a will executed a specific time before the testator's death, as discussed *infra* § 109, or restricting, to a specified fractional share of his estate the amount which a testator may devise or bequeath to such organizations or for such purposes, *infra* § 110 In some states there are no other limitations on the right of a person to dispose of his property for charitable uses<sup>1</sup> In the absence of statutory or constitutional provisions in this regard, no limitations on testamentary capacity of the types here considered are applicable<sup>2</sup>

In Mississippi under the constitutional and statutory provisions charitable, religious, and educational institutions may be beneficiaries under a will, but they can hold title to land so devised only for a fixed period of time<sup>3</sup> Prior to the enactment of these provisions, the provisions which invalidated devises and bequests of land or interests in land, or of money directed to be raised by the sale of land, for religious or charitable purposes,<sup>4</sup> and bequests of personal property in favor of religious or ecclesiastical organizations or to such organizations or religious denominations, for their own use or benefit or for charitable uses,<sup>5</sup> were restrictions on testamentary capacity, and the purpose of such provisions was to prevent a testator from disregarding the interests of his heirs<sup>6</sup> The view was ap-

95 NY—*Lougheed v Dykeman's Baptist Church*, 29 NE 249, 129 NY 211, 14 LRA 410

96 DC—*Williams v Protestant Episcopal Theological Seminary in Va.*, 198 F2d 595, 91 US App DC 69, certiorari denied 73 SCt 105, 344 US 210, 344 US 894, 97 LEd 670, rehearing denied 73 SCt 210, 344 US 894, 97 LEd 691

Mont—*In re Hauge's Estate*, 9 P 2d 1065, 92 Mont 36, stating Minnesota law

54 CJ p 52 note 44

#### Filing of incorporation articles

(1) Fact that foreign religious corporation at time testatrix died had not filed in state copy of articles of incorporation did not prevent it from accepting legacy

Cal—*In re Brehm's Estate*, 2 P2d 402, 116 Cal App 206

(2) Foreign religious corporation, if authorized to take under resident's will, need not file certified copy of incorporation articles with secretary of state.

Mont—*In re Hauge's Estate*, 9 P2d 1065, 92 Mont 36

97 US—*Miller v Ahrens*, CCW Va., 150 F 644

NY—*Levy v Levy*, 33 NY 97

98 Mont—*In re Hauge's Estate*, 9 P2d 1065, 92 Mont 36

99 Md—*Methodist Episcopal Church Extension v Smith*, 56 Md 362

1. Cal—*In re Dwyer's Estate*, 115 P 242, 159 Cal 680

2. Mass—*Hubbard v Worcester Art Museum*, 80 NE 490, 194 Mass 280, 9 LRA, NS., 689, 10 Ann Cas 1025

3. Miss—*Bell v Mississippi Orphans Home*, 5 So 2d 214, 192 Miss 205

4. US—*Watkins v Fly*, CCA Miss., 136 F2d 578 certiorari denied 64 SCt 80, 320 US 769, 88 LEd 459

Miss—*Bell v Mississippi Orphans Home*, 5 So 2d 214, 192 Miss 205—*Old Ladies' Home Ass'n v Grubbs' Estate*, 199 So 287, 191 Miss 250,

suggestion of error overruled 2 So 2d 593, 191 Miss 250  
68 CJ p 534 note 57

#### Contract to make a will

Under mortmain provisions of constitution avoiding devise for charitable uses, contract by inmate in home for aged women to make will leaving all her property to home and providing that in event of her failure to do so home should be entitled to designated sum for time she remained in home, did not discharge indebtedness of inmate to home for her care because of inclusion of agreement to make void will

Miss—*Wright v Mary Galloway Home for Aged Women*, 187 So 752, 186 Miss 197

#### Private burial ground held not within provisions

Miss—*Nolan v Easley*, 58 So 2d 491, 214 Miss 190

5. Miss—*Bell v Mississippi Orphans Home*, 5 So 2d 214, 192 Miss 205

68 CJ p 534 note 58

6. Miss—*National Bank of Greece*

parently taken that these provisions relating to land did not apply where the real property referred to in the will had been converted into personality prior to the death of the testator,<sup>7</sup> nor did such provisions apply to land situated in another state,<sup>8</sup> but such provisions did apply to land situated in Mississippi,<sup>9</sup> notwithstanding the testator and the beneficiaries were domiciled in other states<sup>10</sup> or the will directed a conversion of the realty into personality.<sup>11</sup> These constitutional provisions applied to a will made prior to the adoption of such provisions where the testator died after such adoption.<sup>12</sup> Land which was the subject matter of a gift which was rendered void by such constitutional and statutory provisions descended to the heirs at law of the testator in the same manner and to the same extent,<sup>13</sup> and subject to the same burdens,<sup>14</sup> as though such land had not been included in the will.

# § 109. — Execution of Will Within Specified Time Prior to Death

- a In general
- b Nature and purpose of statutes and general rules of construction

v Savarika, 148 So 649, 167 Miss 571

68 C J p 535 note 59

7 Miss—Hailey v. McLaurin's Estate, 73 So 727, 112 Miss 705

8 Miss—Hailey v. McLaurin's Estate, supra

68 C J p 535 note 61

9. Miss—Greely v Houston, 144 So 740, 148 Miss 799

10 Miss—Greely v Houston, supra

11. Miss—Greely v Houston, supra

12. Miss—Blackbourn v Tucker, 17 So 737, 72 Miss 735

13 US—Watkins v Fly, CCA Mass, 136 F 2d 578, certiorari denied 64 S Ct 80, 320 US 769, 88 L Ed 459

68 C J p 535 note 66

14 Miss—Anderson v Gift, 126 So 656, 156 Miss 736

15. Ohio—Kirkbride v Hickok, 98 NE 2d 815, 155 Ohio St 293

68 C J p 535 note 68

## Mandatory statute

The statute limiting bequests to charitable societies, executed within thirty days of testator's death is mandatory

Idaho—In re Coleman's Estate, 163 P 2d 847, 66 Idaho 567

## Scope of application

Statute providing that where a testator dies leaving issue of his body, or an adopted child, and his will contains devises or bequests to charitable institutions, such devises or be-

quests are invalid, unless will was executed at least one year prior to death of testator, applies where gifts are made to more than one charity, as well as to cases where gift is made to only one charity

Ohio—Kirkbride v Hickok, 98 NE 2d 815, 155 Ohio St 293

16. Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 A L R 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Ohio—Kirkbride v Hickok, 98 NE 2d 4, 155 Ohio St 165

68 C J p 535 note 69

17. US—Selig v U S, DCPa, 73 F Supp 886, affirmed CCA, 166 F 2d 299

Pa—In re Koehler's Estate, 61 A 2d 870, 360 Pa 460

In re Parsons' Estate, 54 A 2d 287, 161 Pa Super 330

In re Spatz' Estate, 51 Pa Dist & Co 427, 58 York Leg Rec 9—Wiley v First Presbyterian Church of Emporium, 45 Pa Dist & Co 296—In re Jennings' Estate, 20 Pa Dist & Co 506—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252

In re Eby's Estate, 30 Pa Dist 338

In re Edge's Estate, Orph, 48 Dauph Co 127, affirmed 14 A 2d 293, 339 Pa 67—In re Crozer's Estate, Orph, 31 Del Co 285, affirmed 18 A 2d 323, 341 Pa. 75—

- c Subsequent will or codicil executed within statutory period
- d What law governs, foreign corporations
- e Devises or legatees within statute
- f Type or form of gift
- g Who protected by, and entitled to question validity under, statute, waiver
- h Devolution of property where gift invalid

## a. In General

Certain statutes invalidate testamentary gifts for charitable, benevolent, or like uses, contained in wills executed within a specified time prior to the testator's death.

Some statutes invalidate testamentary gifts for charitable, benevolent, or like uses, contained in wills executed within a specified period prior to the death of the testator,<sup>15</sup> and the courts have asserted or sustained the constitutionality of such a statute.<sup>16</sup> Some of these statutes invalidate all gifts for the purposes specified, or to the corporations or institutions designated, where the will is executed within the prescribed period.<sup>17</sup> On the

In re Reed's Estate, Orph, 23 Erie Co 20—In re York's Estate, Orph, 3 Fiduciary 1, 25 Lehl J 111

68 C J p 535 note 70

## Gift pursuant to an oral agreement

(1) Where husband and wife made a binding agreement, in presence of attorney, that survivor would will property owned by them as tenants by entireties to charitable institutions connected with certain church, and in 1941 after death of husband, wife executed will leaving property to charitable institutions of that church, and in 1947 wife revoked 1941 will, and named different charities of that church, and died within thirty days, bequests were not void

Pa—In re Gredler's Estate, 65 A 2d 404, 361 Pa 384.

(2) A gift to a charitable institution executed within the proscribed period is not invalid where the gift is the confirmation of a trust which was already in existence by oral declaration between the testator and his spouse

Pa—In re Heim's Estate, 50 Pa Dist & Co 239, 45 Lack Jur 113.

## Questions of proof

(1) Charitable or religious institutions claiming bequests or devises must show that they were made more than thirty days before testator's death, there being no equities as between them and next of kin of testator, and rights of each being such only as are given by statute.

other hand, some statutes apply when,<sup>18</sup> and only when,<sup>19</sup> specified relatives or heirs survive the testator, and when the person named in the statute is not benefited by the invalidation of the proscribed gift, the effect is the same as though there had been no statute in the first place and the gift to the benevolent, religious, educational, or charitable institution is valid.<sup>20</sup> Such a statute does not render illegal the mere act of making a will for a charitable or benevolent purpose,<sup>21</sup> nor does it invalidate a trust completed within the settlor's lifetime, although the trust is referred to, and incorporated in, the settlor's will.<sup>22</sup> Some statutes do not completely outlaw charitable gifts, even where a will is made within the proscribed period, and such gifts are not invalid but merely voidable.<sup>23</sup>

While there is authority for the view that a statute of the type here considered, which is repealed intermediate the death of the testator and the happening of a contingency on which the vesting of a testamentary gift in a will executed within the statutory period depended, does not have operative force so as to invalidate such contingent gift, as considered *infra*, subdivision d of this section, according to some cases the question as to the invalidity of a gift, under this type of statute, is determined by the state of facts existing at the

time of the testator's death.<sup>24</sup> The mere fact that one of the purposes for which a testamentary gift is made is not for a charitable or religious purpose does not save the gift from the operation of the statute where another of the purposes is charitable or religious and the gift is not separable.<sup>25</sup> Land purchased by the testator within the period fixed by a statute of the type here considered may pass by a will executed beyond such period.<sup>26</sup>

In some jurisdictions, at least, there is no public policy, outside of specific statutory provisions, which condemns testamentary gifts to charitable, benevolent, and like institutions contained in a will executed within any particular period prior to the testator's death,<sup>27</sup> and in the absence of any statutory or constitutional provision in this regard no limitation on testamentary capacity of the type here considered is applicable.<sup>28</sup>

*Computation of time* Where the period fixed by the statute is "at least one calendar month" before the decease of the testator, the number of days in the calendar month is determined by the number of days in the month in which the will is executed.<sup>29</sup> The month is a month of full, clear days without counting hours or fractions of days,<sup>30</sup> and a fraction of a day may not be counted as a

Pa.—In re Hartman's Estate, 182 A 234, 320 Pa 321

(2) Charitable bequests must be proved by disinterested witnesses, but need not be proved by subscribing or attesting witnesses

Pa.—In re Henlein's Estate, 46 Pa Dist & Co 47, 24 Erie Co 240

(3) When a will or codicil is undated there is no presumption either for or against its having been executed within thirty days of decedent's death, and in such case, in order to sustain a charitable bequest the beneficiary must affirmatively prove by the weight of competent evidence that the will or codicil was actually executed more than thirty days prior to testator's death

Pa.—In re Erney's Estate, 85 Pa Dist & Co 349, 3 Fiduciary 426, 67 York Leg Rec 41

18. Ga.—Wesley Memorial Hospital v Thomson, 139 S E 15, 164 Ga 466  
68 C J p 536 note 72.

19. Fla.—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 A L R 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Miss.—Bell v Mississippi Orphans Home, 5 So 2d 214, 192 Miss 205

Ohio.—Deeds v Deeds, Prob, 94 N E 2d 232  
68 C J p 536 note 73

#### In California

(1) Prior to the statutory amendments such gifts were invalid, regardless of whether or not heirs, next of kin, or any particular relatives survive the testator

Cal.—Bishop's School Upon Scripps Foundation v Wells, 65 P 2d 105, 19 Cal App 2d 141—In re Gartwarte's Estate, 21 P 2d 465, 131 Cal App 321

68 C J p 535 note 71

(2) The amended statute provides that no estate may be bequeathed to any charitable or benevolent society or corporation by testator who leaves a spouse or other person who under will or law of succession would otherwise have taken property so bequeathed, unless the will was executed at least thirty days before death of testator

Cal.—In re Steinman's Estate, 94 P 2d 821, 35 Cal App 2d 95

20. Miss.—Bell v Mississippi Orphans Home, 5 So 2d 214, 192 Miss 205

Ohio.—Deeds v Deeds, Prob, 94 N E 2d 232

21. Ohio.—Thomas v Board of Trustees of Ohio State University, 70 N E 896, 70 Ohio St 92.

22. Ohio.—Cleveland Trust Co v White, 16 N E 2d 588, 58 Ohio App 339

23. Cal.—In re Moran's Estate, 264 P 2d 598, 122 Cal App 2d 167—In re Leymel's Estate, 230 P 2d 48, 103 Cal App 2d 773—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 422—In re Haines' Estate, 173 P 2d 693, 76 Cal App 2d 673

Fla.—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 A L R 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

24. Ohio.—Patton v. Patton, 39 Ohio St 590

25. Pa.—In re Brabson's Estate, 16 Pa Dist 669

26. Pa.—Manners v Philadelphia Library Co, 93 Pa 165, 39 Am R 741

27. Ga.—White v McKeon, 17 S E 283, 92 Ga 343  
68 C J p 536 note 79

28. Mass.—Bartlet v King, 12 Mass 537, 7 Am D 99

#### Former New York law

Under the former New York statute, now obsolete, see 68 C J p 536 note 81

29. Pa.—In re Gregg's Estate, 62 A 856, 213 Pa 260  
68 C J p 538 note 17

30. Pa.—In re Gregg's Estate, *supra*

full day in order to make up the necessary calendar month<sup>31</sup>

### b. Nature and Purpose of Statutes and General Rules of Construction

The statutes in question operate as a limitation on the testator's power of disposition, and their purpose is to prevent improvident testamentary gifts to the exclusion of the testator's lawful heirs when the testator is weak and in apprehension of death. In general, such statutes are to be strictly construed.

While some statutes of the type here considered have been regarded as limitations on the power of a charitable corporation to take property under a will,<sup>32</sup> the view has been taken that such a statute operates as a limitation on the testator's power of disposition<sup>33</sup> and not on the beneficiary's power to take.<sup>34</sup> There is authority for the view that there is no principle of right or of public policy involved in such a statute,<sup>35</sup> and that the purpose of such a statute is to prevent improvident testamentary gifts to the exclusion of the testator's lawful heirs and next of kin<sup>36</sup> when the testator is weak and in apprehension of death,<sup>37</sup> or, as sometimes stated, it is intended to prevent a testator, under the fears

incident to death, from disposing of his estate to the prejudice of his descendants.<sup>38</sup> It is generally held that such statutes are to be strictly construed.<sup>39</sup> The general rule that such construction as will prevent intestacy will be adopted rather than one which will render the will invalid has been given effect in holding that a certain gift contained in a will executed within a certain period prior to the testator's death was not within the purview of a statute of the type here considered.<sup>40</sup> Since it is a limitation on the power of testamentary disposition, this type of statute should be strictly construed in favor of such power.<sup>41</sup>

### c. Subsequent Will or Codicil Executed within Statutory Period

A gift in a subsequent will executed within the proscribed period is void, notwithstanding a similarity in the provisions with a previous will executed beyond the statutory period, but if the last will does not change the testamentary purpose, the gift is valid. A codicil executed within the statutory period does not invalidate gifts in a will made beyond the proscribed period, unless the language of the codicil clearly so indicates.

Where a will, which expressly and because of inconsistent provisions revokes all former wills,

31. Pa.—In re Socks' Estate, 15 Pa Super 281

32. Pa.—Arrowsmith v St Mary's Free Hospital for Children, 21 Pa Dist 943

68 C J p 536 note 82

33. Ohio—Thomas v Board of Trustees of Ohio State University, 70 NE 896, 70 Ohio St 92

68 C J p 536 note 83

34. US—Potlatch Hospital v New York Life Ins & Trust Co, DCN Y, 208 F 196

68 C J p 536 note 84

35. Cal.—In re Dwyer's Estate, 115 P 242, 159 Cal 680

Idaho—In re Coleman's Estate, 163 P 2d 847, 66 Idaho 567

Ohio—Thomas v Board of Trustees of Ohio State University, 70 NE 896, 70 Ohio St 92

36. Cal.—In re Dwyer's Estate, 115 P 242, 159 Cal 680

Idaho—In re Coleman's Estate, 163 P 2d 847, 66 Idaho 567

Ohio—Deeds v Deeds, Prob, 94 NE 2d 232

68 C J p 537 note 86

37. Fla.—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 ALR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Ohio—Kirkbride v Hickok, 98 NE 2d 815, 155 Ohio St 293

Pa.—In re Gredler's Estate, 65 A 2d 404, 361 Pa 384

68 C J p 537 note 87.

#### In New York

Statute invalidating bequest to charitable corporations made within two months of death of testator was intended to protect all heirs and kindred of testator and testator himself against influences which might be brought to bear on him in his last moments, and such statute applied to will of any individual who died before July 29, 1911, when repealing act became effective

N Y.—In re Fowler's Estate, 43 NYS 2d 94, affirmed 50 NYS 2d 174, 268 App Div 788

38. Ohio—Ruple v Hiram College, 171 NE 417, 35 Ohio App 8

39. DC—In re Nutting's Estate, D C, 82 F Supp 689, affirmed CA, Linkins v Protestant Episcopal Cathedral Foundation of the District of Columbia, 187 F 2d 357, 87 US App DC 351

#### Meaning of "invalid"

The word "invalid" as used in statute providing that where testator dies leaving issue of his body, or an adopted child, and his will contains devises or bequests to charitable institutions, such devises or bequests are invalid, unless will was executed at least one year prior to death of testator, means void, or without validity

Ohio—Kirkbride v Hickok, 98 NE 2d 815, 155 Ohio St 293

#### Literally construed

Act invalidating charitable bequests made within thirty days of testator's death must be literally

read and construed, and cannot be stretched to save bequest clearly intended by act to be void

Pa.—In re Hartman's Estate, 182 A 234, 320 Pa 321

#### Interpretation applicable to reenacted statute

Interpretation by supreme court of statute invalidating testamentary gifts made within one calendar month of testator's death was applicable to reenactment of statute changing limitation to thirty days

Pa.—In re Hartman's Estate, supra

#### Specific statute prevails

The section of probate code relating to testamentary gifts to charities confers no additional rights on any person except as therein specifically indicated, and definite provisions of section cannot be ignored in favor of general statements found in other sections dealing with ordinary, noncharitable disposition

Cal.—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 422

40. N Y.—In re Crawford's Will, 221 NYS 751, 220 App Div 313

41. Fla.—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 ALR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 L Ed 541, rehearing denied 65 S Ct 113, 323 US 813, 89 L Ed 647

Ohio—Thomas v Board of Trustees of Ohio State University, 70 NE 896, 70 Ohio St 92

Ruple v Hiram College, 171 NE 417, 35 Ohio App 8.

contains gifts for charitable purposes which are void because the revoking will was executed within the statutory period, a prior will containing charitable gifts, which was executed beyond the statutory period, may not be given effect in respect of gifts for particular charities for which gifts were made in both wills,<sup>42</sup> and where a will executed within the statutory period contains a gift which is invalid under the statute, the fact that such gift is identical with a gift contained in a codicil to an earlier will does not render the gift effective, notwithstanding the codicil was executed beyond the statutory period.<sup>43</sup> So, also, the mere fact that in a will revoking an earlier will there is a reference to a gift for charitable purposes contained in the earlier will does not save such gift from the general revocation clause of the later will and thereby prevent the application of the statutory limitation where the gift in the later will is different in amount and in the manner of distribution from that contained in the earlier will.<sup>44</sup> Likewise, a gift in a will executed within the proscribed period is void, notwithstanding a similarity in the provisions of such will and a previous will executed beyond the statutory period.<sup>45</sup> Where, however, the last will, although executed within the proscribed period, does not change the testamentary purpose the gift is valid.<sup>46</sup>

*Codicil executed within statutory period* A gift contained in a codicil executed within the statutory period may be void under a statute of the type here considered.<sup>47</sup> Notwithstanding the general rules that a codicil which refers to a will constitutes a republication of the will and that both will and codicil speak from the date of the codicil, as considered *infra* § 303, according to some cases a codicil executed within the statutory period does not operate to avoid gifts to charities in a will executed beyond the statutory period, in the absence from the codicil of language clearly showing an

intention that the codicil shall so operate.<sup>48</sup> So, a codicil executed within the statutory period usually does not invalidate gifts contained in the will which are otherwise valid where the codicil does not make any effective gift,<sup>49</sup> or where the codicil does not change or touch the gifts in the will.<sup>50</sup>

The mere fact that the codicil recites that it revokes a charitable gift in the will does not operate to bring the gift within the operation of the statute where, in fact, it appears from the terms of the codicil that there is not an actual revocation of the whole gift.<sup>51</sup> Where, however, by a codicil executed within the statutory period, gifts to organizations subject to the statute are revoked and a different distribution to the same organizations is provided for, the statute has been given effect to invalidate gifts.<sup>52</sup> While, under some statutes, a codicil executed within the statutory period which by revoking legacies in the will increases the amount of a residuary gift for charitable purposes contained in the will has been held ineffective as to such increase,<sup>53</sup> the view has been taken that the fact that a codicil executed within the statutory period by revoking a bequest to one other than one whom the statute was designed to protect increased the residuary estate which was given for purposes within the statute by a will executed beyond the statutory period did not invalidate the residuary gift to the extent of the revoked bequest<sup>54</sup> on the ground that neither the spirit nor the letter of the statute involved condemned such codicil.<sup>55</sup>

A codicil executed within the statutory period which merely reduces,<sup>56</sup> or postpones the time of enjoyment of,<sup>57</sup> a charitable gift contained in a will executed beyond the statutory period is not within the statute. An instrument is regarded as a codicil, within the meaning of this rule, even though it is a will in form and the language of the

42. Pa.—Price v. Maxwell, 28 Pa 23 68 C J p 537 note 93

43. Pa.—In re Hoffner's Estate, 29 A 33, 161 Pa 331

44. Pa.—In re Lustig's Estate, 11 Pa Dist & Co 700

45. Pa.—In re Hartman's Estate, 182 A 234, 320 Pa 321.

46. D C.—In re Nutting's Estate, D C, 82 F Supp 689, affirmed C A, Linkins v Protestant Episcopal Cathedral Foundation of the District of Columbia, 187 F 2d 357, 87 US App DC 351

Pa.—In re York's Estate, 75 Pa Dist & Co 164, 24 Leh L J. 94

In re Witmer's Estate, Orph. 62 Dauph Co 246, 2 Fiduciary 113—

In re Borden's Estate, Orph. 1 Fiduciary 7

47. Pa.—In re Lightner's Appeal, 57 Pa Super 469 68 C J p 537 note 96

48. Cal.—In re Herbert's Estate, 281 P 2d 57, 131 Cal App 2d 666

Pa.—In re Darlington's Estate, 137 A 268, 289 Pa 297

In re Kuntz's Estate, 77 Pa Dist & Co 337, 31 Wash Co 158

49. Pa.—In re Darlington's Estate, 137 A 268, 289 Pa 297

50. Cal.—In re McDole's Estate, 10 P 2d 75, 215 Cal 328

68 C J p 537 note 1

51. Pa.—In re Sloan's Appeal, 32 A 42, 168 Pa 422

68 C J p 537 note 2

52. N Y.—Ely v Megie, 113 N.E 800, 219 N Y 112, reargument denied 114 N.E 1066, 219 N Y 597.

68 C J p 537 note 3

53. Pa.—In re Lightner's Appeal, 57 Pa Super 469

In re Kuntz's Estate, 77 Pa Dist & Co 337, 31 Wash Co 158

54. Ohio.—Ruple v Hiram College, 171 N.E 417, 35 Ohio App 8

68 C J p 537 note 6

55. Ohio.—Ruple v Hiram College, supra

56. Pa.—In re Bingaman's Estate, 127 A 73, 281 Pa 497

68 C J p 538 note 8

57. Pa.—In re Sloan's Appeal, 32 A 42, 168 Pa 422

68 C J p 538 note 9.



instrument refers to it as a will, if in effect it is a codicil<sup>58</sup>

The question as to whether or not a provision in a codicil decreases the amount of a charitable gift within the foregoing rule is determinable as of the date of the execution of the codicil,<sup>59</sup> and where a will executed beyond the statutory period contained a gift of all the residuary estate for a specified charitable purpose and a codicil executed within the statutory period gave only half the residuary estate for the same purpose, the fact that the gift in the codicil might in actual amount be greater at the time of execution of such codicil than the amount of the whole residuary estate when the will was executed does not in some jurisdictions at least of itself invalidate the gift<sup>60</sup>

A provision in a codicil executed within the statutory period that, in the event of the testator's decease prior to the expiration of the time prescribed by law which must elapse after making of a will before charitable gifts thereunder become valid and enforceable, a portion of the estate given for a charitable purpose is given to a person named is applicable only if the charitable gift should fail,<sup>61</sup> and where such gift is upheld because the codicil is regarded as diminishing the amount of the charitable gift, the person named does not take<sup>62</sup> A codicil actually executed within the statutory period may, by its terms, render operative the earlier of two wills already executed by the testator, provided he should die before a specified date, and thus give effect to charitable gifts in such earlier will where the will was executed beyond the statutory period<sup>63</sup>

#### d. What Law Governs; Foreign Corporations

Although statutes restricting gifts to charitable or religious corporations of the state of the testator's domicile may be given effect by courts of another state, with respect to real estate located in another state, the law of the situs determines the validity of the gift.

It seems that a statute of the type here considered of the state of the testator's domicile may be given effect by courts of another state,<sup>64</sup> and a statutory provision of this type which is applicable to any charitable or benevolent society or corporation has been applied in declaring invalid a bequest by a person domiciled in the state in which the statute is enacted to a state institution of a foreign country<sup>65</sup> A statute of one state, of the type here considered, has been given effect in declaring void a devise to a corporation of such state of land in another state, contained in a will executed within the statutory period<sup>66</sup> While there is authority to the contrary,<sup>67</sup> it has been held or recognized, on the ground that the statute in question imposes restrictions on the power of testamentary disposition and not on the power of the beneficiary to take, that a statute of the type here considered applies only to testators domiciled within the state in which the statute has been enacted<sup>68</sup> and does not apply to bequests to a corporation domiciled within such state made by a testator domiciled in another state<sup>69</sup> and that such corporation may take the bequest if otherwise authorized to take where there is no statute of the testator's domicile forbidding the bequest<sup>70</sup> Where the statute is by its terms applicable to certain corporations organized under the laws of the state in which it was enacted, it may not be extended to include testamentary gifts to foreign corporations otherwise authorized to take<sup>71</sup> on any theory of an established public policy of the state<sup>72</sup> With respect to the real estate located in

58. Pa.—In re Bingaman's Estate, 127 A. 73, 281 Pa. 497

59. Pa.—In re Bingaman's Estate, supra

60. Pa.—In re Bingaman's Estate, supra

68 C J p 538 note 12

61. Pa.—In re Bingaman's Estate, supra

62. Pa.—In re Bingaman's Estate, supra

63. Pa.—In re Hamilton's Estate, 74 Pa. 69

68 C J p 538 note 15

64. Ga.—Sinnott v Moore, 39 SE 415, 113 Ga. 908

68 C J p 538 note 21.

#### Compelling reason

Where resident of foreign state dies seized of Texas lands and his will makes a devise of remainder in

such lands to charitable and religious organizations, Texas courts, by reason of their ultimate power over lands situated within Texas, have jurisdictional authority in an exceptional case to vary general rule under principles of conflict of laws and apply law of foreign state in preference to Texas law, if Texas courts should find compelling reasons to do so

Tex.—Toledo Soc for Crippled Children v Hickok, 261 SW 2d 692, 152 Tex 578, certiorari denied Hickok v Toledo Soc for Crippled Children, 74 S Ct 631, 347 US 936, 98 L Ed 1086

65. Cal.—In re Halm's Estate, 239 P 307, 196 Cal 778.

68 C J p 538 note 22.

66. Ill.—Elmore v. Carter, 124 NE 582, 289 Ill 560

68 C J p 539 note 23.

67. NY—Carter v Board of Education of Presbyterian Church of United States, 23 NYS 95, 68 Hun 435, affirmed 39 NE 628, 144 NY 621

68 C J p 539 note 24

68. Pa.—In re Hildeburn's Estate, 4 Pa Dist 40, 16 Pa Co 39

69. US—Pottstown Hospital v New York Life Ins & Trust Co, DC NY, 208 F 196

Pa.—Hildeburn's Estate, 4 Pa Dist 40, 16 Pa Co 39

70. US—Pottstown Hospital v New York Life Ins & Trust Co, DC NY, 208 F 196

68 C J p 539 note 28

71. US—Pottstown Hospital v New York Life Ins & Trust Co, supra

68 C J p 539 note 29

72. NY—In re Lampson, 56 NE 9,

another state, the law of the situs determines the validity of the gift <sup>73</sup>

**Repeal of statute** In the absence of a provision to the contrary, in determining the effect of the repeal of a statute of the type here involved, it has been laid down that the validity of a bequest is to be determined as of the date of the testator's death<sup>74</sup> and that, where the testator dies before such repeal, the statute invalidated a present bequest within the statute in a will executed within the statutory period,<sup>75</sup> but it has been held that, where the statute was repealed intermediate the death of the testator and the happening of the contingency on which the vesting of a testamentary gift in a will executed within the statutory period depended, the repealed statute did not operate to invalidate the gift <sup>76</sup>

#### e. Devisees or Legatees within Statute

The devisees or legatees which are within a statute imposing a time limitation with respect to the execution of a will containing dispositions for charitable, benevolent, or religious purposes depend on the terms of the statute.

The devisees or legatees which are within a statute imposing a time limitation with respect to the execution of a will containing dispositions for charitable, benevolent, or religious purposes depend on the terms of the statute<sup>77</sup> Some statutes of the type here considered are expressly applicable to gifts to charitable, religious, educational, or civil institutions<sup>78</sup> Other statutes expressly apply to any charitable or benevolent society or corporation,<sup>79</sup>

and the view has been expressed that there is no substantial difference between the words "charitable" and "benevolent" as used in such statutory provision<sup>80</sup> In construing the statute a "charitable corporation" has been defined as one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class forming a part of it indefinite as to numbers and individuals<sup>81</sup> Accordingly, in order that a corporation may be regarded as a "charitable corporation" within the meaning of such a statute, it is essential that its facilities or funds should be used for the public benefit, either for the entire public or for some particular class of persons, indefinite in number, who constitute a part of the public<sup>82</sup> A corporation which is organized and conducted for the mutual assistance to its members in the event of sickness is not a "charitable" or "benevolent" society or corporation within the meaning of the statute<sup>83</sup>

Under the construction given a statute authorizing the incorporation of certain organizations, all corporations organized under the statute are not necessarily "charitable" or "benevolent" associations or corporations within the meaning of another statute imposing a time limitation in respect of the execution of a will containing gifts to "charitable" or "benevolent" societies or corporations<sup>84</sup> Even though a particular organization, which has attempted to incorporate under such statute authorizing incorporation, is not authorized to incorporate there-

161 N.Y. 511—*Hollis v. Drew Theological Seminary*, 95 N.Y. 166

73. Pa.—In re Koehler's Estate, 61 A.2d 870, 360 Pa. 460

In re Prescott's Estate, 20 Pa. Dist. & Co. 232, 15 Erie Co. 252  
Tex.—*Toledo Soc. for Crippled Children v. Hickok*, 261 S.W.2d 692, 158 Tex. 578, certiorari denied *Hickok v. Toledo Soc. for Crippled Children*, 74 S.Ct. 631, 347 U.S. 936, 98 L.Ed. 1086

74. N.Y.—*Ely v. Megie*, 113 N.E. 800, 219 N.Y. 112, reargument denied 114 N.E. 1066, 219 N.Y. 597

75. N.Y.—*Ely v. Megie*, supra

76. N.Y.—In re Sackett, 218 N.Y.S. 385, 128 Misc. 240  
68 C.J. p. 539 note 33

#### 77. Prior law

For decisions under the New York statute prior to its amendment see 68 C.J. p. 540 note 44—p. 541 note 46

78. Ga.—*Wesley Memorial Hospital v. Thomson*, 139 S.E. 15, 164 Ga. 466.

Ohio—*Harrison v. Hillegas*, 1 Ohio Supp. 160  
68 C.J. p. 539 note 35

**Religious or charitable character of legatees** determines the religious or charitable character of the gift  
Pa.—In re Spotz' Estate, 51 Pa. Dist. & Co. 427, 58 York Leg. Rec. 9

79. Idaho.—In re Coleman's Estate, 163 P.2d 847, 66 Idaho 567  
68 C.J. p. 539 note 36

#### Noncharitable institution

(1) Under the facts shown it was held that a chapter of the Order of Eastern Star is not a charity and, therefore, a bequest to it by a will made less than thirty days before the death of the testatrix was not void  
Pa.—In re Spotz' Estate, 51 Pa. Dist. & Co. 427, 58 York Leg. Rec. 9

(2) Where mission was conducted by founder as her own private enterprise, and if she were eliminated the mission would cease to exist, mission was not a "charitable or benevolent society or corporation," within statute placing limitation on gifts to charitable organizations or societies, or in trust for charitable uses, with

respect to validity of legacy to mission in will executed eight days before testator's death

Cal.—In re Steinman's Estate, 94 P.2d 821, 35 Cal. App. 2d 95

#### Uniting for common purpose

In order to constitute a "charitable society" or "corporation" within statute placing limitation on gifts to charitable corporations or societies or in trust for charitable uses, it is essential that a number of persons unite together for some common purpose

Cal.—In re Steinman's Estate, supra

80. Cal.—In re Halm's Estate, 239 P. 307, 196 Cal. 778—In re Dol's Estate, 187 P. 428, 182 Cal. 159

81. Cal.—In re Dol's Estate, 198 P. 1039, 1040, 186 Cal. 64

82. Cal.—In re Dol's Estate, 187 P. 428, 182 Cal. 159

In re Bailey's Estate, 65 P.2d 102, 19 Cal. App. 2d 135

83. Cal.—In re Dol's Estate, 187 P. 428, 182 Cal. 159  
68 C.J. p. 540 note 40

84. Cal.—In re Dol's Estate, supra  
68 C.J. p. 540 note 41.

under, the character of the organization, as a de facto corporation or as a voluntary association, will be determined by its articles and by laws and its conduct and acts in pursuance thereof, and if these show that it is not a charitable or benevolent organization, it will not be regarded as such for the purpose of invalidating a gift to it contained in a will executed within the statutory period<sup>85</sup> The mere fact that the gift contained in a will executed within the statutory period is made by the testator from motives of benevolence does not render void a gift to an organization which is not a charitable or benevolent society or corporation<sup>86</sup>

*Statutory exceptions* A municipal corporation is not a "state institution" within the meaning of a statutory provision excepting from the operation of a statute of the type here considered bequests or devises to any "state institution."<sup>87</sup>

#### f. Type or Form of Gift

- (1) In general
- (2) Gift subject to moral obligation as to application

##### (1) In General

Whether or not a particular gift comes within the operation of a statute of the type here considered depends largely on the terms of the particular statute

Whether or not a particular gift comes within the operation of a statute of the type here considered depends largely on the terms of the particular statute<sup>88</sup> Under some statutes of this type, where a gift is not to a charitable or benevolent society or corporation, it is necessary that it shall be a gift in trust for a charitable use in order that it may be within the operation of the statute<sup>89</sup> The term "charitable uses," as used in such a statute, is, according to some cases, to be taken in its legal and technical sense,<sup>90</sup> and not in a restricted or popular

sense,<sup>91</sup> and, in general, it seems, if a gift may be regarded as a testamentary gift for a charitable use for the purpose of sustaining it, it is to be regarded as a gift for such a use within the terms of the statute<sup>92</sup> So, it has been said that one of the essential features of a "charitable use" is that it shall be for the public benefit either for the entire public or for some particular class of persons indefinite in number who constitute a part of the public<sup>93</sup> In determining whether or not a gift is in trust for a charitable use within the meaning of a statute which is applicable to such a gift, the view has been expressed that the purpose and motive of the testator are immaterial<sup>94</sup>

Where such a statute invalidates gifts for "religious uses," the term "religious" has been given its broadest meaning which comprehends all systems of belief in the existence of beings superior to, and capable of exercising an influence for good or evil on, the human race, and all forms of worship or service intended to influence or give honor to such superior powers,<sup>95</sup> and the operation of the statute is not confined to the "religious uses" of a Christian organization<sup>96</sup> The estate bequeathed for religious uses need not be money or tangible property, but it may be the release of a debt, or a limitation on the power of executors which confers a benefit on the legatee<sup>97</sup>

Among other gifts which have been held or recognized to be invalid as gifts for charitable uses are gifts for the purposes of a public library,<sup>98</sup> for the building of a college or university with library and the purchase of books for the library,<sup>99</sup> for the benefit of a denominational school,<sup>1</sup> for the building of a chapel to be controlled by the trustees of a specified church,<sup>2</sup> for the publication and distribution of certain books,<sup>3</sup> for the construction by a municipal corporation of a pleasure pier,<sup>4</sup> for

85 Cal—In re Dol's Estate, supra

86. Cal—In re Dol's Estate, supra

87 Cal—In re Houk's Estate, 200 P 417, 186 Cal 643  
68 C J p 541 note 47

88. US—Speer v Colbert, App DC, 26 S Ct 201, 200 US 130, 50 L Ed 403

Pa—In re Gilbert's Estate, Orph, 4 Fiduciary 47

68 C J p 541 note 49, p 543 notes 96-99, p 544 notes 9-17

89. Cal—Estate of Hamilton, 186 P 587, 181 Cal 758

In re Steinman's Estate, 94 P 2d 821, 35 Cal App 2d 95.  
68 C J p 541 note 50.

90. Pa—Price v Maxwell, 28 Pa 23

68 C J p 541 note 51

91. Pa—Price v Maxwell, supra

92. Pa—Price v Maxwell, supra

93. Cal—In re Dol's Estate, 187 P 428, 182 Cal 159

In re Steinman's Estate, 94 P 2d 821, 35 Cal App 2d 95

94 Pa—In re Sharp's Estate, 71 Pa Super 34

68 C J p 541 note 55

95. Pa—In re Knight's Estate, 28 A 303, 159 Pa 500

"Religious purpose" as "charitable purpose" in general see Charities § 17.

96 Pa—In re Knight's Estate, supra

68 C J p 542 note 57

97. Pa—In re Tourison's Estate, 22 Pa Dist & Co 93

98. Cal—In re Budd's Estate, 135 P 1131, 166 Cal 286  
68 C J p 542 note 58

99. Pa—Miller v Porter, 53 Pa 292

1. Pa—Price v Maxwell, 28 Pa 23

2. Pa—In re Vanzant's Estate, 6 Pa Co 625

3. Cal—In re Budd's Estate, 135 P 1131, 166 Cal 286  
68 C J p 542 note 62

4. Cal—In re Houk's Estate, 200 P 417, 186 Cal 643.

the repair of a graveyard,<sup>5</sup> for beautifying a cemetery for the burial of persons of a particular religious denomination,<sup>6</sup> to a college for the education generally of clergymen of a particular denomination,<sup>7</sup> to a religious society,<sup>8</sup> to an unincorporated association organized for charitable and benevolent purposes, whose benevolence extends to an indefinite number of nonmembers,<sup>9</sup> to the consul of a foreign government for the benefit of such government,<sup>10</sup> to a private hospital,<sup>11</sup> to establish a free bed in a private hospital,<sup>12</sup> and, apparently, the gift of the use of certain property to a religious and science association<sup>13</sup>

Among other gifts which have been held or recognized to be invalid as gifts for religious uses are a gift to a religious society,<sup>14</sup> a gift for the salary of a clergyman of a particular church,<sup>15</sup> and a gift for Sunday school purposes of a particular church<sup>16</sup> Where the statute in question applies to gifts for both religious and charitable uses, certain gifts have been held void without a definite characterization of the gift involved as either religious or charitable<sup>17</sup>

Among other gifts which, it has been held or recognized, are not invalidated by a statute applicable to gifts for charitable or religious uses are a bequest in trust for the education for the ministry of a relative of the testator,<sup>18</sup> a gift to a political party,<sup>19</sup> a bequest of a definite sum for the erection of a family monument in a cemetery,<sup>20</sup> a gift for the care and upkeep of a cemetery lot or of family graves,<sup>21</sup> gifts to a beneficial associa-

tion whose benevolence and benefits are confined exclusively to members,<sup>22</sup> or to members and their wives and children,<sup>23</sup> gifts to organizations which maintain homes for aged, indigent, and dependent members of certain fraternal organizations,<sup>24</sup> and for the widows and wives of members,<sup>25</sup> where the right to admission is contractual So the view has been taken that a gift for the construction of a college or university with library and for books for the library is not for a religious use within the meaning of such statute where no purpose or design expressed by the testator has any particular reference to religion<sup>26</sup> So, a statute which applies to gifts in trust for charitable uses does not invalidate a bequest of personal property on a condition subsequent that the legatee shall keep a certain horse as long as the horse lives<sup>27</sup>

*Exclusion of specified relative.* Where a statute applies to gifts made to the exclusion of a surviving wife, or child, the will effects such exclusion where it merely gives a life estate to a child with remainder over to an institution<sup>28</sup>

*Gifts for masses.* The view has been taken that a gift to a church for masses for the benefit and repose of the soul of the testator is not a gift for charitable use within the meaning of a statute of the type here considered,<sup>29</sup> but it has been held that a gift for masses is a gift for religious uses and, therefore, void if the will was executed within the period fixed by a statute applicable to such uses<sup>30</sup>

Where in order to bring a gift to an individual

5. Pa—In re Ralston's Estate, 1 Chest Co 482

6. Cal—In re Lubin's Estate, 199 P 15, 186 Cal 326  
68 C J p 542 note 65

7. Pa—Appeal of McMullen, 11 Wkly NC 440

8. Pa—McLean v Wade, 41 Pa 266

9. Pa—In re Lawson's Estate, 107 A 376, 264 Pa 77  
68 C J p 542 note 68

10. Pa—In re Doboscinski's Estate, 18 Pa Dist & Co 563

11. Idaho—In re Coleman's Estate, 163 P 2d 847, 66 Idaho 567  
Pa—In re Spear's Estate, 22 Pa Dist 600

12. Pa—In re Spear's Estate, supra

13. Cal—In re Budd's Estate, 135 P 1131, 166 Cal 286

14. Pa—McLean v Wade, 41 Pa 266

15. Pa—In re Ralston's Estate, 1 Chest Co 482

16. Pa—In re Ralston's Estate, supra

17. Pa—In re Wenner's Estate, 17 Pa Dist & Co 784

68 C J p 542 note 76

18. Pa—Appeal of McMullen, 11 Wkly NC 440

19. Pa—In re Liapis' Estate, 88 Pa Dist & Co 303, 13 Lawrence LJ 14

20. Pa—In re Calvin's Estate, 18 Pa Dist 809, 35 Pa Co 545

21. Pa—In re Deaner's Estate, 98 Pa Super 360  
68 C J p 542 note 79

22. Pa—Swift's Ex'rs v Easton Beneficial Society, 73 Pa 362

23. Pa—In re Sharp's Estate, 71 Pa Super 34

24. Pa—In re Sharp's Estate, supra

25. Pa—In re Sharp's Estate, supra  
**Admission to home held not contractual**

A bequest of a substantial part of testatrix' estate to the Odd Fellows Home for members of society of Odd Fellows, their wives and widows, who had no legally enforceable right to

enter home, was a bequest for a "charitable use" and void where testatrix died within thirty days after execution of will, notwithstanding applicant when he entered home was compelled to turn over his property to home, since such circumstance did not change his admission from domain of charity to that of contract  
Pa—In re Lowe's Estate, 192 A 405, 326 Pa 375, 111 A L R 518

26. Pa—Miller v. Porter, 53 Pa 292

27. Pa—In re Calvin's Estate, 18 Pa Dist 809

28. Ga—Kine v Becker, 9 SE 828, 82 Ga 563  
68 C J p 543 note 86

29. Pa—Appeal of Rhymer, 93 Pa 142, 39 Am R 936  
Charitable gifts for masses in general see Charities § 18

30. Pa—In re O'Donnell's Estate, 58 A 120, 209 Pa 63  
In re Jennings' Estate, 20 Pa Dist. & Co 506  
68 C J p 543 note 89.

within the operation of the statute it must be both in trust and for a charitable use, it has been held that the statute does not apply to a gift to the person who should be the pastor in charge of a specified church at the time of the testator's death of a portion of the estate to be used by such person to procure the saying of masses for the repose of the testator's soul, because there is no trust<sup>31</sup>

*Bequest contingent on extinction of lineal descendants* Notwithstanding the invalidity of a gift under some statutes is dependent on the existence of lineal descendants, natural or adopted, at the death of the testator, since the use of the void gift is not preserved to lineal descendants, anyone interested in the descent and distribution of the estate may assert the invalidity of a bequest, as discussed *infra* subdivision g of this section, and such a statute may apply to a bequest contingent on the extinction of lineal descendants<sup>32</sup>

*Exercise of power of appointment* A testamentary gift for charitable purposes made in the exercise of a power of appointment has been held to be invalidated by a statute of the type here considered, where the will was executed within the specified period prior to the testator's death<sup>33</sup> notwithstanding the will creating the power of appointment was executed beyond such period<sup>34</sup>

*Statutory exceptions* Under an exception from the operation of a statute of this type, of the disposition of property within the specified period, bona fide made for a fair valuable consideration, the mere execution of the conditions and directions of the bequest itself does not constitute consideration so as to take the bequest out of the operation of the statute.<sup>35</sup> A bequest to a municipal corporation for the purpose of constructing a pleasure pier is not a gift "for the use or benefit of the state" within the meaning of a statutory provision excepting from the operation of a statute of the type here considered bequests or devises "to the state, or any state institution, or for the use or benefit of the state"<sup>36</sup>

## (2) Gift Subject to Moral Obligation as to Application

A will executed within the statutory period is valid where the donee is not bound in law to apply the gift to a purpose within the statute, but if the purpose of the will is to evade the statute by any secret trust for charitable and religious uses, the gift is void

An absolute gift in a will which was executed within the statutory period has been upheld where the donee is not bound in law to apply the gift to a purpose within the statute, even though the gift is actually intended for such purpose,<sup>37</sup> giving effect to the will results in an evasion of the statute,<sup>38</sup> and the donee is under a moral duty so to apply the gift<sup>39</sup> The rule has been recognized or applied where the absolute gift is in the alternative and its operative effect depends on the testator's death within the statutory period and where, if the testator had survived the statutory period, the property involved would go to the charity under the terms of the will<sup>40</sup> The statute may not, however, be evaded by any secret trust for charitable and religious uses,<sup>41</sup> and where there is an implied agreement at the time the will is executed, binding on the donee of a gift absolute in form, to apply the gift to a purpose within the statute, a trust arises and the statute renders the gift void if the will was executed within the statutory period<sup>42</sup>

## g. Who Protected by, and Entitled to Question Validity under, Statute; Waiver

Persons for whose benefit statutes of the type under consideration operate may assert the invalidity of a gift, but they may also waive or relinquish such benefit.

While the view has been expressed that the object of a statute, the operative effect of which is dependent on the existence of lineal descendants of the testator, is to protect the testator's direct issue,<sup>43</sup> or more specifically, is designed for the special protection of the children or issue of the body, or adopted child of the testator and their representatives,<sup>44</sup> it has been recognized that such

31. Cal.—In re Ward's Estate, 14 P 2d 91, 125 Cal App 717  
68 C J p 543 note 90

32. Ohio—Patton v Patton, 39 Ohio St 390

33. Pa.—In re Gallagher's Estate, 28 Pa Dist 622  
68 C J p 543 note 94

34. Pa.—In re Graff's Estate, 16 Pa Dist 518

35. Pa.—In re Vanzant's Estate, 6 Pa Co 625  
68 C J p 543 note 1.

36. Cal.—In re Houk's Estate, 200 P 417, 186 Cal 643  
68 C J p 544 note 2

37. Pa.—In re Hodnett's Estate, 26 A 623, 154 Pa 485, 35 Am SR 851,  
—Appeal of Schultz, 80 Pa 396

38. Pa.—In re Bickley's Estate, 113 A 68, 270 Pa. 101—Appeal of Schultz, 80 Pa. 396  
68 C J p 544 note 4

39. Pa.—In re Bickley's Estate, 113 A 68, 270 Pa. 101—Appeal of Schultz, 80 Pa. 396.

40. Pa.—In re Bickley's Estate, 113 A 68, 270 Pa 101  
68 C J p 544 note 6

41. Pa.—In re Hodnett's Estate, 26 A 623, 154 Pa 485, 35 Am SR 851  
In re Isoleri's Estate, 20 Pa Dist & Co 535

42. Pa.—In re Stirk's Estate, 81 A. 187, 232 Pa 98  
68 C J p 544 note 8

43. Ohio—Ruple v. Hiram College, 171 NE 417, 35 Ohio App 8

44. Ill.—Folsom v Ohio State University, 71 NE 384, 210 Ill. 404

statute may inure to the benefit of others,<sup>45</sup> and that anyone interested in the descent and distribution of the estate may assert the invalidity of a bequest, where the statute is operative because of the survival of persons designated.<sup>46</sup> Some gifts may be avoided at the instance of an aggrieved heir of a designated class who would have been entitled to take the property had it not been willed to charity.<sup>47</sup> Where the operation of the statute does not depend on the survival of any particular relatives, heirs, or next of kin, it seems that in general any person who might be entitled to a share of the estate may assert the invalidity of a gift, under the statute.<sup>48</sup> A charitable institution, however, to which a remainder interest was devised by the will, executed within the proscribed period invalidating such devise, has no standing whatsoever to question the validity of the distribution of the assets.<sup>49</sup>

*Waiver, and confirmation of gift within statute by person benefited by statute* There is authority for the view, in respect of some statutes of this type, that, since such a statute is a limitation on the power of testamentary disposition and there is no principle of right or of public policy involved, as discussed supra subdivision b of this section, the person for whose benefit the statute operates may waive or relinquish the benefit,<sup>50</sup> which renders the gift valid.<sup>51</sup> So, the validity of a provision in a will giving to such person the discretionary power

to confirm a gift which is within the operation of the statute because of the testator's death within the statutory period has been recognized or upheld,<sup>52</sup> and the exercise of this power may, pursuant to the will, defeat a gift over to third persons of the property so made subject to the power.<sup>53</sup> The mere fact, however, that a person has accepted a benefit under a will does not prevent his questioning the validity of a gift in the will to a charitable institution on the ground that the will was executed within the statutory period.<sup>54</sup> Assuming that persons interested in the estate of the testator may waive the benefit of the statute, there is no waiver where such persons, in litigation subsequent to the probate of the will, attack the validity of gifts alleged to be subject to the statutory limitation,<sup>55</sup> such persons are not estopped to attack the validity of the gifts by the fact that the will was probated, where the validity of the gifts was not in issue in the probate proceedings.<sup>56</sup> The heirs are not required, in order to avoid waiver of the statute, to have contested the will, or its validity, within the statutory period,<sup>57</sup> and such heirs, who did not appear in the probate proceedings or file objections to the petition for distribution, but assert their rights by an appeal from the decree of distribution, do not waive, forfeit, or lose their rights to insist that the charitable bequests be limited to the statutory share.<sup>58</sup>

Ohio—Davis v Davis, 57 NE 317, 62 Ohio St 411, 78 AmSR 725

45 Ohio—Davis v Davis, supra 68 CJ p 545 note 21

46. Ohio—Patton v Patton, 39 Ohio St 590

47. Cal—In re Moran's Estate, 264 P 2d 598, 122 Cal App 2d 167—In re Bunn's Estate, 223 P 2d 320, 100 Cal App 2d 228—In re Leymel's Estate, 230 P 2d 48, 103 Cal App 2d 778—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 423—In re Haines' Estate, 173 P 2d 693, 76 Cal App 2d 673

Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 ALR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 LEd 541, rehearing denied 65 S Ct 113, 323 US 813, 89 LEd 647

#### "Aggrieved heirs"

Where heirs of testator, who executed will giving certain property to charities less than thirty days prior to his death, were not mentioned in will either as substitutional or residuary beneficiaries, and will provided that residue and remainder should go to executrix, heirs were not "aggrieved heirs" within meaning of statute.

Cal—In re Leymel's Estate, 230 P 2d 48, 103 Cal App 2d 778

48. NY—Ely v Megie, 113 NE 800, 219 NY 112, reargument denied 114 NE 1066, 219 NY 597 68 CJ p 545 note 23

49. Pa—In re Bridges' Estate, 179 A 70, 318 Pa 591

50. Ohio—Thomas v Ohio State University, 70 NE 896, 70 Ohio St 92 68 CJ p 545 note 25

#### Question of fact

Whether there has been a waiver of the protection afforded by statute restricting power to make bequests to a benevolent, charitable, literary, scientific, religious or missionary institution is a question of fact to be determined in appropriate proceedings

Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 ALR 677, appeal dismissed 65 S Ct 49, 323 US 666, 89 LEd 541, rehearing denied 65 S Ct 113, 323 US 813, 89 LEd 647

#### Form of waiver

Under statute rendering void bequests made to charity by will executed within one year prior to testator's death, waiver of benefited

person's right may take form of a testamentarily conferred power of appointment or may be in form of a quitclaim deed, or in any other manner which benefited person may choose to relinquish his statutorily given right

Ohio—Deeds v Deeds, Prob, 94 NE 2d 232

51. Ohio—Deeds v Deeds, supra

52 Ohio—Thomas v Ohio State University, 70 NE 896, 70 Ohio St 92

Folsom v Haas, 2 Ohio S & C P 559

53 Ohio—Thomas v Ohio State University, 70 NE 896, 70 Ohio St 92

68 CJ p 545 note 27

54 Ohio—Kirkbride v Hickok, 98 NE 2d 815, 155 Ohio St 293

68 CJ p 545 note 28

55. NY—Ely v Megie, 113 NE 800, 219 NY 112, reargument denied 114 NE 1066, 219 NY 597

68 CJ p 545 note 29

56. NY—Ely v Megie, supra

57. Cal—In re Moran's Estate, 264 P 2d 598, 122 Cal App 2d 167

58. Cal—In re Moran's Estate, supra.

### h. Devolution of Property Where Gift Invalid

In general, property included in a testamentary gift which is void under a statute of the type here considered passes as intestate property where it is not otherwise disposed of by the will

In general, property included in a testamentary gift which is void under a statute of the type here considered passes as intestate property where it is not otherwise disposed of by the will,<sup>59</sup> but such void gifts may pass under a residuary clause if that is the intention of the testator<sup>60</sup> Some of these statutes specifically provide that dispositions of property which are void under the statute shall go to the residuary legatee or devisee, next of kin, or heirs, according to law,<sup>61</sup> and, under such statute, where there is no residuary legatee or devisee<sup>62</sup> entitled to take,<sup>63</sup> usually the property goes to the next of kin or heirs according to law The view has been taken, however, that such statutory provision for disposition of the property as stated "according to law" means to one or the other as the case may be, under the existing law of distribution<sup>64</sup> The general rule of construction against intestacy has been applied<sup>65</sup> in holding that, where no residuary legatee was named and the will evidenced a clear intention to dispose of the whole of the testator's estate, the property covered by the void gift should be applied to the payment of the general legacies until the general legatees should receive the amount given them by the will<sup>66</sup> and that the balance of the void gift, if any, would go to the next of kin<sup>67</sup>

While it seems that in the absence of a statute

to the contrary a void gift of a share of the residuary estate passes to the heirs or next of kin,<sup>68</sup> under the above statutory provision for the disposal of void gifts, it has been held that property covered by a void bequest of a share of the residuary estate passes to the other residuary legatees in proportion to their respective interests in the residuary fund by virtue of a general statute so providing in respect of void residuary gifts<sup>69</sup> Such general statute does not apply where the devisees are life tenant and remainderman respectively and the devise of the remainder is void because the will was executed within the statutory period<sup>70</sup>

In some jurisdictions, in determining the devolution of property included in a gift void because the will was executed within the statutory period, where the residuary clause admits of a limited application as well as a more general application, it is given a construction which is more favorable to the heir at law<sup>71</sup> Where the residuary clause is limited in terms to the balance that remains after the payment of certain legacies from a fund derived from particular property, the amount of the void legacies does not pass under such clause,<sup>72</sup> but is subject, as property undisposed of, to the statutes of descent and distribution.<sup>73</sup>

### § 110. — Restrictions as to Amount of Gift

- a In general
- b Nature, purpose, and general rules of construction of statutes
- c Survivorship of particular relatives or heirs

59. Cal.—In re Fleishman's Estate, 145 P 2d 86, 62 Cal App 2d 588

Ohio—Morgan v First Nat Bank of Cincinnati, 84 NE 2d 612, 84 Ohio App 345

68 CJ p 545 note 32

#### Adopted children

Benefits conferred by statute making invalid a will bequeathing estate to benevolent or other similar purposes unless executed one year prior to death of testator if testator died leaving issue of his body or adopted child or lineal descendants of either are not restricted to persons adopted under laws of state, nor are such rights and benefits limited to minors

Ohio—Barrett v Delmore, 54 NE 2d 789, 143 Ohio St 203, 153 ALR 192

#### Persons not entitled to inherit

Where will of testator was executed more than nine months prior to his death and left his estate to a non-profit corporation and his sole heir was a half-sister, she was not entitled to inherit any part of his estate

Cal.—In re Mealy's Estate, 204 P 2d 971, 91 Cal App 2d 371

60. NY—Carter v Board of Education of Presbyterian Church of United States, 23 NYS 95, 68 Hun 435, affirmed 39 NE 628, 144 NY 621

61. Pa.—In re Koehler's Estate, 61 A 2d 870, 360 Pa 460—In re Yeisley's Estate, 56 A 2d 205, 358 Pa 200—In re Hartman's Estate, 182 A 234, 320 Pa 321

In re Isolieri's Estate, 20 Pa Dist & Co 535

In re Linde's Estate, Orph, 58 Montg Co 214

68 CJ p 545 note 34

#### Distribution of residue

Bequest of residuary estate to charity was valid, although will was executed within thirty days of death of testatrix leaving surviving heirs within third degree of consanguinity, where under substitutional residuary clause, residuary estate must be distributed to a nonrelative should bequest to charity be held invalid

Cal.—In re Haines' Estate, 173 P 2d 693, 76 Cal App 2d 673

62. Pa.—Price v Maxwell, 28 Pa 23

63. Pa.—In re Lightner's Appeal, 57 Pa Super 469

64. Pa.—In re Calvin's Estate, 18 Pa Dist 809

65. Pa.—In re Calvin's Estate, 18 Pa Dist 809

66. Pa.—In re Calvin's Estate, supra

67. Pa.—In re Calvin's Estate, supra

68. Pa.—In re Alter's Estate, 4 Pa Co 558, 19 Phila 9

69. Pa.—In re Wenner's Estate, 17 Pa Dist & Co 784

70. Pa.—In re McNulty's Estate, 29 Pa Dist 709

71. Ohio—Davis v Davis, 57 NE 317, 62 Ohio St 411, 78 Am SR 725

72. Ohio—Davis v Davis, supra

73. Ohio—Davis v Davis, supra

- d What law governs; foreign corporations, societies, or associations
- e Corporations, societies, associations, and institutions within statute
- f Type or form of gift
- g Who may question gifts, waiver and estoppel
- h Amount of estate and of gifts subject to statute and disposable amount
- i Interest, increase, and losses
- j Charges to share of estate not applicable to gifts within statute
- k Payment of gifts within statute, adjustment among such gifts, and vesting of title
- l Devolution of property not available for gifts subject to statute

### a. In General

Some statutes impose restrictions as to the share of the estate which a testator may devise or bequeath for charitable, benevolent, and like purposes if he leaves specified heirs, and no bequest is valid in excess of the specified share

Some statutes impose restrictions as to the share of his estate which a testator may devise or bequeath for charitable, benevolent, and like purposes if he leaves specified heirs,<sup>74</sup> and where more than the share permitted is devised or bequeathed and the statutory restriction is otherwise applicable, the gift will be declared void or ineffective as to the excess if the question is duly raised.<sup>75</sup> Under some statutes, if certain specified relatives survive, no bequest of the type designated shall be valid in

excess of a specified share of the estate after payment of debts,<sup>76</sup> but if the excess is inconsequential, it comes within the maxim *de minimis non curat lex*, and such gift will be sustained.<sup>77</sup> Under other statutes a gift in excess of the specified share is wholly void,<sup>78</sup> notwithstanding other statutes enable the court of chancery to effectuate a testator's purpose by approximation "in a manner most similar to that indicated by the testator" or "in a manner next most consonant with the specified mode prescribed."<sup>79</sup>

Statutes here considered do not prohibit charitable gifts altogether,<sup>80</sup> and do not compel the testator to give his property, or any part of it, to his relatives,<sup>81</sup> and when specified relatives do not survive the testator, or they waive the restriction, there is no limitation as to the amount left to charity.<sup>82</sup> Most of these statutes regulate and control testamentary disposition only.<sup>83</sup> The view has been expressed that the will is to be read as though the statutory restriction is a part of it.<sup>84</sup> In the absence of statute or constitutional provision in this regard no limitation as to the amount which a testator may give for charitable, benevolent, and like purposes is applicable.<sup>85</sup>

### b. Nature, Purpose, and General Rules of Construction of Statutes

Statutes which restrict the amount of the gift to charitable institutions are not mortmain acts. Their purpose is to prevent improvident gifts to the exclusion of the testator's lawful heirs, and are usually strictly construed.

Statutes of the type here considered are not

<sup>74</sup> Cal—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 422

NY—In re Brown's Estate, 1 NYS 2d 420, 164 Misc 65—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768

In re Baeuchle's Will, 82 NYS 2d 371, affirmed 94 NYS 2d 582, 276 App Div 925, affirmed 93 NE 2d 491, 301 NY 582

<sup>75</sup> NY—In re Donnelly's Estate, 14 NYS 2d 700, 172 Misc 107—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768—In re Rosenberg's Will, 299 NYS 462, 164 Misc 837  
68 C J p 546 note 49

<sup>76</sup> U S—Humphrey v Millard, CC ANY, 79 F 2d 107

NY—In re Skillman's Will, 286 NYS 673, 247 App Div 327  
In re Baumwald's Estate, 81 NYS 2d 779, 192 Misc 846—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768—In re Kaufman's Estate, 285 NYS 347, 158 Misc 102—

In re Bowker's Estate, 283 NYS 564, 157 Misc 341

68 C J p 546 notes 51, 52

<sup>77</sup> NY—In re Bowker's Estate, supra

<sup>78</sup> Ga—Trustees of University of Georgia v Denmark, 81 SE 230, 141 Ga 390

68 C J p 546 note 53

<sup>79</sup> Ga—Kelley v Welborn, 35 SE 636, 110 Ga 540

<sup>80</sup> Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

68 C J p 546 note 55

Limitation on gifts is not for charitable purposes in general, but only on gifts to charitable corporations or societies or in trust for charitable uses

Cal—In re Hamilton's Estate, 186 P 587, 181 Cal 758

In re Steinman's Estate, 94 P 2d 821, 35 Cal App 2d 95

<sup>81</sup> Iowa—In re Ihmes' Estate, 134 NW 429, 154 Iowa 20.

68 C J p 546 note 56

<sup>82</sup> Cal—In re Cottrill's Estate, 150 P 2d 214, 65 Cal App 2d 222

Miss—Bell v Mississippi Orphans Home, 5 So 2d 214, 192 Miss 205

<sup>83</sup> NY—Robb v Washington, etc., College, 78 NE 359, 185 NY 485

<sup>84</sup> NY—In re Walker's Will, 32 NE 633, 136 NY 20

In re Title Guarantee & Trust Co., 165 NYS 71, 100 Misc 72

Where will is clear and definitely provides method for validly disposing of testator's entire estate, it is not necessary or proper to read into it statutory provisions limiting charitable bequests

NY—In re Bates' Estate, 5 NYS 2d 705, 254 App Div 900, resettled 8 NYS 2d 121, 255 App Div 868, affirmed 23 NE 2d 534, 281 NY 692, motion denied 25 NE 2d 144, 282 NY 591

<sup>85</sup> Mass—Hubbard v Worcester Art Museum, 80 NE 490, 194 Mass 280, 9 L R A N S, 689, 10 Ann Cas 1025, 12 Prob Rep Ann 416.

68 C J p 547 note 60



mortmain acts<sup>86</sup> directed at charities<sup>87</sup> The purpose of such a statute is to protect the natural objects of the testator's bounty from the making of improvident gifts to their neglect<sup>88</sup> or, as sometimes stated, to prevent improvident gifts to the exclusion of the testator's lawful heirs<sup>89</sup> So it is usually considered that such a statute is not a declaration of public policy against dispositions in favor of charities,<sup>90</sup> the prohibition is not made in the public interest but only for the prevention of what the statute regards as a private wrong<sup>91</sup> Accordingly, these statutes usually constitute a limitation on testamentary power,<sup>92</sup> and do not disqualify the devisee or legatee to take the testamentary gift<sup>93</sup> The statutes do not operate on the capacity of corporations, institutions, or individuals to take charitable testamentary gifts,<sup>94</sup> or prescribe or limit the amount or kind of property a corporation may take,<sup>95</sup> and, therefore, they are not arbitrary and discriminatory<sup>96</sup> On the other hand, the view has been taken that a statute of this type is not designed to establish charitable uses as they were known at common law,<sup>97</sup> and that it does not authorize any particular character of persons to accept a gift made by devise or bequest<sup>98</sup>

While there is authority for the view that statutory restrictions here considered are not to be

extended beyond the express language used,<sup>99</sup> and may not by judicial interpretation be made to include that which, by fair construction, is excluded,<sup>1</sup> the view has also been expressed that such statute should be liberally construed to effectuate the humanitarian purpose of the statute, namely, the protection of the testator's family<sup>2</sup> The fact that one of the persons named therein, on whose survival the operation of the statute depends, has an ample estate of his own does not authorize a construction of the statute favorable to a charitable or benevolent organization claiming under the will<sup>3</sup>

Furthermore, it has been laid down that such statute is to be strictly construed in favor of the persons named in the statute,<sup>4</sup> but not in favor of any other person,<sup>5</sup> also, that such statute should be strictly construed against those who seek to invalidate testamentary provisions<sup>6</sup> Unless express and unmistakable declarations of public policy forbid, an interpretation consonant with the testator's real purpose should be adopted<sup>7</sup> It is the exclusion by a testator of those persons who come within the express terms of a statute which provides that no person leaving a wife or child or descendants of a child shall devise more than a certain share of the estate to certain institutions to the exclusion of such wife or child which is prohibited<sup>8</sup> In

86. US—Mead v Welch, CCA Cal, 95 F2d 617

Fla—Taylor v Payne, 17 So 2d 615, 154 Fla 359, 154 ALR 877, appeal dismissed 65 S Ct 49 323 US 666, 89 LEd 541, rehearing denied 65 S Ct 113, 323 US 813, 89 LEd 647

NY—In re Watson's Estate, 30 NYS 2d 577, 177 Misc 308 68 CJ p 547 note 63

87. NY—In re Blumenthal's Estate, 215 NYS 142, 126 Misc 603

88. US—Mead v Welch, CCA Cal, 95 F2d 617

Fla—Corpus Juris cited in Taylor v Payne, 17 So 2d 615, 618, 154 Fla 359, 154 ALR 877, appeal dismissed 65 S Ct 49, 323 US 666, 89 LEd 541, rehearing denied 65 S Ct 113, 323 US 813, 89 LEd 647

Idaho—In re Coleman's Estate, 163 P 2d 847, 66 Idaho 567  
NY—In re Skillman's Will, 286 NYS 673, 247 App Div 327  
In re Hills, 283 NYS 733, 157 Misc 109  
68 CJ p 547 note 65

89. Mont—In re Beck's Estate, 121 P 784, 1057, 44 Mont 561

90. US—Mead v Welch, CCA Cal, 95 F2d 617

Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

Idaho—In re Coleman's Estate, 163 P 2d 847, 66 Idaho 567

91. NY—Trustees of Amherst College v Ritch, 45 NE 876, 151 NY 282, 37 LRA 305  
68 CJ p 547 note 68

92. Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680  
68 CJ p 547 note 69

93. NY—Trustees of Amherst College v Ritch, 45 NE 876, 151 NY 282, 37 LRA 305  
Scott v Ives, 51 NYS 49, 22 Misc 759

94. Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680  
NY—Chamberlain v Chamberlain, 43 NY 424

95. NY—Trustees of Amherst College v Ritch, 45 NE 876, 151 NY 282, 37 LRA 305

96. Iowa—Decker v American University, 20 NW 2d 466, 236 Iowa 895

97. Mont—In re Beck's Estate, 121 P 784, 1057, 44 Mont 561

98. Mont—In re Beck's Estate, supra

99. Cal—In re Davison's Estate, 215 P 2d 504, 96 Cal App 2d 263  
Iowa—Ross v Alleghany Theological Seminary, 215 NW 710, 204 Iowa 648

"Issue" and "descendant" are interchangeable terms

NY—In re Holyland's Will, 116 NYS 2d 628

1. Iowa—In re Cleven's Estate, 142 NW 986, 161 Iowa 289

Assumption excluded in view of specific language

Under statute providing that no person having husband, wife, child, or descendant, or parent shall leave more than one half of estate to charity, court could not assume legislature meant distributee when it used such words

NY—In re Holyland's Will, 116 NYS 2d 628

2. NY—In re Watkins' Estate, 194 NYS 342, 118 Misc 645

3. NY—In re Rowland's Will, 232 NYS 127, 225 App Div 118

4. Ga—Monohan v O'Byrne, 95 SE 210, 147 Ga 633

5. Ga—Monohan v O'Byrne, supra

6. NY—In re Plaster's Will, 43 NYS 2d 1, 266 App Div 439, appeal granted 44 NYS 2d 173, 266 App Div 926, affirmed 59 NE 2d 181, 293 NY 822

7. NY—In re Kaufman's Estate, 285 NYS 347, 158 Misc 102

8. Ga—Monohan v O'Byrne, 95 SE 210, 147 Ga 633

general, a statute of this type speaks as of the time of the death of the testator,<sup>9</sup> and not as of the date of the execution of the will<sup>10</sup>

### c. Survivorship of Particular Relatives or Heirs

Statutes restricting gifts to charities usually apply if specified heirs survive the testator. The burden of proof as to the survival of specified relatives is on those who attack the validity of the gift.

A statute imposing a restriction as to the share of a testator's estate which may be given to certain organizations or for certain purposes, which, in terms, refers to a testator, leaving heirs<sup>11</sup> or his having certain specified relatives,<sup>12</sup> does not apply if the testator is not survived by such heirs or relatives, and in the absence of these surviving heirs or relatives, the will may dispose of the bulk<sup>13</sup> or the whole<sup>14</sup> of his estate to charitable or benevolent and like organizations, or for charitable or benevolent and like purposes or uses. In reaching this conclusion the view has been taken that a statutory provision that no person "having" certain specified relations shall by his or her last will and testament devise or bequeath to certain societies, associations, or corporations more than a specified share of his or her estate speaks as of the death of the testator or testatrix and not as of the time of the execution of the will,<sup>15</sup> and, therefore, does not apply where none of the specified relatives survives the testator,<sup>16</sup> notwithstanding such relative or relatives were in existence when the will was made.<sup>17</sup> As bearing on the applicability of the statute, the death of a relative named in the statute simultaneously with the testator is in effect the same as death before the testator's death.<sup>18</sup>

In general, the burden of proving that one or more of the designated heirs or relatives survived the testator is on those who attack the validity of the gift under the statute.<sup>19</sup> Where the applicability of the statute depends on the survival of a particular relative of the testator and such relative and the testator perished in a common disaster, in the absence of a statute providing otherwise, there is no presumption of survivorship in the absence of proof tending to show the order of death,<sup>20</sup> the courts treat the matter as though the deaths occurred simultaneously.<sup>21</sup>

*Particular survivors.* As already pointed out whether or not a statute imposing restrictions as to the disposable share is applicable usually at least depends on the survivorship of certain specific relatives or heirs. Some statutory restrictions of this type specify the husband, wife, child, descendants, or parent of the testator or testatrix,<sup>22</sup> others specify spouse, brother, sister, nephew, niece, descendant or ancestor.<sup>23</sup> "Child," as used in such a statute, has been construed to include an illegitimate child<sup>24</sup> and also an adopted child,<sup>25</sup> but not a grandchild.<sup>26</sup> Where the statute includes a surviving wife, it applies to a widow, although she was living apart from the testator at the time of his death,<sup>27</sup> and a like rule applies where a husband survives the testatrix notwithstanding she had obtained a divorce from bed and board.<sup>28</sup>

### d. What Law Governs; Foreign Corporations, Societies, or Associations

The statute which is in force at the time of the testator's death governs, and the law of the state of the testator's domicile has been applied with respect to be-

9 NY—In re Seymour, 146 NE 372, 239 NY 259  
68 CJ p 547 note 82

10. NY—Fisher v Lister, 223 NY S 321, 130 Misc 1, modified on other grounds 226 NYS 484, 222 AppDiv 841

11. Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

12. NY—St John v Andrews Institute for Girls, 83 NE 981, 191 NY 254, 14 Ann Cas 708, reargument denied 85 NE 1115, 192 NY 583, and error dismissed 29 SCt 601, 214 US 19, 53 LEd 892  
68 CJ p 548 note 86

13. NY—In re Danklefsen's Will, 157 NYS 119, 171 AppDiv 339

14. Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

15. NY—St John v Andrews Institute for Girls, 83 NE 981, 191 NY 254, 14 Ann Cas. 708, reargument denied 85 NE 1115, 192 N.Y. 583,

and error dismissed 29 SCt 601, 214 US 19, 53 LEd 892  
68 CJ p 548 note 89

16 NY—St John v Andrews Institute for Girls, supra

17. NY—St John v Andrews Institute for Girls, supra

18 NY—St John v Andrews Institute for Girls, supra  
68 CJ p 548 note 92

19. NY—St John v Andrews Institute for Girls, supra

20 NY—St John v Andrews Institute for Girls, supra  
Presumption of survivorship in case of death in common disaster in general see Death § 11.

21. NY—St John v Andrews Institute for Girls, supra

22 NY—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768  
68 CJ p 548 note 97

23. Cal—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 422.

#### Prior law

For decisions under the California statute prior to its amendment see 68 CJ p 548 note 1

24. Iowa—Hastings v Rathbone, 188 NW 960, 194 Iowa 177, 23 ALR 392

68 CJ p 549 note 2

25. NY—In re Upjohn's Will, 107 NE 2d 492, 304 NY 366  
68 CJ p 549 note 3

26. NY—In re Tone's Will, 174 NYS 391, 186 AppDiv 361, affirmed 123 NE 892, 226 NY 696, and motion denied 125 NE 926, 227 NY 584  
68 CJ p 549 note 4

27. NY—In re Watkins' Estate, 194 NYS 342, 118 Misc 645  
68 CJ p 549 note 5

28. NY—In re Moseley's Will, 247 NYS 520, 138 Misc 847.  
68 CJ p 549 note 6.

quests of personal property. Some statutes apply to testamentary gifts to foreign corporations.

In general, a statute of this kind which is in force at the time of the testator's death governs,<sup>29</sup> and an amendment of such statute will not affect gifts in a will of the testator who died before the amendment became operative.<sup>30</sup> Some statutes of the type here considered relate only to domestic corporations,<sup>31</sup> and, therefore, impliedly eliminate from their operation gifts to foreign corporations contained in the will of a testator domiciled in the state in which the statute has been enacted.<sup>32</sup> Such a statute may not arbitrarily be extended to include gifts to foreign corporations,<sup>33</sup> and it seems that an amendment of such statute extending its operation to foreign corporations does not affect the will of a testator who died before the amendment became operative.<sup>34</sup>

Under the construction given a statute of this type, however, it applies to testamentary gifts to foreign corporations,<sup>35</sup> even though the statute does not specifically mention foreign corporations,<sup>36</sup> as, for example, to a gift of personal property by a testator domiciled in the state in which the statute is enacted to a corporation of another state.<sup>37</sup> While the applicability of a statute of a state other than that of the testator's domicile has been recognized where the testator leaves real property situated in such other state,<sup>38</sup> according to some cases, a statute of a state other than that of the testator's domicile does not apply to bequests of personal property,<sup>39</sup> even where the bequest is to a corporation of such other state.<sup>40</sup>

By virtue of statutory provision, the validity of which has been upheld or recognized,<sup>41</sup> the statute

of a state limiting the share of his estate which a testator leaving heirs may give to charitable or benevolent societies or corporations or for charitable uses applies to gifts of personal property which has a situs in the state, contained in a will of a testator domiciled in another state at the time of his death,<sup>42</sup> but such statutory provision has no application to personal property which may not be regarded as having a situs within the state.<sup>43</sup> The applicability of a statute limiting the amount of testamentary gifts, of the state in which the testator was domiciled at the time of his death, has been denied in respect of property which is being administered in the state of the testator's original domicile, by virtue of a statutory provision of the latter state.<sup>44</sup>

#### e. Corporations, Societies, Associations, and Institutions within Statute

Some of the statutes here considered apply to testamentary gifts to specified types of societies, associations, corporations, or institutions, but certain statutes do not apply to gifts to a state government, a state institution, or a municipality.

Some of the statutes here considered apply to testamentary gifts to specified types of societies, associations, corporations, or institutions, and whether or not a particular society, association, corporation, or institution comes within the operation of a particular statute depends on the terms of such statute.<sup>45</sup> Some statutes apparently apply only to gifts to corporations.<sup>46</sup> In general, in order to determine the status of a corporation and to ascertain the purposes for which it was incorporated, as affecting the applicability of the statutory restriction, recourse must be had or consideration given to

29 NY—In re Kaufman's Estate, 285 NYS 347, 158 Misc 102 68 CJ p 549 note 8

30 NY—In re Gardner's Estate, 272 NYS 681, 151 Misc 342 68 CJ p 549 note 9

31 Iowa—Ross v Alleghany Theological Seminary, 215 NW 710, 204 Iowa 648

32 Iowa—Ross v Alleghany Theological Seminary, supra

33. Iowa—Ross v Alleghany Theological Seminary, supra

34. Iowa—Ross v Alleghany Theological Seminary, supra

35 NY—Hollis v Drew, 95 NY 166 68 CJ p 549 note 14

36. NY—Chamberlain v Chamberlain, 43 NY 424

37. NY—Chamberlain v Chamberlain, supra

Scott v Ives, 51 NYS 49, 22 Misc 749.

38. NY—Decker v Vreeland, 115 NE 989, 220 NY 326 68 CJ p 549 note 17.

#### Infringing on right of a foreign state

The policy expressed in statute providing that devise to charity shall be valid only to extent of one half of estate, where testator has wife, child, descendant, or parent, applies to nonresident as well as resident testators, even though its effectuation may at times come perilously close to infringing on right of a foreign state to regulate manner of devolution of property having permanent situs within its confines, or belonging to one of its own citizens, in apparent violation of primary rules that disposition of realty is to be determined in accordance with laws of its situs, and of personality by those of domicile of owner

NY—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768.

39 Ill—Schultz v Chicago City Bank & Trust Co., 51 NE2d 140, 384 Ill 148

68 CJ p 549 note 18

40. Mass—Healy v Reed, 26 NE 404, 153 Mass 197, 10 LRA 766. 68 CJ p 549 note 19

41. Cal—Estate v Lathrop, 131 P 752, 165 Cal 243

42 Cal—In re Sloane's Estate, 152 P 540, 171 Cal 248 68 CJ p 549 note 21

43 Cal—In re Layton's Estate, 19 P2d 793, 217 Cal 451 68 CJ p 550 note 22

44. Md—Johns Hopkins University v Uhrig, 125 A 606, 145 Md 114 68 CJ p 550 note 23

45 NY—Kerr v Dougherty, 79 N. Y. 327 68 CJ p 550 note 27.

46 Iowa—Randleman v Williams, 194 NW 964, 196 Iowa 538. 68 CJ p 550 note 28.

the statute by which it was incorporated or its charter and the statute under which it was framed,<sup>47</sup> its constitution and by-laws,<sup>48</sup> or what has been done or may be done thereunder<sup>49</sup> In the absence of any other evidence as to the character of a particular corporation, its character may be determined from its works<sup>50</sup>

The fact that a corporation was organized under a special act does not prevent its classification as a charitable corporation, under a statute of the type here considered applicable to gifts to charitable corporations, notwithstanding a constitutional provision forbidding incorporation by special act except for a purpose other than charitable and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws<sup>51</sup> The view has been taken that, where both "benevolent" and "charitable" organizations are designated by the statute, the terms are not synonymous,<sup>52</sup> but there is also authority for the view that there is no substantial difference between the two terms<sup>53</sup>

**Statutory exceptions** In order to claim the applicability of a provision of the statute excepting gifts to certain institutions from the operation of the statute of the type here considered, it must appear that the institution in question is within the exception<sup>54</sup> A statutory provision excepting bequests and devises to any state institution or mu-

nicipality, or for the use or benefit of any state institution, exempts from the operation of the statute all absolute bequests and devises and all bequests and devises in trust for charitable uses where the beneficiary is a state institution,<sup>55</sup> a municipality,<sup>56</sup> or an institution exempt from the taxation<sup>57</sup> A county hospital is not, however, a "state institution,"<sup>58</sup> nor is a gift to such hospital for the purpose of a special ward a gift "for the use or benefit" of a state institution,<sup>59</sup> within the meaning of the exception, so as to take the gift out of the operation of the statutory restriction

**Particular corporations, societies, associations, and institutions** The view has been taken that a statute of the type here considered applicable to gifts to charitable or benevolent societies or corporations includes a gift to a bishop as a corporation sole,<sup>60</sup> and a gift to an institution organized for a political purpose<sup>61</sup> A statute applicable to testamentary gifts to corporations not for pecuniary profit has been held to include a corporation organized to conduct a hospital,<sup>62</sup> an orphanage,<sup>63</sup> and a home for aged persons,<sup>64</sup> but a bishop of a particular church is not necessarily a corporation within the meaning of such statute<sup>65</sup> notwithstanding he is for some purposes denominated a corporation sole<sup>66</sup> A statute imposing a restriction on devises or bequests to an educational institution<sup>67</sup> applies to a devise to a state university,<sup>68</sup> and a church is a "religious institution" within the mean-

47. NY—In re Rowland's Will, 232 NYS 127, 225 App Div 118

In re Watkins' Estate, 194 NYS 342, 118 Misc 645

48. NY—In re Watkins' Estate, supra

49. NY—In re Watkins' Estate, supra

50. NY—In re Title Guarantee & Trust Co., 165 NYS 71, 100 Misc 72

68 CJ p 550 note 32

51. NY—In re Rowland's Will, 232 NYS 127, 225 App Div 118

52. NY—In re Watkins' Estate, 194 NYS 342, 118 Misc 645

68 CJ p 550 note 34

53. Cal—In re Halm's Estate, 239 P 307, 196 Cal 778

68 CJ p 550 note 35

54. Cal—In re Bartlett's Estate, 10 P 2d 126, 122 Cal App 375

68 CJ p 550 note 35½

55. Cal—In re Purington's Estate, 250 P 657, 199 Cal 661

68 CJ p 551 note 36

56. Cal—In re Purington's Estate, supra.

#### Memorial for public at large

Where public charitable memorial provided for in will was intended as a memorial for the public at large and was not necessarily intended to become property of county or to be confined to sole benefit of county as a subdivision of state, section, relating to bequests to political subdivisions of state, did not take bequest out of inhibitions of section restricting charitable bequests to one third of estate as against testatrix' niece as her heir

Cal—In re Butin's Estate, 183 P 2d 304, 81 Cal App 2d 76

57. Cal—In re Davis' Estate, 168 P 2d 789, 74 Cal App 2d 357—In re Munson's Estate, 129 P 2d 420, 54 Cal App 2d 590

58. Cal—In re Johnston's Estate, 239 P 397, 197 Cal 28

68 CJ p 551 note 38

59. Cal—In re Johnston's Estate, supra

60. Cal—In re Fitzgerald's Estate, 217 P 773, 62 Cal App 744

68 CJ p 551 note 40

61. Cal—In re Murphey's Estate, 62 P 2d 374, 7 Cal 2d 712

62. Iowa—In re Ihmes' Estate, 134 NW 429, 154 Iowa 20

63. Iowa—Hastings v Rathbone, 188 NW 960, 194 Iowa 177, 23 A L R 392

68 CJ p 551 note 42

64. Cal—In re Henderson's Estate, 112 P 2d 605, 17 Cal 2d 853

Iowa—In re Ihmes' Estate, 134 NW 429, 154 Iowa 20

65. Iowa—Rine v Wagner, 113 N W 471, 135 Iowa 626

66. Iowa—Rine v Wagner, supra

67. **School for blind**, which was exclusively owned, operated, and maintained by the state, was an educational and civil institution which fell within constitutional provision prohibiting bequest of more than one third of estate to any charitable, religious, educational or civil institution to exclusion of decedent's child Miss—Mississippi School for Blind v Armstrong, 62 So 2d 369, 216 Miss 348

68. Ga—Trustees of University of Georgia v Denmark, 81 SE 238, 141 Ga 390

68 CJ p 551 note 46.

ing of a restriction on a devise to such an institution.<sup>69</sup>

Among other organizations which, it has been held or recognized, are subject to a statutory restriction of the type here considered on testamentary gifts to benevolent, charitable, literary, scientific, religious, or missionary societies, associations, or corporations,<sup>70</sup> are a corporation or association whose object or purpose is educational,<sup>71</sup> as, for example, a university,<sup>72</sup> a Young Men's Christian Association,<sup>73</sup> a board of commissioners for foreign missions,<sup>74</sup> a mutual benefit corporation or association,<sup>75</sup> and a society for the prevention of cruelty to animals.<sup>76</sup> There is, however, authority for the view that such statute does not apply to gifts to the United States government,<sup>77</sup> to a state government,<sup>78</sup> or to a municipal corporation.<sup>79</sup> A membership corporation is not a charitable corporation within the statute.<sup>80</sup>

#### f. Type or Form of Gift

- (1) In general
- (2) Gifts to individuals or to corporations not within statute and trusts in general
- (3) Gifts for particular purposes or uses or to particular persons

##### (1) In General

Gifts are not subject to the operation of the statute unless they come plainly within the terms thereof, the statute has been held applicable to gifts of contingent remainders

The question as to whether a particular gift is affected by the statutes here considered is determinable by the terms of the particular statute involved. There is authority for the view that a statute of this type cannot by judicial interpretation be made to include a gift which by fair construction is excluded,<sup>81</sup> and that, since the statute is a limitation on the right of a testator to dispose of his property, a gift is not subject to the operation of the statute unless the gift comes plainly within the terms of the statute.<sup>82</sup> Some of these statutes impose no limitation on gifts in general for charitable uses.<sup>83</sup> In general, a direct gift to a corporation, gifts to which are subject to the statutory limitation, is subject to the limitation<sup>84</sup> and a gift to an institution operated by such a corporation has been regarded as a gift to the corporation so as to bring the case within the operation of the limitation.<sup>85</sup>

*Exercise of power of appointment.* The view has been taken that a statute of this type does not apply to gifts to a charitable or benevolent institution, made in the exercise of a power of appointment conferred on the testator by the will of another,<sup>86</sup> or made in the exercise of a power of appointment over the remainder of a trust fund created by testator for the benefit of another by a deed of trust in which the power was reserved.<sup>87</sup>

*Exclusion of specified relatives.* Under a statute forbidding the gift of more than a specified share of the testator's estate to certain institutions "to the exclusion of" a surviving wife or child, a will effects such exclusion where it creates a life estate

69 Ga.—Kelley v Welborn, 35 SE 636, 110 Ga. 540

#### Limitation as to the size of realty

Where testator devised more than five hundred acres of land to church in trust for maintenance of church house on assumption that such house should forever remain a memorial to testator's wife and provided that should church board ever decree otherwise, land should go to named church Synod in fee simple, ultimate devise to Synod violated statute prohibiting churches and societies of Christians from holding legal or equitable title to more than fifty acres

Ky.—Letcher's Trustee v. Letcher, 194 SW2d 984, 302 Ky 448

70. NY—In re Braasch's Will, 200 NYS 404, 206 App Div 96, 68 CJ p 551 note 48

71. NY—In re Rowland's Will, 232 NYS 127, 225 App Div 118, 68 CJ p 551 note 49

72. NY—Unger v Loewy, 140 NE 201, 236 NY 73

In re Chamot, 111 NYS 2d 299, 201 Misc 374

73. NY—In re Rowland's Will, 232 NYS 127, 225 App Div 118, 68 CJ p 551 note 51

74. NY—In re Donchian's Estate, 199 NYS 107, 102 Misc 535, affirmed 204 NYS 903, 209 App Div 806

75. NY—In re Watkins' Estate, 194 NYS 342, 118 Misc 645, 68 CJ p 551 note 53

76. NY—In re Title Guarantee & Trust Co., 165 NYS 71, 100 Misc 72

77. NY—Levy v Levy, 40 Barb 585, reversed on other grounds 33 NY 97

78. NY—Levy v Levy, supra

79. NY—Matter of Crane, 42 NYS 904, 12 App Div 271, affirmed 54 NE 1089, 139 NY 557

80. NY—In re Schalkenbach's Estate, 279 NYS 181, 155 Misc 332

81. Iowa—In re Clevon's Estate, 142 NW 986, 161 Iowa 289, 68 CJ p 552 note 59

82. NY—Decker v Vreeland, 156 NYS 442, 170 App Div 234, reversed on other grounds 115 NE 989, 220 NY 326

83. Cal.—In re Hamilton's Estate, 186 P 587, 181 Cal 758

84. Iowa—Hastings v Rathbone, 188 NW 960, 194 Iowa 177, 23 ALR 392

NY—In re Allen, 181 NYS 398, 111 Misc 93, affirmed 194 NYS 913, 202 App Div 810, modified on other grounds 142 NE 260, 236 NY 503

85. Iowa—In re Ihmes' Estate, 131 NW 429, 154 Iowa 20

86. NY—Farmers' L & T Co v. Shaw, 107 NYS 337, 56 Misc 201, affirmed 111 NYS 1118, 127 App Div 656, 68 CJ p 552 note 69

87. NY—Lord v Lord, 90 NYS 143, 44 Misc 530

only for the surviving wife or child with remainder over to an institution included in the statute <sup>88</sup>

*Gift of remainder* The applicability of the statute has been recognized, even though the gift otherwise subject to the statute is a contingent remainder<sup>89</sup> subject to being defeated by the birth of issue to the life tenant<sup>90</sup> The applicability of the statute has also been recognized even though the life tenant is authorized to consume the corpus,<sup>91</sup> where executors are given authority to use such portion of the corpus, in addition to income, as may be necessary for the support of the life beneficiary,<sup>92</sup> and where the will creates a trust to pay an annuity to the testator's wife who is the only surviving relative of those mentioned in the statutory limitation, and to pay to a corporation within the statutory limitation the balance of the income and to transfer all the property to such corporation on the death of the wife <sup>93</sup> Where, however, the gift of a remainder never became effective because the contingency on which it depended never happened, the view was taken that such gift may not be included in determining the amount of the gifts subject to the statutory limitation, as discussed *infra* subdivision h(3) (b) of this section

## (2) Gifts to Individuals or to Corporations Not Within Statute and Trusts in General

In order to bring gifts to individuals within the operation of some statutes of the character under consideration, the gifts must be both in trust and for charitable uses

Some of the statutes here considered apply only to gifts to charitable or benevolent corporations, as considered *supra*, subdivision e of this section, or to gifts in trust for charitable uses<sup>94</sup> and, in order to bring gifts to individuals within the operation of such statutes, such gifts must be both in trust and

for charitable uses<sup>95</sup> Where the statute is applicable to gifts to corporations and there is no reference to gifts in trust, the view has been taken that the statute does not apply to gifts to individuals in trust for charitable uses,<sup>96</sup> but a testamentary gift to a corporation which is subject to the statutory limitation, with directions that the corpus of the gift is to constitute a permanent endowment and the income is to be expended for the purposes of the corporation, is a direct bequest to the corporation and is not such a gift in trust as will relieve it from the operation of the statutory limitation<sup>97</sup> Under a statute applicable to testamentary gifts to certain types of institutions, a gift to trustees of such an institution has been regarded as a gift to the institution <sup>98</sup>

*Devise or bequest to an ecclesiastical person* A statute providing that no devise or trust for the benefit of any person and his successor or successors in any ecclesiastical office shall vest any estate or interest in such person or his successor, does not apply to a devise of real, personal, and mixed property to a bishop by name<sup>99</sup> Likewise, the mere fact that a gift is in trust to a person holding an ecclesiastical office is not enough to bring it within the statute <sup>1</sup>

Prior to an amendment of the New York statute, which added "purpose" after "society, association, or corporation,"<sup>2</sup> the statute which in terms applied to gifts to certain types of societies, associations, or corporations, in trust or otherwise, did not include a testamentary gift to individuals in trust for a charitable purpose<sup>3</sup> notwithstanding the will also authorized, but did not compel, the trustees to create a corporation <sup>4</sup> Where, however, the gift is to a trustee, either corporate<sup>5</sup> or individual,<sup>6</sup> in trust to pay the income to a specified society, association, or corporation, gifts to which are subject to the

88. Ga.—Trustees of University of Georgia v Denmark, 81 SE 230, 141 Ga 390—Kellev v Welborn, 35 SE 636, 110 Ga 540

89. NY—In re Shuman's Estate, 224 NYS 363, 130 Misc 716

90. NY—In re Matter of Durand, 87 NE 677, 194 NY 477  
68 CJ p 552 note 74

91. NY—McKeown v Officer, 6 NYS 201, 53 Hun 634, 2 Silv Sup 552, 25 NY St R 319, appeal dismissed 28 NE 401, 127 NY 687, 3 Silv A 525, 40 NY St R 223

92. NY—Rich v Tiffany, 37 NYS 330, 2 App Div 25  
68 CJ p 552 note 76

93. NY—In re Leary's Estate, 1 Tuck Surr 233

94. Cal—In re Hamilton's Estate, 186 P 587, 181 Cal 758

95. Cal—In re Hamilton's Estate, *supra*  
In re Steinman's Estate, 94 P 2d 821, 35 Cal App 2d 95

96. Iowa—Randleman v Williams, 194 NW 964, 196 Iowa 538  
68 CJ p 552 note 83

97. Iowa—Hastings v Rathbone, 188 NW 960, 194 Iowa 177, 23 ALR 392

98. Ga.—Trustees of University of Georgia v Denmark, 81 SE 239, 141 Ga 390  
68 CJ p 553 note 86

99. Del—Monaghan v Joyce, 103 A 582, 12 Del Ch 28

1. Del—Delaware Trust Co v Fitzmaurice, 31 A 2d 383, modified on other grounds Crumlish v Delaware Trust Co, 38 A 2d 463

2. NY—In re Blumenthal's Estate, 208 NYS 682, 686 124 Misc 850, reheard 215 NYS 142, 126 Misc 603

68 CJ p 553 note 87

3. NY—In re Merritt's Will, 209 NYS 243, 124 Misc 709  
68 CJ p 553 note 88

4. NY—In re Merritt's Will, *supra*  
68 CJ p 553 note 89

5. NY—In re Oster's Estate, 204 NYS 235, 123 Misc 17

6. NY—Decker v Vreeland, 115 NE 989, 220 NY 326—Allen v Stevens, 55 NE 568, 161 NY 123

statute, such gift in trust comes within the operation of the statute. So also, the statute is applicable where designated trustees are required to turn over the subject of the trust to a corporation which is within the statute.<sup>7</sup> While a testator may not evade the statute by giving his property by will to individuals, in form absolutely but in fact subject to a secret trust for a purpose or organization within the statute,<sup>8</sup> the mere fact that the will shows that it is the desire of the testator that the property should be used for such a purpose is not sufficient to show the creation of a secret trust,<sup>9</sup> and where in such case evidence dehors the will does not show that there was a secret trust, the statute is not applicable.<sup>10</sup>

### (3) Gifts for Particular Purposes or Uses or to Particular Persons

Gifts for charitable uses include the furtherance of religion or religious purposes and gifts for masses, and a gift for a charitable or benevolent purpose is applicable to a gift for the care, maintenance, and improvement of a cemetery.

There is authority for the view that, within the meaning of a statute of the type here considered applicable to gifts for "charitable uses," such uses include the furtherance of religion or religious purposes,<sup>11</sup> and missionary purposes,<sup>12</sup> and that a statute applicable to gifts for a "charitable" and "benevolent" purpose includes an "educational purpose."<sup>13</sup> So, also, a gift for the benefit of a teachers' welfare loan fund is within a statute applicable to a gift for a "charitable purpose,"<sup>14</sup> as is a gift for a scholarship.<sup>15</sup> Prior to the amendment of the New York statute, which added the word "purpose" after "society, association, or corporation," it was held that a gift to a bishop for the erection

of a parochial school was not within the statutory provision applicable to certain types of societies, associations, or corporations.<sup>16</sup>

*Gifts for care and embellishment of cemetery and cemetery lots* The view has been taken that a statute applicable to a devise or bequest for a charitable or benevolent purpose is applicable to a gift for the care, maintenance, and improvement of a cemetery,<sup>17</sup> but the statute has been held not to apply to gifts for the care, maintenance, and the like of a particular burial or cemetery lot.<sup>18</sup>

*Gifts for masses* A particular gift for masses has been held not excessive and the testator has the right to dispose of the property for any legitimate purpose he sees fit.<sup>19</sup> Prior to an amendment of the New York statute, which added the word "purpose" after "society, association, or corporation," it was held that a gift to the pastor or priest of a specified Roman Catholic Church for masses for the repose of the soul of the testator and of members of his family was not within the statutory provision applicable to gifts to certain types of societies, associations, or corporations,<sup>20</sup> even where the will provided that the masses were to be said in such church,<sup>21</sup> subsequent to the above amendment, the cases are apparently not in accord as to the applicability of the statute to gifts for masses.<sup>22</sup>

In order to bring a testamentary gift to an individual within the application of the governing California statute, the gift must be both in trust and for a charitable use, and, therefore, the statute does not apply to a gift to an individual for masses where the elements of a trust are lacking.<sup>23</sup> It has been held, however, that a gift for masses is a gift for a charitable use within the meaning of such

7 N.Y.—*Jones v Kelly*, 63 N.E. 443, 170 N.Y. 401.

68 C.J. p. 553 note 92.

8 N.Y.—*Trustees of Amherst College v Ritch*, 45 N.E. 876, 151 N.Y. 282, reargument denied 46 N.E. 1152, 152 N.Y. 641.

*Durkee v Smith*, 156 N.Y.S. 920, 171 App.Div. 72, motion denied 112 N.E. 1057, 218 N.Y. 619, and affirmed 114 N.E. 1066, 219 N.Y. 604.

9 N.Y.—*Durkee v Smith*, supra.

10 N.Y.—*Durkee v Smith*, supra.

68 C.J. p. 553 note 95.

11 Cal.—*In re Hamilton's Estate*, 186 P. 587, 181 Cal. 758.

68 C.J. p. 553 note 96.

12 Cal.—*In re Hewitt's Estate*, 29 P. 775, 94 Cal. 376.

13 N.Y.—*In re Rowland's Will*, 232 N.Y.S. 127, 225 App.Div. 118.

14 N.Y.—*In re Howell's Estate*, 261 N.Y.S. 859, 146 Misc. 169.

15 N.Y.—*In re McArdle's Will*, 264 N.Y.S. 764, 147 Misc. 876.

16 N.Y.—*Vanderveer v McKane*, 11 N.Y.S. 808, 25 Abb.N.Cas. 105.

68 C.J. p. 553 note 3.

17 N.Y.—*In re Rathbone's Estate*, 11 N.Y.S.2d 506, 170 Misc. 1030, affirmed *In re Rathbone's Will*, 27 N.Y.S.2d 993, 262 App.Div. 706, affirmed 39 N.E.2d 930, 287 N.Y. 708, and motion denied 41 N.E.2d 171, 287 N.Y. 847.

68 C.J. p. 553 note 5.

18 N.Y.—*In re Baeuchle's Will*, 82 N.Y.S.2d 371, affirmed 94 N.Y.S.2d 582, 276 App.Div. 925, affirmed 93 N.E.2d 491, 301 N.Y. 582.

68 C.J. p. 554 note 6.

**Bequest for upkeep of burial plot held not a gift to charity**

N.Y.—*In re Voelker's Estate*, 285 N.Y.S. 519, 158 Misc. 97—*In re Miranda's Will*, 271 N.Y.S. 913, 151 Misc. 459.

19 Ky.—*Ramsey v Mahoney's Ex'r*, 178 S.W.2d 961, 297 Ky. 62.

20 N.Y.—*In re Zimmerman's Will*, 50 N.Y.S. 395, 22 Misc. 411.

68 C.J. p. 554 note 9.

21 N.Y.—*Vanderveer v McKane*, 11 N.Y.S. 808, 25 Abb.N.Cas. 105.

22 N.Y.—*In re McArdle's Will*, 264 N.Y.S. 764, 147 Misc. 876—*In re Brown's Will*, 238 N.Y.S. 160, 135 Misc. 611.

68 C.J. p. 554 note 11.

23 Cal.—*In re Hamilton's Estate*, 186 P. 587, 181 Cal. 758.

68 C.J. p. 554 note 13.

statute,<sup>24</sup> and that, where the gift is in trust, the statute is applicable<sup>25</sup>

### g. Who May Question Gifts; Waiver and Estoppel

Under some statutes only those persons who are specified may question a testamentary gift on the ground that it is in excess of the permitted amount. The right to invoke the statute may be waived by failure to contest the validity of the gift.

Under some statutes only those persons who are

specified<sup>26</sup> therein as survivors,<sup>27</sup> or a legal representative, such as a guardian, of such specified person,<sup>28</sup> may question a testamentary gift on the ground that it is in excess of the amount permitted by statute. Such authority is a personal privilege,<sup>29</sup> and should be narrowly restricted.<sup>30</sup> Other persons who might be entitled to a share of the estate may not contest the gift notwithstanding the survivorship of a person or persons specified.<sup>31</sup> A person so specified may waive his right to invoke the

24 Cal—In re Hamilton's Estate, supra  
68 C.J. p 554 note 14

25 Cal—In re Hamilton's Estate, supra  
68 C.J. p 554 note 15

26 U.S.—Humphrey v Millard, C.C. A.N.Y., 79 F.2d 107

Cal—In re Bunn's Estate, 206 P.2d 635, 33 Cal.2d 897

In re Davison's Estate, 215 P.2d 504, 96 Cal.App.2d 263

N.Y.—In re Hills' Will, 191 N.E. 12, 264 N.Y. 349, 93 A.L.R. 1380

In re Crakow's Estate, 32 N.Y.S. 2d 832, 177 Misc. 1034—In re Donnelly's Estate, 14 N.Y.S.2d 700, 172 Misc. 107—In re Sonderling's Will, 283 N.Y.S. 568, 157 Misc. 231

In re Shapiro's Estate, 141 N.Y.S.2d 702

#### Purpose of statute

The purpose of the 1929 amendment to the Decedent Estate Law statute providing that the validity of a bequest for more than one half of testator's estate to charity may be contested only by a surviving husband, wife, child, descendant, or parent, was that only those whose survivorship furnishes the ground for an objection to the will shall have the right to object.

N.Y.—In re Plaster's Estate, 37 N.Y.S.2d 498, 179 Misc. 80, affirmed 43 N.Y.S.2d 1, 266 App.Div. 439, affirmed 59 N.E.2d 181, 293 N.Y. 822

An adopted child is entitled to the benefit of statute prohibiting devises or bequests of over one half of testator's estate to charity in event he is survived by a child.

N.Y.—In re Upjohn's Will, 107 N.E.2d 492, 304 N.Y. 366.

#### Incompetent

(1) In determining direction to be given committee with regard to contesting validity of bequest of more than one half of estate to charitable corporation, in absence of convincing direct evidence from which incompetent's wishes can be determined, supreme court must ascertain incompetent's wishes from facts of a circumstantial nature.

N.Y.—In re Chamot, 111 N.Y.S.2d 299, 201 Misc. 374.

(2) Question whether paper propounded as last will and testament of decedent was illegal and void with respect to incompetent widow in that more than one half of estate was devised and bequeathed to charitable and benevolent associations should be presented by duly appointed committee for ward of special guardian.

N.Y.—In re Clocke's Will, 100 N.Y.S.2d 715

(3) Committee of incompetent surviving wife who was life beneficiary of residuary estate devised and bequeathed in trust by testator was not authorized to contest validity of charitable bequest, in absence of direction from supreme court on question whether or not committee should reject testamentary provision made for benefit of wife.

N.Y.—In re Hills' Will, 191 N.E. 12, 264 N.Y. 349, 93 A.L.R. 1380

The word "descendant" as used in the statute providing that the validity of a bequest for more than one half of testator's estate to charity may be contested only by surviving husband, wife, child, descendant, or parent, means one who takes immediately from an ancestor by operation of law as an heir on the death of his ancestor and is limited to living children of testator and to lineal descendants of deceased child and does not include any relative to whom in some possible contingency property may descend.

N.Y.—In re Plaster's Estate, 37 N.Y.S.2d 498, 179 Misc. 80, affirmed 43 N.Y.S.2d 1, 266 App.Div. 439, affirmed 59 N.E.2d 181, 293 N.Y. 822

#### Former law

For decisions under the New York statute prior to its amendment see 68 C.J. p 555 note 23½—p 556 note 37, p 928 note 32 [b]

27 Iowa—Karolusson v Paonessa, 222 N.W. 431, 207 Iowa 127

68 C.J. p 554 note 18

28 Iowa—Karolusson v. Paonessa, supra

29. Cal—In re Bunn's Estate, 206 P.2d 635, 33 Cal.2d 897

N.Y.—In re Chamot, 111 N.Y.S.2d 299, 201 Misc. 374—In re Webster's Estate, 33 N.Y.S.2d 862, 178 Misc. 342—In re Donnelly's Estate, 14 N.Y.S.

2d 700, 172 Misc. 107—In re Sonderling's Will, 283 N.Y.S. 568, 157 Misc. 231

#### Assignment to heir

Assignments to testator's heir of another heir's interests in funds to which they might be entitled by reason of operation of statute was effective as against contention that right to invoke such statute is personal one and that only assignee can benefit by his invocation thereof, since its invocation by him as one of permitted class requires payment to testator's children of excess over statutory limit of such gifts under clause of will devising to them any portion of estate not effectually disposed of by will.

N.Y.—In re Watson's Estate, 30 N.Y.S.2d 577, 177 Misc. 308

30. Cal—In re Bunn's Estate, 206 P.2d 635, 33 Cal.2d 897

N.Y.—In re Plaster's Will, 43 N.Y.S.2d 1, 266 App.Div. 439, affirmed 59 N.E.2d 181, 293 N.Y. 822

In re Webster's Estate, 33 N.Y.S.2d 862, 178 Misc. 342

#### Remedial statute

It has been held, however, that the statute is remedial and should be liberally construed.

N.Y.—In re Sonderling's Will, 283 N.Y.S. 568, 157 Misc. 231

31. Cal—In re Bunn's Estate, 206 P.2d 635, 33 Cal.2d 897

Iowa—Karolusson v Paonessa, 222 N.W. 431, 207 Iowa 127

N.Y.—In re Korzeniewska's Estate, 297 N.Y.S. 997, 163 Misc. 323

#### First cousin

Under statute prohibiting any person having husband, wife, child, or "descendant" or parent from bequeathing more than one half of her estate to charity, first cousin and sole distributee of testatrix had no right to object to the will which left more than half of testatrix' estate to charities.

N.Y.—In re Holyland's Will, 116 N.Y.S.2d 628

#### Natural father

Where father consented to adoption of two year old daughter by child's maternal grandparents, on death of child natural father had no proper standing under Decedent Estate Law to contest charitable be-



statute,<sup>32</sup> and, where surviving children of a testator fail or refuse to claim the enforcement of the prohibition of a statutory provision that no person leaving a wife, child, or descendants of a child shall devise more than a certain fractional share of his estate to certain institutions to the exclusion of such wife or children, collateral heirs of the testator may not invoke such prohibition.<sup>33</sup>

The question as to who has the right to file objections to a will must be decided as of the time of the testator's death and not as of the time of filing objections.<sup>34</sup> A contest of the will begins when one authorized to contest the will first questions its validity and seeks to assert the statutory right.<sup>35</sup> Thus, such person acquires a property right as distributee at the time he commences the contest of the will by filing the objections,<sup>36</sup> and such right survives the contestant's death and can be pursued by his administrators,<sup>37</sup> notwithstanding no decree is submitted or signed before the contestant's death.<sup>38</sup> Where, however, a person entitled to object fails to do so during his lifetime, the right to file objection does not survive him and his executor or administrator has no right to contest the will.<sup>39</sup>

A special guardian, of a person entitled to question the validity of the gift but who is an absentee, has no authority to assert a purely personal right of the ward.<sup>40</sup> If a will is not contested the legal title is in charities, and the property will pass to them under the will.<sup>41</sup>

The right of a parent, husband, wife, child, or grandchild of the testator or the testatrix to waive a restriction of the type here considered by a writing executed at least six months prior to the death of the testator or the testatrix where the will was executed at least six months prior to the death of the testator or the testatrix has been granted by some statutory provision, the validity of which has been upheld.<sup>42</sup>

*What constitutes waiver or estoppel* The failure to assert the right to contest the validity of a gift creates a waiver,<sup>43</sup> and permits the beneficiary to take the whole estate.<sup>44</sup> Persons who are entitled to claim the benefit of the statute may waive or relinquish the right by the execution, for a consideration, of releases in respect of gifts subject to the statute,<sup>45</sup> and a husband may, by an antenuptial

quests in excess of one half of estate of decedent

NY—In re McCabe's Estate, 127 N Y S 2d 726, 205 Misc 198

#### Statute construed

(1) Amendment of section of Probate Code making a limitation as to degree of relationship of heirs who could invalidate testamentary gifts to charity does not operate to repeal other sections in same article relating to bequests or devises by will executed at least six months prior to death of testator leaving no spouse, child, grandchild, or parent

Cal—In re Mealy's Estate, 204 P 2d 971, 91 Cal App 2d 371—In re Cottrill's Estate, 150 P 2d 214, 65 Cal App 2d 222

(2) Sons of predeceased husband of deceased testatrix could not invalidate charitable gifts made by testatrix less than six months before her death to extent that gifts exceeded one third of her estate under statute permitting spouse, brother, sister, nephew, niece, descendant, or ancestor to challenge charitable gifts in excess of one third of estate, if made less than six months before death, and therefore sons were not entitled to take estate of testatrix in excess of one third under statute providing that where there is no will and estate of deceased was separate estate of predeceased spouse and came to deceased by gift, descent, devise, or bequest, estate should go to heirs of predeceased spouse

Cal—In re Jephcott's Estate, 251 P 2d 1001, 115 Cal App 2d 277

32. US—Humphrey v Millard, CC A NY, 79 F 2d 107

Iowa—Randleman v Williams, 194

NW 964, 196 Iowa 538

NY—In re Watson's Estate, 30 NY S 2d 577, 177 Misc 308

#### Effect

Where will contained charitable bequests in excess of one half of estate, contrary to statute, but heirs accepted interests given them by the will and waived any other interests which they might have had, and will was then probated, the proportion of the estate going to charity was established once and for all

US—Dimock v Corwin, DC NY, 19 F Supp 56, affirmed, CCA, 99 F 2d 799, affirmed 59 S Ct 551, 306 U S 363, 83 L Ed 763

33. Ga.—Monahan v O'Byrne, 95 S E 210, 147 Ga 633

68 C J p 555 note 22

34. NY—In re Plaster's Estate, 37 N Y S 2d 498, 179 Misc 80, affirmed 43 N Y S 2d 1, 266 App Div 439, affirmed 59 NE 2d 181, 293 NY 822

**Time to challenge** is on distribution of the estate

Pa.—In re Crozer's Estate, 18 A 2d 323, 341 Pa 75

35. NY—In re Sonderling's Will, 283 N Y S 568, 157 Misc 231

36. NY—In re Sonderling's Will, supra

37. NY—In re Sonderling's Will, supra

38. NY—In re Sonderling's Will, supra

39. NY—In re Plaster's Estate, 37 N Y S 2d 498, 179 Misc 80, affirmed 43 N Y S 2d 1, 266 App Div 439, affirmed 59 NE 2d 181, 293 NY 822 —In re Webster's Estate, 33 N Y S 2d 862, 178 Misc 342

40. NY—In re Donnelly's Estate, 14 N Y S 2d 700, 172 Misc 107

41. US—Millard v Humphrey, DC NY, 8 F Supp 784, affirmed, CCA, Humphrey v Millard, 79 F 2d 107

NY—In re Donnelly's Estate, 14 N Y S 2d 700, 172 Misc 107

42. Cal—In re Graham's Estate, 218 P 84, 63 Cal App 41

43. NY—In re Sonderling's Will, 283 N Y S 568, 157 Misc 231

#### Signing of letter

A testatrix' children signing at her request letters stating that if any portion of her estate, not effectually disposed of by her will, passed to them under provisions thereof, it would be given to named charitable institutions on same terms as testamentary gifts of her residuary personal estate to such institutions, made no effective waiver of their rights under statute prohibiting testamentary gifts to charity in excess of 50 per cent of testator's gross estate less debts

NY—In re Watson's Estate, 30 NY S 2d 577, 177 Misc 308

44. NY—In re Sonderling's Will, 283 N Y S 568, 157 Misc 231

45. NY—Trustees of Amherst College v Ritch, 45 NE 876, 151 NY.

agreement, waive the benefit of a statute which specifies a husband as one of the survivors<sup>46</sup> The statutes in question, however, cannot be evaded by the device of a testator entering into an agreement with a prospective legatee that he would devote his legacy to the charitable purposes desired by the testator, or by charging the gift to one entitled to invoke the statute with the trust obligation to devote it to the charities<sup>47</sup>

There is authority for the view that a person who is entitled to claim the benefit of the statute may waive his right by accepting the benefit of a provision for him in the will and by not objecting to the excessive gift<sup>48</sup> According to some decisions, however, the fact that a person named in a statute of this type as one of the survivors receives payments or benefits in accordance with the terms of the will does not necessarily prevent such person's claiming the applicability of the statute,<sup>49</sup> or work an estoppel in this regard<sup>50</sup> So the fact that a person interested in the testator's estate stipulates, on the withdrawal, for a consideration, of his objections to the probate of the will, that he shall not question the validity of gifts in the will does not necessarily constitute a waiver of the right to invoke the limitation fixed by the statute<sup>51</sup>

Under a proviso in a statute of the type here considered that the statute shall not apply where certain specified heirs shall, by a writing executed a specified time prior to the testator's death, waive the statutory limitation, a mere consent to the pro-

visions of a will written on the face thereof by one of the specified heirs, for whom provision is made by such will, does not constitute a general waiver of the rights and benefits secured to heirs by the statute,<sup>52</sup> and does not apply to a subsequent codicil making substantial changes in the disposition of the property involved<sup>53</sup>

#### **h. Amount of Estate and of Gifts Subject to Statute and Disposable Amount**

- (1) In general
- (2) Determination of amount of estate and disposable amount
- (3) Amount of gifts subject to statute

##### **(1) In General**

The fact that the amount of testamentary gifts is in excess of the share permitted must be established by proof, and the burden of proof is on the person who attacks the validity of the gifts

The fact that the amount of testamentary gifts is in excess of the share permitted must be established by proof<sup>54</sup> The burden of proof is on the person who attacks the gifts because of the alleged excess<sup>55</sup> Whether or not such excess exists is usually a question of fact<sup>56</sup> A complaint in an action by one who seeks to establish that testamentary gifts subject to the statute exceed in amount the fractional share of the testator's estate which may be applied to such gifts, which fails to aver as a fact the existence of such excess, is bad,<sup>57</sup> an averment that the gifts are invalid because they exceed

282, 37 L.R.A. 305, reargument denied 46 NE 1152, 152 NY 641  
68 C.J. p 556 note 38

46. NY—In re Matter of Stilson, 83 NYS 67, 85 App Div 132

47. NY—In re Watson's Estate, 30 NYS 2d 577, 177 Misc 308

48. Iowa—Randleman v Williams, 194 NW 964, 196 Iowa 538  
68 C.J. p 556 note 40

49. Ga—Trustees of University of Georgia v Denmark, 81 SE 238, 141 Ga 390  
68 C.J. p 556 note 41

50. Ga—Trustees of University of Georgia v Denmark, supra  
68 C.J. p 556 note 42

51. NY—In re Opdyke's Will, 243 NYS 606, 230 App Div 290, modified on other grounds 174 NE 646, 255 NY 255, 74 ALR 641

52. Cal—In re Johnston's Estate, 239 P 397, 197 Cal 28

53. Cal—In re Johnston's Estate, supra

54. NY—Garvey v U S Fidelity &

Guaranty Co., 79 NYS 337, 77 App Div 391

68 C.J. p 556 note 48

#### **Gifts held not excessive**

Where one-half of the estate of testator after payment of debts amounted to far more than what the charities provided for by the testator would receive, the testator's heir was entitled to no relief under provision of statute limiting, in certain circumstances, amount which a testator may bequeath to charitable institutions

NY—In re Brenner's Estate, 7 NYS 2d 932, 169 Misc 412, affirmed In re Brenner's Will, 12 NYS 2d 352, 256 App Div 1064

#### **Election by surviving spouse**

A provision in will giving wife a life estate and giving residuary estate at death of wife to village for erection of hospital was not violative of provision relating to election by surviving spouse against or in absence of testamentary provision, where mathematical computation of value of life estate to wife showed

that she received value in excess of one-half of total value of estate  
NY—In re Kirkbride's Estate, 24 NYS 2d 375, 261 App Div 853, appeal denied 25 NYS 2d 1016, 261 App Div 871, appeal denied 32 NE 2d 835, 285 NY 859

#### **Prior will**

The fact that in a prior will the testator attempted to give more than allowed by law to a charity is not the evidence that a bequest to an individual was given on a secret trust to evade such law  
Cal—Garner v Purcell, 160 P 682, 173 Cal 495

55. Iowa—Rine v Wagner, 113 NW 471, 135 Iowa 626

NY—In re Matter of Durand, 87 NE 677, 194 NY 477  
68 C.J. p 547 note 61

56. NY—Garvey v Union Trust Co., 52 NYS 260, 29 App Div 513

57. NY—Garvey v U S Fidelity & Guaranty Co., 79 NYS 337, 77 App Div 391—Garvey v Union Trust Co., 52 NYS 260, 29 App Div 513

the permitted share is a conclusion and is insufficient to raise the question as to the excess<sup>58</sup>

## (2) Determination of Amount of Estate and Disposable Amount

The whole property of the testator wherever situated, less the testator's debts, must be included in determining the disposable share to charities

The method of ascertaining the value of the estate and the amount which may be applied to gifts subject to a statute of the type here considered has been determined by a consideration of the terms of such statute in connection with other statutory provisions governing probate cases and the settlement of the estates of deceased persons<sup>59</sup> Accordingly, the total value of the distributable estate, a fractional share of which may be applied to gifts subject to the statute, is ascertained by taking the value of all the assets,<sup>60</sup> real and personal,<sup>61</sup> distributed, as of the date of distribution<sup>62</sup> Even in the absence of any specific provision for the deduction of debts, it is only the specified fractional share of the estate after the payment of debts,<sup>63</sup> charges of administration,<sup>64</sup> and the federal estate tax,<sup>65</sup> which may be distributed to the corporations or for the purposes subject to the statutory restriction

Under a statutory provision that no devise or bequest shall be valid in excess of a specified fractional

share of the testator's estate after the payment of debts, the debts are to be deducted<sup>66</sup> and the view has been expressed that the term "debts," as used in the statute, includes the costs of administration<sup>67</sup> but not legacies,<sup>68</sup> the "net estate," a share of which may be disposed of by devises or bequests subject to the statute, is determined by deducting the amount of such debts from the value of the gross assets of the estate<sup>69</sup>

Under the New York statute, in fixing the value of a testator's estate, one half of which may be given to organizations or for purposes subject to the statutory limitation, the general rule that the statute speaks as of the time of the death of the testator has been recognized or applied<sup>70</sup> The whole estate,<sup>71</sup> real and personal,<sup>72</sup> of the testator, wherever situated, must be included, and the value taken as of the date of his death,<sup>73</sup> that is, the whole estate must be treated as converted into money as of the date of the testator's death<sup>74</sup> Property which the testator owned at the time of his death, although not disposed of by the will, is included,<sup>75</sup> but property previously given in trust is not included<sup>76</sup> In general, the value of the widow's dower should be excluded from the valuation of the testator's estate as such dower constitutes no part of his estate,<sup>77</sup> but the rule is otherwise where dower has been released by the widow<sup>78</sup> The property set off to the surviving spouse,<sup>79</sup> or a minor

58. NY—Garvey v U S Fidelity & Guaranty Co., 79 NYS 337, 77 App Div 391—Garvey v Union Trust Co., 52 NYS 260, 29 App Div 513

59. Cal—In re Estate of Hinckley, 58 Cal 457

60. Cal—In re Estate of Hinckley, supra

**Statutory share refers to distributable estate**

Cal—Bauer's Estate, 138 P 2d 717, 59 Cal App 2d 152

61. Cal—In re Estate of Hinckley, 58 Cal 457

62. Cal—In re Campbell's Estate, 165 P 931, 175 Cal 345—In re Estate of Hinckley, 58 Cal 457

63. Cal—In re Campbell's Estate, 165 P 931, 175 Cal 345  
68 C J p 557 note 57

64. Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680  
68 C J p 557 note 58

65. Cal—In re Bauer's Estate, 138 P 2d 717, 59 Cal App 2d 152

66. Iowa—Hastings v Rathbone, 188 NW 960, 194 Iowa 177, 23 A L R 392  
68 C J p 557 note 59

67. Iowa—Hastings v. Rathbone, supra

68. Iowa—Hastings v Rathbone, supra

69. Iowa—Hastings v Rathbone, supra

70. NY—In re Seymour's Will, 146 NE 372, 239 NY 259—Harris v American Bible Soc., 2 Abb Dec 316, 4 Transc A 485, 4 Abb Pr, N S, 421

71. NY—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768  
68 C J p 557 note 65

72. NY—Decker v Vreeland, 115 N E 989, 220 NY 326  
68 C J p 557 note 66

73. NY—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768—In re Korzeniewska's Estate, 297 NYS 997, 163 Misc 323—In re Buck's Estate, 285 NYS 515, 158 Misc 111, 114—In re Sonderling's Will, 279 NYS 703, 155 Misc 403  
In re Sykes' Will, 53 NYS 2d 442

68 C J p 557 note 68

74. NY—In re Korzeniewska's Estate, 297 NYS 997, 163 Misc 323—In re Loid's Estate, 279 NYS 613, 155 Misc 628  
68 C J p 557 note 69

75. NY—In re Matter of Moderno, 5 Dem Surr 288

76. NY—In re Walker's Will, 17 NYS 666, 63 Hun 627, reversed on other grounds 32 NE 633, 136 NY 20

68 C J p 557 note 71

77. NY—Chamberlain v. Chamberlain, 43 NY 424  
68 C J p 557 note 72

78. NY—Hughes v Stoutenburgh, 154 NYS 65, 168 App Div 512  
68 C J p 558 note 73

79. NY—In re Epstein's Estate, 27 NYS 2d 872, 176 Misc 494

**Statute governing election by surviving spouse construed**

The statute prohibiting testator or testatrix having spouse, child, descendant or parent from leaving more than half his or her estate to benevolent, charitable, literary, scientific, religious or missionary society, association, corporation or purpose, and the statute governing election by surviving spouse against or in absence of testamentary provision, are correlative, and are neither exclusive nor contradictory of each other, and effect of election under latter statute is involved in and incidental to a determination of rights under former statute, thus, the making of a valid election against will under section 18 of the Decedent Estate

child,<sup>80</sup> is not included in the valuation of the testator's estate. The amount of cash, however, which a surviving spouse withdraws from the estate pursuant to statutory provision conferring the right of election is to be considered as a benefit accruing to the spouse as of the date of the death of the deceased spouse and must be included in the total benefits payable by bequest or devise to the non-charitable beneficiaries.<sup>81</sup>

In view of the fact that the statute limits the disposable amount to organizations or for purposes within the statute to one half part of the estate after the payment of debts, the amount of the testator's debts must be deducted,<sup>82</sup> this requires the deduction of the amount of a bequest in payment of a debt due to the person to whom the bequest is made,<sup>83</sup> and of the amount of the federal income tax on income accrued prior to the testator's death.<sup>84</sup> Legacies for purposes not within the statute<sup>85</sup> and administration expenses<sup>86</sup> are not, however, deductible in determining the net estate. The net estate, of which one half may be given to organizations or for purposes within the statute, is determined by deducting the debts from the value of the gross assets of the estate,<sup>87</sup> and gifts subject to the statute may be given effect, if otherwise valid, to the extent

of one half part of the net estate so ascertained<sup>88</sup> but to no greater extent.<sup>89</sup>

*Situation of property* Under some statutes of the type here considered, the whole estate of the testator, wherever situated,<sup>90</sup> must be considered and valued in determining the disposable portion to organizations or for purposes or uses subject to the statute, even though part of the property involved is located in a jurisdiction other than that in which the statute has been enacted.<sup>91</sup> If legal provisions for organizations or purposes subject to the statute, outside the state in which the statute has been enacted and is operative, amount to the permissible fractional share or more of the entire net estate, the property which has a situs within such state may not be given to the organizations or for the purposes to which the statute applies.<sup>92</sup> If such legal provisions outside the state amount to less than the permitted fractional share, as much of the property which has a situs within the state as is necessary to make up the permissible fractional share may be used.<sup>93</sup> In other words, where it is shown, that, in the administration of the estate in jurisdictions other than the state in which the statute has been enacted and is operative, heirs at law of the testator have received the share of the whole es-

Law effects a restriction on the term "last will and testament" in section 17 of such law, as if such term read "last will and testament as modified by a valid election made under section 18 of this act," and a valid election has the effect of a statutory codicil to the will.

NY—In re Epstein's Estate, *supra*

80 NY—In re Epstein's Estate, *supra*

81. NY—In re Apple's Estate, 252 NYS 580, 141 Misc 380  
68 C.J. p 558 note 82

#### Statutory exemption

Where widow elected to take against provisions of will, charities which were designated as remaindermen under two trusts for widow could not deduct from amount widow was entitled to take one hundred and fifty dollars as the agreed value of an automobile, since widow received automobile under statute as an exemption for her benefit.

NY—In re Ball's Estate, 14 NYS 2d 889, 172 Misc 181

82 NY—In re Mayers' Estate, 73 NYS 2d 715, 189 Misc 700, affirmed 84 NYS 2d 895, 274 App Div 918, affirmed 87 NE 2d 422, 299 NY 388, 11 ALR 2d 1136  
68 C.J. p 558 note 74

Only amount actually paid in settling disputed claims should be used in determining amount of testator's debts, and not full amount of disput-

ed claims, and no addition to such amount paid could be made for legal services rendered in resisting claims.  
NY—In re Epstein's Estate, 27 NYS 2d 872, 176 Misc 494

#### Proceeding expenditures

Proper charges against estate for expenditures made in incompetency proceeding which was terminated by decedent's death were a burden upon the property when received by executor which were required to be taken into account in computing charitable bequest.

NY—In re Heaton's Estate, 46 NYS 2d 165

83 NY—In re Voss' Estate, 238 NYS 267, 135 Misc 691

68 C.J. p 558 note 75

84 NY—In re Donchian's Estate, 217 NYS 318, 128 Misc 51

85. NY—In re Voss' Estate, 238 NYS 267, 135 Misc 691

86. NY—In re Lord's Estate, 279 NYS 613, 155 Misc 628  
68 C.J. p 558 note 78

87. NY—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768—In re Bates' Will, 298 NYS 896, 164 Misc 435, modified on other grounds In re Bates' Estate, 5 NYS 2d 705, 254 App Div 900, re-settled 8 NYS 2d 121, 255 App Div 868, affirmed 23 NE 2d 534, 281 NY 692, motion denied 25 NE 2d 144, 282 NY 591—In re Buck's

Estate, 285 NYS 515, 158 Misc 111, 114—In re Gaubert's Will, 285 NYS 513, 158 Misc 444—In re Sonderling's Will, 279 NYS 703, 155 Misc 403—In re Lord's Estate, 279 NYS 613, 155 Misc 628

68 C.J. p 558 note 79

#### Method of computation

In determining whether the amount of a decedent's estate which passes to charity is in excess of the maximum permitted by statute, the allowable maximum is found by subtracting the debts from the gross estate and dividing by two.

NY—In re Ball's Estate, 14 NYS 2d 889, 172 Misc 181

88 NY—In re Seymour's Will, 146 NE 372, 239 NY 259

68 C.J. p 558 note 80

89 NY—In re Seymour's Will, *supra*

68 C.J. p 558 note 81

90 Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

NY—Decker v Vreeland, 115 NE 989, 220 NY 326

91. Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

68 C.J. p 559 note 86

92. NY—Decker v Vreeland, 115 NE 989, 220 NY 326

68 C.J. p 559 note 88

93 NY—Decker v. Vreeland, *supra*

68 C.J. p 559 note 89.

tate to which they are entitled under the statute,<sup>94</sup> or that only a part of the estate subject to administration in such state is necessary to make up the share to which the heirs are entitled under the statute,<sup>95</sup> the heirs will not be permitted to take in such state more than is necessary to make up their share

### (3) Amount of Gifts Subject to Statute

#### (a) In general

#### (b) Postponed gifts and gifts of remainders

#### (a) In General

The total of all the gifts to organizations or for purposes subject to statutory limitations must be taken in order to determine whether or not more than the disposable share has been bequeathed or devised. If a will provides for gifts in excess of the statutory share, the total must be reduced to the amount permitted

In general under the statutes here considered the total of all the gifts to organizations or for purposes subject to the statutory limitation must be taken in order to determine whether or not more than the disposable share has been bequeathed or devised,<sup>96</sup> in other words, no more may be given to two or more organizations than might have been given to one.<sup>97</sup> Where, however, a legatee or devisee renounces a gift which is subject to the statutory limitation, the amount or value of such gift is not to be included in determining the total amount of gifts subject to the limitation,<sup>98</sup> and a gift to a corporation which is not subject to the particular statutory limitation involved should not be included.<sup>99</sup> If the will provides for gifts in excess of the share permitted by the statute, the total must be reduced to the amount permitted.<sup>1</sup>

Under a statutory provision that certain gifts shall be valid to the extent of a specified fractional part of the estate of the testator and no more, certain absolute gifts of present interests or estates

have been held, on due computation, to constitute more in amount than such specified share and have been upheld to the extent of such share and no more.<sup>2</sup> A will which in terms directs that the residuary estate shall be divided into two equal parts and gives one of such parts to organizations or for purposes subject to the statutory limitation on such type of gifts to one-half part of the estate does not violate the statute where no other gift of that type is made.<sup>3</sup>

*Excessive gifts as gifts for specific amount* The view has been taken that the effect of a statutory limitation of the type here considered is to render the gift of the residuary estate of the testator, which is subject to the statute, and is therefore reduced, practically a bequest of a specific sum.<sup>4</sup> Thus, by virtue of such a statute, where a gift of the residuary estate is made to organizations or for purposes subject to the statutory limitations, in excess of the statutory share, a gift otherwise uncertain in amount is transformed into a general legacy for a fixed sum,<sup>5</sup> that is, the statutory share of the net estate,<sup>6</sup> and the "excess" in effect constitutes the residuary estate.<sup>7</sup>

*Procedure* Computation of the value of gifts to organizations or for purposes subject to the statute, before final determination of debts of the estate, would be premature, and should be postponed until claims are adjudicated.<sup>8</sup> Where the method of computing the total of gifts subject to the statutory limitation is based on a mistake of fact, the surrogate may disregard such computation and make a new computation.<sup>9</sup>

#### (b) Postponed Gifts and Gifts of Remainders

The validity of the gift of a remainder, subject to the statutory limitations, is determinable as of the death of the testator and not as of the date of the death of the life tenant. If it is uncertain that the gift of a remainder will become effective, the determination of its

94 Cal—In re Dwyer's Estate, 115 P 242, 159 Cal 680

95 Cal—In re Dwyer's Estate, supra

96 Iowa—In re Ihmes' Estate, 134 NW 429, 154 Iowa 20  
NY—Chamberlain v. Chamberlain, 43 NY 424

97 Iowa—In re Ihmes' Estate, 134 NW 429, 154 Iowa 20  
68 CJ p 559 note 93

98 NY—In re Meyer's Estate, 244 NYS 398, 137 Misc 730

99 NY—Betts v Betts, 4 Abb N Cas 317, 57 How Pr 355 note.

1. Cal—In re Fitzgerald's Estate, 217 P 773, 62 Cal App 744  
68 CJ p 559 note 96

2. NY—Jones v Kelly, 63 NE 413, 170 NY 401, reargument denied 63 NE 1118, 171 NY 651  
In re Watkins' Estate, 194 NYS 342, 118 Misc 645

3. NY—In re Opdyke's Will, 171 NE 646, 255 NY 255, 74 ALR 641

4. Cal—In re Fitzgerald's Estate, 217 P 773, 62 Cal App 744.

5. Cal—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 422

NY—In re Seymour's Will, 146 NE 372, 239 NY 259  
68 CJ p 559 note 1

6. NY—In re Brown's Will, 238 NYS 160, 135 Misc 160  
68 CJ p 559 note 2

7. NY—In re Brooklyn Trust Co., 166 NYS 513, 179 App Div 262  
In re Brown's Will, 238 NYS 160, 135 Misc 160

8. NY—In re Blumenthal's Estate, 208 NYS 682, 124 Misc 850, reheard 215 NYS 142, 126 Misc 603, and opinion supplemented 217 NYS 316, 128 Misc 56

9. NY—In re Meyer's Estate, 244 NYS 398, 137 Misc 730  
68 CJ p 560 note 5.

value should be postponed until the termination of the preceding trust

In some jurisdictions the view has been expressed that the mere fact that a gift of a remainder may in future be ascertained to be excessive under the statute is not sufficient to warrant a present conclusion that it is excessive,<sup>10</sup> and it has been held, where a gift in remainder, subject to the statutory limitation, is subject to various contingencies so that it is uncertain whether or not the gift will become effective, that the determination of the value of such gift should be postponed until after the termination of the preceding trust<sup>11</sup> In other jurisdictions various gifts in remainder to institutions, subject to the statute, after a life estate to a wife or child of the testator, have been regarded as gifts of more than one third of the testator's estate, to the exclusion of his wife or child, within the statutory prohibition,<sup>12</sup> but the statute is not necessarily violated where a remainder is given to such an institution<sup>13</sup>

The validity of the gift of a remainder subject to the New York statute, after a life estate or interest, not subject to the statute, is determinable

as of the date of the death of the testator and not as of the date of the death of the life tenant,<sup>14</sup> the value of the remainder, as of the date of the death of the testator, must be determined and taken as fixing the value of the gift,<sup>15</sup> and the value of the life estate or interest must not be included in the computation of the charitable gifts<sup>16</sup> In such case the value of the life estate or interest is to be computed as of the date of the testator's death,<sup>17</sup> and the difference between the value of the trust fund or fund subject to the life estate or interest, as of the date of the testator's death, and the value of the life estate or interest, as of that date, is the value of the remainder as of that date<sup>18</sup>

The foregoing rules providing for computation as of the date of the death of the testator were not changed by the amendment of the governing New York statute, which provides in substance that, when payment of a devise or bequest to an organization or for a purpose, subject to the statute, is postponed, in computing the one-half part of such organization or purpose no allowance shall be made for such postponement or for any interest or gains

10. Cal.—In re Campbell's Estate, 165 P 931, 175 Cal 345  
In re Burns' Estate, 80 P 2d 77, 26 Cal App 2d 741

11. Cal.—In re Gorchakoff's Estate, 238 P 2d 121, 108 Cal App 2d 44  
68 C J p 560 note 8

12. Ga.—Trustees of University of Georgia v Denmark, 81 SE 238, 141 Ga 390—Kelley v Welborn, 35 SE 636, 110 Ga 540

13. Ga.—Jasme v Mercer, 168 SE 16, 176 Ga 256  
68 C J p 560 note 10

14. N Y—Fisher v Lister, 226 N Y S 484, 222 App Div 841  
In re Chamot, 111 N Y S 2d 299, 201 Misc 374—In re Gardner's Estate, 272 N Y S 681, 151 Misc 342

#### Outstanding trust

Where testator gave residuary estate in trust for mother and sisters, and on their death gave corpus, which exceeded statutory maximum of one-half of estate, to charity, rule that valid trust estate must terminate before distributing principal was applicable, and hence, as long as charitable trusts were outstanding, no definite sum could be set aside as presently payable to mother as sole next of kin

N Y—In re Sonderling's Will, 279 N Y S 703, 155 Misc 403

15. N Y—In re Bates' Will, 298 N Y S 896, 164 Misc 435, modified on other grounds In re Bates' Estate, 5 N Y S 2d 705, 254 App Div 900, resettled 8 N Y S 2d 121, 255

App Div 868, affirmed 23 NE 2d 534, 281 N Y 692, motion denied 25 NE 2d 144, 282 N Y 591  
68 C J p 560 note 12

#### Residuary estate as basis for computation

Where testator bequeathed remainder of testamentary trust to charitable institutions after termination of trust on death of life tenants, actual residuary estate was to provide basis for calculation of value of future estate bequeathed to charities for purpose of determining whether more than one half of estate had been given to charity contrary to statute  
N Y—In re Mayers' Estate, 73 N Y S 2d 715, 189 Misc 700, affirmed 84 N Y S 2d 895, 274 App Div 918, affirmed 87 NE 2d 422, 299 N Y 388, 11 ALR 2d 1136

16. N Y—In re Ball's Estate, 14 N Y S 2d 889, 172 Misc 181  
68 C J p 560 note 13

17. N Y—In re Williams' Estate, 90 N Y S 2d 727 195 Misc 461—In re Kaufman's Estate, 285 N Y S 347, 158 Misc 102—In re Schalkenbach's Estate, 279 N Y S 181, 155 Misc 332  
68 C J p 560 note 14

#### Contingent secondary life estates

Computation of the value of life estates of beneficiaries of testamentary trust for purpose of determining whether value of remainder to charitable institution is in violation of statute, must await the death of a life beneficiary only where such computation as of date of testator's death is

impossible because of future contingent secondary life estates

N Y—In re Williams' Estate, 90 N Y S 2d 727, 195 Misc 461

#### Power to invade corpus

Where testator bequeathed two thousand five hundred dollars to his widow and the balance, amounting to approximately two hundred thousand dollars, to a trustee, who was directed to pay the income to the widow for life and remainder to charitable organization, and testator authorized invasion of corpus if income were insufficient to provide for widow's well-being, in view of fact that annual income from trust fund was eight thousand three hundred fifty dollars and widow's expenses were only six thousand four hundred dollars, it would be reasonable assumption that any invasion of corpus during remainder of life of widow, who was seventy-seven years of age, would not bring remainder interest within maximum permissible limits for charitable bequest

N Y—In re Chamot, 111 N Y S 2d 299, 201 Misc 374

18. N Y—In re Apple's Estate, 252 N Y S 580, 141 Misc 380  
68 C J p 560 note 15

#### Reduction of remainder

Remainder gift to charity would be reduced where value of remainder, as determined by deducting value of assigned life interest therein, exceeded permissible one-half of taxable estate

N Y—In re Gaubert's Will, 285 N Y S 513, 158 Misc 444.

which may accrue after the testator's death,<sup>19</sup> and the statute as so amended permits a present determination of the value of a contingent remainder<sup>20</sup> Where a remainder exceeds the statutory share at the termination of the life estate, the charity is entitled to the trust assets in the proportion that the maximum permissible gift bears to the present value of the whole remainder, and the statutory distributees receive the trust assets in the proportion that the excess bears to the present value of the whole remainder<sup>21</sup>

In ascertaining the value of the life estate it is proper<sup>22</sup> and sometimes necessary<sup>23</sup> to make use of annuity or mortality tables based on the probability or expectancy of life, and this rule is applicable since the above amendment of the New York statute<sup>24</sup> The propriety of using such other means than the mortality or annuity tables, as may be necessary to ascertain the value of the life estate, has apparently been recognized<sup>25</sup> In some cases governed by the statute prior to the above amendment, the actual period of life after the death of the testator was used as a basis for the computation where the life tenant had died before the date of computation,<sup>26</sup> and the view was taken that in such case the actual value of the life estate or interest,<sup>27</sup> or a valuation based on the actual duration of such estate or interest,<sup>28</sup> should govern rather than a valuation based on annuity tables or expectancy In other cases, however, the propriety of the use of annuity tables was recognized even where the life estate or interest had terminated,<sup>29</sup> and was regard-

ed as the proper and fairer method of computation where there were several life estates or interests, some of which had, and some had not, terminated<sup>30</sup> Where, after a computation in the manner herein indicated, it appears that the value of gifts subject to the statute is in excess of the share permitted by the statute, such gifts may be given effect only to the extent so permitted<sup>31</sup> and, if no excess is shown, such gifts may be given full effect if otherwise valid<sup>32</sup>

*Acceleration of remainder* It seems that the acceleration of a remainder subject to the statute, by the fact that preceding trusts are void, may so increase the value of the remainder as to bring the case within the statutory limitation<sup>33</sup>

*Remainder which never vests* Where the gift of a remainder to an organization subject to the statutory limitations never became effective because the contingency on which it depended never happened, the gift may not be included in determining the amount of the gifts subject to the limitation<sup>34</sup>

#### i. Interest, Increase, and Losses

Where it is necessary to reduce a bequest of the residuary estate for a charitable purpose and thereby render it practically a bequest for a specified sum, the bequest bears interest from the time it becomes due, but if the gift is postponed, in computing the share to charities no allowance shall be made for such postponement or for any interest or gains which may accrue after the testator's death.

Where, pursuant to the statute, it is necessary to reduce a bequest of the residuary estate for a

19 N Y—In re Bates' Will, 298 N YS 896, 164 Misc 435, modified on other grounds In re Bates' Estate, 5 NYS 2d 705, 254 App Div 900, resettled 8 NYS 2d 121, 255 App Div 868, affirmed 23 NE 2d 534, 281 N Y 692, motion denied 25 NE 2d 144, 282 N Y 591—In re Lord's Estate, 279 NYS 613, 155 Misc 628—In re Schalkenbach's Estate, 279 NYS 181, 155 Misc 332—In re Miranda's Will, 271 NYS 913, 151 Misc 459  
68 CJ p 560 note 16

20 N Y—In re Apple's Estate, 252 NYS 580, 141 Misc 380  
68 CJ p 560 note 17

21 N Y—In re Mayers' Will, 87 N E 2d 422, 299 N Y 388, 11 ALR 2d 1136

#### Statute held not violated

Where will provided two thousand five hundred dollars cash legacy to widow and, in addition, created a trust for her benefit of one-half of the "residue of my net estate", the statute prohibiting a devise of more than one-half of the estate to charities was not violated.

N Y—In re Clock's Will, 133 NYS 2d 415

22 N Y—In re Matter of Durand, 87 NE 677, 194 N Y 477  
68 CJ p 561 note 18

23 N Y—Hollis v Drew Theological Seminary, 95 N Y 166

24 N Y—In re Bates' Will, 298 N YS 896, 164 Misc 435, modified on other grounds In re Bates' Estate, 5 NYS 2d 705, 254 App Div 900, resettled 8 NYS 2d 121, 255 App Div 868, affirmed 23 NE 2d 534, 281 N Y 692, motion denied 25 NE 2d 144, 282 N Y 591—In re Bowker's Estate, 283 NYS 564, 157 Misc 341—In re Sonderling's Will, 279 NYS 703, 155 Misc 403—In re Lord's Estate, 279 NYS 613, 155 Misc 628—In re Schalkenbach's Estate, 279 NYS 181, 155 Misc 332—In re Miranda's Will, 271 NYS 913, 151 Misc 459—In re Apple's Estate, 252 NYS 580, 141 Misc 380  
In re Sykes' Will, 53 NYS 2d 442

25 N Y—Hollis v Drew Theological Seminary, 95 N Y 166.

26 N Y—Frost v Emanuel, 137 N YS 559, 152 App Div 687

27 N Y—In re Matter of Grant's Estate, 28 NYS 203, 76 Hun 567  
68 CJ p 561 note 23

28 N Y—In re Seymour's Will, 205 NYS 327, 209 App Div 655, modified on other grounds 146 NE 373, 239 N Y 259  
68 CJ p 561 note 24

29 N Y—In re Kaufman's Estate, 285 NYS 347, 158 Misc 102  
68 CJ p 561 note 25

30 N Y—In re Bullard's Estate, 224 NYS 366, 130 Misc 337, modified on other grounds 232 NYS 706, 225 App Div 734, and affirmed 171 NE 783, 253 N Y 562

31 N Y—In re Sloat's Will, 253 N. YS 215, 141 Misc 710  
68 CJ p 561 note 27

32 N Y—In re Matter of Durand, 87 NE 677, 194 N Y 477  
68 CJ p 561 note 28

33 N Y—In re Howell's Estate, 261 NYS 859, 146 Misc 169

34 N Y—Hughes v Stoutenburgh, 154 NYS 65, 168 App Div. 512

charitable purpose and thereby render it practically a bequest for a specified sum, the bequest bears interest from the time when it becomes due under the provision of the code applicable to interest on legacies<sup>35</sup>

Prior to an amendment to the governing New York statute, which amendment provides in substance that when payment of a devise or bequest to an organization or for a purpose, subject to the statute, is postponed, in computing the one half part of such organization or purpose no allowance shall be made for such postponement or for any interest or gains which may accrue after the testator's death,<sup>36</sup> in the case of the gift of a remainder subject to the statute, it was held that the gift carried interest from the date of the testator's death until the death of the life tenant,<sup>37</sup> payable from the portion of the estate passing as on intestacy<sup>38</sup> The purpose of the amendment was to supersede these rulings<sup>39</sup>

According to some cases, a legacy subject to the New York statutory restriction bears interest on the amount payable from the date the legacy is payable for the period during which payment is deferred,<sup>40</sup> payable out of the portion of the estate which passes as on intestacy<sup>41</sup> On the theory that a gift of the residuary estate to organizations or for purposes subject to the statute in excess of the statutory limitation is converted by the statute into a general legacy for a specified amount, it was held that, since, under the statute then applicable, such legacy was payable one year after the grant of letters testamentary, interest did not commence to run until after the expiration of one year,<sup>42</sup> and the beneficiary of such legacy was not entitled to income earned on the subject matter of such legacy during such year<sup>43</sup> The view was taken, how-

ever, that, where such gift was a gift of a remainder and the life estate or interest had fallen in because the life tenant died a few days after the testator,<sup>44</sup> or because the life tenant, who was the widow of the testator, rejected the provisions made for her in the will,<sup>45</sup> the gift bore interest from one year after the grant of letters testamentary Even prior to the above amendment, the beneficiary of a gift of a remainder subject to the statute was not entitled to share in any increase in the value of the estate after the death of the testator during the period of the life tenancy,<sup>46</sup> and this rule is recognized by the amendment<sup>47</sup> In such case, to the share of the net estate which is not applicable to gifts subject to the statutory limitation, all profits must be credited<sup>48</sup> and all losses charged<sup>49</sup> The right to any increase has apparently been denied even where the life estate has fallen in<sup>50</sup>

While there is authority for the view that, in the case of present gifts in excess of the statutory limitation, the beneficiaries of such gifts are not entitled to any increase or income accruing after the death of the testator,<sup>51</sup> there is apparently authority for the view that, in the case of present gifts of a portion of the residuary estate, in excess of the statutory limitations, the beneficiaries of such gifts are entitled to one half of the increase in value of property of which they are entitled to receive a one half share<sup>52</sup> In the case of present gifts, subject to the statutory limitation, of one half part of the net estate, there is no violation of the statute, and the beneficiaries of such gifts are entitled to an increase in the value of the share given to them occurring after the death of the testator or testatrix<sup>53</sup> The right of the charitable corporation to the income on the portion of the estate to which it is entitled, represented by the gift of a remainder

35 Cal.—In re Fitzgerald's Estate, 217 P 773, 62 Cal App 744

36. N Y—In re Buck's Estate, 285 NYS 515, 158 Misc 111, 114 68 C J p 561 note 34

37 N Y—In re Seymour's Will, 205 NYS 327, 209 App Div 655, modified on other grounds 146 NE 372, 239 NY 259 68 C J p 562 note 35

38. N Y—In re Loewenthal's Estate, 247 NYS 629, 138 Misc 871 68 C J p 562 note 36

39 N Y—In re Apple's Estate, 252 NYS 580, 141 Misc 380 68 C J p 562 note 37

40. N Y—In re Brown's Will, 238 NYS 160, 135 Misc 611 68 C J p 562 note 38

41. N Y—In re Sloat's Will, 253 NYS 215, 141 Misc 710.

42. N Y—In re Brooklyn Trust Co., 166 NYS 513, 179 App Div 262

43 N Y—In re Brooklyn Trust Co., *supra* 68 C J p 562 note 42

44. N Y—In re Blumenthal's Estate, 217 NYS 316, 128 Misc 56

45 N Y—In re Donchian's Estate, 217 NYS 318, 128 Misc 51 68 C J p 562 note 44

46. N Y—In re Seymour's Will, 146 NE 372, 239 NY 259 68 C J p 562 note 45

47. N Y—In re Apple's Estate, 252 NYS 580, 141 Misc 380 68 C J p 562 note 46

48 N Y—In re Seymour's Will, 146 NE 372, 239 NY 259. 68 C J p 562 note 48

49 N Y—In re Seymour's Will, *supra* In re Arnolt's Estate, 217 NYS 323, 127 Misc 579

50. N Y—In re Blumenthal's Estate, 217 NYS 316, 128 Misc 56 68 C J p 562 note 50

51. N Y—In re Mawhinney's Will, 261 NYS 334, 146 Misc 30 68 C J p 562 note 51

52. N Y—In re Brooklyn Trust Co., 157 NYS 671, 92 Misc 695, modified on other grounds 166 NYS 513, 179 App Div 262

53 N Y—In re Opdyke's Will, 174 NE 646, 255 NY 255, 74 ALR 641 In re Buck's Estate, 285 NYS 515, 158 Misc 111, 114—In re Kaufman's Estate, 285 NYS 317, 158 Misc 102.



interest, earned after the death of the life tenant, has been recognized <sup>54</sup>

### j. Charges to Share of Estate Not Applicable to Gifts within Statute

Once the net estate has been ascertained, all expenses of administration, funeral expenses, legacies not subject to the statutory limitation, all commissions, the federal estate tax, and such other charges as are usually paid out of a residuary estate, are to be paid from the part of the estate not subject to the statutory limitation

In New York, after the net estate of which one half may be applied to gifts subject to the statutory limitation, has been ascertained, as set forth above in subdivision h (2) of this section, from the other part of the estate not applicable to such gifts are to be paid all expenses of administration,<sup>55</sup> funeral expenses,<sup>56</sup> legacies not subject to the statutory limitation,<sup>57</sup> other payments which the will directs,<sup>58</sup> all commissions,<sup>59</sup> the federal estate tax,<sup>60</sup> and such other charges as are usually payable out of a residuary estate <sup>61</sup>

### k. Payment of Gifts within Statute, Adjustment among Such Gifts, and Vesting of Title

Where the total gifts subject to the statutory limitations are in excess of the share permitted by the statute, a preferred gift will be given effect by paying such gift without abatement from the share of the estate applicable to the payment of gifts within the statute, and the non-preferred gifts will be abated.

Where gifts in excess of the statutory limitation are immediately payable in part, such funds as are

applicable to the payment of such gifts should then be applied thereto <sup>62</sup> Where the total gifts subject to the statutory limitation are in excess of the share permitted by the statute, a provision of the will giving preference to certain of such gifts will ordinarily be given effect<sup>63</sup> by paying the preferred gifts without abatement<sup>64</sup> from the share of the estate applicable to the payment of gifts within the statute, and the nonpreferred gifts will be abated <sup>65</sup> So, the court has directed the payment from the amount available for the payment of legacies of specific amounts in preference to the payment of gifts of the residuary estate, which are also subject to the statute <sup>66</sup> As between legacies of specific amounts preference has been given to a gift to a cemetery corporation for the care of a burial plot <sup>67</sup> In respect of gifts as to which there is no preference, the amount applicable to them will ordinarily be prorated <sup>68</sup>

Where the statute permits the gift of one-half part of the estate to two organizations subject to the statutory limitation, which were to share in the residuary estate, the view was taken in an early case that if the amount payable to one of such organizations did not exceed one fourth of the estate the necessary deduction should be made from the share of the other organization,<sup>69</sup> and that if one of two organizations, gifts to which were subject to the statutory limitation, was, because of restricted corporate power, unable to take its full share of the limited amount, the other organization could take

54. NY—In re Suydam's Will, 203 NYS 911, 122 Misc 340  
68 CJ p 563 note 55

55. NY—In re Mayers' Estate, 73 NYS 2d 715, 189 Misc 700, affirmed 84 NYS 2d 895, 274 App Div 918, affirmed 87 NE 2d 422, 299 NY 388, 11 ALR 2d 1136—In re Sonderling's Will, 279 NYS 703, 155 Misc 403—In re Gardner's Estate, 272 NYS 681, 151 Misc 342  
In re Jones' Will, 90 NYS 2d 598  
68 CJ p 563 note 58

56. NY—In re Mayers' Estate, 73 NYS 2d 715, 189 Misc 700, affirmed 84 NYS 2d 895, 274 App Div 918, affirmed 87 NE 2d 422, 299 NY 388, 11 ALR 2d 1136—In re McArdle's Will, 264 NYS 764, 147 Misc 876

57. NY—In re Mayers' Estate, 73 NYS 2d 715, 189 Misc 700, affirmed 84 NYS 2d 895, 274 App Div 918, affirmed 87 NE 2d 422, 299 NY 388, 11 ALR 2d 1136—In re Sonderling's Will, 279 NYS 703, 155 Misc 403

In re Jones Will, 90 NYS 2d 598  
68 CJ p 563 note 60

58. NY—In re Grossman's Will, 227 NYS 470, 131 Misc 526

59. NY—In re Jones' Will, 90 NYS 2d 598  
68 CJ p 563 note 62

60. NY—In re Sonderling's Will, 279 NYS 703, 155 Misc 403—In re Arnolt's Estate, 217 NYS 323, 127 Misc 579

#### Taxes actually paid or charged against residue

NY—In re Mayers' Estate, 73 NYS 2d 715, 189 Misc 700, affirmed 84 NYS 2d 895, 274 App Div 918, affirmed 87 NE 2d 422, 299 NY 388, 11 ALR 2d 1136

#### Estate tax excluded

Under will providing for abatement of charitable bequests so that they should be equal to one-half of net estate after payment of debts and taxes, the word "taxes" did not include estate taxes in view of specific reference to estate taxes in other provisions of will

NY—In re Sykes' Will, 53 NYS 2d 442.

61. NY—In re Sonderling's Will, 279 NYS 703, 155 Misc 403  
68 CJ p 563 note 64

62. NY—In re Suydam's Will, 203 NYS 911, 122 Misc 340  
68 CJ p 563 note 66

63. NY—In re Gaubert's Estate, 299 NYS 619, 164 Misc 768—In re McArdle's Will, 264 NYS 764, 147 Misc 876

64. NY—In re McArdle's Will, supra

65. NY—In re Sykes' Will, 53 NYS 2d 442  
68 CJ p 563 note 69

66. NY—In re Sloat's Estate, 253 NYS 215, 141 Misc 710  
68 CJ p 563 note 70

67. NY—In re Sloat's Estate, supra

68. NY—In re Sonderling's Will, 279 NYS 703, 155 Misc 403  
In re Sykes' Will, 53 NYS 2d 442  
68 CJ p 563 note 72

69. NY—Chamberlain v. Chamberlain, 43 NY 424

to the extent of its corporate capacity the entire residue of the estate applicable to such gifts<sup>70</sup> Under a residuary clause devising and bequeathing the rest, residue, and remainder of the testator's property to an organization or organizations subject to the statutory limitation permitting the bequest and devise of only one-half part of the estate to certain organizations, title to one half of the real property vested immediately in such organization or organizations,<sup>71</sup> and such devise is not payable out of the personal property of the estate<sup>72</sup>

### 1. Devolution of Property Not Available for Gifts Subject to Statute

Where gifts are in excess of the statutory share, the

excess, if not otherwise disposed of by the will, usually passes as intestate property

Where gifts subject to the statute are in excess of the fractional share of the estate which is applicable to such gifts, the excess, if not otherwise disposed of by the will, usually passes as intestate property,<sup>73</sup> either to the heirs<sup>74</sup> or next of kin<sup>75</sup> of the testator, according to the nature of the property and the statute governing descent and distribution. If, however, the will contains a provision disposing of such excess,<sup>76</sup> as, for example, an effective residuary clause,<sup>77</sup> the excess will pass pursuant to such provision. Accordingly, where a testator left none of the relatives listed in the statute, the gift of the residue to an institution is not limited to the statutory share<sup>78</sup>

## V. CONTRACTS FOR TESTAMENTARY OR SIMILAR DISPOSITION OF PROPERTY

### § 111. Existence and Validity

- a In general
- b Form
- c Nature

#### a. In General

A person may make a valid contract to leave his property at his death by will or otherwise in a particular way, and such a contract will be enforceable

Subject to the same rules and principles applicable to other contracts,<sup>79</sup> and except as far as the nature of the property itself<sup>80</sup> or the promisor's interest in, or authority over,<sup>81</sup> it is affected by special restrictions or limitations preventive of the existence of such power, a person may make a valid contract to leave his property at his death by will or otherwise in a particular way, and such contract will be enforceable,<sup>82</sup> whether it provides for the payment

70 NY—Chamberlain v Chamberlain, 43 NY 424

71 NY—Barber v Terry, 120 NE 732, 224 NY 334  
68 CJ p 563 note 75

#### Precedence

Charity receiving special bequest under will was not entitled to precedence over residuary bequest to another charity, where residuary gift was reduced by application of statute limiting proportion of gifts to charity under will

NY—In re Gardner's Estate, 272 NY 681, 151 Misc 342

72 NY—Barber v. Terry, 120 NE 732, 224 NY 334  
68 CJ p 564 note 76

73 Cal—In re Clippinger's Estate, 171 P 2d 567, 75 Cal App 2d 426  
NY—In re Bowker's Estate, 283 NYS 564, 157 Misc 341—In re Coughlin's Will, 268 NYS 28, 149 Misc 672, affirmed 273 NYS 444, 242 App Div 672

In re Shapiro's Estate, 141 NYS 2d 702—In re Niles' Will, 99 NYS 2d 238—In re Noble's Will, 95 NYS 2d 375

68 CJ p 564 note 78

#### Substitutional gifts

(1) Under statute limiting charitable gifts in will executed at least thirty days before death to one-third of estate as against designated

surviving blood relatives, portion of devise to charity in excess of designated limitation passes to class of relatives mentioned in the statute only to extent that such relatives take property under a substitutional bequest in will or under laws of succession because of absence of other effective disposition in the will  
Cal—In re Davison's Estate, 215 P 2d 504, 96 Cal App 2d 263

(2) Where total value of residuary bequests to charitable institutions together with specific bequests to charitable institutions, exceeded one-third of net distributable estate of testator whose will bequeathed portion of residuary estate, bequeathed to charitable corporation which could not take, to other charitable corporations which could take, legatees, which were educational institutions exempt from statutory limitations on testamentary gifts to charity, were not entitled to have distributed to them portion of estate which but for restrictions on testamentary gifts to charity would have passed to other charitable legatees, in view of substitutional noncharitable gifts to individuals  
Cal—In re Davis' Estate, 168 P 2d 789, 74 Cal App 2d 357

74 Cal—In re Randall's Estate, 194 P 2d 709, 86 Cal App 2d 422  
Miss—Mississippi School for Blind

v Armstrong, 62 So 2d 369, 216 Miss 348

NY—In re Sonderling's Will, 283 NYS 568, 157 Misc 231—In re Miranda's Will, 271 NYS 913, 151 Misc 459

68 CJ p 564 note 79

75 Cal—In re Pence's Estate, 4 P 2d 202, 117 Cal App 323

68 CJ p 564 note 80

76 NY—In re Grossman's Will, 227 NYS 470, 131 Misc 526

77 Cal—In re Davison's Estate, 215 P 2d 504, 96 Cal App 2d 263

NY—In re Skillman's Will, 286 NYS 673, 247 App Div 327

68 CJ p 564 note 82-99

78 Cal—In re Yule's Estate, 135 P 2d 386, 57 Cal App 2d 652

79 W Va—Grav v Marino, 76 SE 2d 585, 138 W Va 585—Harris v Harris, 43 SE 2d 225, 130 W Va 100—Turner v Theiss, 38 SE 2d 369, 129 W Va 23

80 Iowa—Brandes v Brandes, 105 NW 499, 129 Iowa 351

68 CJ p 565 note 2

81 NY—Farmers' L & T Co v Mortimer, 114 NE 389, 219 NY 290

68 CJ p 565 note 3

82 US—U S v Essex Trust Co, DC Mass, 44 F Supp 476, applying Maine rule

of money, or the leaving of specific property, or of all or a moiety of that which the promisor shall leave at his death<sup>83</sup> This is true if the parties possess the capacity to contract,<sup>84</sup> and if the contract is fair and equitable,<sup>85</sup> and possesses the usual essentials requisite for contracts generally,<sup>86</sup> such as a valid consideration, as considered infra § 113, acceptance of its terms showing a mutual agree-

Ala.—Dennis v West, 26 So 2d 263, 248 Ala 40—Cowin v Salmon, 13 So 2d 190, 244 Ala 285

Alaska—Moumal v Walsh, 9 Alaska 656

Cal.—Daniels v Bridges, 267 P 2d 343, 123 Cal App 2d 585—Fowler v Hansen, 120 P 2d 161, 48 Cal App 2d 518

Fla.—Miller v Carr, 188 So 103, 137 Fla 114

Ga.—Mann v Moseley, 67 SE 2d 128, 208 Ga 420—Matthews v Blanos, 40 SE 2d 715, 201 Ga 549—Salmon v McCrary, 29 SE 2d 58, 197 Ga 281—Harp v McGehee, 177 SE 244, 179 Ga 336

Gilmore v Hammock, 32 SE 2d 844, 72 Ga App 35—Wynne v Buyers, 187 SE 173, 53 Ga App 660

Ill.—In re Greiner's Estate, 107 NE 2d 836, 412 Ill 591—Monninger v Koob, 91 NE 2d 411, 405 Ill 417—Brust v Brust, 89 NE 2d 897, 405 Ill 132—Scham v Besse, 74 NE 2d 517, 397 Ill 309—In re Johnson's Estate, 59 NE 2d 825, 389 Ill 425

Henson v Neumann, 3 NE 2d 110, 286 Ill App 197

Ky.—Finn v Finn's Adm'r, 341 S W 2d 435—Wides v Wides' Ex'r, 184 S W 2d 579, 299 Ky 103—Hehr's Adm'r v Hehr, 157 S W 2d 111, 288 Ky 580

La.—Succession of Sullivan, 151 So 190, 178 La 230

Md.—Shives v Borgman, 69 A 2d 802, 194 Md 29—Fitzpatrick v Michael, 9 A 2d 639, 177 Md 248—Lorenzo v Ottaviano, 173 A 17, 167 Md 138, modified on other grounds 179 A 536, 167 Md 138

Mich.—Kelley v Dodge, 54 N W 2d 730, 334 Mich 499—Elmer v Elmer, 260 N W 759, 271 Mich 517

Minn.—In re Le Borius' Estate, 28 N W 2d 157, 224 Minn 203—Jannetta v Jannetta, 285 N W. 619, 205 Minn 266

Miss.—Old Ladies Home Ass'n v Hall, 52 So 2d 650, 212 Miss 67, modified on other grounds, suggestion of error overruled 54 So 2d 170, 212 Miss 67—Strange v State Tax Commission, 7 So 2d 542, 192 Miss 765

Mo.—Finn v Barnes, 101 S W 2d 718, 340 Mo 445

Mont.—Erwin v Mark, 73 P 2d 537, 105 Mont 361, 113 A L R 1064—Nev.—Waters v Harper, 250 P 2d 915, 69 Nev 315

N J.—Sullivan v Margetts, 75 A 2d 743, 9 N J Super 189

Epstein v Fleck, 57 A 2d 395, 141 N J Eq 486—White v Risdon, 55 A 2d 308, 140 N J Eq 613—

Hackensack Trust Co v Ackerman, 47 A 2d 832, 138 N J Eq 244 N Y.—In re Bonner's Estate, 80 N Y S 2d 122, 192 Misc 753

Kaplan v Kaplan, 133 N Y S 2d 59, reversed on other grounds 134 N Y S 2d 753, 284 App Div 972—Tutunjian v Vetzgian, 64 N Y S 2d 140, affirmed 83 N Y S 2d 184, 274 App Div 910, affirmed 87 NE 2d 275, 299 N Y 315—In re Sterling's Will, 27 N Y S 2d 36, reversed on other grounds In re Sterling's Estate, 35 N Y S 2d 399, 264 App Div 308, affirmed 50 NE 2d 234, 290 N Y 820

Ohio.—Mustard v Cook, App, 34 NE 2d 808

Britsch v Roth, 17 Ohio Supp 46—Passoni v Breehl, 14 Ohio Supp 100

Or.—Magness v Magness, 33 P 2d 1005, 148 Or 44

Pa.—In re Swenk's Estate, 108 A 2d 825, 176 Pa Super 513—In re Culhane's Estate, 2 A 2d 567, 133 Pa Super 339, affirmed 5 A 2d 377, 334 Pa 124

Petition of Eppley, 37 Pa Dist & Co 151, 53 York Leg Rec 153 In re Gredler's Estate, Orph, 31 Erie Co 421—Strosser v Strosser, Com Pl, 49 Lanc Rev 77 S C.—Baylor v Bath, 1 SE 2d 139, 189 SC 269

S D.—Lass v Erickson, 54 N W 2d 741, 74 SD 503—**Corpus Juris cited in** In re Buss' Estate, 26 N W 2d 700, 702, 71 SD 529—**Corpus Juris cited in** Dawson v Corbett, 21 N W 2d 758, 760, 71 SD 106

Tex.—**Corpus Juris cited in** Johnson v Durst, Civ App, 115 S W 2d 1000, 1004, error dismissed

W Va.—Gray v Marino, 76 SE 2d 585, 138 W Va 585—Harris v Harris, 43 SE 2d 225, 130 W Va. 100—Turner v Theiss, 38 SE 2d 369, 129 W Va 23

68 CJ p 565 note 4  
Agreements to make mutual wills see infra § 1367

83 Tex.—Jordan v Abney, 78 S W 486, 97 Tex 296  
68 CJ p 565 note 5

84. Cal.—Drum v Bummer, 175 P 2d 879, 77 Cal App 2d 453  
68 CJ p 566 note 6

**Member of partnership** who had control of its affairs, had authority to contract with an employee whereby he was to continue in his then present employment with the partnership and, as additional compensation for his doing so, to contract to bequeath employee certain prop-

erties belonging to the partner individually

Ga.—Gilmore v Hammock, 32 SE 2d 844, 72 Ga App 35

85. Ga.—Matthews v Blanos, 40 S E 2d 715, 201 Ga 549

Neb.—Peters v Wilks, 39 N W 2d 793, 151 Neb 861

Or.—Hunter v Allen, 147 P 2d 213, 174 Or 261, modified on other grounds 148 P 2d 936, 174 Or 261  
68 CJ p 567 note 7

#### Determination of fairness

(1) The fairness of a contract to execute a will is usually to be determined as of its date, and the happening of subsequent events within a reasonable contemplation of the parties does not afford a defense Ga.—First Nat Bank & Trust Co v Falligant, 67 SE 2d 473, 208 Ga 479—Mann v Moseley, 67 S E 2d 128, 208 Ga 420

(2) Contracts to dispose of property by will in a particular way do not stand on an especially favored footing, and a court will be more strict in examining into the nature and circumstances of such contracts than with other contracts

Ill.—Monninger v Koob, 91 NE 2d 411, 405 Ill 417—Kaiser v Cobbe, 79 NE 2d 604, 400 Ill 214

86. Conn.—Godburn v Meserve, 37 A 2d 235, 130 Conn 723

Ill.—Keniry v Costello, 57 NE 2d 758, 324 Ill App 230

Ky.—Maloney v Maloney, 80 S W 2d 611, 258 Ky 567

Pa.—Magruda v Magruda, Com Pl, 27 Wash Co 163

Wash.—In re Fischer's Estate, 81 P 2d 836, 196 Wash. 41  
68 CJ p 567 note 8

#### Obligatory force

If whole arrangement between two persons is fulfilled by mere making of will and nothing legally binding on him who signs the instrument to let it remain unrevoked is contemplated, obligatory force of a contract is not intended and one who makes will remains at liberty to change his mind and his will N J.—Minogue v Lipman, 96 A 2d 426, 25 N J Super 376

#### Resolution

If deceased's written instrument, wherein he agreed that his wife and son should share equally in his estate, was merely a resolution, judgment dividing estate accordingly was erroneous, since resolutions cannot be enforced

Ky.—Gray v Greer, 70 S W 2d 683, 253 Ky 809

ment thereto, as discussed *infra* § 112, certainty and definiteness in its terms<sup>87</sup> and in the designation of the promisee or beneficiary,<sup>88</sup> and provided the contract is not within the statute of frauds, as discussed in *Frauds, Statute of*, § 56, and is free from fraud, or undue influence in procuring it.<sup>89</sup> A contract to make a will means an effectual will, disposing of property on death, and implies a promise that the promisor will, on his death, leave a will which has not been revoked.<sup>90</sup>

### b. Form

Unless otherwise prescribed by statute, no formal contract is necessary to bind one in the disposition of his property on his death, and, except as required by statute, such contracts may be valid and enforceable even though oral.

If not prescribed by statute, a formal contract is not necessary to bind one in the disposition of his property on his death.<sup>91</sup> Although usually put in the form of an agreement to bequeath by will, that is not essential, it being sufficient that there is an

agreement to leave the property or that the promisee shall have it at the death of the promisor,<sup>92</sup> the fact that the mode whereby the disposition is to be effected is not specified does not impair the validity of the agreement,<sup>93</sup> nor does the fact that the promisor is given his option to transfer by will or conveyance.<sup>94</sup> An instrument in the form of a will may of itself be a contract to leave the testator's property in the manner therein provided,<sup>95</sup> at any rate if delivered to the promisee.<sup>96</sup> The agreement need not be executed in the form required in the execution of testamentary instruments,<sup>97</sup> and it is not essential that the instrument expressing the promise contain any statement or recital of the consideration.<sup>98</sup> The invalidity of the agreement as a will does not prevent enforcement of its contractual provisions.<sup>99</sup>

*Oral contracts* Except as affected by the provisions of the statute of frauds, or of other statutory provisions especially applicable to this class of contracts,<sup>1</sup> such contracts need not be written and

<sup>87</sup> Cal—Wood v Wrigley, 258 P 2d 1049, 119 Cal App 2d 90—Fowler v Hansen, 120 P 2d 161, 48 Cal App 2d 518

Ga—First Nat Bank & Trust Co v Falligant, 67 SE 2d 473, 208 Ga 479

Wynne v Buyers, 187 SE 173, 53 Ga App 660

Ill—Wessel v Eilenberger, 119 NE 2d 207, 2 Ill 2d 522

Bidwell v Dempsey, 67 NE 2d 315, 329 Ill App 182—Keniry v Costello, 57 NE 2d 758, 324 Ill App 230

Md—Davis v Winter, 178 A 604, 168 Md 613

Mass—Read v McKeague, 147 NE 585, 252 Mass 162

NJ—Ehling v Diebert, 15 A 2d 655, 128 NJ Eq 115, affirmed 17 A 2d 777, 129 NJ Eq 11

Pa—Soffee v Hall, 105 A 2d 144, 377 Pa 306—Stafford v Reed, 70 A 2d 345, 363 Pa. 405—Friese v Friese, 9 A 2d 404, 336 Pa 248—In re Friese's Estate, 9 A 2d 401, 336 Pa 241

W Va—Hedrick v Harper, 62 SE 2d 265, 135 W Va 47

Wis—In re McLean's Estate, 262 NW 707, 219 Wis 222

68 CJ p 567 note 11

**Absolute certainty** as to terms of alleged oral contract to leave property to person living with, and caring for, deceased is not exacted, and reasonable certainty as to terms is sufficient

Wash—Ellis v Wadleigh, 182 P 2d 49, 27 Wash 2d 941

#### Contract held sufficiently certain

Father's agreement to bequeath certain property to son in return for son's services in father's in-

tended business was binding, notwithstanding details of services to be rendered were not specified

83 NY—Winne v Winne, 59 NE 832, 166 NY 263, 82 Am SR 647

68 CJ p 568 note 12

89 Miss—Deanes v Tomlinson, 54 So 2d 474

NJ—In re Oppen's Wills, 107 A 2d 348, 31 NJ Super 508

68 CJ p 568 note 14

90 Mass—West v Day Trust Co, 103 NE 2d 813, 328 Mass 381, 29 ALR 2d 1224

91. Cal—In re Lindquist's Estate, 154 P 2d 879, 25 Cal 2d 697, certiorari denied State of Cal v U S, 65 S Ct 1408, 325 US 869, 89 L Ed 1988, and 65 S Ct 1410, 325 US 869, 89 L Ed 1988

92 Conn—Strakosch v Connecticut Trust, etc., Co, 114 A 660, 96 Conn 471

68 CJ p 568 note 17

Agreements to make mutual wills see *infra* § 1367

#### Contract not to revoke or alter existing will

Iowa—Evans v Cole, 281 NW 230, 225 Iowa 756

68 CJ p 568 note 17 [d]

93 Wash—Velikame v Dickman, 168 P 465, 98 Wash 584

68 CJ p 569 note 18

94. Ill—Smith v Smith, 172 NE 32, 340 Ill 34

68 CJ p 569 note 19

95 Utah—Ward v Ward, 85 P 2d 635, 96 Utah 263

68 CJ p 569 note 20

96 Ala—Bolman v Overall, 2 So 624, 80 Ala 451, 60 Am R 107

Ill—Whiton v Whiton, 53 NE 722, 179 Ill 32

97 Iowa—Stewart v Todd, 173 N W 619, 180 NW 146, 190 Iowa 283, 20 ALR 1272

68 CJ p 569 note 22

98. Ind—Caviness v Rushton, 101 Ind 500, 51 Am R 759

99 Kan—Imthurn v Martin, 96 P 2d 860, 150 Kan 906, 151 Kan 324

1. Mo—Shaw v Hamilton, 141 SW 2d 817, 346 Mo 366

#### In New York

(1) By statute, an agreement to make a will so as to make remuneration on decedent's death for services rendered to him during his lifetime must be in writing signed by the decedent

NY—In re Sturges' Estate, 36 N YS 2d 141

(2) Oral agreements not within statute rendering unenforceable oral agreements whose performance is not to be completed before the end of a lifetime or oral agreement to bequeath property and make testamentary provision of any kind, because made before effective date of statute, may be enforceable

NY—In re Loftus' Estate, 85 NY S 2d 244, 193 Misc 704

(3) Enforcement of oral contracts to make or refrain from altering a will is completely inconsistent with, and imperils policy of, the state relating to testamentary dispositions

NY—Rubin v Irving Trust Co, 113 NE 424, 305 NY 288

may be valid although made orally.<sup>2</sup> An oral contract must be definite,<sup>3</sup> certain,<sup>4</sup> and fair.<sup>5</sup> Such contracts are regarded with suspicion and will be carefully scrutinized.<sup>6</sup> A valid oral contract is not rendered nugatory by the refusal of the promisor subsequently to reduce it to writing.<sup>7</sup>

### c. Nature

Contracts for testamentary disposition have been held covenants to stand seized to the use of the promisee, with use and power of disposition except by will continuing in the promisor for life.

A contract to make a particular disposition of one's property by will has been said to be in nature

and legal effect a covenant to stand seized to the use of the promisee, with use and power of disposition except by will continuing in the promisor for life.<sup>8</sup> One who offers to enter into a contract to make a will has the right to designate the offer as either unilateral or bilateral,<sup>9</sup> and whether the offer is unilateral or bilateral depends on the offeror's intent and the facts and circumstances of the particular case.<sup>10</sup> A contract to make a specific bequest, even when a will to that effect has been duly made and executed, is negative in character.<sup>11</sup> Such an agreement is not a sale,<sup>12</sup> and has been held to create or vest no legal or equitable estate, in present, in the beneficiary,<sup>13</sup> but is at most an

2 U.S.—Werbe v Holt, D.C. Ark., 100 F.Supp. 392, reversed on other grounds, C.A., Holt v Werbe, 198 F.2d 910

Ala.—Merchants Nat Bank of Mobile v Cotnam, 34 So.2d 122, 250 Ala. 316

Ark.—Alphin v Alphin, 279 S.W.2d 822—James v Rogers, 271 S.W.2d 930—Brunk v Merchants Nat Bank, 230 S.W.2d 932, 217 Ark. 499—Offord v Agnew, 218 S.W.2d 370, 214 Ark. 822—Crowell v Parks, 193 S.W.2d 483, 209 Ark. 803—Jensen v Housley, 182 S.W.2d 758, 207 Ark. 742—Sheffield v Baker, 145 S.W.2d 347, 201 Ark. 527

Fla.—McDowell v Ritter, 13 So.2d 612, 153 Fla. 50—Miller v Carr, 188 So. 103, 137 Fla. 114

Ga.—Bowles v White, 57 S.E.2d 547, 206 Ga. 433

Ill.—Bidwell v Dempsey, 67 N.E.2d 315, 329 Ill. App. 182

Iowa.—Hatcher v Sawyer, 52 N.W.2d 490, 243 Iowa 858

Ky.—Finn v Finn's Adm'r, 244 S.W.2d 435

Minn.—McCarty v Nelson, 47 N.W.2d 395, 233 Minn. 362, certiorari denied 72 S.Ct. 177, 342 U.S. 887, 96 L.Ed. 665, rehearing denied 72 S.Ct. 624, 342 U.S. 956, 96 L.Ed. 710

N.M.—Rubalcava v Garst, 206 P.2d 1154, 53 N.M. 295

Or.—Hunter v Allen, 147 P.2d 213, 174 Or. 261, modified on other grounds 148 P.2d 936, 174 Or. 261  
Pa.—Petition of Eppley, 37 Pa. Dist. & Co. 151, 53 York Leg. Rec. 153  
In re Gredler's Estate, Orph., 31 Erie Co. 421

Wash.—Dau v Pence, 133 P.2d 523, 16 Wash.2d 368—Thompson v Weimer, 95 P.2d 772, 1 Wash.2d 145—In re Swartwood's Estate, 89 P.2d 203, 198 Wash. 557—Resor v Schaefer, 74 P.2d 917, 193 Wash. 91—Arenetti v Brown, 291 P. 469, 158 Wash. 517—Perkins v Allen, 234 P. 25, 133 Wash. 455—Olsen v Hoag, 221 P. 984, 128 Wash. 8—Alexander v Lewes, 175 P. 572,

104 Wash. 32—Velikanje v Dickman, 168 P. 435, 98 Wash. 584  
68 C.J. p. 569 note 25

#### Gift or bequest of personalty

An oral contract to make a gift or a bequest of personalty in will is enforceable

Fla.—Miller v Carr, 188 So. 103, 137 Fla. 114

#### In California

(1) Prior to the amendments of 1905 and 1907, to Civ. Code § 1624, and Code Civ. Proc. § 1973, expressly requiring a writing, an agreement to devise was not required to be in writing

Cal.—Fowler v Hansen, 120 P.2d 161, 48 Cal. App. 2d 518  
68 C.J. p. 569 note 25 [a]

(2) An oral agreement, entered into between spouses before statutory amendment requiring it to be in writing, that husband would give wife all his property and that she would divide it between his and her relatives equally on her death, would be valid, regardless of spouses' joint tenancy agreement

Cal.—In re Harris' Estate, 72 P.2d 873, 9 Cal. 2d 649

3. U.S.—Appolonio v Baxter, C.A. Tenn., 217 F.2d 267

Ill.—Bidwell v Dempsey, 67 N.E.2d 315, 329 Ill. App. 182

Kan.—In re Wert's Estate, 193 P.2d 253, 165 Kan. 49, opinion adhered to 199 P.2d 793, 166 Kan. 159

4. Ill.—Bidwell v Dempsey, 67 N.E.2d 315, 329 Ill. App. 182

#### Precise terms

An oral contract to bequeath property in consideration of performance of personal services for promisor should be so precise in its terms that neither party could reasonably misunderstand them

Or.—Tiggelbeck v Russell, 213 P.2d 156, 187 Or. 554.

5. U.S.—Appolonio v Baxter, C.A. Tenn., 217 F.2d 267

Wash.—In re Fischer's Estate, 81 P.2d 836, 196 Wash. 41.

6. Ky.—Finn v Finn's Adm'r, 244 S.W.2d 435

Md.—Hanson v Urner, 111 A.2d 649  
Miss.—Johnston v Tomme, 24 So.2d 730, 199 Miss. 337

N.J.—Richards v Richards, 58 A.2d 544, 141 N.J. Eq. 579

N.Y.—Tracy v Danzinger, 3 N.Y.S.2d 24, 253 App. Div. 418, affirmed Tracy v Danzinger, 18 N.E.2d 311, 279 N.Y. 679

Or.—Hunter v Allen, 147 P.2d 213, 174 Or. 261, modified on other grounds 148 P.2d 936, 174 Or. 261  
Pa.—Stafford v Reed, 70 A.2d 345, 363 Pa. 405

Wash.—Jennings v D'Hooghe, 172 P.2d 189, 25 Wash.2d 702—In re Fischer's Estate, 81 P.2d 836, 196 Wash. 41

7. Mich.—Salsbury v Sackrider, 280 N.W. 926, 284 Mich. 493

8. Ala.—Noble v Metcalf, 47 So. 1007, 157 Ala. 295  
68 C.J. p. 569 note 29

9. Cal.—Davis v Jacoby, 34 P.2d 1026, 1 Cal. 2d 370

10. Cal.—Davis v Jacoby, supra.

#### Offer of bilateral contract

Testator's statement, in letter to his niece and her husband, that she would inherit everything if husband could come to testator and look after his affairs was an offer to enter into bilateral contract to make will in niece's favor

Cal.—Davis v Jacoby, supra

11. N.Y.—In re Goldberg's Estate, 9 N.E.2d 829, 275 N.Y. 186  
In re Bekker's Estate, 129 N.Y.S.2d 126, 283 App. Div. 609

12. Cal.—Stewart v Smith, 91 P. 667, 6 Cal. App. 152  
68 C.J. p. 569 note 30

13. Ill.—In re Johnson's Estate, 59 N.E.2d 825, 389 Ill. 425

N.Y.—Kaplan v Kaplan, 134 N.Y.S.2d 753, 284 App. Div. 972

In re Taylor's Will, 95 N.Y.S.2d 459—In re Searles' Will, 82 N.Y.S.2d 219

Ohio.—In re Knisely's Estate, 12 Ohio Supp. 140

agreement to convey in the future<sup>14</sup> A contract to give a legacy is not a contract to pay the amount thereof which must be treated as a legacy subject to rights and conditions under which legacies are paid<sup>15</sup> It creates, however, an indebtedness of the promisor within the rules as to conveyances in fraud of creditors,<sup>16</sup> and, after nonperformance, serves as the foundation of a debt<sup>17</sup> Such a contract is not a testamentary disposition of property, and property received by virtue of it is property acquired by contract or purchase and not by gift, bequest, devise, or descent, even where willed to the promisee pursuant to the contract<sup>18</sup> A contract to leave the promisee not specific property, but such property as one has at his death, creates no trust in the property of the promisor during his life,<sup>19</sup> but fastens itself on such property as he may have at the time of his death<sup>20</sup>

## § 112. — Mutual Assent

Mutual assent is an essential element to a contract for testamentary or similar disposition of property.

As in the case of contracts generally, mutual as-

sent, or agreement to the terms, manifested by a sufficient offer and acceptance, is an essential element<sup>21</sup> There must be a contractual intent,<sup>22</sup> a mere intention to make a particular disposition of property, not reduced to contract, is not enough<sup>23</sup> The minds of the parties must meet as to the exact terms and conditions of the contract<sup>24</sup> There must be some positive promise or agreement,<sup>25</sup> either an offer intentionally designed as the basis of a bargain or a representation intentionally made to induce, and which does induce, action in a particular manner<sup>26</sup> Mere statements, oral or written, of an intent to give property by will to another do not ordinarily amount to an offer to do so,<sup>27</sup> but a statement cast merely in the form of an intention may constitute an offer where, in view of accompanying language or circumstances, it is designed to induce action in a particular manner and manifests a purpose to carry out the intention mentioned in return for the person to whom it is addressed so acting.<sup>28</sup> The contract may be found in an express promise or may be inferred as a conclusion of fact from the circumstances surrounding the parties<sup>29</sup> It is not

W Va.—Harris v Harris, 43 SE 2d 225, 130 W Va. 100  
68 CJ p 569 note 31

### Contractual trust

Where there is no question as to completeness of performance or compliance with agreement to devise property by promisee or beneficiary, or a full measure of damages could not be ascertained by ordinary pecuniary standards, promisor holds his estate with a contractual trust fixed on it, and beneficiary is entitled to the specific property or to its equivalent in money  
Ky—Wides v Wides' Ex'r, 184 SW 2d 579, 299 Ky 103

14 Cal—Stewart v Smith, 91 P 667, 6 Cal App 152  
Ill—Scham v Besse, 74 NE 2d 517, 397 Ill 309

15 Ill—In re Wheeler's Estate, 1 NE 2d 425, 284 Ill App 182

### Right to interest

Beneficiary of contract to give legacy would not be entitled to interest thereon from date of death of testatrix  
Ill—In re Wheeler's Estate, supra

16 NY—Ga Nun v Palmer, 111 NE 223, 216 NY 603

17 Ill—In re Greiner's Estate, 107 NE 2d 836, 412 Ill 591—In re Johnson's Estate, 59 NE 2d 825, 389 Ill 425

18 Wash—Andrews v Andrews, 199 P 981, 116 Wash 513

19 NH—Lemire v Haley, 19 A.2d 436, 91 NH 357  
68 CJ p 570 note 37.

94 CJS—55

In absence of improper purpose, a will or a promise to make one when supported by sufficient consideration by which one in effect agrees to leave at his death his property to another, serves to exclude that which he may in his lifetime dispose of and to include that which he may acquire and own at his death  
Ala—Wagar v Marshburn, 1 So 2d 303, 241 Ala. 73

20. Ala—Wagar v Marshburn, supra  
Ill—Keniry v Costello, 57 NE 2d 758, 324 Ill App 230

W Va.—Steber v Combs, 5 SE 2d 420, 121 W Va 509

21. SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269  
68 CJ p 570 note 39

22. SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269  
68 CJ p 570 note 40

23. SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269  
68 CJ p 570 note 41

24. SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269  
68 CJ p 570 note 42

25. SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269  
68 CJ p 570 note 43

26. SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269  
68 CJ p 570 note 44

27 US—Rash v Peoples Deposit Bank & Trust Co, DCKy, 91 F Supp. 825, affirmed, C.A., 192 F 2d 470, certiorari denied 72 SCt 639, 343 US 909, 96 LEd 1326

Cal—Berdan v Berdan, 103 P 2d 622, 39 Cal App 2d 478

Ill—In re Niehaus' Estate, 94 NE 2d 525, 341 Ill App 454.

Mich—Bell v Cramer's Estate, 295 NW 553, 296 Mich 44—Elmer v Elmer, 260 NW 759, 271 Mich 517

Minn—McCarty v Nelson, 47 NW 2d 595, 233 Minn 362, certiorari denied 72 SCt 177, 342 US 887, 96 LEd 655, rehearing denied 72 SCt 624, 342 US 956, 96 LEd 710—Hanefeld v Fairbrother, 254 NW 821, 191 Minn 547

NJ—Robertson v Hackensack Trust Co, 63 A 2d 515, 1 NJ 304

Pa—In re Handy's Estate, Orph, 37 Del Co 51—Jacobs v Manns, Com Pl, 95 Pittsb Leg J 185, affirmed In re McWilliams Estate, 56 A 2d 241, 162 Pa Super 299

SC—Corpus Juris quoted in Baylor v Bath, 1 SE 2d 139, 142, 189 SC 269

Va—Corpus Juris quoted in Burke v Gale, 67 SE 2d 917, 920, 193 Va 130

W Va.—Hedrick v Harper, 62 SE 2d 265, 135 W Va 47  
68 CJ p 570 note 45

28. Va—Corpus Juris quoted in Burke v Gale, 67 SE 2d 917, 920, 193 Va 130  
68 CJ p 570 note 46

29. Va—Corpus Juris quoted in

necessary that the offer be expressed with technical legal precision in phraseology, it being sufficient that the promisor uses such language as to make his purpose clear<sup>30</sup>

A mere offer, unaccepted, makes no binding contract,<sup>31</sup> there must be an acceptance<sup>32</sup> which must be on the terms of the offer in order to be binding on both parties.<sup>33</sup> Acceptance may consist not alone of a promise, but when contemplated by the offer, of the performance of acts of the kind which the offer calls for,<sup>34</sup> and no formal statement of acceptance, written or verbal, is necessary<sup>35</sup> It is no objection to the enforcement of such a contract that it has been entered into with a third party for the promisee's benefit, if the latter has acted under

and executed it<sup>36</sup>

### § 113(1). — Consideration

Contracts for testamentary or similar disposition of property must, like other contracts, be supported by a sufficient valid consideration

In accordance with the rule applicable to contracts generally, a contract to make a will must be supported by a sufficient valid consideration,<sup>37</sup> except, possibly, where it is a contract under seal<sup>38</sup> The law permits a wide latitude in determining what shall constitute sufficient consideration for a contract to devise<sup>39</sup> A sufficient consideration may consist of a benefit to the promisor,<sup>40</sup> or a detriment to the promisee,<sup>41</sup> or both,<sup>42</sup> but it must fall within at least one of these classes<sup>43</sup> It must have some

Burke v Gale, 67 SE2d 917, 920, 193 Va 130

68 C J p 571 note 47

30 Va.—*Corpus Juris* quoted in Burke v Gale, 67 SE2d 917, 920, 193 Va 130

68 C J p 571 note 48

31. Iowa.—Hankins v Young, 156 N W 380, 174 Iowa 383

32 Iowa.—Hankins v Young, supra

33. Iowa.—Hankins v. Young, supra

34. U S.—Bolander v Godsil, C C A Alaska, 116 F2d 437

Ariz.—Remele v Hamilton, 275 P 2d 403, 78 Ariz 45

Va.—*Corpus Juris* quoted in Burke v Gale, 67 SE2d 917, 920, 193 Va 130

68 C J p 571 note 52

#### Performance as acceptance

The removal of sister to home of deceased was acceptance of deceased's offer to leave property to sister if sister would live with, and care for, deceased, and giving of sixteen years' devoted service to deceased constituted performance of contract by sister entitling her to specific performance of contract, and contract was not abandoned by sister's departure from deceased's home with deceased's consent and without deceased giving sister notice of termination of contract unless sister should resume duties under contract Wash.—Ellis v Wadleigh, 182 P2d 49, 27 Wash 2d 941

35 Va.—*Corpus Juris* quoted in Burke v Gale, 67 SE2d 917, 920, 193 Va 130

68 C J p 571 note 53

36. Iowa.—Kisor v Litzenberg, 212 N W 343, 203 Iowa 1183

68 C J p 571 note 54

37 Alaska.—Moumal v Walsh, 9 Alaska 656

Ala.—Cowan v Salmon, 13 So 2d 190, 244 Ala 285

Ark.—Brunk v Merchants Nat Bank, 230 SW2d 932, 217 Ark 499—Of-ford v Agnew, 218 SW2d 370, 214 Ark 822

Cal.—Fowler v Hansen, 120 P2d 161, 48 Cal App 2d 518

Del.—Equitable Trust Co v Hollingsworth, 49 A2d 325, 29 Del Ch 563

Fla.—Miller v Carr, 188 So 103, 137 Fla 114

Ga.—Mann v Moseley, 67 SE2d 128, 208 Ga 420—Matthews v Blanos, 40 SE2d 715, 201 Ga 549—Walden v Walden, 12 SE2d 345, 191 Ga 182

Ill.—Kaiser v Cobbe, 79 NE2d 604, 400 Ill 214

Keniry v Costello, 57 NE2d 758, 324 Ill App 230

Neb.—In re Nelson's Estate, 256 N W 27, 127 Neb 563

N J.—Ehling v Diebert, 15 A2d 655, 128 N J Eq 115, affirmed 17 A2d 777, 129 N J Eq 11

N M.—Wooley v Shell Petroleum Corporation, 45 P2d 927, 39 NM 256

Ohio.—In re Knisely's Estate, 12 Ohio Supp 140

SD.—Dawson v Corbett, 21 NW2d 758, 71 SD 106

Tex.—Hill v Aldrich, Civ App, 242 SW2d 465, error dismissed

W Va.—Hedrick v Harper, 62 SE2d 265, 135 W Va 47

68 C J p 571 note 56

#### Executed contract

Where son contracted to convey his remainder interest to mother, who owned life estate, in consideration of her executing will leaving all her property to son, and son made deed to mother and mother made will carrying out the contract, will was irrevocable, and the contract being executed, the court would give no attention to adequacy of consideration

Iowa.—Powell v McBlain, 269 NW 883, 222 Iowa 799

#### Nudum pactum

An agreement between brother and two sisters by which sisters agreed to leave their share of father's estate to brother or to brother's surviving wife was a nudum pactum as to all persons other than sisters, who were bound each at the option of the other while both lived, and each of whom could revoke by the other's permission, and their subsequent separate wills leaving nothing to brother's wife, drawn pursuant to a common purpose after brother's death leaving will under which sisters received no actual benefit, was a revocation of the agreement

Mich.—Rose v Southern Mich Nat Bank of Coldwater, 44 NW2d 192, 328 Mich 639

#### Prospective consideration

An agreement to make a will is supported by prospective rather than a past consideration

Ark.—Offord v Agnew, 218 SW2d 370, 214 Ark 822

38. Mass.—Krell v Codman, 28 NE 578, 154 Mass 454, 26 Am SR 260, 14 L R A 860

39. Ill.—Brust v Brust, 89 NE2d 897, 405 Ill 132—Scham v Besse, 74 NE2d 517, 397 Ill 309

40. Alaska.—Moumal v Walsh, 9 Alaska 656

N J.—Drake v Lanning, 24 A 378, 49 N J Eq 452

W Va.—Jefferson v Simpson, 98 SE 212, 83 W Va 274

41. Alaska.—Moumal v. Walsh, 9 Alaska 656

N J.—Drake v Lanning, 24 A 378, 49 N J Eq 452

42. Alaska.—Moumal v Walsh, 9 Alaska 656

N J.—Drake v Lanning, 24 A 378, 49 N J Eq 452

43. Alaska.—Moumal v Walsh, 9 Alaska 656

Cal.—Schaadt v New York Mut L Ins Co, 84 P 249, 2 Cal App 715

value in the eyes of the law,<sup>44</sup> but in the absence of fraud or overreaching, the promisor, if competent, can fix on anything not in itself unlawful as a consideration and put his own value on it,<sup>45</sup> and whether it is equivalent to the promise to leave the property in that respect is for the determination of the parties at the time they make the bargain.<sup>46</sup> A motive, even though expressed in the promise, is not consideration either legal or equitable and will not sustain the contract.<sup>47</sup> A promise may constitute a sufficient consideration.<sup>48</sup> While there must be mutuality of obligation,<sup>49</sup> a consideration exists sufficient to support the contract although it consists of acts to be performed by the offeree if such acts have been fully performed by the promisee.<sup>50</sup>

The conferring of a benefit to which the promisor is already lawfully entitled,<sup>51</sup> or the doing of that which it is the promisee's legal duty to do,<sup>52</sup> does not constitute consideration, but the doing of acts which there is only a moral or social obligation to perform is sufficient for this purpose.<sup>53</sup> A benefit to the promisor, if it forms no part of the inducement for the promise and is given without any

reference thereto, and not as part of any bargain, cannot be made to serve as consideration.<sup>54</sup> In jurisdictions refusing to permit third persons to assert contracts made for their benefit, a contract based thereon may not be enforced by such persons, and it is essential that a consideration of some nature shall have proceeded from the beneficiary in order to render the contract available.<sup>55</sup> Elsewhere the consideration may be sufficient to support the contract although it comes from persons other than the promisee asserting his rights under it,<sup>56</sup> or although the benefits under it flow not to the promisor, but to some third person designated by him.<sup>57</sup> Even though no new or different consideration is given, a continuing consideration is sufficient to support a new promise or ratification where the contract was unenforceable, on other grounds, as originally made.<sup>58</sup>

In the notes below will be found cases of contracts for testamentary or similar disposition of property in which the consideration has been held sufficient,<sup>59</sup> or in which the consideration has been

44 Alaska—Moumal v Walsh, 9 Alaska 656

Kan—Quinton v Kendall, 253 P 600, 122 Kan 814

Pa—In re Lewallen's Estate, 27 Pa Super 320

45 Wash—Alexander v Lewes, 175 P 572, 104 Wash 32

46 Iowa—Burmeister v Hamann, 226 NW 10, 208 Iowa 412

68 C J p 573 note 64

47 NY—Pershall v Elliott, 163 N E 554, 249 NY 183

48 Del—Peyton v William C Peyton Corporation, 194 A 106, 22 Del Ch 187, reversed on other grounds 7 A 2d 737, 23 Del Ch 321, 123 A L R 1482

Ill—In re Wheeler's Estate, 1 NE 2d 425, 284 Ill App 132

Kan—Wolf v Rich, 121 P 2d 370, 154 Kan 636

Md—Hanson v Urner, 111 A 2d 649

68 C J p 573 note 68

49 Ala—Cowin v Salmon, 13 So 2d 190, 244 Ala 285

Ark—Blackburn v White, 147 SW 2d 7, 201 Ark 663

Ill—Keniry v Costello, 57 NE 2d 758, 324 Ill App 230

Ohio—In re Knisely's Estate, 12 Ohio Supp 140

Or—Hunter v Allen, 147 P 2d 213, modified on other grounds 148 P 2d 936

#### Promise to make a gift

Where promisor signed instrument in which he promised to name promisee executor of his will and to devise to him a joint interest in house

and lot and to leave money to promisee's wife for services and kindnesses rendered in the past, and instrument which showed no promise on part of promisee recited "these gifts will appear in my will and must never be disputed," instrument was promise to make a gift and not a contract, and where acts of service and kindness were gratuitous or of negligible value, promisee and wife could not recover for breach of contract from promisor's estate

Cal—Burke v Bank of America Nat Trust & Sav Ass'n, 94 P 2d 58, 34 Cal App 2d 594

50 US—Bolander v Godsil, CCA Alaska, 116 F 2d 437

Kan—Bray v Cooper, 66 P 2d 592, 145 Kan 642

68 C J p 573 notes 69, 70.

51 Cal—Schadt v New York Mut L Ins Co, 84 P 249, 2 Cal App 715

Tex—Hill v Aldrich, Civ App, 242 SW 2d 465, error dismissed

52 Cal—Brown v Freese, 83 P 2d 82, 28 Cal App 2d 603

Fla—Todd v Hyzer, 18 So 2d 888, 154 Fla 702

Ky—Gray v Greer, 70 SW 2d 683, 253 Ky 809

NM—Tellez v Tellez, 186 P 2d 390, 51 NM 416

NC—Sinclair v Travis, 57 SE 2d 394, 231 NC 345—Ritchie v White, 35 SE 2d 414, 225 NC 450

SD—Dawson v Corbett, 21 NW 2d 758, 71 SD 106

68 C J p 573 note 74

53. Ind—Robinson v Foust, 68 NE

182, 31 Ind App 384, 99 Am SR 269

68 C J p 573 note 75

54 Cal—Blanc v Connor, 141 P 217, 167 Cal 719

68 C J p 573 note 76

55 Ga—Ragan v National City Bank of Rome, 170 SE 889, 177 Ga 686

56 NY—Seaver v Ransom, 120 N E 639, 224 NY 233, 2 A L R 1187

68 C J p 574 note 79

57. NY—In re Steglich, 86 NYS 257, 91 App Div 75

58. Ky—Skinner v Rasche, 176 N YS 942, 165 Ky 108

59. Ala—Knight v Smith, 33 So 2d 242, 250 Ala 113—Merchants Nat Bank of Mobile v Cotnam, 34 So

2d 122, 250 Ala 316—Vickers v Pegues, 25 So 2d 720, 247 Ala 624—

Cowin v Salmon, 13 So 2d 190, 244 Ala 285—Wagar v Marshburn, 1

So 2d 303, 241 Ala 73

Cal—West v Stainback, 240 P 2d 366, 108 Cal App 2d 806

Del—Equitable Trust Co v Hollingsworth, 49 A 2d 325, 29 Del Ch. 563

Ga—Cagle v Justus, 28 SE 2d 255, 196 Ga 826—Savannah Bank & Trust Co v Wolff, 11 SE 2d 766, 191 Ga 111

Idaho—Ashbauth v Davis, 227 P 2d 954, 71 Idaho 150, 32 A L R 2d 361

Ill—Brust v Brust, 89 NE 2d 897, 405 Ill 132—Scham v Besse, 74 N E 2d 517, 397 Ill 309

In re Wheeler's Estate, 1 NE 2d 425, 284 Ill App 132.



held insufficient <sup>60</sup>

*Past consideration* Under some circumstances, a past consideration may support, or aid in supporting, the contract,<sup>61</sup> but the past consideration, in order so to operate, must give rise to an equitable obligation, and a previous moral obligation, unconnected with a prior legal or equitable consideration, is not sufficient <sup>62</sup>

## § 113(2). — Evidence as to Existence and Terms of Contract

The burden is on the plaintiff to establish the existence and terms of a contract for testamentary or similar disposition of property, and the contract and its terms must be established by evidence that is clear and convincing

Generally, in actions relating to contracts for testamentary or similar disposition of property, the burden is on plaintiff to show the existence and

terms of the contract,<sup>63</sup> and where the agreement is in writing, the execution of the contract<sup>64</sup> Where a confidential relationship exists, an alleged oral agreement to bequeath property will be presumed to have been obtained by undue influence <sup>65</sup>

The existence and terms of the contract may be shown by any competent evidence which is relevant and material <sup>66</sup> The proved integrity of the deceased is a fact which the court will consider <sup>67</sup> Evidence is admissible of the facts and circumstances,<sup>68</sup> such as the relations of the parties,<sup>69</sup> and their business habits<sup>70</sup> Parol evidence of the existence of an oral contract to make a will is inadmissible to vary the terms of a formal written contract which does not mention a will.<sup>71</sup>

Courts accept with caution and examine with scrutiny evidence offered in support of a contract to make a disposition of property of a deceased person different from that provided by law.<sup>72</sup> The

- Kan—In re Spark's Estate, 212 P 2d 369, 168 Kan 270—Paton v Paton, 103 P.2d 826, 152 Kan 351—Johnson v Soden, 103 P 2d 812, 152 Kan 284
- Ky—Arnold v Arnold's Ex'x, 237 SW 2d 58, 314 Ky 734
- Md—Nichols v Reed, 46 A 2d 695, 186 Md 317
- Mich—Winchell v Mixter, 25 NW 2d 147, 316 Mich 151
- Minn—Downing v Maag, 10 NW 2d 778, 215 Minn 506
- Mo—Adams v Moberg, 205 SW 2d 553, 256 Mo 1175
- NJ—Ochs v Ochs, 192 A 502, 122 NJEq 143, affirmed 192 A 507, 122 NJEq 143
- NY—In re Nichols' Estate, 107 NY 2d 311, 201 Misc 922
- ND—Brock v Noecker, 267 NW 656, 66 ND 567
- Okl—Staton v Moody, 256 P 2d 409, 208 Okl 372—Wallace v Hill, 249 P 2d 452, 207 Okl 319
- Tenn—Clark v Hefley, 238 SW 2d 513, 34 Tenn App 389
- W Va—Harris v Harris, 43 SE 2d 225, 130 W Va. 100
- 68 CJ p 571 note 56 [a]
60. U S—MacGowan v Barber, CC A Vt, 127 F 2d 458
- Ill—Linder v Potier, 100 NE 2d 602, 409 Ill. 407.
- Iowa—Lanier v Lanier, 288 NW 104, 227 Iowa 258
- Kan—In re Pallister's Estate, 152 P 2d 61, 159 Kan 7
- Mich—Pakulski v Ludwiczewski, 289 NW 231, 291 Mich 502
- NY—In re Tschirky's Will, 135 NY 2d 553, 206 Misc 868
- Okl—Jones v Tautfest, 243 P 2d 1003, 206 Okl 380
- Tex—Williams v Lattimer, Civ App, 173 SW 2d 219.
- W Va—Steber v Combs, 5 SE 2d 420, 121 W Va 509
61. Wis—In re McLean's Estate, 262 NW 707, 219 Wis 222
- 68 CJ p 574 note 82
- Promise of forbearance to sue testator for alleged liability for personal injuries constituted consideration for promise by testator to provide for claimant by will
- Wis—In re McLean's Estate, 262 NW 707, 219 Wis 222
62. NY—Pershall v Elliott, 163 NE 554, 249 NY 183
- 68 CJ p 574 note 83
63. Kan—In re Stewart's Estate, 229 P 2d 771, 171 Kan 93
- Ky—Gray v Greer, 70 SW 2d 683, 253 Ky 809
- Mo—Glauert v Huning, 266 SW 2d 653
- Wash—Jennings v D'Hooghe, 172 P 2d 189, 25 Wash 2d 702—Dau v Pence, 133 P 2d 523, 16 Wash 2d 368
- Presumptions and burden of proof in suits for specific performance see Specific Performance § 140
64. Neb—Sack v Siekman, 23 NW 2d 706, 147 Neb 416
65. Cal—Khoury v Barham, 192 P 2d 823, 85 Cal App 2d 202
66. Tex—Howard v Combs, Civ App, 113 SW 2d 221—Cheney v Cheney, Civ App, 82 SW 2d 1021, reversed on other grounds 113 SW 2d 162, 131 Tex 212, rehearing denied 114 SW 2d 533, 131 Tex 212
- Admissibility of evidence in suits for specific performance see Specific Performance § 141
- Evidence held inadmissible
- Minn—Hanefeld v Fairbrother, 254 NW 821, 191 Minn 547.
- NJ—Hackensack Trust Co v Ackerman, 47 A 2d 832, 138 NJEq 244
- Alleged declarations of testator that he would devise all his property to contestant and his sister in equal parts if contestant would transfer his share of mother's estate to testator although inadmissible to establish the validity of, or to enforce the alleged agreements were admissible to show intent of testator and to establish fact that will was in conflict with the fixed purposes and intentions of testator as previously expressed by him
- Fla—In re Burton's Estate, 45 So 2d 873
67. Mo—Feste v Bartlett, 269 SW 2d 609
68. Mo—Thompson v St Louis Union Trust Co, 253 SW 2d 116, 363 Mo 667
- W Va—Gray v Marino, 76 SE 2d 585, 138 W Va. 585
69. Mo—Thompson v St Louis Union Trust Co, 253 SW 2d 116, 363 Mo 667
- W Va—Gray v Marino, 76 SE 2d 585, 138 W Va. 585
70. W Va—Gray v Marino, supra.
71. Miss—Fuqua v Mills, 73 So 2d 113, suggestion of error overruled 73 So 2d 928
72. Ill—Galapeaux v Orviller, 123 NE 2d 321, 4 Ill 2d 442—Wessel v Eilenberger, 119 NE 2d 207, 2 Ill 2d 522—Linder v Potier, 100 NE 2d 602, 409 Ill 407—Anson v Haywood, 74 NE 2d 489, 397 Ill 370
- Keniry v Costello, 57 NE 2d 758, 324 Ill App 230
- Weight and sufficiency of evidence in suits for specific performance of contracts to devise, bequeath, or

contract and its terms must be established by evidence that is clear and convincing,<sup>73</sup> or, as has otherwise been stated, by evidence that is clear and conclusive,<sup>74</sup> clear, cogent, satisfactory, and convincing,<sup>75</sup> clear, concise, convincing, and satisfactory,<sup>76</sup> clear, explicit, and convincing,<sup>77</sup> clear, explicit, and definite,<sup>78</sup> clear, positive, and convincing,<sup>79</sup> clear, precise, and indubitable,<sup>80</sup> clear and satisfactory,<sup>81</sup> clear, satisfactory, and convincing,<sup>82</sup> clear, satisfactory, and unequivocal,<sup>83</sup> clear and unequivocal,<sup>84</sup> cogent, clear, and convincing,<sup>85</sup> conclusive, definite, certain, and beyond all legitimate controversy,<sup>86</sup> or full, clear, and convincing.<sup>87</sup> Very strong evidence is required,<sup>88</sup> and the strongest evidence of consideration and deliberate agreement must be shown.<sup>89</sup> A high

order of proof is required to sustain such contracts,<sup>90</sup> and the claimant is held to a strict proof thereof,<sup>91</sup> and the evidence must establish that the minds of the parties met on definite terms.<sup>92</sup>

The evidence must leave no reasonable doubt as to the terms or character of the agreement,<sup>93</sup> it is not sufficient that the contract be established by a preponderance of testimony,<sup>94</sup> although it has been held that all the provisions of the contract need not be proved beyond a reasonable doubt.<sup>95</sup> In the absence of a statute to the contrary, an oral promise to make a will can be proved as any other fact.<sup>96</sup> While it has been held that the contract need not be established by direct evidence,<sup>97</sup> it has also been held that the agreement must be clearly developed

adopt see Specific Performance § 143

73 Ark—James v Rogers, 271 SW 2d 930—Carter v Walker, 139 SW 2d 233, 200 Ark 465

Fla—Miller v Carr, 188 So 103, 137 Fla 114

Ga—Wynne v Buyers, 187 SE 173, 53 Ga App 660

Ill—Keniry v Costello, 57 NE 2d 758, 324 Ill App 230

Kan—McClean v McClean, 52 P 2d 625, 142 Kan 716

Mo—Glauert v Huning, 266 SW 2d 653

NJ—Robertson v Hackensack Trust Co, 63 A 2d 515, 1 NJ 304

Pa—In re Ickler's Estate, Orph, 34 Del Co 538

RI—Coulbourn v Wootton, 50 A 2d 64, 72 RI 238—Tillinghast v Harrop, 9 A 2d 28, 63 RI 394

74 US—Craig v Bane, CA Ill, 209 F 2d 779

75. Ark—Alphin v Alphin, 279 SW 2d 822—Brunk v Merchants Nat Bank, 230 SW 2d 932, 217 Ark 499—Stuart v Beam, 224 SW 2d 7, 216 Ark 73—Offord v Agnew, 218 SW 2d 370, 214 Ark 822—Crowell v Parks, 193 SW 2d 483, 209 Ark 803

76 Or—Hunter v Allen, 147 P 2d 213, 174 Or 261, modified on other grounds 148 P 2d 936, 174 Or 261

77. US—Craig v Bane, CA Ill, 209 F 2d 779

Ill—Bidwell v Dempsey, 67 NE 2d 315, 329 Ill App 182

78. Mo—Jennings v Achuff, 272 S W 2d 263—Thompson v St Louis Union Trust Co, 253 SW 2d 116, 363 Mo 667

79. Minn—Carlson v Carlson, 300 NW 900, 211 Minn 297—Jannetta v Jannetta, 285 NW 619, 205 Minn 266

80. Pa—In re Rockhill's Estate, Orph., 61 Montg Co 262

"Clear, precise and indubitable proof" such as required to establish a parol contract of a decedent to give a claimant a portion of his estate in consideration of services rendered, means that witnesses must be credible, distinctly remember the facts to which they testify, and narrate the details exactly, and the evidence must be of such weight and directness as to make out the facts alleged beyond a reasonable doubt

Pa—Stafford v Reed, 70 A 2d 345, 363 Pa 405

81. Pa—In re Emig's Estate, 37 Pa Dist & Co 151, 53 York Leg Rec 153

82 Alaska—Moumal v Walsh, 9 Alaska 656

Ark—Watts v Mahon, 264 SW 2d 623—Jensen v Housley, 182 SW 2d 758, 207 Ark 742

Idaho—Johnson v Flatness, 211 P 2d 769, 70 Idaho 37

Iowa—Hatcher v Sawyer, 52 NW 2d 490, 243 Iowa 858—Hale v Iowa Des Moines Nat Bank & Trust Co, 51 NW 2d 421, 243 Iowa 303—Fowler v Lowe, 42 NW 2d 516, 241 Iowa 1093

83 Neb—Eagan v Hall, 68 NW 2d 147, 159 Neb 537

84 Or—Hunter v Allen, 147 P 2d 213, 174 Or 261, modified on other grounds 148 P 2d 936, 174 Or 261

85. NJ—Richards v Richards, 58 A 2d 544, 141 NJ Eq 579—White v Risdon, 55 A 2d 308, 140 NJ Eq 613

86 Wash—In re Hickman's Estate, 250 P 2d 524, 41 Wash 2d 519—Jennings v D'Hooghe, 172 P 2d 189, 25 Wash 2d 702—McGregor v McGregor, 171 P 2d 694, 25 Wash 2d 511—Auger v Shideler, 161 P 2d 200, 23 Wash 2d 505—Whiting v Armstrong, 160 P 2d 1014, 23 Wash 2d 290—Dau v Pence, 133 P 2d 523, 16 Wash 2d 368—Aho v Ahola, 104 P 2d 487, 4 Wash 2d 598—In re

Smartwood's Estate, 89 P 2d 203, 198 Wash 557—In re Fischer's Estate, 81 P 2d 836, 196 Wash 41

87 W Va—Gray v Marino, 76 SE 2d 585, 138 W Va 585

88. NY—In re Loftus' Estate, 85 NY S 2d 244, 193 Misc 704

89 Wash—Jennings v D'Hooghe, 172 P 2d 189, 25 Wash 2d 702

90 NY—Tracy v Danzinger, 3 NY S 2d 24, 253 App Div 418, affirmed Tracy v Danzinger, 18 NE 2d 311, 279 NY 679

91 Md—Wilkins v Anderson, 191 A 433, 172 Md 700

**Contracts to devise or convey distinguished**

The rules of evidence required to establish an oral contract to devise real property should be more strictly construed than those dealing with other cases involving oral contracts to convey real property

Okl—Jones v Taustfest, 243 P 2d 1003, 206 Okl 380

92. Md—Hanson v Urner, 111 A 2d 649

93 Ga—Shadburn v Tapp, 77 SE 2d 7, 209 Ga 887

Idaho—Johnson v Flatness, 211 P 2d 769, 70 Idaho 37

Pa—Stafford v Reed, 70 A 2d 345, 363 Pa 405

94. Ark—Jensen v Housley, 182 S W 2d 758, 207 Ark 742

95 Kan—In re Wert's Estate, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159

96. Miss—Boggan v Scruggs, 29 So 2d 86, 200 Miss 747

97 Mo—Thompson v St Louis Union Trust Co, 253 SW 2d 116, 362 Mo 667

**Acceptance of a contract to make a will may be shown by circumstantial evidence and direct proof is not essential**

Ill—In re Niehaus' Estate, 94 NE 2d 525, 341 Ill App 454.

by direct evidence<sup>98</sup> The agreement may be shown by corroborating testimony,<sup>99</sup> and all the circumstances may be considered,<sup>1</sup> including performance,<sup>2</sup> as well as the governing law<sup>3</sup>

Although such expressions may be considered with other circumstances in determining whether a contract has been made,<sup>4</sup> mere expressions of donative intent are insufficient to establish the existence of a contract,<sup>5</sup> and it is not sufficient to show merely that the statements and conduct of the deceased raised the hopes and expectations of complainant<sup>6</sup> The implication that a contract was made may have reinforcement from evidence of the conduct of the parties at the time of making the agreement and subsequent thereto<sup>7</sup> Statements or conduct of the promisee inconsistent with his claim of a contract will be given due weight in the determination of whether there was such a contract<sup>8</sup> The contract may be proved by declarations and conduct of the parties not in the presence of each other,<sup>9</sup> it may also be shown by competent witnesses who testify to admissions of the deceased party to the agreement,<sup>10</sup> or an express promise may be shown<sup>11</sup>

A will made in conformity with an alleged contract is strong confirmatory proof that such an agreement was entered into,<sup>12</sup> where there is evi-

dence tending to show the existence of a contract, the proof of the execution of a will in favor of the promisee is corroborative proof of the contract, even though the will is invalid,<sup>13</sup> and even where the will is subsequently revoked, it is considered by the court as evidence in support of the agreement,<sup>14</sup> but the subsequent execution of another will, not in conformity with the alleged contract, is strong evidence of the absence of such an agreement<sup>15</sup> The contract may be established by the parol evidence of witnesses who were not present at the making of the contract<sup>16</sup> Impressions made on a witness,<sup>17</sup> or what he understood from a conversation,<sup>18</sup> are not competent to establish a contract to make a will.

The testimony of a witness is to be viewed in the light of his interest, his expectations, his conclusions, and the condition of his memory as disclosed by the record,<sup>19</sup> and witnesses offered for the purpose of proving the contract may speak their own language if, with its background and context, their thought and meaning are clear and the contract is adequately and definitely proved on the whole record<sup>20</sup> The mere relationship of mother and son does not tend to prove the existence of a parol contract to devise<sup>21</sup>

98 Kan.—In re Wert's Estate, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159

Pa.—Stafford v Reed, 70 A 2d 345, 363 Pa 405  
In re Emig's Estate, 37 Pa Dist & Co 151, 53 York Leg Rec 153

99 Kan.—In re Wert's Estate, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159

If based on parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses

N.Y.—In re Booth, 44 N.Y.S 2d 795

1. Iowa.—Hatcher v Sawyer, 52 N W 2d 490, 243 Iowa 858  
Kan.—In re Wert's Estate, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159

#### Date of contract immaterial

Where it was proved that a contract to execute a will existed and was reaffirmed several times by the deceased during his lifetime, the exact date of the origin of the contract was not material

Ill.—In re Niehaus' Estate, 94 N.E 2d 525, 341 Ill App 454

2. Kan.—In re Wert's Estate, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159

3 Iowa.—Hatcher v Sawyer, 52 N W 2d 490, 243 Iowa 858.

4 Mich.—Groening v McCambridge, 275 N.W 795, 282 Mich 135

5. Ga.—Mulligan v Mulligan, 39 S E 2d 699, 201 Ga 444

Iowa.—Hale v Iowa-Des Moines Nat Bank & Trust Co, 51 N.W 2d 421, 243 Iowa 303

Mo.—Rosenberg v Steiner, 238 S W 2d 806, 360 Mo 447—Feiden v Gibson, 218 S W 2d 105

Mont.—Cox v Williamson, 227 P 2d 614, 124 Mont 512

N.Y.—In re Dawkins' Estate, 112 N.Y.S 2d 124, 201 Misc 451

Or.—Hawkins v Toombs, 242 P 2d 194, 194 Or 478

Pa.—Walters v Kinghorn's Estate, Com Pl, 17 Beaver 7—In re Stichler's Estate, Orph, 35 Del Co 55—In re Ickler's Estate, Orph, 34 Del Co 538—Magruda v Magruda, Com Pl, 27 Wash Co 40

Wash.—Jennings v D'Hooghe, 172 P 2d 189, 25 Wash 2d 702—Dau v Pence, 133 P 2d 523, 16 Wash 2d 368

6. Md.—Hanson v Urner, 111 A 2d 649

7. Mo.—Thompson v St Louis Union Trust Co, 253 S W 2d 116, 363 Mo 667

8. Wash.—Thomas v Hensel, 230 P 2d 290, 38 Wash 2d 457

9. Ill.—In re Niehaus' Estate, 94 N.E 2d 525, 341 Ill App 454

10 Mo.—Jennings v Achuff, 272 S W 2d 263—Thompson v St Louis

Union Trust Co, 253 S W 2d 116, 363 Mo 667

11. Mo.—Jennings v Achuff, 272 S W 2d 263—Thompson v St Louis Union Trust Co, 253 S W 2d 116, 363 Mo 667

12. Wash.—Ellis v Wadleigh, 182 P 2d 49, 27 Wash 2d 941—Widman v Maurer, 141 P 2d 135, 19 Wash 2d 28

13. Or.—Tiggelbeck v Russell, 213 P 2d 156, 187 Or 554

14. Or.—Tiggelbeck v Russell, supra—In re Lieurance's Estate, 182 P 2d 969, 181 Or 646, rehearing denied 185 P 2d 575, 181 Or 646—In re Burke's Estate, 134 P 11, 66 Or 252

W Va.—Gray v Marino, 76 S.E 2d 585, 138 W Va 585

15. Wash.—Widman v Maurer, 141 P 2d 135, 19 Wash 2d 28

16. Md.—Hanson v Urner, 111 A 2d 649

17. Idaho.—Johnson v Flatness, 211 P 2d 769, 70 Idaho 37

18 Idaho.—Johnson v Flatness, supra

19. Mo.—Shaw v Hamilton, 141 S W 2d 817, 346 Mo 366

20. Mo.—Glauert v Huning, 266 S W 2d 653

21. Or.—Hunter v Allen, 147 P 2d 213, 174 Or 261, modified on other grounds 148 P 2d 936, 174 Or 261.

In particular cases relating to contracts to devise or bequeath, the evidence has been held sufficient to show the existence or terms of the contract,<sup>22</sup> or insufficient to show such facts<sup>23</sup>

## § 114. Construction

The rules of construction of contracts generally are

applicable to contracts for testamentary or similar disposition of property

Contracts to make a will or other similar disposition of property are subject to the same rules of construction as other contracts generally,<sup>24</sup> and, to some extent, to those which govern the construction of wills<sup>25</sup> The law does not view the renunciation of the right to revoke a will as a casual matter<sup>26</sup>

22. Ariz—Remele v Hamilton, 275 P 2d 403, 78 Ariz 45  
Ark—Watts v Mahon, 264 SW 2d 623  
Del—Equitable Trust Co v Hollingsworth, 49 A 2d 325, 29 Del Ch 563  
Fla—Donnelly v Mann, 68 So 2d 584  
Ga—Matthews v Blancos, 40 SE 2d 715, 201 Ga. 549—Mickle v Moore, 17 SE 2d 728, 193 Ga. 150  
Ill—Anson v Haywood, 74 NE 2d 489, 397 Ill 370  
Iowa—Hatcher v Sawyer, 52 NW 2d 490, 243 Iowa 858  
Kan—In re Wert's Estate, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159  
Me—Lutick v Sileika, 14 A 2d 706, 137 Me 30  
Minn—Ehmke v Hill, 51 NW 2d 811, 236 Minn 60—Hafften v Kirsch, 36 NW 2d 35, 227 Minn 523  
Neb—O'Shea v O'Shea, 11 NW 2d 540, 143 Neb 843—In re Nelson's Estate, 256 NW 27, 127 Neb 563  
Or—Vandiver v Stone, 41 P 2d 247, 149 Or 426  
Tex—Johnson v Durst, Civ App, 115 SW 2d 1000, error dismissed  
Vt—Laplante v Eastman, 105 A 2d 265, 118 Vt 221  
Wash—Jansen v Campbell, 227 P 2d 175, 37 Wash 2d 879—Auger v Shideler, 161 P 2d 200, 23 Wash 2d 505  
Wis—In re McLean's Estate, 262 N W 707, 219 Wis 222

### Contracts in return for care or support

US—Bolander v Godsil, CCA Alaska, 116 F 2d 437  
Ark—Jeffries v Merideth, 243 SW 2d 942, 219 Ark 654  
Kan—In re Spark's Estate, 212 P 2d 369, 168 Kan 270  
Ky—Rose v Reese, 160 SW 2d 614, 290 Ky 356  
Or—Tiggelbeck v Russell, 213 P 2d 156, 187 Or 554  
Wash—Carey v Powell, 204 P 2d 193, 32 Wash 2d 761—Ellis v Wadleigh, 182 P 2d 49, 27 Wash 2d 941  
—Luther v National Bank of Commerce, 98 P 2d 667, 2 Wash 2d 470  
—Resor v Schaefer, 74 P 2d 917, 193 Wash 91

### Evidence held not impeached

Fact that decedent was an attorney did not tend to impeach evidence of his oral contract to make a will devising his estate to a friend  
Minn—Downing v Maag, 10 NW 2d 778, 215 Minn 506.

23 US—Neely v Merchants Trust Co of Red Bank, CCANJ, 113 F 2d 953, certiorari denied 61 S Ct 171, 311 US 705, 85 L Ed 457, rehearing denied 61 S Ct 391, 311 US 730, 85 L Ed 475—Newell v Capelle, CCA Del, 88 F 2d 1007  
Ark—Alphin v Alphin, 279 SW 2d 822—Ellis v Carroll, 220 SW 2d 800, 215 Ark 353—Offord v Agnew, 218 SW 2d 370, 214 Ark 822—Crowell v Parks, 193 SW 2d 483, 209 Ark 803  
Cal—Rodgers v Mitchell, 265 P 2d 143, 122 Cal App 2d 717—Drum v Bummer, 175 P 2d 879, 77 Cal App 2d 453  
Idaho—Johnson v Flatness, 211 P 2d 769, 70 Idaho 37  
Ill—Van Hooser v Fick, 63 NE 2d 141, 326 Ill App 593—Corcoran v Williams, 271 Ill App 312  
Iowa—Hale v Iowa-Des Moines Nat Bank & Trust Co, 51 NW 2d 421, 243 Iowa 303—Fowler v Lowe, 42 NW 2d 516, 241 Iowa 1093  
Kan—McClean v McClean, 52 P 2d 625, 142 Kan 716  
Ky—Conners v Ehle, 269 SW 2d 716  
Md—Tilghman v Frazer, 59 A 2d 781, 191 Md 132, opinion supplemented 62 A 2d 596, 191 Md 132  
Mich—Colgrove v Goodyear, 37 NW 2d 779, 325 Mich 127, 10 ALR 2d 1029—Elmer v Elmer, 260 NW 759, 271 Mich 517  
Minn—In re Le Borius' Estate, 28 N W 2d 157, 224 Minn 203—Carlson v Carlson, 300 NW 900, 211 Minn 297  
Mo—Day v Turner, 232 SW 2d 396  
Neb—Casper v Frey, 41 NW 2d 363, 152 Neb 441  
NJ—Yuritch v Yuritch, 51 A 2d 901, 139 NJ Eq 439—Ehling v Diebert, 15 A 2d 655, 128 NJ Eq 115, affirmed 17 A 2d 777, 129 NJ Eq 11  
NY—In re Baer's Estate, 92 NYS 2d 359, 196 Misc 979  
—In re Conay's Estate, 125 NYS 2d 62, affirmed 135 NYS 2d 626, 284 App Div 950—In re Booth, 44 NYS 2d 795  
Ohio—Alban v Schnieders, 34 NE 2d 302, 67 Ohio App 397  
Or—Hunter v Allen, 147 P 2d 213, 174 Or 261, modified on other grounds 148 P 2d 936, 174 Or 261  
—Nalley v Harder, 32 P 2d 1033, 147 Or 293  
Tex—Hassell v Frey, 117 SW 2d 413, 131 Tex 578  
Wash—Boettcher v Busse, 277 P 2d 368, 45 Wash 2d 579—In re Hick-

man's Estate, 250 P 2d 524, 41 Wash 2d 519—McGregor v McGregor, 171 P 2d 694, 25 Wash 2d 511—Whiting v Armstrong, 160 P 2d 1014, 23 Wash 2d 290—Widman v Maurer, 141 P 2d 135, 19 Wash 2d 28—Aho v Ahola 104 P 2d 487, 4 Wash 2d 598—In re Swartwood's Estate, 89 P 2d 203, 198 Wash 557  
Wis—In re Burmania's Estate, 34 NW 2d 850, 253 Wis 470

### Contracts in return for care or support

Ark—Stuart v Beam, 224 SW 2d 7, 216 Ark 73—Jensen v Housley, 182 SW 2d 758, 207 Ark 742—Carter v Walker, 139 SW 2d 233, 200 Ark 465  
Mich—Truedell v Ludington State Bank, 263 NW 403, 273 Mich 390  
Mont—Cox v Williamson, 227 P 2d 614, 124 Mont 512  
Va—Taylor v Hopkins, 84 SE 2d 430, 196 Va. 571  
Wash—Dau v Pence, 133 P 2d 523, 16 Wash 2d 368  
W Va—Gray v Marino, 76 SE 2d 585, 138 W Va 585

### 24 Ky—Corpus Juris quoted in Farmers Nat Bank of Danville, Ky v Young, 179 SW 2d 229, 234, 297 Ky 95

Or—Florey v Meeker, 240 P 2d 1177, 194 Or 257  
68 CJ p 574 note 86.

### Strict construction

(1) A contract to bequeath property will be closely scrutinized and strictly construed

Utah—Ward v Ward, 85 P 2d 635, 96 Utah 263

(2) Where promisee and wife sought to recover for breach of alleged contract whereby deceased promised to name promisee executor of his will and to devise to him and wife a joint interest in house and lot and certain sum of money to wife, and promisee and wife stood in relation of trust and confidence with promisor, court would view the transaction with the most scrutinizing jealousy  
Cal—Burke v Bank of America Nat Trust & Sav Ass'n, 94 P 2d 58, 34 Cal App 2d 594

### 25. Ky—Corpus Juris quoted in Farmers Nat Bank of Danville, Ky v Young, 179 SW 2d 229, 234, 297 Ky 95

68 CJ p 574 note 87

26. NY—In re Bekker's Estate, 129 NYS 2d 126, 283 App Div 609

A construction will be given which will effectuate the real intent of the parties, as expressed,<sup>27</sup> in the instrument as a whole,<sup>28</sup> and as it was made at the time the agreement was made,<sup>29</sup> in the light of the circumstances surrounding the execution of the contract<sup>30</sup> Some meaning shall, if possible, be given to every part of it<sup>31</sup> Where the contract is contained in a series of letters, all the letters are to be considered and construed together<sup>32</sup> That meaning and effect are to be given the language which the parties manifestly intended it should have;<sup>33</sup> it is to be applied according to its common use or meaning,<sup>34</sup> even though it is expressed in terms having a technical, legal meaning if it is plain from the manner and circumstances in which they are used that the parties used the terms according to their popular, and not their legal signifi-

cation<sup>35</sup>

The meaning which the parties themselves by their conduct attach to the contract is an acceptable guide to its interpretation,<sup>36</sup> but that circumstance is not in all cases conclusive as to the rights of beneficiaries under the agreement<sup>37</sup> A construction totally depriving the contract of all force and effect and rendering it a nullity will not be favored<sup>38</sup> Such contracts will be construed as having been made in view of, and with the intention that they shall operate according to, the existing laws with respect to transfers by will<sup>39</sup> In addition to the examples and instances already set out in this section in connection with particular principles of construction, there are a number of other cases in which provisions of particular contracts of this character have been judicially construed<sup>40</sup>

27. Kan—In re Koellen's Estate, 176 P 2d 544, 162 Kan 395

Ky—Corpus Juris quoted in Farmers Nat Bank of Danville, Ky v Young, 179 SW 2d 229, 234, 297 Ky 95

68 C J p 575 note 88

**When intention is reduced to writing** in form of will or contract, there is strong implication of fact that whole intention has been expressed and still stronger implication that there is no agreement or intention contrary to that expressed  
SC—Young v Levy, 32 SE 2d 889, 206 SC 1

#### **Promise to make third person heir**

The promise of a decedent to make a third person decedent's heir is the equivalent of a promise to devise all of decedent's descendible estate to the third person; and where for a legal consideration one promises to make another his heir, it is always regarded not as promising the impossible of establishing the tie of blood, that which makes one the "heir" of another, but as the equivalent of promising that he shall receive a child's inheritable part of the promisor's estate

Ky—Hehr's Adm'r v Hehr, 157 SW 2d 111, 288 Ky 580

**A contract to devise farm** "subject to a payment to my executors, an amount mutually understood and agreed upon by both parties" meant price which was orally agreed on by testator and purchaser and not price to be agreed on by testator's executors and purchaser

NJ—Ochs v Ochs, 192 A 502, 122 N J Eq 143, affirmed 192 A 507, 122 N J Eq 143

28. Ky—Corpus Juris quoted in Farmers Nat Bank of Danville, Ky v Young, 179 SW 2d 229, 234, 297 Ky 95

68 C J p 575 note 89.

#### **Will part of contract**

(1) Where parties enter into a contract by which one of them agrees to execute a will in favor of the other for sufficient consideration, and thus the parties bind themselves by reciprocal obligations, will made in pursuance of such contract is an integral part of the contract  
Md—Hughes v McDaniel, 98 A 2d 1, 202 Md 626

(2) Where testator and his brother entered into a valid and enforceable agreement providing that, for a consideration, testator would devise a specified tract of land to brother's heirs, but making no provision as to proportions in which such land would be devised, a will made pursuant to the agreement did not become a part of the agreement, although the terms thereof were known by the brother, nor did the terms thereof become a separate and binding agreement, and testator was not divested of his right to revoke the will and exercise, in another will, his discretion as to the portions he would give to such heirs  
Okla—Ashley v Ketchersid, 265 P 2d 487

29. Ky—Corpus Juris quoted in Farmers Nat Bank of Danville, Ky v Young, 179 SW 2d 229, 234, 297 Ky 95

68 C J p 575 note 90

30. Ky—Corpus Juris quoted in Farmers Nat Bank of Danville, Ky v Young, 179 SW 2d 229, 234, 297 Ky 95

NY—In re Glen's Estate, 284 N F S 685, 157 Misc 753, reversed on other grounds In re Glen, 288 N Y S 24, 247 App Div 518, affirmed In re Glen's Estate, 4 NE 2d 433, 272 N Y 530, reargument denied 5 NE 2d 371, 272 N Y 640

68 C J p 575 note 91

31. Iowa—Manchester v Loomis, 181 NW 415, 191 Iowa 554.

68 C J p 575 note 92

32. Ala—Taylor v. Cathey, 100 So 834, 211 Ala 589

33. Ky—Parrott v Graves' Ex'x, 32 SW 605, 17 Ky L 773

34. Ky—Parrott v Graves' Ex'x, supra

35. Iowa—Manchester v Loomis, 195 NW 198, 198 NW 102, 197 Iowa 1049

68 C J p 575 note 96

36. Kan—Bless v Blizzard, 120 P 351, 86 Kan 230

NY—In re Sterling's Estate, 35 N Y S 2d 399, 264 App Div 308, affirmed 50 NE 2d 234, 290 N Y 820

37. NY—Morgan v Sanborn, 122 N E 696, 225 N Y 454

68 C J p 575 note 98

38. NY—Ga Nun v Palmer, 111 NE 223, 216 N Y 603

68 C J p 575 note 99

39. Mass—Clarke v Treasurer and Receiver General, 115 NE 416, 226 Mass 301, L R A 1917D 800

40. Ky—Arnold v. Arnold's Ex'x, 237 SW 2d 58, 314 Ky 734.

68 C J p 576 note 3

#### **After-acquired property**

(1) An agreement whereby owner of property agreed to will his property to children whose custody was entrusted to owner contemplated a transfer of property owned at time of owner's death and not merely that owned at time of execution of agreement

Tex—Cheney v Coffey, 113 SW 2d 162, 130 Tex 212, rehearing denied Cheney v Coffey, 114 SW 2d 533, 130 Tex 212

(2) Other decisions with respect to after acquired property see 68 C J p 576 note 3 [a]

#### **Agreements to compensate by will**

Ky—Rose v Reese, 160 SW 2d 614, 290 Ky 356

NM—Tellez v. Tellez, 186 P.2d 390, 51 NM 416.

## § 115 What Law Governs

The general rules applicable to contracts determine what law governs contracts for testamentary or similar disposition of property

Although a contract to make a will, or the like, if valid where made, is valid everywhere,<sup>41</sup> it is not necessarily enforceable everywhere, and to be enforceable should not be opposed to the policy of the jurisdiction of the testator's final domicile.<sup>42</sup> As far as the enforceability of the agreement depends on matters going to the remedy, the *lex fori*, rather than the *lex loci contractus*, governs.<sup>43</sup> With respect to construction, such a contract is governed by the law of the place where it is executed,<sup>44</sup> relating to damages, by the law of the place where it is to be performed.<sup>45</sup>

## § 116. Performance or Breach

a. By promisor

b. By promisee

NY—In re St John's Estate, 296 N Y S 613, 163 Misc 17  
68 C J p 576 note 3 [b]

**Date of effectiveness of contract**

A contract whereby devisees of realty conveyed to them by their mother agreed that they would execute will leaving the realty to the survivor for life and thereafter to descendants of their father, related back to the deed transactions three years before and became effective between the parties as of the date the deeds were executed and delivered, where the contract was merely evidence of a preexisting oral agreement made at date of execution of the deeds

Ill—Oglesby v Springfield Marine Bank, 69 NE 2d 269, 395 Ill 37

**Family settlement**

Alleged oral agreement by which testator undertook by will to leave second wife only one-sixth of estate, which would equal share of each of his five children, if children would accept second wife socially as a member of the family, entered into before testator's marriage to second wife and at a time when children had no interest in testator's property, was not a family settlement

Kan—In re Pallister's Estate, 152 P 2d 61, 159 Kan 7

**Nature or character of property to be devised or bequeathed**

(1) Generally

Cal—Berdan v Berdan, 103 P 2d 622, 39 Cal App 2d 478

Ky—Farmers Nat Bank of Danville, Ky, v Young, 179 SW 2d 229, 297 Ky 95

Mo—Sportsman v Halstead, 147 S W 2d 447, 347 Mo 286—Roth v Roth, 104 S W 2d 314, 340 Mo 1043  
NY—In re Sterling's Estate, 35 N

Y S 2d 399, 264 App Div 308, affirmed 50 NE 2d 234, 290 NY 820  
Or—McGinn v Gilroy, 165 P 2d 73, 178 Or 24

Tex—Lange v Schulte, Civ App, 276 SW 2d 889, error refused no reversible error—Andrews v Lary, Civ App, 224 SW 2d 770, error refused no reversible error  
68 C J p 576 note 3 [f]

(2) The quoted phrase in contract to leave deceased's meat market business and "all I have got" to plaintiff in consideration of plaintiff's entering the business, meant all that deceased had pertaining to such business

Va—Clark v Atkins, 51 SE 2d 222, 188 Va 688

**Extent of power to deal with, or dispose of, property during his life retained by promisor**

Ill—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19

Iowa—Evans v Cole, 281 NW 230, 225 Iowa 756—Powell v McBlain, 269 NW 883, 222 Iowa 799

NY—In re Glen's Estate, 284 NYS 685, 157 Misc 753, reversed on other grounds In re Glen, 288 NYS 24, 247 App Div 518, affirmed In re Glen's Estate, 4 NE 2d 433, 272 NY 530, reargument denied 5 NE 2d 371, 272 NY 640

Bassett v Salter, 25 NYS 2d 176, affirmed 30 NYS 2d 134, 262 App Div 967

68 C J p 576 note 3 [e]

**Undertaking or obligation of promisee**

Cal—Bank of America Nat Trust & Sav Ass'n v O'Shields, 275 P 2d 153, 128 Cal App 2d 212

Ind—Sample v Butler University, 5 NE 2d 888, 211 Ind 122, 108 ALR 857

68 C J p 576 note 3 [g]

## a. By Promisor

(1) What constitutes

(2) Time for performance, when breach occurs

## (1) What Constitutes

Generally, a substantial compliance with the terms of the contract is sufficient performance, a literal compliance not being required

A valid and enforceable agreement by one party to devise or bequeath certain property to another party calls for performance according to its terms,<sup>46</sup> and in determining whether a will constitutes performance, the contract and the will are to be considered together.<sup>47</sup> A failure to transfer by deed or will the property agreed to be bestowed on the promisee is a breach of the contract.<sup>48</sup> It is not material in what manner the failure to carry out the undertaking is produced<sup>49</sup> or whether it arises by

**Separable contract**

An agreement to give named party stated monthly allowance during her life and, if she fulfilled her part of agreement and remained faithful to her duties as friend of promisor, not to revoke latter's will as to property left to promisee, was separable, not entire, contract

Cal—Brown v Freese, 83 P 2d 82, 28 Cal App 2d 608

41. Mass—Emery v Burbank, 39 N E 1026, 163 Mass 326, 47 Am SR 456, 28 L R A 57

NY—La Vin v La Vin, 39 NYS 2d 317, 179 Misc 1000, affirmed 41 NYS 2d 180, 266 App Div 674

42. Mass—Emery v Burbank, 39 N E 1026, 163 Mass 326, 47 Am SR 456, 28 L R A 57  
68 C J p 577 note 5

43. US—Brooks v Yarborough, C CA Okl, 37 F 2d 527  
68 C J p 577 note 6

44. Miss—Finch v Estes, 71 So 2d 457, 220 Miss 552  
68 C J p 577 note 7

45. US—Sandham v. Grounds, C C A Pa, 94 F 83

46. Tenn—Corpus Juris quoted in Clark v Hefley, 238 SW 2d 513, 517, 31 Tenn App 389  
Pa—White v Arka, 2 Pa Dist & Co 574

47. Cal—Merrill v Dustman, 217 P 2d 998, 97 Cal App 2d 473

48. NY—Campbell v Brown, 51 NYS 2d 310, 268 App Div 324, motion granted 60 NE 2d 849, 294 NY 702  
68 C J p 577 note 11

49. NY—Robinson v Raynor, 28 NY 494.

design or accident<sup>50</sup> The promisee's rights arising from a breach have been said to exist where he has performed his part of the contract and the promisor dies without leaving a valid will in accordance with the contract,<sup>51</sup> either where he dies without making a will,<sup>52</sup> or leaving a will in which there is no provision which can be construed as a compliance with the agreement,<sup>53</sup> or one which by its terms complies with the contract but which is for some reason invalid,<sup>54</sup> unless the promise has been performed during his life,<sup>55</sup> or unless performance is prevented under such circumstances as to excuse its failure<sup>56</sup> Generally, however, a substantial compliance with the contract is all that is necessary for the performance, literal compliance not being required,<sup>57</sup> and there is no breach when the promise to bequeath or devise was general and the provision made is ample, even though the arrangement made by the will is not in all particulars and details the same as that stipulated by the contract if it is equal to, or greater than, the contract provision in substance,<sup>58</sup> or when the provision made satisfies and substantially conforms to the description of the provision that the testator promised to make<sup>59</sup> Where the contract contemplates that the provision in favor of the promisee may be a conditional or limited one, the promisor's exercise of his reserved power by leaving the property subject to the conditions or limitations permitted under the contract is no breach of the agreement,<sup>60</sup> similarly, where, by its terms, the promisor's obligation is to continue only until the happening of some specified contingency, after the contingency occurs the promisor may make an inconsistent disposition thereof without any breach of contract result-

ing,<sup>61</sup> although he may not do so where the contingency never occurs<sup>62</sup> The fact that prior to entering into a new and different contract the promisor states that he will do what he was already bound to do, does not relieve the promisor of the obligation to perform his part of the previous contract<sup>63</sup>

*Act of executing will as performance and discharge* The basis of the rights of the parties to the contract is found in the terms of the contract itself even though a will conforming to it is made<sup>64</sup> The mere drawing and execution of such a will is not of itself a performance and discharge of the contractual obligation<sup>65</sup> The rights of the parties under the contract are not varied by the mere fact of execution or nonexecution of the will<sup>66</sup>

*Independent gifts not referable to contract* Transfers of property to the promisee by the promisor in his lifetime, resting on some independent basis of right or favor, and not referable to the contract, do not show performance,<sup>67</sup> neither does a testamentary provision for the promisee, unless made under such circumstances as to show that it was intended as a satisfaction of the debt,<sup>68</sup> even though it is the same in amount as what was promised<sup>69</sup>

## (2) Time for Performance, When Breach Occurs

Generally, the contract cannot be completely performed until the death of the promisor, but it may be breached during his lifetime by his repudiation of it

Where the contract promises only a particular disposition of property, without specifying the mode in which it is to be made, the promisor can perform

50. NY—Robinson v Raynor, supra. Bair v Hager, 90 NYS 27, 97 App Div 358

51. Mo—State ex rel St Louis Union Trust Co v Sartorius, 171 S W 2d 569, 351 Mo 111  
NY—In re Brown's Will, 15 NYS 2d 387, 171 Misc 1008  
NH—Southern v Kittredge, 158 A 132, 85 NH 307

52. NC—Hager v Whitener, 169 S E 645, 204 NC 747.  
68 C J p 577 note 16

53. Cal—Barr v Ferris, 107 P 2d 269, 41 Cal App 2d 527  
Ill—In re Wheeler's Estate, 1 NE 2d 425, 284 Ill App 132  
Me—Sard v Sard, 83 A 2d 286, 147 Me 46  
68 C J p 577 note 17

54. Ga—Banks v. Howard, 43 S E 438, 117 Ga 94  
68 C J p 578 note 18.

55. Va—Rice v Hartman's Adm'r, 4 SE 621, 84 Va 251

56. NY—Foster v Easton, 2 NY S 772, 50 Hun 603  
68 C J p 579 note 37

57. NC—Price v Price, 45 SE 855, 133 NC 494

58. Mich—Thompson v Tucker-Osborn, 69 NW 730, 111 Mich 470

59. Ky—Brewer's Adm'r v Brewer, 205 SW 393, 181 Ky 400  
68 C J p 578 note 24

60. NC—Price v. Price, 45 SE 855, 133 NC 494  
Pa—Appeal of Major, 17 A 535, 126 Pa 109  
68 C J p 578 note 26.

61. NY—Dreyer v Hyde, 167 NE 583, 251 NY 450, motion denied  
168 NE 440, 251 NY. 593  
68 C J p 578 note 27

62. Cal—Keefe v Keefe, 125 P 929, 19 Cal App 310

63. Cal—Fowler v Hansen, 120 P 2d 161, 48 Cal App 2d 518

64. Miss—Price v. Craig, 143 So 694, 164 Miss. 42

65. Me—Busque v Marcou, 86 A 2d 873, 147 Me 289, 30 A L R 1411  
NY—Corpus Juris quoted in Allen v Payson, 11 NYS 2d 28, 31, 170 Misc 759  
68 C J p 578 note 30

66. Miss—Price v Craig, 143 So 694, 164 Miss 42  
NY—Corpus Juris quoted in Allen v Payson, 11 NYS 2d 28, 31, 170 Misc 759

67. Iowa—Manchester v Loomis, 181 NW 415, 191 Iowa 554  
68 C J p 579 note 32

68. Mo—Stone v Pennock, 31 Mo App 544  
NY—In re Sherman, 53 NYS 376, 24 Misc 65

69. Mo—Stone v. Pennock, 31 Mo App 544

by any means which will effectuate the proposed disposition, whether by will or conveyance,<sup>70</sup> or even, when the agreement is to arrange matters so that a child of the promisor will receive a full child's share, by dying intestate,<sup>71</sup> but in so far as the agreement is left unexecuted by conveyance, or where it specifically contemplates a post mortem provision, the contract is one which necessarily cannot be completely performed until the death of the promisor,<sup>72</sup> and which, for that purpose, can take effect only on that event,<sup>73</sup> and hence it has been said that no breach of the agreement can occur or be assumed as long as the promisor lives.<sup>74</sup> Even so, however, the breach, when it does occur, is one committed by deceased and the liability because thereof is his.<sup>75</sup> This rule that there is no breach in the testator's lifetime is subject, it has been held, to the qualification that when the promisor in his lifetime explicitly and unequivocally disavows and repudiates the disagreement and refuses to carry it out,<sup>76</sup> or puts it out of his power to perform, as by a conveyance to third persons during his life,<sup>77</sup> such conduct may be treated as an immediate breach, previous to his death, but, in order for a repudiation to constitute a breach, notice thereof must be brought home to the promisee.<sup>78</sup> He may, moreover, by his conduct waive such anticipatory breach,<sup>79</sup> it not being imperative on him to regard a lifetime conveyance as a breach where it does not incapacitate the promisor from performing, but leaves him still capable of doing so at his death.<sup>80</sup> Where the promisor, at his death, does

not leave the property according to his agreement, an immediate breach exists at that time without postponement by reason of the fact that a disposition on condition is made which may result in the promisee's receiving all that was promised by satisfaction of the condition which is possible then or thereafter.<sup>81</sup>

#### b. By Promisee

- (1) Necessity
- (2) Sufficiency

##### (1) Necessity

The promisee, in order to claim under the contract, must have performed the obligations imposed on him by it

Performance by the promisee of the obligations imposed on him by the contract is essential in order that he may claim by virtue of it,<sup>82</sup> and, where he never enters on the performance of the obligations on which the promise was conditioned,<sup>83</sup> or where, after partial performance, he fails or refuses to continue to perform, such refusal or failure not being compelled or provoked by the promisor,<sup>84</sup> he cannot have the provisions of the promise enforced, unless explanatory circumstances excusing his failure or default exist,<sup>85</sup> as, for instance, where the promisor is the one primarily at fault, his conduct being the provoking cause of the promisee's failure of performance.<sup>86</sup>

*Condonation of breach; waiver of performance* However, a breach by the promisee may be condoned by the testator,<sup>87</sup> or he may waive or

70. SD—*Corpus Juris* quoted in *In re Buss' Estate*, 26 NW 2d 700, 702, 71 SD 529  
68 CJ p 579 note 38

#### Performance held sufficient

SD—*In re Buss' Estate*, 26 NW 2d 700, 71 SD 529

71. Kan—*Smith v Nyburg*, 16 P 2d 493, 136 Kan 572

72. Mo—*Ver Standig v St Louis Union Trust Co*, App, 62 SW 2d 1094  
68 CJ p 579 note 40

73. Or—*Popejoy v Boynton*, 229 P 370, 112 Or 646, modified on other grounds 230 P 1016, 112 Or 646

74. Idaho—*Ashbauth v Davis*, 227 P 2d 954, 71 Idaho 150, 32 ALR 2d 361

SC—*Corpus Juris* cited in *Harmon v Aughtry*, 85 SE 2d 284, 285, 226 SC 371

Tenn—*Williams v Buntin*, 4 Tenn App 340

Tex—*Cheney v Cheney*, Civ App, 82 SW 2d 1024, reversed on other grounds *Cheney v Coffey*, 113 SW

2d 162, 131 Tex 212, rehearing denied 114 SW 2d 533, 131 Tex 212

68 CJ p 579 note 42

75. Cal—*Morrison v Land*, 147 P 259, 169 Cal 580

76. SC—*Corpus Juris* cited in *Harmon v Aughtry*, 85 SE 2d 284, 285, 226 SC 371

68 CJ p 580 note 45

77. Neb—*Robinet v Olson*, 209 N W 614, 114 Neb 728

68 CJ p 580 note 46

78. Conn—*Appeal of Beardsley*, 75 A 141, 83 Conn 34

79. Minn—*Wold v Wold*, 165 NW 229, 138 Minn 409

68 CJ p 580 note 48

80. Cal—*Rogers v Schlotterback*, 138 P 728, 167 Cal 35

68 CJ p 580 note 49

81. NC—*Spruill v Davenport*, 27 NC 145

68 CJ p 580 note 50

82. Del—*Peyton v William C Peyton Corporation*, 194 A 106, 22 Del Ch 187, reversed on other grounds 7 A 2d 737, 23 Del Ch 321, 123 ALR 1482

Iowa—*Evans v Cole*, 281 NW 230, 225 Iowa 756

Kan—*In re Wert's Estate*, 193 P 2d 253, 165 Kan 49, opinion adhered to 199 P 2d 793, 166 Kan 159

Mass—*Jackson v Boston Safe Deposit & Trust Co*, 39 NE 2d 85, 310 Mass 593

NJ—*Robertson v Hackensack Trust Co*, 63 A 2d 515, 1 NJ 304

68 CJ p 580 note 52

83. Ark—*O'Connor v Patton*, 286 S W 822, 171 Ark 626

84. Mich—*Pakulski v Ludwiczewski*, 289 NW 231, 291 Mich 502

68 CJ p 580 note 54

85. Colo—*Swedish Evangelical Free Church of U S of America v Benson*, 237 P 165, 77 Colo 370

68 CJ p 580 note 55

86. Me—*Brackenbury v. Hodgkin*, 102 A 106, 116 Me 399

68 CJ p 580 note 56

87. Kan—*Smith v Cameron*, 141 P. 596, 92 Kan 652, 52 L R A, N S., 1057

68 CJ p 581 note 57.



abandon further performance by the promisee of the obligations which the latter has undertaken,<sup>88</sup> indeed, it has been held that whenever there is adequate ground for rescission by reason of the promisee's breach of his obligations, the testator's failure to give notice of rescission is a waiver of the non-performance which ceases by reason of the waiver, to be available in impairment of the binding force of the promise<sup>89</sup>

## (2) Sufficiency

**Conduct of the promisee which in fact and substance fulfills his obligations under the contract is sufficient**

Conduct of the promisee which does in fact and substance fulfill the obligations undertaken by him as the consideration for the promise suffices,<sup>90</sup> no other conduct does<sup>91</sup> However, performance, even of material stipulations, need not always be completed during the life of the promisor and may be perfected afterward in some instances,<sup>92</sup> where the time for performance continues open at that time and there has been no breach by the promisee<sup>93</sup> Under a parol contract, strict performance is required of the promisee,<sup>94</sup> and where it requires rendition of services, such rendition must be wholly referable to the contract and solely predicated there-

on, and done with a view to its complete performance<sup>95</sup>

## § 117. Modification, and Rescission, Abandonment, or Other Termination

- a In general
- b Rescission by one party
- c Modification and merger
- d Death of beneficiary during promisor's lifetime
- e Changes in promisor's matrimonial status

### a. In General

Contracts to leave property by will may be abandoned by mutual consent, or the parties may, by agreement, effect a rescission

Contracts to leave property by will may be abandoned by mutual consent,<sup>96</sup> as where the parties both voluntarily consent to change the relationship on which the contract is predicated to some other and different relation between them,<sup>97</sup> or the two may, by agreement, effect a rescission<sup>98</sup> despite the fact that the promisee has theretofore made an attempted assignment to others of a part of his in-

88. Kan—Smith v Cameron, supra  
68 C J p 581 note 58

89 Or—Kelley v Devin, 132 P 535,  
65 Or 211

90 Kan—In re Wert's Estate, 199  
P 2d 793, 166 Kan 159

Ky—Rose v Reese, 160 S W 2d 614,  
290 Ky 356

Wash—In re Donaldson's Estate, 173  
P 2d 159, 26 Wash 2d 72

68 C J p 581 note 62

91 N Y—Krell v Stein, 127 N Y S  
150

68 C J p 581 note 63

**Agreement to provide and care for promisor**

(1) Where owner contracted to devise home to defendant if defendant would live there, take care of and make good comfortable home for and see to needs of plaintiff, defendant's elderly aunt, who would be self-supporting and share household expenses, the home to be provided was not mere shelter for plaintiff or place of abode, but defendant would have to be considerate of plaintiff and courteous in his relations with her and give her that care and attention required by old age

SC—Flowers v Roberts, 66 S E 2d 612, 220 S C 110

(2) Where parents agreed to devise their homestead to their son and his wife in consideration of agreement by son and his wife to care for parents, in action by mother against

son's wife to quiet title to homestead, evidence that mother had outlived her life expectancy did not support conclusion that there was sufficient substantial compliance by son's wife to support wife's cross-action for title  
Tex—Martin v Martin, Civ App, 230 S W 2d 547, error refused no reversible error

(3) Other decisions with respect to such agreements see 68 C J p 581 note 63 [a], [c]

92 Conn—Crofut v Layton, 35 A 783, 68 Conn 91

N Y—Sarasohn v Kamarky, 86 N E 20, 193 N Y 203

93. Conn—Crofut v Layton, 35 A 783, 68 Conn 91

94. Or—Hunter v Allen, 147 P 2d 213, 174 Or 261, modified on other grounds 148 P 2d 936, 174 Or 261

95 Or—Hunter v Allen, supra

**Other compensation for services impossible**

Under a parol contract to devise realty for rendition of certain services, it must appear that proper and adequate compensation for services cannot otherwise be made, and that services were of exceptional character or of such peculiar value to promisee that value thereof is not subject to pecuniary estimate.

Or—Hunter v Allen, supra.

96. Cal—Bank of America National Trust and Savings Association v.

O'Shields, 275 P 2d 153, 128 Cal App 2d 212

68 C J p 581 note 66

97. Mass—French v Boston Safe Deposit, etc., Co., 185 N E 493, 282 Mass 600

98 Ga—Avary v. Avary, 41 S E 2d 314, 202 Ga 22

Idaho—Casady v Scott, 237 P 415, 40 Idaho 137

**Settlement** whereby testatrix obtained refund of larger part of entrance fee on leaving old people's home did not prevent probate of her will executed in favor of home pursuant to practice whereby home required inmates to will home their property

N Y—In re Mortensen's Will, 284 N Y S 420, 157 Misc 717

**Execution of lease**

Fact that mother pursuant to contract to devise land to son on his agreement to support her lived with son for eight years and then voluntarily left without cause and remained until her death twelve years thereafter with her daughter, and that mother and son executed lease covering land involved and other land, did not amount to rescission of contract, notwithstanding son made no claim until probate of subsequent will, where there was nothing to indicate that contract was considered  
ND—Brock v Noecker, 267 N W 656, 66 N D 567.

terest under the contract<sup>99</sup> The abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party<sup>1</sup> The rescission of such an agreement is usually a question of fact<sup>2</sup> and the making of a later contract between the same parties on different terms and making no reference to the contract for a will has been held not necessarily conclusive of a rescission<sup>3</sup> Where a new contract is consistent with the continuance of the former one and only provides a new method of discharging the contract, it has no effect as a rescission unless or until it is performed<sup>4</sup>

*Acceptance of anticipatory breach.* Where, in his lifetime, the promisor breaks the contract and the promisee elects to accept and sue on the anticipatory breach, the operation of the contract, except as an aid in the ascertainment of damages, is at an end,<sup>5</sup> but there is no obligation imposed on the promisee to accept the repudiation and he may if he chooses, treat the contract as continuing until the promisor's death produces a breach<sup>6</sup>

*Effect of forfeiture clause in contract* Where, by its terms, an agreement with respect to the disposition of property is to continue only until the happening of some specified act or event, after the stated contingency occurs the agreement is at an end and inoperative,<sup>7</sup> although where the disposition is contingent on the execution by one not a party to the contract of a release to certain prop-

erty, the promisor cannot repudiate the contract after such person performs the condition.<sup>8</sup> Where the contingency never occurs, the promise remains binding in the same manner and to the same extent as if it had been absolute<sup>9</sup> Although the contract contains such a provision, the parties may by assent waive it so as to permit the occurrence of the contingency specified as that on which a forfeiture is to occur and still retain the contract in force unimpaired<sup>10</sup>

#### b. Rescission by One Party

A contract for testamentary or similar disposition of property is generally irrevocable by one of the parties thereto.

A writing which does not amount to a contract because no obligations are assumed by either party may be revoked<sup>11</sup> An agreement to leave or to make a particular disposition of property cannot be rescinded by the promisor after performance on the part of the promisee<sup>12</sup> without the promisee's consent thereto<sup>13</sup> This would be an intolerable fraud which a court of equity will not permit<sup>14</sup> So, too, not only can the contract not be revoked but, where the contract itself is expressed in the form of a will,<sup>15</sup> or where a will is made pursuant to the contract,<sup>16</sup> the testator cannot, by the act of revoking the will, escape the obligations of his contract nor can his heirs or substituted legatees take any benefit by such revocation, and an attempted revocation, if deliberately made, constitutes a fraud on the promisee<sup>17</sup>

99 Idaho—Casady v Scott, 237 P 415, 40 Idaho 137  
68 C J p 582 note 69

1. Neb—Sopcich v Tangeman, 45 N W 2d 478, 153 Neb 506

2. Mass—Noyes v Noyes, 112 N E 850, 224 Mass 125

3. Mass—Noyes v Noyes, supra

4. Tenn—Williams v Buntin, 4 Tenn App 340

#### Agreement to deed property

In an action to enforce a contract to will real estate where it was insisted that the contract had been abandoned by another letter wherein deceased agreed to deed the property, but where the evidence showed that this was simply an intention of carrying out the former contract, the new proposal would not discharge the old contract since the new one was never carried into effect

Tenn—Williams v Buntin, 4 Tenn App 340

5. Ind—Mug v Ostendorf, 96 N E 780, 49 Ind App 71  
68 C J p 582 note 74

6. Minn—Wold v Wold, 165 N W 229, 138 Minn 409  
68 C J p 582 note 75

7. Ga—Shapiro v Steinberg, 166 S E 767, 175 Ga 869  
68 C J p 584 note 3

8. N Y—Dreyer v Dreyer, 218 N Y S 317, 218 App Div 341

9. Cal—Keefe v Keefe, 125 P 929, 19 Cal App 310

10. Mo—Stellwagen v Grissom, 177 S W 636

11. Or—Richardson v Orth, 66 P 925, 69 P 455, 40 Or 252

Pa—Jordan v Dutton, 1 Phila. 437  
68 C J p 582 note 77

12. Ky—Troxel v Childers, 187 S W 2d 264, 299 Ky 719

Miss—Denson v Denson, 33 So 2d 311, 203 Miss 146

Neb—Sopcich v Tangeman, 45 N W 2d 478, 153 Neb 506—In re Skade's Estate, 283 N W 851, 135 Neb 712  
68 C J p 582 note 78

13. N D—Brock v Noecker, 287 N W 656, 66 N D 567

Wis—In re Soles' Will, 253 N W 801, 215 Wis 129

68 C J p 582 note 79

14. Mont—Huffine v Lincoln, 160 P 820, 52 Mont 585  
68 C J p 582 note 80

15. Ala—Walker v Yarbrough, 76 So 390, 200 Ala 458  
68 C J p 582 note 81

16. US—Hale v Campbell, D C Iowa, 46 F Supp 772

Cal—Brown v Superior Court in and for Los Angeles County, 212 P 2d 878, 34 Cal 2d 559

Iowa—In re Johnson's Estate, 10 N W 2d 664, 233 Iowa 782, 148 A L R 748

Kan—Hagerman v Hagerman, 165 P 2d 431, 160 Kan 742

Miss—Johnston v Tomme, 24 So 2d 730, 199 Miss 337

Neb—Jorgensen v Crandell, 277 N W 785, 134 Neb 33

Okl—Staton v Moody, 256 P 2d 409, 208 Okl 372

Or—In re Engle's Estate, 276 P 270, 129 Or 77

Tex—Cate v Cate, Civ App, 235 S W 2d 456, error refused—Howard v Combs, Civ App, 113 S W 2d 221  
68 C J p 582 note 82

17. Miss—Johnston v Tomme, 24 So 2d 730, 199 Miss 337

The will itself may be revoked or changed as a will<sup>18</sup> even where the contract is that the testator will not revoke,<sup>19</sup> and, thus, a revocation which affects the rights of third persons not parties to the contract but does not affect the rights of the promisee or alter the provision which, pursuant to agreement, the testator has made for him,<sup>20</sup> or which, in so far as it alters such provision, increases the share of the promisee and gives him more than the contract entitles him to,<sup>21</sup> is within the promisor's power and does not afford any ground of objection to the promisee. The contract to make or not to make a will is generally irrevocable,<sup>22</sup> without the consent of the parties,<sup>23</sup> when based on sufficient consideration,<sup>24</sup> and the contract remains in force after the revocation of the will.<sup>25</sup> Even where the contract contains a stipulation expressly permitting a revocation on certain conditions, the contract is irrevocable except in the man-

ner and on the terms which the contract provides<sup>26</sup>

The promisee may elect to treat the contract as rescinded by the promisor's conduct.<sup>27</sup> A breach or nonperformance by the promisee of the obligations assumed by him as consideration for the promise affords no ground for rescission by the promisor unless it is so substantial and fundamental as to defeat the object of the agreement<sup>28</sup> or where the promisor's own conduct is the efficient cause provoking such nonperformance.<sup>29</sup>

*Rescission by promisee* One to whom property is to be left, in consideration of some enforceable obligation assumed by him in favor of the owner thereof, cannot rescind the contract and escape his obligation while the owner continues ready and willing to perform,<sup>30</sup> nor can the promisee, after accepting benefits under a will in part carrying out the agreement, rescind the contract.<sup>31</sup>

18. Cal—In re Carpentier's Estate, 285 P 348, 104 Cal App 33  
Md—O'Hara v O'Hara, 44 A 2d 813, 185 Md 321, 163 A L R 1444  
Minn—Jannetta v Jannetta, 285 N W 619, 205 Minn 266  
Neb—Jorgensen v Crandell, 277 N W 785, 134 Neb 33  
N Y—In re Hirschhorn's Estate, 76 N Y S 2d 344, affirmed 77 N Y S 2d 152, 273 App Div 852  
Or—Florey v Meeker, 240 P 2d 1177, 194 Or 257—In re Lleurance's Estate, 182 P 2d 969, 181 Or 646, rehearing denied 185 P 2d 575, 181 Or 646  
Pa—In re Winters' Estate, 57 Pa Dist & Co 433, 34 Del Co 12  
In re Strosser, Com Pl, 49 Lanc Rev 143  
68 C J p 583 note 84  
19. Kan—Menke v Duwe, 230 P 1065, 117 Kan 207  
68 C J p 583 note 85  
20. Cal—O'Neil v Ross, 277 P 123, 98 Cal App 306  
Kan—Nelson v Schoonover, 131 P 147, 89 Kan 388, rehearing denied 132 P 1183, 89 Kan 779, Ann Cas 1915A 147  
21. Cal—O'Neil v Ross, 277 P 123, 98 Cal App 306  
22. Cal—In re Carpentier's Estate, 285 P 348, 104 Cal App 33  
Idaho—Ashbauth v Davis, 227 P 2d 954, 71 Idaho 150, 32 A L R 2d 361  
Iowa—Powell v McBlain, 269 N W 883, 222 Iowa 799  
N Y—In re Stevens' Will, 78 N Y S 2d 868, 192 Misc 179, affirmed 86 N Y S 2d 480, 274 App Div 1024, appeal denied 88 N Y S 2d 615, 275 App Div 741  
Pa—In re Kocher's Estate, 46 A 2d 488, 354 Pa 81—In re McGinley's Estate, 101 A 807, 257 Pa 478

- In re Swenk's Estate, 108 A 2d 825, 176 Pa Super 513  
In re Winters' Estate, 57 Pa Dist & Co 433, 34 Del Co 12  
Tex—Cate v Cate, Civ App, 235 S W 2d 456, error refused  
Wis—In re McLean's Estate, 262 N W 707, 219 Wis 222  
68 C J p 583 note 88  
23. Minn—Jannetta v Jannetta, 285 N W 619, 205 Minn 266  
24. Ala—Cowan v Salmon, 13 So 2d 190, 244 Ala 285  
Or—Florey v Meeker, 240 P 2d 1177, 194 Or 257—In re Lleurance's Estate, 182 P 2d 969, 181 Or 646, rehearing denied 185 P 2d 575, 181 Or 646  
Pa—Soffee v Hall, 105 A 2d 144, 377 Pa 306—In re Gredler's Estate, 65 A 2d 404, 361 Pa 384—Cramer v McKinney, 49 A 2d 374, 355 Pa 202  
—In re Kocher's Estate, 46 A 2d 488, 354 Pa 81  
In re Swenk's Estate, 4 Fiduciary 173, 54 Lanc Rev 35, 17 Som Leg J 13, 68 York Leg Rec 61  
25. Kan—Nelson v Schoonover, 131 P 147, 89 Kan 388, rehearing denied 132 P 1183, 89 Kan 779, Ann Cas 1915A 147  
68 C J p 583 note 88  
26. Miss—Price v Craig, 143 So 694, 164 Miss 42  
27. Mass—Canada v Canada, 6 Cush 15  
28. Ky—Conners v. Eble, 269 S W 2d 716  
68 C J p 583 note 92  
**Held sufficient grounds for rescission**  
(1) Lack of good faith on part of promisee  
Ky—Conners v Eble, supra  
(2) Where defendant contracted to provide for board, lodging, and care in nursing home for plaintiff for bal-

ance of plaintiff's life and, after plaintiff left home with assent of defendant, sold premises and canceled hospital policy she was required to maintain under terms of contract requiring plaintiff to execute will  
Ky—Conners v Eble, supra

#### **Held not sufficient grounds for rescission**

(1) The fact that after oral contract has been entered into it is found necessary for the promisee to work elsewhere a portion of the time to supplement the income  
Wash—Thomas v Hensel, 230 P 2d 290, 38 Wash 2d 457

(2) The fact that testatrix was placed on diet in accordance with directions from doctor and was required to use a separate drinking cup and towel  
Mont—Rowe v Eggum, 87 P 2d 189, 107 Mont 378

(3) Other instances of insufficient grounds see 68 C J p 583 note 92 [a]

29. Kan—Smith v Smith, 201 P. 75, 109 Kan 584

30. Mich—Andrews v Lavery, 123 N W 543, 159 Mich 26  
68 C J p 583 note 95

#### **Offer of a unilateral contract**

Where husband left will in reliance on wife's promise to trade stock held by her for stock in corporation to be formed after husband's death, wife's promise was not merely an offer of a unilateral contract which could be withdrawn by her after husband's death

Del—Peyton v William C Peyton Corporation, 194 A 106, 22 Del Ch 187, reversed on other grounds 7 A 2d 737, 23 Del Ch 321, 123 A L R. 1482

31. Ill—Downing v. Harris Trust &

*Manner of exercise of right* The right, where it exists, must be exercised in toto so as to constitute a rescission of the contract as an entirety.<sup>32</sup> Proper notice to conform to the requirements established for the rescission of contracts generally must be given,<sup>33</sup> and benefits received under the contract restored,<sup>34</sup> in order for the attempted exercise of the right to be effective.

### c. Modification and Merger

The parties to a contract for testamentary or similar disposition of property may modify it. Where, following the contract, a conveyance of the property affected by the agreement is made by the promisor to the promisee and accepted by the latter, the contract is merged in the conveyance and cannot thereafter be resorted to.

The parties to the contract may modify it,<sup>35</sup> but subsequent promises by the promisor to make some provision for the promisee other than that on the basis of which they originally contracted cannot take away rights under the original contract unless the promisee elects to accept such later promises in full performance of the agreement.<sup>36</sup> Where the beneficiary is a stranger to the contract and has no vested rights under it, the parties to the contract have the right to modify or change it at will without the consent of the beneficiaries.<sup>37</sup> A court may, however, refuse to make a new contract embracing intended modifications.<sup>38</sup>

Where, following the contract, a conveyance of the property affected by the agreement is made by the promisor to the promisee and accepted by the latter, the contract is merged in the conveyance and cannot thereafter be resorted to,<sup>39</sup> even though the conveyance, by reason of its recitals as to consideration, is voluntary in character and so not good as against outstanding equitable claims,<sup>40</sup> similarly, where the promisee subsequently executes a valid release and settlement of all claims against the promisor, or takes a bond covering such claims,<sup>41</sup> or where the parties redefine their several relations by a contract undertaking a full and com-

plete arrangement of all matters between the parties, and settle and dispose of all their rights and claims against one another,<sup>42</sup> the later contract merges and destroys the earlier one, but the execution of a will pursuant to the contract does not operate to effect an abrogation of it under the doctrine of merger.<sup>43</sup>

### d. Death of Beneficiary During Promisor's Lifetime

Where the contract made contemplates the contingency of the beneficiary's predeceasing the promisor and makes express provision therefor, the death of the latter in the promisor's lifetime does not put an end to the obligation of the contract.

Where the contract made contemplates the contingency of the beneficiary's predeceasing the promisor and makes express provision therefor, such as alternative terms to take effect in that event,<sup>44</sup> or where the written agreement was to be operative after the death of either or both parties,<sup>45</sup> or where after its occurrence, the promisor recognizes and confirms it as an obligation surviving the beneficiary's death,<sup>46</sup> the death of the latter in the promisor's lifetime does not put an end to the obligation of the contract. Moreover, even though the contract is one which would terminate at the promisee's death, the promisor may waive this feature of the contract and does so where he permits others, associated with the promisee in his lifetime in rendering the performance, to continue after his death and accepts such performance without giving notice within a reasonable time of an intention to consider the obligation as ended.<sup>47</sup>

Where no such elements are present to indicate the result intended by the parties in that contingency, it has been held that, where the promise is personal to the beneficiary and one which he alone can enforce, and he dies first, the promise does not survive and the promisor may, without any breach of his contract make an inconsistent disposition

Savings Bank, 149 NE 256, 318 Ill 323

32. Ill—Downing v Harris Trust & Savings Bank, supra

33. SC—McLaughlin v Gressette, 79 SE2d 149, 224 SC 296

Wash—Ellis v Wadleigh, 182 P2d 49, 27 Wash 2d 941  
68 CJ p 584 note 1

34. Ill—Downing v Harris Trust & Savings Bank, 149 NE 256, 318 Ill 323

35. Kan—Smith v Cameron, 141 P 596, 92 Kan 652, 52 L.R.A., NS, 1057  
68 CJ p 584 note 6.

36. W Va—Davidson v Davidson, 79 SE 998, 72 W Va 747

37. Ga—Avery v Avery, 41 SE2d 314, 202 Ga 22

38. Ala—Cowan v Salmon, 13 So 2d 190, 244 Ala 285

**Agreement held not abrogated**  
Ala—Cowan v Salmon, 13 So 2d 190, 244 Ala 285

39. Md—Lawson v Mullinix, 64 A 938, 104 Md 156

40. Md—Lawson v Mullinix, supra

41. Mich—Pulver v Fishbeck, 195 NW 422, 224 Mich 647.  
68 CJ p 584 note 10

42. Mich—Pulver v Fishbeck, 195 NW 422, 224 Mich 647

68 CJ p 584 note 11

43. Miss—Price v Craig, 143 So 694, 164 Miss 42

44. Me—Androscoggin County Sav Bank v Tracy, 99 A 257, 115 Me 433

68 CJ p 584 note 13

45. US—Rosenberg v Equitable Trust Co, DCDel, 68 F Supp 991, affirmed, CCA, 165 F2d 786

46. NY—Wood v Vandenburg, 6 Paige 277

68 CJ p 584 note 14.

47. SC—Prater v Prater, 77 SE 936, 94 SC 267.

of the property,<sup>48</sup> so, in the closely analogous case where personal performance by the beneficiary is an essential ingredient in the contract, it has been held that the promisor, in this contingency, may rescind the contract<sup>49</sup> and the rule has been applied where, in return for the promise, a relative of the promisor, with his wife, undertakes to live with, care for, or support the promisor, and they do so until the death of such relative, although the widow remains ready and willing to continue the arrangement thereafter,<sup>50</sup> in that identical case, however, other courts have refused to treat the contract as terminable at the promisee's death<sup>51</sup>

Conversely, unless there are obligations still to be performed by the beneficiary and which can only be performed by him personally, his death prior to that of the promisor does not, it has been held, authorize a revocation or discharge the promisor from his obligation<sup>52</sup> The prior death of a promisee may, however, cause a lapsed legacy or devise<sup>53</sup>

*Prior death of one of several beneficiaries*  
Where the promise is for the benefit of two or more beneficiaries conjointly, and one or some of them predecease the promisor, it has been held that the survivor or survivors at the time of the promisor's death are entitled to the whole of the provision promised<sup>54</sup> Under a contract to bequeath property to a beneficiary, in consideration of which the beneficiary would in turn bequeath to another beneficiary as much of the property as remained in his hands at the time of death, it has been held that the death of such other beneficiary before the death of any of the parties to the contract extinguishes any right of the first beneficiary under the contract,<sup>55</sup> where the original beneficiary predeceases the promisor, the bequest abates as to him,<sup>56</sup> and the subsequent beneficiary has no vested right which he may pass on to his heirs or assignees<sup>57</sup>

#### e. Changes in Promisor's Matrimonial Status

Changes in the promisor's matrimonial status may or may not, depending on the circumstances, work a termination of his contract to make a will

Where the promisee in return for the promised legacy has agreed to live with, and make a home for, the promisor and thereafter marries him, the marriage contract, imposing on her, as it does, all the obligations undertaken by the prior contract, supersedes it and revokes a will pursuant to it, and leaves the promisee under a duty of performance independent of the contract so that there is no legal consideration for the promise and it cannot be enforced<sup>58</sup> So, where the promisee undertakes to act toward the promisor as a daughter, in return for the promise of a legacy, the fact that a marriage ceremony is performed between them, even though for some reason the marriage is invalid, puts an end to the contract and leaves the promisor no longer bound by the promise<sup>59</sup> A valid contract between husband and wife that he will will her a certain part of his estate is not destroyed by divorce,<sup>60</sup> nor is a stepfather's contract to leave property to stepchildren dissolved by a divorce from their mother even though an unreasonable allowance of alimony is made in her favor<sup>61</sup>

#### § 118. Ratification and Affirmance

Although there is authority to the contrary, where the contract is voidable because of the personal disability of the promisor, it may be ratified after removal of the disability.

Where the contract, although unenforceable, is not void but only voidable because of the personal disability of the promisor, it has been held that it may, after removal of the disability, be ratified so as to be enforceable thereafter,<sup>62</sup> but there is other authority reaching a contrary result on a like state of facts.<sup>63</sup> In order that subsequent transactions may be a renewal of the original contract, they must be between the persons who were parties there-

48 N.Y.—*Pershall v Elliott*, 163 N.E. 551, 249 N.Y. 183  
68 C.J. p 585 note 17

49 S.C.—*Prater v Prater*, 77 S.E. 936, 94 S.C. 267  
68 C.J. p 585 note 18

50. S.C.—*Prater v Prater*, *supra*

51. N.D.—*Torgerson v Hauge*, 159 N.W. 6, 34 N.D. 646  
68 C.J. p 585 note 20

52. Cal.—*Corpus Juris* cited in *Trower v Young*, 105 P.2d 160, 166, 40 Cal.App.2d 539

Iowa.—*Corpus Juris* cited in *Powell v McBlain*, 269 N.W. 883, 886, 222 Iowa 799  
68 C.J. p 585 note 21.

53. Mich.—*Andrews v Lavery*, 123 N.W. 543, 159 Mich. 26  
68 C.J. p 585 note 23

54. Iowa.—*Kisor v Litzenberg*, 212 N.W. 343, 203 Iowa 1183  
68 C.J. p 585 note 24

55. Ill.—*Kaiser v Cobbey*, 79 N.E. 2d 604, 400 Ill. 214

56. Ill.—*Kaiser v Cobbey*, *supra*

57. Ill.—*Kaiser v Cobbey*, *supra*

58. Or.—*Bagley v Bagley*, 222 P. 722, 110 Or. 368  
Rights of surviving spouse see *infra* § 120

59. Mass.—*French v Boston Safe Deposit & Trust Co.*, 185 N.E. 493, 282 Mass. 600

60. Ill.—*Elliott v Northern Trust Co.*, 178 Ill.App. 439

61. Neb.—*Hannemann v. Ott*, 153 N.W. 506, 98 Neb. 492

62. Cal.—*Steinberger v Young*, 165 P. 432, 175 Cal. 81  
Ky.—*Skinner v Rasche*, 176 S.W. 942, 165 Ky. 108

63. Ind.—*Austin v Davis*, 26 N.E. 890, 128 Ind. 472, 25 Am.S.R. 456, 12 L.R.A. 120

to<sup>64</sup> A promisee may by his acts ratify an attempted performance by the promisor of a contract to devise<sup>65</sup>

### § 119. Subsequently Executed Transfers, Encumbrances, or Wills

Agreements based on valuable consideration to make a particular disposition of property will not be allowed to be defeated by a conveyance to persons who are not bona fide purchasers, during the lifetime of the promisor

Although bona fide purchasers of property forming the subject matter of the agreement to will will not be disturbed in the interest which they have by their purchase acquired,<sup>66</sup> agreements based on valuable consideration to make a particular disposition of property will not be allowed to be defeated by a conveyance to persons who are not bona fide purchasers, during the lifetime of the promisor,<sup>67</sup> particularly where such conveyance is procured by the exercise of fraud or undue influence,<sup>68</sup> is made with the fraudulent intent of defeating the contract,<sup>69</sup> or is in the nature of a testamentary disposition,<sup>70</sup> nor will such agreements be defeated by a will<sup>71</sup> Likewise, where the promisor falsely admits the existence of a debt to another in order to cut down the amount which the promisee will receive under the contract, the creditor can assert no right to payment superior to the promisee's right

under the contract,<sup>72</sup> even where an encumbrance is given to secure such fictitious obligation<sup>73</sup> It has been held, however, that the execution of a will pursuant to an agreement to devise particular realty to a devisee does not limit the testator's right thereafter to sell such realty or make a contract for its sale, since the will does not become effective until the death of the testator<sup>74</sup>

Where the contract covers only what property the promisor may leave at his death or a fraction or proportion thereof, the promisor remains free to use, control, and dispose of property in his lifetime,<sup>75</sup> and transfers or conveyances by him before his death are valid unless made with intent to defraud,<sup>76</sup> even though no consideration therefor is given<sup>77</sup> Such contracts do not prevent the making of gifts by the promisor in his lifetime<sup>78</sup> provided the gifts are reasonable, absolute, bona fide, not testamentary in effect, and not made for the purpose of defeating the contract or having such effect<sup>79</sup> Even under such contracts, however, no disposition during the promisor's lifetime made with the intention or for the purpose of defeating the contract will be allowed to stand, as against the claims of the promisee under the agreement,<sup>80</sup> at any rate where the transferee is not a bona fide purchaser<sup>81</sup>

64 Ga.—Cooper v Claxton, 50 SE 399, 122 Ga 596  
68 CJ p 586 note 32

65 NY—Davis v Quinn, 156 NY S 422, 170 App Div 489

Acceptance and recording of deed  
NY—Davis v Quinn, supra

66 Mo—Fuchs v Fuchs, 48 Mo App 18  
68 CJ p 586 note 34

67 Ala—Larkins v Howard, 39 So 2d 224, 252 Ala 9, 7 ALR 2d 541  
—Stone v Lacy, 6 So 2d 481, 242 Ala 393

Or—Lay v Proctor, 34 P 2d 631, 147 Or 545

68 CJ p 586 note 36

68 Ky—McGuire v McGuire, 11 Bush 142

Mich—Carmichael v Carmichael, 40 NW 173, 72 Mich 76, 16 Am SR 526, 1 LRA 596

69 Mo—Ragsdale v Achuff, 27 S W 2d 6, 324 Mo 1159  
68 CJ p 586 note 38

70 Cal—Rogers v Schlotterback, 138 P 728, 167 Cal 35

Ill—Whiton v Whiton, 53 NE 722, 179 Ill 32

71 NY—In re Wentworth's Will, 71 NYS 2d 542, 272 App Div 974  
68 CJ p 586 note 40

72 Ky—Smith v Smith, 5 Bush 625

73. Cal—Roy v Pos, 191 P 512, 183 Cal 359

74 W Va—Hannah v Beasley, 53 SE 2d 729, 132 W Va. 814

75. Iowa—Corpus Juris cited in Hatcher v Sawyer, 52 NW 2d 490, 495, 243 Iowa 858—Corpus Juris quoted in Powell v McBlain, 269 NW 883, 887, 222 Iowa 799  
68 CJ p 586 note 43

76 Iowa—Corpus Juris cited in Hatcher v Sawyer, 52 NW 2d 490, 495, 243 Iowa 858—Corpus Juris quoted in Powell v McBlain, 269 NW 883, 887, 222 Iowa 799  
68 CJ p 586 note 44

#### Adverse will or trust

Where father made will, supported by sufficient consideration, bequeathing undivided two-thirds interest in his property to his children, rights of the children could not be affected by any adverse will or by the creation of a trust with extraordinary charges against their interest. An expense provision for the trustee could be charged against only so much of the father's estate as he could consistently with his prior testamentary contract make subject to the trust. The two-thirds interest which was affected by the testamentary contract with the children would be subject to father's debts and ordinary administration expenses,

but not to the provisions of the testamentary trust subversive to the obligations of the testamentary contract

Ala.—Wagar v Marshburn, 1 So 2d 303, 241 Ala 73

77. Ind—Austin v Davis, 26 NE 890, 128 Ind 472, 25 Am SR 456, 12 LRA 120

Iowa—Corpus Juris quoted in Powell v McBlain, 269 NW 883, 887, 222 Iowa 799

78 Ala—Wagar v Marshburn, 1 So 2d 303, 241 Ala 73

Ky—Farmers Nat Bank of Danville Ky, v Young, 179 SW 2d 229, 297 Ky 95—Skinner v Rasche, 176 S W 942, 165 Ky 108

79 Ala—Corpus Juris cited in Wagar v Marshburn, 1 So 2d 303, 307, 241 Ala 73

Iowa—Corpus Juris cited in Hatcher v Sawyer, 52 NW 2d 490, 495, 243 Iowa 858

Ky—Farmers Nat Bank of Danville, Ky, v Young, 179 SW 2d 229, 297 Ky 95—Skinner v Rasche, 176 S W 942, 165 Ky 108

80. Cal—Rogers v Schlotterback, 138 P. 728, 167 Cal 35  
68 CJ p 587 note 48

81 Cal—Mau v McManaman, 85 P 2d 209, 29 Cal App 2d 631  
NJ—Van Dune v Vreeland, 12 N J Eq 142

Moreover, where the contract covers the whole of the estate which the promisor may leave at his death, no disposition to take effect only at that time will be allowed to stand,<sup>82</sup> except where the transfer, although testamentary in character, is consistent with the contract,<sup>83</sup> although, even under such contracts, the testator may make subsequent contracts to leave specific property by will to other promisees, which will be good as against the residuary promisee<sup>84</sup> Where, however, the contract is to leave the promisee a particular fraction or proportion of the whole estate, the promisor may make specific bequests or devise to third persons which will carry a title not defeasible on the score of the contract,<sup>85</sup> as long as the promisee receives the agreed proportion of the whole value of the estate<sup>86</sup>

Where a conveyance, encumbrance, or transfer is of such character that it is ineffective as against the promisee, within the rules stated in this section, he may have it set aside,<sup>87</sup> unless the plaintiff is unable to establish a contract to devise or bequeath.<sup>88</sup>

## § 120. Rights of Surviving Spouse

Contracts to will or leave property, made before the promisor's marriage, vest irrevocable rights which cannot be defeated by a subsequent marriage where the wife, before the marriage, had notice of the agreement

Contracts to will or leave property, made before the promisor's marriage, vest irrevocable rights which cannot be defeated by a subsequent marriage, at least where the wife, before the marriage, had notice of the agreement,<sup>89</sup> and hence operate to prevent widow's rights from attaching to the

property affected where such contracts are of record at the time of marriage<sup>90</sup> Where a will pursuant to the contract has been executed before the marriage, it has been held by some authority that the marriage does not operate as such a revocation by operation of law as to discharge the promisor from the obligation or to give the spouse any equal or superior right to the property affected by the agreement,<sup>91</sup> and by other authority that while the will is, like other wills, revoked by a subsequent marriage,<sup>92</sup> the contract and the obligations arising therefrom continue valid and enforceable<sup>93</sup>

Where the widow was without notice of the contract at the time of marriage, it has been held that the contract is not enforceable as against her interest, at least without important limitations<sup>94</sup> Nevertheless, such lack of notice does not in all cases or under all circumstances defeat the superiority of the promisee's right over her widow's rights,<sup>95</sup> the determination of the relative rights of the promisee and the spouse rests, it has been held, on their respective equities under all the circumstances<sup>96</sup> and where the equities predominate in favor of the spouse, the promisee's claim is inferior<sup>97</sup> although it is superior if the equities are in his favor<sup>98</sup>

A husband's contract during coverture cannot, it has been held, defeat the wife's right to a widow's share in his estate, without her consent,<sup>99</sup> a statute enabling a surviving spouse to take against, or in the absence of, a will limits the power of a married person to bind himself by contract to devise and bequeath his property in a manner which would deprive the surviving spouse of statutory rights<sup>1</sup>

82. N.J.—Van Duyne v. Vreeland, supra  
68 C J p 587 note 50  
83. Ky.—Skinner v Rasche, 176 S W 942, 165 Ky 108  
68 C J p 587 note 51  
84. Kan.—Smith v McHenry, 207 P 1108, 111 Kan 659  
85. Iowa.—Manchester v Loomis, 198 N W 102, 197 Iowa 1049  
N.Y.—Colt v O'Connor, 109 NYS 689, 59 Misc 83  
86. Iowa.—Manchester v Loomis, 198 N W 102, 197 Iowa 1049  
87. Cal.—Mau v McManaman, 85 P 2d 209, 29 Cal App 2d 631  
68 C J p 587 note 55  
88. Mich.—Sunday v Laverse, 28 N W 2d 89, 318 Mich 240  
89. W Va.—Harris v Harris, 43 S E 2d 225, 130 W Va 100  
68 C J p 587 note 57  
90. Ill.—Smith v Smith, 172 NE 32, 340 Ill 34  
68 C J p 587 note 58.

91. Cal.—Rundell v McDonald, 182 P 450, 41 Cal App 175  
92. N.Y.—Kloberg v Teller, 171 NYS 947, 103 Misc 641  
93. N.Y.—Kloberg v Teller, supra  
94. Ala.—Mayfield v Cook, 77 So 713, 201 Ala 187  
68 C J p 587 note 63  
95. Kan.—Dillon v Gray, 123 P 878, 87 Kan 129  
68 C J p 588 note 64  
96. Cal.—Owens v McNally, 45 P 710, 113 Cal 444, 33 L.R.A. 369  
Wash.—In re Arland's Estate, 230 P 157, 131 Wash 297  
97. Cal.—Owens v McNally, 45 P 710, 113 Cal 444, 33 L.R.A. 369  
Wash.—In re Arland's Estate, 230 P 157, 131 Wash 297  
98. Cal.—Rundell v McDonald, 182 P 450, 41 Cal App 175  
99. Ala.—Corpus Jams cited in Wagar v Marshburn, 1 So 2d 303, 306, 241 Ala 73  
Iowa.—Fleming v Fleming, 174 N W

946, 180 N W 206, 184 N W 296, 194 Iowa 71, error dismissed 44 S Ct 246, 264 U S 29, 68 L Ed 547

1. N.Y.—In re Erstein's Estate, 129 NYS 2d 316, 205 Misc 924

### Conflict between surviving spouse and promisee

In cases arising out of conflict between parties to whom a deceased person contracted to make testamentary disposition on one side and surviving spouse, asserting claim to elect to take against or in absence of will, on the other, rights of the promisees should be the same whether deceased fulfilled or broke his promise

N.Y.—In re Erstein's Estate, 129 NYS 2d 316, 205 Misc 924

### Fraud

Where husband agreed with wife in settlement of litigation to deposit life policies, of which wife would be sole beneficiary, in safety deposit box and to pay premiums thereon,

On the other hand, where the widow's rights are statutory and merely extend to property owned by the husband at his decease, he is not prevented from disposing of or encumbering his property by lawful agreements during his life which will take priority over the interest the widow would have had if no contract had been made.<sup>2</sup> Even where a surviving spouse is contractually obligated to dispose of his property at his death in a certain manner, courts are slow to hold that he cannot dispose thereof in good faith during his lifetime, unless he has expressly agreed not to do so.<sup>3</sup>

### § 121. Promisee's Loss of Rights by Waiver, Estoppel, or Abandonment

A promisee may lose his rights under a contract to make a particular disposition of property by waiver, estoppel, or abandonment

Even after rights have accrued in favor of a promisee under a contract to make a particular disposition of property, he may lose them by waiver, estoppel, or abandonment,<sup>4</sup> but repudiation or abandonment of such rights, being contrary to the habits of mankind, must be made to appear clearly<sup>5</sup> and no such result follows unless the promisee, with a full knowledge of all the material facts, does or forbears the doing of something inconsistent with the right or with an intention to rely on it.<sup>6</sup> Whether there is an effective loss of rights in this manner is usually a question of fact.<sup>7</sup> Particularly where he continues to assert a claim thereto the promisee's subsequent removal from land to which he has moved and on which he has made improvements as consideration for a promise to leave it to him is not conclusive of an abandonment of his rights under the contract,<sup>8</sup> nor does the giving

of security by the promisee for the performance of his obligations under a contract to make a particular disposition of property of itself constitute any waiver of its benefits.<sup>9</sup> The promisee's silence as to the existence of the contractual claim, even though continued for a considerable time after the promisor's death leaving the promise unperformed,<sup>10</sup> or at the time the promisor's executor requests him to pay obligations against him held by the estate,<sup>11</sup> or the presentation by him of claims against the estate,<sup>12</sup> even where such claims are for the very matters which constituted the consideration for the promise to leave the property,<sup>13</sup> does not, of itself and under all circumstances, debar the promisee from thereafter asserting his rights under the contract, and he is not estopped by an agreement for division saving his rights under the contract<sup>14</sup> by withdrawal of objections made by him to a partition of the property, on his allegations of ownership thereof, and receiving a share of that and the personal property,<sup>15</sup> or by continuing to pay rent to the promisor's estate on property which he occupies and which was promised him by the contract.<sup>16</sup>

The acquiescence in, or failing to object to, a will does not generally bar the promisee to claim under the contract,<sup>17</sup> and failure to object to the probate of a will does not estop the promisee to claim under an agreement to make a particular disposition of property by will<sup>18</sup> or a contract not to change or revoke a prior will,<sup>19</sup> nor does the fact that he actively participates in the probate proceedings to the extent of filing his election not to take under the will which was made.<sup>20</sup> Indeed, even though he endeavors to dissuade other legatees from contesting the will<sup>21</sup> or actively aids the

but husband took policies and stock certificates from safety deposit box and changed beneficiary, so as to strip himself of all property except disability income under policies, wife was entitled to have share of beneficiary set aside as in fraud of her statutory rights as surviving spouse  
N Y—Reiss v Reiss, 2 N Y S 2d 358, 166 Misc 274

2 Ala—Corpus Juris cited in Wagar v Marshburn, 1 So 2d 303, 306, 241 Ala 73  
Conn—Crofut v Layton, 35 A 783, 68 Conn 91

3 Iowa—Bell v Pierschbacher, 62 N W 2d 784, 245 Iowa 436—Schultz v Brewer, 55 N W 2d 561, 244 Iowa 21

4 Mich—Bird v Pope, 41 N W 514, 73 Mich 483

5 Iowa—Kisor v Litzenberg, 212 N W 343, 203 Iowa 1183.

6 Ind—Garard v Yeager, 56 N E 237, 154 Ind 253

7 Mass—Noyes v Noyes, 112 N E 850, 224 Mass 125

8 Iowa—Allbright v Hannah, 72 N W 421, 103 Iowa 98

9 Ind—Garard v Yeager, 56 N E 237, 154 Ind 253  
68 C J p 588 note 76

10 Mass—Noyes v Noyes, 112 N E 850, 224 Mass 125

Mo—Clark v Cordry, 69 Mo App 6

11 Mo—Clark v Cordry, supra

12 Mass—Noyes v Noyes, 112 N E 850, 224 Mass 125  
Or—Popejoy v Boynton, 229 P 370, 112 Or 646, modified on other grounds 230 P 1016, 112 Or 646

13 Or—Popejoy v Boynton, supra.  
68 C J p 588 note 80

14 N J—Smith v Smith's Adm'rs, 28 N J Law 208, 78 Am D 49.

15 Pa—Bash v Bash, 9 Pa 260  
68 C J p 588 note 83

16 N J—Clawson v Brewer, 58 A 598, 67 N J Eq 201

17 Iowa—Kisor v Litzenberg, 212 N W 343, 203 Iowa 1183

18 Iowa—Stewart v Todd, 173 N W 619, 190 Iowa 283, 20 A L R 1272, modified on other grounds 180 N W 146, 190 Iowa 283, 20 A L R 1272  
68 C J p 588 note 87

19 N Y—Kine v Farrell, 75 N Y S 542, 71 App Div 219

20 Iowa—Stewart v Todd, 173 N W 619, 190 Iowa 283, 20 A L R 1272, modified on other grounds 180 N W 146, 190 Iowa 283, 20 A L R 1272

21 Mass—Noyes v Noyes, 112 N E 850, 224 Mass 125



executors in a will contest over it,<sup>22</sup> those circumstances, while persuasive to show an abandonment of contract rights, are not necessarily conclusive of that fact, an endeavor by the promisee amicably to settle a controversy among the heirs does not preclude the promisee from claiming under the contract<sup>23</sup>

Where, however, being appointed administrator of such inconsistent will, he makes no claim under the contract until after proceeding with the administration to the point where the estate is ready for distribution, recognizing throughout the rights of the designated legatees,<sup>24</sup> or where, as executor, he has the will probated and presents and continues to assert, even after the contract suit is instituted, a claim based on services forming the consideration for the alleged promise,<sup>25</sup> in the absence of explanation or excuse, he cannot claim under the contract. Acceptance of money paid him by the promisor's personal representative, when the payment is not referable to the will or the contract, as for example, an acceptance of his distributive share in an intestate estate does not operate as a waiver or abandonment of the promisee's contract rights,<sup>26</sup> neither does the execution of a release to decedent's personal representatives when surrounded by circumstances of want of full information of the claim by both the promisee and the executors and manifesting an intention that it shall be considered as only partial and operative as to matters other than the contract<sup>27</sup>. The promisee's use of money bequeathed to him under a will does not estop the promisee to claim the entire estate under a contractual agreement, where the promisee uses the money only after being urged to do so by the principal beneficiary under the will<sup>28</sup>. Explanatory circumstances which have been mentioned as tending to relieve the promisee's conduct from the imputation of any intention to waive or abandon his rights include advice of counsel<sup>29</sup> and the

fact that, during the period of the promisee's non-assertion of his contract rights, the written contract was lost or mislaid<sup>30</sup>

*Election between will and contract* Where provision is made for the promisee by the promisor's will, and the promisee accepts without protest benefits under the testamentary provision in his favor, the promisee does not thereby waive or abandon his claim under the contract where the provision made by the will gives to the promisee only a part of what he was promised under the contract and the testamentary benefits accepted by him are only those, or a part of those, to which he is entitled thereunder,<sup>31</sup> even where he declares his satisfaction with the will in express terms<sup>32</sup>. Where, on the other hand, instead of merely giving a part of the contractual benefits and nothing else, the testamentary provision, made with the intention of serving as a substitute for the promisee's claim, gives to him benefits not contracted for, in lieu of those agreed on, and he accepts such substitutional benefits accorded by will, he loses the right to assert any claim dependent on the agreement<sup>33</sup>. Where there is a case proper for an election, the election as between the two sources of right is total and there is no right to take, in certain respects, under the will while reserving the right, in other respects, to claim under the contract.<sup>34</sup>

## § 122 Remedies Available in General

The rights of a promisee who has given goods, services, or other consideration in return for a promise to make a particular disposition of property may be asserted and enforced in a variety of ways

The rights of a promisee who has given goods, services, or other consideration in return for a promise to make a particular disposition of property, or of a third person in whose behalf the promise is made, may be asserted and enforced in a variety of ways,<sup>35</sup> as by an action on the account and

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| <p>22. Mass—Noyes v Noyes, <i>supra</i></p> <p>23. Ky—Rose v Reese, 160 SW 2d 614, 290 Ky 356</p> <p>24. Cal—Staples v Hawthorne, 288 P 67, 208 Cal 578</p> <p>25. Mich—Laird v Laird, 73 NW 382, 115 Mich 352</p> <p>26. Mass—Howe v. Watson, 60 NE 415, 179 Mass 30</p> <p>27. Pa.—In re Cottrell's Estate, 11 Phila 93</p> <p>28. Wash—Ellis v Wadleigh, 182 P 2d 49, 27 Wash 2d 941.</p> | <p>29. Or—Popejoy v Boynton, 229 P 370, 112 Or 646, modified on other grounds 230 P 1016, 112 Or 646</p> <p>30. Mass—Noyes v Noyes, 112 NE 850, 224 Mass 125</p> <p>31. Ky—Freel v Freel, 7 Ky L 288 68 CJ p 589 note 4</p> <p>32. NY—Washburn v Weeks, 17 NY S 708</p> <p>33. Ind—Alerding v Allison, 68 NE 185, 31 Ind App 397 68 CJ p 589 note 6</p> <p>34. Ala—Corpus Juris cited in Wagar v Marshburn, 1 So 2d 303, 308, 241 Ala 73</p> | <p>Wis—Towle v Towle, 48 NW 800, 79 Wis 596</p> <p>35. SC—White v McKnight, 143 S E 552, 146 SC 59, 59 A.L.R 1297 Evidence as to existence and terms of contract see <i>supra</i> § 113(2) Injunction against disposition of property agreed to be conveyed see Injunctions § 92 Relief in lifetime of promisor as to agreement to devise or bequeath see Specific Performance § 164 Setting aside conveyance, encumbrance, or transfer, see <i>supra</i> § 119 Specific performance of contracts to devise or bequeath see Specific Performance § 87.</p> |
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nexed,<sup>36</sup> an action of ejectment,<sup>37</sup> an action to quiet title,<sup>38</sup> an action to quiet title and to determine interests in land,<sup>39</sup> an action to establish an interest,<sup>40</sup> an action to recover an interest in property,<sup>41</sup> or a suit to establish equitable title.<sup>42</sup> Under appropriate circumstances, equity will grant

relief,<sup>43</sup> although equitable relief will be denied where appropriate and adequate remedies at law exist,<sup>44</sup> and an accounting may be denied.<sup>45</sup> An action may lie to prevent a promisor's unjust enrichment.<sup>46</sup> A trust may be imposed<sup>47</sup> or a lien

36 Me—Emery v Wheeler, 152 A 624, 129 Me 428

Or—Corpus Juris quoted in In re Lieurance's Estate, 182 P 2d 969, 977, 181 Or 646, rehearing denied 185 P 2d 575, 181 Or 646

37 Pa—Van Meter v Norris, 177 A 799, 318 Pa 137

38 Ark—Crowell v Parks, 193 S W 2d 483, 209 Ark 803

Neb—Sack v Siekman, 23 NW 2d 706, 147 Neb 416—O'Shea v O'Shea, 11 NW 2d 540, 143 Neb 843

39 Cal—Mau v McManaman, 85 P 2d 209, 29 Cal App 2d 631

An heir of a deceased landowner could maintain action to quiet title and to determine interests in certain land, which landowner had allegedly conveyed to other heirs in violation of agreement to devise all his property to children in equal shares, under statute authorizing heirs to bring suit for the possession of realty or for the purpose of quieting title. Cal—Mau v McManaman, supra

40 Wash—Auger v Shideler, 161 P 2d 200, 23 Wash 2d 505

41 Ark—Watts v Mahon, 264 S W 2d 623, 223 Ark 136

Minn—Hanefeld v Fairbrother, 254 NW 821, 191 Minn 547

#### Burden of proof held on plaintiff

Iowa—Fowler v Lowe, 42 NW 2d 516, 241 Iowa 1093

#### Limitation on action to contest will

An action to recover an interest in land based on an oral contract by a testator in his lifetime to make a will giving plaintiff an interest in the land and for partition of the land is subject to the statutory limitation on actions to contest wills, even though it involves only part of the property covered by the testator's will.

Kan—Koch v Wolf, 69 P 2d 1088, 146 Kan 247

42 Tex—Johnson v Durst, Civ App, 115 SW 2d 1000, error dismissed

#### Evidence

(1) Held admissible

Ga—Shadburn v. Tapp, 77 SE 2d 7, 209 Ga. 887

(2) Held inadmissible

Ga—Shadburn v Tapp, supra

(3) Held to authorize verdict for defendant

Ga—Shadburn v. Tapp, supra

43 Ark—Brunk v Merchants Nat Bank, 230 SW 2d 932, 217 Ark 499

Cal—Mau v McManaman, 85 P 2d 209, 29 Cal App 2d 631

Kan—Imthurn v Martin, 96 P 2d 860, 150 Kan 906, 151 Kan 324

Miss—Johnston v Tomme, 24 So 2d 730, 199 Miss 337

Neb—Eagan v Hall, 68 NW 2d 147, 159 Neb 537

Nev—Waters v Harper, 250 P 2d 915, 69 Nev 315

NJ—Sullivan v Margetts, 75 A 2d 743, 9 NJ Super 189

NY—In re Levin's Estate, 87 NY S 2d 282, 194 Misc 553

Or—Corpus Juris quoted in In re Lieurance's Estate, 182 P 2d 969, 977, 181 Or 646, rehearing denied 185 P 2d 575, 181 Or 646

Pa—Petition of Eppley, 37 Pa Dist & Co 151, 53 York Leg Rec 153 68 C J p 590 note 16

#### Equities held not to outweigh contractual rights

Where son of one party to agreement that parties would consider their separate property as community property and make wills so property would descend in equal shares to son, and children of parties, had been paid adequate salary by enterprises owned by parties, that son had managed parties' business enterprises did not create equities in him for recompense which outweighed the contractual rights of children of parties, and did not entitle him to probate of later will which violated the contract.

Wash—Raab v Wallerich, 282 P 2d 271

#### Executor and legatees as defendants

Suit against independent executor and residuary legatees was not proper remedy to enforce testator's promise to bequeath.

Tex—Patton v Smith, Civ App, 221 SW 1034, reversed on other grounds, Com App, 241 SW 109

#### Pleading held sufficient

Ala—Wagar v Marshburn, 1 So 2d 303, 241 Ala 73.

Miss—Johnston v Tomme, 24 So 2d 730, 199 Miss 337

44. Pa—Van Meter v Norris, 177 A 799, 318 Pa 137

Validity and enforceability of contract to convey all of promisor's estate to another at promisor's death should be tried at law, not in equity, in view of promisee's legal remedies. Pa—Van Meter v Norris, 177 A 799, 318 Pa 137

45. Mich—Winchell v Mixer, 25 N W 2d 147, 316 Mich 151

#### Right to use during lifetime

Where defendant stepmother breached her obligation under an agreement to will property of plaintiffs' deceased father to plaintiffs after a life use thereof by defendant and was seeking fraudulently to deprive plaintiffs of their contractual rights therein, plaintiffs were not entitled to an accounting in view of the right of defendant to use of the property during her lifetime. Mich—Winchell v Mixer, supra

46 NC—Price v Askins, 194 SE 284, 212 NC 583—Lipe v Citizens' Bank & Trust Co, 178 SE 665, 207 NC 794

47 US—Bolander v Godsfil, CCA Alaska, 116 F 2d 437—Newell v Capelle, CCA Del, 86 F 2d 1007

Cal—Osborn v Hoyt, 184 P 854, 181 Cal 336

Ga—Sybilla v Connally, 18 SE 2d 783, 66 Ga App 678

Me—Lutick v Sileika, 14 A 2d 706, 137 Me 30

Nev—Waters v Harper, 250 P 2d 915, 69 Nev 315

NJ—Galloway v Echells, 62 A 2d 499, 1 NJ Super 584

Hackensack Trust Co v Ackerman, 47 A 2d 832, 138 NJ Eq 214

NY—Tracy v Danzinger, 3 NY S 2d 24, 253 App Div 418, affirmed Tracy v Danzinger, 18 NE 2d 311, 279 NY 679

#### Unambiguous contract

Equity will enforce a valid contract to make a will, usually by imposing a trust on property involved, but such contract must be clearly proved and be unambiguous in all its terms.

Del—Equitable Trust Co v Hollingsworth, 49 A 2d 325, 29 Del Ch 563

#### Change of condition

(1) In order to impress trust on realty on ground of oral contract to devise realty in consideration of services, more than mere nonperformance of such contract must be shown, and it must appear that plaintiff in performance of and because of the contract, was compelled to and in fact did change her condition in such manner and to such an extent that in the circumstances, failure to devise the property amounted to fraud on plaintiff.

Me—Lutick v Sileika, 14 A 2d 706, 137 Me 30

(2) In action to impress trust on realty on ground of oral contract to devise realty in consideration of

created or enforced on the property<sup>48</sup> Relief may be afforded during the lifetime of the promisor,<sup>49</sup> when particular property is involved<sup>50</sup> It has been held that an oral contract for a devise cannot be enforced at law because of the statute of frauds and the statute of wills<sup>51</sup>

Where one promises to make a will in consideration of another's promise or act, if no will is left the courts will effectuate the result which the promised will was to accomplish<sup>52</sup> Where the promisor executes a will and covenants not to change it, but nevertheless revokes it, the other party may obtain redress by pursuing at law or in equity such remedy for breach of contract as may be available<sup>53</sup> Where the agreement is to make no will but to allow property to go by the rules of descent, each heir in his own name may maintain ejectment for his portion of the premises without resorting to an action for damages<sup>54</sup> A promisee may set up a contract as a defense against others claiming absolute title under a devise at variance with the contract,<sup>55</sup> and the promisee may set up the claim as a defense to an obligation held against him by the estate, where the decedent's contract was that he should be relieved from the payment thereof,<sup>56</sup> or may urge it as a counterclaim when sued on the

obligation<sup>57</sup> A person inducing the breach of a contract for a particular disposition of property may be sued in tort<sup>58</sup>

The remedy for a wrong arising out of the violation of a contract in respect of the making of a will cannot be litigated in a probate court, but must be pursued in a court of law or a court of equity<sup>59</sup> While there is some authority holding that, where a will is made pursuant to the contract, the promisee may enjoin the probate after the testator's death of a later will revoking it,<sup>60</sup> there is other authority holding that the contract cannot be made the basis for enjoining probate<sup>61</sup> It cannot be set up, in proceedings in probate, to defeat the probate of the will<sup>62</sup> even though an earlier will complying with the contract and revoked by the later one has been made and erroneously admitted to probate,<sup>63</sup> nor can the claim be presented in an action between other persons for the assertion of a dower right,<sup>64</sup> or considered in a proceeding for distribution of the estate<sup>65</sup> Where, however, a will constituting or complying with the contract has been admitted to probate, the contract may be set up as a defense to an attempt to set aside the probate in order to prepare the way for probating a later will<sup>66</sup>

services, whether plaintiff changed her condition in performance of the contract was a question of fact for the sitting justice  
Me—Lutick v Sileika, supra

(3) The mere fact that high-school girl, in reliance on godfather's oral agreement to devise realty to her in consideration of services, worked hard in rendering services and gave up some social activities for ten weeks, during which she continued to live at home and attend high school as before, was not such a change in condition as would entitle her to impress trust on the realty after godfather's death

Me—Lutick v Sileika, 14 A.2d 706, 137 Me 30

48. Mo—Page v Joplin Nat Bank & Trust Co, 255 SW2d 821, 363 Mo 1008

NJ—Galloway v Eichells, 62 A.2d 499, 1 N.J. Super 584

49. Cal—Brown v Superior Court in and for Los Angeles County, 212 P.2d 878, 34 Cal.2d 559—Osborn v Hoyt, 184 P. 854, 181 Cal 336  
NJ—Galloway v Eichells, 62 A.2d 499, 1 N.J. Super 584

50. NJ—Galloway v. Eichells, supra

51. Mo—Ver Standig v St. Louis Union Trust Co, 129 SW2d 905, 344 Mo 880—Kirk v Middlebrook, 100 SW 450, 201 Mo 245.

52. Del—Peyton v William C Peyton Corporation, 194 A. 106, 22 Del Ch 187, reversed on other grounds 7 A.2d 737, 23 Del Ch 321, 123 A. L.R. 1482

53. NJ—Minogue v Lipman, 96 A.2d 426, 25 N.J. Super 376, affirmed 100 A.2d 684, 28 N.J. Super 330

54. Pa—Taylor v Mitchell, 87 Pa. 518, 30 Am R 383

55. W Va—Drake v. Parker, 196 SE 156, 119 W Va 738

56. Or—Corpus Juris quoted in In re Lieurance's Estate, 182 P.2d 969, 977, 181 Or 646, rehearing denied 185 P.2d 575, 181 Or 646

68 C.J. p 590 note 18

57. Iowa—Herrick v Hayes, 173 N.W. 110

Or—Corpus Juris quoted in In re Lieurance's Estate, 182 P.2d 969, 977, 181 Or 646, rehearing denied 185 P.2d 575, 181 Or 646

58. Ga.—Darnell v Toney, 154 SE 379, 41 Ga. 673

#### Complaint held sufficient

NY—Sullivan v Anderson, 64 NY S.2d 704, 187 Misc 670

59. Cal—In re Berry's Estate, 233 P. 330, 195 Cal 354  
Opposition to probate see infra § 322

#### Rescission

If heirs of testatrix after her death were entitled to remedy of rescission of contract regarding disposition of

her property by will, remedy was required to be pursued in court of equity and not in probate

Cal—In re Berry's Estate, supra

60. Cal—Chase v Stevens, 166 P. 1035, 34 Cal App 98

61. Or—Dickerson v Murfield, 191 P.2d 380, 183 Or 149—Corpus Juris quoted in In re Lieurance's Estate, 182 P.2d 969, 977, 181 Or 646, rehearing denied 185 P.2d 575, 181 Or 646

68 C.J. p 592 note 22

62. NY—In re Higgins' Will, 190 NE 417, 264 NY 226

Or—Corpus Juris quoted in In re Lieurance's Estate, 182 P.2d 969, 977, 181 Or 646, rehearing denied 185 P.2d 575, 181 Or 646

Pa—In re Norris' Estate, 198 A. 142, 329 Pa 483

In re Swenk's Estate, 2 Fiduciary 465, 53 Lanc Rev 143—In re Burns' Estate, Orph., 34 West L.J. 245

68 C.J. p 590 note 23—p 592 note 97

63. Or—Corpus Juris quoted in In re Lieurance's Estate, 182 P.2d 969, 977, 181 Or 646, rehearing denied 185 P.2d 575, 181 Or 646

68 C.J. p 590 note 24

64. NY—Purdy v Purdy, 158 NY S. 683, 95 Misc 369

65. Ind—Carroll v Swift, 37 NE 1061, 10 Ind App 170

66. Ala—Walker v Yarbrough, 76 So. 390, 200 Ala. 458

68 C.J. p 590 note 27.

The promisor of a contract to make a will devising realty may have the benefit of such equitable rights and remedies as to it while he still lives as would apply to other contracts relating to real estate,<sup>67</sup> including the privilege conferred by statute giving a grantor the right to rescind a conveyance made on promise of support<sup>68</sup> On a breach by the promisee, the promisor may maintain an action to rescind or cancel the contract<sup>69</sup>

### § 123. Actions for Goods or Services

- a Right of action and defenses
- b Procedure
- c Damages, amount of recovery

#### a. Right of Action and Defenses

One who, in return for an agreement to make a particular disposition of property by will, has rendered services or other consideration to the promisor, under such circumstances that an implied contract may be asserted as a basis of recovery, may sue and recover the reasonable value of such services or other consideration in an action based on quantum meruit.

Where a person renders service to another, relying solely on the testator's generosity and in the mere expectation of a legacy, there being no contract, either express or implied, that compensation shall be made therefor by will, and the party for whom the services are rendered dies without making such provision, no action to recover for such services will lie in favor of the person rendering them<sup>70</sup> However, one who, in return for an agreement to make a particular disposition of property by will, has rendered services or has furnished money, support, or property to the promisor for his benefit, under circumstances such that, notwithstanding the existence of an express contract, an implied contract may be asserted as a basis of recovery,

may sue and recover the reasonable value of such services or other consideration in an action based on quantum meruit<sup>71</sup>

Resort may not ordinarily be had to the common counts where the express contract remains alive and in force, unbroken and unrepudiated<sup>72</sup> Thus, this remedy is not generally available while the promisor continues alive and his contract unbroken and unrepudiated,<sup>73</sup> as where, without repudiating a will complying with the contract, he has refused to accept further performance by the promisee<sup>74</sup> or where, although he has made a later inconsistent will, he has not repudiated the contract so as to bring notice thereof home to the promisee<sup>75</sup> This rule preventing recovery because of an outstanding express contract is subject, however, to the qualification that where the contract is an entirety and contains several provisions, on a breach or repudiation of any of them, although the specific provision as to the purposed testamentary provision is not repudiated, the promisee may accept the breach as infecting the whole contract and sue on the common counts<sup>76</sup> A defaulting promisee is not at liberty to treat the contract as void and sue on the quantum meruit if the promisor continues willing to perform<sup>77</sup> The action is available where the express contract has been abandoned by mutual consent.<sup>78</sup>

A promisee who has made a contract with decedent for the sole benefit of a third person cannot waive the express contract and recover in quantum meruit, while the cause of action remains valid and outstanding in the beneficiary without having been surrendered or lost<sup>79</sup> Moreover, plaintiff must have given goods or services which afford him a basis for recovery and, thus, one who is mere-

67 Ala—Dennis v West, 26 So 2d 263, 248 Ala 90

68. Ala—Dennis v West, supra

69 N J—Hill v Ribble, 28 A 2d 780, 132 N J Eq 486

Tex—Jay v Whiteside, Civ App, 205 S W 2d 389, error refused no reversible error

70. N J—Stone v Todd, 8 A 300, 40 N J Law 274

71. Colo—Norton's Estate v McAlister, 123 P 963, 22 Colo App 293

Ga—Bunting v Dobson, 54 S E 102, 125 Ga 447

Kan—Imthurn v Martin, 96 P 2d 860, 150 Kan 906, 151 Kan 324

La—Succession of Palmer, 68 So 405, 137 La 190

Succession of McNamara, 18 So 908, 48 La Ann 45.

Succession of Simon, 8 La A (Orleans) 115

Mass—Wellington v Apthorp, 13 N E 10, 145 Mass 69, 57 Am R 759

Mo—Whitworth v Monahan's Estate, App, 111 S W 2d 931

N Y—Robinson v Raynor, 28 N Y 494

In re St John's Estate, 296 N Y S 613, 163 Misc 17

Pa—Bemis v Van Felt, 11 A 2d 499, 139 Pa Super 282

68 C J p 591 note 32

#### Invalid contract

A person who renders services under an invalid contract to devise property may secure quantum meruit for the value of those services

Cal—Orella v Johnson, 242 P 2d 5, 38 Cal 2d 693

72. Pa—Markley's Estate, 10 Pa Co 551

68 C J p 591 note 34

73 Conn—Appeal of Beardsley, 75 A 141, 83 Conn 34

Pa—White v Arka, 2 Pa Dist & Co 574

74. Pa—White v Arka, supra.

75. Conn—Appeal of Beardsley, 75 A 141, 83 Conn 34

76. Ind—Mug v Ostendorf, 96 N E 780, 49 Ind App 71

77. NH—Southern v Kittredge, 158 A 132, 85 N H 307

NC—Andrews v Andrews, 29 S E 351, 122 N C 352, 3 Prob Rep Ann 440

78. Ill—Stockley v Godwin, 78 Ill 127

79 Mo—Ver Standig v St Louis Union Trust Co, App, 62 S W 2d 1094

ly the designated beneficiary in a contract between others,<sup>80</sup> or one who, although himself the promisee and furnishing the consideration, has not given as consideration anything in the nature of services or of property,<sup>81</sup> cannot recover in an action of quantum meruit. The right of action, when it exists, is not defeated by plaintiff's failure to present his claim or to demand an accounting and settlement in decedent's lifetime, at least where the conduct of the two was continuously consistent with the claim,<sup>82</sup> by the unsuccessful termination of a prior suit, brought during decedent's life, on the ground that it was prematurely brought,<sup>83</sup> or of a suit for specific performance against the personal representative,<sup>84</sup> by an executory accord between plaintiff and decedent's heirs,<sup>85</sup> or by the birth of a child to the promisor subsequent to the passing of the goods and services from plaintiff to him.<sup>86</sup> Illicit relations between the parties present no bar to a recovery unless they entered into, and formed some part of, the basis of the understanding or agreement for compensation.<sup>87</sup>

*Statute of frauds* The right to recover on a quantum meruit for goods or services furnished decedent is not impaired by the fact that the contract is void under the statute of frauds.<sup>88</sup>

*Accrual of action, limitations* A right of action on quantum meruit for goods and services rendered the promisor does not ordinarily accrue until his death and suit before then is premature.<sup>89</sup> However, where the promisor commits an anticipatory breach by repudiation of the contract, and plaintiff elects to accept it, the cause of action accrues and the statute of limitations starts to run from the time of repudiation<sup>90</sup> without either advancement to the time when the services were rendered<sup>91</sup> or postponement to the time of death.<sup>92</sup> Also, where the performer has been prevented by illness

from completing his contract, an action on quantum meruit is not premature although brought in the lifetime of the promisor.<sup>93</sup> Where the promisor puts it out of his power to perform an agreement to compensate by will, the promisee may recover the reasonable value of services and support by an action brought against the promisor in the latter's lifetime,<sup>94</sup> although recovery may be denied where the proof does not show that the promisor has put it out of his power to perform.<sup>95</sup>

In the absence of repudiation or anticipatory breach, where the action in quantum meruit is rested purely on an implied promise or an understanding that goods or services rendered are to be paid for, without more, the statute of limitations begins to run from the time the services or goods are furnished and not from the date of the promisor's death,<sup>96</sup> but where the agreement to make compensation or provision by will or after death is shown in explanation of the delay, no action accrues until then so that, even as to actions for the value of goods or services, the statutory period starts running only from the time of the promisor's death and not before,<sup>97</sup> even though the promisor makes an inconsistent will<sup>98</sup> or, during his life, refuses to permit or prevents complete performance.<sup>99</sup> The promisee has been held entitled to recover on a quantum meruit although the right of action for breach of the agreement was barred by limitation.<sup>1</sup>

*Satisfaction by legacy* No action for the value of goods or services is maintainable where the promisor has, at his death, left a will which satisfies the contract, plaintiff being limited in such a case to the testamentary provision,<sup>2</sup> and so, where a testamentary provision is made for plaintiff, intended as compensation for the goods or services bestowed on the testator, and plaintiff elects to accept the devise or bequest thus made, he cannot thereafter claim

80. Mo—Ver Standig v St Louis Union Trust Co, supra.

81. Or—Lewis v Siegman, 296 P 51, 207 P 1118, 135 Or 660. 68 C J p 591 note 45.

82. Minn—Schwab v Pierro, 46 N W 71, 43 Minn 520.

83. N Y—Quackenbush v. Ehle, 5 Barb 469.

84. N Y—Lasher v McDermott, 154 N Y S 798, 91 Misc 305, affirmed 158 N Y S 708, 173 App Div 79.

85. N J—Stone v Tod, 8 A 300, 49 N J Law 274.

86. N Y—Jacobson v Le Grange, 3 Johns 199.

87. N Y—Rhodes v Stone, 17 N Y S 561, 63 Hun 624.

88. Mass—Rizzo v Cunningham, 20 NE 2d 471, 303 Mass 16. 68 C J p 592 note 56.

89. N Y—Patterson v Patterson, 13 Johns 379.

90. Mass—Johnson v Starr, 74 NE 2d 137, 321 Mass 566.

N J—Galloway v Eichells, 62 A 2d 499, 1 N J Super 584. 68 C J p 592 note 59.

91. N J—Udike v Ten Broeck, 32 N J Law 105.

92. Mass—Canada v. Canada, 6 Cush 15. 68 C J p 592 note 61.

93. Me—Preble v Preble, 97 A 9, 115 Me 26.

94. N Y—Campbell v. Campbell, 65 Barb 639.

RI—Messier v Messier, 82 A 996, 34 RI 233.

95. RI—Messier v. Messier, supra.

96. Ga—Cooper v Claxton, 50 SE 399, 122 Ga 596. 68 C J p 592 note 62.

97. Okl—Poole v Janovy, 268 P. 291, 131 Okl 219. 68 C J p 592 note 63.

98. Conn—Appeal of Beardsley, 75 A 141, 83 Conn 34.

99. N Y—Quackenbush v. Ehle, 5 Barb 469.

1. Ohio—Sayler v Sellers, 19 Ohio Cir Ct, NS, 206, 2 Ohio App 439.

2. Mass—Frost v Summer, 21 NE 231, 149 Mass 98. 68 C J p 593 note 66.

under, or recover on, the quantum meruit,<sup>3</sup> at least where the legacy is ample and adequate to satisfy the claim,<sup>4</sup> where it is not ample for that purpose, according to some authority, plaintiff may recover for the excess in value of the goods, and services over the amount of the testamentary provision.<sup>5</sup> Where the property which, by the will, is intended for plaintiff, is conveyed to him by decedent in his lifetime, it has been held that, unless such conveyance is agreed to be in satisfaction of the claim and in lieu of the devise, the claim may still be sued on, not being satisfied by the conveyance or by the inoperative provision in the will.<sup>6</sup> It has been held that where services are rendered under an express agreement to pay for them by a legacy, without any agreement as to its amount or character, the legatee has an election between accepting the legacy in full payment, or, if insufficient to compensate for the reasonable value of the services, to reject it and enforce a claim for reasonable value of services.<sup>7</sup>

#### b. Procedure

The general rules of procedure in civil actions apply in actions by a promisee for goods or services.

The rules which apply to procedure in civil actions generally apply in actions for goods or services by one in whose favor another has promised to make a will.<sup>8</sup> Where the services rendered by a wife in consequence of a promised testamentary provision are of such character that the husband is entitled to the earnings, a suit to recover their value is properly brought by him,<sup>9</sup> where they are not, she may herself sue for them.<sup>10</sup> Where statutes exist permitting the enforcement against heirs and devisees of claims against decedent, plaintiff may sue such persons in an action quantum meruit for services and need not bring the suit against decedent's personal representative as defendant.<sup>11</sup>

*Pleading* Where the pleader relies on the common count for labor done, his petition, complaint,

or declaration need state only matters necessary to be set forth in such actions generally, and need not refer at all to a contract looking to testamentary provision,<sup>12</sup> the inclusion of allegations with respect to the contract is an indication that the suit is one for breach of contract, rather than to recover for services performed,<sup>13</sup> although a complaint may be good as on quantum meruit, notwithstanding recitals with reference to a parol contract, since the contract may serve only to rebut the presumption that the services were rendered gratuitously or under a mere hope of reward.<sup>14</sup> Where forms of action are abolished and the pleading is sufficient if it states facts forming the basis for an action, a complaint stating facts showing a good cause of action quantum meruit is sufficient although the pleader mistakes the theory of his case and asks damages for breach of the express contract to make a will.<sup>15</sup> Where services are rendered during several distinct separated periods but always under one original agreement, renewed and ratified as such each time the services are resumed, and not under separate agreements on each occasion, the whole of the services constitutes only one single cause of action and need only be pleaded as such.<sup>16</sup>

Under a general denial, defendant may, it has been held, take advantage of a satisfaction of the debt, without any special plea.<sup>17</sup> A variance between the pleadings and the proof, in order to affect the right of recovery, must be real and material,<sup>18</sup> of such nature that defendant shall have been misled or surprised to his injury in maintaining his defense.<sup>19</sup> In this connection the pleadings are to be construed liberally.<sup>20</sup> Proof of a contract to compensate in a particular manner is not such a variance as will defeat recovery under pleadings merely setting up a claim in quantum meruit and alleging that the services forming the basis of the claim were rendered on a promise or understanding that they were to be paid for.<sup>21</sup>

3. Ind—Alerding v Allison, 68 NE 185, 31 Ind App 397

4. NY—Reynolds v Robinson, 64 NY 589  
68 C J p 593 note 68

5. NY—Reynolds v Robinson, supra

6. NY—Rose v Rose, 7 Barb 174

7. NJ—Schmetzer v Broegler, 105 A 450, 92 NJ Law 88

8. Ark—Peoples Nat. Bank v Cohn, 110 SW 2d 42, 194 Ark 1098

**Judgment held not error**

Wis—In re Soles' Will, 253 NW 801, 215 Wis. 129.

9. NY—Reynolds v Robinson, 64 NY 589

10. NY—Stokes v Pease, 29 NYS 430, 79 Hun 304

11. NJ—Stone v Tod, 8 A 300, 49 NJ Law 274  
68 C J p 593 note 75.

12. Ga.—Banks v Howard, 43 SE 438, 117 Ga 94  
68 C J p 593 note 76

13. Ga.—Banks v Howard, supra  
68 C J p 593 note 77

14. Ind—Miller v Kifer, 130 NE 278, 75 Ind 198

15. US—Quirk v Bank of Commerce & Trust Co, Tenn, 244 F 682, 157 CCA 130

16. Okl—Poole v Janovy, 268 P 291, 131 Okl 219

17. Ind—Alerding v Allison, 68 NE 185, 31 Ind App 397

18. Me—Emery v Wheeler, 152 A 624, 129 Me 428

19. Me—Emery v Wheeler, supra

20. Kan—Griffith v Robertson, 85 P 748, 73 Kan 666  
68 C J p 593 note 83

21. SC—Hursey v Suries, 74 SE 618, 91 SC 284

*Evidence.* The burden of proving the elements of the cause of action such as the performance and the value of services and that they were to be compensated for is on plaintiff,<sup>22</sup> the burden as to matters of defense rests on defendant.<sup>23</sup> While the presumption that services rendered between persons in family relations are gratuitous prevails in cases where the services have been rendered by one who claims to have expected testamentary compensation,<sup>24</sup> the presumption is rebuttable,<sup>25</sup> moreover, it is inapplicable unless plaintiff and deceased did live together as members of one family when the services were rendered.<sup>26</sup> A presumption to the contrary exists where there is no element of kinship or family relationship between the parties.<sup>27</sup> A presumption may exist that plaintiff received payment for his services.<sup>28</sup> An obligation to pay by will for services performed for the decedent cannot fairly be inferred from an implied or express obligation merely to pay.<sup>29</sup>

The ordinary rules governing the admissibility of evidence in civil actions apply to actions for

the value of goods or services given in consequence of a promised disposition of property by will or after death.<sup>30</sup>

The general rule as to the weight and quality of the evidence is no different from that in actions generally.<sup>31</sup> Claimant must prove his claim by a fair preponderance of the evidence,<sup>32</sup> and the evidence must be clear and convincing,<sup>33</sup> but it is not essential that the agreement be established by direct testimony<sup>34</sup> and it is sufficient that the conduct of the parties and the surrounding facts and circumstances clearly indicate the existence of an agreement or understanding that compensation should be made.<sup>35</sup>

*Questions for court and jury; instructions* While the court may, in a proper case, direct a verdict,<sup>36</sup> ordinarily the determination of questions of fact, such as the existence of an agreement or understanding that goods or services are to be paid for, is for the jury<sup>37</sup> or other fact-finding agency<sup>38</sup> under proper instructions by the court.<sup>39</sup>

22. Ark—*Corpus Juris* cited in *Peoples Nat Bank v Cohn*, 110 S W 2d 42, 46, 194 Ark 1098  
Ky—*Sneed's Ex'r v Smith*, 72 S W 2d 1028, 255 Ky 132  
Pa—*Stafford v Reed*, 70 A 2d 345, 363 Pa 405  
68 C J p 594 note 85

*Agreement and value of services*  
Pa—*Bemis v Van Pelt*, 11 A 2d 499, 139 Pa Super 282

23. Ark—*Corpus Juris* cited in *Peoples Nat Bank v Cohn*, 110 S W 2d 42, 46, 194 Ark 1098  
68 C J p 594 note 86

24. Ky—*Armstrong v Shannon*, 197 S W 950, 177 Ky 547  
68 C J p 594 note 88

25. Ind—*Nelson v Masterson*, 28 NE 731, 2 Ind App 524  
68 C J p 594 note 89

26. Mo—*Clark v Cordry*, 69 Mo App 6  
NC—*Whetstone v Wilson*, 10 SE 471, 104 NC 385

27. NJ—*Stone v Tod*, 8 A 300, 49 NJ Law 274

28. Pa—*Bemis v Van Pelt*, 11 A 2d 499, 139 Pa Super 282

29. SC—*McConnell v Crocker*, 60 SE 2d 673, 217 SC 334

30. Ky—*Sneed's Ex'r v Smith*, 72 S W 2d 1028, 255 Ky 132  
68 C J p 594 note 95

**Evidence held inadmissible**

(1) In action on parol contract to devise property in consideration of services, proof of value of property

is incompetent where benefit to decedent can be measured by ascertaining reasonable value of services rendered  
Ky—*Sneed's Ex'r v Smith*, supra

(2) Statements by decedent's husband relating to alleged agreement between plaintiff and decedent's husband for services  
Ky—*Sneed's Ex'r v Smith*, supra

(3) Testimony showing a legacy in a revoked will is not admissible to prove existence of a contract to make a will in return for services rendered unless will itself shows, or it appears by other evidence, that legacy was given in pursuance of a contract to make a will  
Pa—*In re McWilliams' Estate*, 56 A 2d 241, 162 Pa Super 299

(4) Other evidence held inadmissible see 68 C J p 594 note 95 [a] (5)

31. Mo—*Rosenberg v Steiner*, 228 S W 2d 806, 360 Mo 447  
68 C J p 594 note 96

**Evidence held sufficient**

(1) To sustain verdict for promisee

NY—*Yusko v Wyshnovski*, 283 N Y S 494, 246 App Div 672  
Okl—*Smith v Long*, 83 P 2d 167, 183 Okl 441

(2) As to other matters see 68 C J p 594 note 96 [a]

**Evidence held insufficient**

(1) To entitle promisee to recovery

Ga—*Rogers v Stamos*, 48 SE 2d 548, 77 Ga App 285

(2) To establish contract  
Ga—*Rogers v Stamos*, supra  
Mo—*Rosenberg v Steiner*, 228 S W 2d 806, 360 Mo 447

(3) To prove rendition of services  
Mo—*Rosenberg v Steiner*, supra

(4) To sustain burden on promisee to show that failure to continue to perform was not due to his default  
Mass—*Jackson v Boston Safe Deposit & Trust Co*, 39 NE 2d 85, 310 Mass 593

(5) As to other matters see 68 C J p 594 note 96 [b]

32. NY—*In re Wood's Will*, 201 N Y S 716, 207 App Div 41

33. NY—*In re Wood's Will*, supra

34. Kan—*Griffith v Robertson*, 85 P 748, 73 Kan 666  
68 C J p 595 note 99

35. Okl—*Poole v Janovy*, 268 P 291, 131 Okl 219  
68 C J p 595 note 1

36. Minn—*Schwab v Pierro*, 46 N W 71, 43 Minn 520  
68 C J p 595 note 2

37. Pa—*Bemis v Van Pelt*, 11 A 2d 499, 139 Pa Super 282  
68 C J p 595 note 3

38. NY—*Quackenbush v Ehle*, 5 Barb 469  
68 C J p 595 note 4

39. Ky—*Sneed's Ex'r v Smith*, 72 S W 2d 1028, 255 Ky 132  
Pa—*Bemis v Van Pelt*, 11 A 2d 499, 139 Pa Super 282  
68 C J p 595 note 5.

### c. Damages; Amount of Recovery

The measure of damages is the reasonable value of the services rendered or the goods or money supplied or furnished the promisor

The measure of damages is the reasonable value of the services rendered or the goods or money supplied or furnished the promisor<sup>40</sup> and not the value of the provision or disposition of property promised to plaintiff on the promisor's death<sup>41</sup>. The recovery cannot, however, exceed in amount the promised provision<sup>42</sup> or the sum demanded by plaintiff in his pleadings<sup>43</sup>. In estimating the value of services, regard should be paid to the situation of the parties<sup>44</sup> and the nature of the services<sup>45</sup>. Declarations of the testator indicating the amount of the contemplated provision should be considered as showing his estimate of the value of the services to him, in arriving at the amount recoverable<sup>46</sup>. Plaintiff is entitled to a recovery of money advanced or paid to the promisor<sup>47</sup> and of the value of improvements made by him on promisor's land<sup>48</sup>.

The value or amount of the estate left by decedent cannot be made the basis for determining damages which depend instead on the value of the goods or services supplied him,<sup>49</sup> and it has even been held that any consideration of the value of the estate is improper as it may improperly influence damages,<sup>50</sup> but other authorities hold that evidence of its value may properly be received and considered as shedding light on the style and standard of living of deceased and thus aiding in the formation of a proper estimate as to the value of the services<sup>51</sup>. Although it has been held that an account for services rendered is not an interest-

bearing demand,<sup>52</sup> the value of the goods or services having been computed, addition should then be made of interest on the sum arrived at from the time or times when the debt accrued<sup>53</sup> and deductions of all sums that plaintiff received under such circumstances as to constitute them proper applications on the debt<sup>54</sup>.

### § 124 Actions for Damages for Breach

Particular matters with respect to actions for damages for breach of contracts for testamentary or similar disposition of property are discussed infra §§ 125, 126

Examine Pocket Parts for later cases.

### § 125. — Right of Action, Time to Sue, and Procedure Generally

- a In general
- b Parties
- c Pleading
- d Trial
- e Damages

#### a. In General

In a proper case, an action for breach of contract will lie on a contract to make a particular disposition of property by will

Under appropriate circumstances, where the facts are such as to establish the requisite conditions for that class of actions, an action for breach of contract will lie on a contract to make a particular disposition of property by will or the like<sup>55</sup> and in some cases such an action is the only remedy available<sup>56</sup>. It has, for instance, been said that

40. Del—Palmer v Lodge, 109 A 125, 7 Boyce 537  
68 C J p 595 note 6  
41. Pa—Stafford v Reed, 70 A 2d 345, 363 Pa 405  
Bemis v Van Pelt, 11 A 2d 499, 139 Pa Super 282  
68 C J p 595 note 7  
42. Ga—Hudson v Hudson, 16 SE 349, 90 Ga 581  
68 C J p 595 note 8  
43. Conn—Appeal of Beardsley, 75 A 141, 83 Conn 34  
44. Ind—Nelson v Masterson, 28 NE 731, 2 Ind App 524  
45. Ind—Nelson v Masterson, supra  
68 C J p 595 note 11  
46. NJ—Stone v Tod, 8 A 300, 49 NJ Law 274  
47. Mich—De Moss v Robinson, 8 NW 712, 46 Mich 62, 41 Am R 144  
Miss—Carter v Witherspoon, 126 So. 388, 156 Miss 597.

48. NJ—Smith v Smith's Adm'rs, 28 NJ Law 208, 78 Am D 49  
68 C J p 595 note 15  
49. Ind—Wallace v Long, 5 NE 666, 105 Ind 522, 55 Am R 222  
68 C J p 595 note 16  
50. Minn—Schwab v Pierro, 46 N W 71, 43 Minn 520  
51. US—Quirk v Bank of Commerce & Trust Co, Tenn, 244 F 682, 157 CCA 130  
68 C J p 595 note 18  
52. SC—Hursey v Surles, 74 SE 618, 91 SC 284  
53. NJ—Udike v Ten Broeck, 32 NJ Law 105  
54. Ga—Hudson v Hudson, 16 SE 349, 90 Ga 581  
68 C J p 595 note 20  
55. Fla—Farrington v Richardson, 16 So 2d 158, 153 Fla 907—Exchange Nat Bank of Tampa v Bryan, 165 So 685, 122 Fla 479  
Ga—Gilmore v Hammock, 32 SE 2d 844, 72 Ga App 35

Ky—Farmers Nat Bank of Danville, Ky, v Young, 179 SW 2d 229, 297 Ky 95—Hehr's Adm'r v Hehr, 157 SW 2d 111, 288 Ky 580  
NJ—Sullivan v Margetts, 75 A 2d 743, 9 NJ Super 189  
NC—Stewart v Wyrick, 45 SE 2d 764, 228 NC 429—Price v Askins, 194 SE 284, 212 NC 583—Lipe v Citizens' Bank & Trust Co, 178 SE 665, 207 NC 794  
Ohio—Passoni v Breehl, 14 Ohio Supp 100  
Or—Florey v Meeker, 240 P 2d 1177, 194 Or 257  
Pa—Van Meter v Norris, 177 A 799, 318 Pa 137  
Miller v Thomas, Com Pl, 48 Dauph Co 103  
68 C J p 595 note 21

56. Cal—Morrison v Land, 147 P 259, 169 Cal 580  
**Purely legal demand**  
Claim for amount which testator had agreed to provide in will as compensation for relative's acting as



this is the only remedy available during the promisor's lifetime,<sup>57</sup> but, on the other hand, it has been said that on a repudiation or breach by the promisor in his lifetime a cause of action may accrue at once for rescission, for the recovery of damages, or for appropriate equitable relief<sup>58</sup> An action for damages for the breach is not proper where the disposition of the cause involves the determination of questions with respect to the estate on which the jury are not competent to pass<sup>59</sup> Such an action usually merits the careful scrutiny and skepticism of the court,<sup>60</sup> and the assertion of a contract diverting the statutory devolution of an estate must be regarded with grave suspicion<sup>61</sup>

*Accrual and limitation of actions* No right exists to sue on the contract previous to a breach<sup>62</sup> and normally no right of action accrues until the death of the promisor without having complied with the agreement,<sup>63</sup> although it has been held that the cause of action may accrue at the time of abandonment or anticipatory breach of the contract<sup>64</sup> The promisee is not bound to treat the conveyance of specific property to a third person as a breach of an agreement to leave it to him where the conveyance still leaves it within the promisor's power to perform<sup>65</sup> Where two persons contract to make a particular disposition of their property at their death, the cause of action arises at, and not until, the death of the survivor of the two,<sup>66</sup> but, where one person contracts to will the property, to take effect at the death of himself and another, whoever should survive, and dies before such other without having made the will, the cause of action arises immediately on the

death of the promisor without postponement until the death of such other<sup>67</sup> When a breach of the agreement exists by reason of the promisor's death without making the disposition of the property which he contracted to do, the promisee may sue at once without awaiting the settlement of the accounts of the decedent's representatives,<sup>68</sup> the fact that the deductions essential to be made in computing the damages are as yet unascertained does not prevent his doing so<sup>69</sup>

### b. Parties

An action for damages for breach of contract may be maintained by the beneficiary although he was not the promisee or the person from whom the consideration moved

Under statutes authorizing suits by the real parties in interest,<sup>70</sup> or wherever the sole beneficiary of a contract may sue on it,<sup>71</sup> the action may be maintained by the beneficiary, although he was not the promisee or the person from whom the consideration moved,<sup>72</sup> but, where a third person is denied the right to sue on contracts made for his benefit, a result to the contrary is reached<sup>73</sup> Under an agreement to leave property by will to several persons, share and share alike, constituting a several and not a joint undertaking, they cannot join in presenting their claims against the estate of the promisor,<sup>74</sup> and, where similar contracts have been made by the deceased with two promisees and both are broken, they need not join in the suit, since there is no requirement that two or more plaintiffs join separate causes of action in a single suit<sup>75</sup>

housekeeper was a legal demand for breach of contract to make will, which could not be made basis of bill in equity, notwithstanding claim was asserted in same suit with unrelated claims to establish trust against testator's estate

U S—Newell v Capelle, D C Del., 14 F Supp 147, affirmed, CCA, 86 F 2d 1007

57. Ala—Stone v Burgeson, 109 So 155, 215 Ala 23

58. Iowa—Chantland v Sherman, 125 NW 871, 148 Iowa 352

59. Neb—In re Peterson, 107 NW 993, 111 NW 361, 76 Neb 652

60. Ill—Moreen v Carlson's Estate, 6 NE 2d 871, 365 Ill 482

Pa—Walters v Kinghorn's Estate, Comp Pl, 17 Beaver 7

61. Ill—Moreen v Carlson's Estate, 6 NE 2d 871, 365 Ill 482

62. Miss—Carter v Witherspoon, 126 So 388, 156 Miss 597

63. Ill—Henson v Neumann, 3 NE

2d 114, 286 Ill App 610—Henson v Neumann, 3 NE 2d 110, 286 Ill App 197

Ky—Watkins v Whitis, 267 SW 2d 728

Mass—Johnson v Starr, 74 NE 2d 137, 321 Mass 566

NC—Lipe v Citizens' Bank & Trust Co., 178 SE 665, 207 NC 794

SC—Corpus Juris cited in Harmon v Aughtry, 85 SE 2d 284, 285, 226 SC 371

Tex—Richardson v Lingo, Civ App, 274 SW 2d 883, error refused no reversible error

68 C J p 596 note 29

64. NC—Lipe v Citizens' Bank & Trust Co., 178 SE 665, 207 NC 794—Brown v Williams, 145 SE 233, 196 NC 247

Pa—Van Meter v Norris, 177 A 799, 318 Pa 137

68 C J p 597 note 33

65. Cal—Rogers v Schlotterback, 138 P 728, 167 Cal 35

66. Mo—Sharkey v McDermott, 4 S

W 107, 91 Mo 647, 60 Am SR 270

68 C J p 597 note 37

67. NC—Lipe v Houck, 38 SE 297, 128 NC 115

68. Iowa—In re Anderson's Estate, 213 NW 567, 203 Iowa 985

68 C J p 597 note 39

69. NY—Andrews v Brewster, 26 NE 1024, 124 NY 433

70. Ky—Moore v Wager, 48 SW 2d 15, 243 Ky 351

68 C J p 597 note 44

71. NH—Knox v Perkins, 163 A 497, 86 NH 66

72. NY—Seaver v Ransom, 120 N E 639, 224 NY 233, 2 ALR 1187

68 C J p 597 note 44

73. Ga—Cooper v Claxton, 50 SE 399, 122 Ga 596

74. NY—Myers v Cronk, 45 Hun 401, affirmed 21 NE 984, 113 NY 608

75. NJ—Van Houten v Van Houten, 98 A 251, 89 NJ Law 301.

Save in cases involving independent executors,<sup>76</sup> or foreign executors as to whom the court is without jurisdiction,<sup>77</sup> a suit for damages for breach of deceased's contract may<sup>78</sup> and should<sup>79</sup> be asserted against his personal representatives and not against heirs or legatees,<sup>80</sup> at least where the latter were not parties to the agreement, never assumed its performance, and are not shown to have received any of the property affected by the contract<sup>81</sup>

### c. Pleading

The general rules of pleadings in actions on contracts apply in actions for damages for breach of contracts for testamentary or similar disposition

The principles governing pleadings in actions on contracts apply in actions on contracts of the character under consideration<sup>82</sup> Accordingly, plaintiff's petition or complaint must allege all the facts necessary to support a recovery,<sup>83</sup> such as the existence or terms of the contract,<sup>84</sup> a sufficient consideration,<sup>85</sup> performance by plaintiff of the obligations undertaken by him,<sup>86</sup> and a breach of the contract by deceased,<sup>87</sup> with sufficient clearness and certainty,<sup>88</sup> and the omission of a necessary allegation renders the pleading fatally defective<sup>89</sup>

It has been held that plaintiff may in one paragraph plead the breach of the contract and in another proceed on the common counts without thereby rendering either paragraph subject to demurrer<sup>90</sup> In jurisdictions where the statute of frauds to be available as a bar must be specially pleaded, defendant must, in order to avail himself of that defense allege the fact that the agreement was unwritten<sup>91</sup> Statutes requiring the nonperformance of conditions precedent to be pleaded have no reference to cases where the claim is that the promisee never gave the agreed consideration for the promise and an objection of that character may be raised by the general denial and an averment of nonperformance, the failure not being as to a condition precedent but as to a dependent covenant forming the consideration<sup>92</sup> A special demurrer to plaintiff's complaint based on the breach of a contract to will must, in order to be sufficient, point out clearly and distinctly the vice in the complaint<sup>93</sup>

*Issues, proof, and variance* Where suit is brought on an express contract, plaintiff must prove the existence or terms of the contract and cannot recover on a quantum meruit,<sup>94</sup> furthermore the recovery must be on the contract alleged and plaintiff cannot plead one special contract and recover on

76. Tex.—Patton v Smith, Civ App, 221 SW 1034, reversed on other grounds, Com App, 241 SW 109  
68 C J p 597 note 49

77. N Y—Williams v Fischlein, 129 NYS 129, 144 App Div 244

78. Ala.—Taylor v Cathey, 100 So 834, 211 Ala 589  
Ind.—Bell v Hewitt, 24 Ind 280

79. NH.—Day v Washburn, 81 A 474, 76 NH 203

80. NH.—Day v Washburn, supra  
N Y—Williams v Fischlein, 129 NYS 129, 144 App Div 244

81. N Y—Williams v Fischlein, supra

82. Colo.—Ward v Ward, 30 P 2d 853, 94 Colo 275  
68 C J p 597 note 57.

83. **Petition or complaint held to state cause of action**

Ga.—First Nat Bank of Atlanta v De Loach, 74 SE 2d 740, 87 Ga App 639—Gilmore v Hammock, 32 SE 2d 844, 72 Ga App 35

Ky.—Arnold v Arnold's Ex'x, 237 SW 2d 58, 314 Ky 734  
68 C J p 597 note 57

**Petition or complaint held not demurrable**

Colo.—Ward v Ward, 30 P 2d 853, 94 Colo 275

Ga.—Wynne v Buyers, 187 SE 173, 53 Ga App 660  
68 C J p 597 note 57 [b].

**Petition or complaint held not to state cause of action**

Mo.—Page v Joplin Nat Bank & Trust Co, 255 SW 2d 821, 363 Mo 1008

84. Ohio.—Heyn v Kahn, 39 NE 2d 866, 69 Ohio App 274, appeal dismissed 43 NE 2d 240, 140 Ohio St 337

Pa.—Merselles v Wright, Com Pl, 28 Del Co 526

85. Pa.—Merselles v Wright, supra  
68 C J p 597 note 59

86. Ohio.—Heyn v Kahn, 39 NE 2d 866, 69 Ohio App 274, appeal dismissed 43 NE 2d 240, 140 Ohio St 337

Or.—Lewis v Siegman, 296 P 51, 297 P 1118, 135 Or 660

87. Ky.—Lee v McCrocklin's Adm'r, 56 SW 2d 570, 247 Ky 44

**Complaints held not to allege repudiation**

Miss.—Old Ladies Home Ass'n v Hall, 52 So 2d 650, 212 Miss 67, modified on other grounds suggestion of error overruled 54 So 2d 170, 212 Miss 67

SC.—Harmon v Aughtry, 85 SE 2d 284, 226 SC 371

**Complaint held not premature**

N Y—Corcoran v John F Trommer, Inc, 113 NYS 2d 627, 203 Misc 37, affirmed 126 NYS 2d 895, 282 App Div 1041

88. Ga.—Cooper v Claxton, 50 SE 399, 122 Ga 596

Ky.—Lee v McCrocklin's Adm'r, 56 SW 2d 570, 247 Ky 44

89. Or.—Lewis v Siegman, 296 P 51, 290 P 1118, 135 Or 660  
68 C J p 598 note 63

90. Ind.—Cairness v Rushton, 101 Ind 500, 51 Am R 759  
68 C J p 598 note 64

91. N Y—Krell v Stein, 127 NYS 150

92. Iowa.—In re Fetterman's Estate, 222 NW 872, 207 Iowa 252

93. Ga.—Alford v Davis, 95 SE 313, 21 Ga App 820

94. Ohio.—Heyn v Kahn, 39 NE 2d 866, 69 Ohio App 274, appeal dismissed 43 NE 2d 240, 140 Ohio St 337

68 C J p 598 note 70

**Issue of quantum meruit inoperative**

Where jury found that special contract was entered into covering services rendered to testatrix and that such special contract was breached by testatrix, further issue on reasonable value of services rendered to testatrix pursuant to implied contract to pay therefor became inoperative and would not support judgment  
NC.—Lipe v Citizens' Bank & Trust Co, 173 SE 316, 206 NC 24

another<sup>95</sup> The promisee must prove performance on his part or a readiness and willingness to perform<sup>96</sup> Where plaintiff does not allege whether the contract was written or oral, it is permissible for him to prove a written contract corresponding to the averments<sup>97</sup> A variance between the pleadings and the proof, in order to be fatal, must consist of some disagreement between the allegations and the proof in some matter essential to the charge or claim and immaterial variances will be disregarded<sup>98</sup>

#### d. Trial

In an action for breach of a contract for testamentary disposition, questions of fact should be submitted to the jury under proper instructions from the court

While the court may, where a proper case for such action is made out, dismiss the complaint or direct a verdict,<sup>99</sup> the determination of whether or not the evidence shows the existence of the facts essential to the action is primarily for the jury,<sup>1</sup>

aided by proper instructions by the court<sup>2</sup>

#### e. Damages

In an action for damages for breach of a contract to make a testamentary or similar disposition of property, the measure of damages is what the promisee has lost by the promisor's failure to keep his agreement.

In an action for damages for breach of contract, the measure of damages is what the promisee has lost by the promisor's failure to keep his agreement,<sup>3</sup> which is ordinarily the value of the property agreed to be bequeathed or devised,<sup>4</sup> or of the provision or disposition for plaintiff's benefit agreed to be made,<sup>5</sup> less whatever deductions lawfully should be made,<sup>6</sup> and not the value of the services rendered or other consideration furnished by the promisee<sup>7</sup> In at least one jurisdiction, the measure of damages for the breach of a contract to will all or a part of an estate to a person in return for personal services is the value of the services rendered and not the estate promised,<sup>8</sup> but the

95. US—Appolonio v Baxter, CA Tenn., 217 F2d 267  
Me—Dufour v Stebbins, 145 A 893, 128 Me 133

96. Ohio—Heyn v Kahn, 39 NE2d 866, 69 Ohio App 274, appeal dismissed 43 NE2d 240, 140 Ohio St 337

97. Tex—Henderson v Davis, Civ App, 191 SW 358

98. Conn—Strakosch v Connecticut Trust & Safe Deposit Co, 114 A 660, 96 Conn 471  
68 CJ p 598 note 73

99. US—Cromwell v Simons, CCA NY, 280 F 663, certiorari denied 42 S Ct 463, 258 US 630, 66 L Ed 800  
68 CJ p 601 note 8

1. Tex—Bennett v McKrell, Civ App, 125 SW2d 701, modified on other grounds 144 SW2d 242, 135 Tex 557

68 CJ p 601 note 9

#### Existence of contract

Tex—Bennett v McKrell, Civ App, 125 SW2d 701, modified on other grounds 144 SW2d 242, 135 Tex 557

2. Ga—Spinks v Jenkins, 43 SE2d 586, 75 Ga App 414  
68 CJ p 601 note 10

#### Instructions held erroneous

Ky—Cheatham's Ex'r v Parr, 214 SW2d 91, 308 Ky 175

3. Fla—Farrington v Richardson, 16 So2d 158, 153 Fla 907

Mass—Clark v Treasurer & Receiver General, 115 NE 416, 226 Mass 301, LRA 1917D 800

Tenn—Corpus Juris cited in Cate v Popejoy, 94 SW2d 51, 53, 19 Tenn App 643.

#### Expenditures for improvements

(1) Where plaintiffs were in possession of farm under oral agreement to leave farm to them at defendant's death and made valuable improvements on farm in reliance on agreements, expenditures for such improvements, rather than increased value of premises occasioned thereby, constituted proper measure of damages for breach of agreement, unless improvements were shown to be unreasonable or utterly unadapted to the premises

Mich—Trisch v Fairman, 54 NW2d 621, 334 Mich 432

(2) Failure to offset against plaintiffs' expenditures for improvements, damages resulting from plaintiffs' alleged neglect and misuse of premises was not error, in absence of proof itemizing or particularizing such damages or showing the amount thereof in dollars and cents

Mich—Trisch v Fairman, supra

4. Cal—Chahon v Schneider, 256 P 2d 54, 117 Cal App 2d 334

Fla—Farrington v Richardson, 16 So2d 158, 153 Fla 907

Ga—Gilmore v Hammock, 32 SE2d 844, 72 Ga App 35

Me—Sard v Sard, 83 A2d 286, 147 Me 46

NC—Lipe v Citizens' Bank & Trust Co., 173 SE 316, 206 NC 24

Tenn—Corpus Juris cited in Cate v Popejoy, 94 SW2d 51, 53, 19 Tenn App 643—Williams v Buntin, 4 Tenn App 340

68 CJ p 601 note 12

#### Benefits ascertainable or not ascertainable

(1) Where the benefit to the promisor cannot be measured in money, there is no way to determine the

amount of recovery other than by the pecuniary standard fixed by the parties to the contract and so the measure of damages in such case is the value of the property agreed to be devised or bequeathed

Ky—Finn v Finn's Adm'r, 244 SW 2d 435—Jordan's Adm'r v Burton, 135 SW2d 684, 281 Ky 309—Sneed's Ex'r v Smith, 72 SW2d 1028, 255 Ky 132

68 CJ p 601 note 12 [b] (1)

(2) Where the value of the consideration or other services rendered is ascertainable, the standard to be applied as to damages is the reasonable value of such services

Ky—Sneed's Ex'r v Smith, supra

68 CJ p 601 note 12 [b] (3)

5. Fla—Farrington v Richardson, 16 So2d 158, 153 Fla 907

68 CJ p 601 note 13

6. Tenn—Corpus Juris cited in Cate v Popejoy, 94 SW2d 51, 53, 19 Tenn App 643

68 CJ p 601 note 14

7. Tenn—Corpus Juris cited in Cate v Popejoy, 94 SW2d 51, 53, 19 Tenn App 643

68 CJ p 602 note 15

8. Pa—Stafford v Reed, 70 A2d 345, 363 Pa 405—In re Stichler's Estate, 59 A2d 51, 359 Pa 262—In re Jones' Estate, 59 A2d 50, 359 Pa 260—Cramer v McKinney, 49 A2d 374, 355 Pa 202—In re Anderson's Estate, 35 A2d 301, 348 Pa 294  
Bemis v Van Pelt, 11 A2d 499, 139 Pa Super 282

In re Hofmann's Estate, 64 Pa Dist & Co 575

In re Stichler's Estate, Orph, 35 Del Co 55—In re Swenk's Estate, Orph, 4 Fiduciary 173, 54 Lanc Rev 85, 17 Som Leg J 13, 68 York Leg

measure of damages for the breach of a contract to will a specific sum in exchange for services is the promised benefit, rather than the value of the services rendered.<sup>9</sup> It has been held that where the consideration for the promise is a past or executed consideration consisting of services performed or liabilities incurred before the promise, the measure of damages is the reasonable value of such services or the amount of the precedent liability and not the value of the property promised or the amount which the promisor agreed to bestow on the promisee.<sup>10</sup> So, too, where the promise is in terms to make compensation for services to be rendered, the measure of damages is the reasonable value of the services rendered under the contract,<sup>11</sup> together with interest computed, according to some authority, from the date of their rendition,<sup>12</sup> but, according to other authority, only from the time of the promisor's death.<sup>13</sup>

Where the measure of damages rests on the value of the property, it is computed on the basis of the market value thereof at the time of the promisor's death,<sup>14</sup> where it is determined by reference to the value of services, it depends on the character of the services<sup>15</sup> and is based on the actual value of the services at the time of their rendition.<sup>16</sup> A debt owed by the promisee to the decedent<sup>17</sup> and any money or property already paid, or left, to plaintiff in partial satisfaction of the debt is to be deducted,<sup>18</sup> the damages being, in case there

has been such partial performance of the contract, the difference between the property promised and the property given,<sup>19</sup> but the amount or value of gifts made by the promisor to the promisee without any reference to the contract obligation but purely as gifts is not deductible.<sup>20</sup> Thus, under an agreement to leave specific property, the deduction is not of the whole value of all devises or bequests to the promisee but of only so much as forms a part of the property promised and constitutes a partial performance of the undertaking,<sup>21</sup> where the will does not indicate an intention that the property left the promisee shall apply on or discharge the indebtedness.<sup>22</sup>

The whole or a proportional share of the expenses of administration is deductible in computing the amount of recovery where the contract was to give to the promisee the whole or a proportional share of the promisor's estate at his death.<sup>23</sup> Where the contract is to will the promisee all the property except a specified amount as a bequest, the funeral expenses and the bequest are deducted from plaintiff's judgment.<sup>24</sup> Equity may, in a proper case, impound the proceeds arising from the sale of the property affected by the contract to satisfy a claim for damages for breach of the contract to devise.<sup>25</sup> No substantial recovery can be had for the damages sustained where the damages are not susceptible of monetary calculation,<sup>26</sup> and a breach of a contract to make a will results in no damage to the

Rec 61—In re Rockhill's Estate, Orph, 61 Montg Co 262

68 C J p 601 note 12 [c] (2)

9. Pa—In re Elwood's Estate, 164 A 617, 309 Pa 505

Bemis v Van Pelt, 11 A 2d 499, 139 Pa Super 282

Kelly v Sheehan, 82 Pa Dist & Co 154, affirmed 105 A 2d 706, 378 Pa 33

Hacker v Hendrick, Com Pl, 46 Lack Jur 145

10. Wis—Murtha v Donohoo, 136 NW 158, 149 Wis 481, 41 L R A, NS, 246, followed in Frieders v Frieders' Estate, 193 NW 77, 180 Wis 430, 31 A L R 118

68 C J p 602 note 17

11. NC—Lipe v Citizens' Bank & Trust Co, 178 SE 665, 207 NC 794

Pa—In re Byrne's Estate, 186 A 187, 122 Pa Super 413

Hacker v Hendrick, Com Pl, 46 Lack Jur 145

68 C J p 602 note 18

12. Ga—Banks v Howard, 43 SE 438, 117 Ga 94

13. Ohio—Norris v Clark, 7 Ohio Dec (Reprint) 564, 3 Cinc L Bul 994.

14. NC—Hager v Whitener, 169 S E 645, 204 NC 747

15. Ky—Jordan's Adm'x v Burton, 135 SW 2d 684, 281 Ky 309—Sneed's Ex'r v Smith, 72 SW 2d 1028, 255 Ky 132

16. Ga—Banks v Howard, 43 SE 438, 117 Ga 94

17. Ala—Wagar v Marshburn, 1 So 2d 303, 241 Ala 73

18. Pa—Bash v Bash, 9 Pa 260 68 C J p 602 note 24

19. Ill—Downing v Harris Trust & Savings Bank, 149 NE 256, 318 Ill 323

20. Wis—McNaughton v McClure, 171 NW 936, 169 Wis 288

21. Mass—Noyes v Noyes, 112 NE 850, 224 Mass 125 68 C J p 602 note 27

22. Mass—Noyes v Noyes, supra 68 C J p 602 note 28

23. NH—Day v Washburn, 81 A 474, 76 NH 203

68 C J p 602 note 29

24. NY—Campbell v Brown, 51 N Y S 2d 310, 268 App Div 324, mo-

tion granted 60 NE 2d 849, 294 N Y 702

25. Neb—Robinette v Olsen, 209 N W 614, 114 Neb 728, followed in In re Boyden's Estate, 209 NW 617, 114 Neb 726

26. Fla—Farrington v Richardson, 16 So 2d 158, 153 Fla 907

**Contract held not to provide measure of damages**

Provisions in written contract to devise realty in return for personal services and expenditures that in event title to the realty should not vest in promisee or his wife at death of promisor, promisee should be reimbursed by estate of deceased promisor for taxes and costs of improvements paid by promisee referred to a situation in which title might fail to vest in promisee because of some unforeseen contingency beyond the control of the parties and did not provide the measure of damages for breach of contract by promisor

Miss—Old Ladies Home Ass'n v Hall, 52 So 2d 650, 212 Miss 67, modified on other grounds, suggestion of error overruled 54 So 2d 170, 212 Miss 67.

other party where the contract contemplates revocation of the will long before the decedent's death.<sup>27</sup>

## § 126. — Evidence

In an action for damages for breach of a contract for testamentary disposition of property, the burden of establishing a contract to devise or bequeath property is on the plaintiff, and claims of this character must be established by evidence which is clear and convincing

The burden of establishing a contract to devise or bequeath property is on plaintiff,<sup>28</sup> who must, likewise, prove performance by him of his own obligations.<sup>29</sup> Strict proof of both the contract and the consideration is required,<sup>30</sup> but this does not mean that the proof must be so clear as to exclude any controversy over the evidence.<sup>31</sup> When a prima facie case for plaintiff is made out, the burden is on defendant to disprove any element thereof of the existence of which he denies,<sup>32</sup> or any affirmative defense asserted in opposition to the action, such as abandonment of his rights by plaintiff.<sup>33</sup> While plaintiff must, ordinarily, prove a breach by the promisor, as one of the elements essential to his action,<sup>34</sup> where an estate has been probated as an intestate estate, the burden is not

on plaintiff to negative the existence of a will but on defendant to show that one was made, if performance by execution of a will is made a ground of defense.<sup>35</sup>

The rules with respect to the admissibility of evidence, prevailing in civil actions generally, have been applied to actions on contracts of this character.<sup>36</sup> The contract must be established by the mode of proof legally permissible in establishing other contracts.<sup>37</sup>

Claims of this character must be established by evidence that is clear and convincing,<sup>38</sup> or, as otherwise expressed, by evidence that is clear and certain,<sup>39</sup> clear, cogent, and convincing,<sup>40</sup> clear, precise, and indubitable,<sup>41</sup> or clear, satisfactory, and convincing.<sup>42</sup> An oral contract to make a will cannot be established by loose or casual conversation.<sup>43</sup> Plaintiff is bound to make out his case by a fair preponderance of the evidence,<sup>44</sup> but ordinarily he is not required to do more,<sup>45</sup> although it has been held that one seeking to establish an oral contract must establish it beyond a reasonable doubt,<sup>46</sup> that the proof must leave no reasonable doubt that the contract as pleaded was in fact made and has been

27 N.Y.—McKenna v Williamsburgh Sav Bank, 16 N.Y.S.2d 206, 258 App Div 894, reargument denied in re Lamerdin's Estate, 17 N.Y.S.2d 480, 258 App Div 907

28 Cal.—Wood v Wrigley, 258 P.2d 1049, 119 Cal App 2d 90

Iowa.—Corpus Juris cited in Hatcher v Sawyer, 52 N.W.2d 490, 493, 243 Iowa 858

Pa.—Stafford v Reed, 70 A.2d 345, 363 Pa 405

In re Stichler's Estate, Orph., 35 Del Co 55

68 C.J. p 598 note 75

Presumptions and burden of proof in suits for specific performance see Specific Performance § 140

29. Iowa.—Corpus Juris cited in Hatcher v Sawyer, 52 N.W.2d 490, 493, 243 Iowa 858

68 C.J. p 598 note 76

30. R.I.—Spencer v Spencer, 55 A.637, 25 R.I. 239

Tex.—Barnes v Hobson, Civ App., 250 S.W. 238

31. Iowa.—Bird v Jacobus, 84 N.W.1062, 113 Iowa 194, 6 Prob Rep Ann 343

32. Iowa.—Manchester v Loomis, 181 N.W. 415, 191 Iowa 554  
68 C.J. p 598 note 79

33. Iowa.—Allbright v Hannah, 72 N.W. 421, 103 Iowa 98

34. Ga.—Roberts v Johnson, 111 S.E. 194, 152 Ga. 746

S.C.—Harmon v Aughtry, 85 S.E.2d 284, 226 S.C. 371.

35. Pa.—Snyder v. McGill, 108 A.410, 265 Pa. 122

36. Ky.—Settlemyres v Corum, 200 S.W.2d 105, 304 Ky 105  
68 C.J. p 599 note 85.

Admissibility of evidence in suits for specific performance see Specific Performance § 141

### Evidence held admissible

(1) Admitting proof as to value of deceased's estate was not error, where such proof was admitted for purpose of showing that plaintiff had performed his part of agreement and jury were admonished to consider evidence for such purpose only  
Ky.—Settlemyres v Corum, supra

(2) Other particular evidence held admissible see 68 C.J. p 599 note 85 [a]

### Plaintiff's testimony of transactions with deceased

Statutes as to the admissibility of testimony of transactions or conversations with deceased persons apply to actions involving contracts to will, and evidence of matters coming within the operation of such statutes is inadmissible

Ark.—Corpus Juris quoted in Jensen v Housley, 182 S.W.2d 758, 760, 207 Ark 742

68 C.J. p 599 note 85 [d] (1)

37. N.C.—Halsey v Snell, 198 S.E. 633, 214 N.C. 209

38. Cal.—Wood v Wrigley, 258 P.2d 1049, 119 Cal App 2d 90

Ky.—Hehr's Adm'r v Hehr, 157 S.W.2d 111, 288 Ky 580—Jordan's

Adm'r v Burton, 135 S.W.2d 684, 281 Ky 309

Tex.—Williams v Lattimer, Civ App., 173 S.W.2d 219

Wis.—In re McLean's Estate, 262 N.W. 707, 219 Wis 222

68 C.J. p 599 note 92

Weight and sufficiency of evidence in suits for specific performance see Specific Performance § 143 c

39. Ky.—Finn v Finn's Adm'r, 244 S.W.2d 435

### Exclusion of controversy

Such rule does not require exclusion of any controversy

Ky.—Finn v Finn's Adm'r, supra

40. Mont.—Cox v Williamson, 227 P.2d 614, 124 Mont 512

41. Pa.—Kelly v Sheehan, 105 A.2d 706, 378 Pa. 33

Walters v Kinghorn's Estate, Com Pl., 17 Beaver 7

42. Wis.—In re West's Will, 16 N.W.2d 806, 246 Wis 199

43. U.S.—Appollonio v Baxter, C.A. Tenn., 217 F.2d 267

Pa.—Strosser v Strosser, Com Pl., 49 Lanc Rev 77

44. Wis.—In re McLean's Estate, 262 N.W. 707, 219 Wis 222  
68 C.J. p 600 note 93

45. Iowa.—Thompson v Romack, 156 N.W. 310, 174 Iowa 155

68 C.J. p 600 note 94

46. Wash.—Scarlett v Peoples Bank & Trust Co., 46 P.2d 1045, 182 Wash 257.

performed by the parties relying on the contract,<sup>47</sup> and that it is not sufficient that the contract be established by a preponderance of the testimony.<sup>48</sup> The jury may, in its discretion, reject evidence under circumstances which might satisfy them were the promisor living<sup>49</sup> or in the event of a failure of corroboration by disinterested witnesses,<sup>50</sup> and should scrutinize it carefully in the light of the surrounding circumstances,<sup>51</sup> but they are not required to do so and it is not essential that the case be made out in all substantial particulars by disinterested witnesses.<sup>52</sup> The contract can be established by circumstantial testimony.<sup>53</sup>

The stringent rules as to character and sufficiency of the evidence announced and applied by courts of equity in determining claims to the particular property covered by the asserted contract

have been recognized as those to be applied in actions for damages for breach of contract,<sup>54</sup> and have been accepted as being applicable in cases where the asserted contract was between relatives, it not being sufficient in such cases merely that the evidence be clear and satisfactory<sup>55</sup> but being requisite, in addition, that proof of the agreement be by positive and direct testimony,<sup>56</sup> every presumption being against the claim which cannot be established by inference or from the admissions and declarations of one party out of the presence of the other.<sup>57</sup>

On the basis of the rules announced, the evidence has in particular cases been held sufficient<sup>58</sup> or insufficient.<sup>59</sup> Evidence to sustain a contract made up solely of declarations after the time of the con-

<sup>47</sup> US—Appolonio v Baxter, CA Tenn, 217 F 2d 267

<sup>48</sup> Wis—In re West's Will, 16 NW 2d 806, 246 Wis 199

<sup>49</sup> US—Simons v Cromwell, CC A NY, 262 F 680

NY—McKeon v Van Slyck, 119 NE 851, 223 NY 392

<sup>50</sup> Mont—Cox v Williamson, 227 P 2d 614, 124 Mont 512

NY—McKeon v Van Slyck, 119 NE 851, 223 NY 392

#### Qualifications of witnesses

For evidence to be clear, precise and indubitable, as required to sustain oral contract to make bequest by will, witnesses must be credible, distinctly remember facts to which they testify, and narrate details exactly

Pa—Kelly v Sheehan, 105 A 2d 706, 378 Pa 33

<sup>51</sup> NY—Kenny v Carroll, 202 NY S 799, 207 App Div 729

<sup>52</sup> US—Cromwell v Simons, CC A NY, 280 F 663, certiorari denied 42 S Ct 463, 258 US 630, 66 L Ed 800

68 CJ p 600 note 98

<sup>53</sup> US—Simons v Cromwell, CC A NY, 262 F 680

NJ—Messenger v Paterson Sav Inst, 103 A 178, 91 NJ Law 654

#### Circumstances considered

In determining whether oral contract to distribute decedent's estate in a way different from that provided by law was made, weakness or strength of direct evidence depends upon circumstances, and element of reasonable probabilities enters into solution, and whether claimed contract accords with what is natural or unnatural in common experiences and observations is of most importance

Ky—Finn v Finn's Adm'r, 244 SW 2d 435

<sup>54</sup> Ill—In re Reed's Estate, 166 Ill App 341

Tex—Henderson v Davis, Civ App, 191 SW 358

<sup>55</sup> Pa—Burgess v Burgess, 1 A 167, 109 Pa 312—Bash v Bash, 9 Pa 260

<sup>56</sup> Pa—Graham v Graham, 34 Pa 475  
68 CJ p 599 note 89

<sup>57</sup> Pa—Burgess v Burgess, 1 A 167, 109 Pa 312

<sup>58</sup> Mich—Trisch v Fairman, 54 N W 2d 621, 334 Mich 432

NJ—Syle v Freedley, 99 A 2d 541, 27 NJ Super 461  
68 CJ p 600 note 3

#### Particular evidence held sufficient

(1) To show existence of contract  
Ill—In re Niehaus' Estate, 94 NE 2d 525, 341 Ill App 454

Ky—Finn v Finn's Adm'r, 244 SW 2d 435—Hehr's Adm'r v Hehr, 157 SW 2d 111, 288 Ky 580

Mich—Trisch v Fairman, 54 NW 2d 621, 334 Mich 432

Or—Lay v Proctor, 34 P 2d 331, 147 Or 545

68 CJ p 600 note 3 [a] (1)

(2) To show breach of agreement  
Minn—Hanefeld v Fairbrother, 254 NW 821, 191 Minn 547

68 CJ p 600 note 3 [a] (3)

(3) To authorize or sustain judgment for promisee

Ky—Settlemyres v Corum, 200 SW 2d 105, 304 Ky 105—Hehr's Adm'r v Hehr, 157 SW 2d 111, 288 Ky 580

<sup>59</sup> Ill—Henson v Neumann, 3 NE 2d 110, 286 Ill App 197

Wis—Holty v Landauer, 70 NW 2d 633, 270 Wis 203, rehearing denied 71 NW 2d 926

68 CJ p 600 note 4

#### Particular evidence held insufficient

(1) To show existence of contract  
Cal—Wood v Wrigley, 258 P 2d 1049, 119 Cal App 2d 90

Ky—Moore v Moore's Adm'r, 182 S W 2d 886, 298 Ky 312—Jordan's Adm'r v Burton, 135 SW 2d 684, 281 Ky 309

NY—Rundle v Hayward, 12 NYS 2d 809, 256 App Div 1012

Pa—Kelly v Sheehan, 105 A 2d 706, 378 Pa 33

In re Hofmann's Estate, 64 Pa Dist & Co 575, 64 Montg Co 194

Tex—Harrell v Walsh, Civ App, 249 SW 2d 927, error refused, no reversible error—Williams v Lattimer, Civ App, 173 SW 2d 219

Wis—Holty v Landauer, 70 NW 2d 633, 270 Wis 203, rehearing denied 71 NW 2d 926—In re West's Will, 16 NW 2d 806, 246 Wis 199

(2) To entitle promisee to judgment

Ga—Wynne v Buyers, 187 SE 173, 53 Ga App 660

(3) To justify finding of anticipatory breach

Ill—Henson v Neumann, 3 NE 2d 110, 286 Ill App 197

(4) To show performance by promisee

Ohio—Heyn v Kahn, 39 NE 2d 866, 69 Ohio App 274, appeal dismissed 43 NE 2d 240, 140 Ohio St 337

Pa—Kelly v Sheehan, 105 A 2d 706, 378 Pa 33

68 CJ p 600 note 4 [a] (7).

(5) To show prevention of performance by promisor.

Conn—Godburn v Meserve, 37 A 2d 235, 130 Conn 723

(6) To establish that payments and services were not voluntary

Tex—Williams v Lattimer, Civ App, 173 SW 2d 219.

tract should clearly indicate the terms of the contract and that it was agreed to by both parties,<sup>60</sup> and evidence to establish an intention to will prop-

erty or evidence showing the rendition of services will not of itself support the allegation of an agreement to leave property<sup>61</sup>

## VI. NATURE, REQUISITES, AND VALIDITY

### A. GENERAL NATURE AND ESSENTIALS OF WILL

#### § 127(1). In General

The requisites of a valid will are that it be an instrument in writing, that it be executed as prescribed by statute, with testamentary intent, that it make a disposition of property to take effect after death, and that it be by its own nature ambulatory and revocable during the lifetime of the maker.

As discussed supra § 1, a "will" is the legal declaration of a man's intentions, which he wills to be performed after his death, and the requisites of a valid will are that it be an instrument in writing, that it be executed as prescribed by statute, with testamentary intent, that it make a disposition of property to take effect after death, and that it be by its own nature ambulatory and revocable during the lifetime of the maker.<sup>62</sup> The subject matter of a will is bounty and, therefore, such an instrument is a complete stranger to the doctrine of consideration,<sup>63</sup> that is, a will is ordinarily without valuable consideration and lacks the element of present existing contractual right.<sup>64</sup> The theory on which the right to make a will rests implies that a person controlling his property in life may determine its dominion after death and direct who shall

make distribution of it.<sup>65</sup> A testator can have but one last will,<sup>66</sup> and the validity of a proffered will depends not only on its form and execution, but also on the fact that it was in existence as a testamentary instrument as of testator's death.<sup>67</sup>

The right to dispose of property by will at death is a favorite of the law,<sup>68</sup> and it is a valuable right which will be sustained whenever possible.<sup>69</sup> The courts have the duty, in so far as it is compatible with the public interest, to effectuate the devolutionary wishes of a deceased person,<sup>70</sup> and they are diligent to guard the right of a testator to dispose of his property as he pleases.<sup>71</sup> It is not the policy of the law to seek grounds for avoiding devises and bequests, but to deal with them so as to uphold and enforce them, if possible, consistently with rules of law,<sup>72</sup> and a will should not be declared invalid except for compelling reasons.<sup>73</sup> A court in performing the duty of effectuating the testator's wishes, is, in effect, an additional party to every litigation affecting the disposal of the assets of the deceased.<sup>74</sup>

While provisions of a will not repugnant to law

60. Pa.—Caldwell v. Taylor, 1 Pa Dist & Co 765

61. US—Cromwell v Simons, CCA NY, 280 F 663, certiorari denied 42 S Ct 463, 258 US 630, 66 L Ed 800

62. Tex.—Harper v Meyer, Civ App, 274 SW2d 904, error refused no reversible error

A will is valid, if it shows the intention of the testator is to be operative only after death, is revocable by testator, and if it operates to dispose of all of testator's property at his death

Tex.—In re Dromgoole's Estate, Civ App, 127 SW2d 977

#### Instruments held not valid wills

Tex.—Harper v Meyer, Civ App, 274 SW2d 904, error refused no reversible error

Ky.—Quinlan v Quinlan, 169 SW2d 617, 293 Ky 565

Pa.—In re Hamilton Case, Orph, 6 Sch Reg 137

The institution of an heir or other testamentary disposition committed to the choice of a third person is null.

La.—Succession of Wallis, 14 So2d 749, 203 La 874

63. Or.—Legler v Legler, 211 P2d 233, 187 Or 273

64. Conn.—Faggelle v Marenga, 38 A2d 791, 131 Conn 277

65. Vt.—First Nat Bank of Boston v Harvey, 16 A2d 184, 111 Vt 281

66. Va.—Tate v Wren, 40 SE2d 188, 185 Va 773

67. Md.—Rabe v McAllister, 8 A2d 922, 177 Md 97

68. NC.—In re Winborne's Will, 57 SE2d 795, 231 NC 463

69. Wash.—In re Elliott's Estate, 156 P2d 427, 22 Wash2d 334, 157 A LR 1335—O'Leary v Bennett, 66 P2d 875, 190 Wash 115

70. NY.—In re French's Will, 115 NYS2d 289, 202 Misc 735—In re Canfield's Will, 300 NYS 502, 165 Misc 66

#### Similar to contracts

It is as much duty of court to uphold and enforce individual's will after his death, as to uphold and enforce his contracts made during life

Iowa.—In re Nugen's Estate, 272 N W 638, 223 Iowa 428

71. Tex.—In re Caruthers' Estate, Civ App, 151 SW2d 946, error dismissed, judgment correct

The courts will recognize right of every person possessing testamentary capacity to direct in some statutory form how his property shall vest after his death, subject to recognized restrictions

Tex.—Ellison v Ellison, Civ, 164 S W2d 775, error refused

72. Va.—Owens v Bank of Glade Spring, 81 SE2d 565, 195 Va 1138

73. Pa.—In re Duncan's Will, 23 A2d 357, 147 Pa Super 133

#### Other statement of rule

Court should not lightly set aside wills where central plan is plain and may be carried out without violating any statute

NY.—In re Sutton's Will, 268 NYS 458, 150 Misc 137

Okl.—Dannenburg v. Dannenburg, 271 P2d 345

74. NY.—In re French's Will, 115 NYS2d 289, 202 Misc 735—In re Canfield's Will, 300 NYS 502, 165 Misc 66

or public policy should be carried out,<sup>75</sup> a provision of a will which is against public policy is void,<sup>76</sup> and provisions which are impossible of fulfillment are inoperative.<sup>77</sup> A provision in a will is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or if it is at war with the interests of society.<sup>78</sup> Presumptions indulged in favor of validity of judgments as a matter of public policy do

not apply in favor of wills.<sup>79</sup>

### § 127(2). Ambulatory and Revocable Character

As a general rule, during the lifetime of the testator, a will is and remains ambulatory, and so a will is revocable or subject to being changed or superseded by the testator at any time during his life

The essential characteristic of a will has been held to be that during the lifetime of the testator it is and remains ambulatory,<sup>80</sup> having no effect

75. Ohio—Feiler v Klein, App, 74 NE 2d 384

76. US—Jenkins v First Nat Bank, CCA Tex, 107 F 2d 764

Ohio—Murr v Youse, Prob, 80 NE 2d 788

#### Provisions held not illegal

An item of will, requiring executrices to act as guardians for minors interested in estate, with power to mortgage minors' property for improvements, giving executrices and guardians full power of lease and sale, but requiring use of proceeds of sales for improvements or specified reinvestments, and providing that such powers should exist as to properties occupied by certain corporation when it no longer desired to occupy them, was not illegal as requiring executrices to remain in office forever when construed with item giving corporation right to lease such properties so long as it desired to occupy them

Ga—Williams v J M High Co, 36 SE 2d 667, 200 Ga 230, 162 ALR 1139

77. DC—American Sec & Trust Co v Unknown Heirs at Law and Next of Kin of Mary Ann Spencer, 82 F 2d 456, 65 App DC 200

78. Ky—Hanks v McDanell, 210 S W 2d 784, 307 Ky 243, 17 ALR 2d 1

#### Other statement of rule

Provision of will may be successfully attacked as offensive to public policy only when such provision is detrimental to public interest or public welfare or public good and is against "societal interest"

Tenn—National Bank of Commerce v Greenberg, 258 S W 2d 765, 195 Tenn 217, 38 ALR 2d 1337

79. Tex—Burton v Connecticut General Life Ins Co, Civ App, 72 S W 2d 318, error refused

80. US—Corpus Juris cited in Plummer v U S, DCCal, 89 F Supp 911, 912—Owen v Paramount Productions, DCCal, 41 F Supp 557

Ala—Kelley v Sutliff, 80 So 2d 636, 262 Ala 622—Pugh v Perryman, 58 So 2d 117, 257 Ala 187—Weaver v Pool, 32 So 2d 765, 249 Ala 644.

Ark—Janes v Rogers, 271 S W 2d 930

Cal—Notten v Mensing, 45 P 2d 198, 3 Cal 2d 469

Daniels v Bridges, 267 P 2d 343, 123 Cal App 2d 585—Shive v Barrow, 199 P 2d 693, 88 Cal App 2d 838

Colo—Smith v Greenburg, 218 P 2d 514, 121 Colo 417

Fla—Corpus Juris cited in In re Sharp's Estate, 183 So 460, 133 Fla 802

Ill—Monninger v Koob, 91 NE 2d 411, 405 Ill 417—Fleming v Fleming, 10 NE 2d 641, 367 Ill 97

Alcorn v Alcorn, 32 NE 2d 982, 309 Ill App 267

Ind—Lawrence v Ashba, 59 NE 2d 568, 115 Ind App 485

Ky—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

La—Succession of Dambly, 186 So 7, 191 La 500

Me—Busque v Marcou, 86 A 2d 873, 147 Me 289, 30 ALR 2d 1411

Md—Ottaviano v Lorenzo, 179 A 530, 169 Md 51

Mass—West v Day Trust Co, 103 N E 2d 813, 328 Mass 381, 29 ALR 2d 1224—Leahy v Old Colony Trust Co, 93 NE 2d 238, 326 Mass 49—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

Mo—Humphreys v Welling, 111 S W 2d 123, 341 Mo 1198

NJ—Sellye v Lecso, 101 A 2d 26, 28 N J Super 593—Minogue v Lipman, 96 A 2d 426, 25 N J Super 376, affirmed 100 A 2d 684, 28 N J Super 330—Michaels v Donato, 67 A 2d 911, 4 N J Super 570

NM—Vehn v Bergman, 258 P 2d 734, 57 NM 351

NY—Tutunjan v Vetziganian, 87 NE 2d 275, 299 NY 315

In re Rubin's Will, 113 NYS 2d 70, 280 App Div 348, 864, affirmed Rubin v Irving Trust Co, 113 NE 2d 424, 305 NY 288—In re Robinson's Will, 13 NYS 2d 324, 257 App Div 405

In re Owens' Estate, 65 NYS 2d 221, 186 Misc 777—In re Lavine's Will, 4 NYS 2d 923, 167 Misc 879—In re Dean's Estate, 2 NYS 2d 757, 166 Misc 499—City Bank Farmers Trust Co v Miller,

297 NYS 88, 163 Misc 459, affirmed 1 NYS 2d 640

Kaplan v Kaplan, 133 NYS 2d 59, reversed on other grounds 134 NYS 2d 753, 284 App Div 972—In re Buttikofer's Will, 79 NYS 2d 252, affirmed 93 NYS 2d 920, 276 App Div 863—In re Culley's Will, 48 NYS 2d 216—City Bank Farmers Trust Co v Neary, 27 NYS 2d 979, appeal dismissed 27 NYS 2d 1017, 261 App Div 1079, reargument denied 28 NYS 2d 707, 262 App Div 756

Ohio—Provident Sav Bank & Trust Co v Volhard, 7 NE 2d 234, 54 Ohio App 327—Helmig v Kramer, 192 NE 388, 48 Ohio App 71

Fitzgerald v Bell, 6 Ohio Supp 119, affirmed, App, 39 NE 2d 186—Fifth-Third Union Trust Co v Davis, 1 Ohio Supp 251, affirmed 10 NE 2d 4, 55 Ohio App 377

Okl—In re Blaydes' Estate, 216 P 2d 277, 202 Okl 558—Dixon v Dixon, 126 P 2d 1020, 191 Okl 139—Frost v Davis, 79 P 2d 600, 182 Okl 593

Or—Corpus Juris cited in Florey v Meeker, 240 P 2d 1177, 1186, 194 Or 257

Pa—In re Kenin's Trust Estate, 23 A 2d 837, 343 Pa 549—In re Tunnell's Estate, 190 A 906, 325 Pa 554—In re Reist's Estate, 44 A 2d 847, 158 Pa Super 281

In re Simun's Estate, 33 A 2d 64, 152 Pa Super 603—In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83

RI—Dwight v Dwight, 12 A 2d 227, 64 RI 294, 129 ALR 855

SD—Corpus Juris cited in Dawson v Corbett, 21 NW 2d 758, 760, 71 SD 106

Tex—Harper v Meyer, Civ App, 274 S W 2d 904, error refused no reversible error—Maxey v Queen, Civ App, 206 S W 2d 114

Utah—Ward v Ward, 85 P 2d 635, 96 Utah 263

Vt—Blair v Blair, 10 A 2d 188, 111 Vt 53

Va—Foster v Helms, 194 SE 799, 169 Va 634—Williams v Williams, 96 SE 749, 123 Va 643

W Va—Turner v Theiss, 38 SE 2d 369, 129 W Va 23

68 CJ p 602 note 33



until his death occurs, as considered *infra* § 128, and so is revocable or subject to being changed or superseded by the testator at any time during his life,<sup>81</sup> subject to the rules relating to capacity to revoke, discussed *infra* § 264, and capacity to make a will or codicil, *supra* §§ 3-30, and subject also to rights and liabilities arising out of a subsisting contract to make a will, *supra* §§ 111-126. So the probative existence of a will depends on its not having been wholly revoked as a testamentary paper.<sup>82</sup> A will may be revoked, notwithstanding an agreement not to revoke,<sup>83</sup> and a declaration

that a will shall be irrevocable has no more effect than a declaration that a will is the testator's last will, merely meaning that the testator does not intend to execute another will, and notwithstanding such declaration he may make a different disposition of his property by will so long as he possesses testamentary capacity.<sup>84</sup>

Where property is conveyed in trust, to be disposed of in accordance with the terms of a will executed theretofore or at the same time, so that such will so far as it relates to such trust is a part of the trust instrument, the will cannot thereafter

Revocation of wills generally see *infra* §§ 262-297

Revocation of joint and mutual wills see *infra* § 1366

#### Future disposition

"Will" is merely expression of testator's intention to dispose of his property in certain way in future, if he does not change his mind  
 Colo.—In re Clark's Estate, 57 P 2d 5, 98 Colo 321

#### Power of appointment

Testamentary execution under power of appointment is ambulatory  
 Md.—Cowman v Classen, 144 A 367, 156 Md 428  
 Pa.—In re Bailey's Estate, 140 A 145, 291 Pa 421

81. US—Owen v Paramount Productions, D C Cal, 41 F Supp 557  
 Ala.—Kelley v Sutliff, 80 So 2d 636, 262 Ala 622—Pugh v Perryman, 58 So 2d 117, 257 Ala. 187—Weaver v Pool, 32 So 2d 765, 249 Ala 644  
 —Wagar v Marshburn, 1 So 2d 303, 241 Ala 73

Ark.—James v Rogers, 271 SW 2d 930

Cal.—Cook v Cook, 111 P 2d 322, 17 Cal 2d 639—Notten v Mensing, 45 P 2d 198, 3 Cal 2d 469

Shive v Barrow, 199 P 2d 693, 88 Cal App 2d 838—In re Crawford's Estate, 160 P 2d 64, 69 Cal App 2d 607—De Mattos v McGovern, 77 P 2d 522, 25 Cal App 2d 429

Fla.—In re Sharp's Estate, 183 So 460, 133 Fla 802

Ga.—Cummings v Cummings, 80 SE 2d 204, 89 Ga App 529

Ill.—Monninger v Koob, 91 NE 2d 411, 405 Ill 417—Frese v Meyer, 63 NE 2d 768, 392 Ill 59

Alcorn v Alcorn, 32 NE 2d 982, 309 Ill App 267

Ind.—Lawrence v Ashba, 59 NE 2d 568, 115 Ind App 485

Ky.—Dixon v Dameron's Adm'r, 77 SW 2d 6, 256 Ky 722

Me.—Busque v Marcou, 86 A 2d 873, 147 Me 289, 30 A L R 2d 1411

Md.—Ottaviano v Lorenzo, 179 A 530, 169 Md 51

Mich.—Mertens v Mertens, 23 NW 2d 114, 314 Mich 651.

Miss.—Strange v State Tax Commission, 7 So 2d 542, 192 Miss 765

Mo.—Crampton v Osborn, 201 SW 2d 336, 356 Mo 125, 172 A L R 344

N J.—Sellyei v Lecso, 101 A 2d 26, 28 N J Super 593—Minogue v Lipman, 96 A 2d 426, 25 N J Super 376, affirmed 100 A 2d 684, 28 N J Super 330—Michaels v Donato, 67 A 2d 911, 4 N J Super 570—Ziegler v Sutphin, 62 A 2d 750, 1 N J Super 147

N M.—McDonald v Polansky, 153 P 2d 670, 48 N M 518

N Y.—Tutunjian v Vetzgian, 87 NE 2d 275, 299 N Y 315—In re Goldberg's Estate, 9 NE 2d 829, 275 N Y 186

In re Bekker's Estate, 129 N Y S. 2d 126, 233 App Div 609—Central Trust Co of New York v Dewey, 166 N Y S 214, 179 App Div 112, affirmed 120 NE 859, 223 N Y 726

In re Aebly's Will, 29 N Y S 2d 929, 177 Misc 64, affirmed 31 N Y S 2d 664, 263 App Div 707, modified on other grounds Scholen v Guaranty Trust Co of New York, 43 NE 2d 28, 288 N Y 249, 141 A L R 1273

Kaplan v Kaplan, 133 N Y S 2d 59, reversed on other grounds 134 N Y S 2d 753, 284 App Div 972—In re Gudewicz' Will, 72 N Y S 2d 838

Okla.—Ashley v Ketchersid, 265 P 2d 487

Or.—Flory v Meeker, 240 P 2d 1177, 194 Or 257—Legler v Legler, 211 P 2d 233, 187 Or 273—In re Lleurance's Estate, 182 P 2d 969, 181 Or 646, rehearing denied 185 P 2d 575, 181 Or 646

In re Kennin's Trust Estate, 23 A 2d 837, 343 Pa. 549—In re Tunnell's Estate, 190 A 906, 325 Pa 554

In re Reist's Estate, 44 A 2d 847, 158 Pa Super 281—In re Simun's Estate, 33 A 2d 64, 152 Pa Super 603—In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83

In re Winters' Estate, 57 Pa Dist & Co 433, 34 Del Co 12—In re Reinger's Estate, 36 Pa Dist & Co 163, 81 Berks Co 310

S C.—Lowe v Fickling, 36 SE 2d 293,

207 SC 442—Stanton v. David, 7 SE 2d 852, 193 SC 108

S D.—Corpus Juris cited in Dawson v Corbett, 21 NW 2d 758, 760, 71 SD 106

Tex.—Harper v Meyer, Civ App, 274 SW 2d 904, error refused no reversible error—Richardson v Lingo, Civ App, 274 SW 2d 883, error refused no reversible error—Maxey v Queen, Civ App, 206 SW 2d 114—Garland v Meyer, Civ App, 169 SW 2d 531

Utah—Ward v Ward, 85 P 2d 635, 96 Utah 263

Vt.—Blair v Blair, 10 A 2d 188, 111 Vt 53

Va.—Foster v Helms, 194 SE 799, 169 Va. 634—Redford v Booker, 185 SE 879, 166 Va 561—Williams v Williams, 96 SE 749, 123 Va 643

Wash.—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

W Va.—Turner v Theiss, 38 SE 2d 369, 129 W Va 23  
 68 C J p 603 note 35

#### Confirmation

A husband's failure to revoke his will amounts to confirmation of will  
 Cal.—Grimm v Grimm, 157 P 2d 841, 26 Cal 2d 173

#### Bequest for services rendered

Where a testator makes a bequest to one for services rendered to testator during his lifetime, testator may revoke the bequest at any time, notwithstanding that it is declared in will that bequest is made in consideration for services rendered  
 La.—Succession of Joubanc, 5 So 2d 762, 199 La 250

82. Md.—Rabe v McAllister, 8 A 2d 922, 177 Md 97.

83. Cal.—Notten v Mensing, 45 P 2d 198, 3 Cal 2d 469

Shive v Barrow, 199 P 2d 693, 88 Cal App 2d 838

N J.—Sellyei v Lecso, 101 A 2d 26, 28 N J Super 593

84. Md.—O'Hara v O'Hara, 44 A 2d 813, 185 Md 321, 163 A L R 1444

N J.—Sellyei v Lecso, 101 A 2d 26, 28 N J Super 593

be revoked so as to change or terminate the trust, and a revocation does not affect the trust,<sup>85</sup> but as to all matters except such trust its existence does not affect the right of the testator to revoke his will or make a new one.<sup>86</sup> The fact that a will has been delivered to, and remains in the possession of, the sole or principal beneficiary does not destroy or affect its revocability.<sup>87</sup>

## § 128. Time of Taking Effect

A will does not take effect until the death of the testator, and produces no legal effect on the property bequeathed or devised, and gives no interest therein to the legatee or devisee, until that time

A will, at whatever time executed, does not take effect until the death of the testator,<sup>88</sup> and produces no legal effect on the property bequeathed or devised, and gives no interest therein to the legatee or

85. Ill—Padfield v Padfield, 72 Ill 322

68 C J p 603 note 39

86. Ill—Padfield v Padfield, supra

87 Pa—In re Megary's Estate, 55 A 963, 206 Pa 260—Wilson v Van Leer, 103 Pa 600

88. U S—McFarland v Campbell, C A Tex, 213 F 2d 855

Cal—Cook v Cook, 111 P 2d 322, 17 Cal 2d 639

In re Walsh's Estate, 223 P 2d 322, 100 Cal App 2d 194, 22 A L R 2d 689—In re Erskine's Estate, 190 P 2d 659, 84 Cal App 2d 323—In re Philippi's Estate, 161 P 2d 1006, 71 Cal App 2d 127—In re Carter's Estate, 121 P 2d 540, 49 Cal App 2d 251

Del—Hill v Baker, 102 A 2d 923, 9 Terry 305

Ga—Jenkins v Shufften, 57 SE 2d 283, 206 Ga 315

Cummings v Cummings, 80 SE 2d 204, 89 Ga App 529

Ill—Lloyd v Treasurer of State of Illinois, 82 NE 2d 470, 401 Ill 520

—Lydick v Tate, 44 NE 2d 583, 380 Ill 616, 145 A L R 1216—Fleming v Fleming, 10 NE 2d 641, 367 Ill 97—Bradford v Andrew, 139 NE 922, 308 Ill 458

Lavin v Banks, 88 NE 2d 512, 338 Ill App 612, reversed on other grounds 94 NE 2d 876, 406 Ill 605—Alcorn v Alcorn, 32 NE 2d 982, 309 Ill App 267

Ky—McElroy v Trigg, 177 SW 2d 867, 296 Ky 543, 151 A L R 966

Md—Fletcher v Safe Deposit & Trust Co, 67 A 2d 386, 193 Md 100

—Ottaviano v Lorenzo, 179 A 530, 169 Md 51

Mass—West v Day Trust Co, 103 NE 2d 813, 328 Mass 381, 29 A L R 2d 1224—Leahy v Old Colony Trust Co, 93 NE 2d 238, 326 Mass 49—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457—Vinton v Pratt, 117 N E 919, 228 Mass 466, L R A 1918D 343

Mich—Morrow v Detroit Trust Co, 48 NW 2d 136, 330 Mich 635.

Miss—Lee v Foley, 80 So 2d 765

Mo—Crampton v Osborn, 201 SW 2d 336, 356 Mo 125, 172 A L R 344

Neb—Hackbarth v Hackbarth, 22 NW 2d 184, 146 Neb 919

Nev—First Nat Bank of Nev v Wolff, 202 P 2d 878, 66 Nev 51.

N J—Brown v Corn Exchange Nat Bank & Trust Co, 42 A 2d 474, 136 N J Eq 430, modified on other grounds 45 A 2d 668, 137 N J Eq 507—Miller v Reich, 34 A 2d 143, 134 N J Eq 28—Byers v Fidelity Union Trust Co, 28 A 2d 655, 132 N J Eq 416—In re Davis' Estate, 28 A 2d 72, 132 N J Eq 282, reversed on other grounds 35 A 2d 880, 134 N J Eq 393—Fidelity Union Trust Co v Hall, 6 A 2d 124, 125 N J Eq 419

N Y—Rubin v Irving Trust Co, 113 NE 424, 305 N Y 288

In re Bekker's Estate, 129 N Y S 2d 126, 283 App Div 609

In re Owen's Estate, 65 N Y S 2d 221, 186 Misc 777—In re Montuori's Will, 40 N Y S 2d 414, 179 Misc 711—In re Lavine's Will, 4 N Y S 2d 923, 167 Misc 879—In re Dean's Estate, 2 N Y S 2d 757, 166 Misc 499—City Bank Farmers Trust Co v Miller, 297 N Y S 88, 163 Misc 459, affirmed 1 N Y S 2d 640, 253 App Div 707, reversed on other grounds 15 NE 2d 553, 278 N Y 134

In re Russell's Estate, 133 N Y S 2d 52—In re Culley's Will, 48 N Y S 2d 216—City Bank Farmers Trust Co v Neary, 27 N Y S 2d 979, appeal dismissed 27 N Y S 2d 1017, 261 App Div 1079, reargument denied 28 N Y S 2d 707, 263 App Div 756

Ohio—Sherman v Johnson, 112 NE 2d 326, 159 Ohio St 209

Fifth-Third Union Trust Co v Davis, 1 Ohio Supp 251, affirmed 10 NE 2d 4, 55 Ohio App 377

Okl—In re Blaydes' Estate, 216 P 2d 277, 202 Okl 558—Dixon v Dixon, 126 P 2d 1020, 191 Okl 139

Pa—In re Simun's Estate, 33 A 2d 64, 152 Pa Super 603—In re Rzedzianowski's Estate, 25 A 2d 600, 148 Pa Super 361

R I—Dwight v Dwight, 12 A 2d 227, 64 R I 294, 129 A L R 855

SC—Nash v Gardner, 84 SE 2d 375, 226 SC 165—Lowe v Fickling, 36 SE 2d 293, 207 SC 442—First Nat Bank of Holly Hill v Bennett, 34 SE 2d 678, 206 SC 402

SD—Dawson v Corbett, 21 NW 2d 758, 71 SD 106

Tex—Pool v Sneed, Civ App, 173 S W 2d 768, error refused

Vt—Blair v Blair, 10 A 2d 188, 111 Vt 53

Va—Disney v. Wilson, 57 SE 2d 144, 190 Va 445

W Va—Wheeling Dollar Sav & Trust Co v Stewart, 37 SE 2d 563, 128 W Va 703

Wis—Horlick v Sidley, 3 NW 2d 710, 241 Wis 81—Koppelkam v First Wis Trust Co, 3 NW 2d 350, 240 Wis 254

68 C J p 603 note 43

Time from which will speaks for purposes of construction see infra §§ 629-631

Necessity of probate to give effect to will see infra § 310

**Intent**

Testator, by use of word "misfortune" in will giving his property to his wife in case of any misfortune occurring in the future, used the word as synonymous with "death" and intended will to take effect on his death

N Y—In re Montuori's Will, 40 N Y S 2d 414, 179 Misc 711

**Forgiveness of mortgage**

Where, after mortgage was executed, mortgagee in executing will forgave mortgage, and mortgagor without knowledge of will voluntarily paid mortgage, which payment mortgagee knowingly accepted and for which she executed a satisfaction piece, provisions of will became effective only upon probate and could have no retroactive effect upon mortgagee's right to enforce payment of mortgage during her lifetime, and mortgagor was not entitled to a claim against mortgagee's estate regardless whether mortgagee requested repayment of mortgage or whether mortgagee's executrix withheld terms of will from mortgagor and induced payment of mortgage

N Y—In re Muller's Estate, 49 N Y S 2d 767, 183 Misc 957

**Power of appointment**

The exercise of a power of appointment by will occurs at time of donee's death, because a will only takes effect as of time of death of testator

Cal—In re Newton's Estate, 221 P 2d 952, 35 Cal 2d 830, 19 A L R 2d 1399

Md—Cowman v Classen, 144 A 367, 156 Md 428

Mass—Thompson v People, 102 NE 122, 214 Mass 520

Pa—In re Bailey's Estate, 140 A 145, 291 Pa 421.

devisee, until that time,<sup>89</sup> even though the will is delivered to a beneficiary while the testator still lives,<sup>90</sup> but on his death it becomes effective, at once,<sup>91</sup> or not at all.<sup>92</sup> So the execution of a will does not preclude deceased from disposing of his property by gift or in any manner that he might desire, subsequent to the execution of the will and during deceased's lifetime.<sup>93</sup> A will does, however, have inchoate existence from the time of its making, even though it is not consummate until the testator dies,<sup>94</sup> and for purposes other than a disposition

of property it may have effect at the time of making.<sup>95</sup>

## § 129. Testamentary Intent

In order that a document may be operative as a will, it must have been intended when it was executed to operate as a will, that is, to create a revocable disposition of the maker's property to take effect at his death. No particular form of words is necessary to show a testamentary intent, and there is no definite, fixed rule by which the presence or absence of testamentary intent may be determined.

Animus testandi is essential to a will,<sup>96</sup> that being

89 U.S.—*Awtry's Estate v C I R.*, CA 8, 221 F 2d 749

Cal—*Cook v Cook*, 111 P 2d 322, 17 Cal 2d 639—In re *McConnell's Estate*, 58 P 2d 639, 6 Cal 2d 493  
*Daniels v Bridges*, 267 P 2d 343, 123 Cal App 2d 585

Del—*Hill v Baker*, 102 A 2d 923, 9 Terry 305

Mass—*Leahy v Old Colony Trust Co.*, 93 NE 2d 238, 326 Mass 49—*National Shawmut Bank of Boston v Joy*, 53 NE 2d 113, 315 Mass 457

Miss—*Allen v Howard*, 25 So 2d 325, 199 Miss 839—*Strange v State Tax Commission*, 7 So 2d 542, 192 Miss 765

NC—*Vandiford v Vandiford*, 84 S E 2d 278, 241 NC 42

ND—*Johnson v Weldy*, 54 NW 2d 829

Or—*Legler v Legler*, 211 P 2d 233, 187 Or 273

Pa—In re *Simun's Estate*, 33 A 2d 64, 152 Pa Super 603

SD—*Corpus Juris quoted in Dawson v Corbett*, 21 NW 2d 758, 760, 71 SD 106

Vt—*Blair v Blair*, 10 A 2d 183, 111 Vt 53

68 CJ p 604 note 43½

90 Mich—*Moody v Macomber*, 124 NW 549, 159 Mich 657, 134 Am SR 765

68 CJ p 604 note 44

91 Ala—*Kimrough v Dickinson*, 24 So 2d 424, 247 Ala 324

Cal—In re *Davison's Estate*, 215 P 2d 504, 96 Cal App 2d 263

Ga—*Schriber v Anderson*, 53 SE 2d 490, 205 Ga 343—*Nixon v Nixon*, 21 SE 2d 702, 194 Ga 301

Md—*Schildt v Schildt*, 92 A 2d 367, 201 Md 10

Mo—*Ostmann v Ostmann*, 169 SW 2d 81, 237 Mo App 223

Neb—*Tucker v Myers' Estate*, 37 NW 2d 585, 151 Neb 359

NJ—*Michaels v Donato*, 67 A 2d 911, 4 NJ Super 570

NY—In re *Leonard's Estate*, 100 NYS 2d 105, 199 Misc 138, affirmed 103 NYS 2d 136, 278 App Div 668  
In re *Cannock's Will*, 81 NYS 2d 42

Tex—*Boone v Stone*, 142 SW 2d

936, error dismissed, judgment correct

Vt—In re *Campbell's Will*, 138 A 725, 100 Vt 395, 54 ALR 1369

Wis—*Riedl v Heinzl*, 3 NW 2d 366, 240 Wis 297  
68 CJ p 604 note 45

92. Miss—*Palmer v Riggs*, 46 So 2d 86, 209 Miss 127

Tex—*Harper v Meyer*, Civ App, 274 SW 2d 904, error refused no reversible error  
68 CJ p 604 note 46

### Vestiture of title

No will, joint or single, can be allowed to postpone vestiture of titles to a date subsequent to death of testator or to provide for such vestiture prior thereto

Tenn—*Richmond v Richmond*, 227 SW 2d 4, 195 Tenn 704

93 Ark—*Ransom v Ransom*, 149 SW 2d 937, 202 Ark 123—*Carter v Walker*, 139 SW 2d 233, 200 Ark 465

94 Pa—*Martindale v Warner*, 15 Pa 471

### Until revocation

Validly executed will remains in force and effect until revoked as required by law

Okl—*Hooker v Barton*, 284 P 2d 708

95. Philippine—*Gomez Medel v Avecilla*, 15 Philippine 465  
68 CJ p 604 note 48

96. Ala—*Corpus Juris cited in Wiggins v Wiggins*, 2 So 2d 402, 403, 241 Ala 333

Ark—*Stark v Stark*, 143 SW 2d 875, 201 Ark 133

Cal—In re *Golder's Estate*, 193 P 2d 465, 31 Cal 2d 848

In re *Taylor's Estate*, 259 P 2d 1014, 119 Cal App 2d 574—In re *Beebee's Estate*, 258 P 2d 1101, 118 Cal App 2d 851—In re *Moore's Estate*, 228 P 2d 66, 102 Cal App 2d 672

Ky—*Bogges v McGaughey*, 207 SW 2d 766, 306 Ky 319—*Landrum v McNeill*, 107 SW 2d 314, 269 Ky 474

La—*Succession of Patterson*, 177 So 692, 188 La 635

Mont—In re *Augestad's Estate*, 106 P 2d 1087, 111 Mont 138

Ohio—In re *Crowe's Will*, 4 Ohio Supp 370

Pa—In re *Kehr's Estate*, 95 A 2d 647, 373 Pa 473—In re *Wenz' Estate*, 29 A 2d 13, 345 Pa 393

In re *Lewis' Estate*, 11 A 2d 667, 139 Pa Super 83

In re *Glass' Estate*, 30 Pa Dist & Co 469

In re *Throne's Estate*, Orph, 49 Dauph Co 251—In re *Coyne's Estate*, Orph, 45 Lack Jur 21, reversed on other grounds 37 A 2d 509, 349 Pa 331—*Van Alstyne v McConnell*, Com Pl, 23 Northumb Leg J 159

SC—*Smith v Whetstone*, 39 SE 2d 127, 209 SC 78

SD—In re *Zech's Estate*, 20 NW 2d 229, 70 SD 622

Tenn—*Campbell v Henley*, 110 SW 2d 329, 172 Tenn 135

Tex—*Corpus Juris cited in Hinson v Hinson*, 280 SW 2d 731, 733

*Corpus Juris quoted in In re Williams' Estate*, Civ App, 135 SW 2d 1078, 1081—*Shiels v Shiels*, Civ App, 109 SW 2d 1112

Va—*McElroy v Rolston*, 34 SE 2d 241, 184 Va 77—*Henderson v Henderson*, 33 SE 2d 181, 183 Va 663

W Va—*Rice v Henderson*, 83 SE 2d 762—*Black v Maxwell*, 46 SE 2d 804, 131 W Va 247

68 CJ p 604 note 51

In case of

Holographic wills see *infra* § 203

Nuncupative wills see *infra* § 210

### Intention or purpose

(1) "Animus testandi" is intention or serious purpose to make will and is an essential to validity of will  
Del—In re *Kemp's Will*, 186 A 890, 7 WW Harr 514

(2) The "animus testandi" required to constitute a paper writing a last "will" and testament is more than an intent to execute a will, and it is the intent to presently devise by the paper writing being then executed and that such writing shall have the effect of a will  
NC—In re *Taylor's Will*, 17 SE 2d 654, 220 NC 524

(3) The nature of the statutory right of making a will requires that all considerations which enter into such a document should be solemnly,

its distinguishing feature, and the thing that makes an instrument a will<sup>97</sup> So, in order that a document may be operative as a will, it must have been intended when it was executed to operate as a will,<sup>98</sup> except as instructions or memoranda for the preparation of a will may be given testamentary effect where an act of God prevents the completion of the instrument in regular form, as discussed *infra* § 167 In other words, it must appear from the

paper claimed to be a will that the decedent intended by the very paper to make a disposition of his property,<sup>99</sup> and the mere fact that an instrument is executed with two witnesses, as required for wills, does not make it a will where it was not intended as such.<sup>1</sup> The animus testandi must exist at the time the instrument is executed,<sup>2</sup> and the paper must express a genuine present and not merely a future testamentary intent,<sup>3</sup> but it has also been

carefully, intelligently, and purposefully observed

Fla.—In re Sharp's Estate, 183 So 470, 133 Fla 802

97. Ky.—Bogges v McGaughey, 207 SW 2d 766, 306 Ky 319

Tex.—**Corpus Juris** quoted in In re Williams' Estate, Civ App, 135 SW 2d 1078, 1081  
68 C J p 604 note 52

98 Ala.—**Corpus Juris** cited in Wiggins v Wiggins, 2 So 2d 402, 403, 241 Ala 333

Ark.—Stark v Stark, 143 SW 2d 875, 201 Ark 133

Cal.—In re Sargavak's Estate, 216 P 2d 850, 35 Cal 2d 93, 21 ALR 2d 307—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274

In re Stickney's Estate, 225 P 2d 649, 101 Cal App 2d 572—In re Logan's Estate, 84 P 2d 245, 29 Cal App 2d 60

Ky.—Bogges v McGaughey, 207 SW 2d 766, 306 Ky 319

La.—Succession of Patterson, 177 So 692, 188 La 635

Mo.—St Louis Uniformed Firemen's Credit Union v Haley, App, 190 SW 2d 636

Mont.—In re Watts' Estate, 160 P 2d 492, 117 Mont 505—In re Mickich's Estate, 136 P 2d 223, 114 Mont 258

N Y.—In re Pryll's Estate, 107 NY S 2d 415, 200 Misc 828

N C.—In re Taylor's Will, 17 SE 2d 654, 220 NC 524

Pa.—In re Burt's Estate, 44 A 2d 670, 353 Pa 217, 162 ALR 1053

Tenn.—Ball v Miller, 214 SW 2d 446, 31 Tenn App 271

Tex.—**Corpus Juris** cited in Hinson v Hinson, 280 SW 2d 731, 733—Langehenrig v Hohmann, 163 SW 2d 402, 139 Tex 452

**Corpus Juris** quoted in In re Williams' Estate, Civ App, 135 SW 2d 1078, 1081

68 C J p 604 note 53

#### Testamentary function

A will must reflect an intent by maker to perform some testamentary function, such as the post-obit disposition of the property of the testator, the appointment of a testamentary guardian, or the naming of an executor

N Y.—In re Hefner's Will, 122 NY S 2d 252.

#### Concurrence of intention

(1) The intentions to make a will and to dispose of a person's estate in manner described in a paper writing signed by such person must concur to render the paper writing effectual as a "will"

N C.—In re Taylor's Will, 17 SE 2d 654, 220 NC 524

(2) To validate will, there must be concurrence of "animus testandi" and "animus signandi", that is, of intention to make will and intention to sign instrument as and for a will  
Va.—Hamlet v Hamlet, 32 SE 2d 729, 183 Va 453

#### Ceremony of initiation

Whether will executed as part of ceremony of initiation into secret order can be established as valid will depends on intent with which it was executed

Fla.—Vickery v Vickery, 170 So 745, 126 Fla 294

68 C J p 605 note 58 [a]

99 Ala.—Wiggins v Wiggins, 2 So 2d 402, 241 Ala 333

Cal.—In re Sargavak's Estate, 216 P 2d 850, 35 Cal 2d 93, 21 ALR 2d 307

In re Beebee's Estate, 258 P 2d 1101, 118 Cal App 2d 851—In re Moore's Estate, 228 P 2d 66, 102 Cal App 2d 672—In re Stickney's Estate, 225 P 2d 649, 101 Cal App 2d 572—In re Kising's Estate, 156 P 2d 57, 68 Cal App 2d 163—In re Dotta's Estate, 64 P 2d 741, 18 Cal App 2d 763

Ohio.—In re Crowe's Will, 4 Ohio Supp 370

Tex.—Hinson v Hinson, 280 SW 2d 731—Ragland v Wagener, 180 SW 2d 435, 142 Tex 651, 152 ALR 1232

Maley v Queen, Civ App, 206 SW 2d 114

68 C J p 604 note 53 [a]

#### Similar recitals

Where decedent left instrument reciting manner in which she desired to dispose of her property but which failed to show testamentary intent, and also left document which had testamentary intent but was otherwise ineffectual as will, the absence of testamentary intent was not supplied by similar recitals in the two documents as to desired disposition of property  
Cal.—In re Moore's Estate, 228 P 2d 66, 102 Cal App 2d 672

1. Mich.—In re Henry's Estate, 248 NW 853, 263 Mich 410.

68 C J p 604 note 53 [c]

2 Ala.—Wiggins v Wiggins, 2 So 2d 402, 241 Ala 333

N H.—In re Amor's Estate, 112 A 2d 665

Ohio.—In re Crowe's Will, 4 Ohio Supp 370

#### Intent not retroactive

Testamentary intent is never retroactive, but must concur with the writing relied on as a will or is of no effect

Cal.—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

Okl.—Hooker v Barton, 284 P 2d 708

#### Subsequent act

Where letter expressing intention to leave property to hospital was not written with animus testandi, it could not achieve that status by any subsequent act of decedent short of a writing to that effect

Cal.—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

#### Intent to make similar disposition

For instrument to constitute will, animus testandi must exist when it is executed or acknowledged and apply to particular instrument produced, as will, and paper is not established as deceased's will merely by proof that he intended to make disposition of his property similar to or even identically same as that in such paper  
La.—Succession of Patterson, 177 So 692, 188 La 635

3. Ala.—Wiggins v Wiggins, 2 So 2d 402, 241 Ala 333

N C.—In re Taylor's Will, 17 SE 2d 654, 220 NC 524

#### Other statements of rule

(1) If an alleged testamentary statement refers to something which deceased intended to do in the future, as opposed to something then being done by him, statement is not a testamentary disposition

Okl.—Craig v McVey, 195 P 2d 753, 200 Okl 434

(2) The fact that the writer expresses a present intent to thereafter make a will is not sufficient to constitute a paper writing a last "will", and it must appear from language used that it was writer's intent that paper itself should operate as a disposition of writer's property to take effect after death.

held that although not originally intended as a will, a paper or document may be made such afterwards, by adoption.<sup>4</sup> The intention must continue to the time of death.<sup>5</sup>

The animus testandi does not depend on the maker's knowledge or realization that he is making a will,<sup>6</sup> or on his designation of the instrument as a will,<sup>7</sup> or on the time, place, and circum-

stances of its execution,<sup>8</sup> but on his intention to create a revocable disposition of his property to take effect at his death.<sup>9</sup> The intention should be plainly apparent,<sup>10</sup> but effect must be given to it if it can be discovered,<sup>11</sup> and in arriving at such intention the court is not limited to an examination of the document itself, but may consider the surrounding circumstances.<sup>12</sup> So far as concerns the

NC—In re Taylor's Will, 17 S E 2d 654, 220 NC 524

68 C J p 604 note 53 [b]

#### Additional formalities

If testator does not intend instrument in question to take effect as his will, but intends it to take effect only when additional formalities are completed, it will not be given effect

Cal—In re Beebee's Estate, 258 P 2d 1101, 118 Cal App 2d 851

4. Md—Boofter v Rogers, 9 Gill 44, 52 Am D 680

68 C J p 605 note 54

5. Md—Morsell v Ogden, 24 Md 377

6. Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

Tex—Corpus Juris cited in Hinson v Hinson, 280 S W 2d 731, 733

Corpus Juris quoted in In re Williams' Estate, Civ App, 135 S W 2d 1078, 1081—Warnken v Warnken, Civ App, 104 S W 2d 935, error dismissed—Saathoff v Saathoff, Civ App, 101 S W 2d 910, error refused

Va—Henderson v Henderson, 33 S E 2d 181, 183 Va 663

W Va—Rice v Henderson, 83 S E 2d 782

68 C J p 605 note 56

7. Iowa—In re White's Estate, 229 N W 705, 209 Iowa 1210

Tex—Corpus Juris cited in Hinson v Hinson, 273 S W 2d 116, 280 S W 2d 731, 733

Corpus Juris quoted in In re Williams' Estate, Civ App, 135 S W 2d 1078, 1081—Saathoff v Saathoff, Civ App, 101 S W 2d 910, error refused

#### Designation as copy

The designation of an instrument purporting to be a will as a "copy" is not alone sufficient to establish that the decedent lacked testamentary intent in executing the instrument, as "copy" implies that instrument so labeled is identical with another instrument and if it is properly executed, the copy of a will is in effect the same as a duplicate which may be admitted to probate

Cal—In re Janes' Estate, 116 P 2d 438, 18 Cal 2d 512

8. Tex—Corpus Juris quoted in In re Williams' Estate, Civ App, 135 S W 2d 1078, 1081

Wash—In re Watkins' Estate, 198 P 721, 116 Wash 190, 17 A L R 372

58 C J p 605 note 58

#### When material

The time, place, and circumstances under which a will is executed are material in determining the maker's intent only as they bear on question of such intent

Tex—Shiels v Shiels, Civ App., 109 S W 2d 1112

9. Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574—In re Hughes' Estate, 35 P 2d 204, 140 Cal App 97

Ky—Bogges v McGaughey, 207 S W 2d 766, 306 Ky 319—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

Md—Dietrich v Morgan, 20 A 2d 175, 179 Md 553

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

NY—In re Dash's Will, 120 N Y S 2d 621

Pa—In re Deist's Estate, 75 Pa Dist & Co 145, 15 Som Leg J 193

Tenn—Howell v Moore, 14 Tenn App 594

Tex—Corpus Juris cited in Hinson v Hinson, 280 S W 2d 731, 733—Langehenning v Hohmann, 163 S W 2d 402, 139 Tex 452

Harper v Meyer, Civ App, 274 S W 2d 904, error refused no reversible error—Maxey v Queen, Civ App, 206 S W 2d 114—Corpus

Juris quoted in In re Williams' Estate, Civ App, 135 S W 2d 1078, 1081

Va—Henderson v Henderson, 33 S E 2d 181, 183 Va 663

Wash—In re Murphy's Estate, 71 P 2d 6, 191 Wash 180, reheard 75 P 2d 916, 193 Wash 400, adhered to

81 P 2d 779, 195 Wash 695

W Va—Rice v Henderson, 83 S E 2d 782

68 C J p 605 note 59.

10. Ala—Corpus Juris cited in Wiggins v Wiggins, 2 So 2d 402, 403, 241 Ala 333.

Ark—Stark v Stark, 143 S W 2d 875, 201 Ark 133

Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274

Ky—Landrum v McNeill, 107 S W 2d 314, 269 Ky 474

Mont—In re Augestad's Estate, 106 P 2d 1087, 111 Mont 138

Pa—In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83

Va—Grimes v Crouch, 7 S E 2d 115, 175 Va 126

68 C J p 605 note 60

#### Presumption of intent

Where testamentary intent is clearly deducible from writing itself and the writing meets other formalities required for a will, there is a presumption of testamentary intent

Cal—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

#### Imperfect instrument

Where instrument propounded as a will is on its face imperfect and equivocal, presumption is against it operating as a will unless it clearly appears that it was executed animo testandi or was intended by the author to operate as a posthumous disposition of property

Ala—Wiggins v Wiggins, 2 So 2d 402, 241 Ala 333

#### Recital of prior conveyance

A paragraph of will reciting that testator had conveyed certain business to his son and had no further interest therein, did not dispose of such business, which son reconveyed to testator, so that it was part of testator's general estate at time of his death

NY—In re Goldstein's Will, 109 N Y S 2d 553

11. Cal—In re Hughes' Estate, 35 P 2d 204, 140 Cal App 97

Mass—Barber v Henderson, 22 N E 2d 620, 304 Mass 3, 127 A L R 382

NC—Rountree v. Rountree, 195 S E 784, 213 NC 252

Pa—In re Kauffman's Estate, 76 A 2d 414, 365 Pa 555—In re Tranor's Estate, 188 A 292, 324 Pa 265

68 C J p 605 note 61.

#### Precatory language

Where testamentary intent can be plainly found in the instrument itself, the instrument is sufficient to give such effect irrespective of any precatory language that may be used

NY—In re Bosworth's Will, 55 N Y S 2d 422, 269 App Div 252

12. Cal—In re Beebee's Estate, 258 P 2d 1101, 118 Cal App 2d 851—In re Smilhe's Estate, 222 P 2d 692, 99 Cal App 2d 794—In re Dotta's Estate, 64 P 2d 741, 18 Cal App 2d 763

Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

Iowa—In re Mathews' Estate, 12 N W 2d 162, 234 Iowa 188

Ky—Bogges v McGaughey, 207 S W 2d 766, 306 Ky 319

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont. 450—In re

requirement of *animus testandi*, it is immaterial whether an instrument was intended by the maker as a new will or as a republication of a prior will.<sup>13</sup> A will is not invalid for want of testamentary intent because the testator intends at the time of execution to make changes therein or to execute another will.<sup>14</sup>

*No particular form of words is necessary* to show a testamentary intent,<sup>15</sup> and there is no definite, fixed rule by which the presence or absence of testamentary intent may be determined,<sup>16</sup> but each case must stand on its own peculiar facts and cir-

cumstances,<sup>17</sup> and the character of an instrument alleged to be a will must be determined by the dispositions which it makes.<sup>18</sup> The true and actual intention of the maker will be allowed to prevail if, in view of the instrument and the circumstances surrounding its making, such intent fairly appears;<sup>19</sup> and if it can be gathered from the language of a document and the surrounding circumstances that it was intended to make by such document a revocable disposition of the maker's property to take effect at his death, it is effectual as a will, provided, of course, it conforms to other requirements of valid testamentary disposition.<sup>20</sup> The form or lan-

Augestad's Estate, 106 P 2d 1087, 111 Mont 138

SD—**Corpus Juris cited in** In re McNair's Estate, 38 NW 2d 449, 459, 72 SD 604

Tex—Langenhennig v Hohmann, 163 SW 2d 402, 139 Tex 452

Harper v Meyer, Civ App, 274 SW 2d 904, error refused on reversible error—Maxey v Queen, Civ App, 206 SW 2d 114—Shiels v Shiels, Civ App, 109 SW 2d 1112 68 C J p 605 note 62

#### Other statement of rule

Alleged testator's intention that an instrument should be his will must be determined in the light of the words used in the writing and any extraneous circumstances bearing on the question of intention

SD—In re Zech's Estate, 20 NW 2d 229, 70 SD 622

#### Implied intention

The *animus testandi* may under certain conditions be implied and where the *animus testandi* is established the character of the instrument is fixed and it should be probated as a valid "will" if other statutory requirements as to form and execution have been complied with

Ohio—In re Crowe's Will, 4 Ohio Supp 370

#### Apprehension of death

An important consideration, in determining intention of one executing instrument that it shall operate as his will, is his apprehension or anticipation of early death

Ky—Bogges v McGaughey, 207 SW 2d 766, 306 Ky 319

#### Failure to provide for wife or child

Court, in determining whether writer intended to make testamentary disposition of estate by letter addressed to mother could consider fact that no provision was made for writer's child or wife with whom he was then living, on friendly terms

Cal—In re Golder's Estate, 193 P 2d 465, 31 Cal 2d 848

13. Pa—In re Fouche's Estate, 23 A 547, 147 Pa 395

14. Tenn—Richberg v Robbins, 228 SW 2d 1019, 33 Tenn App 66.

#### Sanction as final disposition

A paper, to operate as will, need not be identical one intended by testator as his last will, but instrument sanctioned by him as final disposition of his property will remain so until it is revoked or canceled in statutory manner or his intention to make another will is consummated by execution of posterior instrument

Va—Henderson v Henderson, 33 SE 2d 181, 183 Va 663—McBride v McBride, 67 Va 476

15. Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274

In re Taylor's Estate, 259 P 2d 1014, 118 Cal App 2d 574—In re Smilie's Estate, 222 P 2d 692, 99 Cal App 2d 794—In re Hughes' Estate, 35 P 2d 204, 140 Cal App 97

Del—In re Kemp's Will, 186 A 890, 7 WW Harr 514

Ky—Bogges v McGaughey, 207 SW 2d 766, 306 Ky 319

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

NY—In re Schwedler's Trust, 113 NYS 2d 306

Pa—In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83

In re Deist's Estate, 75 Pa Dist & Co 145, 15 Som Leg J 193—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

Tex—Penix v First Nat Bank of Paris, Civ App, 260 SW 2d 63, error refused

Va—Henderson v Henderson, 33 SE 2d 181, 183 Va 663

68 C J p 606 note 64

Particular form as necessary to existence or validity of will in general see infra § 155

#### Intention otherwise determined

The formal expression of testator's intention to make the last and final disposition of his property is not essential if the testamentary intention can be determined from other parts of the will

Va—Moon v Norvell, 36 SE 2d 632, 184 Va 842.

#### Informal character of writing

While informal character of paper is element in determining whether or

not paper was intended to be testamentary, informal character becomes unimportant if it is shown that decedent intended by paper to make testamentary gift

Pa—Appeal of Thompson, 100 A 2d 69, 375 Pa 193, 40 ALR 2d 694

16. Cal—In re Spitzer's Estate, 237 P 739, 196 Cal 301

Del—In re Kemp's Will, 186 A 890, 7 WW Harr 514

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450—In re Augestad's Estate, 106 P 2d 1087, 111 Mont 138

17. Mont—In re Augestad's Estate, supra

SD—In re Zech's Estate, 20 NW 2d 229, 70 SD 622

18. NY—In re Dash's Will, 120 NY. 1 S 2d 621

19. Del—In re Kemp's Will, 186 A 890, 7 WW Harr 514

Iowa—In re White's Estate, 229 N. W 705, 209 Iowa 1210

20. Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574—In re Hughes' Estate, 35 P 2d 204, 140 Cal App 97

Del—In re Kemp's Will, 186 A 890, 7 WW Harr 514

Ky—Bogges v McGaughey, 207 SW 2d 766, 306 Ky 319

Miss—Holcomb v Holcomb, 159 So 564, 173 Miss 192

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

NY—In re Sayers' Will, 76 NYS 2d 788, 190 Misc 976, appeal dismissed 79 NYS 2d 770, 273 App Div 1051.

In re Dash's Will, 120 NYS 2d 621—In re Kapell's Will, 120 NY. S 2d 52—In re Schwedler's Trust, 113 NYS 2d 306

NC—Rountree v Rountree, 195 SE. 784, 213 NC 252

Pa—In re Conlin's Estate, 89 Pa. Dist & Co 318

In re Killough's Estate, Orph. 36 Del Co 30—In re Kauffman's Estate, Orph. 63 York Leg Rec 193, affirmed 76 A 2d 414, 365 Pa 555

SC—Meier v Meier, 38 SE 2d 762, 208 SC 520

guage of a writing may establish it to be a will, and the use of such terms as "devise," "leave," or "will" is highly persuasive of the writer's intent that that paper shall operate as a will <sup>21</sup>

*Instrument executed without testamentary intent*  
An instrument in form of a will is not a will where it is executed under compulsion,<sup>22</sup> or merely as part of a ceremonial,<sup>23</sup> or for purposes of deception,<sup>24</sup> or for the purpose of perpetrating a jest <sup>25</sup>

### § 130. Knowledge of Testator of Contents of Will

Knowledge of testator as to the contents of his will, at the time of its execution, is essential to the validity of the will

It is indispensable to the validity of a will that the testator should know its contents<sup>26</sup> at the time of its execution,<sup>27</sup> knowledge after execution being insufficient <sup>28</sup> However, as discussed infra § 384, knowledge will ordinarily be presumed from the execution of the instrument, although the presumption is only a prima facie one and may be rebutted Where a will written in the presence of testator according to his dictation is executed according to the statute, it may be valid although not read to, or by, him, as discussed infra § 178, but if it appears

affirmatively that testator did not read the will and that it was not read to him, it must be shown that the contents were in some way known to him <sup>29</sup>

*Sufficiency of knowledge or understanding* If the testator knows and understands what the actual contents of the will are, this will be sufficient, although he may have had some erroneous opinions with respect to their legal effect and operation,<sup>30</sup> and if he understands the effect of the instrument as a whole it is not material that he did not understand the meaning of all the technical terms used therein <sup>31</sup>

*Testator unable to read will through blindness, illiteracy, or other infirmity* In order to give validity to the will of a person who is illiterate,<sup>32</sup> blind,<sup>33</sup> or subject to other infirmities,<sup>34</sup> it is indispensable that he should know the contents of the will Nevertheless the reading of the will to him,<sup>35</sup> or the reading of the will to him in the presence of attesting witnesses,<sup>36</sup> is not necessary where he is shown to have knowledge of its contents<sup>37</sup> and the execution of the will raises a presumption that the testator was aware of its contents <sup>38</sup>

*Will in language unknown to testator* In the absence of statute providing otherwise,<sup>39</sup> a will execut-

Tex—*Sanders v Maxwell*, Civ App, 265 S W 2d 683  
68 C J p 606 note 67

#### Purported disposition

To be a will, paper offered for probate need only purport to be a disposition of writer's property after his death, however informal expressions therein are and regardless of whether writer's language is sufficient for intended purpose, that being a matter of construction by proper court after establishment of testamentary character of instrument

Tenn—*Carver v Anthony*, 245 S W 2d 422, 35 Tenn App 306

21. Ky—*Bogges v McGaughey*, 207 S W 2d 766, 306 Ky 319

22. Wash—In re *Watkins' Estate*, 198 P 721, 116 Wash 190, 17 A L R 372

23. Wash—In re *Watkins' Estate*, supra

24. Wash—In re *Watkins' Estate*, supra

25. Wash—In re *Watkins' Estate*, supra

26. Ala—*Claburn v Mathews*, 61 So 2d 83, 258 Ala 41

Ark—*Corpus Juris* quoted in *Meek v Bledsoe*, 253 S W 2d 369, 370, 221 Ark 395

Cal—*Corpus Juris* cited in In re *Johanson's Estate*, 144 P 2d 72, 79, 62 Cal App 2d 41

Ill—*Pepe v. Caputo*, 97 N E 2d 260,

408 Ill 321—*Downey v Lawley*, 36 NE 2d 344, 377 Ill 298

Kan—*Corpus Juris* cited in In re *Koellen's Estate*, 176 P 2d 544, 550, 162 Kan 395—*Corpus Juris* cited in *Protheroe v Davies*, 89 P 2d 890, 899, 149 Kan 720

Neb—In re *Bose's Estate*, 285 N W 319, 136 Neb 156

Pa—In re *Dugacki's Will*, Com Pl, 31 North Co 145

S D—In re *Rowlands' Estate*, 18 N W 2d 290, 70 S D 419

68 C J p 606 note 76

#### Previously expressed intention

The fact that testator had previously expressed intention to leave his property to sole beneficiary, who wrote purported will, did not avoid application of rule that testator must know, when signing instrument, that it was will

Ill—*Barber v Barber*, 1 N E 2d 44, 362 Ill 634

27. Ark—*Corpus Juris* quoted in *Meek v Bledsoe*, 253 S W 2d 369, 370, 221 Ark 395—*Corpus Juris* cited in In re *Koellen's Estate*, 176 P 2d 544, 550, 162 Kan 395

N Y—In re *Costos' Will*, 25 N Y S 2d 306  
68 C J p 606 note 77

28. Ark—*Corpus Juris* quoted in *Meek v Bledsoe*, 253 S W 2d 369, 370, 221 Ark 395

N Y—In re *Hatten*, 45 Hun 590, 10 N Y St 19

29. Ark—*Corpus Juris* quoted in *Meek v Bledsoe*, 253 S W 2d 369, 370, 221 Ark 395

Ill—*Downey v Lawley*, 36 N E 2d 344, 377 Ill 298

N J—*Day v Day*, 3 N J Eq 549

30. N Y—In re *Nole's Estate*, 49 N Y S 2d 225

68 C J p 606 note 82

31. N Y—In re *Nole's Estate*, supra  
68 C J p 607 note 84

32. Ill—*Pepe v Caputo*, 97 N E 2d 260, 408 Ill 321  
68 C J p 607 note 87

33. Del—*Davis v Rogers*, 6 Del 44  
N J—*Lyons v Van Riper*, 26 N J Eq 337

34. N J—*Lyons v Van Riper*, supra  
N Y—In re *Liddington*, 4 N Y S 646

35. Pa—Appeal of *Combs and Hankinson*, 105 Pa 155

Va—*Boyd v Cook*, 3 Leigh 32, 30 Va 32

36. Md—*Wampler v. Wampler*, 9 Md 540

68 C J p 607 note 91

37. Ga—*Clifton v Murray*, 7 Ga 564, 50 Am D 411

Md—*Wampler v Wampler*, 9 Md 540

38. N C—*Hemphill v Hemphill*, 13 N C 291, 21 Am D 331

39. Philippine—*Acop v. Piraso*, 52 Philippine 660

68 C J p 607 note 95.

ed in a language unknown to testator is valid where, notwithstanding this fact, it appears that he knew its contents,<sup>40</sup> but otherwise it is void.<sup>41</sup> It has been held that the court must be clearly convinced from the evidence that testator was fully and accurately advised as to the contents of the will, and that it sets forth his testamentary intentions by disposing of his property as he desired.<sup>42</sup>

### § 131. Disposition of Property

The essence of a will is a disposition of property, and ordinarily an instrument which disposes of no property is not valid as a will.

The essence of a will, by its very definition, is a disposition of property,<sup>43</sup> and an instrument which disposes of no property is not valid as a will, even though it is so designated by the maker,<sup>44</sup> unless it appoints an executor or guardian, as considered *infra* § 134, or unless it revokes a prior will, or revives a will previously revoked, discussed *infra* § 135. As otherwise expressed, a will, in order to be valid, must either provide for the disposition of property after death, or nominate an executor, and while it may do both, it is sufficient if it does either.<sup>45</sup> It is no objection, however, to the validity of a will that it disposes of a part only of the testator's property,<sup>46</sup> or disposes of income without disposing of principal,<sup>47</sup> or fails to dispose of a remainder or reversion after the termination of a

prior particular estate,<sup>48</sup> or that it contains no residuary clause,<sup>49</sup> even though the testator intended and believed that his entire property was being disposed of.<sup>50</sup> The intention of the testator to give property must appear from the face of a will, and parol evidence cannot be resorted to for the purpose of supplying such intention.<sup>51</sup> The fact that there are nontestamentary provisions along with testamentary provisions in an instrument does not render it inoperative as a will.<sup>52</sup>

*Will directing distribution of property under the law*, or statutes of descent and distribution, is testamentary in character, and valid as a will where properly executed.<sup>53</sup>

*Instrument merely precatory*, and only expressing the maker's wishes or intentions, without affirmatively disposing of any property, is not a will.<sup>54</sup>

### § 132 — Manner of Disposition; Unjust and Unnatural Dispositions

A testator of sound mind has absolute dominion over the disposition of his property by will, and authority to dispose of it as he sees fit, provided he does not violate the law or public policy, and a will is not rendered invalid by the mere fact that the disposition of property made thereby is unnatural, unreasonable, or unjust, or appears so to the court or to others.

It is a general rule that a testator of sound mind has, in making his will, absolute dominion over the disposition of his property, and authority to dispose

40 N.Y.—*In re Liquori's Will*, 142 N.Y.S.2d 220.

Pa.—*In re Koslosky's Estate*, Orph. 2 Fiduciary 570.

S.D.—*In re Rowlands' Estate*, 18 N.W.2d 290, 70 S.D. 419.

Wis.—*In re Zych's Will*, 28 N.W.2d 316, 251 Wis. 108.

68 C.J. p. 607 note 96.

41. S.D.—*Kittleson's Estate v Kittleson*, 173 N.W. 161, 42 S.D. 126. 68 C.J. p. 607 note 97.

42. Okl.—*Bell v Davis*, 155 P. 1132, 55 Okl. 121.

Wis.—*In re Arneson's Will*, 107 N.W. 21, 128 Wis. 112.

43. Ky.—*Panke v Panke*, 260 S.W.2d 397.

Md.—*Dietrich v Morgan*, 20 A.2d 175, 179 Md. 553.

68 C.J. p. 607 note 2.

What property may pass by will see *infra* §§ 76-90.

#### Sole purpose

Except for the nomination of a fiduciary to effectuate his wishes, the sole purpose of a will is to indicate the intention of the testator with respect to the disposal of those assets over which he possesses the authority for devolutionary direction. N.Y.—*In re Bush's Estate*, 14 N.Y.S.2d 223, 171 Misc. 1013.

44. Ky.—*Panke v Panke*, 260 S.W.2d 397—*Quinlan v Quinlan*, 169 S.W.2d 617, 293 Ky. 565.

Pa.—*In re Sciutti's Estate*, 92 A.2d 188, 371 Pa. 536.

Tenn.—*Howell v Moore*, 14 Tenn. App. 594.

68 C.J. p. 607 note 3.

#### Designation of beneficiary of fund

An instrument not purporting to dispose of any of the real or personal estate of decedent nor to effect any of the purposes of a last will but only to substitute a specified person as the beneficiary of the fund provided by a fraternal benefit society for expense incident to the death and burial of the member was not entitled to probate as the will of the member, notwithstanding the instrument embraced some expressions and formalities of a will.

Tex.—*In re Campia's Estate*, Civ. App., 161 S.W.2d 164, error refused.

45. S.D.—*In re Vasgaard's Estate*, 253 N.W. 453, 62 S.D. 421.

46. Fla.—*In re Stephan's Estate*, 194 So. 343, 142 Fla. 88, 128 A.L.R. 440.

Md.—*Rabe v McAllister*, 8 A.2d 922, 177 Md. 97.

N.J.—*In re Schubert's Estate*, 71 A.2d 898, 7 N.J. Super. 48—*Ziegler v*

*Sutphin*, 62 A.2d 750, 1 N.J. Super. 147.

N.C.—*Ferguson v Ferguson*, 35 S.E.2d 231, 225 N.C. 375.

Pa.—*In re Shoemaker's Estate*, 47 Pa. Dist. & Co. 337, 53 Dauph. Co. 324.

Tex.—*Casey v Kelley*, Civ. App., 185 S.W.2d 492, error refused.

68 C.J. p. 608 note 6.

47. Pa.—*In re Wickersham's Estate*, 104 A. 509, 261 Pa. 121.

48. N.Y.—*Stewart v Stewart*, 200 N.Y.S. 168, 205 App. Div. 587.

49. W.Va.—*Langfitt v Langfitt*, 151 S.E. 715, 108 W.Va. 466.

50. Minn.—*In re Knutson's Estate*, 174 N.W. 617, 144 Minn. 111.

51. N.D.—*Montague v Street*, 231 N.W. 728, 59 N.D. 618. 68 C.J. p. 608 note 11.

52. N.Y.—*In re Dash's Will*, 120 N.Y.S.2d 621.

53. Ga.—*Lucas v Parsons*, 24 Ga. 640, 71 Am. D. 147.

54. Miss.—*Du Sauzay v Du Sauzay*, 63 So. 273, 105 Miss. 839.

Pa.—*In re Jamison's Estate*, 98 A. 565, 253 Pa. 284.



of it as he sees fit, provided he does not violate | the law or public policy,<sup>55</sup> and he may distribute

55. US—Schwager v Schwager, C CA Wis, 109 F 2d 754  
In re Lummis' Estate, DC NJ, 126 F Supp 379—U S Trust Co of New York v Sears, DC Conn, 29 F Supp 643—Colt v Dugger, DC NY, 25 F Supp 268  
Ala—First Nat Bank v Hartwell, 168 So 446, 232 Ala 413  
Ariz—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353  
Ark—Dunklin v Black, 275 SW 2d 447—Hammond v Stringer, 258 S W 2d 46, 222 Ark 189—Sheltering Arms Hospital v Shineberger, 146 S W 2d 921, 201 Ark 780—Pickering v Loomis, 135 S W 2d 833, 199 Ark 720  
Cal—In re Flint's Estate, 177 P 451, 179 Cal 552  
In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150  
Colo—Hale v Wheeler, 114 P 2d 566, 108 Colo 119—Wehrle v Pickering, 102 P 2d 737, 106 Colo 134  
Conn—First Congregational Soc of Bridgeport v City of Bridgeport, 121 A 77, 99 Conn 22  
Del—Conner v Brown, 3 A 2d 64, 9 WW Harr 529  
Fla—Martin v Munroe & Chambliss Nat Bank of Ocala, 169 So 582, 125 Fla 65  
Ga—Moore v Segars, 14 SE 2d 752, 192 Ga 190  
Cummings v Cummings, 80 SE 2d 204, 89 Ga App 529  
Ill—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19  
Martin v Martin, 35 NE 2d 560, 310 Ill App 622  
Ind—Able v Bane, 110 NE 2d 306, 123 Ind App 585  
Iowa—In re Ruedy's Estate, 66 NW 2d 387, 245 Iowa 1307—In re French's Estate, 44 NW 2d 706, 242 Iowa 113—In re Kirby's Estate, 41 NW 2d 8, 241 Iowa 340—Roorda v Roorda, 300 NW 294, 230 Iowa 1103  
Kan—Lafferty v Sheets, 267 P 2d 962, 175 Kan 741—Calkin v Wallace, 165 P 2d 224, 160 Kan 760  
Ky—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190—Phillips v Johnson, 198 SW 2d 305, 303 Ky 574—Sloan v Sloan, 197 SW 2d 77, 303 Ky 180—Perkins v Guardian v Bell, 172 SW 2d 617, 294 Ky 767—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318—Wilson v Stephens, 161 SW 2d 604, 290 Ky 390—Ecken's Ex'x v Abbey, 141 S W 2d 863, 283 Ky 449—Coulter v Hardin, 119 SW 2d 562, 274 Ky 544—Combs v Combs, 112 SW 2d 989, 271 Ky 543—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352  
La—Sanders v Sanders, 62 So 2d 284, 222 La 233—McCarty v Trichel, 46 So 2d 621, 217 La. 444—Rostrup v Succession of Spicer, 165 So 307, 183 La 1087  
Michiels v Succession of Gladden, App, 180 So 862, affirmed 183 So 217, 190 La 917  
Me—U S Trust Co of N Y v Douglass, 56 A 2d 633, 143 Me 150  
Md—Stockslager v Hartle, 92 A 2d 363, 200 Md 544  
Md—American Jewish Joint Distribution Committee v Eisenberg, 70 A 2d 40, 194 Md 193  
Mich—In re Livingston's Estate, 295 NW 343, 295 Mich 637  
Minn—In re Mazanec's Estate, 283 N W 745, 204 Minn 406  
Mo—Mississippi Valley Trust Co v Ruhland, 222 SW 2d 750, 359 Mo 616  
Eberlin v Brunner, 123 SW 2d 543, 233 Mo App 563  
Mont—Trenouth v Mulroney, 227 P 2d 590, 124 Mont 499  
Neb—In re O'Donnell's Estate, 64 N W 2d 116, 158 Neb 583—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Wahl's Estate, 39 NW 2d 783, 151 Neb 812—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Thomason's Estate, 13 NW 2d 141, 144 Neb 300—In re Kajewski's Estate, 279 N W 185, 134 Neb 485—In re Frazier's Estate, 267 NW 181, 131 Neb 61  
NJ—In re Bumsted's Estate, 64 A 2d 55, 1 NJ 386  
Morrison v Reed, 70 A 2d 799, 6 NJ Super 598  
Shelley v Creighton, 55 A 2d 646, 140 NJ Eq 603—Kerlin v Maher, 52 A 2d 767, 139 NJ Eq 566—In re Reynolds' Estate, 32 A 2d 353, 133 NJ Eq 344—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444  
NY—In re Vanderbilt's Estate, 22 NE 2d 379, 281 NY 297, affirmed Whitney v State Tax Commission of New York, 60 S Ct 635, 309 US 530, 84 L Ed 909  
In re Baeuchle's Will, 94 NYS 2d 582, 276 App Div 925, affirmed 93 NE 2d 491, 301 NY 382—In re Price's Will, 35 NYS 2d 111, 264 App Div 29, affirmed 46 NE 2d 354, 289 NY 751  
In re Morgan's Estate, 82 NYS 2d 868, 193 Misc 405—In re Surbeck's Estate, 56 NYS 2d 487, 185 Misc 635—In re Lavine's Will, 4 NYS 2d 923, 167 Misc 879—In re Dean's Estate, 2 NYS 2d 757, 166 Misc 499—In re Chalmers' Estate, 297 NYS 176, 163 Misc 142—In re Draske's Will, 290 NYS 581, 160 Misc 587—In re Griffin's Will, 287 NYS 514, 159 Misc. 12—In re Sidman's Estate, 278 NYS 43, 154 Misc 675—In re Andrews' Estate, 272 NYS 847, 151 Misc 361  
In re King's Estate, 100 NYS 2d 353—In re Buttikofer's Will, 79 NYS 2d 252, affirmed 93 NYS 2d 920, 276 App Div 863  
Ohio—Feiler v Feiler, 77 NE 2d 237, 149 Ohio St 17  
Moskowitz v Federman, 51 NE 2d 48, 72 Ohio App 149—Fitzgerald v Bell, App, 39 NE 2d 186  
Okla—Parnacher v Mount, 248 P 2d 1021, 207 Okl 275  
Pa—In re Walker's Estate, 101 A 2d 652, 376 Pa 16—In re Johnson's Estate, 87 A 2d 188, 370 Pa 125—In re Higbee's Estate, 75 A 2d 599, 365 Pa 381—In re Edge's Estate, 14 A 2d 293, 339 Pa 67—In re Nola's Estate, 3 A 2d 326, 333 Pa 106—In re Bryant's Estate, 173 A 190, 315 Pa 151  
In re Duncan's Will, 23 A 2d 357, 147 Pa Super 133  
In re Petruzis' Estate, Orph, 4 Fiduciary 278, 44 Luz Leg Reg 81  
Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623  
In re Gray's Estate, Civ App, 279 SW 2d 936, error refused no reversible error—Bell v Bell, Civ App, 248 SW 2d 978, error refused no reversible error—Gainer v Johnson, Civ App, 211 SW 2d 789—Singleton v St Louis Union Trust Co, Civ App, 191 SW 2d 143, refused no reversible error—Stell v Salters, Civ App, 83 SW 2d 742  
Va—Owens v Bank of Glade Spring, 81 SE 2d 565, 195 Va. 1138—Griffin v Central Nat Bank of Richmond, 74 SE 2d 188, 194 Va 485—Alderman v Virginia Trust Co, 25 SE 2d 333, 181 Va 497—Aetna Casualty & Surety Co of Hartford, Conn, v Landis, 180 SE 155, 164 Va 270  
Wis—In re Borzych's Estate, 66 N W 2d 164, 267 Wis 526—In re Williams' Will, 41 NW 2d 191, 256 Wis 338  
Wyo—Burns v Burns, 224 P 2d 178, 67 Wyo 314—In re Lane's Estate, 58 P 2d 415, 50 Wyo 119, rehearing denied 60 P 2d 360, 50 Wyo. 119  
68 CJ p 608 note 15.
- Objects of bounty**  
A testator of sound mind may, subject to statutory restrictions, choose the objects of his bounty  
Colo—Kingdom of Yugo-Slavia v Jovanovich, 69 P 2d 311, 100 Colo 406  
NY—In re Liberman, 18 NE 2d 658, 279 NY 458, 122 ALR 1—In re Lyons' Will, 2 NE 2d 628, 271 NY. 204
- Property of devisee or legatee**  
Property of testator becomes prop-

his estate without regard to the views of juries or courts<sup>56</sup> Accordingly, subject to any statute giving a testator's surviving spouse a right to a specified share of his estate, or authorizing an election by such spouse to take under the will or to renounce it and take under the law, discussed *infra* §§ 1256-1296, and to statutes relating to forced heirs and pretermitted children or issue of deceased children, considered in Descent and Distribution §§ 26, 45,

and subject also to the rules as to persons who may take under a will, and restrictions on testamentary disposition generally, *infra* §§ 91-110, he may bestow it or refuse to bestow it on whomsoever he pleases, without regard to natural or moral claims on his bounty, or to the motives or prejudices which influence him,<sup>57</sup> and without assigning any reason for his action,<sup>58</sup> or even with any inac-

erty of devisee or legatee only so far as it is made such by the will, and then with such control, incidents of ownership and liability to creditors as are given to it in the will  
Pa—Holmesburg Bldg Ass'n v Badger, 18 A 2d 529, 144 Pa Super 65

#### Limitation

(1) The rule that a testator has the right to dispose of his property in any manner that he may think proper is subject to limitation that testator cannot make any disposition of his effects in violation of any established rule of law

Ill—Lydick v Tate, 44 NE 2d 583, 380 Ill 616, 145 A L R 1216

(2) A will cannot curtail a court's power to require right and justice to be done to creditors and legatees and devisees, including remaindermen

Fla—Moss Grove v Mach, 182 So 786, 133 Fla 459

#### Inter vivos conveyances

In will contest, mere facts shown by evidence that testatrix, after making will, disposed of good portion of her property by inter vivos conveyances did not prove that she lacked testamentary capacity at time of making will

Utah—In re Butters' Estate, 261 P 2d 171

56 Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Russell's Estate, 182 P 2d 318, 80 Cal App 2d 711—In re Markham's Estate, 115 P 2d 866, 46 Cal App 2d 307—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449—In re Burns' Estate, 80 P 2d 77, 26 Cal App 2d 741—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738

Ky—New v Creamer, 275 SW 2d 918—Phillips v Johnson, 198 SW 2d 305, 303 Ky 574

Mich—In re Kramer's Estate, 37 N W 2d 564, 324 Mich 626

Mo—Rex v Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589  
Mont—In re Benson's Estate, 98 P 2d 868, 110 Mont 25

NJ—In re Alper's Will, 60 A 2d 320, 142 N J Eq 529, affirmed 65 A 2d 736, 2 N J 104.

In re Reynolds' Estate, 32 A 2d 353, 133 N J Eq 344—In re Reynolds' Estate, 27 A 2d 226, 132 N.

J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

ND—Stormon v Weiss, 65 NW 2d 475

Ohio—Feiler v Feiler, 77 NE 2d 237, 149 Ohio St 17

Okl—Parnacher v Mount, 248 P 2d 1021, 207 Okl 275

Tenn—National Bank of Commerce v Greenberg, 258 SW 2d 765, 195 Tenn 217, 38 A L R 2d 1337

Tex—Taylor v Taylor, Civ App, 281 SW 2d 232, error refused no reversible error.

#### Interference

A testator can make such disposition as he wishes of his property without interference by the courts or by those who believe that some other disposition would be more desirable or practicable

Iowa—In re Kirby's Estate, 41 NW 2d 8, 241 Iowa 340—In re Heller's Estate, 11 NW 2d 586, 232 Iowa 1356

NY—In re Kramer's Estate, 15 NY S 2d 700, 172 Misc 598

#### Presumption

A mentally competent testator who in his testamentary dispositions departs from the course usually and ordinarily followed in like circumstances is presumed to have done so for rationally conceived reasons, satisfactory to himself

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

57. Ala—Antone v Snodgrass, 14 So 2d 506, 244 Ala. 501

Ariz—In re Nolan's Estate, 108 P 2d 385, 56 Ariz 353

Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re McDaniel's Estate, 176 P 2d 952, 77 Cal App 2d 877—In re Moorehouse's Estate, 148 P 2d 385, 64 Cal App 2d 210—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449

Iowa—Glider v Melinski, 25 NW 2d 379, 238 Iowa 140

Ky—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767

Mich—In re Teller's Estate, 284 N W. 696, 288 Mich 193

Miss—Coward v Cowart, 51 So 2d 775, 211 Miss 459—Ross v Biggs, 40 So 2d 293, 206 Miss 542

Mo—Stevens v Meadows, 100 SW 2d 281, 340 Mo 252

NY—In re Rosenthal's Estate, 123 NY S 2d 326, 204 Misc 432, reversed on other grounds In re Rosenthal's Will, 127 NY S 2d 778, 283 App Div 316, 708, affirmed 121 N E 2d 539, 307 NY 715—In re Stein's Estate, 21 NY S 2d 102, 174 Misc 465

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Walther's Estate, 163 P 2d 285, 177 Or 282

Pa—In re Porter's Estate, Orph, 4 Fay L J 37, affirmed 19 A 2d 731, 341 Pa 476

Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

In re Good's Estate, 274 SW 2d 900, error refused no reversible error—Scheetz v Bader, Civ App, 251 SW 2d 427, error refused—Jowers v Smith, Civ App, 237 SW 2d 805—Bell v Bell, Civ App, 237 SW 2d 688—Green v Dickson, Civ App, 208 SW 2d 119, refused no reversible error—Aron v Aron, Civ App, 168 SW 2d 917, error refused—In re Caruthers' Estate, Civ App, 151 SW 2d 946, error dismissed, judgment correct

Wis—In re Bauer's Estate, 59 NW 2d 481, 264 Wis 556.

Wyo—Corpus Juris cited in In re Johnston's Estate, 181 P 2d 611, 615, 63 Wyo 332  
68 C J p 609 note 20

#### Unfettered discretion

The law leaves everything to testator's unfettered discretion as to disposition of his property by will on assumption that nothing short of mental unsoundness will avoid will, though, in some instances, caprice, passion, or power of new ties may lead to neglect of claims which should be attended to

Ark—McWilliams v Neill, 155 SW 2d 344, 202 Ark 1087—Pernot v King, 110 SW 2d 539, 194 Ark 896

58 Mo—Clark v Powell, 175 SW 2d 842, 351 Mo 1121

Pa—In re Lovering's Estate, 96 A 2d 104, 373 Pa 360

In re Laughlin's Estate, 42 A 2d 173, 157 Pa Super 155, reversed on other grounds 46 A 2d 477, 354 Pa 43, 165 A L R 891.

68 C J. p 609 note 21.

curate or untrue statement of his reason <sup>59</sup>

Therefore, a will is not rendered invalid by the mere fact that the disposition of property made thereby is unnatural, unreasonable, or unjust, or appears so to the court or to others,<sup>60</sup> or is not in conformity with the statute of descent or distributions,<sup>61</sup> and nothing in the law prevents a testator from making a will as eccentric, injudicious, or unjust as caprice, frivolity, revenge, or the like, may

dictate <sup>62</sup> However, the unjust or unnatural character of a scheme of distribution may be evidence tending to show that fraud or undue influence was practised on the testator, as discussed *infra* § 255, or a lack on his part of testamentary capacity, *supra* §§ 44, 62

In accordance with the foregoing rules, the testator, by will, may make an unequal distribution or division among heirs or relatives,<sup>63</sup> provide for

59 N Y—In re Shumway's Will, 246 N Y S 178, 138 Misc 429

#### Discrimination

Where evidence discloses that there were reasons present in testator's mind for discrimination against contestants, it is not for jurors or appellate court to say that reasons were good or bad

Cal—Sanders v Crabtree, 112 P 2d 923, 44 Cal App 2d 602

60. Ariz—In re Smith's Estate, 91 P 2d 254, 53 Ariz 505

Ark—Dunklin v Black, 275 SW 2d 447—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Blake v Simpson, 215 SW 2d 287, 214 Ark 263

Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Alegria's Estate, 197 P 2d 571, 87 Cal App 2d 645—In re Hilker's Estate, 194 P 2d 132, 85 Cal App 2d 680—In re McGovern's Estate, 168 P 2d 232, 74 Cal App 2d 150—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129

Ga—Leventhal v Baumgartner, 61 S E 2d 810, 207 Ga 412—Whitfield v Pitts, 53 SE 2d 549, 205 Ga 259—Scott v Gibson, 22 SE 2d 51, 194 Ga 503—Thompson v Mitchell, 16 SE 2d 540, 192 Ga 750

Ill—Heideman v Kelsey, 111 NE 2d 538, 414 Ill 453—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219—Quathamer v Schoon, 19 NE 2d 750, 370 Ill 606

Ind—Ford v Cleveland, 44 NE 2d 244, 112 Ind App 420

Ky—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190—Combs v Combs, 112 SW 2d 989, 271 Ky 543

Md—Grant v Curtin, 71 A 2d 304, 194 Md 363

Mo—Callaway v Blankenbaker, 141 SW 2d 810, 346 Mo 383

McGill v Wiltz, App, 148 SW 2d 822

Neb—In re O'Donnell's Estate, 64 N W 2d 116, 158 Neb 583—In re Fehrenkamp's Estate, 48 NW 2d 421, 154 Neb 488—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67—In re Thomason's Estate, 13 NW 2d 141, 144 Neb 300—In re Bose's Estate, 285 NW 319, 136 Neb 156.

NH—Cowan v Cowan, 6 A 2d 179, 90 NH 198

NJ—In re Hoover's Estate, 91 A 2d 155, 21 NJ Super 323

In re Raynolds' Estate, 32 A 2d 353, 133 NJ Eq 344—In re Raynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344—In re Neuman's Estate, 26 A 2d 499, 132 NJ Eq 7, reversed on other grounds 32 A 2d 826, 133 NJ Eq 532—In re White's Estate, 20 A 2d 442, 129 NJ Eq 566—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

In re Looori's Will, 28 A 2d 281, 20 NJ Misc 376, affirmed 28 A 2d 288, 132 NJ Eq 316

N Y—In re Richards' Will, 292 NY S 384, 249 App Div 793, affirmed 13 NE 2d 455, 277 NY 520

In re Nones' Will, 86 NYS 2d 226

Ohio—Holt v Miller, App, 33 NE 2d 400, affirmed 14 NE 2d 409, 133 Ohio St 418

Fitzgerald v Bell, 6 Ohio Supp 119, affirmed, App, 39 NE 2d 186

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

Tex—In re Good's Estate, Civ App, 274 SW 2d 900, error refused no reversible error—Bledsoe v Short, Civ App, 264 SW 2d 445, refused no reversible error—Vogt v Meyer, Civ App, 169 SW 2d 745

Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

W Va—Ritz v Kingdon, 79 SE 2d 123—Ebert v Ebert, 200 SE 831, 120 W Va 722

Wyo—Corpus Juris cited in In re Johnston's Estate, 181 P 2d 611, 615, 63 Wyo 332

68 CJ p 609 note 23

"Unnatural will" see *supra* § 1

#### Legal right

A testator who has legal capacity to make a will has the legal right to make an unequal, unjust, or unreasonable will

Va—Grimes v Crouch, 7 SE 2d 115, 175 Va 126

#### Unimportance

Whether will is unnatural in its provisions is of no great importance, in absence of sufficient evidence that it was not spontaneous act of a competent testator

Cal—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100

#### Approbation

One is not bound to bequeath one's property so as to gain the approbation of one's contemporaries, the wise, or the good

Cal—In re Moorehouse's Estate, 148 P 2d 385, 64 Cal App 2d 210

61 Ga—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga 247

Tex—Long v Long, 125 SW 2d 1031, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206 error dismissed 138 SW 2d 798, 133 Tex 623

Gainer v Johnson, Civ App, 211 SW 2d 789

Wyo—Corpus Juris cited in In re Johnston's Estate, 181 P 2d 611, 615, 63 Wyo 332

68 CJ p 611 note 24

The purpose of statute of wills was to give an owner of property, having testamentary capacity, the right to dispose of it according to his own will and wish, and contrary to usual rules of inheritance fixed by the statute of descent

Ky—Howe v Howe's Ex'r, 155 SW 2d 196, 287 Ky 756

62 Ark—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Purveyor v Puryear, 94 SW 2d 695, 192 Ark 692

Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659

Ga—Moreland v Word, 74 SE 2d 82, 209 Ga 463

Mo—Lastofka v Lastofka, 99 SW 2d 46, 339 Mo 770

NJ—In re Raynolds' Estate, 32 A 2d 353, 133 NJ Eq 344

Tex—Bridges v Howell, Civ App, 122 SW 2d 665

68 CJ p 611 note 25

#### Arbitrary disposition

A testator may be as arbitrary as he pleases in disposing of his property

Del—Carlisle v Delaware Trust Co, 99 A 2d 764

63 Ark—Scott v Dodson, 214 SW 2d 357, 214 Ark 1

Cal—In re Hilker's Estate, 194 P 2d 132, 85 Cal App 2d 680

Ill—Heideman v Kelsey, 111 NE 2d 538, 414 Ill 453—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19—Stewart v. Sunagel, 68 NE 2d 268,

his spouse to the exclusion of other blood relations,<sup>64</sup> prefer some children or heirs to others,<sup>65</sup> or give a child all<sup>66</sup> or little<sup>67</sup> of his estate, or disinherit him completely<sup>68</sup> The testator is under no duty to

leave his property to his spouse or relatives,<sup>69</sup> he may leave his estate to strangers to testator's blood to the exclusion or virtual exclusion of his family or heirs,<sup>70</sup> or bestow his property on persons who

394 Ill 209—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219—Quathamer v Schoon, 19 NE 2d 750, 370 Ill 606

Martin v Martin, 35 NE 2d 560, 310 Ill App 622

Ind—Powell v Ellis, 105 NE 2d 348, 122 Ind App 700

Ky—Teegarden v Webster, 199 SW 2d 728, 304 Ky 18—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767

Md—Gilbert v Gaybrick, 73 A 2d 482, 195 Md 297

Miss—Blalock v Magee, 38 So 2d 708, 206 Miss 209

Mo—Smith v Fitzjohn, 188 SW 2d 832, 354 Mo 137

NJ—In re White's Estate, 20 A 2d 442, 129 NJ Eq 566

NY—In re Bremer's Will, 283 NY S 159, 157 Misc 221

Pa—In re Lovering's Estate, 96 A 2d 104, 373 Pa 360

Tenn—Cude v Culbertson, 209 SW 2d 506, 30 Tenn App 628

Wis—In re Dobson's Will, 46 NW 2d 758, 258 Wis 587

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444

68 CJ p 609 note 23 [a] (8)

64 Cal—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806

68 CJ p 609 note 23 [a] (4)

#### Legality of marriage

Whether testator and proponent were legally married was immaterial in determining whether testator's will was an unnatural will, where testator believed proponent to be his wife, since it was the apparent rather than the legal relationship of the parties that was significant

Cal—In re Comino's Estate, supra

65 Ga—Scott v Gibson, 22 SE 2d 51, 194 Ga 503—Thompson v Mitchell, 16 SE 2d 540, 192 Ga 750

Mich—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102

Minn—In re Meehan's Estate, 18 NW 2d 781, 220 Minn 1

Mo—Kaddery v Vossbrink, 149 S W 2d 869

NJ—In re Looi's Will, 28 A 2d 281, 20 NJ Misc 376, affirmed 28 A 2d 288, 132 NJ Eq 316

Pa—In re Kocher's Estate, 46 A 2d 488, 354 Pa 81

Va—Bird v Newcomb, 196 SE 605, 170 Va 208

68 CJ p 609 note 23 [a] (1), (3)

#### Preference to stepchildren

Ky—Allen v Henderson, 184 SW 2d 885, 299 Ky 92

#### Preference over grandchildren

That nieces and nephew of testa-

trix were preferred in will to testatrix' grandchildren may be unusual and unnatural, but testatrix had right to make such a disposition of her property, and unless it is shown that she was mentally incapacitated in some way, the will would not be set aside for such reason

Fla—Wartmann v Burleson, 190 So 789, 139 Fla 458

66 Ohio—City Nat Bank & Trust Co v Kelly, 1 Ohio Supp 311

67. Minn—In re Bergquist's Estate, 1 NW 2d 418, 211 Minn 380

Nev—Sarrazin v First Nat Bank of Nevada, 111 P 2d 49, 60 Nev 414

Ohio—City Nat Bank & Trust Co v Kelly, 1 Ohio Supp 311

68. Cal—Jones v Blankenburg, App, 94 P 2d 92

Iowa—Green v Ellsworth, 267 NW 714, 221 Iowa 1098

Ky—Hehr's Adm'r v Hehr, 157 SW 2d 111, 288 Ky 580

Mich—In re Vallender's Estate, 17 NW 2d 213, 310 Mich 359

NY—Hirschfeld v Ralston, 66 NY S 2d 59

Ohio—City Nat Bank & Trust Co v Kelly, 1 Ohio Supp 311

Okla—Munson v Snyder, 275 P 2d 249

Or—In re Detsch's Estate, 229 P 2d 264, 191 Or 161

Tenn—Cude v Culbertson, 209 SW 2d 506, 30 Tenn App 628

Tex—Bass v Bass, Civ App, 207 SW 2d 103, refused no reversible error

68 CJ p 609 note 23 [a] (2), (3), (5)

**Purpose of law** empowering person to dispose of property by will is to enable testator to disinherit child entirely

Neb—In re Alexander's Estate, 258 NW 655, 128 Neb 334

#### Foster child

(1) Contract of adoption, even when established, would not deprive foster parent of right to make a testamentary disposition of his estate which left nothing to the foster child

Ark—Stanley v Wacaster, 178 SW 2d 50, 206 Ark 872

Mich—In re Darmstaetter's Estate, 292 NW 495, 293 Mich 596

(2) Adopted child of life beneficiary of testamentary trusts created by beneficiary's father and aunt had no vested right to inherit or otherwise participate in estates of adopting parent's father and aunt but could take under their wills only if intent be found that he should take

Ohio—Central Trust Co v Hart, 80 NE 2d 920, 82 Ohio App 450.

#### Children born out of wedlock

Ariz—In re Cook's Estate, 159 P 2d 797, 63 Ariz 78

69 Colo—Gehm v Brown, 245 P 2d 865, 125 Colo 555

Miss—O'Bannon v Henrich, 4 So 2d 208, 191 Miss 815

Mo—Clark v Powell, 175 SW 2d 842, 351 Mo 1121

Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Kaiser's Estate, 34 NW 2d 366,

150 Neb 295—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—

In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Bose's Estate,

285 NW 319, 136 Neb 156—In re Frazier's Estate, 267 NW 181, 131 Neb 61

Nev—First Nat Bank of Nev v Wolff, 202 P 2d 878, 66 Nev 51

Ohio—Central Trust Co v Hart, 80 NE 2d 920, 82 Ohio App 450

Pa—In re Geist's Estate, 191 A 29, 325 Pa 401

SD—In re Rowlands' Estate, 18 NW 2d 290, 70 SD 419

Wash—Cissna v Beaton, 98 P 2d 651, 2 Wash 2d 491

Wyo—Blanson v Roelofs, 70 P 2d 589, 52 Wyo 101

68 CJ p 609 note 20 [a]

70 Ariz—In re Gary's Estate, 211 P 2d 815, 69 Ariz 228

Cal—In re Leahy's Estate, 54 P 2d 704, 5 Cal 2d 301

In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449

Fla—Watts v Newport, 6 So 2d 829, 149 Fla 181

Ga—Crutchfield v McCallie, 5 SE 2d 33, 188 Ga 833

Ill—Heideman v Kelsey, 111 NE 2d 538, 414 Ill 453—Lewis v Deamude, 33 NE 2d 440, 376 Ill 219

Quathamer v Schoon, 19 NE 2d 750, 370 Ill 606

Cooper v Cooper's Estate, 111 NE 2d 564, 350 Ill App 37

Ky—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767

Md—Stockslager v Hartle, 92 A 2d 363, 200 Md 544

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307

Pa—In re Rzedzianowski's Estate, 25 A 2d 600, 148 Pa Super 361

Tex—Chambers v Winn, Civ App, 133 SW 2d 279, reversed on other grounds 154 SW 2d 454, 137 Tex. 444

Va—Tate v Wien, 40 SE 2d 188, 185 Va 773

are ordinarily not deemed the natural objects of his bounty,<sup>71</sup> or leave his property to charitable, educational, or religious institutions<sup>72</sup> So a will is not rendered invalid by reason of failure of the testator to provide for some or all of his relatives<sup>73</sup> or heirs.<sup>74</sup>

### § 133. Tenure, Estate, or Interest Which May Be Created

Testator may devise land as he pleases and by such tenure as he desires, provided he violates no rule of law or public policy.

The owner of land, so long as he violates no rule of law or public policy, may devise land as he pleases and by such tenure as he desires<sup>75</sup> However, the estate created must be one recognized by law<sup>76</sup> A decedent may give his property outright in its entirety to one or more persons, or may

divide his gift as to any particular item by donating the beneficial use thereof for a period of not exceeding two lives in being at his death to one individual or set of individuals, and give ultimate possessory ownership to still others<sup>77</sup> Personality as well as realty is a proper subject of limitation by will.<sup>78</sup>

### § 134. Appointment of Executor or Guardian, and Provision for Payment of Debts

An instrument in testamentary form may be valid and effective as a will which nominates or appoints an executor, without disposing of any property, and a will is not invalid because it fails to provide for the payment of debts

An instrument in testamentary form which nominates or appoints an executor is not invalid or ineffective as a will merely because it contains no disposition of property,<sup>79</sup> or because it is for any

Wis—In re Puls' Will, 18 NW 2d 321, 246 Wis 660  
68 C J p 609 note 23 [a] (7)

71. U S—Schwager v Schwager, C C A Wis, 109 F 2d 754

72. Cal—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150  
NJ—Alper v Alper, 60 A 2d 880, 142 N J Eq 547, affirmed 65 A 2d 737, 2 N J 105, 7 A L R 2d 1350  
NY—In re Kimball's Will, 281 N Y S 605, 156 Misc 338

#### Defunct institution

The fact that the ultimate beneficiary of testator's entire estate was a defunct institution did not establish that testator's will was an unnatural one where it was reasonably probable that with testator's gift added to the institution's endowment funds, the institution would be able to resume its activities  
Ky—Perkins' Guardian v Bell, 172 SW 2d 617, 294 Ky 767

73. Cal—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150

Iowa—In re Heller's Estate, 11 NW 2d 586, 232 Iowa 1356

Ky—Teegarden v Webster, 199 SW 2d 728, 304 Ky 18—Barryman v Sidwell, 129 SW 2d 154, 278 Ky 713

#### Reasons

A will cannot be set aside because the testatrix disinherits a near relative, motivated by reasons which to a court would appear to be entitled to little weight

Wash—In re Sinclair's Estate, 113 P 2d 65, 8 Wash 2d 611

74. Mo—Hennings v Hallar, 149 S W 2d 338, 347 Mo 827

Pa—In re Mohler's Estate, 22 A 2d 680, 343 Pa. 299.

#### Collateral heirs

Cal—In re Del Fosse's Estate, 154 P 2d 734, 67 Cal App 2d 490

75. Iowa—Moore v McKinley, 69 NW 2d 73

#### Appointment

An owner of property may, by will, appoint the person to whom such property shall go upon owner's death or an owner may give to another a power of appointment over such property to be exercised at a future time

NY—In re Vanderbilt's Estate, 22 NE 2d 379, 281 NY 297, affirmed Whitney v State Tax Commission of New York, 60 S Ct 635, 309 US 530, 84 L Ed. 909

Future estates may be created by will

Va—Harlan v Weatherly, 31 SE 2d 263, 183 Va 49

#### Parts of same fund

Requests of different parts of the same fund can be made to single individual

NY—In re Hillard's Will, 299 NY S 788, 164 Misc 677, affirmed In re Myers, 5 NYS 2d 92, 254 App Div 879, reargument denied In re Hillard's Estate, 7 NYS 2d 111, 255 App Div 781

76 Ohio—Rugg v Smith, 177 NE 784, 40 Ohio App 101  
69 C J p 430 note 53

#### Validity of

Conditions and restrictions repugnant to nature of estate or interest created see infra § 978

Executory devise see infra § 916

Remainder after fee see infra § 910

#### Exemption

Testatrix was held not entitled during her lifetime to exempt her property from state's power to regulate incidents of its tenure, and could

not by will confer such exemption on property passing thereunder  
NY—Sand v Beach, 200 NE 821, 270 NY 281

77 NY—In re Hillard's Will, 299 NYS 788, 164 Misc 677, affirmed In re Myers, 5 NYS 2d 92, 254 App Div 879, reargument denied In re Hillard's Estate, 7 NYS 2d 111, 255 App Div 781—In re Densen's Estate, 296 NYS 567, 163 Misc 232—In re Shupack's Estate, 287 NYS 184, 158 Misc 873  
In re Danziger's Will, 58 NYS 2d 790, modified on other grounds 67 NYS 2d 130, 271 App Div 888

78. Me—Union Safe Deposit & Trust Co v Wooster, 130 A. 433, 125 Me 22, 25  
69 C J p 430 note 54

A life estate, with remainder over to designated persons, may be created in personality, at least in personality of a more permanent nature, directly by will without the intervention of a trustee

NC—Willard v Weaver, 23 SE 2d 890, 222 NC 492

79 Ala—Corpus Juris cited in Parrish v Gamble, 174 So 303, 306, 234 Ala 220

Cal—McMahon v State Bar, 246 P. 2d 931, 39 Cal 2d 367

In re Selditch's Estate, 204 P 2d 364, 91 Cal App 2d 62—In re Philippi's Estate, 161 P 2d 1006, 71 Cal App 2d 127

Fla—Leffler v. Leffler, 10 So 2d 799, 151 Fla 455

Iowa—In re Swanson's Estate, 31 N W 2d 385, 239 Iowa 294

NY—In re Traversi's Estate, 64 NYS 2d 453, 189 Misc 251

In re Dorrie's Will, 48 NYS 2d 841.

Ohio—In re Crowe's Will, 4 Ohio Supp 370.

reason inoperative to dispose of property,<sup>80</sup> as where the sole beneficiary has died,<sup>81</sup> and this is true of an instrument which, under a statute authorizing it, appoints a guardian.<sup>82</sup> On the other hand, a will which makes a disposition of property is not invalid or insufficient because it does not nominate or appoint an executor,<sup>83</sup> notwithstanding the selection of a person to execute the testator's testamentary purpose is important and material from the standpoint of a testator's intention and ordinarily constitutes an integral part of his will.<sup>84</sup> The legislature has the power to qualify a testator's right of appointing an executor.<sup>85</sup>

A provision of a will directing payment of the testator's just debts and funeral expenses out of his estate is valid,<sup>86</sup> but a will is not invalid because it fails to provide for the payment of debts,<sup>87</sup> or because it fails to provide for the filing of a list of claims due the estate.<sup>88</sup>

### § 135. Revocation or Revival of Prior Will

An instrument in testamentary form which merely revokes a prior will or declares an intention to revive a prior will may be valid as a will.

Pa.—In re Sando's Estate, 66 A 2d 312, 362 Pa 1

SD—In re Vasgaard's Estate, 253 NW 453, 62 SD 421

Tex—**Corpus Juris** cited in *Boyles v Gresham*, 263 S W 2d 935, 937 68 C J p 611 note 28

#### Special disposition

The naming of executor without making devise or bequest of property, while it does not invest executor with title, may be regarded as a special disposition of property to executor for administration purposes

Tex—*Boyles v Gresham*, supra  
Instrument merely appointing executor as entitled to probate see *infra* § 312

Necessity that will make disposition of property in general see *supra* § 131.

80. NY—In re Frickey's Will, 96 NYS 2d 825, 198 Misc 716, reversed on other grounds in re Frickey's Estate, 114 NYS 2d 270, 280 App Div 880.

SD—In re Vasgaard's Estate, 253 NW 453, 62 SD 421 68 C J p 611 note 29

81. Cal—In re Hickman's Estate, 36 P 118, 101 Cal 609

82. NY—In re Meyer, 131 NYS 27, 72 Misc 566, 2 NY Civ Proc. N S, 364, 8 Mills Surr 202

83. Cal—In re Kinney's Estate, 104 P 2d 782, 16 Cal 2d 50

Mich—In re Cosgrove's Estate, 287 NW 456, 290 Mich 253, 125 A L R 410

SD—In re Vasgaard's Estate, 253 NW 453, 62 SD 421.

Tenn—*Pulley v Cartwright*, 137 S W 2d 336, 23 Tenn App 690 68 C J p 611 note 32

84. NY—In re Winters' Will, 98 NYS 2d 312, 277 App Div 24, motion denied 95 NE 2d 43, 301 NY 680, affirmed 98 NE 2d 477, 302 NY 666, motion denied 100 NE 2d 43, 302 NY 845

85. Minn—In re Crosby's Estate, 15 NW 2d 501, 218 Minn 149

86. Ohio—*Flowers v Metcalf*, 4 Ohio Supp 177, appeal dismissed 9 Ohio Supp 199

87. Va—*Moon v Norvell*, 36 SE 2d 632, 184 Va 842 68 C J p 611 note 33

88. Tex—*Norling v Wright*, Civ App, 99 SW 2d 403

89. Or—*Sullivan v Murphy*, 179 P 680, 92 Or 52 68 C J p 611 note 34

90. Iowa—In re Cameron's Estate, 241 NW 458, 215 Iowa 63

91. Cal—In re Howe's Estate, 189 P 2d 5, 31 Cal 2d 395, 1 A L R 2d 1171

Ky—*De Lapp v Anderson*, 203 SW 2d 388, 305 Ky 333

Mich—In re Boucher's Estate, 46 N W 2d 577, 329 Mich 569

Miss—*Ates v Ates*, 196 So 243, 189 Miss 226

NY—*City Bank Farmers Trust Co v Neary*, 27 NYS 2d 979, appeal dismissed 27 NYS 2d 1017, 261 App Div 1079, reargument denied 28 NYS 2d 707, 262 App Div 756

Pa—In re Reist's Estate, Orph, 49 Lanc L Rev 307

Vt—*Scott v Beland*, 45 A 2d 641, 114 Vt 383

Va—*Spinks v Rice*, 47 SE 2d 424, 187 Va 730

Wash—In re *Murphy's Estate*, 75 P 2d 916, 193 Wash 400, opinion adhered to 81 P 2d 779, 195 Wash 695

68 C J p 612 note 45

Conclusiveness of probate as to testamentary character of instrument see *infra* § 573

Instrument operating as will and also as other document see *infra* § 165

Revocability as essential characteristic of wills see *supra* § 127

Time will takes effect see *supra* § 128.

#### Ambulatory

(1) An instrument that is "testamentary" in character operates only on and by reason of maker's death and, until then, it has no effect, and it is this ambulatory quality which is characteristic of wills

Mich—*Ireland v Lester*, 298 NW 488, 298 Mich 154

(2) Ambulatory character of will generally see *supra* § 223

92. Cal—*Bergman v Oinbaun*, 92 P 2d 654, 33 Cal App 2d 680

Conn—*Costello v Costello*, 73 A 2d 333, 136 Conn 611—*Bowen v Morgillo*, 14 A 2d 724, 127 Conn 161

Ky—**Corpus Juris** quoted in *Vaugh v Metcalf*, 118 SW 2d 727, 729, 274 Ky 379—*Todd v Williams' Adm'x*, 95 SW 2d 593, 264 Ky 788

Okl—**Corpus Juris** quoted in *Blackwell v Lee*, 15 P 2d 574, 578, 160 Okl 73.

An instrument in testamentary form, which merely revokes a prior will,<sup>89</sup> or which merely declares the maker's intention or wish that a certain prior will, which has been revoked, shall be deemed his will,<sup>90</sup> is valid as a will, although it does not in terms dispose of any property.

### § 136. Will Distinguished from Other Instruments

Whether a particular instrument disposing of property is a will or an instrument of another kind is to be determined by the disposition made by the instrument, that is, whether it is not to take effect until the death of the maker, and is revocable until that occurs

The question whether a particular instrument disposing of property is a will or an instrument of another kind is to be determined by the disposition made by the instrument, that is, whether it is a disposition of property not to take effect until the death of the maker, and is revocable until that occurs.<sup>91</sup> As a general rule, the question is to be determined in accordance with the manifested intention of the maker of the instrument,<sup>92</sup> but it has been held that the intention of the maker,

while important, is not conclusive.<sup>93</sup> While they are factors to be considered, neither the form of the instrument,<sup>94</sup> the presence or absence of expressions therein declaratory of testamentary character,<sup>95</sup> or of words apt to testamentary dispositions,<sup>96</sup> nor the name applied to it by the person executing it, or his belief as to its character,<sup>97</sup> nor the fact that the paper is or is not under seal,<sup>98</sup> is conclusive as to whether or not an instrument is testamentary. So, whatever its form, and even though it appears on its face to have been made in pursuance of a previous promise, compact or obligation, or recites a consideration for its making,<sup>99</sup> an instrument which passes no present interest and

is to become effective at the death of the maker is testamentary in character and is operative, if at all, as a will.<sup>1</sup> For an instrument which is testamentary in character to be effective as a will, it must be executed in accordance with the statute of wills and must meet the other requisites of a valid will.<sup>2</sup>

On the other hand, an instrument which creates or passes a present interest or obligation,<sup>3</sup> or which is not dependent on the death of the maker for its consummation or effectiveness,<sup>4</sup> is not a will, even though enjoyment of such interest is postponed until the death of the maker,<sup>5</sup> or is contingent on the survivorship of the donee.<sup>6</sup> If the owner of property can find a means of disposing of it inter vivos

Tenn—**Corpus Juris** quoted in Smith v Prichard, 122 SW2d 829, 836, 23 Tenn App 321  
68 C J p 612 note 43

93 Wis—Sheldon v Blackman, 205 NW 486, 188 Wis 4

94 Wis—Sheldon v Blackman, supra  
Form of will generally see infra § 155

**The informal character of a paper** is element in determining whether or not it was intended to be testamentary, but the character becomes a matter of no moment when it appears thereby that the deceased's purpose was to make a posthumous gift

Pa—In re Gibson's Estate, 193 A 302, 128 Pa Super 44

**Any writing executed with the formalities of a will**, no matter in what form, if intended as a will, and not to take effect until the maker's death, may be construed as testamentary and admitted to probate, if revocable at any time at the pleasure of the maker

Ky—Moss v Hodges, 172 SW2d 584, 294 Ky 677

95 Ala—Daniel v Hill, 52 Ala 430  
NY—In re Diez, 50 NY 88

96 Cal—Brandt v Brandt, 260 P 342, 85 Cal App 720  
68 C J p 612 note 40

97. Miss—Peebles v Rodgers, 50 So 2d 632, 211 Miss 8  
68 C J p 612 note 41

**Animus testandi** not dependent on knowledge or understanding that instrument is will see supra § 129

98. Md—Cover v Stem, 10 A 231, 67 Md 449, 1 Am SR 406  
NY—Wuesthoff v Germania L Ins Co, 14 NE 811, 107 NY 580

99. Tex—Grubb v Anderson, Civ App, 38 SW2d 847  
68 C J p 612 note 47

**Contract distinguished from will** see infra § 140

1. US—Hale v Campbell, DC Iowa, 46 F Supp 772.

Colo—Urbancich v Jersin, 226 P 2d 316, 123 Colo 88

Ill—Fonda v Miller, 103 NE2d 98, 411 Ill 74

Ind—Van Orman v Van Orman, 41 NE2d 693, 112 Ind App 394

Ky—De Lapp v Anderson, 203 SW 2d 388, 305 Ky 333—Glocksen v Holmes, 186 SW2d 634, 299 Ky 626  
—Moss v Hodges, 172 SW2d 584, 294 Ky 677—**Corpus Juris** quoted in Vaughn v Metcalf, 118 SW2d 727, 729, 274 Ky 379

Mo—Goins v Melton, 121 SW2d 821, 343 Mo 413—Thorp v Daniel, 99 SW2d 42, 339 Mo 763

Neb—Young v McCoy, 40 NW2d 540, 152 Neb 138

Okl—**Corpus Juris** quoted in Blackwell v Lee, 15 P2d 574, 578, 160 Okl 73

Pa—Onofrey v Wolliver, 40 A2d 35, 351 Pa 18, 155 ALR 1074

In re Rugh's Estate, 84 Pa Dist & Co 445, 35 West Co 67

Tenn—**Corpus Juris** quoted in Smith v Prichard, 122 SW2d 829, 836, 22 Tenn App 321

Utah—First Sec Bank of Utah v Burgi, 251 P2d 297

Wash—In re Murphy's Estate, 75 P2d 916, 193 Wash 400, opinion adhered to 81 P2d 779, 195 Wash 695  
68 C J p 612 note 48

**Testamentary disposition other than by a will is void**

Mass—National Shawmut Bank of Boston v Joy, 53 NE2d 113, 315 Mass 457

2. Conn—Costello v Costello, 73 A2d 333, 136 Conn 611—Bowen v Morgillo, 14 A2d 724, 127 Conn 161

Ill—Fonda v Miller, 103 NE2d 98, 411 Ill 74

Ind—Van Orman v Van Orman, 41 NE2d 693, 112 Ind App 394

Ky—Douglas v Snow, 202 SW2d 629, 304 Ky 805

Mich—In re Bliss' Estate, 268 NW 783, 276 Mich 689

Mo—Goins v Melton, 121 SW2d 821, 343 Mo 413—Thorp v Daniel, 99 SW2d 42, 339 Mo 763

Neb—Young v McCoy, 40 NW2d 540, 152 Neb 138

NY—In re Karlinski's Estate, 38 NY 2d 297, 180 Misc 44

Okl—Yeldell v Moore, 275 P2d 281

**Requisites of will** generally see supra § 127 et seq

**Requirements as to execution** see infra § 167 et seq

3. Cal—In re Belknap's Estate, 152 P2d 657, 66 Cal App 2d 644

Conn—Bowen v Morgillo, 14 A2d 724, 127 Conn 161

Ky—De Lapp v Anderson, 203 SW 2d 388, 305 Ky 333—Moss v Hodges, 172 SW2d 584, 294 Ky 677

Mass—National Shawmut Bank of Boston v Joy, 53 NE2d 113, 315 Mass 457

Tenn—Smith v Prichard, 122 SW 2d 829, 22 Tenn App 321

68 C J p 612 note 49

4. Tenn—Jones v Jones, 43 SW2d 205, 163 Tenn 237

68 C J p 613 note 50

5. US—Hale v Campbell, DC Iowa, 46 F Supp 772

Cal—In re Belknap's Estate, 152 P2d 657, 66 Cal App 2d 644

Conn—Bowen v Morgillo, 14 A2d 724, 127 Conn 161

Ky—**Corpus Juris** quoted in Vaughn v Metcalf, 118 SW2d 727, 729, 274 Ky 379

NY—City Bank Farmers Trust Co v Neary, 27 NYS2d 979, reargument denied 28 NYS2d 707, 262 App Div 756

Okl—**Corpus Juris** quoted in Blackwell v Lee, 15 P2d 574, 578, 160 Okl 73

Tenn—**Corpus Juris** quoted in Smith v Prichard, 122 SW2d 829, 836, 22 Tenn App 321

68 C J p 613 note 51

**The mere deferring of payment until after death of maker** is not of itself sufficient to make a writing testamentary

Pa—In re Gibson's Estate, 193 A 302, 128 Pa Super 44

6. NY—In re Diez's Will, 50 NY 88.

which renders a will unnecessary for his practical purposes, he has a right to employ it,<sup>7</sup> and the fact that the motive of the transfer is to obtain the practical advantages of a will without making one is immaterial.<sup>8</sup> An instrument which is not ambulatory and revocable cannot be a will.<sup>9</sup>

Where the apparent character of an instrument is, or is not, that of a will, it should not be otherwise construed, unless its provisions, when harmonized if possible, are wholly inconsistent with its apparent character.<sup>10</sup> Subject to this rule, it has been held that the courts will, wherever possible, construe an instrument to be a will, rather than a disposition of another character,<sup>11</sup> and, when it cannot be supported as such, will construe it to be a deed or some other valid transfer of property.<sup>12</sup>

### § 137. — Deeds

Whether an instrument is a deed or will depends on whether it passes a present interest or takes effect only on the death of the maker, and is ambulatory and revocable until that time, an instrument in the form of a deed is testamentary in character where it is not to become operative until the maker's death.

The essential difference between a deed and a will is that a deed passes a present interest, even though the possession or enjoyment thereof may be postponed, while a will passes no present interest at the time of its execution, but takes effect only on the death of the testator, and until such time is ambulatory and revocable.<sup>13</sup> In determining whether a present interest is or is not passed, or attempted to be passed, by an instrument, and whether it is, accordingly, a deed or a will, the manifest intention of the maker is controlling,<sup>14</sup> but, as has been pointed out, there is no definite and uniform test by which the character of a particular instrument can be determined.<sup>15</sup> The form and language of the instrument,<sup>16</sup> the name applied to it by the maker,<sup>17</sup> and his belief as to its nature and character,<sup>18</sup> while proper to be considered, and entitled to some weight, are not conclusive.

As a general rule, an instrument, even though partly or wholly in the form of a deed, which is not to become operative until the maker's death, is not a deed, but is of testamentary character.<sup>19</sup>

7. Mass—National Shawmut Bank of Boston v Joy, 53 NE2d 113, 315 Mass 457

8. Mass—National Shawmut Bank of Boston v Joy, supra

9. Or—In re Neil's Estate, 226 P 439, 111 Or 282  
68 C J p 613 note 53

Ambulatory and revocable character of wills in general see supra § 127

10. Ark—Sutton v Sutton, 216 SW 1052, 141 Ark 93  
68 C J p 613 note 54

11. Cal—In re Spitzer's Estate, 237 P 739, 196 Cal 301  
SC—Milledge v. Lamar, 4 S CEq 617

12. Conn—Bryan v. Bradley, 16 Conn 474  
Ky—Jacoby v Nichols, 62 SW 734, 23 Ky L 205

13. Kan—Lowry v Lowry, 159 P 2d 411, 160 Kan 11

Mich—Gibson v Dymon, 274 NW 739, 281 Mich 137

Miss—Rodgers v Rodgers, 67 So 2d 698, 218 Miss 655, 40 ALR 2d 254  
—Coulter v Carter, 26 So 2d 344, 200 Miss 135—Watts v Watts, 22 So 2d 625, 198 Miss 246—Hald v Pearson, 20 So 2d 71, 197 Miss 410  
—Carter v Dabbs, 18 So 2d 747, 196 Miss 692—Mims v Williams, 7 So 2d 822, 192 Miss 866—Ates v Ates, 196 So 243, 189 Miss 226—Federal Land Bank of New Orleans v Newsom, 161 So 864, 175 Miss 114, affirmed 166 So 345, 175 Miss 114.

Mo—Goins v Melton, 121 SW 2d 821, 343 Mo 413—Thorp v Daniel, 99 SW 2d 42 339 Mo 763

Tex—**Corpus Juris** quoted in Payne v Brown, 176 SW 2d 306, 309, 142 Tex 102

68 C J p 613 note 62

Deeds generally see Deeds § 1 et seq

Nature of will generally see supra § 127 et seq

**Delivery** is essential to a deed, but not to a will

Mich—Gibson v Dymon, 274 NW 739, 281 Mich 137

14. Ind—Van Orman v Van Orman, 41 NE2d 693, 112 Ind App 394

Kan—Thom v Thom, 237 P 2d 250, 171 Kan 651—Mears v Kruckenberg, 233 P 2d 472, 171 Kan 450, 31 ALR 2d 525

Ky—Glocksen v Holmes, 186 SW 2d 634, 299 Ky 626—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318

Miss—Carter v Dabbs, 18 So 2d 747, 196 Miss 692

Mo—Mizell v Osmon, 189 SW 2d 306, 354 Mo 321

ND—Johnson v Weldy, 54 NW 2d 829

Tenn—Smith v Prichard, 122 SW 2d 829, 22 Tenn App 321

Tex—**Corpus Juris** quoted in Payne v Brown, 176 SW 2d 306, 309, 12 Tex 102

68 C J p 613 note 63—18 C J p 149 note 47

#### **Secret intention**

In determining whether instrument is a deed or a will, a secret intention of maker antagonistic to the plain

wording of the instrument will not prevail

Ky—Glocksen v Holmes, 186 SW 2d 634, 299 Ky 626

15. Ala—Craft v Moon, 75 So 302, 201 Ala 11—Crocker v Smith, 10 So 258, 94 Ala 295, 16 LRA 576

16. Miss—Mims v Williams, 7 So 2d 822, 192 Miss 866

Pa—In re Murphy's Estate, 51 Pa Dist & Co 579

Tex—Brown v Payne, 176 SW 2d 306, 142 Tex 102

68 C J p 613 note 65

17. Miss—Ates v Ates, 196 So 243, 189 Miss 226

SD—McGillivray v Wipf, 266 NW 724, 64 SD 367

Tex—Soper v Medford, Civ App, 258 SW 2d 118

Va—Harlan v Weatherly, 31 SE 2d 263, 183 Va 49

68 C J p 613 note 66

18. Mo—Schoenwetter v Affeld, 99 SW 2d 41

68 C J p 613 note 67

**Grantee's misunderstanding**, misconstruction, or misstatement of provision in deed that "grantors retain possession until their death," as statement that deed was to be recorded after their death, cannot control over actual provision, which did not make deed testamentary in character.

Mo—Schoenwetter v Affeld, supra

19. US—Lane v Illinois Bankers Life Assur Co, CCA Okl, 116 F 2d 475

Ala—Kelley v Sutliff, 80 So 2d 636, 262 Ala 622.



Whether such an instrument is effective as a will depends on whether it was executed in conformity with the statutory requirements relating to the execution of wills and meets the other requisites of a will<sup>20</sup> An instrument which is not testamentary in form or substance will not be treated as a will in the absence of collateral evidence to show that it was intended as such<sup>21</sup> An instrument in the form of a will is not to be treated as a deed

where it conveys no present interest<sup>22</sup>

As a general rule an instrument which conveys or is sufficient to convey an interest presently is a deed, and not a will,<sup>23</sup> even though in part its form or language is more appropriate to a will,<sup>24</sup> and although the maker reserves a life interest in the property, or otherwise postpones the enjoyment of the interest granted until his death,<sup>25</sup> or reserves

Ariz.—In re Anderson's Will, 141 P 723, 16 Ariz 185  
Cal.—Gerard v Gerard, 145 P 2d 702, 62 Cal App 2d 672  
Conn.—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161  
Fla.—Williams v Williams, 6 So 2d 275, 149 Fla 454  
Ill.—Klouda v Pechousek, 110 NE 2d 258, 414 Ill 75—Helper v Connolly, 86 NE 2d 226, 403 Ill 358—Stanford v Stanford, 20 NE 2d 275, 371 Ill 211—Rouland v Burton, 15 NE 2d 920, 296 Ill 138—Steinke v Sztanka, 4 NE 2d 472, 364 Ill 334  
Ind.—Stevenson v Harris, 118 NE 2d 368, 124 Ind App 358  
Iowa.—Benz v Paulson, 70 NW 2d 570  
Ky.—Douglas v Snow, 202 SW 2d 629, 304 Ky 805—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318—Todd v Williams' Adm'x, 95 SW 2d 593, 264 Ky 788  
Mich.—Benton Harbor Federation of Women's Clubs v Nelson, 3 NW 2d 844, 301 Mich 465  
Miss.—McMillan v Gibson, 76 So 2d 239—Rodgers v Rodgers, 67 So 2d 698, 218 Miss 655, 40 ALR 2d 254—Mims v Williams, 7 So 2d 822, 192 Miss 866—Gaston v Mitchell, 4 So 2d 892, 192 Miss 452, suggestion of error overruled 6 So 2d 318—Taylor v Raby, 168 So 59, 175 Miss 836—Tapley v McManus, 168 So 51, 175 Miss 849  
Mo.—Goins v Melton, 121 SW 2d 821, 343 Mo 413  
Okla.—Harvey v Madden, 153 P 2d 478, 194 Okl 587—Green v Comer, 141 P 2d 258, 193 Okl 133—Maynard v Husted, 90 P 2d 30, 185 Okl 20  
RI.—Lambert v Lambert, 77 A 2d 325, 77 RI 463  
Tex.—Brown v Payne, 176 SW 2d 306, 142 Tex 102  
Wash.—In re Murphy's Estate, 75 P 2d 916, 193 Wash 400, opinion adhered to 81 P 2d 779, 195 Wash 695  
68 CJ p 614 note 70—18 CJ p 149 note 46

**Distinguished from conveyance of future interest**

(1) Conveyances by instruments to take effect at maker's death are not within rule that conveyances may be made to vest in future, since instru-

ments conveying interests to vest in future must take effect in present, and maker must part with all right to thereafter dispose of land otherwise Miss.—Tapley v McManus, 168 So 51, 175 Miss 849

(2) Under the statute providing that an estate may be made to commence in the future by deed, it is essential to the validity of a deed purporting to convey such an estate, that the right to the future estate conveyed vest in the grantee immediately, even though possession is deferred

Mo.—Goins v Melton, 121 SW 2d 821, 343 Mo 413

**Deed of property which grantor owns at death does not convey a present interest and is testamentary in character**

Ky.—Brennenstuhl v Scharfenberger, 259 SW 2d 41

20. Cal.—Counter v Counter, 232 P 2d 551, 104 Cal App 2d 786

Conn.—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161

Fla.—Williams v Williams, 6 So 2d 275, 149 Fla 454

Ill.—Klouda v Pechousek, 110 NE 2d 1058, 414 Ill 75—Stanford v Stanford, 20 NE 2d 275, 371 Ill 211—Steinke v Sztanka, 4 NE 2d 472, 364 Ill 334

Rouland v Burton, 15 NE 2d 920, 296 Ill App 138

Ky.—Brennenstuhl v Scharfenberger, 259 SW 2d 41—Douglas v Snow, 202 SW 2d 629, 304 Ky 805—McKinley v McKinley, 151 SW 2d 392, 286 Ky 484

Md.—Buchwald v Buchwald, 199 A 800, 175 Md 115

Mich.—In re Wawrzyniak's Estate, 298 NW 118, 297 Mich 520

Mo.—Goins v Melton, 121 SW 2d 821, 343 Mo 413

Okla.—Maynard v. Husted, 90 P 2d 30, 185 Okl 20

Wash.—In re Murphy's Estate, 75 P 2d 916, 193 Wash 400, opinion adhered to 81 P 2d 779, 195 Wash 695

Wis.—In re Wnuk's Will, 41 NW 2d 294, 256 Wis 360

Statutory requirements as to execution of will generally see infra § 167 et seq

21. Mont.—Plymale v. Keene, 247 P 554, 76 Mont 403

68 CJ p 614 note 69.

Testamentary intent as essential element of will generally see supra § 129

22. Ala.—Spence v Spence, 195 So 717, 239 Ala 480

Ga.—Page v Jones, 198 SE 63, 186 Ga 485

Tex.—Burgess v Sylvester, 182 SW 2d 358, 143 Tex 25

23. US—U S v 12,800 Acres of Land in Hall County, Neb, DC Neb, 69 F Supp 767

Ala.—Wilcoxon v Owen, 185 So 897, 237 Ala 169, 125 ALR 539

Cal.—Lowe v Ruhlman, 155 P 2d 671, 67 Cal App 2d 828

Ill.—Berigan v Berrigan, 108 NE 2d 488, 413 Ill 204

Ky.—Glocksens v Holmes, 186 SW 2d 634, 299 Ky 626—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318—Vaugh v Metcalf, 118 SW 2d 727, 274 Ky 379

Mich.—Benton Harbor Federation of Women's Clubs v Nelson, 3 NW 2d 844, 301 Mich 465

Mo.—Mizell v Osmon, 189 SW 2d 306, 354 Mo 321—Goins v Melton, 121 SW 2d 821, 343 Mo 413—Lanphere v Affeld, 99 SW 2d 36

Tenn.—Howell v Davis, 268 SW 2d 85, 196 Tenn 334—Jones v Jones, 206 SW 2d 801, 185 Tenn 586

Smith v Prichard, 122 SW 2d 829, 22 Tenn App 321

Tex.—Brown v Payne, 176 SW 2d 306, 142 Tex 102

68 CJ p 614 note 72—18 CJ p 149 note 46

24. Ky.—Glocksens v Holmes, 186 SW 2d 634, 299 Ky 626

Mo.—Monroe v Lyons, 98 SW 2d 544, 339 Mo 515

Tex.—Soper v Medford, Civ App, 258 SW 2d 118

68 CJ p 615 note 73

25. US—Chance v Buxton, CAGa, 177 F 2d 297

Ala.—Wise v Helms, 40 So 2d 700, 252 Ala 227—Rathff v Rathff, 175 So 259, 234 Ala 320

Ark.—Dickey v Stevens, 184 SW 2d 955, 208 Ark 111

Cal.—Lowe v Ruhlman, 155 P 2d 671, 67 Cal App 2d 828

Fla.—Williams v Williams, 6 So 2d 275, 149 Fla 454

Ga.—Martin v Smith, 87 SE 2d 406, 211 Ga 600—Patterson v Patterson, 80 SE 2d 310, 210 Ga 359—

Smith v. Thomas, 34 SE 2d 278,

a power of disposition during his lifetime,<sup>26</sup> or reserves the full control and use of the property,<sup>27</sup> or exacts of the grantee a promise to reconvey the property if injuries or illness from which the grantor is suffering shall not prove fatal,<sup>28</sup> or requires the grantee to care for or support the grantor during his life,<sup>29</sup> or to do acts, some of which cannot or are not to be performed until after the grantor's death<sup>30</sup> The fact that the instrument is executed contemporaneously with a will,<sup>31</sup> or contains a reference to a will theretofore made,<sup>32</sup> or

recites that it is made in lieu of a will,<sup>33</sup> or the fact that the instrument is executed and delivered shortly before and in contemplation of death,<sup>34</sup> does not make it testamentary in character, nor does the fact that the grantee does not take possession of the property conveyed until after the grantor's death,<sup>35</sup> or that the instrument is not sooner recorded<sup>36</sup>

A provision in an instrument in the form of a deed that it is not to take effect until the grantor's death ordinarily indicates that the instrument

199 Ga 396—Smaha v George, 24 SE 2d 385, 195 Ga 412

Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318—Vaugh v Metcalf, 118 SW 2d 727, 274 Ky 379

Ill—Fonda v Miller, 103 NE 2d 98, 411 Ill 74

Iowa—Benz v Paulson, 70 NW 2d 570—Kregel v Fredelake, 169 NW 642, 184 Iowa 1318

Kan—Thom v Thom, 237 P 2d 250, 171 Kan 651—Mearns v Kiuckenberg, 233 P 2d 472, 171 Kan 450, 31 ALR 2d 525—Jones v Walker, 216 P 2d 822, 169 Kan 29

Ky—Noffsinger v Noffsinger, 197 SW 2d 785, 303 Ky 344—Barnett v Barnett, 142 SW 2d 975, 283 Ky 710

Mich—Benton Harbor Federation of Women's Clubs v Nelson, 3 NW 2d 844, 301 Mich 465

Miss—Lang v Jones, 80 So 2d 783—McMillan v Gibson, 76 So 2d 239—Rodgers v Rodgers, 67 So 2d 698, 218 Miss 655, 40 ALR 2d 254—Tanner v Foreman, 54 So 2d 483, 212 Miss 355—Watts v Watts, 22 So 2d 625, 198 Miss 246—Carter v Dabbs, 18 So 2d 747, 196 Miss 692

Mo—Ruff v Young, 190 SW 2d 208, 354 Mo 506—Mizell v Osmon, 189 SW 2d 306, 354 Mo 321—Galloway v Galloway, 169 SW 2d 883—**Corpus Juris cited in** Lanphere v Affeld, 99 SW 2d 36, 39

NM—Westover v Harris, 137 P 2d 771, 47 NM 112

NY—Stoutenburg v Stoutenburg, 40 NYS 2d 146, 265 App Div 570, appeal denied 41 NYS 2d 956, 266 App Div 759

Stoutenburg v Stoutenburg, 27 NYS 2d 734, 176 Misc 430, affirmed 40 NYS 2d 146, 265 App Div 570, appeal denied 41 NYS 2d 956, 266 App Div 759

NC—Beck v Blanchard, 186 SE 338, 210 NC 276

Okl—Billingslea v Booker, 263 P 2d 176

Pa—Hess v Jones, 7 A 2d 299, 335 Pa 569

Tenn—Howell v Davis, 268 SW 2d 85, 196 Tenn 334

Tex—Harrell v Hickman, 215 SW 2d 876, 147 Tex 396—Brown v

Payne, 176 SW 2d 306, 142 Tex 102

Richardson v Richardson, Civ App, 270 SW 2d 307, error refused—Cushenberry v Proffitt, Civ App, 153 SW 2d 291, error refused

Vt—Blair v Blair, 10 A 2d 188, 111 Vt 53

68 CJ p 615 note 74—18 CJ p 149 note 46

#### **Reservation of life estate indicates immediate grant**

A provision for a life estate to the grantor in an instrument purporting to convey the fee indicates that it is intended that the instrument take immediate effect as a present conveyance of a future interest, because if it did not the reservation of a life estate would be useless

Mo—Thorp v Daniel, 99 SW 2d 42, 339 Mo 763

**Passing of property at death** may be provided for by deed where the donor divests himself of all interest in the property in favor of the beneficiary

NY—In re McKay's Will, 137 NY S 2d 455

#### **Life estate to commence on grantor's death**

An instrument granting a life estate in realty to commence on grantor's death was not void, on ground that it was testamentary in character and had not been executed as a will, because grantee's right of possession did not accrue until grantor's death

Cal—Lowe v Ruhlman, 155 P 2d 671, 67 Cal App 2d 828

26. Mo—St Louis County Nat Bank v Fielder, 260 SW 2d 483, 364 Mo 207, overruling Goins v Melton, 121 SW 2d 821, 343 Mo 413

68 CJ p 616 note 75

**Reservation of right of revocation** by grantor does not of itself make apparent deed testamentary

Cal—Lowe v Ruhlman, 155 P 2d 671, 67 Cal App 2d 828

Mo—St Louis County Nat Bank v Fielder, 260 SW 2d 483, 364 Mo 207, overruling Goins v Melton, 121 SW 2d 821, 343 Mo 413

27. Ala—Dennis v West, 26 So 2d 263, 248 Ala 90

Ga—Martin v Smith, 87 SE 2d 406, 211 Ga 600

28. Ill—Szymczak v Szymczak, 138 NE 218, 303 Ill 541

29. Cal—Maier v Boyle, 112 P 2d 913, 44 Cal App 2d 698

Miss—Hald v Pearson, 20 So 2d 71, 197 Miss 410

Tex—Burgess v Hatton, Civ App, 209 SW 2d 999, error refused

Va—Foster v Helms, 191 SE 799, 169 Va 634

68 CJ p 616 note 77

Contracts for support as testamentary see *infra* § 140

Instrument creating trust for support of settlor for life as will see *infra* § 143

30. Pa—Logan v Glass, 7 A 2d 116, 136 Pa Super 221, affirmed 14 A 2d 306, 328 Pa 489

68 CJ p 616 note 78

#### **Payment to third person on grantor's death**

(1) A provision in a deed requiring the grantee to make specified payments to third persons on the grantor's death does not render the instrument testamentary in character

Okl—Stewart v Colvin, 214 P 2d 229, 202 Okl 380

(2) A provision in a deed charging the land with the payment of a specified sum to a designated person on the grantor's death is not a testamentary disposition

Pa—Logan v Glass, 7 A 2d 116, 136 Pa Super 221, affirmed 14 A 2d 306, 328 Pa 489

31. Cal—Longley v Brooks, 92 P 2d 394, 13 Cal 2d 754

Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318

68 CJ p 616 note 79

32. Mo—Tillman v City of Carthage, 247 SW 992, 297 Mo 74

33. Ill—Young v Payne, 119 NE 612, 283 Ill 649

34. Colo—Burton v Burton, 69 P 2d 307, 100 Colo 567

35. Ariz—Pass v Stephens, 198 P 712, 22 Ariz 461

36. Mass—O'Loughlin v Prendergast, 168 NE 96, 269 Mass 41

is testamentary,<sup>37</sup> but there is substantial authority that such a recital is not of itself sufficient to establish that the instrument is testamentary<sup>38</sup> but merely reserves a life estate to the grantor<sup>39</sup>

Delivery of an instrument in the form of, and otherwise sufficient as, a deed ordinarily makes it operative as such, and not as a will,<sup>40</sup> unless the delivery is conditioned on the grantee surviving the grantor<sup>41</sup>. Mere physical delivery of an instrument in the form of a deed does not conclusively es-

tablish an intention to transfer a present interest<sup>42</sup>. An instrument in the form of a deed ordinarily operates as a deed and not as a will, even though the delivery is to a third person, to hold it until the grantor's death,<sup>43</sup> except where the grantor reserves control over the deed or power to recall it,<sup>44</sup> or the delivery by the third person to the grantee is made conditional on the grantor dying before him<sup>45</sup>. It has been held that in order for an instrument which is in the form of a deed to be held testamentary, it must lack delivery<sup>46</sup>. An instru-

37. Miss—Rodgers v Rodgers, 67 So 2d 698, 218 Miss 655, 40 A L R 2d 254—White v Inman, 54 So 2d 375, 212 Miss 237, 30 A L R 2d 380—Peebles v Rodgers, 50 So 2d 632, 211 Miss 8—Coulter v Carter, 26 So 2d 344, 200 Miss 135—Ates v Ates, 196 So 243, 189 Miss 226—Smith v Buffington, 170 So 816, 176 Miss 889

Mo—Thorp v Daniel, 99 S W 2d 42, 339 Mo 763

Okl—Dalton v Burdick, 110 P 2d 297, 188 Okl 446

Wis—In re Wnuk's Will, 41 N W 2d 294, 256 Wis 360

#### Death of grantee before grantor

(1) Deed containing terms and conditions that deed should not take effect until death of grantor and that if grantee should die before grantor it should not take effect at all, conveyed no present interest but was testamentary in character and was of no force

Ky—Spicer v Spicer, 236 S W 2d 474, 314 Ky 560

(2) The inclusion, in an instrument in the ordinary form of a warranty deed, of a provision that it shall be null and void in case the grantee dies before the grantor renders the instrument testamentary in character and invalid where not witnessed in the manner required for wills

Kan—Chaplin v Chaplin, 184 P 984, 105 Kan 481

38. U S—Carter Oil Co v McQuigg, D C Ill, 27 F Supp 182, affirmed, C C A, 112 F 2d 275

Ala—Dennis v West, 26 So 2d 263, 248 Ala 90

Ark—McCallen v Christian, 274 S W 2d 350—Lindsey v Christian, 257 S W 2d 935, 222 Ark 169

Fla—Parrish v Robbirds, 200 So 925, 146 Fla 324

Ga—Smith v Thomas, 34 S E 2d 278, 199 Ga 396—Smaha v George, 24 S E 2d 385, 195 Ga 412

Kan—Gustafson v Dean, 57 P 2d 69, 143 Kan 845

N M—Matlock v Mize, 230 P 2d 246, 55 N M 218

N C—Beck v Blanchard, 186 S E 338, 210 N C 276

Tenn—Howell v Davis, 268 S W 2d 85 196 Tenn 334,

Tex—Worley v Empire Gas & Fuel Co, 103 S W 2d 368, 129 Tex 532

Davis v Zeanon, Civ App, 111 S W 2d 772, error refused

"The trend of the modern decisions is to uphold such an instrument as a deed, although it may contain words strongly suggestive of the idea that it is not to take effect until the death of the grantor"

Ga—Patellis v Tanner, 29 S E 2d 419, 422, 197 Ga 471

39. U S—Carter Oil Co v McQuigg, D C Ill, 27 F Supp 182, affirmed, C C A, 112 F 2d 275

Ark—McCallen v Christian, 274 S W 2d 350—Lindsey v Christian, 257 S W 2d 935, 222 Ark 169—Smith v Smith, 235 S W 2d 886, 218 Ark 228

Fla—Parrish v Robbirds, 200 So 925, 146 Fla 324

N M—Matlock v Mize, 230 P 2d 246, 55 N M 218

40. Ala—Ezzel v Ezzel, 105 So 813, 213 Ala 544

Ark—Owen v Owen, 51 S W 2d 524, 185 Ark 1069

Cal—Hitch v Hitch, 74 P 2d 1098, 24 Cal App 2d 291

Colo—Million v Botefur, 9 P 2d 284, 90 Colo 343

Ill—Oard v Dolan, 151 N E 244, 320 Ill 371

Mich—Sprunger v Ensley, 178 N W 714, 211 Mich 103

Miss—Stubblefield v Haywood, 86 So 295, 123 Miss 480

Tenn—Calloway v Witt, 105 S W 2d 123, 21 Tenn App 74

W Va—Liggett v Rohr, 7 S E 2d 867, 122 W Va 166

Wis—Sederlund v Sederlund, 187 N W 750, 176 Wis 627

68 C J p 616 note 84

41. Cal—Kelly v Bank of America Nat Trust & Sav Ass'n, 246 P 2d 92, 112 Cal App 2d 388, 34 A L R 2d 578

Idaho—Crenshaw v Crenshaw, 199 P 2d 264, 68 Idaho 470

Ohio—Knebbe v Wade, 118 N E 2d 833, 161 Ohio St 294

42. Cal—Counter v Counter, 232 P 2d 551, 104 Cal App 2d 786

Ind—Stevenson v Harris, 118 N E 2d 368, 124 Ind App 358

43. Ark—Hudgens v Taylor, 176 S W 2d 244, 206 Ark 507—Ransom v Ransom, 149 S W 2d 937, 202 Ark 123

Mich—Ryckman v Cooper, 289 N W 252, 291 Mich 556

N D—Silbernagel v Silbernagel, 55 N W 2d 713

Tenn—Couch v Hoover, 79 S W 2d 807, 18 Tenn App 523

68 C J p 616 note 85

Real test in determining whether delivery of deed to third person is effective as a conveyance or ineffective as an attempted testamentary disposition of property is grantor's intention at time of delivery to third person, and if accompanied by intent forever to part with control, delivery is effective, notwithstanding grantor may subsequently regret his action and attempt to place a different construction on transaction

Okl—Anderson v Mauk, 67 P 2d 429, 179 Okl 640

44. Ind—Dickason v Dickason, 18 N E 2d 479, 107 Ind App 515, mandate modified on other grounds and rehearing denied 25 N E 2d 1014, 107 Ind App 515

Kan—In re Smith's Estate, 174 P 2d 1012, 162 Kan 215—Foster v Allen, 152 P 2d 818, 159 Kan 116

Mich—Hynes v Halstead, 276 N W 578, 282 Mich 627

Neb—Kula v Kula, 31 N W 2d 96, 149 Neb 347

N D—Silbernagel v Silbernagel, 55 N W 2d 713—Johnson v Weldy, 51 N W 2d 829

S D—Stanga v Miller, 70 N W 2d 827

—Jorgensen v Jorgensen, 51 N W 2d 632, 74 S D 239

68 C J p 617 note 86

Delivery of deed to third person to be held until grantor's death in general see Deeds § 43

45. Cal—Thompson v Thompson, 267 P 375, 91 Cal App 554

Ohio—Leatherman v Abrams, 90 N E 2d 402, 86 Ohio App 149

Okl—Atchison v Atchison, 175 P 2d 309, 198 Okl 98

Wash—Holohan v Melville, 249 P 2d 777, 41 Wash 2d 380, rehearing denied 255 P 2d 899, 41 Wash 2d 380

46. Ill—Klouta v Pechousek, 110 N E 2d 258, 414 Ill. 75—Heiligen-

ment in the form of a deed which is not delivered until the grantor's death is not an effective deed and is operative, if at all, as a will<sup>47</sup> Subject to the statutory requirements as to the form of execution, an undelivered deed may be given effect as a will,<sup>48</sup> but not, it has been held, where there is no proof of an intention that it should operate as such,<sup>49</sup> or where it was designed and intended by the maker to operate only as a deed<sup>50</sup> The fact that an instrument is void as a deed does not transmute it into a will<sup>51</sup> An instrument is inoperative as either a will or a deed, where it is invalid as a will because not executed in compliance with statute, and as a deed because not delivered or not passing a present interest<sup>52</sup>

An instrument is to be construed as a whole in determining if it is a will or a deed<sup>53</sup> Where an instrument can have no operation as a deed, but may have as a will, or vice versa, it is the policy of the courts in doubtful cases so to construe it as to make it operative rather than inoperative,<sup>54</sup> but this rule can have no application where the instrument

was clearly intended by the maker to be a deed, or a will, as the case may be<sup>55</sup> It has been said that where an instrument indicates on its face that it was drawn by an unskilled person, greater latitude in construction, as to whether it is a deed or a will, is proper than in the case of an instrument drawn by an experienced hand<sup>56</sup>

*Instrument must be construed as of time of execution*, in determining whether it is a will or a deed,<sup>57</sup> and where made and executed with intention that it shall be one or the other, its character cannot be changed by a subsequent writing or agreement<sup>58</sup>

### § 138. — Mortgages

A mortgage is not rendered testamentary because no interest is to be paid during the grantor's lifetime or the mortgage is to become void on the mortgagee's death

A mortgage absolute in terms is not rendered testamentary by the fact that it is executed on the understanding that it shall be assigned at the mortgagor's death to a designated person whom he desires

stein v Schlotterbeck, 133 NE 188, 300 Ill 206

47 Ill.—Stanford v Stanford, 20 N E 2d 275, 371 Ill 211

Kan—Lowry v Lowry, 159 P 2d 411, 160 Kan 11

Mich—Wilcox v Wilcox, 278 NW 79, 283 Mich 313

Miss—Palmer v Riggs, 46 So 2d 86, 209 Miss 127—Palmer v Riggs, 19 So 2d 807, 197 Miss 256

N Y—In re Gyllstrom's Will, 15 NY S 2d 801, 172 Misc 655

SD—McGillivray v Wipf, 266 NW 724, 64 SD 367

Tex—Unsell v Federal Land Bank of Houston, Civ App, 138 SW 2d 305, error dismissed

Delivery during grantor's lifetime as essential to validity of deed generally see Deeds § 47

#### Deed to grantor and grantee as joint tenants

Where owner of land, desiring to leave land to her foster daughter without providing therefor in will, but not intending that title should pass before her death, executed deed to land to attorney's clerk as mere instrumentality, and clerk executed deed to owner and foster daughter as joint tenants, and returned deeds to owner, clerk's delivery of deeds to owner did not make delivery effective with respect to foster daughter, on theory that delivery to one joint grantee was delivery to both, since both deeds must be considered as a single transaction whose validity depended on owner's intent

Mich—Wilcox v Wilcox, 278 NW 79, 283 Mich 313

48. Cal—In re Beffa's Estate, 201 P 616, 54 Cal App 186

68 C J p 617 note 89

49. Mont—Carnahan v Gupton, 96 P 2d 513, 109 Mont 244

68 C J p 617 note 90

Testamentary intent as essential element of will generally see supra § 129

50 Miss—Edwards v. Smith, 35 Miss 197

51 Cal—Schroeder v Wilson, 200 P 2d 173, 89 Cal App 2d 63

52 Kan—Poore v Poore, 41 P 973, 55 Kan 687

Md—Buchwald v Buchwald, 199 A 800, 175 Md 115

Mont—Carnahan v Gupton, 96 P 2d 513, 109 Mont 244

68 C J p 617 note 93

53. Mo—Mizell v Osmon, 189 SW 2d 306, 354 Mo 321—Goins v Melton, 121 SW 2d 821, 343 Mo 413

#### Reservation or exception

In determining whether grantor intended by deed to vest in her son absolute title in fee subject only to life estate of grantor or to reserve to grantor the absolute title and possession until grantor's death, it was significant that words of reservation rather than of exception were used throughout deed, and that statement of intention to reserve absolute title and ownership in grantor appeared in the habendum clause of the deed

N Y—Stoutenburg v Stoutenburg, 27 NYS 2d 734, 176 Misc 430, affirmed 40 NYS 2d 146, 265 App Div 570, appeal denied 41 NYS 2d 956, 266 App Div 759

54 Ala—Stratford v Lattimer, 50 So 2d 420, 255 Ala 201—Arrington v Brown, 178 So 218, 235 Ala 196

Cal—Schroeder v Wilson, 200 P 2d 173, 89 Cal App 2d 63

Tenn—Carmody v Trustees of Presbyterian Church, 203 SW 2d 176, 29 Tenn App 275—Smith v Prichard, 122 SW 2d 829, 22 Tenn App 321

Tex—Cushenberry v Profit, Civ App, 153 SW 2d 291, error refused 68 C J p 617 note 95

55. Cal—Schroeder v Wilson, 200 P 2d 173, 89 Cal App 2d 63

Tex—Belgarde v Carter, Civ App, 146 SW 964

56 Ala—Turk v. Turk, 89 So 457, 206 Ala 312

Ky—Hayes v Kentucky West Virginia Gas Co, 160 SW 2d 376, 290 Ky 174—Vaughn v Metcalf, 118 SW 2d 727, 274 Ky 379

Tenn—Carmody v Trustees of Presbyterian Church, 203 SW 2d 176, 29 Tenn App 275

57. Mich—Cline v Cline, 197 NW 502, 226 Mich 378

58 US—Autenreith v CIR, CC A 3, 115 F 2d 856

Robinson's Women's Apparel v Union Bank & Trust Co of Los Angeles, DCNY, 67 F Supp 395

Ga—Smaha v George, 24 SE 2d 385, 195 Ga 412

Mont—Walsh v Kennedy, 147 P 2d 425, 115 Mont 551

NM—Westover v Harris, 137 P 2d 771, 47 NM 112

68 C J p 617 note 99

to benefit.<sup>59</sup> nor is a mortgage providing for the payment of interest during the mortgagee's lifetime, and that it shall become void at his death, the principal remaining the property of the mortgagor and his heirs, therefore to be deemed of testamentary character.<sup>60</sup> A gift of a mortgage on the grantor's property is not rendered testamentary by the fact that no interest is to be paid during the grantor's lifetime.<sup>61</sup> However, a provision, in a mortgage that specified sums shall be paid to designated third persons, strangers to the mortgage transaction, after the death of the mortgagee, has been regarded as testamentary.<sup>62</sup> An assignment of a mortgage which is intended to take effect only on death is a testamentary disposition which is ineffective unless the instrument contains the requisites of a will.<sup>63</sup>

### § 139. — Leases

Whether an instrument is a will or a lease depends on the effect and operation of the instrument, to be determined from its terms

Whether an instrument is a will or a lease depends on the effect and operation of the instrument, to be determined from its terms.<sup>64</sup> An instrument in the form of a lease which is not actually delivered and does not take effect until the lessor's death is a testamentary disposition.<sup>65</sup> A lease taking effect from and after its date is not a will.<sup>66</sup> A

lease is not converted into a will, where it is not executed with the formalities necessary to the execution of a will, by a provision in it attempting to dispose of the reversion,<sup>67</sup> or the rents accruing after the death of the lessor,<sup>68</sup> or by a provision giving the lessee an option to purchase the demised premises after the lessor's death.<sup>69</sup> While the lease may be valid as such, an ambulatory provision therein providing for the transfer of the fee on the lessor's death is testamentary and is valid, if at all, as a will.<sup>70</sup>

### § 140. — Contracts

As a general rule, the fact that the death of a party determines the time for performance of a contract does not of itself make the contract testamentary, and an otherwise sufficient contract is not rendered testamentary by the fact that it provides for the passing of title to property at death or payment at death.

Although a contract and a will are essentially unlike, in that the former is an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties, and the latter is a unilateral disposition of property acquiring binding force only at the death of the testator and then from the fact that it is his last expressed purpose,<sup>71</sup> and a will, although absolute and unconditional, cannot be termed a contract.<sup>72</sup>

59. Iowa.—Patterson v Mills, 28 N W 53, 69 Iowa 755

60. Neb.—Fiscus v Wilson, 104 N W 856, 74 Neb 444

61. N.J.—Basse v Raab, 46 A 2d 787, 138 N.J. Eq 432

62. N.Y.—Townsend v Rackham, 38 N.E. 731, 143 N.Y. 516

63. Conn.—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161

64. Wash.—In re Murphy's Estate, 75 P 2d 916, 193 Wash 400, opinion adhered to 81 P 2d 779, 195 Wash 695

65. Ill.—Kleinhaus v Ohde, 112 N.E. 2d 198, 350 Ill App 177

66. Mich.—Johnson v Becker, 231 N.W. 96, 251 Mich 132  
Wis.—In re Ogle's Estate, 72 N.W. 389, 97 Wis 50

67. Vt.—Graves v Sheldon, 2 D Chipm 71, 15 Am D 653

68. Ind.—Murray v Cazner, 53 N.E. 476, 55 N.E. 880, 23 Ind App 600  
N.Y.—Priester v Hohloch, 75 N.Y.S. 405, 70 App Div 256

69. N.J.—Chas J Smith Co v Anderson, 95 A 358, 84 N.J. Eq 681  
Pa.—In re Specht's Estate, 112 A 92, 268 Pa 384

70. Wash.—In re Murphy's Estate, 75 P 2d 916, 193 Wash 400, opinion

adhered to 81 P 2d 779, 195 Wash 695

71. Kan.—Imthurn v Martin, 96 P 2d 860, 150 Kan 906, 151 Kan 324  
N.J.—Fidelity Union Trust Co v Price, 87 A 2d 565, 18 N.J. Super 578, affirmed in part and reversed in part 93 A 2d 321, 11 N.J. 90, 35 A.L.R. 2d 980

68 C.J. p 618 note 11

#### Other statements of distinction

(1) A "will" is dispositive whereas a "contract" is promissory, a will is gratuitous whereas a contract requires consideration, ordinarily, a will is revocable, but usually a contract is irrevocable, a will is inoperative unless it is made in accordance with statute regulating execution of wills, and as a general rule it has no legal effect until probated, whereas such principles do not govern contracts

La.—Succession of Lanata, 18 So 2d 500, 205 La 915

(2) A contract creates a present, enforceable and binding right over which promisor has no control without consent of promisee, while a testamentary disposition operates prospectively

N.J.—Michaels v Donato, 67 A 2d 911, 4 N.J. Super 570

Wash.—In re Lewis' Estate, 98 P 2d 654, 2 Wash 2d 458, 127 A.L.R. 628

(3) An instrument testamentary in character is distinguished from one containing an enforceable contractual obligation by the ambulatory character of an instrument permitting change or revocation before death

Ohio.—Duemer v Duemer, 88 N.E. 2d 603, 86 Ohio App 192

(4) The words "testamentary disposition" connote or denote a gift rather than a contract

N.J.—Elsenhardt v Schmidt, 98 A 2d 698, 27 N.J. Super 76

(5) The essential distinction between a contractual obligation and a "testamentary disposition" is that the "contract" contemplates performance, in part at least, during the lifetime and vests some quantum of present interest in the other party

Cal.—Bergman v Ornbaun, 92 P 2d 654, 33 Cal App 2d 680  
Ind.—Society of Missionary Catechists of Our Blessed Lady of Victory v Bradley, 44 N.E. 2d 209, 112 Ind App 556

Wash.—In re Murphy's Estate, 71 P 2d 6, 191 Wash 180, reversed on other grounds 75 P 2d 916, 193 Wash 400, adhered to 81 P 2d 779, 195 Wash 695

72. N.Y.—Hughes v Hiscox, 181 N.Y.S. 395, 110 Misc 141.

their characteristics are sometimes combined to some extent in one instrument, so that an instrument purporting to be a contract may have a testamentary character,<sup>73</sup> or an instrument in form of a will may be an irrevocable agreement,<sup>74</sup> and, on the other hand, an instrument properly executed and intended as a will may operate as such although it contains contractual features,<sup>75</sup> and an instrument executed and intended as a contract may operate as such although it contains provisions of a testamentary nature<sup>76</sup>

In determining whether an instrument is a contract or a will, the dominant purpose of the maker as manifested therein must control<sup>77</sup> So the question whether any given writing is a will or a contract must be determined by the character of its contents, rather than by its title or any formal words with which it may begin or conclude,<sup>78</sup> but words

which do not change the legal effect of the instrument may nevertheless be significant in determining its character and the intention with which it was made<sup>79</sup> All of the provisions of the instrument and the pertinent facts are to be considered in determining whether a writing is a contract or a will<sup>80</sup> An instrument which meets the requirements for a will is not to be construed as a contract, ineffective for lack of consideration<sup>81</sup>

Although an agreement involves or effectuates a disposition of property belonging to a party thereto, it is valid as a contract, and is not a will, where it contemplates performance, in part at least, during his lifetime, or vests a present interest in the other party,<sup>82</sup> as in the case of an antenuptial contract,<sup>83</sup> or a contract to convey,<sup>84</sup> or an option contract,<sup>85</sup> or a contract to devise or bequeath,<sup>86</sup> and a contract creating a present obligation is not

SC—Lowe v Fickling, 36 SE 2d 293, 207 SC 442

73 NY—In re Deyo's Estate, 42 NYS 2d 379, 180 Misc 32  
68 CJ p 618 note 14

Instrument operating as will and also as other document generally see infra § 165

74. US—Church of Jesus Christ of Latter Day Saints v Scarborough, CA Utah, 189 F 2d 800  
68 CJ p 618 note 15

75 Iowa—Baker v Syfritt, 125 N W 998, 147 Iowa 49  
68 CJ p 618 note 16

76. Kan—Imthurn v Martin, 96 P 2d 860, 150 Kan 906, 151 Kan 324  
68 CJ p 618 note 17

77 Mont—Trenouth v Mulroney, 227 P 2d 590, 124 Mont 499  
NY—In re Galewitz' Estate, 132 NYS 2d 297, 206 Misc 218, affirmed 139 NYS 2d 897, 286 App Div 947, reargument and appeal denied 141 NYS 2d 501, 285 App Div 1049—In re Deyo's Estate, 42 NYS 2d 379, 180 Misc 32

Pa—Book v Book, 104 Pa 240  
Wash—Corpus Juris quoted in In re Murphy's Estate, 71 P 2d 6, 11, 191 Wash 180  
68 CJ p 619 note 28

78 Mont—Trenouth v Mulroney, 227 P 2d 590, 124 Mont 499  
Pa—In re Hamilton Case, Orph, 6 Sch Reg Rec 137

Wash—Corpus Juris quoted in In re Murphy's Estate, 71 P 2d 6, 11, 191 Wash 180  
68 CJ p 619 note 29

79. Mont—Trenouth v Mulroney, 227 P 2d 590, 124 Mont 499  
NC—Chambers v Byers, 199 SE 398, 214 NC 373.  
RI—Dutra v. Davis, 38 A.2d 471, 70

RI 318—Slaney v Cormier, 139 A 665, 49 RI 74

Wash—Corpus Juris quoted in In re Murphy's Estate, 71 P 2d 6, 11, 191 Wash 180

80. Miss—Strange v State Tax Commission, 7 So 2d 542, 192 Miss 765

RI—Dutra v Davis, 38 A 2d 471, 70 RI 318

81. Ill—In re Apsey's Estate, 1 NE 2d 558, 285 Ill App 29

82. Cal—In re Howe's Estate, 189 P 2d 5, 31 Cal 2d 395, 1 ALR 2d 1171

Bergman v Ornbaun, 92 P 2d 654, 33 Cal App 2d 680

Ind—Corpus Juris cited in Society of Missionary Catechists of Our Blessed Lady of Victory v Bradley, 44 NE 2d 209, 212, 112 Ind App 556

Ky—More v Carnes, 214 SW 2d 984, 309 Ky 41—Vaughn v Metcalf, 118 SW 2d 727, 274 Ky 379

NY—In re Fairbairn's Estate, 40 NYS 2d 280, 265 App Div 431, appeal denied 42 NYS 2d 576, 266 App Div 821

Love v Tames, 135 NYS 2d 609  
NC—Silverthorne v Mayo, 77 SE 2d 678, 238 NC 274

Pa—In re Groome's Estate, 11 A 2d 271, 337 Pa 250—Baldi v Baldi, 189 A 490, 325 Pa 177

Wash—Corpus Juris quoted in In re Murphy's Estate, 71 P 2d 6, 12, 191 Wash 180

68 CJ p 618 note 18

#### Contract for benefit of third party

In determining whether a contract for the benefit of a third person, is in substance an informal "will," and unenforceable, the test is whether the contract confers a fixed right on the beneficiary when the contract is made, or whether it is to have no effect until the death of the maker

NY—In re Deyo's Estate, 42 NYS 2d 379, 180 Misc 32

#### Estoppel

In assumpsit on a writing as an alleged contract under which title to newspaper distribution agency was to be transferred at death of father in consideration for son's agreement to make certain payments to other persons, son was estopped to disclaim liability under writing by contending writing was testamentary, where son admitted in pleading that he entered into a "contract" in writing, took over business mentioned in contract, and enjoyed benefits thereunder after death of father

Pa—Rhoads v Rhoads, 190 A 533, 126 Pa Super 141

83. Kan—In re Greenleaf's Estate, 217 P 2d 275, 169 Kan 22

Md—Michael v Baker, 12 Md 158, 71 Am D 593

A community property agreement executed by a husband and wife in compliance with statute is an enforceable contract, and is not a will and is not governed by laws relating to wills

Wash—In re Dunn's Estate, 197 P 2d 606, 31 Wash 2d 512—In re Brown's Estate, 185 P 2d 125, 29 Wash 2d 20

84. US—O'Connell v U S, D C Ill, 37 F Supp 832

Ala—Owens v Lackey, 25 So 2d 423, 247 Ala 537

Ohio—Duemer v Duemer, 88 NE 2d 603, 86 Ohio App 192

Pa—In re Simun's Estate, 33 A 2d 64, 152 Pa Super 603

68 CJ p 618 note 20—66 CJ p 483 note 70

85. Ill—Owings v Lehman, 190 Ill App 432

86. Ala—Dennis v. West, 26 Sc 2d 263, 248 Ala 90

testamentary merely because the obligation is to be performed, wholly or in part, after the obligor's death<sup>87</sup>

The fact that the death of one of the parties to a contract determines the time of performance does not of itself make the contract testamentary<sup>88</sup> Thus, an otherwise sufficient contract is not rendered testamentary by the fact that it provides that title to property is to pass at death<sup>89</sup> or that payment is to be made at death, and by the maker's estate or representative<sup>90</sup> The statute of wills does not prevent the owner of property from providing by contract for the disposition of his property on his death,<sup>91</sup> and there is nothing in the statute of wills which prevents the creation by contract of a bona fide equitable interest in property and its enforcement after the death of the contracting party, even though the date of death is agreed on as the time for the transfer of legal title<sup>92</sup>

An instrument, although partly or wholly in the form of a contract, is testamentary in character, and operative, if at all, as a will, where it is to have no operation during the party's lifetime, and disposes or attempts to dispose of his property at his death, and not before,<sup>93</sup> as where it provides that property belonging to one party shall go to or belong to another after the former's death<sup>94</sup> A contract which is testamentary in character is not effective as a will unless it meets the requisites of a will with respect to manner of execution, etc<sup>95</sup> An instrument which is in substance a joint, mutual, and reciprocal will, but is ineffective as such because not executed in compliance with the statute of wills cannot be given effect as a contract<sup>96</sup>

Applying these rules, it has been held by some authorities that an agreement as to the disposition of partnership assets in case of the death of a partner is of a testamentary character,<sup>97</sup> and by other

Fla—Exchange Nat Bank of Tampa v Bryan, 165 So 685, 122 Fla 479  
 Kan—Inthurn v Martin, 96 P 2d 860, 150 Kan 906, 151 Kan 324  
 Ky—Rose v Reese, 160 SW 2d 614, 290 Ky 356  
 Md—Wilson v Safe Deposit & Trust Co of Baltimore, 37 A 2d 321, 152 A L R 892  
 Mich—Ryckman v Cooper, 289 NW 252, 291 Mich 556  
 NY—In re Rundberg's Will, 29 NY S 2d 375, 177 Misc 43  
 Tex—Andrews v Lary, Civ App, 224 SW 2d 770, error refused no reversible error  
 W Va—Harris v Harris, 43 SE 2d 225, 130 W Va 100  
 68 C J p 618 note 22  
 87 US—Kerrigan's Estate v Joseph E Seagram & Sons, C A Pa, 199 F 2d 694  
 Ala—Hendrix v Pique, 185 So 390, 277 Ala 49  
 Mich—In re Boucher's Estate, 46 NW 2d 577, 329 Mich 569—Ireland v Lester, 298 NW 488, 298 Mich 154  
 NJ—Eisenhardt v Schmidt, 98 A 2d 698, 27 NJ Super 76  
 NY—In re Galewitz' Estate, 132 NY S 2d 297, 206 Misc 218, affirmed 139 NY S 2d 897, 286 App Div 947, reargument and appeal denied 141 NY S 2d 501, 285 App Div 1049  
 Love v Tames, 135 NY S 2d 609  
 Ohio—Duemer v Duemer, 88 NE 2d 603, 86 Ohio App 192  
 Pa—In re Althouse's Estate, Orph, 66 Montg Co 243  
 68 C J p 619 note 23  
 88 Mich—In re Boucher's Estate, 46 NW 2d 577, 329 Mich 569—Ireland v Lester, 298 NW 488, 298 Mich 154  
 89. Cal—In re Howe's Estate, 189

P 2d 5, 31 Cal 2d 395, 1 A L R 2d 1171  
 Ill—In re Ilg's Estate, 109 NE 2d 362, 348 Ill App 545  
 NJ—Michaels v Donato, 67 A 2d 911, 4 NJ Super 570  
 NY—In re McKay's Will, 137 NY S 2d 455, affirmed 147 NY S 2d 482  
**Support and maintenance**  
 Contract to convey property at death in consideration of support and maintenance is not testamentary  
 NH—Reynolds v Chase, 177 A 291, 87 NH 227  
 90 US—Kerrigan's Estate v Joseph E Seagram & Sons, C A Pa, 199 F 2d 694  
 Ark—Searcy v Clark, 82 SW 2d 839, 190 Ark 1069  
 Mass—Krell v Codman, 28 NE 578, 154 Mass 454, 14 L R A 860, 26 Am S R 260  
 NJ—Eisenhardt v Schmidt, 98 A 2d 698, 27 NJ Super 76  
 NY—In re Whiteman's Will, 52 NY S 2d 723, 268 App Div 591  
 Okl—Wallace v Hill, 249 P 2d 452, 207 Okl 319—Farmers & Merchants Nat Bank v Lee, 132 P 2d 931, 192 Okl 9  
 Pa—In re Althouse's Estate, Orph, 66 Montg Co 243  
**Support and maintenance**  
 A promise to pay at death for support and maintenance furnished the promisor is not testamentary  
 Ill—In re Reab's Estate, 108 NE 2d 223, 348 Ill App 798  
 Pa—In re Grierson's Estate, 48 A 2d 102, 159 Pa Super 421  
 91 US—Stevens v U S, Mass, 58 S Ct 388, 302 US 623, 82 L Ed 484  
 92. Mass—Legro v Kelley, 42 NE 2d 836, 311 Mass 674

NJ—Michaels v Donato, 67 A 2d 911, 4 NJ Super 570  
 93 Ind—Reed v Reed, 14 NE 2d 320, 105 Ind App 185  
 Kan—In re Koellen's Estate, 176 P 2d 544, 162 Kan 395  
 Ky—Vaugh v Metcalf, 118 SW 2d 727, 274 Ky 379  
 Mo—Scheer v Gerleman, 221 SW 2d 875  
 NH—Towle v Wood, 60 NH 434, 49 Am R 326  
 Va—Spinks v Rice, 47 SE 2d 424, 187 Va 730  
 Wash—Corpus Juris quoted in In re Murphy's Estate, 75 P 2d 916, 920, 193 Wash 400  
 68 C J p 619 note 24  
**Pure testamentary disposition**  
 of property must be by will and cannot be made by contract, where undertaking between two people to pass, on death of maker first to die, his or her property to survivor, was testamentary in character but was not executed in accordance with statutory requirements, undertaking was not enforceable by survivor as a contract  
 Va—Spinks v Rice, 47 SE 2d 424, 187 Va 730  
 94. Mich—Tincknell v. Ward, 280 NW 104, 285 Mich 47  
 68 C J p 619 note 25  
 95. Md—Citizens' Nat Bank of Pocomoke City v Parsons, to Use of Worth, 175 A 852, 167 Md 631  
 Mo—Foster v Fraternal Aid Union, 87 SW 2d 669, 230 Mo App 477  
 96 Va—Spinks v Rice, 47 SE 2d 424, 187 Va 730  
 97 Ala—Gomez v Higgins, 30 So. 417, 130 Ala 493  
 RI—Feriara v Russo, 102 A 86, 40 RI 533, L R A 1918D 905.

authorities that it is contractual only<sup>98</sup> While there is some authority to the contrary,<sup>99</sup> it has been held that a promise to pay a specific sum at death to a charitable or educational institution is not a testamentary disposition<sup>1</sup> An agreement between two owners of stock in a corporation for the purchase by the survivor of the decedent's stock is not a testamentary disposition<sup>2</sup> A provision in a contract calling for installment payments that in the event of the creditor's death, the debtor should pay the balance to a designated person, is not testamentary<sup>3</sup> An agreement to pay premiums coupled with a request to executors to continue the payments, if the person insured survives the maker, has been held to be an agreement or contract and not a will<sup>4</sup>

*Obligation to be discharged on death* An agreement that a debt or legal obligation shall be extinguished by the death of the creditor or obligee does not constitute a testamentary disposition<sup>5</sup> It has been held that where a creditor accepts from his debtor, or a person who has turned over or lent money to another accepts from the latter, a bond or note providing for payment of interest to the creditor during his lifetime, but it is agreed that the principal shall never become due, or that the bond or note shall become void on the death of the payee, the transaction does not amount to a testamentary disposition of the principal sum,<sup>6</sup> but there is also authority that such a transaction is of the nature of a testamentary disposition, and is invalid

93 US—Autenreith v CIR, CC A 3, 115 F 2d 856  
 Ariz—Coe v Winchester, 33 P 2d 286, 43 Ariz 500  
 Conn—Fagelle v Marena, 38 A 2d 791, 131 Conn 277  
 Fla—Hirsch v Bartels, 49 So 2d 531  
 Ky—More v Carnes, 214 SW 2d 984, 309 Ky 41  
 Mich—Ireland v Lester, 298 NW 488, 298 Mich 154  
 NJ—Michaels v Donato, 67 A 2d 911, 4 NJ Super 570  
 NC—Silverthorne v Mayo, 77 SE 2d 678, 238 NC 274  
 68 C J p 619 note 27

#### In New York

(1) Agreements providing for conduct of the partnership business after the death of a partner and for disposition of the interest of partners in the business on such event are valid, although not executed in accordance with the statute of wills, when fairly made without illegal purpose and without intent to evade the statute

NY—In re Karlinski's Estate, 38 NY 2d 297, 180 Misc 44

(2) A testamentary provision in partnership agreement between deceased and wife purporting to dispose of each partner's interest in the partnership business on death of one of the partners was invalid, and deceased's interest in business was asset of his estate which passed to his surviving wife under terms of will giving his property to his wife  
 NY—In re Gardner's Will, 66 NY 2d 256

99. NJ—American University v Conover, 180 A. 830, 115 NJ Law 468

#### Share of estate

An instrument containing promise of signer to pay educational corporation one third of signer's estate and providing that pledge should become due on day of signer's decease and should be paid within one year there-

after out of proceeds of her estate was an attempted testamentary disposition, void because not executed in accordance with testamentary laws  
 Md—American University v Collings, 59 A 2d 333, 190 Md 688

1. Kan—Southwestern College of Winfield v Hawley, 62 P 2d 850, 141 Kan 652  
 68 C J p 613 note 51 [a]

#### Existence of contractual liability

(1) Where promise is otherwise enforceable, it is not testamentary, but where promise is in substance one to make a gift, it is testamentary and unenforceable except as a will  
 Ky—Floyd v Christian Church Widows and Orphans Home of Kentucky, 176 SW 2d 125, 296 Ky 196, 151 ALR 1230

(2) Instruments reciting that in consideration of makers' interest in benevolence or education and of gifts and pledges of others, makers promised to pay specified sums to designated charitable organizations, payable sixty days after death of survivor, and reciting that certain bequests should be preferred to the pledges, were testamentary in character and were required to be executed with all formalities of a will  
 Ky—Floyd v Christian Church Widows and Orphans Home of Kentucky, supra

(3) A writing accepted by university whereby promisor in consideration of others' gifts agreed to pay to university five thousand dollars which was payable after promisor's death and was subject to annuity to be paid to promisor's widow for life was not testamentary but contractual and enforceable against promisor's estate, since university's acceptance constituted an implied promise to comply with imposed condition, and was a sufficient consideration for promisor's agreement

Ky—Transylvanian University v Rees, 179 SW 2d 890, 297 Ky 246

2. Miss—Strange v State Tax Commission, 7 So 2d 542, 192 Miss 765  
 NY—Chase Nat Bank of City of New York v Manufacturers Trust Co., 39 NY 2d 370, 265 App Div 406

In re Galewitz' Estate, 132 NY 2d 297, 206 Misc 218, affirmed 139 NY 2d 897, 286 App Div 947, reargument and appeal denied 141 NY 2d 501, 285 App Div 1019

3. US—Kerrigan's Estate v Joseph E Seagram & Sons, CCA Pa., 199 F 2d 694

Robinson's Women's Apparel v Union Bank & Trust Co of Los Angeles, DC NY, 67 F Supp 395

4. Ala—Wiggins v Wiggins, 2 So 2d 402, 241 Ala 333

5. Cal—Bergman v Ornbaun, 92 P 2d 654, 33 Cal App 2d 680

Colo—Kauffman v Kauffman, 278 P 2d 179

Ill—Miller v Allen, 90 NE 2d 251, 339 Ill App 471

Iowa—In re Smith's Estate, 58 NW 2d 378, 244 Iowa 866

Ky—De Lapp v Anderson's Adm'r, 203 SW 2d 389, 305 Ky 336—Milligan v Gwinn's Adm'r, 163 SW 2d 31, 291 Ky 21

Mo—Dillard v Dillard, App., 269 S W 2d 769

Ohio—Twyman v Wood, 22 NE 2d 495, 61 Ohio App 229

Neb—Brock v Lueth, 4 NW 2d 285, 141 Neb 545

NY—Helmick v Probst, 9 NY 2d 975, 170 Misc 284

Wash—In re Lewis' Estate, 98 P 2d 654, 2 Wash 2d 458, 127 ALR 628

6. Ind—Society of Missionary Catechists of Our Blessed Lady of Victory v Bradley, 44 NE 2d 209, 112 Ind App 556

68 C J p 623 note 86.



in the absence of compliance with the statute of wills<sup>7</sup>

### § 141. — Bills and Notes

The fact that a bill or note is payable at the maker's death does not make it testamentary, as long as it creates or recognizes a present obligation, only the payment or discharge of which is postponed

The fact that a bill or note is by its terms payable at or after the death of the maker, does not give it a testamentary character, as long as it creates or recognizes a present indebtedness or obligation, only the payment or discharge of which is postponed,<sup>8</sup> even though it is executed at the same time as a will,<sup>9</sup> or the maker, after delivering it, has and retains possession of the note during his lifetime,<sup>10</sup> or delivery is to a third person<sup>11</sup> Where, however, an instrument, although in form a bill or note, is intended to have no operation until the death of the maker, it is not contractual, but of the nature of a will,<sup>12</sup> so a check made payable, after the maker's death, and consequently not collectable until that time,<sup>13</sup> or an instrument merely directing the maker's executor or administrator to pay a sum of money to a designated person,<sup>14</sup> is testamentary and inoperative unless executed in accordance with the statute of wills, and otherwise satisfying the requisites of a will<sup>15</sup> Similarly, a paper giving a bank directions as to the disposition of a depositor's account on his death is testamentary in character<sup>16</sup> A fortiori, an instrument containing no unconditional promise or order to pay,

but merely expressing the maker's desire that at his death a designated person shall have a specified sum out of his estate, is not a bill or note, but a testamentary instrument<sup>17</sup> Where the indorsement and transfer of a note is intended to take effect only at death, the transfer is of a testamentary character and is ineffective unless it meets the requisites of a will<sup>18</sup>

### § 142. — Bonds

A bond for the payment of a sum of money is not testamentary because payment is to be made on or after the maker's death

Like a promissory note, a bond, presently effective, for the payment of a sum of money is not testamentary in character because payment is to be made at or after the obligor's death<sup>19</sup> In determining whether an instrument was intended by the maker as a bond or a will, the court will consider language contained therein which would be immaterial in construing the instrument after its character had been established<sup>20</sup>

*Government bonds* Where government bonds are registered in accordance with federal regulations in the name of the owner, with provision for payment on his death to another, the registration in favor of the beneficiary is not a testamentary disposition, or one simply for the protection of the United States, but vests a present interest in the beneficiary even though the owner retains the right to destroy that interest by redeeming the bond during his lifetime<sup>21</sup>

7. NJ—Reed v Bonner, 102 A 383, 91 NJ Law 712

8. NY—In re Dashnau's Estate, 88 NYS 2d 13, 194 Misc 156

In re McKay's Will, 137 NYS 2d 455, affirmed 147 NYS 2d 482

Pa—In re Mornes' Estate, 79 Pa Dist & Co 356, 2 Fiduciary 76

Van Alstyne v McConnell, Com Pl, 23 Northumb Leg J 159

SD—Jensen v Jensen's Estate, 253 NW 619, 62 SD 496

Tex—Box v Ussery, Civ App, 108 S W 2d 230, error dismissed 68 CJ p 619 note 33

Note payable in stated time or at death

Note payable in twenty-five years or within two years after maker's death held not unenforceable as being testamentary in character

Tex—Chastain v Texas Christian Missionary Soc, Civ App, 78 SW 2d 728, error refused

Note to be secured on death

Where note executed by stepfather and mother in favor of son contained notation that note would be secured by a second deed of trust on describ-

ed property only on death of mother, but mother became well and later the property was sold, note was not void as being testamentary in character and not executed in conformity with statutory requirements Mo—Henleben v Krause, 209 SW 2d 888

9. Wis—Sheldon v Blackman, 205 NW 486, 188 Wis 4

10. Wis—Sheldon v Blackman, supra

11. NY—In re McKay's Will, 137 NYS 2d 455, affirmed 147 NYS 2d 482

12. Wash—Corpus Juris cited in In re Murphy's Estate, 75 P 2d 916, 934, 193 Wash 400 68 CJ p 619 note 36

13. NC—Graham v Hoke, 14 SE 2d 790, 219 NC 755 68 CJ p 620 note 37

14. Mont—Trenouth v Mulroney, 227 P 2d 590, 124 Mont 499 68 CJ p 620 note 38

15. Ind—Galbraith v Galbraith, 193 NE 707, 99 Ind App 563.

16. Wis—Tucker v Simrow, 21 N W 2d 252, 248 Wis 143

17. Mo—Lakin v. Blum, App, 43 SW 2d 853

18. Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161

19. Pa—In re Eisenlohr's Estate, 102 A 117, 258 Pa 438 68 CJ p 620 note 43

20. NC—Smith v Eason, 49 NC 34.

21. NY—In re Deyo's Estate, 42 NYS 2d 379, 180 Misc 32 Contra

NY—Deyo v Adams, 36 NYS 2d 734, 178 Misc 859

Computation of widow's share

Where a person purchases a United States Government Savings Bond, registering it in his own and another's name, and does not deliver bond during lifetime, the gift would properly be considered testamentary in character for purpose of computing that person's widow's share of the estate under the Kansas law of descent and distribution

US—Moore v Brodrick, D.C.Kan, 123 F Supp. 108.

## § 143. — Declarations or Deeds of Trust

An instrument purporting to create an inter vivos trust is testamentary where the instrument is not to take effect until the settlor's death and does not pass any present interest to the beneficiaries, or where the settlor retains such interests and powers with respect to the trust property as amount to full ownership and control of the property for his lifetime

The primary distinction between wills and declarations or deeds of trust is that the former take effect in the future on the death of the testator, while the latter take effect in præsenti during the lifetime of the settlor,<sup>22</sup> and, as in the case of deeds generally, the question whether a particular instrument is a will or is a declaration or deed of trust depends on the manifest intention of the maker<sup>23</sup>

An instrument partly or wholly in the form of a

declaration or deed of trust, but which is not intended to take effect until the death of the maker, and which does not pass any interest to a beneficiary during the settlor's lifetime is testamentary in character, and operative, if at all, only as a will.<sup>24</sup> In order that an instrument create a testamentary trust, it must meet all the requisites of a will, including the requirements as to manner of execution,<sup>25</sup> and an instrument purporting to create an inter vivos trust may be given effect as a will where it meets such requirements<sup>26</sup>

An instrument which conveys the legal title on trust, or sufficiently declares a trust, to take effect during the lifetime of the settlor will be construed to create a trust inter vivos, and not to be testamentary where the instrument passes a present interest to the beneficiaries of the trust<sup>27</sup> although

22 Neb—Whalen v Swircin, 4 NW 2d 737, 141 Neb 650  
Wis—Boyle v Kempkun, 9 NW 2d 589, 243 Wis 86  
68 C J p 620 note 46

23 Mo—St Louis Uniformed Firemen's Credit Union v Haley, App., 190 SW 2d 636  
Pa—In re Pengelly's Estate, Orph., 45 Berks Co 33  
Tex—Cushenberry v Profit, Civ App., 153 SW 2d 291, error refused  
68 C J p 620 note 48

**Formality of transaction**

(1) An important factor in determining whether an inter vivos trust is an attempted testamentary disposition is the formality of the transaction

Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 417

(2) In determining whether inter vivos trust in corporate stock was invalid as a testamentary disposition without compliance with the statute of wills court could consider the fact that the stock certificates were issued in the name of the settlor as trustee and that he manifested his intention in a solemn and formal manner to create a valid trust

Ill—Farkas v Williams, supra

24 Ala—Dauphin v Gatlin, 53 So 2d 580, 256 Ala 34  
DC—Betker v Nalley, 140 F 2d 171, 78 US App DC 312  
Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 2d 417

Williams v Anderson, 5 NE 2d 593, 288 Ill App 149

Iowa—Trustees of Synod of Reformed Presbyterian Church of North America v Horel, 16 NW 2d 209, 235 Iowa 281

Ky—Hines v Louisville Trust Co., 254 SW 2d 73

Mass—Leahy v Old Colony Trust Co., 93 NE 2d 238, 326 Mass 49

Neb—Young v McCoy, 40 NW 2d 540, 152 Neb 138

NY—Application of Cerchia, 108 NY 2d 753, 279 App Div 734  
In re Wilson's Will, 45 NYS 2d 167, 182 Misc 698

ND—Johnson v Weldy, 54 NW 2d 829

Ohio—Murr v Currier, 7 Ohio Supp 14

Pa—In re Pengelly's Estate, 97 A 2d 844, 374 Pa 358—In re Tunnell's Estate, 190 A 906, 325 Pa 554

In re Olmsted's Estate, 65 Pa Dist & Co 451, 59 Dauph Co 293  
—In re Kenin's Estate, 41 Pa Dist & Co 572, affirmed In re Kenin's Trust Estate, 23 A 2d 837, 343 Pa 549, and affirmed 23 A 2d 846, 343 Pa 567

In re Pengelly's Estate, Orph., 45 Berks Co 33—In re Kershner's Estate, Orph., 47 Berks Co 95, 5 Fiduciary 84

RI—Knowles v Metropolitan Life Ins Co, 197 A 459, 60 RI 197

Utah—Alexander v Zion's Sav Bank & Trust Co, 273 P 2d 173, 2 Utah 2d 317, opinion adhered to 287 P 2d 665

Vt—Warner v Burlington Federal Sav & Loan Ass'n, 49 A 2d 93, 114 Vt 463, 168 ALR 1265

68 C J p 621 note 55

25 Cal—Fritz v Thompson, 271 P 2d 205, 125 Cal App 2d 858

Iowa—Trustees of Synod of Reformed Presbyterian Church of North America v Horel, 16 NW 2d 209, 235 Iowa 281

Ky—Hines v Louisville Trust Co., 254 SW 2d 73

NJ—In re Brueck's Estate, 194 A 60, 122 NJ Eq 329, affirmed 199 A 61, 124 NJ Eq 62

NY—In re Hammer's Estate, 72 NYS 2d 636, affirmed 72 NYS 2d 410, 272 App Div 822

**Undelivered deed**

The fact that instrument was nev-

er delivered, and so had no vitality as a deed, does not allow it to be given operation as a will

Wis—Dexter v Witte, 119 NW 891, 138 Wis 74

26 Ky—Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 32 ALR 2d 1261

Or—Detsch v Detsch, 205 P 2d 180, 186 Or 1

27 US—United Bldg & Loan Ass'n v Garrett, DC Ark, 64 F Supp 460  
—Nail v American Nat Bank of Bristow, DC Okl, 21 F Supp 385, rehearing denied 22 F Supp 977, affirmed, CCA, Burgess v Nail, 103 F 2d 37

Ill—Robbins v Continental Nat Bank & Trust Co of Chicago, 58 NE 2d 254, 324 Ill App 422

Ky—Hines v Louisville Trust Co., 254 SW 2d 73

Minn—In re Soper's Estate, 264 NW 427, 196 Minn 60

Mo—Brumbaugh v Young, 144 SW 2d 823, 235 Mo App 643

Neb—Dahlke v Dahlke, 51 NW 2d 266, 155 Neb 169

NJ—Fidelity Union Trust Co v Hall, 6 A 2d 124, 125 NJ Eq 419

NY—Wnuk v Wnuk, 95 NYS 2d 254, affirmed 96 NYS 2d 687, 276 App Div 1102

Ohio—Routson v Hovis, 22 NE 2d 209, 60 Ohio App 536

Bennett v Donley, 17 Ohio Supp 100

Pa—In re Pengelly's Estate, 97 A 2d 844, 374 Pa 358—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499, 164 ALR 877—In re Reese's Estate, 177 A 792, 317 Pa 473

In re Olmsted's Estate, 65 Pa Dist & Co 451, 59 Dauph Co 293

In re Bossler's Estate, Orph., 41 Sch Leg Rec 188

Tex—Smith v Wayman, 224 SW 2d 211, 148 Tex 318

68 C J p 620 note 49.

some of its provisions contemplate a postponement of distribution and enjoyment of interests granted until after the settlor's death,<sup>28</sup> or although the trust was created in contemplation of death,<sup>29</sup> and the trust instrument made in lieu of a will<sup>30</sup>

In accordance with the view discussed in Trusts § 47 that the reservation by the settlor of such interests, estates, or powers does not prevent the

creation of a valid inter vivos trust, an instrument otherwise effective to create a valid inter vivos trust is not rendered testamentary by the fact that the settlor reserves a life estate,<sup>31</sup> the right to invade and consume the corpus of the trust,<sup>32</sup> power to revoke the trust in whole or part,<sup>33</sup> power to alter or modify the terms of the trust,<sup>34</sup> power to change the beneficiaries of the trust,<sup>35</sup> power to

#### **Vested or contingent interest**

If beneficiaries acquire interest, vested or contingent, during settlor's lifetime, transfer is not testamentary

Neb—Dahlke v Dahlke, 51 NW 2d 266, 155 Neb 169

28 US—United Bldg & Loan Ass'n v Garrett, DC Ark 64 F Supp 460—Nail v. American Nat Bank of Bristow, DC Okl 21 F Supp 385, rehearing denied 22 F Supp 977, affirmed, CCA, Burgess v Nail, 103 F 2d 37

Ark—Hughes v Coffey, 263 SW 2d 689, 222 Ark 945

Cal—Oakland Scavenger Co v Gandi, 124 P 2d 143, 51 Cal App 2d 69

DC—Liberty Nat Bank v Hicks, 173 F 2d 631, 84 US App DC 198, 9 ALR 2d 1355

Ill—Robbins v Continental Nat Bank & Trust Co of Chicago, 58 NE 2d 254 324 Ill App 422

Iowa—Trustees of Synod of Reformed Presbyterian Church of North America v Horel, 16 NW 2d 209, 235 Iowa 281

Ky—Hines v Louisville Trust Co, 251 SW 2d 73

Miss—Bryant v Sevier, 20 So 2d 582, 197 Miss 457

Mo—St Louis Uniformed Firemen's Credit Union v Haley, App, 190 SW 2d 636

Neb—Dahlke v Dahlke, 51 NW 2d 266 155 Neb 169

Pa—Murphy v C I T Corp, 33 A 2d 16, 347 Pa 591—In re Reese's Estate, 177 A 792, 317 Pa 473

Wis—Boyle v Kempkin, 9 NW 2d 589, 243 Wis 86

68 CJ p 620 note 19

#### **Trust to terminate at death**

Provision of trust declaration fixing termination of trust one year after death of settlor, did not make instrument testamentary in character or evidence an intent of settlor to effect a testamentary disposition of his property, under Arkansas law  
US—United Bldg & Loan Ass'n v. Garrett, DC Ark, 64 F Supp 460

29 Wash—Hanley v Most, 115 P 2d 933, 9 Wash 2d 429—Hamlin v Hamlin, 109 P 362, 59 Wash 182  
Wis—Koppelkam v First Wis Trust Co, 3 NW 2d 350, 240 Wis 254

30. Ill—Bear v Millikin Trust Co, 168 NE 349, 336 Ill. 366, 73 ALR

173—Patterson v McClenathan, 129 NE 767, 296 Ill 475

31 Ill—Kolze v Fordtran, 107 NE 2d 686, 412 Ill 161

Ky—Hines v Louisville Trust Co, 251 SW 2d 73—DeLeuil's Ex'rs v DeLeuil, 74 SW 2d 474, 255 Ky 406

Mass—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

Miss—Bryant v Sevier, 20 So 2d 582, 197 Miss 457

ND—Johnson v Weldy, 54 NW 2d 829

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

Routson v Hovis, 22 NE 2d 209, 60 Ohio App 536

Bennett v Donley, 17 Ohio Supp 100

Pa—In re Pengelly's Estate, 97 A 2d 844, 374 Pa 358—Damiani v Lobasco, 79 A 2d 268, 367 Pa 1—Murphy v C I T Corp, 33 A 2d 16, 347 Pa 591—In re Sheasley's Trust, 77 A 2d 448, 366 Pa 316—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499, 164 ALR 877

Tex—Cushmanberry v Profit, Civ App, 153 SW 2d 291, error refused

Vt—Smith v Deshaw, 78 A 2d 479, 116 Vt 441

Wis—Boyle v Kempkin, 9 NW 2d 589, 243 Wis 86

32 Ky—Hines v Louisville Trust Co, 251 SW 2d 73

Neb—Whalen v Swircin, 4 NW 2d 737, 141 Neb 650

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

Pa—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499 164 ALR 877

#### **Power to consume as equivalent to power to revoke**

With respect to determination as to whether trust instrument is testamentary in character, power to consume may be deemed equivalent of power to revoke

Pa—In re Pengelly's Estate, 97 A 2d 844, 374 Pa 358.

33 Ga—Wilson v Fulton Nat Bank of Atlanta, 4 SE 2d 660, 188 Ga 691—Corpus Juris cited in Wilder v Howard, 4 SE 2d 199, 203, 188 Ga 426

Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 417—Gurnett v Mutual

Life Ins Co of New York, 191 NE 250, 356 Ill 612

Mass—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

NY—Pinckney v City Bank Farmers Trust Co, 292 NYS 835, 249 App Div 375

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

Pa—In re Pengelly's Estate, 97 A 2d 844, 374 Pa 358—In re Sheasley's Trust, 77 A 2d 448, 366 Pa 316—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499, 164 ALR 877  
In re Lyon's Estate, 63 A 2d 415, 164 Pa Super 140

Vt—Smith v Deshaw, 78 A 2d 479, 116 Vt 441

Wis—Boyle v Kempkin, 9 NW 2d 589, 243 Wis 86—Koppelkam v First Wis Trust Co, 3 NW 2d 350, 240 Wis 254  
68 CJ p 621 note 58

34 Ga—Wilson v Fulton Nat Bank of Atlanta, 4 SE 2d 660, 188 Ga 691

Mass—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

NY—Pinckney v City Bank Farmers Trust Co, 292 NYS 835, 249 App Div 375

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

Pa—In re Sheasley's Trust, 77 A 2d 448, 366 Pa 316—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499, 164 ALR 877

Vt—Smith v Deshaw, 78 A 2d 479, 116 Vt 441

35. Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 417

Ky—Siter v Hall, 294 SW 767, 220 Ky 43

Mass—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

#### **Power of another to appoint beneficiaries**

A provision that the beneficiaries named in the trust instrument shall take only if settlor fails to designate other beneficiaries during his life, or if, after his death, his wife fails to designate other beneficiaries, is not testamentary

Ohio—Central Trust Co v Watt, supra.

supervise the investment of the trust fund,<sup>36</sup> or all or some of these interests, estates and powers,<sup>37</sup> unless the trustee retains such power to control the details of the administration of the trust as to make the purported trustee a mere agent of the settlor.<sup>38</sup> On the other hand an instrument purporting to create an inter vivos trust is testamentary in so far as it disposes of property after the

settlor's death where the interests and powers reserved by the settlor amount to the ownership of the fund and he retains full control of the trust property for his lifetime.<sup>39</sup> A fortiori, a purported inter vivos trust is not testamentary where the settlor does not reserve a power of revocation.<sup>40</sup>

*A settlor may name himself as sole trustee without making the trust testamentary,*<sup>41</sup> and he may

36 Kv—Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 32 ALR 2d 1261

Mass—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

#### Exoneration of trustee to all but settlor

A provision that the trustee need not account to any one but the settlor during the settlor's lifetime does not make the trust testamentary

NY—Application of Central Hanover Bank & Trust Co (Moland), 26 NYS 2d 924, 176 Misc 183, affirmed 32 NYS 2d 128, 263 App Div 809, affirmed Central Hanover Bank & Trust Co v Moland, 42 NE 2d 610, 288 NY 608

#### Third person given power to control investments

The powers given to broker to control investments of trust did not impair validity of gifts over to statutory next of kin or show that trust instrument was to take effect in a testamentary manner or make the trust a merely passive one, in view of important duties which were left to trustees

Mass—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

#### Settlor appointed manager of fund

Where settlor conveyed property to a corporation as trustee and vested management in a foundation to distribute certain amount of income to settlor for life and an amount for annuities and made balance payable to a college to establish a new philosophy and religion department and trustees appointed settlor manager of foundation and allowed him to deal with property in same manner after declaration of trust was executed as he had before, but there was no evidence that college understood declaration of trust was not intended to be presently operative and college was a party to declaration and operated under its terms and received payments, trust was not invalid on ground that it was not intended to be operative during settlor's lifetime

Cal—Davenport v Davenport Foundation, 222 P 2d 11, 36 Cal 2d 67

#### Settlor one of trustees

Where donor became one of the trustees and as such trustee was giv-

ing a large share in the management of the res, but this power resided in him as trustee not as donor, and others named as trustees were not his agents but trustees, the trust was not a "testamentary trust" which was required to be executed in accordance with statute of wills

NJ—Savings Inv & Trust Co v Little, 39 A 2d 392, 135 NJ Eq 546

37 Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 417

Mass—Leahy v Old Colony Trust Co, 93 NE 2d 238 326 Mass 49—Kerwin v Donaghy, 59 NE 2d 299, 317 Mass 559—National Shawmut Bank of Boston v Joy, 53 NE 2d 113, 315 Mass 457

Ohio—Central Trust Co v Watt, 38 NE 2d 185, 139 Ohio St 50

Cleveland Trust Co v White, 16 NE 2d 588, 58 Ohio App 339

Pa—In re Sheasley's Trust, 77 A 2d 448, 366 Pa 316—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499, 164 ALR 877

In re Kenin's Estate, 41 Pa Dist & Co 572, affirmed In re Kenin's Trust Estate, 23 A 2d 837, 343 Pa 549, and affirmed 23 A 2d 846, 313 Pa 567

In re Pengelly's Estate, Orph, 15 Berks Co 33—In re McKean's Trust, Orph, 1 Fiduciary 26

Vt—Smith v Deshaw, 78 A 2d 479, 116 Vt 441

So long as title passes to the trustee, extent of control retained by the settlor is immaterial, with respect to validity of the trust

Wis—Boyle v Kempkin, 9 NW 2d 589, 243 Wis 86 applying Michigan law

38. Ky—Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 32 ALR 2d 1261

NY—In re Fitzpatrick's Estate, 17 NYS 2d 280

Pa—In re Pengelly's Estate, 97 A 2d 844, 374 Pa 358—In re Shapley's Deed of Trust, 46 A 2d 227, 353 Pa 499, 164 ALR 877

#### Formality of transaction

In determining whether reserve powers are so great as to make trustee of an inter vivos trust an agent of the settlor, one of the factors to be considered is formality of the transaction, and if transfer to trustee was by deed formally executed and recorded the conclusion that trustee was also agent of settlor

would be less likely to be drawn than if transfer was less formally evidenced

Pa—In re Sheasley's Trust, 77 A 2d 448, 366 Pa 316

#### Power to control trustees limited by trust instrument

Under trust instrument reserving to settlor for life the net income from trust estate, and reserving to settlor the right during her lifetime to modify, amend or revoke the trust, and providing that as long as settlor was qualified trustee thereunder and subject to no disability trustees should exercise powers conferred upon them only upon written instructions of settlor, and giving trustees specific well-defined powers, power reserved by settlor to control trustees in administration of trust, which power could only be exercised within limits and in accordance with terms of trust instrument, was not of such degree as to reduce trustees to status of agents of settlor, and trust instrument was not testamentary

Ky—Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 32 ALR 2d 1261

39 Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 417

Ky—Corpus Juris cited in Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 917

Pa—In re Tunnell's Estate, 190 A 906, 325 Pa 554

In re Vederman's Estate, 78 Pa Dist & Co 207, 2 Fiduciary 596

In re Pengelly's Estate, Orph, 45 Berks Co 33

68 CJ p 621 note 59

Retention of control, possession, and right of revocation makes instrument testamentary

Colo—Dunham v Armitage, 48 P 2d 797, 97 Colo 216

40. Ky—Hines v Louisville Trust Co, 254 SW 2d 73

Tex—Eaton v Husted, 172 SW 2d 493, 141 Tex 349

Brainerd v First Nat Bank, Civ App, 169 SW 2d 802, modified on other grounds 174 SW 2d 953, 141 Tex 558—Cushenberry v Profit Civ App, 153 SW 2d 291, error reversed

41. Ky—Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 32 ALR 2d 1261

Ohio—Thomas v Dye, App, 127 NE 2d 228

also reserve a life interest<sup>42</sup> and a power of revocation,<sup>43</sup> but where the settlor declares himself trustee and reserves not only a life estate and power to revoke or modify the trust, but also power to deal with the trust property as he likes as long as he lives, the trust is testamentary<sup>44</sup>

*An inter vivos trust vesting the entire equitable estate in the settlor is not testamentary*<sup>45</sup>

*An insurance trust*, under which trustee is designated as beneficiary of insurance on settlor's life and agrees to distribute the proceeds in accordance with the settlor's instructions is not testamentary<sup>46</sup>

*Bank deposit.* Where, under the rules discussed in Trusts § 54, a deposit in a bank or other financial institution is made in such manner as to create a valid inter vivos trust, the transaction is not regarded as testamentary and need not comply with the statute of wills or meet the other requisites of a will in order to be valid and enforceable<sup>47</sup>. Conversely, if a valid inter vivos trust is not created, the transaction is testamentary in so far as it attempts to dispose of account after the depositor's death and is valid, if at all, as a will<sup>48</sup>

In re Barnes' Estate, Com Pl, 108 NE 2d 88, affirmed, App, 108 NE 2d 101

**Death of beneficiary before settlor's death**

A written declaration by purchaser of corporate stock that he held it in trust for named beneficiary and providing that the decease of the beneficiary before the death of the settlor should operate as a revocation of the trust was valid even though the interest of the beneficiary was contingent upon the existence of a certain state of the facts at the time of the settlor's death

Ill—Farkas v Williams, 125 NE 2d 600, 5 Ill 417

42. Ill—Farkas v Williams, supra

43. Ill—Farkas v Williams, supra

44. Ky—Dawson v Dawson's Adm'x, 272 SW 2d 666

Pa—In re Bullock's Estate, 79 Pa Dist & Co 389, 62 Dauph Co 128, 2 Fiduciary 19—In re Bullock's Estate, 79 Pa Dist & Co 389, 62 Dauph Co 128, 2 Fiduciary 19.

Vt—Smith v Deshaw, 78 A 2d 479, 116 Vt 441

45. Ohio—Central Trust Co v McCarthy, 57 NE 2d 126, 73 Ohio App 431

46. Conn—Sigal v Hartford Nat Bank & Trust Co, 177 A 712, 119 Conn 570.

Or—Gordon v Portland Trust Bank, 271 P 2d 653, 201 Or 648

Pa—Fidelity Trust Co v Union Nat Bank of Pittsburgh, 169 A 209, 313 Pa 467, certiorari denied Union Nat Bank of Pittsburgh v Fidelity Trust Co, 54 S Ct 530, 291 US 680, 78 L Ed 1068

SD—In re Albert Anderson Life Insurance Trust, 293 NW 527, 67 SD 393

47. Ga—Wilder v Howard, 4 SE 2d 199, 188 Ga 426

Mass—Greeley v O'Connor, 2 NE 2d 471, 204 Mass 527

NJ—Trust Co of New Jersey v Farawell, 11 A 2d 98, 127 NJ Eq 45

Pa—In re Pozzuto's Estate, 188 A 209, 124 Pa Super 93.

A "Totten trust" cannot be classified as a "will" nor can letters testamentary or letters of administration with the will annexed be issued thereon

NY—Murray v Brooklyn Sav Bank, 15 NYS 2d 915, 258 App Div 132

**Loan to be repaid to beneficiary**

Where money deposited in savings account in trust for depositor's grandnephew was loaned by depositor to beneficiary's parents under written agreement that in event of depositor's death before repayment of loan, note and collateral security therefor should revert to beneficiary, such agreement amounted to a "testamen-

**§ 144. — Instruments Creating Powers**

An instrument conferring a power which is not intended to have any effect until the death of the donor is testamentary in character

An instrument, creating and conferring a power, which is not intended to have any effect until the death of the donor, as distinguished from an instrument presently creating a power although providing for its exercise only after the donor's death, is testamentary in character, and inoperative unless executed in accordance with the statutes relating to wills<sup>49</sup>. An instrument directing a designated person to realize, out of property belonging to the maker of the instrument, a specified sum of money and to pay over or disburse it in a particular manner is a will, and not a mere power of sale or disposition, where it manifests an intention that, subject to such payments or disbursements, the maker's property shall pass and belong to such person at the former's death<sup>50</sup>. The exercise by will of a power to appoint the beneficiaries of an inter vivos trust does not give a testamentary character to the disposition of the trust fund<sup>51</sup>. It has been held that a contract with respect to the exercise of a power to appoint by will is testamentary in character<sup>52</sup>

tary disposition" good only when made by a valid will

NY—In re McCabe's Estate, 27 NYS 2d 127, 176 Misc 286

48. Ga—Guest v. Stone, 56 SE 2d 247, 206 Ga 239

Pa—Brown v Monaca Federal Sav & Loan Ass'n, 42 A 2d 50, 352 Pa 1

Vt—Warner v Burlington Federal Sav & Loan Ass'n, 49 A 2d 93, 111 Vt 463, 168 A L R 1265

**Writings by a depositor on his bank book envelope and on a separate piece of paper, stating manner of disposition of savings account, could not after depositor's death be given effect of creating a trust at the time of their execution or upon the death of depositor in favor of party named in writings, since to give them such an effect would be to contravene statutory requirements as to prerequisites of a written will**

Cal—In re Albert's Estate, 160 P 2d 538, 38 Cal App 2d 12

49. NJ—Remer v Benedict, 58 A 382, 81 NJ Eq 21, affirmed 63 A 383, 81 NJ Eq 222.

50. Wash—North End Workers' Supply Co-Op Ass'n v. Sablich, 198 P. 738, 116 Wash 111.

68 CJ p 621 note 62.

51. NY—In re Norton's Trust, 122 NYS 2d 705

52. N.J.—Marx v. Rice, 65 A 2d 18, 1 N.J. 574, 9 A L R.2d 584.

## § 145. — Assignments

An assignment is not rendered testamentary by the fact that its subject matter is such that the assignee will not realize the full benefit of the assignment until the death of the assignor

An assignment which passes a present interest is not rendered testamentary by the fact that its subject matter, as in the case of a policy of life insurance, or the terms or conditions on which it is made, are such that the assignee will not realize the full benefit of the assignment until the death of the assignor<sup>53</sup> Thus, the assignment of a mortgage, with a reservation of the interest for the assignor's lifetime is not testamentary<sup>54</sup> An assignment of so much of the principal of a note as was unpaid at the assignor's death is a present transfer and not a testamentary one<sup>55</sup> Where an assignment passes no present interest, but only an interest to take effect at the assignor's death, it is testamentary in character, and inoperative where not executed in accordance with the statutes governing testamentary dispositions<sup>56</sup> Thus, an instrument disposing or attempting to dispose of a bond or note, or its proceeds, after the death of the person executing such instrument is testamentary in nature, and cannot be given effect unless properly executed as a will<sup>57</sup> An assignment of the interest which the assignor may receive as heir, legatee, or devisee of another may be a presently operative transfer and not a testamentary disposition,<sup>58</sup> the test is whether the assignment is presently operative or is merely ambulatory and revocable until the death of the assignor<sup>59</sup>

## § 146 — Bills of Sale

An instrument which passes a present interest in personal property is a bill of sale rather than a will, even though such interest is not to take effect in possession or enjoyment until the death of the seller

The essential difference between a will and a bill of sale is that the former takes effect only at the death of the maker, while the latter must take effect on its execution or not at all<sup>60</sup> As in the case of a deed, the intention of the maker of an instrument, as manifested therein, must govern in determining whether it is a will or a bill of sale<sup>61</sup> An instrument which passes or is in form sufficient to pass a present interest in personal property is a bill of sale, rather than a will, even though such interest is not to take effect in possession or enjoyment until the death of the vendor,<sup>62</sup> and a want of delivery, preventing the instrument from being effective as a bill of sale, does not allow it to operate as a will<sup>63</sup> Where, however, an instrument, although partly or wholly in the form of a bill of sale, passes no present interest or title and is intended to take effect only at the death of the vendor, it is testamentary, and ineffective unless properly executed as a will.<sup>64</sup>

## § 147 — Gifts

If a purported gift does not take effect as an executed and completed transfer to the donee, either legally or equitably, during the life of the donor, it is a testamentary disposition, good only when made by a valid will

Although possessing some characteristics in common, wills and gifts are distinguishable in that under a will no title or interest passes to the donee or beneficiary until the death of the testator, while the title passes immediately and irrevocably in the case of a gift inter vivos<sup>65</sup> Whether a transaction is a gift or is testamentary in character depends on the intention of the donor<sup>66</sup> Where a gift is made effective in the lifetime of the decedent and he has divested himself of all power to recall it, such transaction is a gift inter vivos, and not testamentary in its nature,<sup>67</sup> even though a

53. Ill.—Gray v Penn Mut Life Ins Co of Philadelphia, 126 NE 2d 109, 5 Ill App 2d 511

68 C.J. p 622 note 61

54. N.J.—Kohl v Robbins, 173 A 146, 12 N.J Misc 553

55. Utah—Thatcher v Merriam, 210 P 2d 266

56. Cal.—Noble v Garden, 79 P 583, 146 Cal 225, 2 Ann Cas 1001, 10 Prob Rep Ann. 350  
68 C.J. p 622 note 65

57. Ill.—Jennings v Neville, 51 NE 202, 180 Ill 270—Comer v. Comer, 11 NE 816, 120 Ill. 120.  
68 C.J. p 622 note 66

58. Ill.—Crowley v Engelke, 68 NE 2d 211, 394 Ill. 261.

59. Ill.—Crowley v Engelke, supra.

60. Colo.—Taylor v Wilder, 165 P. 766, 63 Colo. 282.

61. Mich.—In re Lloyd's Estate, 239 NW 390, 256 Mich 305

Tex.—Ramirez v Vela, Civ App, 102 S W 2d 447, error dismissed

62. Tex.—Ramirez v Vela, supra.  
68 C.J. p 622 note 71

#### Reservation of life estate

An instrument whereby one party purported to sell, assign, transfer and deliver certain personalty, the seller, however, reserving a life estate therein, in consideration for buyer's agreement to set up certain trusts and pay certain annuities on seller's death, was not invalid as being "testamentary"

Ind.—Van Orman v Van Orman, 41 NE 2d 694, 111 Ind App. 394

63. Mich.—In re Lloyd's Estate, 239 NW 390, 256 Mich 305.

64. Miss.—Beasley v Beasley, 171 So 680, 177 Miss 522

68 C.J. p 622 note 74

65. U.S.—Speaker v Keating, CCA NY, 122 F 2d 706

Tex.—O'Donnell v Halladay, Civ App, 152 S W 2d 847, error refused

66. Colo.—Johnson v Hilliard, 160 P 2d 386, 113 Colo 548

Minn.—Innes v Potter, 153 NW 601, 130 Minn 320, 3 A L R 896

NY—McCarthy v Pieret, 24 NE 2d 102, 281 NY 407, reargument denied 27 NE 2d 207, 282 NY 800

In re Lorch's Estate, 33 NYS 2d 157—In re Fitzpatrick's Estate, 17 NYS 2d 280.

28 C.J. p 624 note 78

67. Cal.—Rypka v Field, 115 P 2d 521, 46 Cal App 2d 225

Colo.—Johnson v Hilliard, 160 P 2d 386, 113 Colo 548—Corpus Juris

life interest is reserved to the maker or the enjoyment of the gift is postponed until his death<sup>68</sup>

If the gift does not take effect as an executed and completed transfer to the donee, either legally or equitably, during the life of the donor, it is a testamentary disposition, good only when made by a valid will<sup>69</sup> A transaction ineffective as a gift because not completed or because of lack of delivery cannot be given effect as a will unless it meets all of the requisites of a will<sup>70</sup> An instrument, otherwise effective as a will, is not to be denied probate merely because it contains some language indicating an intention to make a present transfer<sup>71</sup> A writing amounting merely to an expression of intention to make a gift inter vivos is not to be treated as testamentary merely because such intention is not carried out in the lifetime of the maker,<sup>72</sup> and, on the other hand, a provision in an instrument in the form of a will expressing the maker's desire, that the beneficiary take care of him

during his lifetime does not make the disposition a gift inter vivos<sup>73</sup> The fact that an instrument of gift is also sufficient as a will does not prevent it from operating as the former.<sup>74</sup>

The nature of a gift causa mortis as a testamentary transaction is discussed in Gifts §§ 72, 73 A gift causa mortis is distinguished from a legacy infra § 1125

*Indorsement of credit on bill or note* An indorsement, by way of gift, of a credit on a bill or note is not testamentary, or invalid because not complying with the statutes relating to the execution of wills, where it is intended to take effect at the time the indorsement or entry is made,<sup>75</sup> but it is testamentary where it is to take effect only on the death of the person making the indorsement or entry<sup>76</sup> Thus, a direction that the amount of the credit shall be charged to the maker of the note as an advancement renders the indorsement testamentary, since it indicates an intention to make a dis-

cited in *Burton v Burton*, 69 P 2d 307, 308, 100 Colo 567

Ill—*Haskell v Art Institute of Chicago*, 26 NE 2d 736, 304 Ill App 393

Md—*Bierau v Bohemian Bldg, Loan & Sav Ass'n, "Slavie"* of Baltimore City, 109 A 2d 120, 205 Md 456

Mo—*Benton v Smith*, App, 171 S W 2d 767

NY—*Corpus Juris* cited in *McCarthy v Pieret*, 24 NE 2d 102, 103, 281 NY 407, reargument denied 27 NE 2d 207, 282 NY 800

In re *Kilgallen's Estate*, 123 N Y S 2d 827, 204 Misc 558, affirmed 141 N Y S 2d 511, 285 App Div 1151  
In re *Hall's Will*, 120 N Y S 2d 188, affirmed 135 N Y S 2d 295, 284 App Div 1013—*Corpus Juris* cited in *In re Lorch's Estate*, 33 N Y S 2d 157, 168—In re *Fitzpatrick's Estate*, 17 N Y S 2d 280

Ohio—*MacLean v J S MacLean Co*, 123 NE 2d 761

Pa—*Reynolds v Maust*, Com Pl, 87 Pittsb Leg J 339, affirmed 15 A 2d 853, 142 Pa Super 109

68 CJ p 622 note 79—28 CJ p 624 notes 75, 79

68. Iowa—In re *Conner's Estate*, 36 NW 2d 833, 240 Iowa 479

Minn—*Innes v Potter*, 153 NW 604, 130 Minn 320, 3 A L R 896

Mo—*Wahl v Wahl*, 206 SW 2d 334, appeal transferred 200 SW 2d 597, 357 Mo 89

Pa—*Corpus Juris* cited in *In re Lewis' Estate*, 11 A 2d 667, 668, 139 Pa Super 83

In re *Murphy's Estate*, 51 Pa Dist & Co 579

Tex—*Peterson v Weiner*, Civ App, 71 SW 2d 544, error refused  
68 CJ p 622 note 80

69 Ala—*Dauphin v Gathin*, 53 So 2d 580, 256 Ala 34

Colo—*Urbancich v Jersin*, 226 P 2d 316, 123 Colo 88—*Johnson v Hilliard*, 160 P 2d 386, 113 Colo 548

Fla—*Leonard v Campbell*, 189 So 839, 138 Fla 405

Ga—*Guest v Stone*, 56 SE 2d 247, 206 Ga 239

Idaho—*Zimmerman v Fawkes*, 219 P 2d 951, 70 Idaho 389

Ill—In re *Waggoner's Estate*, 125 NE 2d 154, 5 Ill App 2d 130—*Warden's Estate v Pelling*, 20 NE 2d 143, 299 Ill App 353

Ky—*Dawson v Dawson's Adm'x*, 272 SW 2d 666

Mo—*Wahl v Wahl*, 206 SW 2d 334, appeal transferred 200 SW 2d 597, 357 Mo 89

NJ—*Bendix v Hudson County Nat Bank*, 59 A 2d 253, 142 N J Eq 487—*Hackensack Trust Co v Nowacki*, 3 A 2d 615, 124 N J Eq 565

NY—*Corpus Juris* quoted in *McCarthy v Pieret*, 24 NE 2d 102, 103, 281 NY 407, reargument denied 27 NE 2d 207, 282 NY 800

In re *Earley's Will*, 96 N Y S 2d 716, 198 Misc 727—In re *Kessler's Estate*, 18 N Y S 2d 772, 173 Misc 716

*Corpus Juris* quoted in *In re Lorch's Estate*, 33 N Y S 2d 157, 168

—*Corpus Juris* quoted in *In re Fitzpatrick's Estate*, 17 N Y S 2d 280, 287

Ohio—*Waltenberger v Pearson*, 77 NE 2d 491, 81 Ohio App 51

Pa—In re *Brown's Estate*, 22 A 2d 821, 343 Pa 230

Solomon v National Bank, Com Pl, 87 Pittsb Leg J 142

*Axton v Harding*, Com Pl, 12 Fay L J 211—In re *Elliott's Estate*, Orph, 66 York Leg Rec 194

Tex—*Olive v Olive*, Civ App, 231 SW 2d 480

68 CJ p 622 note 81—28 CJ p 621 note 76

70 US—*Speaker v Keating*, C C A N Y, 122 F 2d 706

Ala—*Smith v Eshelman*, 180 So 313, 235 Ala 588

NY—In re *Watson's Estate*, 30 N Y S 2d 577, 177 Misc 308

In re *Tobin's Estate*, 113 N Y S 2d 831—In re *Hooley's Estate*, 34 N Y S 2d 278

68 CJ p 622 note 82

71. Pa—In re *Eaby's Estate*, 173 A 174, 315 Pa 161

#### Holographic instrument

Instrument, written by hand of deceased, and reciting "I bequeath to my sister all I have," showed on its face that it was intended as a holographic will and not a donation inter vivos, "bequeath" meaning to give or leave by will, to give by testament, to hand down, to transmit  
La—*Succession of Sutherland*, 160 So 794, 181 La 1011

72. Pa—In re *Kauffman's Estate*, 129 A 98, 283 Pa 375

73. La—*Succession of Nelson*, 112 So 298, 163 La 458

74. Cal—In re *Escolle's Estate*, 25 P 2d 860, 134 Cal App 473

75. Tenn—*Condrey v Coffey*, 43 S W 2d 928, 163 Tenn 508

76. Pa—*Estate of Kohl*, 28 Pa Co 552, 19 Montg Co 182

position pro tanto to take effect at death<sup>77</sup> Similarly, an indorsement of credit accompanied by a statement that the amount of such credit is all the maker of the note shall receive out of the holder's estate, and that the balance of his estate is reserved for distribution to other persons, is testamentary in character<sup>78</sup>

### § 148. — Other Instruments

Provisions as to the disposition of the proceeds of a life insurance policy are ordinarily not regarded as testamentary

The designation of a beneficiary or a change in beneficiary of life insurance or the like is not a testamentary disposition of property, and not within the statute of wills,<sup>79</sup> particularly as during the lifetime of the insured there is no specific property owned by him or to which he is entitled, and instead of the designation of the beneficiary being a disposition of property, it is the mere naming of a person for whose benefit a contract is made<sup>80</sup> A contract whereby one agrees to name another as beneficiary of his life insurance policy is not a testamentary transaction<sup>81</sup> An agreement by the beneficiary of a policy with the owner to pay part of the proceeds of the policy to another is not testamentary<sup>82</sup>

Where it is agreed between the insurer and the beneficiary that the insurer shall retain the proceeds of the policy subject to the demand of the

beneficiary, and in the interim, pay the interest or income to the beneficiary, a provision as to the disposition of the fund on the beneficiary's death is not testamentary<sup>83</sup> and is valid and enforceable although not made in compliance with the statute of wills<sup>84</sup> An annuity policy providing for payment of income to insured for life and payment of principal to designated beneficiary on death is not a testamentary disposition,<sup>85</sup> even though the insured retains the right to change the beneficiary or to cash in the policy<sup>86</sup>

*Joint tenancy, joint bank account* Ordinarily, the creation of a joint tenancy between one who is the sole owner and another is not a testamentary transfer<sup>87</sup> Where a husband transfers property to himself and his wife in joint tenancy with the understanding that the wife is to have no interest in the property until she survives him, the transfer is testamentary,<sup>88</sup> but where the intention is to make a present gift of a joint interest, the transfer is not testamentary even though the husband is to retain sole control of the property until his death<sup>89</sup> The creation of a joint bank account by one person for himself and another, as joint owners, with right of survivorship, is not a will, and not subject to the statutes relating to the execution of wills, where the other joint owner's interest in, or title to, the account arises or vests immediately,<sup>90</sup> but the rule is otherwise if full domin-

77 Tenn—Condrey v Coffey, 43 S W 2d 928, 163 Tenn 508

78 Tenn—Condry v Coffey, supra

79. US—Cors v State Mut Life Assur Co, C A Ohio, 196 F 2d 625 N Y—*Corpus Juris* cited in Bayreuther v LaGuardia, 25 NYS 2d 620, 621, 176 Misc 547

Wash—Occidental Life Ins Co v Powers, 74 P 2d 27, 192 Wash 475, 114 A L R 531  
68 C J p 624 note 97

80 N J—In re Koss' Estate, 150 A 360, 106 N J Eq 323

81. Mass—Massachusetts Linotyping Corp v Fielding, 43 NE 2d 521, 312 Mass 147

82. S C—Legrande v Legrande, 182 SE 432, 178 SC 230, 102 A L R 582

83. US—Mutual Ben Life Ins Co v Ellis, CCANY, 125 F 2d 127, 138 A L R 1478, certiorari denied 62 S Ct 945, 316 US 665, 86 L Ed 1741

N Y—Hall v Mutual Life Ins Co of N Y, 122 NYS 2d 239, 282 App Div 203, affirmed 119 NE 2d 598, 306 NY 909

Wash—Toulouse v New York Life

Ins Co, 245 P 2d 205, 40 Wash 2d 538

84. US—Mutual Ben Life Ins Co v Ellis, CCANY, 125 F 2d 127, 138 A L R 1478, certiorari denied 62 S Ct 945, 316 US 665, 86 L Ed 1741

85. Mo—Kansas City Life Ins Co v Rainey, 182 SW 2d 624, 353 Mo 477, 155 A L R 168

86 Mo—Kansas City Life Ins Co v Rainey, supra

87. Me—Strout v Burgess, 68 A 2d 241, 144 Me 263, 12 A L R 2d 939

88. Mass—MacLennan v MacLennan, 55 NE 2d 928, 316 Mass 593

89. Mass—MacLennan v MacLennan, supra

#### Invalidity avoided

An interpretation which would void as being testamentary an arrangement whereunder postal savings certificates were to be purchased with plaintiff's money in name of plaintiff and his wife so that survivor would take would be avoided if possible  
Mass—Zambunos v Zambunos, 85 N E 2d 328, 324 Mass 220

90. Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161.

Ill—Stewart v Sunagel, 68 NE 2d 268, 394 Ill 209

Mass—Zambunos v Zambunos, 85 N E 2d 328, 324 Mass 220—Ball v Forbes, 49 NE 2d 898, 314 Mass 200—Sullivan v Hudgins, 22 NE 2d 43, 303 Mass 442—Castle v Wightman, 20 NE 2d 436, 303 Mass 74—Goldston v Randolph, 199 NE 896, 293 Mass 253, 103 A L R 1117—Batal v Buss, 199 NE 750, 293 Mass 329

Miss—In re Lewis' Estate, 13 So 2d 20, 194 Miss 480

N Y—In re Lorch's Estate, 33 NYS 2d 157

Ohio—Guitner v McEowen, App, 124 NE 2d 744—In re Jones' Estate, App, 122 NE 2d 111

Pa—In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83—In re Culhane's Estate, 2 A 2d 567, 133 Pa Super 339, affirmed 5 A 2d 377, 334 Pa 124

68 C J p 623 note 94

#### Joint account made in consideration of promise to maintain

(1) Instrument by which decedent had during his lifetime declared his savings account on deposit with building association to be thereafter a joint account in names of himself



ion over the account is retained by the depositor during his life, and the benefit to the other person is intended to arise only at the former's death,<sup>91</sup> even though in the meantime such other person is authorized, as the depositor's agent, to make withdrawals from the account<sup>92</sup>

*A transfer of a bank deposit* which is not to take effect until the death of the transferer is testamentary in character and is ineffective unless it meets the requisites of a will<sup>93</sup>

*A letter of instructions*, which contained directions to be effective only in case of the writer's death is a testamentary writing and is ineffective unless it meets the requisites of a will<sup>94</sup>

### § 149. — Evidence as to Character of Instrument

Where the character of the instrument is doubtful, extrinsic evidence of the circumstances surrounding its

making is admissible to aid in determining whether the instrument is testamentary or of an inter vivos nature

In determining whether an instrument is of a testamentary character, its contents may be examined,<sup>95</sup> and the question whether the writing was intended by the maker to be his will or to be an instrument of some other character should, if possible, be determined from the face of the instrument<sup>96</sup> The presumption is against the testamentary character of an instrument neither signed nor written by the deceased<sup>97</sup> Where the character of the instrument is doubtful, or its nature is uncertain, extrinsic evidence of the circumstances surrounding its making is admissible to aid in determining the question,<sup>98</sup> but where a writing is on its face an instrument of nontestamentary character, and is not ambiguous or equivocal in form, parol evidence is not admissible to show that it was intended to be a will,<sup>99</sup> and, similarly, it has been held that where

and his sister, in absence of execution in conformity with statute of wills, could not operate as valid bequest of account to decedent's sister  
D C—Murray v Gadsden, 197 F 2d 194, 91 US App DC 38, 33 A L R 2d 554

(2) Agreement whereby deceased placed his savings deposit in a joint account payable to himself and another who, in consideration of deposit, agreed to care for deceased until his death and which deposit, by agreement, was made payable to either party or the survivor, was held to constitute a valid transfer of deposit by deceased to other joint depositor as against contention that agreement was invalid because of intent to make a testamentary disposal of property without complying with conditions of statute of wills  
Me—Saco & Biddeford Sav Ins v Johnston, 180 A 322, 133 Me 445

91. US—Cashman v Mason, D C Minn, 72 F Supp 487, affirmed, C C A, 166 F 2d 693

Ala—Clark v Young, 21 So 2d 331, 246 Ala 529

D C—Murray v Gadsden, 197 F 2d 194, 91 US App DC 38, 33 A L R 2d 554

Gibson v Industrial Bank of Washington, Mun App, 36 A 2d 62

Fla—Webster v St Petersburg Federal Sav & Loan Ass'n, 20 So 2d 400, 155 Fla 412

Ill—In re Schneider's Estate, 127 N E 2d 445, 6 Ill 2d 180

Mass—Zambunos v Zambunos, 85 N E 2d 323, 324 Mass 220

NH—Packard v Foster, 56 A 2d 925, 95 NH 47—New Hampshire Sav Bank v McMullen, 185 A 158, 88 NH 123

NJ—Stiles v Newschwander, 54 A 2d 767, 140 N J Eq 591—Rush v Rush, 49 A 2d 238, 138 N J Eq 611  
Pa—Onofrey v Wolliver, 40 A 2d 35, 351 Pa 18, 155 A L R 1074  
RI—Wyatt v Moran, 103 A 2d 801—McCartin v Devine, 17 A 2d 864, 66 R I 100—Weber v Harkins, 13 A 2d 380, 65 R I 53  
68 C J p 623 note 95

92. NJ—Morristown Trust Co v Capstick, 106 A 391, 90 N J Eq 22, affirmed 108 A 926, 91 N J Eq 152

93. Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161  
Neb—Young v McCoy, 40 N W 2d 540, 152 Neb 138

94. NY—In re Ryan's Will, 52 N Y S 2d 502

#### Provision for devolution of property on intestacy

A paper, stating that, in case of signer's death without having made a will, he wished that money derived from certain gas wells, in which he owned fractional interest, be paid to named person, was "testamentary" in character, though in form of letter addressed to trustee for collection and distribution of proceeds of sale of gas produced from such wells  
Pa—In re Wenz' Estate, 29 A 2d 13, 345 Pa 393

95. Mich—Mayhew v Wilhelm, 229 N W 459, 249 Mich 640

Evidence in proceedings for probate, establishment, or annulment of will see infra § 383 et seq

96. Mo—Kansas City Life Ins Co v Rainey, 182 S W 2d 624, 353 Mo 477, 155 A L R 168

Tex—Payne v Brown, Civ App, 172 S W 2d 352, reversed on other grounds 176 S W 2d 306, 142 Tex 102

68 C J p 624 note 2

97. Tenn—Taylor v Taylor, 14 Tenn App 101

98. Cal—In re Janes' Estate, 116 P 2d 438, 18 Cal 2d 512

In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38—In re Logan's Estate, 84 P 2d 245, 29 Cal App 2d 60

Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161

Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

Iowa—Smith v Fay, 293 N W 497, 228 Iowa 868

Mich—Benton Harbor Federation of Women's Clubs v Nelson, 3 N W 2d 844, 301 Mich 465

Miss—Baker v Baker's Estate, 24 So 2d 841, 199 Miss 388—Kinard v Whites, 167 So 636, 175 Miss 480

Mo—Mizell v Osmon, 189 S W 2d 306, 354 Mo 321—Merz v Tower Grove Bank & Trust Co, 130 S W 2d 611, 344 Mo 1150

NY—McCarthy v Pieret, 24 N E 2d 102, 281 N Y 407, reargument denied 27 N E 2d 207, 282 N Y 800

Pa—Appeal of Thompson, 100 A 2d 69, 375 Pa 193, 40 A L R 2d 694—In re Wenz' Estate, 29 A 2d 13, 345 Pa 393

In re Conlin's Estate, 89 Pa Dist & Co 318

Tex—Harper v Meyer, Civ App, 274 S W 2d 904, error refused no reversible error

Vt—Scott v Beland, 45 A 2d 611, 114 Vt 383

68 C J p 624 note 3

99. Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

Pa—Appeal of Thompson, 100 A 2d 69, 375 Pa 193, 40 A L R 2d 694  
In re Fay's Estate, 30 Pa Dist & Co 640

68 C J p 624 note 4.

an instrument purporting to be a will is fair and regular on its face, and properly executed as a will, parol evidence is ordinarily inadmissible to show that it was not intended as such,<sup>1</sup> although on this point there is also authority to the contrary.<sup>2</sup>

Where extrinsic evidence is admissible, the general rules of evidence govern as to what evidence is admissible.<sup>3</sup> A preamble written on the same sheet with a doubtful or ambiguous instrument must be read as a part of it, in determining its character.<sup>4</sup> In determining whether an instrument is a will or a marriage settlement the fact that the maker's wife acquiesced therein is immaterial.<sup>5</sup>

The execution of an instrument contemporaneously with the execution of a will is evidence that the instrument was not executed with testamentary intent.<sup>6</sup> It has been said that where an instrument is imperfect and equivocal in form, the presumption is against its operating as a will.<sup>7</sup>

*Weight and sufficiency* In particular cases the evidence has been held to show an instrument to be of testamentary nature, or to have been intended to operate as a will,<sup>8</sup> or to be an instrument of a different character,<sup>9</sup> as a deed,<sup>10</sup> a declaration of trust,<sup>11</sup> a contract,<sup>12</sup> a promissory note,<sup>13</sup> or a gift.<sup>14</sup>

**Failure to employ dispositive words** is not of itself sufficient to compel conclusion that instrument is of such a nontestamentary character that parol evidence may not be introduced to show its true character:

Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

1 Ala—Killian v Nappier, 12 So 2d 402, 244 Ala 130

Cal—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

Pa—Appeal of Thompson, 100 A 2d 69, 375 Pa 193, 40 A L R 2d 694  
68 C J p 624 note 5

2 Va—Clark v. Hugo, 107 S E 730, 130 Va 99

3 Cal—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

Ill—Barber v Barber, 13 N E 2d 257, 368 Ill 215—Steinke v Sztanka, 4 N E 2d 472, 364 Ill 334

#### Statements of decedent

(1) Statements of decedent made prior to writing relied on as a will are admissible as an exception to the 'hearsay' rule, since they involve a future plan or design, but statements made after the writing are not within such recognized exception

Cal—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

(2) Declarations of testatrix, whether made before, at, or after execution of will, may be received to show whether she did or did not regard instrument as a will

Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

(3) Grantor's direction that deed be put of record was entitled to be considered by court in arriving at finding as to intent as expressed in the deed

N M—Westover v Harris, 137 P 2d 771, 47 N M 112

4 S C—Hydrick v Hydrick, 141 S E 156, 142 S C 531

5 Cal—In re Hueler's Estate, 278 P 1031, 207 Cal 391.

6 Cal—In re Logan's Estate, 84 P 2d 245, 29 Cal App 2d 60

7 Ala—Self v Self, 103 So 591, 212 Ala 512

8 Ariz—In re Morrison's Estate, 103 P 2d 669, 55 Ariz 504

Cal—In re Janes' Estate, 116 P 2d 438, 18 Cal 2d 512

Mademann v Sexauer, 256 P 2d 34, 117 Cal App 2d 400—Counter v

Counter, 232 P 2d 551, 104 Cal App 2d 786—Gerard v Gerard, 145 P 2d

702, 62 Cal App 2d 672

Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

Ill—Stanford v Stanford, 30 N E 2d 275, 371 Ill 211—Steinke v

Sztanka, 4 N E 2d 472, 364 Ill 334

Iowa—In re Mathews' Estate, 12 N W 2d 162, 234 Iowa 188

Ky—Elrod v Schroader, 88 S W 2d 12, 261 Ky 491

Mass—Boyle v Owens, 93 N E 3d 404, 326 Mass 163

Miss—Kinard v Whites, 167 So 636, 175 Miss 480

Mo—Merz v Tower Grove Bank & Trust Co, 130 S W 2d 611, 344 Mo

1150

N H—New Hampshire Sav Bank v McMullen, 185 A 158, 88 N H 123

N J—Stiles v Newschwander, 54 A 2d 767, 140 N J Eq 591—In re Ri-

land's Estate, 30 A 2d 902, 133 N J Eq 152

N Y—In re Baker's Will, 90 N Y S 2d 489, 195 Misc 477—In re Rosen-

thal's Estate, 25 N Y S 2d 72, 175 Misc 771, affirmed 27 N Y S 2d 994,

262 App Div 706, appeal denied 29 N Y S 2d 506, 262 App Div 833

Okl—Johndrow v Johndrow, 186 P 2d 325, 199 Okl 363

R I—Millman v Streeter, 19 A 2d 254, 66 R I 341, reargument denied

21 A 2d 559, 67 R I 218—Lockwood v Rhode Island Hospital Trust Co,

6 A 2d 707, 62 R I 494

Tenn—Duncan v Peebles, 192 S W 2d 235, 28 Tenn App 592

Tex—Brown v Payne, 176 S W 2d 306, 142 Tex 102  
68 C J p 624 note 10

9 Cal—In re Logan's Estate, 84 P 2d 245, 29 Cal App 2d 60

Md—Dietrich v Morgan, 20 A 2d 175, 179 Md 553

Mass—Goldston v Randolph, 199 N E 896, 293 Mass 253, 103 A L R

1117

Mich—Geisel v Burg, 276 N W 904, 283 Mich 73

Mont—In re Augestad's Estate, 106 P 2d 1087, 111 Mont 138

Or—Nunrer v Erickson, 51 P 2d 839, 151 Or 575

Pa—In re Glass' Estate, 30 Pa Dist & Co 469

R I—Dutra v Davis, 38 A 2d 471, 70 R I 318

Tex—Cushenberry v Profit, Civ App, 153 S W 2d 291, error refused

10 Cal—Huhtala v Huhtala, 186 P 2d 456, 82 Cal App 2d 557—Ro-

man Catholic Bishop of San Diego v Lawrence, 129 P 2d 931, 54 Cal.

App 2d 730

Iowa—Keune v McCauley, 293 N W 25, 228 Iowa 607

Mich—Tackaberry v Monteith, 295 N W 236, 295 Mich 487

Mont—Walsh v Kennedy, 147 P 2d 425, 115 Mont 551

Mo—Claik v Skinner, 70 S W 2d 1094, 334 Mo 1190

N M—Westover v Harris, 137 P 2d 771, 47 N M 112

Okl—Shaw v Shaw, 282 P 2d 748

Tex—Cushenberry v Profit, Civ. App, 153 S W 2d 291, error refused.

68 C J p 624 note 11

11. Mass—O'Loughlin v Prender-

gast, 168 N E 96, 269 Mass 41

N Y—In re Ford's Estate, 108 N Y. S 2d 122, 279 App Div 152, affirmed

107 N E 2d 87, 304 N Y 598

12 N Y—In re Karlinski's Estate, 38 N Y S 2d 297, 180 Misc 44

13. Colo—Brothe v Zaiss, 183 P 2d 561, 116 Colo 472

68 C J p 624 note 13

14. Mass—Zambunos v Zambunos, 85 N E 2d 328, 324 Mass 220

Mo—In re Lindhorst's Estate, 270 S W 150, 216 Mo App 473.

## § 150. What Law Governs

- a As between laws of different jurisdictions
- b As between laws in force at time of execution and time of testator's death

## a. As between Laws of Different Jurisdictions

In the absence of an expressed intent or a statute to the contrary, the validity of a will with respect to personality is governed by the law of the testator's last domicile, and with respect to realty, by the law of the place where the realty is situate, the place of execution being without legal significance or effect

In the absence of an expressed intent<sup>15</sup> or a statute otherwise providing, the validity of a will with

respect to personal property, wherever situate is governed by the law of the testator's last domicile,<sup>16</sup> rather than by the law of the state where the residuary legatees are domiciled or have their situs,<sup>17</sup> whether in trust or otherwise<sup>18</sup> It has been held that the law of the testator's domicile at the time of his death not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will, without regard to the place either of birth, or death, or the situation of the property at that time<sup>19</sup> With respect to disposition of realty, the validity of the will is governed by the law of the place where the realty is situate,<sup>20</sup> whether in trust or other-

15. NJ—In re Pfizer's Estate, 110 A 2d 40, 33 N J Super 242, affirmed 110 A 2d 54, 17 N J 40
- NY—In re Tabbagh's Estate, 3 N Y S 2d 542, 167 Misc 156
- 16 US—Proctor v White, D C Mass, 28 F Supp 161
- Cal—In re Sloan's Estate, 46 P 2d 1007, 7 Cal App 2d 319
- Del—Equitable Trust Co v Ward, 48 A 2d 519, 29 Del Ch 206
- Ill—Sternberg v St Louis Union Trust Co, 68 NE 2d 892, 394 Ill 452, 169 A L R 545
- Ind—Duckwall v Lease, 20 NE 2d 204, 106 Ind App 664
- La—Jarel v Moon's Succession, App, 190 So 867
- Me—U S Trust Co of N Y v Boshkoff, 90 A 2d 713, 148 Me 134
- Md—Fletcher v Safe Deposit & Trust Co, 67 A 2d 386, 193 Md 400
- Mass—New England Trust Co v Wood, 93 NE 2d 547, 326 Mass 239
- Lee v Monks, 62 NE 2d 657, 318 Mass 513, appeal dismissed 66 S Ct 492, 326 U S 696, 90 L Ed 410
- Minn—In re Kimmel's Estate, 258 N W 304, 193 Minn 233
- NJ—In re Pfizer's Estate, 110 A 2d 40, 33 N J Super 242, affirmed 110 A 2d 54, 17 N J 40
- Redmond v New Jersey Historical Soc, 18 A 2d 275, 129 N J Eq 57, modified on other grounds 28 A 2d 189, 132 N J Eq 464
- In re Winter's Estate, 47 A 2d 548, 24 N J Misc 172
- NY—In re Merritt's Estate, 75 N Y S 2d 828, 273 App Div 79
- In re Slade's Estate, 276 N Y S 956, 154 Misc 275
- In re Sherman's Will, 71 N Y S 2d 492—In re Ryan's Estate, 43 N Y S 2d 822
- Ohio—Heater v Mittendorf, 50 NE 559, 72 Ohio App 4
- Pa—In re Shafer's Estate, 67 Pa Dist & Co 495—In re Barton's Estate, 49 Pa Dist & Co 273
- RI—Corpus Juris cited in Pickering v Pickering, 10 A 2d 721, 723, 64 RI 112
- SC—Corpus Juris cited in Collins v Collins, 63 SE 2d 811, 814, 219 SC 1
- Tenn—Howell v Moore, 14 Tenn App 594
- Tex—Singleton v St Louis Union Trust Co, Civ App, 191 SW 2d 143, refused no reversible error—Simmons v O'Connor, Civ App, 149 S W 2d 1107, error dismissed, judgment correct
- Va—Seaton v Seaton, 34 SE 2d 236, 184 Va 180
- 68 CJ p 625 note 16
- What law governs
- Capacity to make will see supra § 4
- Construction of will see infra § 587
- Contract to make will see supra § 115
- Holographic wills see infra § 201
- Revocation of will by
- Act of testator see infra § 268
- Operation of law see infra § 288
- Who may
- Make will see supra § 4
- Take under will see supra § 96
- Residence**
- Statutes making validity and effect of testamentary disposition of property within the state other than real property dependent on laws of testator's residence at time of death, used the term "residence" as synonymous with "domicile"
- NY—In re Moran's Will, 39 NYS 2d 929, 180 Misc 469—In re Gifford's Will, 18 NE 2d 663, 279 NY 470
17. NJ—In re Pfizer's Estate, 110 A 2d 40, 33 N J Super 242, affirmed 110 A 2d 54, 17 N J 40
- 18 Del—Equitable Trust Co v Ward, 48 A 2d 519, 29 Del Ch 206
- NY—In re Tabbagh's Estate, 3 N Y S 2d 542, 167 Misc 156
- NC—Johnson v Salisbury, 61 SE 2d 327, 232 NC 432
- What law governs execution of power see Powers § 44
19. Tenn—Howell v Moore, 14 Tenn App 594
20. US—Melon v Entidad Provincia Religiosa de Padres Mercedarios de Castilla, C A Puerto Rico, 189 F 2d 163—Arrott v Heiner, CCA Pa, 92 F 2d 773
- Ark—McPherson v McKay, 181 SW 2d 685 207 Ark 546—Bell v Wadley, 177 SW 2d 403, 206 Ark 569
- Colo—In re McLaughlin's Will, 265 P 2d 691, 128 Colo 581—Foster v Kragh, 113 P 2d 666, 107 Colo 389
- Conn—Pond v Porter, 104 A 2d 228, 141 Conn 56
- Del—Equitable Trust Co v Ward, 48 A 2d 519, 29 Del Ch 206
- Fla—Trotter v Van Pelt, 198 So 215, 144 Fla 517, 131 A L R 1018
- Ga—Veach v Veach, 53 SE 2d 98, 205 Ga 185
- Ill—Sternberg v St Louis Union Trust Co, 68 NE 2d 892, 394 Ill 452, 169 A L R 545
- In re Barrie's Estate, 73 NE 2d 654, 331 Ill App 443
- Ind—Hofferd v Coyle, 8 NE 2d 827, 212 Ind 520, certiorari denied 58 S Ct 408, 302 US 762, 82 L Ed 591
- Duckwall v Lease, 20 NE 2d 204, 106 Ind App 664
- Iowa—In re Barrie's Estate, 35 NW 2d 658, 240 Iowa 431, 9 A L R 2d 1399, certiorari denied Hodge v First Presbyterian Church of Sterling, Illinois, 70 S Ct 550, 338 US 815, 94 L Ed 493, rehearing denied 70 S Ct 55, 338 US 881, 94 L Ed 541
- La—Jarel v Moon's Succession, App, 190 So 867
- Me—U S Trust Co of N Y v Boshkoff, 90 A 2d 713, 148 Me 134
- Md—Roach v Jurchak, 35 A 2d 817, 182 Md 646
- Mont—In re Gift's Estate, 232 P 2d 328, 125 Mont 95
- NJ—Fidelity-Philadelphia Trust Co v Harloff, 30 A 2d 57, 133 N J Eq 44
- In re Winter's Estate, 47 A 2d 545, 24 N J Misc 167
- NY—In re Del Drago's Estate, 38 N E 2d 131, 287 NY 61, reversed on other grounds Riggs v Del Drago, 63 S Ct 109, 317 US 95, 87 L Ed

wis<sup>21</sup> and such law also determines whether the property shall be regarded as real or personal<sup>22</sup> The place of execution of a will devising realty is without legal significance or effect<sup>23</sup>

This rule, where it has been left unchanged, or has been declared or confirmed, by statute, renders invalid as to real property a will which is not executed in conformity with the law of the place where such realty is situate, even though it is executed in accordance with the law of the testator's domicile or of the place of execution<sup>24</sup> On the other hand, this rule renders valid as to personal property a will which conforms to the law of the testator's last domicile, even though it would be insufficient if judged by the law of the state or country in which it was executed,<sup>25</sup> or where the personalty is actually situate,<sup>26</sup> except that effect will not be given in such another state or country to provisions which

are contrary to its public policy<sup>27</sup> A will, however, which is executed in the manner prescribed by the laws of a state is valid as to property therein, whether or not its execution conforms to the law of the place where it was executed or of the testator's domicile<sup>28</sup> Where a statute has been enacted allowing wills executed in a foreign state or country to take effect or be probated if they are valid under the laws of such foreign state or country, or have been probated there, the validity of a will is to be tested by the law of the place of execution, as to property within the state in which the statute is in force, even though the will was not executed in conformity with the law of such state<sup>29</sup>

Although the formality essential to execution of a will may by statute be required to be tested by the laws of the place of execution,<sup>30</sup> or of the testator's

106, 142 A L R 1131, and reargument denied 40 N E 2d 46, 287 N Y 764

In re Sisk's Will, 96 N Y S 2d 237, 197 Misc 1086—In re Watson's Estate, 56 N Y S 2d 443, 185 Misc 735—In re Culley's Will, 48 N Y S 2d 216, 182 Misc 998—In re Wuppermann's Estate, 300 N Y S 344, 164 Misc 900—In re Gaubert's Estate, 299 N Y S 619, 164 Misc 768—In re Bruington's Estate, 289 N Y S 725, 160 Misc 34—In re Slade's Estate, 276 N Y S 956, 154 Misc 275

In re McVoy's Estate, 106 N Y S 2d 32—In re Ginnever's Estate, 69 N Y S 2d 452—In re Collier's Estate, 45 N Y S 2d 773—Spafford v Stafford, 28 N Y S 2d 523

Or—In re Moore's Estate, 223 P 2d 393, 190 Or 63

Tenn—Howell v Moore, 14 Tenn App 594

Tex—Singleton v St Louis Union Trust Co, Civ App, 191 S W 2d 143, refused no reversible error—Simmons v O'Connor, Civ App, 149 S W 2d 1107, error dismissed, judgment correct—King v Lowry, Civ App, 80 S W 2d 790, error refused—Va—Seaton v Seaton, 34 S E 2d 236, 184 Va 180

Wis—In re Rees' Estate, 290 N W 167, 233 Wis 635

68 C J p 625 note 18

#### Right to probate

The probate of nonresident's unwitnessed holographic Arizona will in such state does not affect right to probate of testator's previous New Jersey will, devising realty in state, in view of statutory condition that New Jersey will shall not have been probated elsewhere

N J—In re Winter's Estate, 47 A 2d 545, 24 N J Misc 167

21. N Y—In re McVoy's Estate, 106 N Y S 2d 32.

Wis—Boyle v Kempkin, 9 N W 2d 589, 243 Wis 86

22. Del—Equitable Trust Co v Ward, 48 A 2d 519, 29 Del Ch 206

**Undivided, undetermined equitable interest** in real estate of nonresident testator who had provided fund for investment in realty by another was real estate, devise of which was governed by law of situs

Mo—Cunningham v Kinnerk, 74 S W 2d 1107, 230 Mo App 749

23. Colo—In re McLaughlin's Will, 265 P 2d 691, 128 Colo 581

Tenn—Jacobs v Willis' Heirs, 249 S W 815, 147 Tenn 539

24. Ark—Crossett Lumber Co v Files, 149 S W 908, 104 Ark 600  
68 C J p 626 note 20

25. US—Higgins v Eaton, C C N Y, 188 F 938, reversed on other grounds 202 F 75, 122 C C A 1, rehearing denied 204 F 273, 122 C C A 471

68 C J p 626 note 21

26. Ga—Fraser v Rummele, 25 S E 2d 662, 195 Ga 839

68 C J p 626 note 21

27. N Y—In re Gaubert's Estate, 299 N Y S 619, 164 Misc 768

68 C J p 626 note 22

28. N J—In re Winter's Estate, 47 A 2d 545, 24 N J Misc 167

68 C J p 626 note 23

#### Reason for rule

Disposition of real estate, either by wills, not executed according to laws of the state where the property is situate, or by foreign statutes, cannot be affected by any principle of interstate comity

N J—In re Winter's Estate, supra

29. Hawaii—In re Lufkin's Estate, 32 Hawaii 826

Iowa—**Corpus Juris quoted in** In re Barrie's Estate, 35 N W 2d 658, 663, 240 Iowa 431, 9 A L R 2d 1399, cer-

tiorari denied Hodge v First Presbyterian Church of Sterling, Illinois, 70 S Ct 55, 338 U S 815, 94 L Ed 493, rehearing denied 70 S Ct 154, 338 U S 881, 94 L Ed 541

68 C J p 626 note 25

Probate or record of foreign wills in general see infra §§ 340-350

#### Statute relating merely to execution

Statute held not to render valid in territory a will which by the law of the place of its execution is valid. It merely relates to the manner of its execution and not to the effect on it of subsequent acts of the testator or other subsequent circumstances

Hawaii—In re Lufkin's Estate, 32 Hawaii 826

#### Personalty or realty

In order to dispose of realty in Missouri, foreign will must be executed according to Missouri law, but personalty in Missouri may be bequeathed by will valid where executed

Mo—Schulenberg & Bockler v Campbell, 14 Mo 491

Cunningham v Kinnerk, 74 S W 2d 1107, 230 Mo App 749

30. Ark—In re Alzheimer's Estate, 256 S W 2d 719, 221 Ark 941

Iowa—Wodney v Hess, 45 N W 2d 233, 242 Iowa 342

Iowa—In re Barrie's Estate, 35 N W 2d 658, 240 Iowa 431, 9 A L R 2d 1399, certiorari denied Hodge v First Presbyterian Church of Sterling, Illinois, 70 S Ct 55, 338 U S 815, 94 L Ed 493, rehearing denied, 70 S Ct 154, 338 U S 881, 94 L Ed 541

N Y—In re Speyer's Estate, 27 N Y S 2d 603, 176 Misc 419

In re McCalp's Will, 119 N Y S 2d 55—In re Costello's Will, 114 N Y S 2d 525—In re Crandall, 75 N Y

domicile,<sup>31</sup> proof of execution is referable to the statutes of the place of probate<sup>32</sup> Where the laws of a particular jurisdiction are inapplicable for the purpose of determining the validity of a testamentary disposition, they are of no effect in the determination, in the absence of a clear or explicit declaration or election in the will that such laws apply<sup>33</sup>

With respect to a testamentary trust, the law of the situs of the corpus applies if the trust is to be held there, but if the trustees are to be foreign, the foreign law will apply<sup>34</sup> The fact that provisions of testamentary trusts of personalty to be held and administered in another state, where such trust is valid, are contrary to the general policy of testator's domicile, is usually unimportant in determining the validity of the gift and the conditions imposed, the question of state policy in such cases being ordinarily only a matter of legitimate interest in the jurisdiction in which the trust is to be held and administered.<sup>35</sup>

*Execution in different jurisdictions of more than one will* A state and foreign state may both recognize intentions of a testator executing wills in each state, as far as legally expressed by him according to the laws thereof, if each state keeps within its jurisdiction and the principle of interstate comity<sup>36</sup>

#### b. As between Laws in Force at Time of Execution and Time of Testator's Death

The validity of a will depends on the law in force at

the time of the death of the testator, but as to execution, there is a diversity of opinion as to the law to be applied where a change in the statutes governing the formalities to be observed has been made intermediate the execution of a will and the testator's death

It has been laid down as a general rule that the validity of a will depends on the law in force at the time of the death of the testator,<sup>37</sup> inasmuch as the will takes effect at that time, as is discussed supra § 128

With respect to execution, however, there is a diversity of opinion as to the law to be applied where a change in the statutes governing the formalities to be observed has been made intermediate the execution of a will and the testator's death<sup>38</sup> The rule prevailing in a number of jurisdictions is that the validity of the execution of a will is to be tested by the statutes in force at the time of its execution, and that statutes subsequently enacted have no retrospective effect,<sup>39</sup> except where they otherwise provide<sup>40</sup> According to other authorities, the statutes in force at the time of death of a testator are controlling as to the proper execution of his will, and a will not executed in conformity with such statutes is ineffective, although its execution was sufficient at the time it was made<sup>41</sup> A third, and broader, view, supported by some authority, is that statutes relating to the execution of wills, when they increase the necessary formalities to be observed, should not be so construed as to impair the validity of wills made

S 2d 565—In re Bond's Estate, 51 NYS 2d 244

RI—Pickering v Pickering, 10 A 2d 721, 64 RI 112

31. Ind—Duckwall v Lease, 20 NE 2d 204, 106 Ind App 664

Iowa—In re Barrie's Estate, 35 NW 2d 658, 240 Iowa 431, 9 A LR 2d 1399, certiorari denied Hodge v First Presbyterian Church of Sterling, Illinois, 70 S Ct 55, 338 US 815, 94 L Ed 493, rehearing denied, 70 S Ct 154, 338 US 881, 94 L Ed 541

NY—In re Bates' Will, 5 NYS 2d 628, 168 Misc 526

In re McCalip's Will, 119 NYS 2d 55—In re Costello's Will, 114 NYS 2d 525—In re Crandall, 75 NYS 2d 565—In re Bond's Estate, 51 NYS 2d 244

RI—Pickering v Pickering, 10 A 2d 721, 64 RI 112

Tex—Singleton v St Louis Union Trust Co, Civ App, 191 S W 2d 143, refused no reversible error

**Rule limited to wills executed outside state**

The statute declaring the validity in Iowa of a will valid where executed or in testator's domicile cre-

ates an exception to general rule and applies only to wills executed without the state, as against contention that statute was intended merely to establish validity of a foreign will free from collateral attack unless and until it would be contested and set aside in direct proceeding as authorized by law and within two years from date of order of probate  
Iowa—Widney v Hess, 45 NW 2d 233, 242 Iowa 342

32. Ark—In re Alzheimer's Estate, 256 S W 2d 719, 221 Ark 941

33. NY—In re Berger's Estate, 50 NYS 2d 550, 183 Misc 366

34. NY—In re Merritt's Estate, 75 NYS 2d 828, 273 App Div 79

35. Del—Equitable Trust Co v Ward, 48 A 2d 519, 29 Del Ch 206

36. NJ—In re Winter's Estate, 47 A 2d 545, 24 NJ Misc 167

37. NJ—Miller v Reich, 34 A 2d 143, 134 NJ Eq 28

NY—In re Lavine's Will, 4 NYS 2d 923, 167 Misc 879

Ohio—Fitzgerald v Bell, 6 Ohio Supp 119, affirmed, App, 39 NE 2d 186

Pa—In re Crozer's Estate, Orph, 31

Del Co 285, affirmed 18 A 2d 323, 341 Pa 75

68 C J p 627 note 27

Constitutionality of statutes altering requirements as to execution of wills see Constitutional Law § 228

**Validity of bequest of remainder** must be determined by law in effect at death of testatrix and not by law in effect at vesting of remainder

NY—In re Fowler's Estate, 43 NYS 2d 94, affirmed 50 NYS 2d 174, 268 App Div 788

38 Conn—Appeal of Lane, 17 A 926, 57 Conn 182, 14 Am SR 94, 4 L R A 45

Philippine—In re Will of Riosa, 39 Philippine 23

39 NY—In re Redmond's Will, 60 NYS 2d 316

Pa—Farmers Trust Co v Wilson, 63 A 2d 14, 361 Pa 43

68 C J p 627 note 30

40. Pa—In re Gray's Estate, 76 A 2d 169, 365 Pa 411—In re Spain's Estate, 193 A 262, 327 Pa. 226, 111 A L R 902

68 C J p 627 note 31

41. Cal—Learned's Estate, 11 P 587, 70 Cal 140

68 C J p 627 note 32.

prior to their enactment,<sup>42</sup> and, when they lessen the formalities, should be so construed as to aid wills defectively executed according to the law in force at the time of their making<sup>43</sup> Obviously, none of these rules has any application where the will is made after the enactment of a statute changing the mode of execution,<sup>44</sup> or where the death of the testator occurs prior to the adoption of such legislation<sup>45</sup>

## § 151. Partial Invalidity

### a In general

### b Where valid and invalid parts are separable

#### a. In General

Where the invalid part of a will is inseparable from the valid parts, the entire will is invalid

The question whether a will invalid in part is therefore invalid as a whole depends on whether the valid parts of the will are separable from those parts which are not valid<sup>46</sup> Where the several parts of a will are so intermingled and interdependent that the presumed wishes of the testator would be defeated if one portion were retained and another portion rejected, or if manifest injustice to beneficiaries would result from such construction, the will must fail altogether<sup>47</sup>

*Test of separability* is, in all cases, whether the upholding of one part and the rejection of another will defeat the presumed wishes of the testator for

the disposal of his property, or work injustice among the beneficiaries<sup>48</sup> The mere fact that the testator intended by his will to dispose of his entire estate does not render the provisions of the will inseparable or interdependent<sup>49</sup>

### b. Where Valid and Invalid Parts Are Separable

If a will is valid as to some of its provisions and invalid as to others, and the valid provisions can be separated from the invalid, and upheld without doing injustice to any of the beneficiaries under the will, or defeating the general intent of the testator, the will must be sustained in so far as it is valid.

It is a rule of general application that if a will is valid as to some of its provisions and invalid as to others, and the valid provisions can be separated from the invalid, and upheld without doing injustice to any of the beneficiaries under the will, or defeating the general intent of the testator, the will must be sustained in so far as it is valid,<sup>50</sup> even though the invalid provisions relate to, or affect most or nearly all of, the estate,<sup>51</sup> except that otherwise valid provisions which are by their terms dependent on invalid provisions must fail with the latter<sup>52</sup>

So, under this rule, the disposing portions of a will may be void, and the provisions appointing an executor valid, or vice versa,<sup>53</sup> and the invalidity of a provision as to personality does not necessarily affect a provision as to realty, or vice versa<sup>54</sup> The rule has been applied where part of the will was in-

42. Ala.—Powell's Distributees v Powell's Legatees, 30 Ala 697 68 C J p 627 note 33

43. Ala.—Hoffman v Hoffman, 26 Ala 535 68 C J p 627 note 34

44. Md.—Remington v Metropolitan Sav Bank, 25 A 666, 76 Md 546

45. Md.—Metropolitan Sav Bank v Murphy, 33 A 640, 82 Md 314, 51 Am SR 473, 31 L R A 454 68 C J p 627 note 36

46. N Y.—In re Horner's Will, 143 NE 655, 237 N Y 489 Partial or limited probate of will see infra § 319

47. Ill.—Tucker v Countryman, 111 NE 2d 101, 414 Ill 215 N M.—In re Morrow's Will, 73 P 2d 1360, 41 N M 723

Pa.—In re Rainbow's Estate, Orph., 93 Pittsb Leg J 461 68 C J p 630 note 63

48. Ill.—Burke v Burke, 102 NE 293, 259 Ill 262 68 C J p 628 note 39

49. S C.—Woodruff Oil & Fertilizer Co v Yarborough's Estate, 142 S E 50, 144 S C 18.

50. Cal.—In re Smith's Estate, 35 P 2d 335, 140 Cal App 508

Iowa.—Corpus Juris quoted in In re Ankeny's Estate, 28 NW 2d 414, 420, 238 Iowa 754

La.—Succession of Reynolds, 71 So 2d 537, 224 La 975—Carr v Hart, 57 So 2d 739, 220 La 833—Succession of Earhart, 57 So 2d 695, 220 La 817

N J.—In re Bartles' Will, 19 A 2d 17, 129 N J Eq 280

N Y.—In re MacPhail's Will, 127 N Y S 2d 114—In re Winter's Will, 108 N Y S 2d 723

Or.—Corpus Juris cited in U S National Bank of Portland v First Nat Bank of Portland, 142 P 2d 785, 787, 172 Or 683

Pa.—In re Laucks' Estate, Orph., 95 Pittsb Leg J 42, 60 York Leg Rec 141

Va.—Seaton v Seaton, 34 SE 2d 236, 184 Va 180 68 C J p 628 note 41

Invalidity of residuary clause in will did not invalidate remaining provisions

W Va.—Goetz v Old Nat Bank of Martinsburg, 84 SE 2d 759

51. Iowa.—Corpus Juris quoted in In re Ankeny's Estate, 28 NW 2d 414, 420, 238 Iowa 754 68 C J p 629 note 42

52. Iowa.—Corpus Juris quoted in In re Ankeny's Estate, 28 NW 2d 414, 420, 238 Iowa 754

Kan.—Lasnier v Martin, 171 P 645, 102 Kan 551

N Y.—In re Kozlay, 171 N Y S 669, 104 Misc 120

Invalidity of limitation under rule against perpetuities as affecting subsequent limitations see Perpetuities § 22

Where residuary trusts were invalid, no conditions attached to the legacies to the residuary legatee in the valid portions of the will survive N Y.—In re Finck's Estate, 198 N Y S 670, 120 Misc 428

53. La.—Succession of Beattie, 112 So 802, 163 La 831

54. Fla.—In re Blocks' Estate, 196 So 410, 143 Fla 163

Mich.—Hay v Hay, 26 NW 2d 708, 317 Mich 370

N Y.—In re Dewitt, 99 N Y S 415, 115 App Div 790, affirmed 80 NE 1108, 188 N Y 567

valid for uncertainty,<sup>55</sup> or rendered indeterminable and, therefore, unenforceable because of lack of continuity,<sup>56</sup> or where the greater portion of the testator's property passes under the intestate laws because of the incompleteness of the instrument,<sup>57</sup> or where it contained provisions void as against public policy,<sup>58</sup> or in violation of statutes prohibiting the manumission or emancipation of slaves,<sup>59</sup> or regulating testamentary disposition of property for charitable uses,<sup>60</sup> or provisions violating the rule against perpetuities,<sup>61</sup> or statutes restricting suspensions of absolute ownership or the power of alienation,<sup>62</sup> or provisions for an illegal accumulation of income.<sup>63</sup>

Likewise, the rule has been applied in cases where some of the provisions of the will were void for undue influence, as discussed *infra* § 236, or as attempting to exempt the testator's estate from liability for a legatee's debts,<sup>64</sup> or attempting to reserve the power to change the will without complying with statutory formalities,<sup>65</sup> or as assuming to appoint

guardians for testator's minor children<sup>66</sup> or grandchildren,<sup>67</sup> or as naming a beneficiary incapable of taking by will,<sup>68</sup> or where, as to some of the gifts made by it, the will was not attested by the required number of witnesses.<sup>69</sup> It has been held, on similar principles, that where a will disposes of a greater amount of property for a designated object than is permitted by law,<sup>70</sup> or of more property than by law he is allowed to dispose of,<sup>71</sup> the will is valid except as to the excess.

## § 152. Contingent Wills

A contingent will is a will which is to take effect only on the happening of a specified contingency, and such a will is operative if the contingency happens, but its operation is defeated by a failure or nonoccurrence of the contingency.

A will may be drawn to take effect only on the happening of a specified contingency,<sup>72</sup> which is a condition precedent to the operation of the will,<sup>73</sup> and when so drawn a will is denominated a contingent, or conditional, will.<sup>74</sup> Such a will is opera-

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| <p>55 Mich—<i>La Mere v Jackson</i>, 284 NW 659, 288 Mich 99<br/>68 C J p 629 note 46<br/>Certainty or uncertainty<br/>In general see <i>infra</i> § 157<br/>Of description of beneficiary see <i>infra</i> § 644<br/>Of description of property see <i>infra</i> § 747<br/>Purposes, beneficiaries, and subject matter of testamentary trust see <i>infra</i> § 1012</p> <p>56 La—<i>Succession of Reynolds</i>, 71 So 2d 537, 224 La 975</p> <p>57 Ohio—<i>In re Crowe's Will</i>, 4 Ohio Supp 370</p> <p>58 Conn—<i>Griffin v Sturges</i>, 40 A 2d 758, 131 Conn 471, 156 A L R 972<br/>NJ—<i>Whitfield v Parsons</i>, 35 A 2d 673, 134 N J Eq 352<br/>Ohio—<i>In re Crowe's Will</i>, 4 Ohio Supp 370<br/>68 C J p 629 note 47<br/>Testamentary dispositions against public policy in general see <i>supra</i> § 91</p> <p>59 Ga—<i>Webb v Fleming</i>, 30 Ga 808, 76 Am D 675<br/>68 C J p 629 note 48<br/>Manumission and emancipation of slaves in general see <i>Slaves</i> § 10</p> <p>60 Cal—<i>In re Campbell's Estate</i>, 165 P 931, 175 Cal 345<br/>Ga—<i>Sinnott v Moore</i>, 39 S E 415, 113 Ga 908<br/>Testamentary dispositions for charitable purposes in general see <i>supra</i> §§ 108-110</p> <p>61 Kan—<i>Lasnier v Martin</i>, 171 P 645, 102 Kan 551<br/>68 C J p 629 note 50.</p> | <p>Effect of invalidity under rule against perpetuities of<br/>Limitation on validity of prior limitations see <i>Perpetuities</i> § 22<br/>Trust on independent trusts created by same instrument see <i>Perpetuities</i> § 28</p> <p>62 Ky—<i>Johnson's Trustee v Johnson</i>, 79 S W 293, 25 Ky L 2119<br/>68 C J p 629 note 51<br/>Severance of limitations invalid under statute in general see <i>Perpetuities</i> § 70</p> <p>63 N Y—<i>Smith v Chesebrough</i>, 68 N E 625, 176 N Y 317<br/>68 C J p 629 note 52<br/>Restrictions on accumulation in general see <i>Perpetuities</i> § 33</p> <p>64 Ky—<i>Johnson's Trustee v Johnson</i>, 79 S W 293, 25 Ky L 2119</p> <p>65 RI—<i>Merrill v Boal</i>, 132 A 721, 47 R I 274, 45 A L R 830</p> <p>66 Miss—<i>Hemphill v Smith</i>, 91 So 337, 128 Miss 586, 24 A L R 1456<br/>68 C J p 629 note 56</p> <p>67 N Y—<i>Post v Hover</i>, 33 N Y 593</p> <p>68 Ga—<i>Shaw v Fehn</i>, 27 S E 2d 406, 196 Ga 661<br/>68 C J p 629 note 58<br/>Who may take under will in general see <i>supra</i> §§ 91-110</p> <p><b>Alien enemy</b><br/>Even though principal beneficiary of will was an alien enemy and as such could not take under will, such fact would not invalidate entire will but would merely render legacy void<br/>Ga—<i>Shaw v Fehn</i>, 27 S E 2d 406, 196 Ga 661</p> <p>69 Pa—<i>In re McClure's Estate</i>, 165 A 24, 309 Pa 370<br/>68 C J p 630 note 59</p> | <p>Number of attesting witnesses in general see <i>infra</i> § 184</p> <p>70 La—<i>Succession of Elmore</i>, 49 So 989, 124 La 91<br/>68 C J p 630 note 60</p> <p>71 La—<i>Succession of May</i>, 34 So 52, 109 La 994<br/>Tex—<i>Paschal v Acklin</i>, 27 Tex 173</p> <p>72 Ark—<i>Corpus Juris cited in Wilson v Higgason</i>, 178 S W 2d 855, 856, 207 Ark 32</p> <p>Ill—<i>Corpus Juris cited in Barber v Barber</i>, 13 N E 2d 257, 261, 368 Ill 215</p> <p>La—<i>Corpus Juris quoted in Succession of Gurganus</i>, 20 So 2d 296, 298, 206 La 1012</p> <p>SC—<i>Capps v Richardson</i>, 53 S E 2d 876, 215 SC 34</p> <p>Tex—<i>Corpus Juris quoted in Bagnall v Bagnall</i>, 225 S W 2d 401, 442, 148 Tex 423<br/><i>Ferguson v Ferguson</i>, Civ App, 288 S W 833, reversed on other grounds 45 S W 2d 1096, 121 Tex 119, 79 A L R 1163</p> <p>73 Ill—<i>Barber v Barber</i>, 13 N E 2d 257, 368 Ill 215</p> <p>74 Ark—<i>Corpus Juris cited in Wilson v Higgason</i>, 178 S W 2d 855, 856, 207 Ark 32</p> <p>Ill—<i>American Trust &amp; Safe Deposit Co v Eckhardt</i>, 162 N E 843, 331 Ill 261</p> <p>La—<i>Corpus Juris quoted in Succession of Gurganus</i>, 20 So 2d 296, 298, 206 La 1012</p> <p>SC—<i>Capps v Richardson</i>, 53 S E 2d 876, 215 SC 34</p> <p>Tex—<i>Corpus Juris quoted in Bagnall v Bagnall</i>, 225 S W 2d 401, 402, 148 Tex 423.</p> |
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tive if the contingency happens or occurs,<sup>75</sup> but its operation is defeated by failure or nonoccurrence of such contingency,<sup>76</sup> except where it is subsequently revived or republished by the testator.<sup>77</sup>

*Whether a will is to be regarded as contingent* turns on the point whether the contingency is referred to merely as the occasion of, or reason for, making the will at the time it is made, or is referred to as the reason for making the particular disposition of property which is provided for, and is in-

tended to specify the condition on which the will is to become operative,<sup>78</sup> it being only in the latter case, where the disposition and the contingency are so related to each other that the one is dependent on the other, that the will is contingent.<sup>79</sup> The will must contain language which fairly indicates a purpose to limit its operation,<sup>80</sup> and that it was the intention of the testator to make a will which would operate only during a certain period or until a certain emergency has passed.<sup>81</sup> The condition must

75. Ark—*Corpus Juris* cited in *Wilson v Higasson*, 178 S W 2d 855, 856, 207 Ark 32

Kan—*Lydick v Lydick*, 76 P 2d 876, 147 Kan 385

La—*Corpus Juris* quoted in *Succession of Gurganus*, 20 So 2d 296, 298, 206 La 1012

Ohio—*Thomas v Dye*, App, 127 NE 2d 228

Pa—*In re Trevaskis' Estate*, 29 A 2d 29, 345 Pa 525

Tex—*Corpus Juris* quoted in *Bagnall v Bagnall*, 225 S W 2d 401, 402, 148 Tex 423

Utah—*Ellerbeck v Haws*, 265 P 2d 404, 1 Utah 2d 229

68 C J p 630 note 66

76 Ark—*Corpus Juris* cited in *Wilson v Higasson*, 178 S W 2d 855, 856, 207 Ark 32

Ill—*Hampton v Dill*, 188 NE 419, 354 Ill 415

Ky—*Ellison v Smoot's Adm'r*, 151 S W 2d 1017, 286 Ky 768

La—*Corpus Juris* quoted in *Succession of Gurganus*, 20 So 2d 296, 298, 206 La 1012

NJ—*Glover v Reynolds*, 37 A 2d 90, 135 N J Eq 113, affirmed 40 A 2d 624, 136 N J Eq 116

NY—*In re Pascal's Will*, 137 N Y S 2d 386, 285 App Div 456, reversed on other grounds 127 NE 2d 835, 309 N Y 108

Ohio—*Thomas v Dye*, App, 127 NE 2d 228

Pa—*In re Trevaskis' Estate*, 29 A 2d 29, 345 Pa 525

SC—*Capps v Richardson*, 53 SE 2d 876, 215 SC 34

Tex—*Corpus Juris* quoted in *Bagnall v Bagnall*, 225 S W 2d 401, 402, 148 Tex 423

Utah—*Ellerbeck v Haws*, 265 P 2d 404, 1 Utah 2d 229

68 C J p 630 note 67

77. La—*Corpus Juris* quoted in *Succession of Gurganus*, 20 So 2d 296, 298, 206 La 1012

Revival or republication of contingent will after nonoccurrence of contingency see *infra* § 299

78. Ill—*Corpus Juris* cited in *In re Trager's Estate*, 108 NE 2d 908, 910, 413 Ill 364

Ill—*Corpus Juris* cited in *Barber v Barber*, 13 NE 2d 257, 261, 368 Ill 215

La—*Corpus Juris* quoted in *Succession of Gurganus*, 20 So 2d 296, 298, 206 La 1012

SC—*Corpus Juris* quoted in *Capps v Richardson*, 53 SE 2d 876, 877, 215 SC 34

Tex—*Corpus Juris* quoted in *Burke v Jackson*, 95 S W 2d 1296, 1298, 127 Tex 623

68 C J p 631 note 70

**Language held to make will contingent**

(1) In general

Ky—*Ellison v Smoot's Adm'r*, 151 S W 2d 1017, 286 Ky 768

SC—*Capps v Richardson*, 53 SE 2d 876, 215 SC 34

Tex—*Bagnall v Bagnall*, 225 S W 2d 401, 148 Tex 423

68 C J p 631 note 70 [b]

(2) A letter testamentary in nature and directing how writer's property should be disposed of if the writer died "at any time soon"

Ark—*Wilson v Higasson*, 178 S W 2d 855, 207 Ark 32

(3) In devise to wife, if testator should marry, and if wife survived him, expressions with respect to testator's wife and prospect of marriage made will contingent

Ill—*Hampton v Dill*, 188 NE 419, 354 Ill 415

(4) Where husband executed will, during pendency of wife's divorce action, making wife beneficiary of income from property "as long as she is my wife or remains single thereafter"

Kan—*Lydick v Lydick*, 76 P 2d 876, 147 Kan 385

(5) A holographic will, expressing testator's wish that it should become effective on date of his marriage to named woman

Ky—*Puckett's Ex'x v Puckett*, 205 S W 2d 1016, 305 Ky 812

(6) Where will giving all testatrix' property to her husband provided that "in the event that my husband and myself die simultaneously regardless of the order of passing, I give and bequeath my property"

NJ—*Glover v Reynolds*, 37 A 2d 90, 135 N J Eq 113, affirmed 40 A 2d 624, 136 N J Eq 116

(7) Testamentary instrument of wife reciting that husband and wife were going on journey, and, if any-

thing should happen to them, wife's mother was to get all property of wife, where they made journey safely

Tex—*Burke v Jackson*, 95 S W 2d 1296, 127 Tex 623

(8) Where first sentence of will recited that testator was in hospital from digestive and other troubles and that named person should take charge of home and business "in the event I do not survive"

Utah—*Ellerbeck v Haws*, 265 P 2d 404, 1 Utah 2d 229

**Language held not to make will contingent**

NY—*In re Johnston's Estate*, 53 N Y S 2d 212, 186 Misc 533

Okl—*In re Jones' Estate* (Choctaw 7012), 121 P 2d 574, 190 Okl 123

Pa—*In re Kayser's Estate*, Orph, 38 Berks Co 205

68 C J p 631 note 70 [c]

79 Cal—*In re Taylor's Estate*, 259 P 2d 1014, 119 Cal App 2d 574

Ill—*Corpus Juris* cited in *Barber v Barber*, 13 NE 2d 257, 261, 368 Ill 215

La—*Corpus Juris* quoted in *Succession of Gurganus*, 20 So 2d 296, 298, 206 La 1012

SC—*Corpus Juris* quoted in *Capps v Richardson*, 53 SE 2d 876, 877, 215 SC 34

Tex—*Corpus Juris* quoted in *Burke v Jackson*, 95 S W 2d 1296, 1298, 127 Tex 623—*Ferguson v Ferguson*, 45 S W 2d 1096, 121 Tex 119, 79 A L R 1163

**Mutual dependence held not to exist**

Where a will recited that testator was leaving for another state, and if anything should happen to testator, all his property should be given to sister, the trip and contingency of death were not mutually dependent on each other so as to render the will conditional and not entitled to probate, because testator died long after return from trip

Ill—*Barber v Barber*, 13 NE 2d 257, 368 Ill 215

80. Cal—*In re Taylor's Estate*, 259 P 2d 1014, 119 Cal App 2d 574

81. Ill—*In re Trager's Estate*, 108 NE 2d 908, 413 Ill 364—*Barber v Barber*, 13 NE 2d 257, 368 Ill 215  
Ky—*Watkins v Watkins' Adm'r* 106 S W 2d 975, 269 Ky 246



appear on the face of the will,<sup>82</sup> and parol evidence is not admissible to show that an instrument which in form is a general or absolute will was intended to take effect only on a contingency.<sup>83</sup> Parol evidence is admissible, however, to show that the testator's intention was to make an absolute and not a contingent will.<sup>84</sup> Evidence of the preservation of the document for a considerable time after the non-happening of the contingency, or the expiration of the time of impending calamity, is admissible to show that the testator regarded the contingency as relating to the motive inducing the making of the will, rather than as a condition to its becoming operative,<sup>85</sup> and such evidence has been held to raise a presumption that the will was intended to be absolute and noncontingent.<sup>86</sup>

Whether a will is conditional or unconditional is largely dependent on the factual situation presented,<sup>87</sup> and the test is, not what the testator may have meant, but meaning of his words considered in connection with surrounding conditions at the time of execution of the instrument.<sup>88</sup> The general rule is that mere matters of inducement, even though phrased conditionally, do not constitute a condition which requires the rejection of a will,<sup>89</sup> and that

the language of a will should be held to be a mere inducement to testator's making a will and not a condition precedent to operation of the will, if that construction is fairly permissible.<sup>90</sup> Unless the terms of a will clearly show that it was intended to be contingent, it will be regarded as absolute and unconditional.<sup>91</sup>

A condition precedent to operation of a will should not be implied from indefinite language,<sup>92</sup> but must appear expressly or by necessary implication from the language of the will as a whole.<sup>93</sup> In particular, if the language used in a will can reasonably be construed to mean that the testator refers to a possible danger or threatened calamity only as a reason for making a will at the time, rather than as a condition precedent to the will becoming operative, such construction should prevail, and the will be construed as not conditional.<sup>94</sup>

*Contingent will distinguished from will making conditional dispositions* A contingent will, which does not become operative as a will if the contingency does not occur, is to be distinguished from an absolute will disposing of property subject to conditions or restrictions.<sup>95</sup> Conditions attached to

La—Succession of Gurganus, 20 So 2d 296, 206 La 1012

SC—Capps v Richardson, 53 SE 2d 876, 215 SC 34

82. La—*Corpus Juris* quoted in Succession of Gurganus, 20 So 2d 296, 298, 206 La 1012

NY—In re Johnston's Estate, 53 NY S 2d 212, 186 Misc 533  
68 CJ p 632 note 72

83. Ill—*Corpus Juris* cited in In re Trager's Estate, 108 NE 2d 908, 910, 413 Ill 364—*Corpus Juris* cited in Barber v Barber, 13 NE 2d 257, 261, 368 Ill 215

La—*Corpus Juris* quoted in Succession of Gurganus, 20 So 2d 296, 298, 206 La 1012

68 CJ p 632 note 73

84. Cal—*Corpus Juris* cited in In re Taylor's Estate, 259 P 2d 1014, 1018, 119 Cal App 2d 574

Ill—*Corpus Juris* cited in In re Trager's Estate, 108 NE 2d 908, 910, 413 Ill 364—*Corpus Juris* cited in Barber v Barber, 13 NE 2d 257, 261, 368 Ill 215

La—*Corpus Juris* quoted in Succession of Gurganus, 20 So 2d 296, 298, 206 La 1012

68 CJ p 632 note 74

85. Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

La—*Corpus Juris* quoted in Succession of Gurganus, 20 So 2d 296, 298, 206 La 1012

68 CJ p 632 note 75

Delivery of will by testator to someone for preservation is some ev-

idence that testator intended will to be unconditional

Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

86. La—*Corpus Juris* quoted in Succession of Gurganus, 20 So 2d 296, 298, 206 La 1012

Ohio—McMinnan v Schiel, 140 NE 600, 108 Ohio St 334

87. Ill—Barber v Barber, 13 NE 2d 257, 368 Ill 215

Pa—In re Morrison's Estate, 65 A 2d 384, 361 Pa 419

88. Pa—In re Morrison's Estate, supra—In re Moore's Estate, 2 A 2d 761, 332 Pa 257

89. NY—In re Langer's Estate, 281 NYS 866, 156 Misc 440

Statements held mere matters of inducement

US—Wood v Greimann, CCA Alaska, 165 F 2d 637

Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

Ill—Barber v Barber, 13 NE 2d 257, 368 Ill 215

Ky—Watkins v Watkins' Adm'r, 106 SW 2d 975, 269 Ky 246

Mass—Bobblis v Cupol, 7 NE 2d 440, 297 Mass 164

NY—In re Langer's Estate, 281 NYS 866, 156 Misc 440

In re Marques' Will, 123 NYS 2d 877

Pa—In re Morrison's Estate, 65 A 2d 384, 361 Pa 419—In re Moore's Estate, 2 A 2d 761, 332 Pa 257

In re Slater's Will, Orph, 3 Fiduciary 543

Tex—Boyles v Gresham, 263 SW 2d 935

W Va—National Bank of Commerce of Charleston v Wehrle, 20 SE 2d 112, 124 W Va 268

90. Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

Ill—Barber v Barber, 13 NE 2d 257, 368 Ill 215

Ky—Watkins v Watkins' Adm'r, 106 SW 2d 975, 269 Ky 246

NY—In re Langer's Estate, 281 NYS 866, 156 Misc 440

Pa—In re Moore's Estate, 2 A 2d 761, 332 Pa 257

91. Ill—In re Trager's Estate, 108 NE 2d 908, 413 Ill 364

La—*Corpus Juris* quoted in Succession of Gurganus, 20 So 2d 296, 298, 206 La 1012

Pa—In re Moore's Estate, 2 A 2d 761, 332 Pa 257

68 CJ p 632 note 77

92. Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

93. SC—Capps v Richardson, 53 SE 2d 876, 215 SC 34

Tex—In re Bagnall's Estate, Civ App, 222 SW 2d 1015, reversed on other grounds Bagnall v Bagnall, 225 SW 2d 401, 148 Tex 423

94. Ill—Barber v Barber, 13 NE 2d 257, 368 Ill 215

95. Pa—In re Huntzinger's Estate, 29 Pa Dist 1155

Conditions and restrictions attached to dispositions of property see infra §§ 974-1003.

a particular testamentary disposition of property, rather than to the operation of the instrument as a will, do not render it a contingent will,<sup>96</sup> even though the will contains but a single devise or bequest<sup>97</sup>

*Soldiers' or mariners' wills* Particularly in the case of those in military or naval service, who are liable to sudden peril and whose informal wills receive high favor at the hands of the courts, as discussed *infra* § 220, language expressive of special apprehension as inducement to making of will is not readily construed into a positive condition<sup>98</sup>

### § 153 Instructions for, and Preparation of, Will

A will is not invalidated by the fact that it is prepared or written by the testator, or is prepared by a person named in the will, or by one in a confidential relationship to the testator, or by the fact that the scrivener makes suggestions or gives information to the testator to aid in the preparation of the will

A will may validly be prepared or written by the testator himself<sup>99</sup> It is not invalid because prepared by the person named therein as executor,<sup>1</sup> or by a beneficiary,<sup>2</sup> or by a person in a confidential relationship to testator,<sup>3</sup> although this circumstance imposes on the court the duty of increased vigilance in seeing that the will was fairly executed and that

it does in fact carry out the testator's wishes<sup>4</sup>

Similarly, a will is not invalidated by the fact that the scrivener makes suggestions or gives information to the testator to aid in the preparation of the will,<sup>5</sup> or that he suggests the order or arrangement of its provisions,<sup>6</sup> and where there is nothing to arouse suspicion, one who draws a will is under no duty to inquire as to the prospective testator's ownership<sup>7</sup> It is not even essential to the validity of a will that it be drawn up under instructions from the testator, if he adopts it understandingly as drawn,<sup>8</sup> but where it is so prepared by, or under instructions from, another, proof of understanding and adoption by the testator must be clear<sup>9</sup> Even though it is in violation of law for a probate judge,<sup>10</sup> or an unlicensed practitioner,<sup>11</sup> to draw a will, a will drawn by him is not void A will understandingly executed supercedes previous instructions<sup>12</sup>

### § 154 Statutory Requirements

Compliance with all statutory prerequisites is necessary to the validity of a will

Since, as discussed *supra* § 3, the making of a will is based on statute, it follows that compliance with all statutory prerequisites is necessary to the validity of a will<sup>13</sup>

96 Ky—Ganaway v. Ganaway's Adm'r, 56 SW2d 4, 246 Ky 722  
68 C J p 632 note 80

97 Ky—Lee v Kirby, 217 SW 895, 186 Ky 603

98 Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

99 NY—In re De Hart's Will, 122 NYS 220, 67 Misc 13

Instructions and directions for will as will

Nuncupative will see *infra* § 210  
Where complete execution is prevented by act of God see *infra* § 167

Holographic wills see *infra* §§ 200-207

1. Ill—O'Brien v Bonfield, 72 NE 1090, 213 Ill 428

2. Del—In re Gordon's Will, 111 A 610, 31 Del 108  
68 C J p 632 note 85

3. Del—In re Gordon's Will, *supra* Kan—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210

4. Or—In re Faling's Will, 208 P 715, 105 Or 365  
68 C J p 632 note 87

Presumption of undue influence arising from preparation of will by beneficiary see *infra* § 241.

5. Or—In re Phillips' Will, 213 P 627, 107 Or 612

6. La—Succession of McDermott, 66 So 546, 136 La 80

7. Colo—Ellis v Colorado Nat Bank of Denver, 10 P 2d 336, 90 Colo 489

8. Kan—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210

68 C J p 632 note 90  
Necessity that testator know and understand contents of will in general see *supra* § 130

9. Kan—Smith's Estate v Davis, *supra*  
Md—Plater v Groome, 3 Md 134  
Burden of proving testator's knowledge of contents of will in general see *infra* § 384

10. NH—Moses v Julian, 45 NH 52, 84 Am D 114

11. Minn—In re Peterson's Estate, 42 NW 2d 59, 230 Minn 478, 18 A L R 2d 910

12. NJ—In re Livingston's Will, Prerog 37 A 770  
68 C J p 633 note 93

13. Cal—In re Bauer's Estate, 124 P 2d 630, 51 Cal App 2d 636.

Colo—Urbancich v Jersin, 226 P 2d 316, 123 Colo 88

Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161

Ky—Letcher's Trustee v Letcher, 194 SW 2d 984, 302 Ky 448—Floyd v Christian Church Widows and Orphans Home of Kentucky, 176 SW 2d 125, 296 Ky 196, 151 A L R 1230

NJ—In re Davis' Estate, 35 A 2d 880, 134 N J Eq 393—In re Amsden's Will, 191 A 801, 121 N J Eq 571

NY—Hall v Mutual Life Ins Co of NY, 109 NYS 2d 646, 201 Misc 203, reversed on other grounds 122 NYS 2d 239, 282 App Div 203, affirmed 119 NE 2d 598, 306 NY 909—In re Ditson's Estate, 31 NYS 2d 468, 177 Misc 648—In re McCaffrey's Estate, 20 NYS 2d 178, 174 Misc 162

Or—Winters v Winters, 109 P 2d 857, 165 Or 659

Tenn—Howell v Moore, 14 Tenn App 594

68 C J p 633 note 96  
Execution of will see *infra* §§ 167-199

Form and contents see *infra* §§ 155-166.

## B FORM AND CONTENTS

## § 155. In General

As a general rule, it is not necessary that any particular form or words be used in making a will, if there is a compliance with statutory requisites

Of all instruments a will is least governed by form,<sup>14</sup> and it need not necessarily be in the usual form of a will,<sup>15</sup> the form being unimportant ex-

cept as indicating intent<sup>16</sup> Since good-faith wills should be upheld whenever possible,<sup>17</sup> they should not be set aside because of mere irregularities in form<sup>18</sup> As a general rule, it is not necessary that any particular form or words be used,<sup>19</sup> or that technical or legal language be used,<sup>20</sup> if the statutory

14 Ky—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

Miss—Peebles v Rodgers, 50 So 2d 632, 211 Miss 632

Form of

Joint and mutual wills see *infra* § 1364

Holographic wills see *infra* § 204

Nuncupative wills see *infra* § 214

"In making a will certain formalities are not essential as required in executing a deed"

Tex—Briggs v Peebles, 188 S W 2d 147, 149, 144 Tex 47

#### Least formal

Of all written instruments, wills are the least formal

Mo—Adams v Simpson, 213 S W 2d 908, 358 Mo 168—Grundmann v Wilde, 141 S W 2d 778, 346 Mo 327

#### Position of clauses

(1) A special bequest may follow a residuary disposition, although it does not usually do so

La—Succession of Montegut, 29 So 2d 583, 211 La 112

(2) Position of residuary clause as affecting validity of will see *infra* § 796

15. Md—Dietrich v Morgan, 20 A 2d 175, 179 Md 553

16. Ky—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

Miss—Peebles v Rodgers, 50 So 2d 632, 211 Miss 632

Pa—In re Gable's Estate, Orph, 53 York Leg Rec 169

Necessity of showing testamentary intent see *supra* § 129

"The form of a will is of little importance except as it may bear on the question of intent"

Del—In re Kemp's Will, 186 A 890, 895, 7 W W Harr 514

"While informal character of a paper is an element in determining whether or not it was intended to be testamentary, this becomes a matter of no moment when it appears thereby that the decedent's purpose was to make a posthumous gift"

Pa—In re Kauffman's Estate, 76 A 2d 414, 416, 365 Pa 555

17. Ind—Thrift Trust Co v White, 167 NE 141, 168 NE 250, 90 Ind App 116

68 C J p 633 note 99

18 Ind—Thrift Trust Co v. White, *supra*.

Pa—In re Dahlinger's Estate, Orph, 36 Del Co 282

68 C J p 633 note 1

**Form should not be raised above substance in order to destroy a will**  
N Y—In re Lubitz' Will, 136 N Y S 2d 901, 207 Misc 33

In re Reid's Will, 47 N Y S 2d 426

19. Ariz—In re Miller's Estate, 92 P 2d 335, 54 Ariz 58

Ark—Evans v Evans, 101 S W 2d 435, 193 Ark 585

Ill—Barber v Barber, 13 NE 2d 257, 368 Ill 215

Ky—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

N Y—In re Sayers' Will, 76 N Y S 2d 788, 19 Misc 976, appeal dismissed

79 N Y S 2d 770, 272 App Div 1051

—In re Chapman's Will, 9 N Y S 2d 520, 169 Misc 1035—In re Zaiac's Will, 295 N Y S 286, 162 Misc 642,

modified on other grounds, 5 N Y S 2d 897, 255 App Div 709, 718, reversed on other grounds, 18 NE 2d 848, 279 N Y 545—In re Burch's Estate, 274 N Y S 123, 152 Misc 387, affirmed 276 N Y S 933, 243 App Div 663

Pa—In re Hengen's Estate, 12 A 2d 119, 337 Pa 947

In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83

In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

In re Kemmerling's Estate, Orph, 44 Sch Leg Rec 52—In re Kemmerling's Estate, Orph, 9 Sch Reg 104—In re Hamilton Case, Orph, 6 Sch Reg 137

Tex—Payne v Brown, Civ App, 172 S W 2d 352, reversed on other grounds, 176 S W 2d 306, 142 Tex 102—In re Dromgoole's Estate, Civ App, 127 S W 2d 977

68 C J p 633 note 2

Particular form of words as necessary to show testamentary intent see *supra* § 129

"It is familiar law that no particular form or special language is required for a will"

Ky—Bogges v McGaughey, 207 S W 2d 766, 767, 306 Ky 319

**Informality of paper and looseness of language does not preclude giving testamentary effect to directions contained therein if intent of decedent that paper should have that ef-**

fect can be gleaned from its language

N Y—In re Sayers' Will, 76 N Y S 2d 788, 190 Misc 976 appeal dismissed

79 N Y S 2d 770, 273 App Div 1051

#### Phrase or set of phrases

The law does not require the employment of any particular phrase or set of phrases to dispose of property by will

N Y—In re Reben's Will, 115 N Y S 2d 228

#### Provision against intestacy

A testator is not required to visualize all changes and contingencies near or remote, trivial, or important, which might come about during a considerable period of time following his demise and meticulously provide against intestacy in order to make a valid will

NC—Van Winkle v Berger, 46 SE 2d 305, 228 NC 473

**There is no prescribed form for a will, either under statute or by common law**

Ill—Noble v Fickes, 32 NE 950, 230 Ill 594

In re Apsey's Estate, 1 NE 2d 558, 285 Ill App 29

**No particular words or conventional forms of expression are necessary to effectuate a testamentary disposition of property**

Neb—Wall v Wall, 59 NW 2d 398, 157 Neb 360—Rawls v Hewitt, 30 NW 2d 623, 149 Neb 161—In re Lewis' Estate, 28 NW 2d 427, 148 Neb 592—In re Zents' Estate, 26 NW 2d 793, 148 Neb 104—Lacy v Murdock, 22 NW 2d 713, 147 Neb 242—In re Dimmitt's Estate, 3 NW 2d 752, 141 Neb 413, 144 ALR 704

Wash—In re Ludston's Estate, 202 P 259, 32 Wash 2d 408

20. Md—Buchwald v Buchwald, 199 A 795, 175 Md 103

N Y—In re Sayers' Will, 76 N Y S 2d 788, 190 Misc 976, appeal dismissed

79 N Y S 2d 770, 273 App Div 1051

Pa—In re Hengen's Estate, 12 A 2d 119, 337 Pa 947

In re Lewis' Estate, 11 A 2d 667, 139 Pa Super 83

68 C J p 633 note 2 [b], [h]

"One should not be deprived of the privilege of disposing of his property by will merely because he is unable to express his will and purpose in le-

requisites for making a will are complied with<sup>21</sup>

The particular form of the instrument is immaterial<sup>22</sup> if its substance is testamentary,<sup>23</sup> and any writing, however informal it may be, made with the

express intent of giving a posthumous destination to the maker's property, if executed in accordance with the statutory requirements, will be a good testamentary disposition,<sup>24</sup> by whatever name the testator may choose to call it<sup>25</sup> In order to consti-

gal phraseology, if what he says leaves no doubt in the minds of persons of ordinary experience and intelligence of what he means, and if what he intended violates no rule or principle of established law "Md—Buchwald v Buchwald, 199 A 795, 798, 175 Md 103

**To constitute a devise or bequest** it is not essential that will contain appropriate technical language, or the words "give", "devise", or "bequeath" N Y—In re Mackey's Estate, 122 N Y S 2d 540

#### Designation of instrument as will

(1) It is not necessary that the testator use the word "will" in his last testament

Ariz—In re Miller's Estate, 92 P 2d 335, 54 Ariz 58

(2) An instrument which in plain and unambiguous language expressed testator's intentions was not defeated because the testator did not call the instrument a will

Tex—Saathoff v Saathoff, Civ App, 101 S W 2d 910, error refused

21 Ariz—In re Miller's Estate, 92 P 2d 335, 54 Ariz 58

Necessity for complying with statutory requisites see supra § 154

#### Want of legal form

Testator's attempted donation created no debt or obligation where his will was null for want of legal form and any donation made by his forced heir to comply with testator's wishes must come out of the forced heir's estate, subject to rights of her forced heirs, and not out of testator's estate La—Succession of Harris, 155 So 446, 179 La 954

22 Cal—In re Smilie's Estate, 222 P 2d 692, 99 Cal App 2d 794

N Y—In re Zaiac's Will, 295 N Y S 286, 162 Misc 642, modified on other grounds 5 N Y S 2d 897, 255 App Div 709, 718, reversed on other grounds 18 N E 2d 848, 279 N Y 545

Pa—In re Deist's Estate, 75 Pa Dist & Co 145, 15 Som Leg J 193—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

#### Form of little consequence

The form of any instrument is of little consequence in determining whether or not it is a will

Mich—In re Fowle's Estate, 290 N W 883, 292 Mich 500—Lautenshlager v Lautenshlager, 45 N W 147, 80 Mich 285

#### Testimonium or attestation clause

A will is valid even though it con-

tains neither a testimonium nor an attestation clause

Ohio—In re Mazurie, 3 Ohio Supp 63

23 Pa—In re Deist's Estate, 75 Pa Dist & Co 15 Som Leg J 193—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

#### Use of testamentary language

An instrument reciting "after death, please forward all to Red Cross", and referring to itself as "this will", would not be denied probate as a "will" for alleged want of testamentary language

US—Lovskog v American Nat Red Cross, CCA Alaska, 111 F 2d 88

24 Ariz—In re Miller's Estate, 92 P 2d 335, 54 Ariz 58

Del—Corpus Juris cited in In re Kemp's Will, 186 A 890, 895, 7 W W Harr 514

Ky—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

N Y—In re Mackey's Estate, 122 N Y S 2d 540

Pa—In re Hengen's Estate, Orph, 55 Montg Co 327

Tenn—Druen v Hudson, 68 S W 2d 146, 17 Tenn App 428

68 C J p 634 note 6

Necessity and showing of testamentary intent see supra § 229

Necessity for, and sufficiency of, writing see infra § 156

Requisites for execution see infra § 167 et seq

"The test is the intention of decedent to make a disposition of property upon his death"

Pa—In re Deist's Estate, 75 Pa Dist & Co 145, 149, 15 Som Leg J 193

#### Similar statements of rule

(1) In general

Cal—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

Ill—Barber v Barber, 13 N E 2d 257, 368 Ill 215

Miss—Peebles v Rodgers, 50 So 2d 632, 211 Miss 8

N Y—In re Dorrie's Will, 48 N Y S 2d 841

Pa—In re Zell's Estate, 198 A 76, 329 Pa 312

In re Kemmerling's Estate, Orph, 44 Sch Leg Rec 52—In re Kemmerling's Estate, Orph, 9 Sch Reg 104—In re Hamilton Case, Orph, 6 Sch Reg 137

Tex—Crites v Faulkner, Civ App, 245 S W 2d 1013, error refused

W Va—Hunt v Furman, 52 S E 2d 816, 132 W Va 706

68 C J p 634 note 6 [a]

(2) Where instrument manifests maker's lawful intention to dispose of his estate after death and is exe-

cuted in conformity to statute, it will operate as a will, regardless of its form

Ill—Noble v Fickes, 82 N E 950, 230 Ill 591

In re Apsey's Estate, 1 N E 2d 558, 285 Ill App 29

(3) If the instrument is executed with formalities required by statute, and if it is to operate only after death of maker, it is a will

Mich—In re Fowle's Estate, 290 N W 883, 292 Mich 500—Lautenshlager v Lautenshlager, 45 N W 147, 80 Mich 285

(4) Anything written, in any form, constitutes a will, if it reveals the intention of the maker to dispose of his property at death

Mo—Adams v Simpson, 213 S W 2d 908, 358 Mo 168—Grundmann v Wilde, 141 S W 2d 778, 346 Mo 327

(5) An instrument which is in writing and is signed by the decedent at the end thereof and is an otherwise legal declaration of decedent's intention which he wills to be performed after his death must be given effect as a will or codicil, as the case may be

Pa—In re Kaufman's Estate, 76 A 2d 414, 365 Pa 555—In re Hengen's Estate, 12 A 2d 119, 337 Pa 547

Appeal of Thompson, Orph, 14 Beaver Co 248, affirmed 100 A 2d 69, 375 Pa 193

#### Instruments held to be wills

Ill—Barber v Barber, 13 N E 3d 257, 368 Ill 215

Mich—In re Fowle's Estate, 290 N W 883, 292 Mich 500

Pa—In re Zell's Estate, 198 A 76, 329 Pa 312—In re Tranor's Estate, 188 A 292, 324 Pa 263

In re Gibson's Estate, 193 A 302, 128 Pa Super 44

In re Deist's Estate, 75 Pa Dist & Co 145, 15 Som Leg J 193—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

In re Wood's Estate, Orph, 40 Berks Co 211

Tenn—Bowman v Helton, 7 Tenn App 325

Tex—In re Dromgoole's Estate, Civ App, 127 S W 2d 977

68 C J p 634 note 6 [d]

25. Del—Corpus Juris cited in In re Kemp's Will, 186 A 890, 895, 7 W W Harr 514

La—Succession of Ledet, 128 So 273, 170 La 449

Miss—Peebles v Rodgers, 50 So 2d 632, 211 Miss 632

#### Name not controlling

The name given an instrument of-

tute such an instrument, all that is necessary is that it should clearly appear to be the intention of the party to have it operate after his death and not before<sup>26</sup> Any writing to take effect at death may constitute a will,<sup>27</sup> even though it does not contain an express statement that it was to take effect only after the maker's death<sup>28</sup> Words and phrases in a will which are not dispositive are not actual parts of the will,<sup>29</sup> but words or statements not essential to a will will not strip an instrument of its character as a will<sup>30</sup> A document may be a will notwithstanding it is written in incorrect English<sup>31</sup>

The declaration of the testator, in the beginning of the instrument offered for probate as his will, that it is his last will and testament, is not conclusive<sup>32</sup> While the courts will go far to give effect to written testamentary instruments, when such instruments come within the meaning of statutes

relating to wills,<sup>33</sup> the words used by the decedent must be sufficient for the purpose,<sup>34</sup> since they have no authority to make a will for the decedent when he has not done so in his lifetime<sup>35</sup>

*Memorandum or instructions* A paper drawn up as a memorandum<sup>36</sup> or mere instructions or directions for the preparation of a will, without intent that the writing itself shall operate as a will,<sup>37</sup> do not amount to a will However, a testamentary paper drawn up in the form of instructions for a formal will may itself be a valid will if properly executed<sup>38</sup>

## § 156. Writing

A will must ordinarily be in writing

Except where nuncupative wills are permitted, a will must ordinarily be in writing,<sup>39</sup> statutes usually so providing<sup>40</sup> An oral will or any oral part of a

ferred for probate as a will is not controlling

Iowa—In re Mathews' Estate, 12 N W 2d 162, 231 Iowa 188

26 NC—In re Perry's Will, 137 S E 145, 193 NC 397  
68 C J p 635 note 8

27 NC—In re Dayton's Will, 99 S E 424, 177 NC 494  
68 C J p 635 note 9

28 Tex—In re Dromgoole's Estate, Civ App, 127 S W 2d 977

29 NY—In re Croker's Will, 105 N Y S 2d 190, 201 Misc 264

30 Ark—Owens v Douglas, 181 S W 896, 121 Ark 448  
68 C J p 635 note 10

### Nontestamentary provisions

The fact that there are nontestamentary provisions along with those testamentary, and that the latter are a very small part of the bulk of a document relied on as a will, does not make such small part inoperative as a will

Cal—In re Pagel's Estate, 125 P 2d 853, 52 Cal App 2d 38

31 Cal—In re Silva's Estate, 145 P 1015, 169 Cal 116

32 Mass—Aldrich v Aldrich, 102 NE 487, 215 Mass 164, Ann Cas 1914C 906

Pa—In re Kemmerling's Estate, Orph, 41 Sch Leg Rec 52—In re Kemmerling's Estate, Orph, 9 Sch Reg 104

33 Pa—In re Baldwin's Estate, Orph, 95 Pittsb Leg J 473, affirmed 55 A 2d 263, 357 Pa 432

Tex—Maxcy v Queen, Civ App, 206 S W 2d 114

34 Va—Lawless v Lawless, 47 SE 2d 431, 187 Va 511

The words of the testator must be sufficient for the purpose when taken in the sense in which they would be

used by the normal speaker of English under the testator's circumstances

Neb—In re Dimmitt's Estate, 3 N W 2d 752, 141 Neb 413, 144 A L R 704

35 NC—Buffaloe v Barnes, 38 S E 2d 222, 226 NC 313, rehearing denied 39 SE 2d 599, 226 NC 778  
Tex—Maxey v Queen, Civ App, 206 S W 2d 114

### Papers lacking formal requisites

Papers signed by one who acted as father of younger man, reciting that younger man had a half interest in all that older man had or owned because younger man had done all work to make a living for past six years and that, if older man should die, he left everything to younger man, lacked formal requisites to take effect as a will, and therefore younger man was not entitled to take as an heir, devisee, or legatee

Mich—Perry v Boyce, 34 N W 2d 570, 323 Mich 95

36 Wash—Wayman v Miller, 81 P 2d 501, 195 Wash 457

Mere drafts or minutes of wills are inadmissible to probate, and a mere unexecuted intention to leave by will is of no effect

Mich—In re Cosgrove's Estate, 287 N W 456, 290 Mich 258, 125 A L R 410

37 Del—Corpus Juris cited in In re Kemp's Will, 186 A 890, 895, 7 W W Harr 514

68 C J p 635 note 12

### Instructions for future

Instructions for a will to be drawn and executed in the future will not amount to a will, although they would be a valid will as far as execution is concerned if testator had so intended

Cal—In re Beebee's Estate, 258 P 2d 1101, 118 Cal App 2d 851.

38 Del—Corpus Juris cited in In re Kemp's Will, 186 A 890, 895, 7 W W Harr 514

68 C J p 635 note 13

Directions for will as amounting to nuncupative will see infra § 210

Necessity and sufficiency of execution see infra § 167

### Memorandum of instructions

A paper drawn up as a memorandum of instructions and then duly executed and attested as a will operates in its final character because of a corresponding change of purpose which the testator has properly carried out

Mich—In re Cosgrove's Estate, 287 N W 456, 290 Mich 258, 125 A L R 410

39 La—Succession of Wallis, 14 So 2d 749, 203 La 874

Va—Lawless v Lawless, 47 SE 2d 431, 187 Va 511

68 C J p 635 note 16

Holographic wills see infra §§ 200-207

Nuncupative wills see infra §§ 209-218

40. US—O'Connell v U S, D C Ill, 37 F Supp 832

Ill—Barber v Barber, 13 NE 2d 257, 368 Ill 215

In re Carlin's Estate, 125 NE 2d 649, 5 Ill App 2d 241—In re Apsey's Estate, 1 NE 2d 558, 285 Ill App 29

Iowa—In re Klein's Estate, 42 N W 2d 593, 241 Iowa 1103

Ky—Haysley v Rogers, 255 S W 2d 649

Neb—In re Dimmitt's Estate, 3 N W 2d 752, 141 Neb 413, 144 A L R 704

N J—In re Amsden's Will, 191 A 801, 121 N J Eq 571

NC—Paul v Davenport, 7 SE 2d 352, 217 NC 154

ND—In re Lyons' Estate, 58 N W 2d 845.

written will is inoperative as such.<sup>41</sup> A will cannot be made by having the intended executors or any one else promise the testator to carry out his wishes orally expressed.<sup>42</sup> An oral will, made and published according to the custom of the country, at a time antecedent to the statute requiring a writing and at a time when such oral wills were valid, will be sustained.<sup>43</sup>

**Sufficiency of writing** The general rule is that, in the absence of a statute to the contrary, it is not necessary that a will be written in English or any particular language.<sup>44</sup> A will written in lead pencil,<sup>45</sup> or partly written in ink and partly in pencil,<sup>46</sup>

partly typewritten and partly printed,<sup>47</sup> or partly printed and partly written,<sup>48</sup> or on a printed form,<sup>49</sup> has been held to satisfy the requirement, but a will written on a slate does not.<sup>50</sup>

The fact that a will is written with carbon paper does not affect the validity of a will which is otherwise executed in proper form.<sup>51</sup>

### § 157. Certainty Required

In order to be effective, a will must be worded with sufficient clarity to enable the court to determine from the will itself just what the testator intended.

Although no particular form or expression is needed for the creation of a will, it must be definite

Ohio—*Sherman v Johnson*, 112 N E

2d 326, 159 Ohio St 209

Okl—*Heupel v Heupel*, 174 P 2d 850, 197 Okl 567

S D—*In re McNair's Estate*, 38 N W 2d 449, 72 S D 604

68 C J p 635 note 17

#### Effect of statutory provision

(1) A provision of a statute requiring a will to be in writing is mandatory

Ill—*Cunningham v Hallyburton*, 174 N E 550, 342 Ill 442

Mo—*Brownfield v Brownfield*, 249 S W 2d 389—*Capps v Adamson*, 242 S W 2d 556, 362 Mo 539—*Potter v Ritchardson*, 230 S W 2d 672, 360 Mo 661

(2) A mere testamentary disposition to devise by will or a mere benevolent disposition to convey by deed by way of gift or as a reward for services not plainly provoked by, and bottomed on, oral contract will not take case out of the statute requiring wills to be in writing

Mo—*White v Cochran*, 248 S W 2d 854—*Wallace v Shanks*, 221 S W 2d 873—*Feiden v Gibson*, 218 S W 2d 105

41. Va—*Rinker's Adm'r v Simpson*, 166 S E 546, 159 Va 612  
68 C J p 635 note 18

#### Conversations or statements

(1) Conversations between deceased and daughter whereby deceased stated that she was dissatisfied with her will and that it should be destroyed and that she wanted her daughter, grandson, and granddaughter to share estate equally was not a valid testamentary disposition of deceased's property

Mich—*Haack v Burmeister*, 286 N W 666, 289 Mich 418

(2) Statements by intestate to disinterested third persons after her nephew had been taken into the home of intestate and her husband after proceedings by intestate's husband for adoption of the nephew that she had adopted the nephew and that he would inherit her property did not

have effect of a devise of her real estate to nephew

Tenn—*Taylor v Aulton*, 231 S W 2d 573, 191 Tenn 81

#### Oral instructions

(1) Deceased's attempt to give son orally testamentary instructions for distributing estate after death failed  
US—*Williams v Thrasher*, CCA Tex, 62 F 2d 944, certiorari denied  
*Thrasher v Williams*, 53 S Ct 691, 289 US 748, 77 L Ed 1493

(2) A clause in will, reading "regarding a memorial hall or room and the residue of my estate I have given full instructions to Trust Wood whom I make executor of my will", was invalid except as to appointment of executor, where instructions referred to were not in writing  
La—*Succession of Wallis*, 14 So 2d 749, 203 La 874

(3) Mother's oral instructions to daughter as to disposition of mother's property at her death were ineffective as a testamentary disposition and mother died intestate as to the property

NY—*In re Bates' Estate*, 21 NYS 2d 306, affirmed *In re Bates' Will*, 20 NYS 2d 1012, 259 App Div 968, reargument denied *In re Bates' Estate*, 21 NYS 2d 393, 259 App Div 986

#### Verbal agreements

(1) A mere verbal agreement with respect to testamentary disposition, which does not constitute a contract to make a will, is ineffective as a will

Pa—*In re Zechman's Estate*, Orph, 45 Berks Co 93, 3 Fiduciary 143  
68 C J p 635 note 18 [d]

(2) An administrator of an estate, who is also an heir, may not take to his own use the entire estate or any part thereof, under a claim that deceased, sixteen years previously, had made a verbal agreement that he wanted his property disposed of in such manner, since, in absence of will, such a claim cannot be sustained  
Ga—*McNeely v Booth*, 2 S E 2d 512, 59 Ga App 889

#### Understanding

Where testator and his brother, who was legal life tenant under the will, had understanding that survivor of them would untangle, salvage, and liquidate jointly held property so that proceeds could be enjoyed by family of first to die, but understanding was indefinite and was vague as to when and how survivor was to turn property over to decedent's family, there was no secret trust capable of enforcement that could be impressed on legal life estate, even though brother wished to perform in full his idea of the understanding  
NY—*In re Behn's Estate*, 106 NYS 2d 118, 201 Misc 12

42. Pa—*Porter v Wolf*, 116 A 55, 272 Pa 93

43. Hawaii—*Matter of Kanui*, 2 Hawaii 82

44. Okl—*Heupel v Heupel*, 174 P 2d 850, 197 Okl 567

45. Pa—*Tomlinson's Estate*, 19 A 482, 133 Pa 245, 19 Am SR 637—*Myers v Vanderbilt*, 84 Pa 510, 24 Am R 227

46. Mass—*Paglia v Messina*, 160 NE 423, 270 Mass 1  
68 C J p 636 note 22

47. Ala—*Stuck v Howard*, 104 So 500, 213 Ala 184

48. Ala—*Stuck v Howard*, supra  
Ohio—*Roush v Wensel*, 15 Ohio Cir Ct 133, 8 Ohio Cir Dec 141

49. Ala—*Stuck v Howard*, 104 So 500, 213 Ala 184  
NY—*Matter of Murphy's Will*, 62 NYS 785, 48 App Div 211

50. Pa—*Reed v Woodward*, 2 Chest Co 563, 11 Phila 511

51. Tex—*Howard v Combs*, Civ App, 113 S W 2d 221

#### Carbon copy

The fact that the typewritten part of will was not the first sheet made by typewriter, but a carbon copy did not affect validity of will which was otherwise executed in proper form  
La—*Succession of Patterson*, App, 22 So 2d 214.

and certain<sup>52</sup> Although absolute certainty is not required of a will,<sup>53</sup> in order to be effective, it must be worded with sufficient clarity to enable the court to determine from the will itself just what the testator intended<sup>54</sup> A will must be sufficiently clear so that the court does not have to indulge in conjectures as to the supposed intent of a testator,<sup>55</sup> but it is sufficiently certain if it can be ascertained by use of means referred to in the will<sup>56</sup> There must be a definite subject of disposition<sup>57</sup> and a definite object of testamentary bounty,<sup>58</sup> pointed out

on the face of the will or certainly ascertainable through means provided by the will itself,<sup>59</sup> and if either is uncertain the defect is fatal<sup>60</sup>

The courts are reluctant to hold wills void for uncertainty,<sup>61</sup> and a will will not be overturned on such grounds if a construction effectuating the testator's intent is possible<sup>62</sup> It is only in extreme cases, where the language of the will is such that it is absolutely impossible to ascertain its meaning, that the court will declare the whole will void for uncertainty<sup>63</sup> and hold that the testator died intes-

52. Ky—Meader's Ex'r v Old Odd Fellows and Rebekahs Home, 177 S W 2d 874, 296 Ky 497—Harlan v Anderson's Ex'r, 103 S W 2d 310, 267 Ky 779

Mich—La Mere v Jackson, 284 N W 659, 288 Mich 99

Tex—Boyles v Gresham, 263 S W 2d 935

"The general rule is that if a person makes a will he must declare his wishes in specific terms and not leave it in uncertain terms for another to make his will for him"

Mont—In re Swayze's Estate, 191 P 2d 322, 324, 120 Mont 546

"If a man wishes to dispose of his estate by will he ought to express his desires so that they can be accomplished If he is not able to say what he wants to say or is so negligent that he does not write what he has in his mind, or have someone else do it, he ought not to expect the courts to read his mind or divine his will by some sort of supernatural power"

Ky—Winn v William, 165 S W 2d 961, 964, 292 Ky 44

53. Ill—Hiskey v Frey, 107 N E 2d 858, 348 Ill App 122

54. Ky—Johnson v Johnson, 229 S W 2d 743, 312 Ky 773—Blankenship v Blankenship, 124 S W 2d 1060, 276 Ky 707

68 C J p 636 note 28

#### Resort to doubtful authorities

In construing will, no resort will be had to doubtful authorities to invalidate will on ground of uncertainty when testator's intention can be gathered from language used in will

Colo—Ireland v Hudson, 41 P 2d 237, 96 Colo 240

#### Religious purpose

(1) Generally, courts do not attempt to further testamentary purpose, even though religious, that is indefinite and impracticable, especially if it is to be accomplished through medium of a trust

N Y—In re Payne's Estate, 290 N Y S 407, 160 Misc 224

(2) Testamentary direction that executor expend entire estate to defray expenses of publishing uncopied manuscript on religion writ-

ten by testator and place copies thereof in public libraries was enforceable, since execution of testamentary plan was not indefinite or impracticable, notwithstanding generality and indefiniteness of objects of book

N Y—In re Payne's Estate, supra

55. Ill—Hiskey v Frey, 107 N E 2d 858, 348 Ill App 122

Mich—La Mere v Jackson, 284 N W 659, 288 Mich 99

56. Tex—Grubb v Anderson, Civ App, 38 S W 2d 847

57. W Va—Hunt v Furman, 52 S E 2d 816, 132 W Va 706

68 C J p 636 note 29

Certainty in description of property devised or bequeathed see infra § 747

58. Md—Cassilly v Devenny, 177 A 919, 168 Md 443

W Va—Hunt v Furman, 52 S E 2d 816, 132 W Va 706

68 C J p 636 note 30

Certainty of designation of beneficiary see infra § 641

"Any language in will technical or otherwise, which clearly indicates the intention of testator to dispose of his property to certain persons either named or ascertainable is sufficient, for the purpose of a will"

W Va—Dingess v Drake, 64 S E 2d 601, 604, 135 W Va 502

#### Definite disposition to designated beneficiaries

Will making definite disposition to designated beneficiaries of all the property owned by testatrix was not void for uncertainty

Ark—Garrett v Mendenhall, 192 S W 2d 972, 209 Ark 898

59. Md—Cassilly v Devenny, 177 A 919, 168 Md 413

60. W Va—Hunt v Furman, 52 S E 2d 816, 132 W Va 706—Arnett v Fairmount Trust Co, 73 S E 930, 70 W Va 296—Weaver v Spurr, 48 S E 852, 56 W Va 95

#### Future designation

If the beneficiary and the property given to him is in terms left to future designation, the will is incomplete and ineffective While future acts may determine what is within

the designation contained in the will, it cannot be altered or created in that way unless provisions of the statute of wills are complied with

N H—Hastings v Bridge, 166 A 273

61. D C—Washington Loan & Trust Co v Hammond, 278 F. 569, 51 App D C 260

Construction upholding will see infra § 614

62. Ky—Crawford v Crawford, 162 S W 2d 4, 290 Ky 542

Tenn—Nashville Trust Co v Johnson, 236 S W 2d 100, 34 Tenn App 197

68 C J p 637 note 37

"That is certain which can be made certain" is a maxim which applies in probate proceedings

Cal—In re Bourn's Estate, 78 P 2d 193, 25 Cal App 2d 590

#### Extraneous or parol evidence

(1) A devise or bequest should not be construed as void for uncertainty if, by resort to proper extraneous evidence, such devise can be rendered reasonably certain so as to carry out intention of testator

Tex—Welch v Rawls, Civ App, 186 S W 2d 103, refused without merit

(2) A will is sufficiently certain and definite to be capable of enforcement if the subject matter and the beneficiaries thereunder can be identified by parol evidence

Ga—Garrett v Wheelless, 69 Ga 466

Pa—In re Gaston, 41 A 529, 188 Pa 374, 68 Am S R 874, 46 Pittsb Leg J 174

63. Mo—St Louis Union Trust Co v Little, 10 S W 2d 47, 320 Mo 1058

68 C J p 637 note 38.

#### Wills held not void as vague and uncertain

Ky—Cambron v Pottinger, 193 S W 2d 412, 301 Ky 768—Moss v Hodges, 172 S W 2d 584, 294 Ky 677

R I—Tirocchi v Tirocchi, 20 A 2d 680, 67 R I 71

Tex—Hunt v Carroll, Civ App, 157 S W 2d 429, error dismissed Carroll v Hunt, 168 S W 2d 238, 140 Tex 424

68 C J p 637 note 38 [c].

tate<sup>64</sup> Stated otherwise, it is only when all the established rules of law for the construction of wills have been applied in vain may the court reject the instrument as impossible of construction<sup>65</sup> On the other hand, the court cannot make a will and supply by construction omitted elements of certainty<sup>66</sup> The courts will hold a will void in its entirety for uncertainty when, after consideration of all its provisions and all the matters which might shed light on it and make it certain, it remains so obscure, indefinite, and ambiguous that no definite idea of the testator's intention can be formed<sup>67</sup> This is particularly true where the court cannot, by the application of reasonable rules of construction, ascertain the intent of the testator<sup>68</sup>

A court is not entitled to pronounce an instrument ambiguous until it has brought to its aid all the

light afforded by the collateral facts and circumstances<sup>69</sup> Mere uncertainty of expression and doubtful meaning does not absolve the court from the duty of interpreting a will, unless it is so vague and so indefinite as to render the purpose and meaning incomprehensible<sup>70</sup> The fact that there is uncertainty of complete fulfillment of the intention of the testator does not render his intention uncertain and indefinite<sup>71</sup> Also, the fact that a will is artificially drawn does not effect its validity where the meaning of any particular clause, expounded by a consideration of all other parts of the will, can be ascertained with reasonable accuracy<sup>72</sup>

*Provisions of will* Uncertainty is fatal to any provision in a will,<sup>73</sup> but a provision of a will should not be stricken for uncertainty or ambiguity if such a result can possibly be avoided<sup>74</sup> A provi-

64 Del—Tippett v Tippett, 7 A 2d 612, 24 Del Ch 115

"The law itself makes a just and equitable disposition of property of an intestate among the natural objects of his bounty and it should prevail over provisions of an attempted disposition that are so obscure that the purpose of the testator cannot be ascertained with reasonable certainty"

Ky—Winn v William, 165 SW 2d 961, 964, 292 Ky 44

65 NY—In re Allen's Will, 181 NY 398, 111 Misc 93, affirmed 194 NYS 913, 202 App Div 810, modified on other grounds 142 NE 260, 236 NY 503

66 Ky—Futrell v Futrell's Ex'r, 7 SW 2d 232, 224 Ky 814

Pa—Wise v Rupp, 112 A 548, 269 Pa 505

67 DC—District of Columbia v Adams, DC, 57 F Supp 946

Ill—Hiskey v Frey, 107 NE 2d 858, 348 Ill App 122

Iowa—Wright v Copeland, 41 NW 2d 102, 241 Iowa 447

Ky—Meader's Ex'r v Old Odd Fellows and Rebekahs Home, 177 SW 2d 874, 296 Ky 497—Winn v William, 165 SW 2d 961, 292 Ky 44—Crawford v Crawford, 162 SW 2d 4, 290 Ky 542—Blankenship v Blankenship, 124 SW 2d 1060, 276 Ky 707

SC—Corpus Juris cited in Meier v Meier, 38 SE 2d 762, 765, 208 SC 520

68 C J p 636 note 34

"If the writing is so uncertain or confused or ambiguous that the testator's intentions cannot be reasonably ascertained, it is void as a testamentary instrument"

Ky—Johnson v Johnson, 229 SW 2d 743, 744, 312 Ky 773

69 Mo—Griffith v Witten, 161 SW 708, 252 Mo 627.

69 NH—Glover v Baker, 83 A 916, 76 NH 393

70. NY—In re Allen's Will, 181 NY 398, 111 Misc 93, affirmed 194 NYS 913, 202 App Div 810, modified on other grounds 142 NE 260, 236 NY 503

71. Ill—Harges v Zander, 145 NE 363, 314 Ill 170

72. NJ—Weber v Beales, 55 A 2d 67, 140 NJ Eq 423

Where the intention is evident, mere inartificiality in expression will not divert a clear testamentary purpose into intestacy

Md—Home for Incurables of Baltimore City v Bruff, 153 A 403, 160 Md 156

73. Ky—Andrew's Ex'x v Spruill, 112 SW 2d 402, 271 Ky 516

La—Succession of Smart, 36 So 2d 639, 214 La 639

Mich—La Mere v Jackson, 284 NW 659, 288 Mich 99

NJ—Girard Trust Co v Schmitz, 20 A 2d 21, 129 NJ Eq 444

NY—In re Berwind's Estate, 42 NY S 2d 58, 181 Misc 559

Ohio—Murr v Youse, Prob, 80 NE 2d 788

Any part of a will where the testator's intention cannot be determined is void for uncertainty

Ky—Blankenship v Blankenship, 124 SW 2d 1060, 276 Ky 707—Futrell v Futrell's Ex'r, 7 SW 2d 232, 224 Ky 814

Incomplete interlineated direction

Where incomplete interlineated direction at end of paragraph of will, "That the principal sum Four thousand Dollars more or less shall remain on deposit for investment at Peekskill Savings bank The interest", was unrelated to any other provision in will, it was rejected as nugatory

NY—In re Kear's Will, 51 NYS 2d 897.

Provisions held void for uncertainty

(1) Generally

Ky—Underwood v Underwood, 117 SW 2d 596, 273 Ky 654

Pa—In re McKean's Estate, 48 A 2d 74, 159 Pa Super 409

(2) Where testatrix named "Arthur Blankenship" as her executor, provision that "house and lot Jay Justice now lives in to be his and Arthur can name any others he wishes" was void for vagueness and uncertainty Ky—Blankenship v Blankenship, 124 SW 2d 1060, 276 Ky 707

(3) A provision of will giving testator's property to his wife for life, with remainder after her death to their brothers and sisters and children of deceased brothers or sisters, that share of one of wife's brothers should go to his son, "less one hundred and fifty dollars," was void because of indefiniteness and impossibility of ascertaining whether testator intended such sum to be charged against such son's share of realty RI—Barker v Ashley, 192 A 304, 58 RI 243.

74. Md—Legge v Canty, 4 A 2d 465, 176 Md 283

Directions as to disposal of balance of estate

Where document designated as a will and executed by a layman manifested intention to provide for payment of all just debts, necessary expenses, and eight specific bequests, and language throughout indicated positive directions to executor to dispose of estate in manner specifically declared in document, clause directing executor to dispose of any balance after aforementioned gifts according to his wise discretion constituted a valid testamentary disposition

Wash—In re Lidston's Estate, 203 P 2d 259, 32 Wash 2d 408



sion in a will will be declared void on the ground of uncertainty only when its terms are so indefinite and uncertain that the court, in applying the usual rules of construction, is unable to declare the intention of the testator for the reason that in legal contemplation there was no expression on his part <sup>75</sup>

## § 158. Instrument in Form of Letter

Provided the statutory requisites are present, an instrument in the form of a letter may constitute a will

An instrument in the form of a letter may be a valid will <sup>76</sup> Accordingly, a letter which is testamentary in character, <sup>77</sup> and which complies with

### Provisions held not void

(1) Generally  
Cal—In re Deffenbach's Estate, 57 P 2d 1340, 14 Cal App 2d 268  
Kan—O'Toole v Fish, 51 P 2d 992, 142 Kan 837  
RI—Barker v Ashley, 192 A 304, 38 RI 243

(2) A testamentary direction that corpus of trust be paid to family holding company on termination of life estate was not void for vagueness because some stranger to testatrix might acquire stock in holding company and thus benefit by bounty of testatrix

US—Heller v National Bank of West Virginia at Wheeling, DCW Va, 33 F Supp 250

(3) Provision in will by which testator, who was sole owner of stock of corporation, bequeathed stock to trustee and provided for organization and operation of corporation, and distribution of all of profits among employees of corporation after death of wife and sister, without limitation of time of enjoyment of income and with no other disposition of stock, was not void for uncertainty  
Colo—Ireland v Hudson, 41 P 2d 237, 96 Colo 240

75. NC—Fuller v Hedgpeth, 80 S E 2d 18, 239 NC 370

### Speculation

Where any construction which might be placed on a portion of a will would be the purest speculation, testator's effort to express an intention must be regarded as abortive and the attempted disposition of his property as void

Mich—La Mere v Jackson, 284 NW 659, 288 Mich 99

76. Cal—In re Beebe's Estate, 258 P 2d 1101, 118 Cal App 2d 851  
Ky—Dixon v Dameron's Admr, 77 S W 2d 6, 256 Ky 722

Pa—In re Kauffman's Estate, 76 A 2d 414, 365 Pa 555  
Appeal of Thompson, Orph, 14 Beaver Co 248, affirmed 100 A 2d 69, 375 Pa 193—In re Gable's Estate, Orph, 53 York Leg Rec 169 68 CJ p 637 note 47

The form or language of a letter may establish it to be a will  
Ky—Bogges v McGaughey, 207 S W 2d 766, 306 Ky 319

77. Cal—In re Smilie's Estate, 222 P 2d 692, 99 Cal App 2d 794  
Ky—Dixon v Dameron's Admr, 77 S W 2d 6, 256 Ky. 722.

Pa—In re Thompson's Estate, Orph, 3 Fiduciary 240—In re Kemmerling's Estate, Orph, 44 Sch Leg Rec 52

SD—In re Zech's Estate, 20 NW 2d 229, 70 SD 622  
69 CJ p 638 note 48

**Instrument on business letter head**  
in maker's handwriting reciting that maker transferred and assigned his present automobile or any other that he might own at time of death to named individual, and signed by maker and witnessed by two witnesses, was admissible to probate as a testamentary instrument

NY—In re Sayers' Will, 76 NY S 2d 788, 190 Misc 976, appeal dismissed 79 NY S 2d 770, 273 App Div 1051

### Part or portion of letter

(1) A portion of letter written wholly in handwriting of testatrix and signed by her, and stating that she had three nieces and a husband who had had enough and in whom she was not interested, but that if she left \$5 or \$5,000 she wanted church to have it, was revocable and complete in itself and fulfilled every requirement of the essential elements of a will so as to be entitled to probate

Ky—De Lapp v Anderson, 203 SW 2d 388, 305 Ky 333

(2) Where deceased while living with mother wrote in pencil to mother in form of letter and therein stated in part that if anything should happen to deceased, deceased wanted her mother to have deceased's son, home, and everything she had, such writing was testamentary in character and was entitled to probate

Tenn—In re Bramlett's Estate, 260 SW 2d 181, 195 Tenn 471.

### Testamentary intent

(1) In order to justify probate of alleged will written in form of letter, fact that deceased intended the document to be her last will was required to clearly appear

Cal—In re Beebe's Estate, 258 P 2d 1101, 118 Cal App 2d 851

(2) Letter to decedent's attorney requesting him to visit her to make out a new will, and advising him of intended disposal of her property, authorized conclusion that decedent did not intend letter to be her last will  
Cal—In re Kisinger's Estate, 156 P 2d 57, 68 Cal App 2d 163.

### Letters held not wills

(1) Generally  
Ky—Bogges v McGaughey, 207 S W 2d 766, 306 Ky 319  
NY—In re Pryll's Estate, 107 NY S 2d 415, 200 Misc 828

(2) Letter written by deceased to manager of estate planning division of trust company stating that deceased wished to revoke all former wills and codicils because of changed conditions, and that she wished to leave her entire estate to her son without reservation, and signed by deceased, but containing an additional paragraph stating that deceased was eighty nine years old and going blind, and that she was not able to get down to the trust company, and requesting manager to do whatever was necessary under the circumstances, whether by codicil or new will and followed by second signature of deceased, was not a will when considered alone without evidence

Cal—In re Beebe's Estate, 258 P 2d 1101, 118 Cal App 2d 851

(3) Message written by son to his mother directing her to pay his funeral expenses and just debts, and message addressed by the son to his wife directing her to take life policy and take care of it, could not be probated as testamentary documents even though each was placed in an envelope containing a life policy

Ky—Quinlan v Quinlan, 169 SW 2d 617, 293 Ky 565

(4) A letter from decedent to his sister reciting "I am making out my will leaving my securities to you", where no such will was found, did not itself constitute a will

Pa—In re Tyson's Estate, 9 A 2d 733, 336 Pa 497

### Nomination of executors

Where a letter was offered as a holographic will which stated where the will of the writer and that of his mother might be found and gave instructions with reference to the disposition of them should any fatal accident befall either his mother or himself and in the last paragraph of the letter the writer stated that he desired certain parties to act as executors, was of a testamentary character to the extent and only to the extent that it purported to nominate executors

Tenn—Howell v. Moore, 14 Tenn App 594

all the formalities required by statute,<sup>78</sup> is valid as a will, irrespective of its informal character.<sup>79</sup> Its character as a will is not defeated because it was not delivered to the addressee and no attempt made to enforce it during the testator's life.<sup>80</sup>

### § 159. Incomplete Instruments

In order to be effective as a will, the instrument must appear to be so far complete as to have left no part of the testator's intention unexpressed.

A will must be perfect in the testamentary sense and designed as something final in shape, and not preliminary, or it cannot take effect as a will.<sup>81</sup> An instrument may be so incomplete and unfinished that courts will not declare it to be a will,<sup>82</sup> and an instrument will not be declared a will if the testator does not intend it to take effect as such, but intends it to take effect only when additional formalities are completed.<sup>83</sup> In order to be effective as a will, the testator must not depend on some

further voluntary act of his own to complete it,<sup>84</sup> and the instrument must appear to be so far complete as to have left no part of the testator's intention unexpressed.<sup>85</sup> The presumption is against an incomplete and unfinished will,<sup>86</sup> some cases holding that an instrument is not a will, where the testator intended some further act to complete it.<sup>87</sup> On the other hand, an incomplete or unfinished instrument has been held to be operative as far as it goes, where the provisions written are complete and embody the last intention of the testator,<sup>88</sup> and the failure to finish the will is not due to a change of mind or desire to abandon it.<sup>89</sup> An incomplete instrument may be given effect as a valid will if it is shown that the testator, at the time of the execution of the instrument, adopted the incomplete instrument as the last expression of his testamentary purpose.<sup>90</sup> If the instrument is coherent and consistent,<sup>91</sup> the fact that there are blank spaces between the words, sentences, or paragraphs of a document otherwise

78 S D—In re Zech's Estate, 20 N W 2d 229, 70 S D 622  
Pa—In re Gray's Estate, 76 A 2d 169, 365 Pa 411

#### Execution

(1) Letter written by owner of bank account that her husband had assured her that he would see to it that her niece and nephew were educated, but that in case anything prevented his doing so she wanted to leave letter as her will, and wished all her money to be used to educate niece and nephew, was testamentary in character, but could not become a will as not properly executed  
Ohio—Thomas v Dye, App, 127 N E 2d 228

(2) Execution generally see *infra* § 167 et seq

#### Attestation

(1) A letter, not attested in manner prescribed by Decedent Estate Law, was ineffectual as testamentary disposition of writer's property  
N Y—In re Fry's Will, 65 N Y S 2d 831

(2) Necessity of attestation see *infra* § 183

79 S D—In re Zech's Estate, 20 N W 2d 229, 70 S D 622

Informal letters addressed to beneficiary may be testamentary in character

Pa—Appeal of Thompson, 100 A 2d 69, 375 Pa 193, 40 A L R 2d 694

80. Mo—Murphy v Clancy, 163 SW 915, 177 Mo App 429.

81. Mich—In re Cosgrove's Estate, 287 NW 456, 290 Mich 258, 125 A L R 410  
Necessity of testamentary intent see *supra* § 129.

82. Ohio—Corpus Juris quoted in In re Crowe's Will, 4 Ohio Supp 370, 374  
68 C J p 638 note 51  
Incomplete execution see *infra* § 167

83. Mich—In re Greenman's Estate, 52 NW 2d 363, 332 Mich 646

Application of rule held not justified  
Mich—In re Greenman's Estate, *supra*

84. Tex—Ragland v Wagener, 180 SW 2d 435, 142 Tex 651, 152 A L R 1232

#### Execution of deed

A provision of a will making devise as a whole dependent on testator's executing a deed to devisees and placing it with will in his private box was ineffective as leaving something remaining for testator to do to complete the devise which was conditioned, not on the happening of an independent contingency or the fulfillment of a condition, but on testator's mental attitude to be thereafter formulated by him.

Tex—Ragland v. Wagener, *supra*

85. Ohio—Corpus Juris quoted in In re Crowe's Will, 4 Ohio Supp 370, 374

Tex—Corpus Juris cited in Ragland v Wagener, 180 SW 2d 435, 438, 142 Tex 651, 152 A L R 1232  
66 C J p 638 note 54

86. Ohio—Corpus Juris quoted in In re Crowe's Will, 4 Ohio Supp 370, 374  
68 C J p 638 note 52

87. Ohio—Corpus Juris quoted in In re Crowe's Will, 4 Ohio Supp 370, 374  
68 C J p 638 note 53

88. Tenn—Orgain v Irvine, 43 SW 768, 100 Tenn 193  
68 C J p 638 note 55

#### Document held properly admitted to probate

Where testator handed document to another with request that she check the real estate descriptions therein and then typewrite a copy thereof for his signature, and where document, which was entitled "Will," was written in testator's own handwriting and was complete in form except for signature, attestation, and name of executor, but testator signed document at other's suggestion because he was going away before final draft would be prepared and attestation of witnesses was executed in his presence, document was properly admitted to probate  
Mich—In re Cosgrove's Estate, 287 NW 456, 290 Mich 258, 125 A L R 410

89. Tenn—Orgain v Irvine, 43 SW 768, 100 Tenn 193  
68 C J p 638 note 55

90. Ohio—In re Crowe's Will, 4 Ohio Supp 370, 375

"The test is whether the incomplete instrument expresses the final testamentary purpose of the testator"  
Ohio—In re Crowe's Will, *supra*

Instrument known to be beginning of draft of a will may nevertheless be given effect if it is shown that the testator adopted such paper as the final expression of his testamentary purpose  
Pa—In re Plate's Estate, 9 Pa Co 644, reversed on other grounds 23 A 1038, 148 Pa 55, 33 Am S R 805

91. Mich—In re Cosgrove's Estate, 287 NW 456, 290 Mich 258, 125 A L R 410.

a complete will, without any further act to be done to complete it, does not affect its character as such<sup>92</sup> Where a testator provided in his will that the remainder of his estate should be disposed of in accordance with a codicil to be thereafter attached, but no codicil was ever executed, no legal effect can be given to the provision<sup>93</sup>

### § 160. Will on Both Sides of Paper

A valid will may consist of separate writings on two sides of the same paper

A valid will may consist of separate writings on two sides of the same paper<sup>94</sup>

Hence, where it is clearly the intention of the testator that writings on both sides of a paper shall constitute his will, the courts will so construe it<sup>95</sup> Similarly, where a separate writing on the reverse side of a will is necessary to make it complete and valid, the court will take the two together<sup>96</sup>

### § 161. Separate Instruments

A will may be comprised of two or more separate instruments

A will may be comprised of two or more separate

instruments<sup>97</sup> Thus, two or more instruments, purporting to be wills of the same person and properly executed at the same time, will be treated as one will and as though combined in the same instrument<sup>98</sup> However, except as it may be permitted by the rules regulating incorporation of an extrinsic document in a will by reference, as considered infra § 163, an instrument not of testamentary character<sup>99</sup> and not properly executed<sup>1</sup> cannot, together with an alleged will, constitute the will of the testator Totally inconsistent documents offered as one will should not be taken as one will,<sup>2</sup> and if executed at the same time, both must be held void for uncertainty<sup>3</sup> So, if from the absence of a date and other evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are void<sup>4</sup>

It has been stated to be a general rule that wills executed at different times may be treated as one will, as far as they are not wholly inconsistent,<sup>5</sup> and there is no revocation of the earlier will<sup>6</sup> This rule, however, does not permit the ingrafting on a will properly executed of another instrument not of a testamentary character and not executed as a

92. Mich—In re Cosgrove's Estate, supra

Ohio—In re Crowe's Will, 4 Ohio Supp 370

68 C J p 638 note 57

93. N Y—In re Dean's Estate, 2 N Y S 2d 757, 166 Misc 499

94. Ky—Hays v Marshall, 48 S W 2d 540, 243 Ky 392

95. Ky—Hays v Marshall, supra

68 C J p 638 note 59

96. Cal—In re Ballesio's Estate, 256 P 1101, 201 Cal 357

68 C J p 638 note 60

97. Kan—Mann v Haines, 73 P 2d 1066, 146 Kan 988—Derr v Derr, 256 P 800, 123 Kan 681

Pa—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

R I—Merrill v Boal, 132 A 721, 47 R I 274, 45 A L R 830

Admission to probate of separate instruments see infra § 313

Construing instruments together see infra §§ 623-625

**Several testamentary papers**

(1) Several testamentary papers made together constitute last will of testator

Tenn—Druen v Hudson, 68 S W 2d 146, 17 Tenn App 428

(2) Several testamentary papers and codicils may together constitute the last will of the testator

Tenn—Howell v Moore, 14 Tenn App 594

**Letter and paper**

Letter of testatrix to niece and paper which letter stated testatrix

would write later were held together to constitute will

Ky—Dixon v Dameron's Adm'r, 77 S W 2d 6, 256 Ky 722

**Will and letter**

Where will made a number of specific bequests but contained no residuary or revocative clauses, and at direction of testatrix the will was placed in a large envelope in a secret drawer and after her death the envelope was found to contain a smaller envelope enclosing an undated letter from testatrix in her handwriting to executor directing destruction of two notes in tin box in desk drawer, the letter, while precatory, was testamentary and forgave indebtedness, disposing of what otherwise would have been assets of the estate

Pa—In re McKean's Estate, 48 A 2d 74, 159 Pa Super 409

98. Cal—In re Murphy's Estate, 38 P 543, 104 Cal 554

68 C J p 639 note 65

99. Okl—Corpus Juris cited in

Collar v Mills, 125 P 2d 197, 202, 190 Okl 481

68 C J p 639 notes 64, 72

**Letter**

(1) A letter written by one who had imperfectly executed a will, addressed to the chief beneficiary thereunder, which does not refer directly or indirectly to any paper whatever, and which merely recites some of the provisions of the will for the purpose of conveying information to the beneficiary of the writer's solicitude in

her behalf, and not to ratify anything already done, or to republish the will, does not, together with the will, constitute a valid will

Mont—In re Noyes' Estate, 106 P 355, 40 Mont 231

(2) Letter from attorney to his client suggesting insertion in client's will clearly to state that trust inter vivos created by client is to be terminated and his entire estate distributed under will, which letter client marks "approved" and signs, does not properly constitute part of client's will even though prorated as such; it is merely authorization to prepare will and does not of itself operate as such

Pa—In re Chance's Estate, 29 Pa Dist & Co 586

1. Cal—In re Lewis' Estate, 204 P 2d 898, 91 Cal App 2d 322

68 C J p 639 note 72

2. Okl—Corpus Juris cited in Collar v Mills, 125 P 2d 197, 201, 190 Okl 481

68 C J p 639 note 66

3. Okl—Corpus Juris cited in Collar v Mills, 125 P 2d 197, 201, 190 Okl 481

68 C J p 639 note 67

4. N C—In re Westfeldt's Will, 125 S E 531, 188 N C 702

5. Ala—Wheat v Wheat, 181 So. 243, 236 Ala 52

68 C J p 639 note 70

6. Ala—Wheat v Wheat, supra

Revocation by subsequent will see infra § 274.

will,<sup>7</sup> unless it comes within the rule allowing the incorporation, by reference, of extrinsic writings, as considered *infra* § 163

**Multiple instruments** Where there has been a multiple execution of a will, all of the counterparts collectively constitute the will of the deceased person<sup>8</sup>

## § 162. One Will on Separate Sheets of Paper

A will may be written on several sheets of paper, provided the sheets are so connected together that they may be identified as parts of the same will

A will need not be written entirely on one sheet of paper,<sup>9</sup> but may be written on several separate sheets,<sup>10</sup> even though there is confusion in the order of their arrangement,<sup>11</sup> provided the sheets are so connected together that they may be identified as parts of the same will<sup>12</sup> A valid will may be written on several sheets of paper without attaching them where the principle of integration may be applied<sup>13</sup>

While connection by the meaning and coherence of the subject matter is sufficient,<sup>14</sup> as physical connection by mechanical, chemical, or other means is

7. *Okl—Corpus Juris cited in* Col-lar v Mills, 125 P 2d 197, 202, 190 Okl 481  
68 C J p 639 note 73

8. *NY—In re Rinder's Estate*, 92 N Y S 2d 320, 196 Misc 657—*In re Hedin's Will*, 48 N Y S 2d 870, 181 Misc 730—*In re Andriola's Will*, 290 N Y S 671, 160 Misc 775

### Duplicate

(1) Where the will has been executed in duplicate, either of the wills possesses the elements of a valid will

*Miss—Phinizee v Alexander*, 49 So 2d 250, 210 Miss 196

(2) Where will was printed in duplicate, one from carbon and other with ink from typewriter ribbon, both were signed by testator and by witnesses, the will was executed in duplicate and both together constituted testator's will

*NY—In re Robinson's Will*, 13 N Y S 2d 324, 257 App Div 405  
*In re Konner's Estate*, 101 N Y S 2d 651

9. *Neb—Corpus Juris quoted in* *In re Kaiser's Estate*, 34 N W 2d 366, 373, 150 Neb 295

*Pa—Corpus Juris quoted in* *In re Covington's Estate*, 33 A 2d 235, 238, 348 Pa 1  
68 C J p 639 note 76

10. *Ala—Johnston v King*, 35 So 2d 202, 250 Ala 571

*Neb—Corpus Juris quoted in* *In re Kaiser's Estate*, 34 N W 2d 366, 373, 150 Neb 295

*NY—Corpus Juris cited in* *In re Allen's Will*, 15 N Y S 2d 401, 404, 257 App Div 718, appeal granted 16 N Y S 2d 693, 258 App Div 836, reversed on other grounds 27 N E 2d 22, 282 N Y 492, reargument denied 28 N E 2d 40, 283 N Y 643  
*In re Johnson's Estate*, 7 N Y S 2d 81, 169 Misc 215

*Pa—Corpus Juris quoted in* *In re Covington's Estate*, 33 A 2d 235, 238, 348 Pa 1—*In re Davis' Estate*, 26 A 2d 339, 344 Pa 520  
68 C J p 639 note 76

"There is no statute forbidding the use of separate sheets or directing how they shall be joined together."

*NY—In re Costello's Will*, 114 N Y S 2d 525, 529

**A will may consist of several sheets of paper**, and it does not in and of itself matter that one of such sheets standing alone would not constitute an executed will

*Cal—In re Moody's Estate*, 257 P 2d 709, 118 Cal App 2d 300

### Only last one signed

(1) A valid will may be written on separate, not physically united, sheets of paper, only the last one of which is signed

*Pa—In re Covington's Estate*, 33 A 2d 235, 348 Pa 1

(2) Where purported will is written on separate, not physically united, sheets of paper only the last one of which is signed, it is not necessary to testamentary validity of such papers that a specific reference be made on signed page to the preceding pages

*Pa—In re Covington's Estate*, supra

(3) In order for probate as a will of separate, not physically united, sheets of paper, only the last one of which is signed, it is not necessary that separate sheets be verbally united by completion on successive page of a sentence or paragraph begun on the preceding page

*Pa—In re Covington's Estate*, supra

11. *NY—In re Allen's Will*, 15 N Y S 2d 401, 257 App Div 718, appeal granted 16 N Y S 2d 693, 258 App Div 836, reversed on other grounds, 27 N E 2d 22, 282 N Y 492, reargument denied 28 N E 2d 40, 283 N Y 643

12. *Neb—Corpus Juris quoted in* *In re Kaiser's Estate*, 34 N W 2d 366, 373, 150 Neb 295

*Pa—Corpus Juris quoted in* *In re Covington's Estate*, 33 A 2d 235, 238, 348 Pa 1—*In re Bryen's Estate*, 195 A 17, 328 Pa 122

*In re Brawdy's Estate*, Orph, 25 West L J 86

68 C J p 639 note 76

"It is not essential to the validity of a will consisting of more than one sheet of paper that the sheets be fastened together. It is enough if they reasonably appear to be each a proper part of a completed will."

*Iowa—In re Puckett's Estate*, 38 N W 2d 593, 598, 240 Iowa 986

### All papers present at time of execution

(1) Papers will not be construed to be a will, unless all of papers are clearly shown to have been present as one document at time of execution

*NY—In re Stege's Estate*, 293 N Y S 856, 161 Misc 667

(2) Three papers in decedent's handwriting, found together in envelope shortly after decedent's death, could not be probated together as will, where there was no proof that two of the papers, which were unsigned and unattested, were physically present or attached to first one when first one was subscribed by decedent at end thereof and when she declared it to be her last will

*NY—In re Stege's Estate*, supra

13. *Cal—In re Dumas' Estate*, 210 P 2d 697, 34 Cal 2d 406

*NY—In re Redden's Will*, 56 N Y S 2d 751, 185 Misc 382

"To be effective as an integral part of a will, separate document must be dispositive and actually attached to the will, or by its contents disclose that it was intended to supplement the will"

*Cal—In re Fritz's Estate*, 227 P 2d 539, 541, 102 Cal App 2d 385

### Integration distinguished from incorporation by reference

In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will

*Cal—In re Dumas' Estate*, 210 P 2d 697, 34 Cal 2d 406—*In re Wunderle's Estate*, 181 P 2d 874, 30 Cal 2d 274

*In re McNamara's Estate*, 260 P 2d 182, 119 Cal App 2d 474—*In re Moody's Estate*, 257 P 2d 709, 118 Cal App 2d 300—*In re Morrison's Estate*, 220 P 2d 413, 98 Cal App 2d 380

14. *Ala—Johnston v King*, 35 So 2d 202, 250 Ala 571

*Iowa—In re Puckett's Estate*, 38 N W 2d 593, 240 Iowa 986

not required,<sup>15</sup> although it is sufficient when made,<sup>16</sup> in the absence of such physical connection, the papers must be identified as one will by their internal sense,<sup>17</sup> by coherence,<sup>18</sup> or adoption of the several parts.<sup>19</sup> Where there is sufficient credible proof of the identity of disconnected sheets propounded as one will, neither the physical nor coherent rule of attachment is applicable.<sup>20</sup> While two or more separate writings may constitute one will when they bear either mechanical evidences of the testator's intention or internal proof that the author intended both to be one,<sup>21</sup> it is an equally well established rule that the absence of a date or a testamentary intent in one document cannot be supplied by another totally disconnected instrument.<sup>22</sup>

While the pages of a will need not follow in numerical order,<sup>23</sup> there must be a sequence of pages or paragraphs which relates to its logical and inter-

nal sense.<sup>24</sup> Where an explanation is offered showing why a will is written on papers of different sizes and grades, an objection thereto is overcome by the presumption that the will was prepared in accordance with the testator's instruction.<sup>25</sup>

## § 163. Incorporation by Reference to Extrinsic Document or Occurrence

- a In general
- b Rule against incorporation by reference
- c Evidence

### a In General

In a number of jurisdictions, a will may incorporate in itself by reference any document or paper not so executed, so as to take effect as part of the will.

The doctrine of incorporation by reference, as applied to wills, is followed in many jurisdictions.<sup>26</sup>

Neb—**Corpus Juris** quoted in Kaiser's Estate, 34 N W 2d 366, 373, 150 Neb 295

Pa—**Corpus Juris** quoted in In re Covington's Estate, 33 A 2d 235, 238, 348 Pa 1  
68 C J p 640 note 77

15. Iowa.—In re Puckett's Estate, 38 N W 2d 593, 240 Iowa 986

Neb—**Corpus Juris** quoted in Kaiser's Estate, 34 N W 2d 366, 373, 150 Neb 295

Pa—**Corpus Juris** quoted in In re Covington's Estate, 33 A 2d 235, 238, 348 Pa 1  
68 C J p 640 note 78

16. Iowa.—In re Puckett's Estate, 38 N W 2d 593, 240 Iowa 986

Neb—**Corpus Juris** quoted in In re Kaiser's Estate, 34 N W 2d 366, 373, 150 Neb 295

Pa—**Corpus Juris** quoted in In re Covington's Estate, 33 A 2d 235, 238, 348 Pa 1  
68 C J p 640 note 79

17. Neb—**Corpus Juris** quoted in In re Kaiser's Estate, 34 N W 2d 366, 373, 150 Neb 295

Pa—**Corpus Juris** quoted in In re Covington's Estate, 33 A 2d 235, 238, 348 Pa 1—In re Bryen's Estate, 195 A 17, 328 Pa 122  
In re Baldwin's Estate, 95 Pittsb Leg J 473, affirmed 55 A 2d 263, 357 Pa 432  
68 C J p 640 note 80

### Connection held lacking

(1) Unsigned memoranda on separate pieces of paper found with testator's will, and codicil, which memoranda were not connected in their internal sense and were fastened to will and codicil with moveable non-nutulating paper clips, formed no part of testator's will

a—In re Sando's Estate, 66 A 2d 312, 362 Pa 1.

(2) Where letter requesting decedent's friend to take care of decedent's bank book in case of decedent's death and card on which name and address of a favorite second cousin of the decedent were written were placed with bank book and rubber bands were placed around them, the letter and card could not be construed as constituting the decedent's will in view of fact that they were not connected or correlated in their internal sense

Pa—In re Davis' Estate, 26 A 2d 339, 344 Pa 520

(3) For other cases where connection was held lacking see 68 C J p 640 note 80 [a]

18. Pa—In re Covington's Estate, 33 A 2d 235, 348 Pa 1—In re Bryen's Estate, 195 A 17, 328 Pa 122  
In re Baldwin's Estate, 95 Pittsb Leg J 473, affirmed 55 A 2d 263, 357 Pa 432

### One continuous composition

Where there is no extrinsic evidence of testator's intention to have his will consist of various pages, they will not be so regarded by the courts unless context indicates such a coherency as to constitute one continuous composition

Cal—In re Fritz's Estate, 227 P 2d 539, 102 Cal App 2d 385

### Nothing incongruous or out of harmony

A will may be written on several detached or loose sheets of paper, and the papers will be given effect as a will if they can be coherently read as a will, that is, if they contain nothing incongruous or out of harmony in the general conception as a will

Pa—In re Davis' Estate, 26 A 2d 339, 344 Pa 520

19. Ala—Johnston v King, 35 So 2d 202, 250 Ala 571

Pa—In re Covington's Estate, 33 A 2d 235, 348 Pa 1—In re Bryen's Estate, 195 A 17, 328 Pa 122  
In re Baldwin's Estate, Orph, 95 Pittsb Leg J 473, affirmed 55 A 2d 263, 357 Pa 432

20. Neb—**Corpus Juris** quoted in In re Kaiser's Estate, 34 N W 2d 366, 373, 150 Neb 295

Pa—**Corpus Juris** quoted in In re Covington's Estate, 33 A 2d 235, 238, 348 Pa 1  
68 C J p 640 note 81

21. Cal—In re Fritz's Estate, 227 P. 2d 539, 102 Cal App 2d 385

22. Cal—In re Fritz's Estate, supra

23. Pa—In re Maginn's Estate, 122 A 264, 278 Pa 89, 30 A L R 418

24. Pa—In re Maginn's Estate, supra

25. Ohio—Chaney v. Coulter, 29 Ohio C A 177

26. Ark—Montgomery v Blankenship, 230 S W 2d 51, 217 Ark 357, 21 A L R 2d 212—Kinnear v Langley, 192 S W 2d 978, 209 Ark 878  
Cal—Simon v Grayson, 102 P 2d 1081, 15 Cal 2d 531

In re Bauer's Estate, 124 P 2d 630, 51 Cal App 2d 636

NH—In re Amor's Estate, 112 A 2d 665

Pa—In re Hogue's Will, 6 A 2d 108, 135 Pa Super 543

In re Roth's Estate, Orph, 57 Dauph Co 224

Tenn—Howell v. Moore, 14 Tenn App 594

Va—Lawless v Lawless, 47 S E 2d 431, 187 Va 511

Tex—Brooker v Brooker, 106 S W 2d 247, 130 Tex 27.

Doctrine of incorporation by reference as applied to holographic wills see *infra* § 205

Under this doctrine, and subject to certain conditions and limitations, a properly executed will incorporates in itself by reference any document or paper not so executed, so as to take effect as part of the will,<sup>27</sup> whether such document or paper be in the form of a will,<sup>28</sup> codicil,<sup>29</sup> contract,<sup>30</sup> deed,

27. Ala.—Wheat v Wheat, 181 So 243, 236 Ala 52—**Corpus Juris** quoted in Arrington v Brown, 178 So 218, 220, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW2d 51, 217 Ark 357, 21 ALR 2d 212—**Corpus Juris** cited in Kinnear v Langley, 192 SW2d 978, 980, 209 Ark 878

Cal—In re Dobrzensky's Estate, 232 P2d 886, 105 Cal App2d 134

Del—Marvel v Sadtler, 18 A2d 231, 25 Del Ch 288

Ill—Wagner v Clauson, 78 NE2d 203, 399 Ill 403—Eschmann v Caw, 192 NE 226, 357 Ill 379

Neb—**Corpus Juris** cited in In re Dimmitt's Estate, 3 NW2d 752, 757, 141 Neb 413, 144 ALR 704

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345  
Pa—In re Hogue's Will, 6 A2d 108, 135 Pa Super 543

Va—Triplett's Ex'r v Triplett, 172 SE 162, 161 Va 906

68 CJ p 641 note 90

Extrinsic paper or document as included in probate of will see *infra* § 313

#### Other statements

(1) "A will may, by definite reference, incorporate into its four corners a document already in existence and sufficiently identified"

Ark—Kinnear v Langley, 192 SW 2d 978, 980, 209 Ark 878

(2) "An attested testamentary instrument may refer to and incorporate another testamentary instrument executed with different statutory formalities or an informal or unattested document, so long as the reference is unmistakable or with the aid of extrinsic proof can be made so"

Cal—In re Smith's Estate, 191 P2d 413, 416, 31 Cal 2d 563

(3) There is incorporation by reference when one of the writings is a complete testamentary instrument, and refers to another document in a manner clearly designed to accomplish that purpose

Cal—In re Wunderle's Estate, 181 P2d 874, 30 Cal 2d 274

In re McNamara's Estate, 260 P 2d 182, 119 Cal App 2d 474

(4) "The principle of incorporation by reference" implies that document referred to shall become a part of the will of the testator

Fla—In re Gregory's Estate, 70 So 2d 903, 907

(5) "The great weight of authority is that a document, although not itself executed in accordance with statutory requirements of a will may be incorporated into a will by sufficient reference"

Ky—Daniel v Tyler's Ex'r, 178 S W2d 411, 414, 296 Ky 808

(6) An instrument may be incorporated in a will by reference, and its terms employed as testamentary clauses, although such instrument may have lost its force as to the peculiar original purpose of the document

Ohio—Fifth Third Union Trust Co v Wilensky, 70 NE2d 920, 79 Ohio App 73

(7) An extrinsic writing, which has no validity in itself as a will, may nevertheless be incorporated by reference as part of a valid will  
Pa—In re Scutti's Estate, 92 A 2d 188, 371 Pa 536

#### Rule does not evade statute

Rule that a separate writing may become part of a will, if properly identified, does not evade provision of statute of wills requiring an attested writing, since the separate writing is considered a part of the will, to which the attested signatures are attached

Ill—Wagner v Clauson, 78 NE2d 203, 399 Ill 403, 3 ALR 2d 672

28. Ala.—**Corpus Juris** quoted in Arrington v Brown, 178 So 218, 220, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW2d 51, 217 Ark 357, 21 ALR 212—Kinnear v Langley, 192 SW2d 978, 209 Ark 878

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345  
68 CJ p 641 note 90

#### Will of another

Ark—Kinnear v Langley, 192 SW 2d 978, 209 Ark 878

68 CJ p 641 note 90 [b]

29. Ala.—**Corpus Juris** quoted in Arrington v Brown, 178 So 218, 220, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW2d 51, 217 Ark 357, 21 ALR 212—Kinnear v Langley, 192 SW2d 978, 209 Ark 878

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345  
68 CJ p 641 note 90

30. Ohio—Fifth Third Union Trust Co v Wilensky, 70 NE2d 920, 79 Ohio App 73

#### Unsigned contract

A contract reduced to writing, but not signed, may be incorporated by reference as an extraneous writing in a will

Tex—Allday v Cage, Civ App, 148 SW 838

#### Trust agreement or instrument

(1) An existing trust agreement may be incorporated by reference in a will

Ohio—Bolles v Toledo Trust Co,

58 NE2d 381, 144 Ohio St 195, 157 ALR 1164

In re Bunting's Estate, 15 Ohio Supp 54, appeal dismissed 64 NE 2d 323, 146 Ohio St 185—Shawhan v City Bank Farmers Trust Co, 1 Ohio Supp 297

Pa—In re Wilson's Estate, 70 A2d 354, 363 Pa 546

In re Glatfelter's Estate, Orph, 60 York Leg Rec 77

(2) The mere possibility of future amendment or modification of terms of a living trust which have been incorporated by reference in a will does not render will void in whole or in part

Ohio—Bolles v Toledo Trust Co, 58 NE2d 381, 144 Ohio St 195, 157 ALR 1164

(3) An unrevoked and unamended, revocable and amendable living trust, the terms of which had been incorporated in a will by reference, did not invalidate testamentary devise to trustee of such trust to be administered according to terms of trust  
Ohio—Bolles v Toledo Trust Co, *supra*

(4) Where will specifically referred to trust created by testator and to amendments thereof and will was reaffirmed by codicil after trust was last amended, will effectively incorporated trust agreement by reference

Ohio—First Central Trust Co v Clafin, Comp Pl, 73 NE2d 388

(5) If testator has created a trust, reserving power to amend trust, trust instrument may be incorporated in will by reference, but operative effect of will cannot be changed by a subsequent modification of trust instrument if modification is not executed in accordance with wills act and effect is to be given to will and to provisions of trust instrument as they existed when will was executed and no effect can be given to subsequent modification of trust instrument if not executed in accordance with act which regulates execution of will

Ark—Montgomery v Blankenship, 230 SW2d 51, 217 Ark 357, 21 ALR 2d 212

(6) Where residuary clause of will bequeathed residue of testatrix' estate to trustees of trust created by testatrix on same day as will was executed, and testatrix as settlor reserved power to modify, amend or revoke trust instrument, possibility of amendments to trust by means of unattested writings was insufficient to invalidate will, and original trust instrument and instruments amending trust instrument which

or other written form of conveyance of realty,<sup>31</sup> mere list,<sup>32</sup> schedule,<sup>33</sup> or memorandum<sup>34</sup> If the document is incorporated by reference it makes no difference whether or not the document of itself was valid at law<sup>35</sup>

Considerable caution must be exercised in apply-

ing the doctrine of incorporation by reference<sup>36</sup> The reference in the will must show an intention on the part of the testator to incorporate or adopt the document referred to<sup>37</sup> The intention of the testator to incorporate into a will a paper or document must clearly appear from the will,<sup>38</sup> a mere

were executed in accordance with requirements for will were valid parts of will

Ky—Stouse v First Nat Bank of Chicago, 245 SW 2d 914, 32 ALR 2d 1261

(7) Fact that trust agreement incorporated into will by reference was amendable or revocable by testatrix did not affect validity of incorporation and as no changes were ever in fact made in trust instrument as it existed at time will was executed, no problem was presented as to whether amended instrument could be given effect

Ark—Montgomery v Blankenship, supra.

(8) Where inter vivos trust, even though subject to modification, assumed its final form before execution of codicil to will by which settlor devised residuary estate to trustees of inter vivos trust to be added to trust estate and held subject to terms of trust deed as amended, such disposition of residuary estate according to terms of trust deed as amended was valid, although trust deed was not shown to have been executed in compliance with statute of wills

NH—In re York's Estate, 65 A 2d 282, 95 NH 435, 8 ALR 2d 611

31. Ala—Corpus Juris quoted in Arrington v Brown, 178 So 218, 220, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 ALR 2d 212—Kinnear v Langley, 192 SW 2d 978, 209 Ark 878

Neb—In re Dimmitt's Estate, 3 N W 2d 752, 141 Neb 413, 144 ALR 704

Ohio—Fifth Third Union Trust Co v Wilensky, 70 NE 2d 920, 79 Ohio App 73—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345

Or—In re Neil's Estate, 226 P 439, 111 Or 282

Pa—In re Hogue's Will, 6 A 2d 108, 135 Pa Super 543

W Va—Wible v Ashcraft, 178 SE 516, 116 W Va 54

68 CJ p 641 note 90

**Deeds executed contemporaneously or simultaneously**

Mo—Hourigan v McBee, App, 130 SW 2d 661

Pa—In re Hogue's Will, 6 A 2d 108, 135 Pa Super 543

**Memoranda of another**

If there is no such deed executed but only a memoranda made by an-

other than the testator, it cannot be received as part of will

Ky—Daniel v Tyler's Ex'r, 178 SW 2d 411, 296 Ky 808

32 Ala—Corpus Juris quoted in Arrington v Brown, 178 So 218, 220, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 ALR 212—Kinnear v Langley, 192 SW 2d 978, 209 Ark 878

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345 68 CJ p 641 note 90

33 Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 ALR 2d 212—Kinnear v Langley, 192 SW 2d 978, 209 Ark 978

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345

34 Ala—Corpus Juris quoted in Arrington v Brown, 178 So 218, 220, 235 Ala 196

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345 68 CJ p 641 note 90

35. Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 ALR 2d 212

**Trust agreement**

Where by residuary clause of will testatrix devised to named trustee all residue of her estate to be added to become part of and subject to all terms of conditions of living trust created by her under specified date, and trust instrument was in existence when will was executed, alleged failure of trust agreement to create a valid inter vivos trust when executed did not prevent incorporation of living trust agreement into will by reference

Ark—Montgomery v Blankenship, supra

36. Cal—In re Selditch's Estate, 204 P 2d 364, 91 Cal App 2d 62

**Recollection of testator**

The doctrine of incorporation may not be invoked to read into a will the recollection of the executor

NH—Hills v D'Amours, 59 A 2d 551, 95 NH 130

37. Ill—Wagner v Clauson, 78 NE 2d 203, 399 Ill 403, 3 ALR 2d 672—Eschman v Carvi, 192 NE 226, 357 Ill 379

Continental Ill Nat Bank & Trust Co of Chicago v Art Institute of Chicago, 94 NE 2d 602, 341 Ill App 624, affirmed 100 NE 2d 625, 409 Ill 481

Ky—Daniel v Tyler's Ex'r, 178 SW 2d 411, 296 Ky 808

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345 68 CJ p 641 note 91

38 Ohio—Linney v. Cleveland Trust Co, supra

Or—Witham v Witham, 66 P 2d 281, 156 Or 59, 110 ALR 253

W Va—Wible v Ashcraft, 178 SE 516, 116 W Va 54

**Will or surrounding circumstances**

The testator's intent to incorporate other documents into a will should be reasonably apparent either from a direct reference thereto in the will or from some rather unequivocal surrounding circumstances clearly indicating the same intent

Cal—In re Selditch's Estate, 204 P 2d 364, 91 Cal App 2d 62

**Trust agreement**

(1) It is neither necessary nor proper to apply the doctrine of incorporation by reference to a valid and operative inter vivos trust where the trustor has expressed no intention in the will or in the inter vivos trust agreement that the latter be incorporated in the will

Cal—Wells Fargo Bank & Union Trust Co v Superior Court in and for Marin County, 193 P 2d 721, 32 Cal 2d 1

(2) Where inter vivos trust amendment provided for disposition of income from the trust as established by the trustor in his lifetime or increased by him under his will, and the will referred to the existing inter vivos trust and provided that the corpus of the trust amounted to two hundred thousand dollars and that a sufficient sum was bequeathed to make up the difference between two hundred thousand dollars and the value of the corpus at the time of testator's death, there was no intention that the inter vivos instrument be incorporated into the will under doctrine of incorporation by reference

Cal—Wells Fargo Bank & Union Trust Co v Superior Court in and for Marin County, supra

(3) Where settlor created an inter vivos trust the existence of which was mentioned in his will which devised certain property to the trustee, trustor-testator intended that there should be a single trust administered as one unit rather than two trusts separately administered

Cal—Wells Fargo Bank & Union

reference thereto without evidence of such intention being insufficient<sup>39</sup> The testator's intention to incorporate or adopt an extrinsic paper must be determined from the language of the will read in the light of the surrounding circumstances<sup>40</sup> It is not essential that the paper referred to be itself a dispositive instrument<sup>41</sup>

It is well settled that, in order that a document or paper may be incorporated in a will by reference, it must be referred to in the will as existing at the time of its execution<sup>42</sup> The document or paper must in fact be in existence at the time of the execution of the will,<sup>43</sup> or have been made at the same time as the will, as part of the same transaction<sup>44</sup> The will must clearly and definitely de-

Trust Co v Superior Court in and for Marin County, *supra*

**39** Ohio—Linney v Cleveland Trust Co, 165 NE 101, 120 Ohio App 345

Or—Witham v Witham, 66 P 2d 281, 156 Or 59, 110 ALR 253

68 CJ p 641 note 91 [d]

**40** Ill—Bottrell v Spengler, 175 NE 781, 343 Ill 476

68 CJ p 642 note 92

#### Deed

In determining whether reference to purported conveyance to testator's son resulted in incorporation of undelivered deed in will as part thereof, intention of testator as gleaned from language of will in light of circumstances of testator and properties of which he was disposing should control

Or—Witham v Witham, 66 P 2d 281, 156 Or 59, 110 ALR 253

**41.** Conn—In re Bryan's Appeal, 58 A 748, 77 Conn 240, 107 AmSR 34, 68 LRA 353

Kan—Shulsky v Shulsky, 157 P 407, 98 Kan 69

**42** Ill—Wagner v Clauson, 78 NE 2d 203, 399 Ill 403, 3 ALR 672—Eschman v Cawi, 192 NE 226, 357 Ill 379

Continental Ill Nat Bank & Trust Co of Chicago v Art Institute of Chicago, 94 NE 2d 602, 341 Ill App 624, affirmed 100 NE 2d 625, 409 Ill 481

Ky—Daniel v Tyler's Ex'r, 178 S W 2d 411, 296 Ky 808

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345

Tenn—Howell v Moore, 14 Tenn App 594

68 CJ p 642 note 95

**It must appear from face of will** that the paper is in actual existence at the time

Va—Lawless v Lawless, 47 SE 2d 431, 187 Va 511—Triplett's Ex'r v Triplett, 172 SE 162, 161 Va 906

#### Will of another

Where it was sought to incorporate the will of deceased's mother in his will by reference, and the only reference was to "the last will and testament of my mother," she at the time being alive, there was not a reference an existing document such as required by law

Tenn—Howell v. Moore, 14 Tenn App 594.

**43** Ala—Arrington v Brown, 178 So 218, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 ALR 2d 212

Cal—Simon v Grayson, 102 P 2d 1081, 15 Cal 2d 531

In re Bauer's Estate, 124 P 2d 630, 51 Cal App 2d 636

Fla—In re Gregory's Estate, 70 So 2d 903

Ill—Wagner v Clauson, 78 NE 2d 203, 399 Ill 403, 3 ALR 672—Eschman v Cawi, 192 NE 226, 357 Ill 379

Continental Ill Nat Bank & Trust Co of Chicago v Art Institute of Chicago, 94 NE 2d 602, 341 Ill App 624, affirmed 100 NE 2d 625, 409 Ill 481

Ky—Daniel v Tyler's Ex'r, 178 S W 2d 411, 296 Ky 808

Neb—In re Dimmitt's Estate, 3 N W 2d 752, 141 Neb 413, 144 ALR 704

Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345

Pa—In re Hogue's Will, 6 A 2d 108, 135 Pa Super 543

In re Roth's Estate, Orph, 57 Dauph Co 224—In re Glatfelter's Estate, Orph, 60 York Leg Rec 77

Tenn—Howell v Moore, 14 Tenn App 594

Tex—Corpus Juris cited in Brooker v Brooker, 106 SW 2d 247, 253, 130 Tex 27

Ragland v Wagener, Civ App, 179 SW 2d 380, reversed on other grounds 180 SW 2d 435, 142 Tex 651, 152 ALR 1232

Va—Lawless v Lawless, 47 SE 2d 431, 187 Va 511—Triplett's Ex'r v Triplett, 172 SE 162, 161 Va 906

68 CJ p 642 note 96

#### Document need not be signed

The requirement for incorporation of a document into a will by reference is only that extrinsic document be in existence, not signed

Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 ALR 2d 212

#### Time will makes reference

The incorporated document must be in existence at the time the will makes reference to it

Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274

In re McNamara's Estate, 260 P 2d 182, 119 Cal App 2d 744—

In re Dobrzenky's Estate, 232 P 2d 886, 105 Cal App 2d 134

#### Later date than will

Separate paper was not incorporated into, and did not become part of, will, where paper bore a later date than will, and was presumptively not in existence at date of will

Ill—Wagner v Clauson, 78 NE 2d 203, 399 Ill 403, 3 ALR 672

#### Future document

(1) An attempt to incorporate a future document in a will is ineffectual, since testator cannot be permitted to create for himself the power to dispose of his property without complying with formalities required in making a will

Cal—Simon v Grayson, 102 P 2d 1081, 15 Cal 2d 531

In re Bauer's Estate, 124 P 2d 630, 51 Cal App 2d 636

(2) However, where a letter to be written in the future by testator was incorporated in will by reference, and after writing the letter testator executed a codicil reciting that will should remain in full force except as expressly modified by the codicil, a resulting republication of the will operated to make the letter effective, though letter was not effective when first written

Cal—Simon v Grayson, 102 P 2d 1081, 15 Cal 2d 531

#### Practice to make codicils

To meet requirement that will must incorporate documents in existence, it is the practice to make codicils whenever amendments to a trust instrument are made after execution of will referring to trust, such codicils to refer to amendment and to reaffirm will

Ill—Continental Ill Nat Bank & Trust Co of Chicago v Art Institute of Chicago, 94 NE 2d 602, 341 Ill App 624, affirmed 100 NE 2d 625, 409 Ill 481

#### Writing of letter

In order for a document, which is incorporated by reference in an ordinary letter, to gain the status and force of a will, such document must be in existence when the letter is written

Cal—Ahlborn v Peters, 100 P 2d 542, 37 Cal App 2d 698

**44.** Neb—In re Dimmitt's Estate, 3 NW 2d 752, 141 Neb 413, 144 ALR 704—In re Hopper's Estate 134 NW. 237, 90 Neb 622.



scribe or identify the documents intended to be incorporated,<sup>45</sup> or render them capable of identification by extrinsic evidence,<sup>46</sup> so that no room for doubt can exist as to what papers were meant<sup>47</sup>

Where the attempt to incorporate a document or paper is ineffective, the will cannot be affected by it,<sup>48</sup> and such document or paper can be effective only if it complies with the statute of wills<sup>49</sup>

No effect can be given a paper referred to where it is a blank except as to the caption or heading<sup>50</sup>

### b. Rule against Incorporation by Reference

A few jurisdictions have adopted a rule against the doctrine of incorporation by reference in a will, but the rule is subject to some exceptions

A few jurisdictions refuse to follow the doctrine of incorporation by reference in a will,<sup>51</sup> and have

Pa.—**Corpus Juris** quoted in *In re Hogue's Will*, 6 A 2d 108, 110, 135 Pa Super 543

*In re Roth's Estate*, Orph., 57 Dauph Co 224

45 Cal.—*In re Wunderle's Estate*, 181 P 2d 874, 30 Cal 2d 274—*Simon v Grayson*, 102 P 2d 1081, 15 Cal 2d 531

*In re McNamara's Estate*, 260 P 2d 182, 119 Cal App 2d 744—*In re Dobrzensky's Estate*, 232 P 2d 886, 105 Cal App 2d 134—*In re Bauer's Estate*, 124 P 2d 639, 51 Cal App 2d 636

Ill—*Wagner v Clauson*, 78 NE 2d 203, 399 Ill 403, 3 A L R 2d 672—*Eschmann v Cawi*, 192 NE 226, 357 Ill 379

*Continental Ill Nat Bank & Trust Co of Chicago v Art Institute of Chicago*, 94 NE 2d 602, 341 Ill App 624, affirmed 100 NE 2d 625, 409 Ill 481

Ky—*Daniel v Tyler's Ex'r*, 178 S W 2d 411, 296 Ky 808

Neb—*In re Dimmitt's Estate*, 3 N W 2d 752, 141 Neb 413, 144 A L R 704

NH—*In re Amor's Estate*, 112 A 2d 665

Ohio—*Linney v Cleveland Trust Co*, 165 NE 101, 30 Ohio App 345

Pa—*In re Hogue's Will*, 6 A 2d 108, 135 Pa Super 543

*In re Roth's Estate*, Orph., 57 Dauph Co 224—*In re Glatfelter's Estate*, Orph., 60 York Leg Rec 77

Tex—*Ragland v Wagener*, Civ App, 179 S W 2d 380, reversed on other grounds 180 S W 2d 435, 142 Tex 651, 152 A L R 1232

W Va—*Wible v Ashcraft*, 178 SE 516, 116 W Va 54  
68 C J p 642 note 98

#### Reasonable certainty

(1) The document or paper must be identified and described with reasonable certainty

Va—*Lawless v Lawless*, 47 SE 2d 431, 187 Va 511—*Triplett's Ex'r v Triplett*, 172 SE 162, 161 Va. 906

(2) An informal document incorporated in will by reference need not be identified with exact precision, but it is enough that descriptive words and extrinsic circumstances combine to produce a reasonable certainty that the document is the one referred to in the will

Cal—*Simon v Grayson*, 102 P 2d 1081, 15 Cal 2d 531

#### Identification held sufficient

Ark—*Montgomery v Blankenship*, 230 S W 2d 51, 217 Ark 357, 21 A L R 2d 212

#### Identification held insufficient

(1) Generally

Mich—*In re Shattuck's Estate*, 37 N W 2d 555, 324 Mich 568

Va—*Lawless v Lawless*, 47 SE 2d 431, 187 Va 511

68 C J p 642 note 98 [b]

(2) Reference in wife's will to provisions of paragraph of husband's will did not identify will contemporaneously executed by husband, where such will contained no such paragraph, and hence such reference did not incorporate by reference husband's will, although wife's will directed executor to transfer residuary estate to executor and trustee of estate of deceased husband for distribution according to terms and conditions of his will, if he should predecease testatrix

Fla—*In re Gregory's Estate*, 70 So 2d 903

(3) A separate paper was not incorporated into, and did not become part of, will where there was no similarity between the paper executed by the testatrix and the paper described in the will

Ill—*Wagner v Clauson*, 78 NE 2d 203, 399 Ill 403, 3 A L R 2d 672

(4) A testamentary provision, reciting that testator had executed deeds to named grantees, and that "said deeds" should become effective on testator's death as provided in deeds, did not describe deeds sufficiently to incorporate them in will by reference, and hence was void

Tex—*Brooker v Brooker*, 106 S W 2d 247, 130 Tex 27.

46. Cal—*Simon v Grayson*, 102 P 2d 1081, 15 Cal 2d 531.

*In re Dobrzensky's Estate*, 232 P 2d 886, 105 Cal App 2d 134—*In re Bauer's Estate*, 124 P 2d 630, 51 Cal App 2d 636

47. Cal—*In re Miller's Estate*, 17 P 2d 181, 128 Cal App 176.

68 C J p 643 note 99

#### Reasonably free from doubt

Documents in existence at time will is executed cannot be incorporated therein by reference, if at all, unless they are identified by

will so as to leave intention of testator in regard thereto reasonably free from doubt

Tex—*Brooker v Brooker*, 106 S W 2d 247, 130 Tex 27

48. NH—*In re Amor's Estate*, 112 A 2d 665

#### Envelope

(1) An envelope referred to in will, if considered as component of will, did not pass anything to person who was to share in contents, where envelope was empty and indorsement thereon did not disclose what had ever been put in it Where indorsement on envelope containing valuable bonds did not include name of person claiming under will referring to envelope, such person would take nothing thereunder, even though envelope was considered as a component part of will

Ky—*Daniel v Tyler's Ex'r*, 178 S W 2d 411, 296 Ky 808

(2) Where provision of will directing delivery of property to four named devisees in accordance with notations to be found on an envelope in lock box could not be enforced because of inability to identify envelope, disposition of property of testatrix would be had under later provision to effect that in case of uncertainty equal division should be made among three named devisees including all except one named originally

Ky—*Daniel v Tyler's Ex'r*, supra

#### Testamentary dispositions of property

Where will contained reference to extraneous document purporting to dispose of certain personalty, fact that reference might have been ineffective did not affect testamentary dispositions of property made according to law

Mich—*In re Greenman's Estate*, 52 N W 2d 363, 332 Mich 646—*In re Reynolds' Estate*, 262 N W. 619, 273 Mich 71

49. NH—*In re Amor's Estate*, 112 A 2d 665

50 US—*Handley v. Palmer*, C C. Pa., 91 F 948

51. NY—*In re Welcke's Will*, 33 N Y S 2d 735

68 C J p 643 note 5

The doctrine, which is the product of judicial construction, by which a document which is testamentary

adopted a rule against it<sup>52</sup> The general rule in such jurisdictions is that documents of a strictly testamentary character which have not been executed in accordance with statutory requirements may not be incorporated into a will by reference<sup>53</sup>

However, the rule against incorporation by reference, well established as it is, will not be carried to its dryly logical extreme,<sup>54</sup> and is subject to some exceptions to its application<sup>55</sup> It is limited by considerations of practical expediency that

in character but is not executed and witnessed in accordance with statute of wills, is permitted to take effect as part of will, provided document was in existence at time of execution of will and is identified by clear and satisfactory proof as the document referred to in will, is not the law in New York

NY—President and Directors of Manhattan Co v Janowitz, 21 NYS 2d 232, 260 App Div 174, 954

52 NY—In re Schmitt's Will, 61 NYS 2d 569, 187 Misc 409

In re Snyder's Will, 125 NYS 2d 459, appeal dismissed 134 NYS 2d 174

68 CJ p 643 note 4

#### **Safeguard against fraud and mistake**

Rule against incorporation by reference as applied to wills is designed as a safeguard against fraud and mistake

NY—In re Andrus' Will, 281 NYS 831, 156 Misc 268

53. NY—In re Potter's Will, 297 NY 295, 251 App Div 679, affirmed 16 NE 2d 93, 273 NY 534

In re Frickey's Will, 96 NYS 2d 825, 198 Misc 716, reversed on other grounds, In re Frickey's Estate, 114 NYS 2d 270, 280 App Div 880—In re Rosenstock's Estate, 82 NYS 2d 428, 192 Misc 936

In re Snyder's Will, 125 NYS 2d 459, appeal dismissed 134 NYS 2d 174—In re Whyte's Will, 123 NYS 2d 846, appeal dismissed 130 NYS 2d 237, 283 App Div 947, appeal denied 131 NYS 2d 902, 283 App Div 1079—In re Eldridge's Will, 61 NYS 2d 234

68 CJ p 643 note 6

#### **Unattested papers**

(1) Unattested papers, testamentary in nature, cannot be incorporated by reference into a will even though referred to by the will

NY—Schenectady Trust Co v Emmons, 25 NYS 2d 230, 261 App Div 154, affirmed 36 NE 2d 461, 286 NY 626, reargument denied 37 NE 2d 140, 286 NY 698

In re Koehler's Estate, 76 NYS 2d 100, 190 Misc 897—In re Le Collen's Will, 72 NYS 2d 467, 190 Misc 272—In re Menken's Will, 44 NYS 2d 164, 180 Misc 656

In re Collier's Estate, 45 NYS 2d 773—In re Welcke's Will, 33 NYS 2d 735

(2) Where a will directs the disposition of property in a manner to be determined by some memo-

randum or other instrument, such direction cannot be given effect as a valid testamentary disposition unless the paper referred to has been executed and attested in the manner required by statute and rule is applicable whether the instrument is required to be resorted to for identification of the beneficiary or the quantum of his benefit

NY—In re Le Collen's Will, 72 NYS 2d 467, 190 Misc 272

(3) A foreign will, which attempted to incorporate by reference unattached and unattested instruments, referred to as Exhibits A and B and as containing a list of real and personal property and a list of "friends and employees" to whom certain interests were given, was invalid as to realty within New York

NY—In re Collier's Estate, 45 NYS 2d 773

#### **Unsigned and unattested paper**

Where testatrix by will gave nephew authority to disburse the remainder of her money and personal effects and left a paper in her desk and instructions that a portion of the money was to go for cancer cure, but paper was unsigned and unattested and there was no proof that paper was in existence when will was executed and no testimony was offered, there was no secret trust for cancer cure capable of enforcement

NY—In re Leidemer's Will, 113 NYS 2d 808

#### **Agreement or contract**

(1) A contract whereunder decedent agreed not to change will devising residue of estate to party of second part without consent of party of second part, and which provided that if party of second part predeceased decedent or could not provide for care of decedent before ten years from date of agreement, party of second part should receive interest in residue of decedent's estate to extent determinable by recited formula, which contract was not executed in accordance with section of Decedent Estate Law reciting how will should be executed and attested, could not be incorporated in will by reference, so that contract was ineffective to pass an interest in decedent's estate

NY—In re Whyte's Will, 123 NYS 2d 846, appeal dismissed 130 NYS 2d 237, 283 App Div 947, appeal denied 131 NYS 2d 902, 283 App Div 1079

(2) Agreement, which was not executed in accordance with formal re-

quirements for will, could not be incorporated into will by reference

NY—In re Whyte's Will, 130 NYS 2d 237, 283 App Div 947, appeal denied 131 NYS 2d 902, 283 App Div 1079

#### **Policies of life insurance**

(1) Policies of insurance on testator's life which were not executed in testamentary form and which were not referred to in will could not be incorporated into will

NY—Bellinger v Bellinger, 46 NYS 2d 263, 180 Misc 948

(2) Language used in testator's will and policies on testator's life was not sufficiently clear to indicate intent that proceeds of policies should be disposed of as directed by will

NY—Bellinger v Bellinger, supra

54 NY—President and Directors of Manhattan Co v Janowitz, 21 NYS 2d 232, 260 App Div 174, 954

In re Andrus' Will, 281 NYS 831, 156 Misc 268—In re Bremer's Will, 281 NYS 264, 156 Misc 160, reheard 283 NYS 159, 157 Misc 221—In re Hillard's Estate, 278 NYS 675, 154 Misc 872

In re Snyder's Will, 125 NYS 2d 459, appeal dismissed 134 NYS 2d 174

68 CJ p 643 note 8

55 NY—President and Directors of Manhattan Co v Janowitz, 21 NYS 2d 232, 260 App Div 174, 954

In re Andrus' Will, 281 NYS 831, 156 Misc 268

In re Snyder's Will, 125 NYS 2d 459, appeal dismissed 134 NYS 2d 174—In re Whyte's Will, 123 NYS 2d 846

#### **Executor's recollection**

Equitable doctrine of incorporation into will of extrinsic writings referred to may not be invoked to read executor's recollection into will

NY—In re Casper's Will, 292 NYS 415, 161 Misc 461, reversed on other grounds, In re Casper's Estate, 18 NYS 2d 82, 259 App Div 56

#### **Trust agreements**

(1) Incorporation by reference to properly executed trust agreement is permitted

NY—In re Bremer's Will, 281 NYS 264, 156 Misc 160, reheard 283 NYS 159, 157 Misc 159

(2) Provision in will giving residue and remainder of testator's property to trustee or trustees of trust created by a certain described and existing agreement, and incorporating such agreement in the will, and

brought it into being,<sup>56</sup> and in each case it is the substance that must be looked to.<sup>57</sup> If the possibility of fraud or mistake does not exist in the case, the reason for the application of the rule fails.<sup>58</sup>

While papers containing testamentary dispositions may not be incorporated by reference,<sup>59</sup> papers of an identifying or clarifying character may be so incorporated.<sup>60</sup> A bequest of a trust fund created

stating that testator did not intend to incorporate in will any future amendments of agreement, was valid and effective

**N Y**—In re Snyder's Will, 125 N Y S 2d 459, appeal dismissed 134 N Y S 2d 174

(3) Testator, by providing in will that testamentary trustees should have all the powers in connection with the disposition, administration, and investment of capital of testamentary trust which he had conferred upon the trustees under two inter vivos trust agreements, was held to have effected a valid incorporation by reference to the powers contained in the inter vivos trust deeds in so far as they related to the disposition, administration, and investment of capital of testamentary trust

**N Y**—In re Andrus' Will, 281 N Y S 331, 156 Misc 268

(4) Where will made gift for support and maintenance of incompetent son subject to terms of previously executed trust agreement, doctrine of incorporation by reference applied

**N Y**—In re Bremer's Will, 281 N Y S 264, 156 Misc 160, reheard 283 N Y S 159, 157 Misc 221

**56** **N Y**—In re Rausch's Will, 179 NE 755, 258 N Y 327, 80 A L R 98

**57** **N Y**—In re Fowles' Will, 118 NE 611, 222 N Y 222, Ann Cas 1918D 834

President and Directors of Manhattan Co v Janowitz, 21 N Y S 2d 232, 260 App Div 174, 954

**58** **N Y**—In re Fowles' Will, 118 NE 611, 222 N Y 222, Ann Cas 1918D 834

68 C J p 643 note 11

#### Chicanery and mistake

Incorporation of any document is permissible as long as it is of a variety which excludes any reasonable possibility of chicanery or mistake

**N Y**—In re Comey's Will, 17 N Y S 2d 949, 173 Misc 377

In re Eldridge's Will, 64 N Y S 2d 234

**59** Conn—Nash v Danbury Nat Bank, 88 A 2d 397, 138 Conn 676

**N Y**—In re Stern's Estate, 56 N Y S 2d 631, 189 Misc 639

68 C J p 643 note 12

#### Annexed list

A provision in a will purporting to bequeath to persons named in an annexed list articles therein described is ineffective

**N Y**—In re Welcke's Will, 33 N Y S 2d 735

#### Independent instrument

An independent instrument which has not been executed in accordance with section of Decedent Estate Law reciting how will should be executed and attested cannot be incorporated in will by reference where independent instrument purports to dispose of any portion of decedent's estate or to contravene express provisions of will

**N Y**—In re Whyte's Will, 123 N Y S 2d 846, appeal dismissed 130 N Y S 2d 237, 283 App Div 947, appeal denied 131 N Y S 2d 902, 283 App Div 1079

#### Letter

Where will made an absolute gift of money to testator's nephew, but requested nephew to distribute so much of the money in such manner and to such charities as testator thereafter designated by letter, a subsequent unauthenticated letter written by testator to nephew designating charities could not be incorporated in will for purpose of construing the absolute bequest as creating a trust in favor of charities

**N Y**—In re Bouvier's Estate, 15 N Y S 2d 111, 257 App Div 665

#### Memoranda

(1) It is axiomatic that memorandum may not be incorporated by reference into a will so as to control the disposition of the testator's estate

Conn—Nash v Danbury Nat Bank, 88 A 2d 397, 138 Conn 676

(2) A testator may not, by reference, incorporate into his will an unattested memorandum of his mere desires

**N Y**—In re Leidemer's Will, 113 N Y S 2d 808

(3) Where inscriptions on envelopes found at testatrix' death directed executor to give the cash therein contained to persons named, such inscriptions were not incorporated into will by reference, since testatrix may not so incorporate unattested memoranda of mere desires

**N Y**—In re Tobin's Estate, 113 N Y S 2d 831

(4) Unattested memoranda referred to in a will, by which the testatrix purported to indicate wishes for devolution of property, cannot be considered

**N Y**—In re Judge's Will, 252 N Y S 500, 141 Misc 254

(5) Testatrix' unattested holographic memorandum contained in envelope with stock certificates which testatrix turned over to executor, directing that certificates be

delivered to decedent's brother on her death, where will was wholly silent as to brother's identity or quantum of his benefit, was held not incorporated by reference in will, notwithstanding direction in will for disposition in accordance with memorandum which testatrix was leaving with one of executors

**N Y**—In re Hilliard's Estate, 278 N Y S 675, 154 Misc 872

(6) Bequest of articles enumerated in memorandum to be distributed to persons named therein was void where memorandum referred to was not found among effects of deceased

**N Y**—In re Kelly's Estate, 274 N Y S 488, 153 Misc 445

**60** **N Y**—In re Rausch's Will, 179 NE 755, 258 N Y 327, 80 A L R 98

In re Hilliard's Estate, 278 N Y S 675, 154 Misc 872

68 C J p 644 note 13

#### Determination of question

Each case is determinative on its own facts and it has become necessary for the court to distinguish between extraneous papers of a testamentary character and extraneous papers referred to for identification purposes only, a factor regarded extremely difficult at times because the two classes of cases run into each other by almost imperceptible gradations. The inquiry in each instance as to whether the extrinsic memorandum is a mere identification of the thing given or is testamentary in its character is resolved once it has been determined whether the will is complete without additions from extrinsic unattested memoranda so that these unattested papers could be used as evidence to identify the property intended to be given, even if no reference had been made thereto in the will

**N Y**—In re Le Collen's Will, 72 N Y S 2d 467, 190 Misc 272

#### Nontestamentary instrument or paper

(1) Nontestamentary instruments may be incorporated in wills, if evidence establishes that they were in existence at date when wills were executed, and instruments are clearly identified and are of variety which exclude possibility of alteration, chicanery, fraud, or mistake

**N Y**—In re Snyder's Will, 125 N Y S 2d 459, appeal dismissed 134 N Y S 2d 174

(2) A nontestamentary extraneous paper may be resorted to and referred to by will for the limited purpose of identifying the thing intended to be given.

during the lifetime of the testator to be administered by the testamentary trustee in accordance with the original trust agreement has been held valid,<sup>61</sup> even though reference to the original trust agreement is necessary to determine the persons ultimately entitled to the bequest,<sup>62</sup> so, also, has a direction that property be disposed of as provided in the will of another,<sup>63</sup> or as another may in his will direct.<sup>64</sup> Even in jurisdictions where the rule here discussed

is in effect, a document to be incorporated by reference must be in writing,<sup>65</sup> it must have been in existence at the time the will was executed,<sup>66</sup> it must be referred to and identified with certainty,<sup>67</sup> and it must appear to have been the intention of the testator that the paper referred to be a part of his will.<sup>68</sup> Unsigned memoranda may not be incorporated into a will by reference.<sup>69</sup>

NY—In re Le Collen's Will, 72 N Y S 2d 467, 190 Misc 272

(3) A nontestamentary extraneous instrument may be resorted to for limited purpose of ascertaining identity of beneficiary

NY—In re Stern's Estate, 56 N Y S 2d 631, 189 Misc 639

#### Account

Where testatrix bequeathed remainder of estate which she received from her husband to her son and daughter's account kept by testatrix showing property received from husband's estate, proceeds she received therefrom and securities purchased did not form part of testatrix' will and could not be incorporated in will by reference, but to extent that account reflected actual transaction it could be used to trace property received by testatrix from her husband's estate

NY—In re Potter's Will, 297 N Y S 295, 251 App Div 679, affirmed 16 N E 2d 93, 278 N Y 534

#### Envelopes

(1) Will was valid and effective insofar as it bequeathed to the persons named therein the "contents of certain envelopes now in my safe deposit box" containing "securities of various kinds", which envelopes, four in number, addressed separately to legatees, were found in the safe deposit box of testatrix after the death of testatrix

NY—In re Le Collen's Will, 72 N Y S 2d 467, 190 Misc 272

(2) Where a will bequeathed the contents of certain envelopes in safe deposit box of testatrix in a named bank and referred to the envelopes as containing securities of various kinds and identified beneficiaries and quantum of their benefits, and resort to the names appearing on envelopes was only for limited purpose of identifying specific envelopes containing contents bequeathed, the bequests did not come within the prohibition against reference by will to extrinsic documents nontestamentary in character

NY—In re Le Collen's Will, supra

#### Terms of testamentary trust

A provision in will giving realty and personalty to trustee named in original trust indenture, and directing that such property be added to

trust fund held by trustee and be administered in accordance with provisions of indenture, was invalid, and would not be upheld on ground that indenture and its amendments were facts of such independent significance that they might be referred to for purpose of determining the terms of intended testamentary trust, where original indenture was amendable and revocable, and supplemental indentures were made both before and after execution of will

NY—President and Directors of Manhattan Co v Janowitz, 21 N Y S 2d 232, 260 App Div 174, 954

61. NJ—Swetland v Swetland, 134 A 822, 100 N J Eq 196, affirmed 140 A 279, 102 N J Eq 294  
68 C J p 644 note 14

62. NJ—Swetland v Swetland, supra

63. NY—In re Barlow's Will, 258 N Y S 451, 144 Misc 210

#### Husband's will

To identify persons entitled to balance of testatrix's residuary estate, on her death after that of her husband, under will giving such balance to him or his heirs and devisees according to his will, reference to his will is permissible

NY—In re Brown's Will, 82 N Y S 2d 167

64. NY—In re Fowles' Will, 118 N E 611, 613, 222 N Y 222, Ann Cas 1918D 834  
68 C J p 644 note 17

65. NJ—Magnus v Magnus, 84 A 705, 80 N J Eq 346

**The object referred to must be a document or something equivalent thereto**

NY—In re Rausch's Will, 179 N E 755, 258 N Y 327

In re Watson's Will, 130 N Y S 2d 420

66. NJ—Hackensack Trust Co v Hackensack Hospital Ass'n, 183 A 723, 120 N J Eq 14

NY—In re Watson's Will, 130 N Y S 2d 420—In re Eldridge's Will, 64 N Y S 2d 234

68 C J p 644 note 19

#### Letters intended to be written

Reference in will to letters which testator intended to write in the future outlining his desires as to use and disposition of property given ab-

solutely by the will would not make the letters effective as testamentary provisions

Conn—Peyton v Wehrhane, 6 A 2d 313, 125 Conn 420

**Under common-law rule, a paper to be incorporated in will by reference must be in existence when will was executed**

NY—In re Leidemer's Will, 113 N Y S 2d 808

**The so-called doctrine of incorporation by reference has no application unless it is evident that the document to which reference was made was actually in existence at date of will with which it is to be blended**  
NJ—First-Mechanics Nat Bank of Trenton v Norris, 34 A 2d 746, 134 N J Eq 229

67. NJ—Hackensack Trust Co v Hackensack Hospital Ass'n, 183 A 723, 120 N J Eq 14

NY—In re Comey's Will, 17 N Y S 2d 949, 173 Misc 377

In re Eldridge's Will, 64 N Y S 2d 234  
68 C J p 644 note 20

#### Letter of instruction

Where testatrix bequeathed jewelry and household effects to her husband with the request that he deliver such articles mentioned in a letter of instruction attached to the will to persons therein named, but the will did not clearly identify the letter of instruction and the letter was not of such a nature that the reasonable possibility of identification could be made or reasonable possibility of chicanery or mistake avoided, the letter of instruction was void as a testamentary disposition and notice of probate was not required to the persons mentioned therein

NY—In re Welcke's Will, 33 N Y S 2d 735

**The tests of identification must be precise and definite**

NY—In re Rausch's Will, 179 N E 755, 258 N Y 327

In re Watson's Will, 130 N Y S 2d 420

68. NY—In re Watson's Will, supra

68 C J p 644 note 21

69. NY—In re Rand's Will, 200 N. Y S 334, 120 Misc 670

68 C J p 644 note 22

A whole will is not avoided because one provision making reference to an extrinsic document or paper is ineffective<sup>70</sup>

In Louisiana a will cannot be made by mere reference to another document not itself a will,<sup>71</sup> or to a former invalid will<sup>72</sup> It is permissible for a testator to make reference in his will to another writing for the purpose of rendering certain the object to which the will refers,<sup>73</sup> but by such a reference he does not incorporate the other writing into his will<sup>74</sup>

### c. Evidence

The burden of proving incorporation by reference is on the party claiming it

The party claiming incorporation of an extrinsic document by reference has the burden of proving its identity by sufficient proof,<sup>75</sup> he must also prove that the testator intended to incorporate such instrument in his will<sup>76</sup> There must be affirmative evidence that a document sought to be enforced as part of the will was in existence when the will was made<sup>77</sup>

While parol evidence is necessarily admissible to prove whether there is or is not in existence at the

testator's death any such instrument as is referred to in the will,<sup>78</sup> and may be received to effect identification where the reference in the will is such as to make the paper referred to capable of identification,<sup>79</sup> nevertheless it is not admissible to show what paper was meant when the uncertainty and ambiguity as to the paper referred to are patent on the face of the will.<sup>80</sup>

## § 164. Codicils

In order to be effective as a codicil, a writing need not assume any particular form or be couched in language technically appropriate to its testamentary character

The courts entertain liberal views as to the form and contents of codicils<sup>81</sup> A writing need not assume any particular form<sup>82</sup> or be couched in language technically appropriate to its testamentary character<sup>83</sup> in order to be effective as a codicil An instrument need not be called a codicil in order to be a codicil,<sup>84</sup> and an instrument called a codicil is not necessarily one,<sup>85</sup> and, as in the case of the will proper, the intention of the testator must be looked to in determining whether a particular instrument is a codicil<sup>86</sup> A codicil to be effective must be either dispositive<sup>87</sup> or appointive<sup>88</sup>

70. NY—Thompson v Qumby, 2 Bradf Surr 449, affirmed 21 Barb 107

71. La—Hessmer v Edenborn, 199 So 647, 196 La 575—Succession of Ledet, 128 So 273, 170 La 449

72. La—Hessmer v Edenborn, 199 So 647, 196 La 575—Succession of Ledet, 128 So 273, 170 La 449

73. La—Hessmer v Edenborn, 199 So 647, 196 La 575  
Hall v Hill, McLean & Co, 6 La Ann 745

74. La—Hessmer v Edenborn, 199 So 647, 196 La 575

75. Me—Appeal of Sleeper, 151 A 150, 129 Me 194, 71 A L R 518  
68 C J p 644 note 24

### Clear and satisfactory proof

Ala—Arrington v Brown, 178 So 218, 235 Ala 196

Ark—Montgomery v Blankenship, 230 SW 2d 51, 217 Ark 357, 21 A L R 2d 212—Kinnear v Langley, 192 SW 2d 978, 209 Ark 878  
Tex—Brooker v Brooker, 106 SW 2d 247, 130 Tex 27

76. Cal—Wells Fargo Bank & Union Trust Co v Superior Court in and for Marin County, 193 P 2d 721, 32 Cal 2d 1  
68 C J p 644 note 25

### Evidence held sufficient

Pa—In re Hogue's Will, 6 A 2d 108, 135 Pa Super 543

### Evidence held insufficient

Cal—In re McCurdy's Estate, 240 P 498, 197 Cal 276.

Or—Witham v Witham, 66 P 2d 281, 156 Or 59, 110 A L R 253

77. Ky—Daniel v Tyler's Ex'r, 178 SW 2d 411, 296 Ky 808

78. SC—Richardson v Byrd, 164 SE 643, 166 SC 251

79. Mont—In re Noyes's Estate, 106 P 355, 40 Mont 231  
68 C J p 644 note 27

80. Ohio—Linney v Cleveland Trust Co, 165 NE 101, 30 Ohio App 345

Or—Witham v Witham, 66 P 2d 281, 156 Or 59, 110 A L R 253  
68 C J p 644 note 28

81. Va—Corpus Juris quoted in Henderson v Henderson, 33 SE 2d 181, 183, 183 Va 663  
68 C J p 645 note 35

82. Pa—In re Hengen's Estate, 12 A 2d 119, 337 Pa 547

83. Pa—In re Hengen's Estate, supra

84. Okl—Johnson v. Johnson, 279 P 2d 928

85. NY—In re Mucklow's Will, 272 N Y S 776, 242 App Div 111, affirmed 195 NE 178, 266 N Y 513.

86. Cal—In re Morrison's Estate, 220 P 2d 413, 98 Cal App 2d 380—In re Loud's Estate, 161 P 2d 49, 70 Cal App 2d 399

NY—In re Benaglia's Estate, 89 N Y S 2d 383, 195 Misc 680.

Pa—In re Nagele's Estate, Orph, 3 Fiduciary 279

Va—Henderson v Henderson, 33 S E 2d 181, 183 Va 663  
68 C J p 645 note 32

Necessity for testamentary intent generally see supra § 129

"The intention to add a codicil is controlling"

Okl—Johnson v. Johnson, 279 P 2d 928

### Codicil or later will

Whether a particular testamentary instrument is a codicil or a later will depends on intention of testatrix as indicated by words in instrument together with admissible evidence of surrounding circumstances

Wash—In re Whittier's Estate, 176 P 2d 281, 26 Wash 2d 833

87. Cal—In re Cutting's Estate, 155 P 1002, 172 Cal 191.  
68 C J. p 645 note 33

### "Expect"

Paper executed by testator subsequent to will and witnessed by two persons, wherein testator referred to provision in will for son to receive three thousand dollars and then stated that he had lent son two thousand two hundred dollars and "expect same to be repaid or deducted" from legacy, was valid as codicil, in view of dispositive character of "expect" Miss—Holcomb v. Holcomb, 159 So. 564

88. Cal—In re Cutting's Estate, 155 P 1002, 172 Cal 191.

A codicil need not necessarily be in the usual form of such an instrument.<sup>89</sup> If it is in writing and properly executed,<sup>90</sup> and is an otherwise legal declaration of the testator's intention which he wills to be performed after his death,<sup>91</sup> it must be given effect as a codicil. Hence, an instrument, executed with a testamentary purpose and the requisite formalities, may operate as a codicil, although it is

partly or wholly in the form of a letter,<sup>92</sup> power of attorney,<sup>93</sup> or deed,<sup>94</sup> or although its only provision is one naming an executor.<sup>95</sup> Prior to a decree of probate,<sup>96</sup> a will and codicil are separate instruments for the purpose of considering the formality of their execution,<sup>97</sup> the validity of the one not being dependent on the validity of the other,<sup>98</sup> and

89 Md—Dietrich v Morgan, 20 A 2d 175, 179 Md 553

90 NY—In re Johnson's Estate, 7 NYS 2d 81, 169 Misc 215

Pa—In re Hengen's Estate, 12 A 2d 119, 337 Pa 547—In re Baker's Estate, 200 A 2d 65, 331 Pa 33  
In re Dahringer's Estate, Orph, 36 Del Co 282—In re Wenrich's Will, Orph, 43 Sch Leg Rec 77

Execution of codicils generally see infra § 198

91 Pa—In re Hengen's Estate, 12 A 2d 119, 337 Pa 547

In re Palmer's Estate, Orph, 66 Montg Co 44, 64 York Leg Rec 81

#### "Desire" and "wish"

Where in codicil testatrix stated her "desire" was that all taxes applicable to the property should be paid out of it and remainder paid to her brothers, and that her "wish" was that "immediate distribution" should be made when the property was received by her "executors," the codicil was not merely expressive of a wish but was a testamentary disposition

NY—In re Bosworth's Will, 55 NYS 2d 422, 269 App Div 252

#### Envelope

An envelope which contained securities and which was found in testatrix' safe deposit box and apparently executed after execution of will, having on its face instructions signed by testatrix addressed "to my executor," directing delivery of securities to "Mr Gearhart," and also bearing words "Property of Charles C Gearhart" and "Held for safe keeping," was testamentary in character, and was entitled to probate as a codicil

Pa—In re Glass' Estate, 1 A 2d 239, 331 Pa 561, 117 A LR 1322

#### Undated paper

A paper in deceased's handwriting and signed by deceased, but not dated, stating "I want Mamie to have my house" at designated address, and found in a drawer, together with deceased's will and other important papers, pinned to active page of savings account book, was testamentary in character and was entitled to probate as a codicil, where paper could accomplish its intended purpose of conveying realty only as a testamentary disposition, and evidence disclosed that paper was executed subsequent to will

Pa—In re Hengen's Estate, 12 A 2d 119, 337 Pa 547

#### Writing held not testamentary in character

A writing signed by a testator subsequent to the date of his will stating his desire that in distributing his estate equally between his sons as provided in the will, credit should be taken and necessary adjustments made for advancements made to each during testator's lifetime as therein-after listed, so that the two sons will divide the estate equally, is not testamentary in character, and may not be probated as a codicil to the will

Pa—In re Nagele's Estate, 87 Pa Dist & Co 140, 3 Fiduciary 569, 71 Montg Co 1

92. Pa—In re Kruk's Estate, Orph, 95 Pittsb Leg J 245

Va—Corpus Juris quoted in Henderson v Henderson, 33 SE 2d 181, 183, 183 Va 663

68 C J p 645 note 36

#### Particular letters

(1) A letter written by testator to designated executors bearing same date as holographic will, which told executors that testator wanted them to see that a friend to whom specific bequest had been made would receive her money as soon as possible, and which expressed hope that such friend should never be in want, could not be admitted to probate as a codicil

Cal—In re Loud's Estate, 161 P 2d 49, 70 Cal App 2d 399

(2) A letter written by the testatrix to her attorney stating particulars in which she wished to change her original will, where the letter was signed by the testatrix in the presence of witnesses, is valid as a codicil

Mich—In re Henry's Estate, 244 N W 141, 259 Mich 499, adhered to 248 NW 853, 263 Mich 410

(3) A letter from testatrix to her brother, stating that she would "now" have to make change in her will and that she "now" wanted bequest to named person to go to such brother, directing him to keep letter intact for "business-like transfer" and in case there should be trouble, stating that testatrix wanted such brother to have what she planned for another brother, to whom will devised property, and expressing her anxiety for addressee and his family

to be cared for in his old age, was properly admitted to probate as codicil to will

Va—Henderson v Henderson, 33 SE 2d 181, 183 Va 663

(4) A letter from testatrix to proponent reciting that she had made certain provisions, which were not in fact made in will admitted to probate, did not itself constitute a will, under concededly applicable Pennsylvania law, and was not entitled to be admitted to probate as codicil

NY—In re Pryll's Estate, 107 NY S 2d 415, 200 Misc 828

93. Va—Corpus Juris quoted in Henderson v Henderson, 33 SE 2d 181, 183, 183 Va 663

68 C J p 645 note 37

94. Va—Corpus Juris quoted in Henderson v Henderson, 33 SE 2d 181, 183, 183 Va 663

68 C J p 645 note 38

95 Pa—In re Baker's Estate, 200 A 65, 331 Pa 33

Va—Corpus Juris quoted in Henderson v Henderson, 33 SE 2d 181, 183, 183 Va 663

68 C J p 645 note 39

#### Nominating other persons

A codicil, nominating other persons as executors unless the person nominated in will should be willing to serve as executor for total fee of one thousand dollars, effected a conditional nomination of executor named in will which was valid

Ind—Butler University v Danner, 50 NE 2d 928, 114 Ind App 236, rehearing denied 51 NE 2d 487, 114 Ind App 236

96. NY—In re Johnson's Estate, 174 NYS 493, 105 Misc 451, affirmed 176 NYS 905, 188 App Div 954

97. NY—Osburn v Rochester Trust & Safe Deposit Co, 136 NYS 859, 152 App Div 235, modified on other grounds 102 NE 571, 209 NY 54, 46 LRA, NS, 983, Ann Cas 1915A 101

In re Johnson's Estate, 174 NYS 493, 105 Misc 451, affirmed 176 NYS 905, 188 App Div 954

98. NY—Osburn v Rochester Trust & Safe Deposit Co, 136 NYS 859, 152 App Div 235, modified on other grounds 102 NE 571, 209 NY 54, 46 LRA, NS, 983, Ann Cas 1915A 101.

the designating name being immaterial<sup>99</sup>

A codicil must be certain and definite in order to be effective,<sup>1</sup> but a codicil will not be declared void for uncertainty if it is possible to arrive at any reasonable construction which will give it validity<sup>2</sup> Where the testator executed a codicil which is ambiguous, the courts are not bound to endeavor to give it effect save in so far as it appears from the language that facts have arisen under which the testator directed that it should be declared valid<sup>3</sup> A codicil need not be on the same paper as the will, or be physically attached to the will<sup>4</sup> or, if there are several codicils, to each other,<sup>5</sup> but may consist of several separate sheets of paper<sup>6</sup> Where a will and the codicil thereto are both legally executed, the fact that the codicil was written in the blank space between the last dispositive item and the testimonium clause does not invalidate the instrument<sup>7</sup> Where a codicil fails as a supplement to the will because of the will's being nonexistent or insufficiently executed, it may operate as an independent testamentary disposition of property, if it is complete

in itself<sup>8</sup> The rule is otherwise where the codicil is incapable of execution independently of the will<sup>9</sup> A statute requiring a will, in order to be valid, to contain a clause revoking all former wills, does not apply to a codicil<sup>10</sup>

*Reference to will or other writing* While a codicil must in effect refer to some existing will,<sup>11</sup> or at least be sufficiently connected therewith,<sup>12</sup> it need not do so specifically<sup>13</sup> Where the codicil does not refer specifically to any will, however, it must be taken to refer to the last executed will<sup>14</sup> A provision in a codicil, not specifically referring to any will, revoking a bequest revoked by the last executed will, will be disregarded as meaningless, having nothing on which to operate,<sup>15</sup> but such provision does not invalidate the remainder of the codicil<sup>16</sup> A codicil is not invalidated because it contains a reference to a previous writing,<sup>17</sup> and a codicil executed in accordance with the requirements of statute, may, by an appropriate reference, incorporate within itself a document or paper not so executed<sup>18</sup> Where the codicil clearly and unmis-

99 N.Y.—In re Johnson's Estate, 174 N.Y.S. 493, 105 Misc. 451, affirmed 176 N.Y.S. 905, 188 App. Div. 954

1. Pa.—In re Erhart's Estate, Orph., 35 Erie Co. 40

2. Kan.—Fauser v. Jordan, 103 P.2d 862, 152 Kan. 407

Pa.—In re Boyer's Estate, Orph., 2 Fiduciary 553

Va.—Domestic & Foreign Missionary Soc. v. Crippled Children's Hospital, 176 S.E. 193, 163 Va. 114

#### Debatable meaning

Fact that true meaning and intent of legacies of holographic codicils were debatable would not warrant declaring controversial legacies void for uncertainty, where reasonable construction which would give validity to legacy and carry out wishes of testatrix with respect thereto could be reached

Va.—Domestic & Foreign Missionary Soc. v. Crippled Children's Hospital, supra

3. N.Y.—In re Werlich, 130 N.E. 632, 230 N.Y. 516

Okl.—Reeves v. Duke, 137 P.2d 897, 192 Okl. 519, 147 A.L.R. 634

4. Cal.—In re Graham's Estate, 183 P. 952, 42 Cal. App. 653

N.C.—In re Thompson's Will, 145 S.E. 393, 196 N.C. 271, 62 A.L.R. 288

5. Cal.—In re Johnston's Estate, 221 P. 382, 64 Cal. App. 197

68 C.J. p. 645 note 47

6. Cal.—In re Morrison's Estate, 220 P.2d 413, 98 Cal. App.2d 380

#### Rule of integration

Where testator the day before his death wrote on a sheet of paper

that he intended it to be his will and that it was intended to "help these people," and witnesses signed that sheet of paper, and testator took that sheet and a second sheet and folded them and put them in an envelope which he sealed and gave to a friend to take to bank, and after testator's death the second sheet was found to contain in testator's handwriting a list of names of persons to which testator desired to have bequest and devise made, and second sheet was not signed, rule of integration was applicable rather than principle of incorporation by reference, and the two sheets were a codicil to will

Cal.—In re Morrison's Estate, supra

7. Ohio—Clark v. Carpenter, 14 Ohio App. 278

8. N.Y.—Matter of Emmons' Will, 96 N.Y.S. 506, 110 App. Div. 701

9. Pa.—Hiller's Estate, 9 Kulp 64

10. Ill.—Abdill v. Abdill, 128 N.E. 741, 295 Ill. 40

68 C.J. p. 646 note 57

11. Cal.—In re Graham's Estate, 183 P. 952, 42 Cal. App. 653

Mont.—In re Hansen's Estate, 254 P.2d 1073, 126 Mont. 522

12. Wash.—State v. Superior Court for Spokane County, 255 P. 960, 143 Wash. 578

68 C.J. p. 645 note 49

**Reasonable certainty**

When a codicil is on a separate sheet of paper and found at a place where will is not kept, there must be something about it or within it that identifies with reasonable certainty the will to which it is to be a codicil.

Okl.—Reeves v. Duke, 137 P.2d 897, 192 Okl. 519, 147 A.L.R. 634

13. Va.—Perkins v. Jones, 4 S.E. 833, 84 Va. 358, 10 Am. SR. 863

68 C.J. p. 645 note 50

14. Cal.—In re Graham's Estate, 183 P. 952, 42 Cal. App. 653

15. Cal.—In re Graham's Estate, supra

Revocation by codicil see infra § 275

16. Cal.—In re Graham's Estate, supra

17. Ill.—In re Apsey's Estate, 1 N.E.2d 558, 285 Ill. App. 29

18. Cal.—In re Dobrzensky's Estate, 232 P.2d 886, 105 Cal. App.2d 134

Ill.—Eschmann v. Cawi, 192 N.E. 226, 357 Ill. 379

68 C.J. p. 641 note 90 [c] (4)

Incorporation by reference as applied to wills see supra § 163

**Will**

(1) Where codicil, admittedly written, signed, and dated by testatrix, expressly referred to and sufficiently identified her formal will, codicil operated to incorporate formal will by reference as part of codicil

Cal.—In re Dobrzensky's Estate, 232 P.2d 886, 105 Cal. App.2d 134

(2) Where codicil refers to restrictions in the body of the will, such reference is to be given the same effect as if set forth in the codicil

Pa.—In re Onderdonk's Estate, 189 A. 550, 125 Pa. Super. 124

(3) Fact that purported will was not duly attested does not militate against effectiveness of codicil con-

takably refers to another paper so as to preclude all doubt of its identity, and where the evidence is clear that the testator intended to make that paper part of his will, proof of proper execution of the codicil establishes both instruments as the will of the testator<sup>19</sup>

### § 165. Instrument Operating as Will and Also as Other Document

An instrument may be sustained as a will and also as another instrument, such as a contract or deed.

While ordinarily the same instrument cannot operate both as a will and as some other transfer of property,<sup>20</sup> it sometimes happens that an instrument is so drawn that part of its provisions may be sustained as a will and the remainder, relating to another distinct subject matter, as another instrument,<sup>21</sup> as, for example, a contract<sup>22</sup> or a deed<sup>23</sup>. To have this effect it must employ variant and distinct terms in reference to different pieces of

property, clearly indicating the intent to give the instrument a testamentary effect as to one and a present operation as to the other<sup>24</sup>. It is obvious that an instrument cannot operate both as a will and a deed with respect to the same property<sup>25</sup>. Neither can the same instrument be both a contract and a will as to the same property<sup>26</sup>.

### § 166. Alterations

A testator may alter or change his will as he pleases, provided the alterations are made in compliance with the requirements of law.

"Alteration," as applied to wills, has been defined as a change in the words of a will by addition, or erasure, or both, made by the testator or some one acting under his authority, after the execution of the will<sup>27</sup>. A testator may alter or change his will as often as he pleases, and in any respect that suits his fancy,<sup>28</sup> provided the alterations are made in compliance with statutory requirements.<sup>29</sup> Addi-

taining proper reference to will, since execution and attestation of codicil cures defects and omissions in execution of incorporated document

Ill—Eschmann v Caw, 192 NE 226, 357 Ill 379

#### Doctrine held not applicable

Where a memorandum written on an envelope in decedent's hand and dated and signed by decedent, and which was offered for probate as a codicil to decedent's will, made no reference to notation on envelope written by third person to whom decedent delivered envelope or to contents thereof, which consisted of a savings bank book, the doctrine of incorporation was not applicable so as to lend meaning to memorandum by reference to other writings or contents of envelope

Cal—In re Coffin's Estate, 112 P 2d 34, 44 Cal App 2d 178

19. Ill—Eschmann v Caw, 192 NE 226, 357 Ill 379

20. Ala—Thompson v. Johnson, 19 Ala 59

68 C J p 646 note 59

"Will" distinguished from other instruments see supra §§ 136-148

21. Tenn—Jones v Jones, 43 SW 2d 205, 163 Tenn 237

#### Attempted testamentary disposition held invalid

Where instrument contained two independent contracts first part being an ordinary farm lease in no way related to last clause of lease which provided that title to personalty upon farm at time of death of lessor should pass to lessees if death occurred while contract was in effect, the last clause was an attempted testamentary disposition of personalty to take effect at death of

lessor under certain conditions and was invalid because not executed under formalities required to make a will

Ind—Crowell v Hines, 69 NE 2d 135, 117 Ind App 56

22. Kan—Foster v Allen, 152 P 2d 818, 159 Kan 116

Mich—In re Boucher's Estate, 46 NW 2d 577, 329 Mich 569

Pa—In re Callahan's Estate, 79 Pa Dist & Co 530, 2 Fiduciary 602  
68 C J p 646 note 61

A single written instrument may constitute both a will and a contract

Cal—In re Watkins' Estate, 108 P 2d 417, 16 Cal 2d 793, prior opinion 104 P 2d 389, rehearing denied 109 P 2d 1

Chase v Leiter, 215 P 2d 756, 96 Cal App 2d 439—Security-First Nat Bank v Stack, 90 P 2d 337, 32 Cal App 2d 586—Norton v Estate of Norton, 183 P 214, 41 Cal App 614

#### Partnership agreement

Where partnership agreement between decedent and another contained provisions relating to disposition of decedent's interests therein upon his death, and where, although certificate signed by attesting witnesses did not describe instrument as a will or state that decedent declared it to be such, oral testimony established that decedent knew nature of instrument, that he intended it to be his will, and that it was duly executed as such in conformity with statute, dispositive provisions of agreement would be admitted to probate as decedent's will

NY—In re Dash's Will, 120 NYS 2d 621.

23. RI—Merrill v Boal, 132 A 721, 45 A L R 830, 47 RI 274

68 C J p 646 note 62

24. Tenn—Jones v Jones, 43 SW 2d 205, 163 Tenn 237

68 C J p 646 note 63

#### Inter vivos and after death

The same instrument cannot serve to dispose of the same property inter vivos and again after the maker's death

Mich—In re Boucher's Estate, 46 NW 2d 577, 329 Mich 569

RI—Merrill v Boal, 132 A 721, 47 RI 274, 45 A L R 830

25. RI—Merrill v Boal, supra  
68 C J p 646 note 64

26. Mich—In re Boucher's Estate, 46 NW 2d 577, 329 Mich 569

Wis—In re Beyschlag's Estate, 231 NW 165, 201 Wis 613

27. Neb—In re Diener, 113 NW. 149, 150, 79 Neb 569

#### "Revocation" distinguished

Conn—Appeal of Miles, 36 A 39, 41, 68 Conn 237

2 C J p 1167 note 93 [a]

#### "Spoliation" distinguished

Neb—In re Diener, 113 NW. 149, 79 Neb 439

2 C J p 1167 note 93 [b]

28. Pa—In re Vey's Estate, Orph. 87 Pittsb Leg J 237

SC—Guerin v Hunt, 110 SE 71, 118 SC 32

68 C J p 646 note 67

29. Mich—In re Houghten's Estate, 18 NW 2d 254, 310 Mich 613—In re Houghten's Estate, 17 NW 2d 774, 310 Mich 613, rehearing denied 18 NW 2d 254, 310 Mich 613

Pa—In re Ducommun's Estate, Orph. 2 Fiduciary 69, 53 Lanc L Rev 11

68 C J p 646 note 67.



tions, erasures, interlineations, or other alterations are valid and effective when made prior to the execution of the will,<sup>30</sup> and the will so changed is the one which should be received.<sup>31</sup> While it has been held that alterations made subsequent to the execution of the will are of no effect whatever,<sup>32</sup> and do not impair its validity as a whole,<sup>33</sup> especially where the alterations made are of an immaterial nature and do not change the legal effect of the provisions of the will,<sup>34</sup> there is authority that a material alteration made after the execution of the will may operate as a destruction of the will.<sup>35</sup> An alteration does not affect the validity of the provisions not altered, but only those altered, where the two are separable and enforceable independently of each other,<sup>36</sup> and, according to some decisions, the pro-

visions altered are not affected, but may be probated as they first stood, provided their original language can be ascertained.<sup>37</sup> Where the alteration is an immaterial one, validity of the will is not affected whether made before or after the execution of the will,<sup>38</sup> and the alteration, addition, or interlineation in such cases is ignored.<sup>39</sup>

Interlineations in a will amounting to the filling of blanks,<sup>40</sup> or which are necessary to the sense of the will<sup>41</sup> and which do not change the sense thereof,<sup>42</sup> are deemed to have been written before the will was executed. The retracing of the signature of one of the attesting witnesses will not invalidate a will otherwise regular and properly executed.<sup>43</sup> An immaterial alteration by a stranger without fraudulent intent has no effect.<sup>44</sup>

### C. EXECUTION

#### § 167. Statutory Requirements

- a. In general
- b. Purpose of statutes
- c. Intent of testator as affecting operation of statutes
- d. Sufficiency of compliance with statutes
- e. Character of property disposed of as affecting requirements

#### f. Complete execution prevented by act of God

##### a. In General

A will must be executed in accordance with statutory requirements or it will be void, and these requirements apply to all instruments which are testamentary in character, unless otherwise provided.

The right to make a will is created and regulated by statutes, as discussed supra § 3, the provisions of which prescribing the method of execution are

30. Pa.—In re Morrow's Estate, 54 A 313, 204 Pa 479  
68 C J p 646 note 68

Necessity of noting alteration in attesting clause see infra § 197

"Alterations are entirely immaterial unless they were in fact made after the will's execution"

Wis.—In re Home's Will, 284 NW 766, 231 Wis 227, rehearing denied 285 NW 754, 231 Wis 227

##### Part of will

(1) Alterations are part of will as originally executed if made before execution

Wis.—In re Home's Will, supra.

(2) A testator's initialed interlineations of words "higher" and "or higher" between words "college" and "education" in one paragraph of will and with his initials in subscribing witnesses' presence at time of executing will constituted part of such paragraph

NY.—In re Schreiner's Will, 137 N Y S 2d 217

31. US.—City Nat Bank of Columbus v Slocum, CCA Ohio, 272 F 11, certiorari denied 42 S Ct 49, 257 US 637, 66 L Ed. 409

32. NH.—Ruel v. Hardy, 6 A.2d 753, 90 NH 240  
68 C J. p 647 note 72.

33. Ark.—Musgrove v Holt, 240 S W 1068, 183 Ark 355  
68 C J p 647 note 74

Alterations as not revoking will see infra § 282

34. Pa.—In re Griffith's Estate, 57 A 2d 893, 358 Pa 474  
In re Henne's Estate, Orph., 39 Berks Co 1

68 C J p 647 note 75

##### Erasures or striking of letters

A will was not rendered invalid by certain erasures or striking of letters not shown to have been of particular importance.

La.—Succession of Patterson, App, 22 So 2d 214

35. Wis.—Moore v Halberstadt, 16 NW 2d 819, 246 Wis 263—In re Wilson, 8 Wis 171

Obliteration of date which is necessary part of will is a material alteration and, in absence of proof sufficient to establish that it was authorized or to otherwise satisfactorily explain the alteration, the alteration operated as a destruction of the will.

Wis.—Moore v Halberstadt, 16 N.W. 2d 819, 246 Wis 263

Suspiciousness of alterations  
Opportunities for making altera-

tions in will are so great, and requirement of statute that will shall not take effect unless executed with due formality so strict, that apparent alterations in will are looked on with suspicion

Okl.—In re Cravens' Estate, 242 P 2d 135, 206 Okl 174, 35 A L R 2d 615

36. R I.—Nelen v Nelen, 161 A 121  
68 C J p 647 note 76

37. NY.—In re Enright's Will, 248 NYS 707, 139 Misc 192  
68 C J p 647 note 77.

38. Pa.—In re Hausman's Estate, Orph, 26 Erie Co 26

Va.—Jenkins v Trice, 147 S E 251, 152 Va 411

39. Pa.—In re Teed's Estate, 74 A 646, 225 Pa 633, 133 Am SR 896

40. Ill.—Martin v Martin, 165 NE 644, 334 Ill 115, 67 A L R 1127

41. Ill.—Martin v Martin, supra.

42. Ill.—Martin v Martin, supra

43. Ill.—Craig v Wismar, 141 NE 766, 310 Ill 262  
68 C J p 648 note 84.

44. DC.—McIntire v McIntire, 19 DC 482, affirmed 16 S Ct. 814, 162 US 383, 40 L Ed. 1009.

mandatory in character,<sup>45</sup> and the will must be executed in accordance with the prescribed requirements or it will be void,<sup>46</sup> and the property therein described will descend as intestate property,<sup>47</sup> and nothing will pass to the beneficiaries therein nam-

ed<sup>48</sup> The statutory requirements as to execution apply to all instruments whatsoever which are of a testamentary character, whatever their form may be,<sup>49</sup> unless the legislature otherwise provides<sup>50</sup> A will is either valid or invalid as an

45 Ark—Leister v Chitwood, 225 SW 2d 936, 216 Ark 418  
Cal—Kelly v Bank of America Nat Trust & Sav Ass'n, 246 P 2d 92, 112 Cal App 2d 388, 34 A L R 2d 578  
Ill—Spangler v Bell, 60 NE 2d 864, 390 Ill 152—Brehle v Wilkie, 26 NE 2d 475, 373 Ill 409  
Mo—Morton v Simms, 263 SW 2d 435—Brownfield v Brownfield, 249 SW 2d 389—Capps v Adamson, 242 SW 2d 556, 362 Mo 539—Wright v McDonald, 233 SW 2d 19, 361 Mo 1—Potter v Ritchardson, 230 SW 2d 672, 360 Mo 661  
Neb—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Cagle's Estate, 270 NW 664, 132 Neb 47—In re Smith's Estate, 266 NW 611, 130 Neb 739  
N D—In re Lyons' Estate, 58 NW 2d 845  
Okl—Corpus Juris cited in In re Abrams' Will, 77 P 2d 101, 103, 182 Okl 215  
Tenn—Ball v Miller, 214 SW 2d 446, 31 Tenn App 271  
68 C J p 648 note 89  
46. Ark—Leister v Chitwood, 225 SW 2d 936, 216 Ark 418—Evans v Evans, 101 SW 2d 435, 193 Ark 585  
Cal—In re Krause's Estate, 117 P 2d 1, 18 Cal 2d 623  
In re Chase's Estate, 124 P 2d 895, 51 Cal App 2d 353—In re Alberts' Estate, 100 P 2d 538, 38 Cal App 2d 42  
Colo—In re McGary's Estate, 258 P 2d 770, 127 Colo 495  
Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161  
Ill—In re Lagow's Will, 62 NE 2d 469, 391 Ill 72—Spangler v Bell, 60 NE 2d 864, 390 Ill 152  
Ind—Fletcher Trust Co v Morse, 101 NE 2d 658, 230 Ind 44  
Granger's Estate v Gosport Cemetery Ass'n, 118 NE 2d 386, 124 Ind App 686, rehearing denied In re Granger's Estate, 119 NE 2d 437, 124 Ind App 686—Bulen v Pendleton Banking Co, 78 NE 2d 449, 118 Ind App 217—Hinton v Bryant, 190 NE 554, 99 Ind App 38  
Kan—Humphrey v. Wallace, 216 P 2d 781, 169 Kan 58—In re Koellen's Estate, 176 P 2d 544, 162 Kan 395  
Ky—Letcher's Trustee v Letcher, 194 SW 2d 984, 302 Ky 448—Floyd v Christian Church Widows and Orphans Home of Kentucky, 176 SW 2d 125, 296 Ky. 196, 151 A L R. 1230.

La—Succession of Berdon, 12 So 2d 654, 202 La 621  
Miss—Warren v Sidney's Estate, 184 So 806, 183 Miss 669  
Mo—Wyers v Arnold, 147 SW 2d 644, 347 Mo 413, 134 A L R 876, certiorari denied Arnold v Wyers, 61 S Ct 1112, 313 US 589, 85 L Ed 1544  
Mont—In re Woodburn's Estate, 273 P 2d 391—Trenouth v Mulrony, 227 P 2d 590, 124 Mont 499—In re Watts' Estate, 160 P 2d 492, 117 Mont 505—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132  
Neb—In re Coons' Estate, 48 NW 2d 778, 154 Neb 690—In re Kaiser's Estate, 34 NW 2d 366, 150 Neb 295—In re Cagle's Estate, 270 NW 664, 132 Neb 47—In re Smith's Estate, 266 NW 611, 130 Neb 739  
N J—In re D'Agostino's Will, 75 A 2d 913, 9 N J Super 230—In re Di Persia's Estate, N J Co, 75 A 2d 833, 9 N J Super 576  
In re Amsden's Will, 191 A 801, 121 N J Eq 571  
N Y—In re Douglas' Will, 83 N Y S 2d 641, 193 Misc 623—In re Thompson's Will, 68 N Y S 2d 123, 189 Misc 873—In re Karlinski's Estate, 43 N Y S 2d 40, 180 Misc 44—In re Jones' Estate, 285 N Y S 894, 157 Misc 847—In re Bremer's Will, 281 N Y S 264, 156 Misc 160, affirmed 283 N Y S 159, 157 Misc 221  
In re Begun's Will, 123 N Y S 2d 782  
N C—Paul v Davenport, 7 SE 2d 352, 217 NC 154  
N D—In re Lyons' Estate, 58 NW 2d 845—In re Baur's Estate, 54 NW 2d 891—Johnson v Weldy, 54 NW 2d 829—McKee v Buck, 4 NW 2d 652, 72 ND 86  
Ohio—Bloechle v Davis, 8 NE 2d 247, 132 Ohio St 415  
Pa—In re Cohen's Estate, 51 A 2d 704, 356 Pa 161—In re McClellan's Estate, 189 A 315, 325 Pa 257  
In re Barone's Estate, Orph, 2 Fiduciary 149—In re Ducommun's Estate, Orph, 2 Fiduciary 69, 53 Lanc Rev 11—In re Gray's Estate, Orph, 12 Fay L J 175—In re Granuskie's Estate, Orph, 40 Lack Jur 94, 53 York Leg Rec 56  
Tenn—Lawrence v Lawrence, 250 SW 2d 781, 35 Tenn App 648—Eslick v Wodicka, 215 SW 2d 12, 31 Tenn App 333—Ball v Miller, 214 SW 2d 446, 31 Tenn App 271  
Utah—In re Alexander's Estate, 139 P 2d 432, 104 Utah 296  
Vt—In re Moon's Will, 176 A 410, 107 Vt 92

Va—Bell v Timmins, 58 SE 2d 55, 190 Va 648—McElroy v Rolston, 34 SE 2d 241, 184 Va 77  
W Va—Goetz v Old Nat Bank of Martinsburg, 84 SE 2d 759—In re Winzenrith's Will, 55 SE 2d 897, 133 W Va. 267—Black v Maxwell, 46 SE 2d 804, 131 W.Va. 247  
68 C J p 648 note 90  
Requirements for execution of:  
Holographic wills see infra § 205  
Nuncupative wills see infra §§ 215-217  
Change of statutory requirements subsequent to execution of will see supra § 150  
47. Ind—Bulen v Pendleton Banking Co, 78 NE 2d 449, 118 Ind App 217—Hinton v Bryant, 190 NE 554, 99 Ind App 38  
Md—Bringle v Tucker, 80 A 224, 114 Md 597  
48. Iowa—Ramsey v Ramsey, 186 NW 627, 192 Iowa 1356  
49. Ark—Stewart v Tucker, 188 S W 2d 125, 208 Ark 612  
Conn—Bowen v Morgillo, 14 A 2d 724, 127 Conn 161  
N Y—In re Karlinski's Estate, 43 N Y S 2d 40, 180 Misc 44—In re Penno's Estate, 221 N Y S 205, 128 Misc 718  
In re Bradbury's Estate, 53 N Y S 2d 948  
Ohio—Thomas v Dye, App, 127 N E 2d 228  
Okl—Hooker v Barton, 284 P 2d 708  
Pa—Stazewski v Peoples-Pittsburgh Trust Co, 55 Pa Dist & Co 549, 94 Pittsb Leg J 41  
R I—Cutroneo v Cutroneo, 98 A 2d 921  
68 C J p 649 note 93  
A deed, if testamentary in character, would be of no effect where it was not executed in the manner which would entitle it to probate as a will  
Ga—Childs v Mitchell, 50 SE 2d 216, 204 Ga 542  
Kan—Ammon v Ammon, 237 P 926, 119 Kan 164  
Indorsement on bank records  
Where bank cashier, in accordance with depositor's desire, indorsed signature card and ledger sheet to effect that in case of depositor's death funds in savings account be paid to sister-in-law, attempted testamentary disposition did not give sister-in-law title to funds  
Utah—Helper State Bank v Crus, 61 P 2d 318, 90 Utah 207  
50. Neb—Tobas v Mutual Bldg &

entirety as far as the execution is concerned<sup>51</sup> All the requirements stand as of equal importance and must be observed,<sup>52</sup> however insignificant they may be in themselves, or however meaningless they may be when considered in relation to the circumstances of the particular case<sup>53</sup> Courts are entirely lacking in power to dispense with any of the requirements of the statutes, or to supply defects in the execution of the will<sup>54</sup> A failure to comply with any one of the requirements is fatal to the validity of the will,<sup>55</sup> and no defect in its execution can be aided or supplied by parol proof, as discussed *infra* § 391 However, a will must be sustained as legally executed if possible,<sup>56</sup> and where the requirements have been complied with, the will must be upheld,<sup>57</sup> as courts have no power to prescribe other requirements.<sup>58</sup> If the will is executed in accordance with the statutory requirements, it is of no consequence who drafted the instrument or under what circumstances it was drafted<sup>59</sup>

Loan Ass'n of North Platte, 24 N W 2d 870, 147 Neb 676

#### Stock jointly held

The statute providing that whenever certificates of stock in building and loan associations are made payable to joint account of two or more persons, the account represented thereby shall be payable to the survivor, is an exception to the statute of wills and applies, even though it may conflict with the statute of wills

Neb.—Tobias v Mutual Bldg & Loan Ass'n of North Platte, *supra*

51 N.Y.—Matter of O'Neil's Will, 91 N.Y. 516

In re Fults' Will, 59 N.Y.S. 756, 42 App Div 593

A defect in the execution attaches to the entire instrument

Colo.—Ireland v Jacobs, 163 P 2d 203, 114 Colo 168, 161 A.L.R. 1413

52 N.J.—In re Amsden's Will, 191 A 801, 121 N.J.Eq. 571

Tex.—Whatley v McKanna, Civ App, 207 S.W.2d 645, error refused no reversible error

68 C.J. p 649 note 95

Compliance cannot be abridged

N.Y.—In re Lyons' Will, 75 N.Y.S.2d 237

53. Cal.—In re Price's Estate, 112 P 482, 14 Cal App 462

68 C.J. p 649 note 96

#### Absence of fraud no excuse

Failure to comply with formalities required by a statute enacted for prevention of fraud is not excused by showing that in particular case there was no fraud

Cal.—In re Moore's Estate, 206 P 2d 413, 92 Cal App 2d 120.

54. Ill.—In re Lagow's Will, 62 N E 2d 469, 391 Ill 72

Mont.—In re Woodburn's Estate, 273 P 2d 391

N.Y.—In re Ditson's Estate, 31 N.Y.S. 2d 468, 177 Misc 648

Utah.—In re Alexander's Estate, 139 P 2d 432, 104 Utah 296

W.Va.—Black v Maxwell, 46 S.E.2d 804, 131 W.Va. 247

68 C.J. p 649 notes 97, 98

55. N.J.—In re Di Persia's Estate, 75 A 2d 833, 9 N.J. Super 576

N.Y.—Matter v Kellum, 52 N.Y. 517, 32 App Div 46

N.D.—In re Baur's Estate, 54 N.W. 2d 891

56. Tenn.—Leathers v Binkley, 264 S.W.2d 561, 196 Tenn 80

57. Iowa.—Corpus Juris cited in In re Klein's Estate, 42 N.W.2d 593, 596

N.Y.—In re Connor's Will, 100 N.Y. S 2d 879

68 C.J. p 649 note 2.

58. Va.—Savage v Bowen, 49 S.E. 668, 669, 103 Va 540

68 C.J. p 650 note 3

59 Pa.—In re Carson's Estate, 90 A 719, 244 Pa 401

In re Umbles Estate, 177 A 340, 117 Pa Super 15

Tenn.—Howell v Brown, 7 Tenn App 380

60 Ky.—Barton's Adm'r v Barton, 244 S.W.2d 770

Miss.—Gordon v Parker, 104 So 77, 139 Miss 334

Tenn.—Ragsdale v Hill, 269 S.W.2d 911, 37 Tenn App 671, applying law of Mississippi

There should be no technical and hard rules of construction, where

*Liberal or strict construction* While some authorities have declared that statutes governing the execution of wills are to be liberally construed,<sup>60</sup> other authorities have declared in favor of strict construction<sup>61</sup>

The words "execute" and "execution," as used in a statute relating to wills, are employed plainly to designate the whole operation, including both the signature or acknowledgment of the testator, and the attestation of the subscribing witnesses, they are not used to designate the testator's part alone<sup>62</sup>

#### b. Purpose of Statutes

The purpose of statutes prescribing formalities for the execution of wills is to guard against and prevent mistake, imposition, undue influence, fraud, or deception, and not to restrain the power of testators to dispose of their property.

The purpose of the statutes prescribing formalities for the execution of wills is to guard against and prevent mistake, imposition, undue influence, fraud, or deception,<sup>63</sup> to afford means of determin-

the facts show an effort by the testator in good faith to execute a will

Miss.—Better v Hirsch, 76 So 555, 115 Miss 614

Tenn.—Ragsdale v Hill, 269 S.W.2d 911, 37 Tenn App 671, applying law of Mississippi

61. Colo.—In re McGary's Estate, 258 P 2d 770, 127 Colo 495

Neb.—In re Kaiser's Estate, 34 N.W. 2d 366, 150 Neb 295—In re Cagle's Estate, 270 N.W. 664, 132 Neb 47—

In re Smith's Estate, 266 N.W. 611, 130 Neb 739

N.Y.—In re Winters' Will, 98 N.Y.S. 2d 312, 277 App Div 24, affirmed

98 N.E.2d 477, 302 N.Y. 666, motion denied 100 N.E.2d 43, 302 N.Y. 845

In re Ditson's Estate, Sur, 31 N.Y.S.2d 468, 177 Misc 648

Pa.—In re Hunter's Estate, 196 A 35, 328 Pa 484

Strict or substantial compliance with requirements see *infra* subsection d of this section

62. N.Y.—In re Burton, 25 N.Y.S. 824, 4 Misc 512

23 C.J. p 279 note 61.

63. Ark.—Anthony v College of the Ozarks, 180 S.W.2d 321, 207 Ark 212

Colo.—In re McGary's Estate, 258 P 2d 770, 127 Colo 495

La.—Corpus Juris quoted in Souleau v Ortego, 180 So 496, 497, 189 La 713

Me.—In re Cox' Will, 29 A 2d 281, 139 Me 261

Mo.—Wright v McDonald, 233 S.W. 2d 19, 361 Mo 1

Mont.—In re Watts' Estate, 160 P 2d 492, 117 Mont 505—Corpus

Juris quoted in In re Bragg's Es-

ing their authenticity,<sup>64</sup> and to prevent the substitution of some other writing in place thereof<sup>65</sup> It is not their purpose to restrain or abridge the power of testators to dispose of their property, but to guard and protect them in the exercise of that power<sup>66</sup>

### c. Intent of Testator as Affecting Operation of Statutes

The intention to make a will, although clearly stated or proved, will be ineffectual unless the execution thereof complies with statutory requirements.

As discussed *infra* § 590, it is a cardinal rule of construction and interpretation of wills that the intention of the testator as expressed in the will must govern. However, the intention to make a will, although clearly stated<sup>67</sup> or proved,<sup>68</sup> will be ineffectual unless the execution thereof complies with the statutory requirements<sup>69</sup> With respect to the execution of a will, the intention of the testator

is not to be considered at all, but only that of the legislature which governs in determining whether the will is properly executed<sup>70</sup> This intent must be gathered from the language, and from a consideration of the existing law, the evils intended to be remedied, and the remedy applied<sup>71</sup> As has been said, when wills truly expressing the intentions of the testators are made without observation of the required forms, the genuine intention is frustrated by act of the legislature.<sup>72</sup>

### d. Sufficiency of Compliance with Statutes

While it has been declared that the statutory requirements with respect to the execution of wills must be strictly followed, it has very generally been held that a substantial compliance therewith is sufficient, provided there is no violation of the express language of the statutory provisions.

While it has been declared that the statutory requirements with respect to the execution of wills must be strictly,<sup>73</sup> precisely,<sup>74</sup> or scrupulously<sup>75</sup>

tate, 76 P 2d 57, 61, 106 Mont 132  
N Y—In re Robinson's Will, 103 N  
Y S 2d 967, 201 Misc 439—In re  
Douglas' Will, N Y Sur, 83 N Y S  
2d 641, 193 Misc 623

Ohio—*Sherman v Johnson*, 112 NE  
2d 326, 159 Ohio St 209

Pa—In re Bryen's Estate, 195 A 17,  
328 Pa 122

Tenn—*Ragsdale v Hill*, 269 SW 2d  
911, 37 Tenn App 671, applying law  
of Mississippi

Va—*French v Beville*, 62 SE 2d 883,  
191 Va 842—*Bell v Timmins*, 58  
SE 2d 55, 190 Va 648—*Moon v*  
*Norvell*, 36 SE 2d 632, 184 Va  
842

68 CJ p 650 note 5

64 La—*Corpus Juris* quoted in  
*Soileau v Ortego*, 180 So 496, 497,  
189 La 713

Mont—*Corpus Juris* quoted in *In re*  
*Bragg's Estate*, 76 P 2d 57, 61,  
106 Mont 132

68 CJ p 650 note 6

65. La—*Corpus Juris* quoted in  
*Soileau v Ortego*, 180 So 496, 497,  
189 La 713

Mont—In re *Swords' Estate*, 284 P 2d  
674—In re *Watts' Estate*, 160 P  
2d 492, 117 Mont 505—*Corpus Ju-*  
*ris* quoted in *In re Bragg's Estate*,  
76 P 2d 57, 61, 106 Mont 132

68 CJ p 650 note 7

66 Me—In re *Cox' Will*, 29 A 2d  
281, 139 Me 261

Tenn—*Ragsdale v Hill*, 269 SW  
2d 911, 37 Tenn App 671, applying  
law of Mississippi

Va—*French v Beville*, 62 SE 2d 883,  
191 Va 842—*Bell v Timmins*, 58  
SE 2d 55, 190 Va 648

67. La—*Corpus Juris* quoted in  
*Soileau v Ortego*, 180 So. 496, 497,  
189 La. 713.

Va—*Clarkson v Bliley*, 38 SE 2d  
22, 185 Va 82, 171 ALR 1308—  
*Hamlet v Hamlet*, 32 SE 2d 729,  
183 Va 453

68 CJ p 650 note 9

68 La—*Corpus Juris* quoted in  
*Soileau v Ortego*, 180 So 496, 497,  
189 La 713

N Y—In re *Truelsen's Will*, 223 NY  
S 691, 130 Misc 172

69. Cal—In re *Jordan's Estate*, 184  
P 2d 165, 81 Cal App 2d 419

La—*Corpus Juris* quoted in *Soileau*  
*v Ortego*, 180 So 496, 189 La. 713

Mich—In re *Houghten's Estate*, 17  
NW 2d 774, 310 Mich 613, rehear-  
ing denied 18 NW 2d 254, 310 Mich  
613

N Y—In re *Robinson's Will*, 103 NY  
S 2d 967, 201 Misc 439—In re  
*Douglas' Will*, 83 NYS 2d 641, 193  
Misc 623

Va—*Clarkson v Bliley*, 38 SE 2d 22,  
185 Va 82, 171 ALR 1308—*McEl-*  
*roy v Rolston*, 34 SE 2d 241, 184  
Va 77—*Hamlet v Hamlet*, 32 S  
E 2d 729, 183 Va. 453

68 CJ p 650 note 11

Question is not what testator mis-  
takenly thought he was doing, but  
what he actually did with respect to  
determination of whether will was  
properly executed

Pa—In re *Bryen's Estate*, 195 A  
17, 328 Pa 122

70. Cal—In re *Moore's Estate*, 206  
P 2d 413, 92 Cal App 2d 120

N Y—In re *Peabody's Will*, 109 NY  
S 2d 257, 279 App Div 826—In re  
*Winters' Will*, 98 NYS 2d 312, 277  
App Div 24, motion denied 95 NE  
2d 43, 301 NY 680, affirmed 98 N  
E 2d 477, 302 NY 666, motion de-  
nied 100 NE 2d 43, 302 NY 845—  
In re *Stever's Will*, 52 NYS 2d  
348, 268 App Div 559.

In re *McCaffrey's Estate*, 20 N  
YS 2d 178, 174 Misc 162—In re  
*Roughgarden's Will*, 295 NYS  
355, 162 Misc 455—In re *Snyder's*  
*Estate*, 277 NYS 577, 154 Misc  
156

In re *Begun's Will*, 123 NYS 2d  
782—In re *Rothstein's Will*, 112 N  
YS 2d 716

Okl—*Corpus Juris* cited in *In re*  
*Abrams' Will*, 77 P 2d 101, 103

68 CJ p 650 note 12

The mental reservations of the  
testator are unimportant with re-  
spect to the required mode or man-  
ner of the execution of a will  
N Y—In re *Peabody's Will*, 109 NY  
S 2d 257, 279 App Div 826

71. NC—*Alexander v Johnston*, 88  
SE 785, 171 NC 468

72 Ariz—In re *Tyrell's Estate*, 153  
P 767, 768, 17 Ariz 418

68 CJ p 651 note 14

73 Cal—In re *Moore's Estate*, 206  
P 2d 413, 92 Cal App 2d 120

Kan—In re *Davis' Estate*, 212 P  
2d 343, 168 Kan 314

N Y—In re *Douglas' Will*, 83 NYS  
2d 641, 193 Misc 623

Okl—In re *Paul's Estate*, 254 P 2d  
357, 208 Okl 195

Strict compliance with statutes gov-  
erning wills of realty see *infra*  
subsection e of this section

Strict or liberal construction of stat-  
utory requirements see *supra* sub-  
section a of this section

Precise fixed rules governing the  
testamentary disposition of property  
should be strictly followed

Va—*McElroy v Rolston*, 34 SE 2d  
241, 184 Va 77

74. Pa—In re *Cohen's Estate*, 51  
A 2d 704, 356 Pa 161

75 NC—In re *Bennett's Will*, 103  
SE 917, 180 NC 5

followed, it has very generally been held that a substantial compliance therewith is sufficient,<sup>76</sup> provided there is no violation of the express language of the statutory provisions.<sup>77</sup> More especially is substantial compliance sufficient where there is no suggestion of fraud, deception, undue influence, or mental incapacity.<sup>78</sup> Nevertheless, any material deviation from the manner of execution prescribed by statute will be fatal to the validity of the will.<sup>79</sup> The fact that there is no fraud, or even suggestion or intimation of it, will not justify the courts in departing from the statutory requirements, even to bring about justice in the particular instance,<sup>80</sup> since any material relaxation of the statutory rule will open up a fruitful field for fraud, substitution, and imposition.<sup>81</sup>

### e. Character of Property Disposed of as Affecting Requirements

Unless the statutory provisions governing the execu-

tion of wills make a distinction between wills of realty and wills of personalty, the requirements as to execution for both types of wills are the same, but under provisions applying in terms to wills of real estate only, the execution of wills of personalty is governed by the requirements of the common law, and under such provisions a will of both real and personal estate may be good as personal estate and void as to the real estate, provided the dispositions of real and personal estate are independent and separable.

Unless the statutory provisions governing the execution of wills make a distinction between wills of realty and wills of personalty, the requirements as to execution for both types of wills are the same.<sup>82</sup> Where statutes prescribing formalities for the execution of wills apply in terms to wills of real estate only, the execution of wills of personalty is governed by the requirements of the common law,<sup>83</sup> and it has been held that the rules of the English ecclesiastical courts still prevail,<sup>84</sup> but with respect to wills of realty strict compliance with the statutory requirements is necessary.<sup>85</sup> Under

#### With substantial precision

The requirements of the statutes as to the formalities in executing a will must be scrupulously followed in all essential respects, and with substantial precision

Mont—*Corpus Juris* quoted in *In re Bragg's Estate*, 76 P 2d 57, 61, 106 Mont 132  
NC—*In re Bennett's Will*, 103 SE 917, 180 NC 5

76. Ky—*Darnaby v Halley's Ex'r*, 208 SW 2d 299, 306 Ky 697—*Weiss v Hanscom*, 205 SW 2d 485, 305 Ky 687—*Rybolt v Futrell*, 176 SW 2d 269, 296 Ky 158—*Madden v Cornett*, 160 SW 2d 607, 290 Ky 268

La—*Corpus Juris* cited in *Stephens v Adger*, 79 So 2d 491, 495, 227 La 387

Mont—*Corpus Juris* quoted in *In re Bragg's Estate*, 76 P 2d 57, 61, 106 Mont 132

Neb—*In re Kaiser's Estate*, 34 NW 2d 366, 150 Neb 295—*In re Cagle's Estate*, 270 NW 664, 132 Neb 47—*In re Smith's Estate*, 266 NW 611, 130 Neb 739

NY—*In re Andrews' Will*, 88 NY S 2d 32, 195 Misc 421

*In re Rothstein's Will*, 112 NY S 2d 716

Okl—*Hicks v Cravatt*, 235 P 2d 936, 205 Okl 105—*Goff v Knight*, 206 P 2d 992, 201 Okl 411—*In re Belmore's Estate*, 113 P 2d 817, 189 Okl 86—*Corpus Juris* cited in *In re Abrams' Will*, 77 P 2d 101, 103, 182 Okl 215—*In re Free's Estate*, 75 P 2d 476, 181 Okl 564

Va—*Bell v Timmins*, 58 SE 2d 55, 190 Va 648

Wis—*In re Lagershausen's Estate*, 272 NW 469, 224 Wis 479, 68 C.J. p 651 note 16.

77. Ky—*Rybolt v Futrell*, 176 SW 2d 269, 296 Ky 158

*Madden v Cornett*, 160 SW 2d 607, 290 Ky 268

78 La—*Corpus Juris* cited in *Stephens v Adger*, 79 So 2d 491, 495, 227 La 387

Mont—*In re Bragg's Estate*, 76 P 2d 57, 106 Mont 132

NY—*In re Case's Will*, 214 NY S 678, 126 Misc 704

A slight variance from the usual formality in the execution of will, unattended by any other circumstances throwing suspicion on will, does not render will invalid  
NY—*In re Thompson's Will*, 68 NY S 2d 123, 189 Misc 873

79. Ky—*Catlett v Satterfield*, 251 SW 659, 199 Ky 617—*McKee v McKee's Ex'r*, 160 SW 261, 155 Ky 738

La—*Corpus Juris* cited in *Stephens v Adger*, 79 So 2d 491, 495, 227 La 387—*Corpus Juris* quoted in *Soileau v Ortego*, 180 So 496, 497, 189 La 713

There is no substantial compliance where there is a violation of a mandatory provision

Ky—*Darnaby v Halley's Ex'r*, 208 SW 2d 299, 306 Ky 697—*Weiss v Hanscom*, 205 SW 2d 485, 305 Ky 687

80 Ky—*McKee v McKee's Ex'r*, 160 SW 261, 155 Ky 738

La—*Corpus Juris* cited in *Stephens v Adger*, 79 So 2d 491, 495, 227 La 387—*Corpus Juris* quoted in *Soileau v Ortego*, 180 So 496, 497, 189 La 713

81. Ky—*McKee v McKee's Ex'r*, 160 SW 261, 155 Ky 738

La—*Corpus Juris* quoted in *Soileau v Ortego*, 180 So 496, 497, 189 La 713

#### 82. In Tennessee

(1) Under the statutes in force prior to 1941, there was a distinction between wills of realty and wills of personalty with respect to the manner of execution, but in 1941, the legislature enacted the Uniform Wills Act which makes no distinction in the requirements as to execution between a will of realty and a will of personalty

Tenn—*Ball v Miller*, 214 SW 2d 446, 31 Tenn App 271

(2) The act of 1941, adopted to make uniform the execution of wills was intended to cover the whole subject, and being in direct and irreconcilable conflict with the statutes theretofore existing, repealed them by necessary implication

Tenn—*McClure v Wade*, 235 SW 2d 835, 34 Tenn App 154, 28 ALR 2d 104

83. Tenn—*Fransioli v. Podesta*, 134 SW 2d 162, 175 Tenn 340

*Howell v Moore*, 14 Tenn App 594—*Taylor v Taylor*, 14 Tenn App 101

Interest of Maryland ground rent lessee may be bequeathed by will executed in form sufficient for the passage of personalty as distinct from realty

US—*Jones v Magruder*, DCMd, 42 F Supp 193.

84. Tenn—*Deitz v. Gallaher*, 88 SW 2d 993, 169 Tenn 435

*Fransioli v Podesta*, 113 SW 2d 769, 21 Tenn App 577.

85. Tenn.—*Fransioli v Podesta*, supra.

Sufficiency of compliance with statutory requirements generally see supra subsection d of this section.

such statutes a will of both real and personal estate may be good as to personal estate although it is void and inoperative as to the real estate for noncompliance with the statutory requirements,<sup>86</sup> provided the dispositions of real and personal estate are independent and separable.<sup>87</sup> It has been said, however, that the fact that the will is imperfect in part, if known to the testator, is a strong circumstance to show that he did not intend the will to operate for any purpose,<sup>88</sup> and where the disposition of real and personal estate is so blended that the intention of deceased in respect of one estate is made to depend on the other, and the will has been defectively executed, the courts will ordinarily reject the will in toto.<sup>89</sup> A will of both personal and real estate which is defectively executed is inoperative as to both personal and real property where it is expressly provided by statute that any will in writing which purports to be both a disposition of real and personal property that shall not be attested and subscribed as is prescribed by statute as a devise of lands shall not be approved and allowed as a testament of personal property only.<sup>90</sup>

#### f. Complete Execution Prevented by Act of God

Where the statutory requirements relating to the execution of wills apply in the main only to devises of realty, the rule obtains that, where a testator is prevented from making the formal execution he intended by an act of God, the will may be valid as to personalty, but not as to realty, but there is a presumption against the validity of an unexecuted will, even as a testamentary disposition of personalty.

Where the statutory requirements relating to the execution of wills apply in the main only to devises of real property, the rule obtains that, where a testator is prevented from making the formal execution which he has intended, not by change or abandonment of purpose, but by an act of God, such

as extreme illness, loss of mental capacity, or sudden death, the will may be valid as a testament of personal property, but not as a will of real estate.<sup>91</sup> However, it is only where formal execution is so prevented that the instrument may be operative as a will of personalty,<sup>92</sup> and there must be a continuance of the intention of the testator, down to the time when the act of God prevented the execution of the formal instrument,<sup>93</sup> although the fact that a short time elapses between the time the testator might have executed the will and the intervention of an act of God does not affect the operation of the rule, where the delay is not shown to be due to a change of purpose.<sup>94</sup> There is a presumption, however, against the validity of an unexecuted will, even as a testamentary disposition of personalty,<sup>95</sup> especially where it is to alter a previously executed instrument,<sup>96</sup> and it must be shown that the testator adopted and intended the instrument to operate as his will.<sup>97</sup> In most of the jurisdictions where the rule under consideration has been held to obtain, the statutes now require all wills, whether of realty or personalty, to be signed by the testator, as discussed *infra* § 170. It has been expressly held that, where statutes of this character are in force, an intention to execute, arrested in performance by death, cannot be taken in lieu of performance.<sup>98</sup>

#### § 168. Date

Unless a statute provides otherwise, a date is not essential to the validity of a will, and it is not invalidated by an erroneous date.

Unless a statute provides otherwise,<sup>99</sup> a date is not essential to the validity of a will,<sup>1</sup> as the time of its execution may be shown by extrinsic evidence,<sup>2</sup> and it is not invalidated by an erroneous date<sup>3</sup> or rendered ineffective by an alteration or

86 Tenn—Howell v Moore, 14 Tenn App 594—Taylor v Taylor, 14 Tenn App 101

68 C J p 651 note 21

Will sustained as to personalty although not attested see *infra* § 183

87. Tenn—Orgain v Irvine, 43 S W 768, 100 Tenn 193

88 Md—Plater v Groome, 3 Md 134

89. Va—Rochelle v Rochelle, 10 Leigh 130, 37 Va 130  
68 C J p 651 note 24

90. Mass—Kendall v Kendall, 24 Pick 217

91. Tenn—Orgain v. Irvine, 43 S W 768, 100 Tenn 193

68 C J p 652 note 27

Character of property disposed of as

affecting requirements see *supra* subsection e of this section

92 US—In re McIntire, C C Dist Col, 16 F Cas No 8,823a, 2 Hayw & H 339

D C—Cruit v Owen, 21 App DC 378

93 DC—Cruit v Owen, *supra*

68 C J p 652 note 29

94. NC—Gaskins v Gaskins, 25 N C 158

68 C J p 652 note 30

95. Tenn—Orgain v Irvine, 43 S W 768, 100 Tenn 193

96. Md—Plater v Groome, 3 Md 134

97 Va—Rochelle v Rochelle, 37 Va 130

68 C J p 652 note 33

98. NY—Verman v Spencer, 3 Bradf Surr 16

99 La—Fuentes v. Gaines, 25 La Ann 85, reversed on other grounds  
92 US 10, 23 L Ed 524

Philippine—Velasco v Lopez, 1 Philippine 720

1. Mich—Corpus Juris cited in In re Swan's Estate, 284 N W 599, 600, 287 Mich 662

Pa—In re Hengen's Estate, Orph, 55 Montg Co 327

Tenn—Pulley v Cartwright, 137 S W 2d 336, 23 Tenn App 690  
68 C J p 652 note 37

2 Ill—Cunningham v Hallyburton, 174 NE 550, 342 Ill 442

3. Pa—In re Bates' Estate, 134 A 513, 286 Pa 583, 48 A L R 294  
68 C J p 652 note 39.

Date of will and of attestation different

Where will was signed by testator

modification in the date thereof<sup>4</sup> Nor is a will rendered invalid by the fact that the sole beneficiary therein inserts the correct date at the request of the testator on his discovering that it has been omitted<sup>5</sup> However, where the testator has left several paper writings purporting to be his last will, each of which is validly executed and makes a different disposition of his property, but only one of them bears date, it has been held that in the absence of proof as to which of the wills was the last one, the legal effect is intestacy<sup>6</sup>

### § 169. Signature or Subscription by or for Testator

Generally speaking, it is essential to the validity of a will that it is signed by or for the testator, as discussed *infra* §§ 170, 173, but the use of any signature intended by the testator to authenticate it, including a mark, *infra* §§ 171, 172, will suffice, even though the signing is with the assistance of another, *infra* § 174. In the absence of a statute

otherwise providing, the place of signature is immaterial, as considered *infra* § 177

Examine Pocket Parts for later cases.

### § 170. — Necessity and Purpose

- a In general
- b Alterations by erasures, interlineations, or substitutions

#### a. In General

Statutes in force in most states require wills to be signed by or for the testator

In the absence of statute requiring it, it is not essential to the validity of a will that it be signed by the testator,<sup>7</sup> but statutes now in force in most states require wills to be signed by or for the testator<sup>8</sup> The purpose of the statutes was to remedy the mischief that arose from admitting to probate memoranda, letters, and notes which were inchoate expressions of intentions<sup>9</sup> Under a statute in effect

and was attested by witnesses on same date, fact that will bore a different date from date of attestation, the dates being obviously erroneous, was immaterial

Ark—*Miller v Mitchell*, 275 S W 2d 3

#### 4. Correct date determined

Where disputed date in will appeared as the figure one and the figure three with a straight heavy vertical line drawn through the figure three, correct date of alleged will was deemed the 11th, rather than the 18th

Cal—*In re Beebee's Estate*, 258 P 2d 1101, 118 Cal App 2d 851

5. Mich—*Lange v Wiegand*, 85 N W 109, 125 Mich 647

6. NC—*Peace v Edwards*, 86 SE 807, 170 NC 64, Ann Cas 1918A 778

7. Pa—*In re Brennan's Estate*, 91 A 220, 244 Pa 574

68 C J p 652 note 43

#### Wills of personality

(1) In the absence of a statute requiring a signature an informal instrument, neither written nor signed by the testator, may be sustained as a valid will of personality, if the testamentary intention is clearly shown

Tenn—*Burrow v Lewis*, 142 S W 2d 758, 24 Tenn App 253—*Fransioli v Podesta*, 113 S W 2d 769, 21 Tenn App 577—*Taylor v Taylor*, 14 Tenn App 101

68 C J p 652 note 43 [a]

(2) However, the presumption of law is against the validity of such will

Tenn—*Burrow v Lewis*, 142 S W 2d 758, 24 Tenn App 253—*Fransioli v Podesta*, 113 S W 2d 769, 21 Tenn App 577.

(3) Character of property disposed of as affecting requirements of execution generally see *supra* § 167 e

8. Iowa—*In re Klein's Estate*, 42 NW 2d 593, 241 Iowa 1103

Ky—*Childers v Welch*, 202 S W 2d 169, 304 Ky 700—*Prewitt v Prewitt's Ex'rs*, 199 S W 2d 435, 303 Ky 772—*Winn v Williams*, 165 S W 2d 961, 292 Ky 44

Neb—*In re Smith's Estate*, 266 NW 611, 130 Neb 739

NJ—*In re Taylor's Estate*, 100 A 2d 346, 28 N J Super 220

*In re Amsden's Will*, 191 A. 801, 121 N J Eq 571

NY—*In re Robinson's Will*, 103 NY S 2d 967, 201 Misc 439

*In re Morgan's Will*, 135 NYS 2d 321—*In re Kurtz' Will*, 64 NY S 2d 749

NC—*In re Etheridge's Will*, 49 SE 2d 480, 229 NC 280—*Paul v Davenport*, 7 SE 2d 352, 217 NC 154

Ohio—*Sherman v Johnson*, 112 NE 2d 326, 159 Ohio St 209

Pa—*In re Hunter's Estate*, 196 A 35, 328 Pa. 484

*In re Gingrich's Estate*, Orph, 58 Dauph Co 282

RI—*Cutroneo v Cutroneo*, 98 A 2d 921

SD—*In re McNair's Estate*, 38 NW 2d 449, 72 SD 604

Tenn—*Ragsdale v Hill*, 269 S W 2d 911, 37 Tenn App 671

Va—*Fenton v Davis*, 47 SE 2d 372, 187 Va 463—*Hamlet v Hamlet*, 32 SE 2d 729, 183 Va 453

68 C J p 652 note 44

#### Foreign law

(1) Under German law, an unsigned postscript at bottom of will was not valid and could dispose of nothing

NY—*In re Kapell's Will*, 120 NYS 2d 52

(2) What law governs nature and essentials of will generally see *supra* § 150

To "subscribe", as required by statute for execution of will, means to give consent to something written by signing

Ky—*Weiss v Hanscom*, 205 S W 2d 485, 305 Ky 687

#### Signing spouse's will by mistake

(1) Where husband and wife intended to make wills and executed two instruments simultaneously, subscribing witnesses to each instrument being the same, but by mistake each spouse signed instrument prepared for the other, instrument offered as will of the wife was void

NY—*In re Egner's Will*, 112 NYS 2d 568—*In re Cutler's Will*, Sur, 58 NYS 2d 604

(2) The same result follows, of course, where the terms of the two instruments are similar but not the same

NY—*In re Cutler's Will*, *supra*

In Tennessee, although signing and attestation of a will of personality was not necessary, as discussed in the preceding note, an unsigned and unattested will of realty was wholly inoperative

Tenn—*Orgain v Irvine*, 43 S W 768, 100 Tenn 193

*Fransioli v Podesta*, 113 S W 2d 769, 21 Tenn App 577.

9. Pa—*In re Brennan's Estate*, 91 A 220, 244 Pa 574

68 C J p 653 note 45

#### Other statements of purpose

The purpose of statute requiring

so providing signature by the testator or by some person in his presence and by his direction is not required when prevented by the extremity of the testator's last illness<sup>10</sup>

*When subscription is omitted*, the court cannot substitute another signature of the testator, made for a different purpose at another place in the will<sup>11</sup>

#### b. Alterations by Erasures, Interlineations, or Substitutions

Although there is some authority to the contrary, it has generally been held that, where alterations of a will are made by erasures, interlineations, or substitutions, such alterations are valid and operative only when subscribed by the testator or when he has resubscribed the will

Although there is some authority to the contrary,<sup>12</sup> it has generally been held that, where alterations of a will are made by erasures, interlineations, or substitutions, such alterations are valid and operative only when subscribed by the testator or when he has resubscribed the will,<sup>13</sup> and the subsequent acknowledgment by the testator of his prior subscription does not satisfy the requirements of this rule<sup>14</sup> Nor is the operation of the rule affected by the fact that the alteration was made before the testator had declared or published the instrument, and before his request to the witnesses to sign as attesting witnesses and before their names as such were added<sup>15</sup> However, al-

terations of this character do not affect the validity of such part of the will as was signed in accordance with the requirements of the statute<sup>16</sup>

### § 171. — Requisites and Sufficiency in General

- a In general
- b Several signatures

#### a. In General

As a general rule, the use of any signature intended by the testator to authenticate the will is sufficient

While "signing," in the usual acceptance of the word, is the writing of a name or the affixing of what is meant as a signature,<sup>17</sup> exactly what constitutes a signing has never been reduced to a judicial formula<sup>18</sup> As a general rule, the use of any signature intended by the testator to authenticate the will is sufficient,<sup>19</sup> no particular form being necessary<sup>20</sup> On the other hand, unless made with the intention of finally and completely authenticating the will, no subscription or signing of any kind will constitute a valid execution thereof,<sup>21</sup> and it has sometimes been expressly so provided by statute<sup>22</sup> However, an imperfect or indistinct subscription of a testator's name may be sufficient if intended as a signature<sup>23</sup> A testator may sign his name by writing it out in full,<sup>24</sup> or by abbreviating it,<sup>25</sup> or by writing his initials only,<sup>26</sup> and the

a will to be signed is to connect testator with the paper, and to establish the finality and completion of testamentary intent

Va—Fenton v Davis, 47 SE 2d 372, 187 Va 463

10. Pa—In re Hunter's Estate, 196 A 35, 328 Pa 484

**Where testator is unable to sign but has time and opportunity to ask another to do so, and does neither, the will fails, but testator is entitled to a reasonable time after will has been prepared, within which to sign it or ask someone else to sign for him**  
Pa—In re Hunter's Estate, supra

11. NY—In re Rudolph's Estate, 167 NYS 760, 180 App Div 486  
Place of signature generally see infra § 177

12. NJ—In re Bullivant's Will, 88 A 1093, 82 NJEq 240, 51 LRA, NS, 169, Ann Cas 1915C 72  
68 CJ p 653 note 48

#### Cancellations held effective

Pa—In re Arthur's Estate, 44 Berks Co 181, 2 Fiduciary 449

13. NY—In re Goettel's Will, 55 NYS 2d 61, 184 Misc 155  
68 CJ p 653 note 49

14. NY—In re Goettel's Will, supra  
68 CJ p 653 note 50.

15. NY—In re Mackey's Estate, 243 NYS 229, 136 Misc 833

16. NY—In re Mackey's Estate, supra—In re Foley's Will, 136 NYS 933, 76 Misc 168

17. Pa—In re Brennan's Estate, 91 A 220, 244 Pa 574

18. Pa—Plate's Estate, 23 A 1038, 148 Pa 55, 33 AmSR 805

19. Mich—In re Fowle's Estate, 290 NW 883, 292 Mich 500

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153

NY—**Corpus Juris cited in** In re Romaniw's Will, 296 NYS 925, 933, 163 Misc 481

Pa—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252

Va—Fenton v Davis, 47 SE 2d 372, 187 Va 463

68 CJ p 653 note 55

20. Mass—Chase v Kittredge, 11 Allen 49, 87 AmD 687

#### Word "exec" treated as surplusage

Signature made by widow, who was acting as executrix of her deceased husband's estate, to her will disposing of her own property with word "exec" after her name satisfied requirements of statute, the word "exec" being regarded as surplusage  
Mich—In re Fowle's Estate, 290 NW 883, 292 Mich 500

21. Mo—Potter v Ritchardson, 230 SW 2d 672, 360 Mo 661

Pa—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252

Va—Fenton v Davis, 47 SE 2d 372, 187 Va 463—McElroy v Rolston, 34 SE 2d 241, 184 Va 77—Hamlet v Hamlet, 32 SE 2d 729, 183 Va 453

68 CJ p 653 note 57

**Court must determine intent of testator at time he wrote or adopted his signature from his other statements and his conduct or on a series of facts, and facts in particular case depend on circumstances of that case**  
Mo—Potter v Ritchardson, 230 SW 2d 672, 360 Mo 661

22. Va—Forrest v Turner, 133 SE 69, 146 Va 734

68 CJ p 654 note 58

23. NY—Hartwell v McMaster, 4 Redf Surr 389

24. Ky—Wells v Lewis, 228 SW 3, 190 Ky 626

68 CJ p 654 note 60

25. Pa—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324

68 CJ p 654 note 61

26. Md—Quimby v. Greenhawk, 171 A 59, 166 Md 335.



first name of a testator may be by itself a sufficient signature to a will<sup>27</sup> The omission of a letter,<sup>28</sup> or even several letters,<sup>29</sup> from the name of the testator does not render the signature insufficient if intended as such A signature will be sufficient although some of the letters are indistinct and imperfectly formed where the name can be made out without difficulty<sup>30</sup> Mere illegibility of a signature does not prevent its being a legal signature, if introduced and adopted as such<sup>31</sup> Signing by a wrong name will be sufficient if the identity of the testator is sufficiently established, or is not questioned<sup>32</sup> And such is the rule in respect of the use of an assumed name, used for political reasons<sup>33</sup>

*Testator may adopt as his sign his own sign-manual made at the foot of his will before its completion and before the witnesses attest and subscribe it His acknowledgment makes it his signature to the will as it stands*<sup>34</sup>

*Printed or typewritten signature* It has been held that a signature, if adopted as such, may be printed,<sup>35</sup> lithographed,<sup>36</sup> or typewritten<sup>37</sup> However, some doubt has been expressed as to the validity of a signature which is not handwritten,<sup>38</sup> and it has been held that if a typewritten signature is relied on, it must be shown, at the very least, that the name of the testator was typed by the testator himself,<sup>39</sup> or for the testator by another in compliance with the requirements, as discussed infra § 173, governing signing for the testator by another.

*Signing carbon copy* The fact that the testator signs a carbon copy of the will, and not the

original, does not affect the validity of the will<sup>40</sup>

### b. Several Signatures

Where a will is written on more than one sheet of paper, while it may be considered better practice to have the testator sign each sheet, it is not essential to the validity of the will that he do so, unless required by statute, and generally where a will is signed in several places, it is the last signature which consummates the instrument.

Where a will is written on more than one sheet of paper, while it may be considered better practice to have the testator sign each sheet, it is not essential to the validity of the will that he do so,<sup>41</sup> unless required by statute<sup>42</sup> Where the will is signed several times at different places, it is the last signature which consummates the instrument and makes it a will<sup>43</sup> However, a second signature affixed after the will has been duly executed and has become a completed instrument is in the nature of an interpolation and forms no part of the will itself<sup>44</sup>

## § 172. — Signing by Mark

- a In general
- b Inability to write or sign name as affecting right to sign by mark
- c Assistance in making mark

### a. In General

Under nearly all statutes, it is held that a signing by mark is a valid execution of a will, if intended in lieu of a signature and made for the purpose of executing the will

Under nearly all statutes prescribing formalities for the execution of wills, it is held that a signing by mark is a valid execution of the will<sup>45</sup> No par-

N Y—In re Romaniw's Will, 296 N Y S 925, 163 Misc 481  
 Pa—In re Shoemaker's Estate, 47 Pa Dist & Co 337, 53 Dauph Co 324 68 C J p 654 note 62  
 27. Ky—Wells v Lewis, 228 S W 3, 190 Ky 626 68 C J p 654 note 63  
 28. La—Succession of Bradford, 49 So 972, 124 La 44, 18 Ann Cas 766 68 C J p 654 note 64.  
 29. La—Succession of Bradford, supra  
 30. Minn—In re Larson's Estate, 170 N W 348, 141 Minn 373  
 31. Wyo—In re Iverson's Estate, 273 P 684, 39 Wyo 482, 64 A L R 203 68 C J p 654 note 67  
 32. Ky—Reed v Hendrix's Ex'r, 201 S W. 482, 180 Ky 57, L R A 1918E 423 68 C J p 654 note 68.

**It is not necessarily the name used** by testator in execution of his will, but it is the person to whom that name applies, that determines whose will it is  
 Ill—In re Westerman's Will, 82 N E 2d 474, 401 Ill 489  
 33. La—Ripoll v Molina, 12 Rob 552  
 34. N J—In re Bullivant's Will, 88 A 1093, 82 N J Eq 340, 341, 51 L R A N S, 169, Ann Cas 1915C 72 68 C J p 654 note 70  
 35. N Y—In re Romaniw's Will, 296 N Y S 925, 163 Misc 481 Stamp as signature see infra § 175  
 36. N Y—In re Romaniw's Will, supra.  
 37. N Y—In re Romaniw's Will, supra  
 Tex—Zaruba v Schumaker, Civ App, 178 S W 2d 542  
 38. Cal—In re Moore's Estate, 206 P 2d 413, 92 Cal App 2d 120.

39. Cal—In re Moore's Estate, supra  
 40. N J—In re Drake's Will, 192 A 428, 15 N J Misc 484  
 Pa—In re Zell's Estate, 198 A 76, 329 Pa 312  
 41. Va—Presbyterian Orphans Home v Bowman, 182 S E 551, 165 Va 484 68 C J p 654 note 73  
 42. Philippine—In re Saguinsin's Estate, 41 Philippine 875 68 C J p 655 note 74  
 43. Pa—Evans' Appeal, 58 Pa 238 Otterson v. Middleton, 1 Leg Gaz 529  
 44. Mass—Thomson v Carruth, 107 N E 395, 220 Mass 77  
 45. Ark—Corpus Juris cited in Miller v Mitchell, 275 S W 2d 3, 5 Ill—In re Westerman's Will, 82 N E 2d 474, 401 Ill 489.  
 Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614—Quimby v. Greenhawk, 171 A 59, 166 Md 335.

ticular mark is necessary<sup>46</sup> However, it is, of course, essential that a mark should be intended to be in lieu of a signature,<sup>47</sup> made for the purpose of executing the will,<sup>48</sup> and the testator should ordinarily distinctly so declare<sup>49</sup> When signing is by mark, in the absence of a statute otherwise providing, it is not necessary that the name of the testator should appear on the face of the will,<sup>50</sup> or accompany, or be attached to, the mark which he makes as his signature,<sup>51</sup> nor is it necessary that the mark be accompanied by the words "his mark"<sup>52</sup>

However, under a statute so providing, the name of the testator should be written near the mark<sup>53</sup> by a person who writes his own name as a witness<sup>54</sup> In the absence of a statute otherwise providing, where the testator makes his mark, that is the signature required by statute and is a sufficient execution of the will, although the name of the testator is written around the mark either at or without the testator's request,<sup>55</sup> and if the name of the testator is written beside the mark made by him as a signature, the fact that there is a mistake

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153

NY—In re Fox' Will, 25 NYS 2d 854, 175 Misc 955—In re Arcowsky's Will, 11 NYS 2d 853, 171 Misc 41—In re Romaniw's Will, 296 NYS 925, 163 Misc 481

In re Surak's Will, 48 NYS 2d 400

ND—McKee v Buck, 4 NW 2d 652, 72 ND 86

Ohio—Sterba v Lienhard, App, 95 NE 2d 12

In re Ryan's Will, 9 Ohio Supp 29

Pa—In re Morris' Estate, Orph, 21 Wash Co 120

Tex—Mortgage Bond Corp of New York v Haney, Civ App, 105 SW 2d 488, error refused—Saathoff v Saathoff, Civ App, 101 SW 2d 910, error refused

Va—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581

68 C J p 655 note 78

Necessity for mark where testator's name is signed by another see infra § 173

#### Not evidence of subscription

While a mark may be a valid signature of a will "Marks are merely arbitrary signs or symbols—mean nothing, identify nothing, and constitute no material testimony in establishing a subscription in fact by the testator"

NY—Robins v Coryell, 27 Barb 556, 560

#### In Kentucky

(1) It has been broadly declared that it is not necessary that a name be signed but that any mark or character is sufficient

Ky—Reed v Hendrix's Ex'r, 201 S W 482, 485, 180 Ky 57, LRA 1918E 423, citing Garnett v Foston, 91 SW 668, 122 Ky 195, 28 Ky L 1119, 121 Am SR 456, 11 Prob Rep Ann 473 and Upchurch v Upchurch, 16 B Mon 102

(2) However, a more recent case asserts that the cases cited do not support the broad declaration made and that when no name is inscribed to the will it is impossible for the testator to "subscribe" to it as requir-

ed by statute, although testator may subscribe by making a mark to his name which has been inscribed by another

Ky—Weiss v Hanscom, 205 SW 2d 485, 305 Ky 687

46. Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153

NY—In re Arcowsky's Will, 11 NY S 2d 853, 171 Misc 41

68 C J p 655 note 80

**Any mark or sign written or placed on a will, with intent to execute or authenticate it is included in term "signature"**

NY—In re Romaniw's Will, 296 NYS 925, 163 Misc 481

#### Fingerprints

(1) Subscription of will by making impressions of fingerprints of testator or testatrix sufficiently complied with statute relating to subscription

NY—In re Arcowsky's Will, 11 NY S 2d 853, 171 Misc 41—In re Romaniw's Will, 296 NYS 925, 163 Misc 481

68 C J p 655 note 80 [a]

(2) It has been said that the use of fingerprints is "far more effective" than the use of an ordinary cross-mark

NY—In re Romaniw's Will, supra

47. Md—Quimby v Greenhawk, 171 A 59, 166 Md 335

68 C J p 655 note 81

48. Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614

NY—In re Arcowsky's Will, 11 NY S 2d 853, 171 Misc 41—In re Romaniw's Will, 296 NYS 925, 163 Misc 481

Pa—In re Plate's Estate, 23 A 1038, 148 Pa 55, 33 Am SR 805

49. NY—Matter of Beneventano's Will, 77 NYS 651, 38 Misc 272

50 Ala—Bailey's Heirs v Bailey's Ex'r, 35 Ala 687

Ariz—In re Wilkins' Estate, 94 P 2d 774, 54 Ariz 218

NY—In re Romaniw's Will, 296 NYS 925, 163 Misc 481

Ohio—In re Ryan's Will, 9 Ohio Supp 29.

51. Ariz—In re Wilkins' Estate, 94 P 2d 774, 54 Ariz 218

Ill—In re Westerman's Will, 82 NE 2d 474, 401 Ill 489

68 C J p 655 note 86

#### General statute inapplicable

The statute relating to signature of will, under which a mark may constitute a signature, even though testator's name is not written near the mark, is not limited by general statutory rule of construction applicable to subscription of instruments generally, under which a mark may be a signature if the person making it cannot write, and his name is written near the mark

Ariz—In re Wilkins' Estate, supra

52 Ill—In re Westerman's Will, 82 NE 2d 474, 401 Ill 489

53. Cal—In re Cecala's Estate, 208 P 2d 436, 92 Cal App 2d 834

**Name in body of will held "near" mark**

Cal—In re Guilfoyle's Will, 31 P 553, 96 Cal 598

54. Cal—In re Cecala's Estate, 208 P 2d 436, 92 Cal App 2d 834

#### Failure to sign not fatal to will

General statute including a mark within the definition of a signature or subscription when a person cannot write and his name is written near the mark by a person who writes his own name as a witness, is applicable to wills and was intended to put a signature by mark on the footing of a signature by writing, and was not intended to exclude other proof of signature by mark, and hence a will which was shown to be valid in all other respects was not rendered invalid because party who wrote testator's name near his mark failed to write his own name as a witness

ND—McKee v Buck, 4 NW 2d 652, 72 ND 86

55. Wash—Wilson v Craig, 150 P 1179, 86 Wash 465, Ann Cas 1917B 871

68 C J p 656 note 87

**Failure to show name was written at request of testatrix does not render will invalid**

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153.

in the name will not affect the validity of the execution,<sup>56</sup> and although the testator's name is written around the mark made by him as his signature, it has been held not a signing for him by another person within a statute providing that any person who shall sign the testator's name to a will shall subscribe his own name as a witness and state that he subscribes the testator's name at his request, and a noncompliance therewith does not affect the validity of the will,<sup>57</sup> the contrary of this last proposition has, however, been held<sup>58</sup>

### b. Inability to Write or Sign Name as Affecting Right to Sign by Mark

While there is authority to the contrary, it has generally been held that the sufficiency of a mark as a signature is not affected by the fact that at the time of making the mark the testator was capable of writing, although such fact may call for great scrutiny before admitting the will to probate.

The rule sustaining the validity of wills executed by mark, as discussed supra subdivision a of this section, is especially applicable where the testator is unable to sign his own name,<sup>59</sup> as "a man who cannot write his own name is not to be deprived of the right to make his will"<sup>60</sup> However, while there is authority to the contrary, as shown in the jurisdictional italic paragraphs infra, the rule is not limited to cases where the testator is unable to write, and it has generally been held under statutes prescribing formalities for the execution of wills that the sufficiency of a mark as a signature is not affected by the fact that at the time of making the mark the testator was capable of writing,<sup>61</sup> although it has been said that the fact that a will of a person able to write is signed by mark calls for "great scrutiny" before admitting it to pro-

bate<sup>62</sup> This rule is not affected by a general statute providing that in all cases where the written signature of any person is required by law it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark or his name written at his request and in his presence<sup>63</sup>

In *California* the right to sign a will by mark is limited by statute to cases where the person cannot write,<sup>64</sup> but in construing this statute it has been held that physical inability to write, although the testator knew how to write, will authorize a signature by mark<sup>65</sup>

In *Louisiana* the mark of a person incapable of writing is a sufficient signature to a will where he declares that he does not know how or is not able to sign, and an express mention of his declaration and of the cause that hinders him from signing is made in the will,<sup>66</sup> but even a mark is unnecessary when the testator makes a declaration of inability and it is attested by a notary The statute makes this the equivalent of a signature<sup>67</sup>

In *Pennsylvania*, the statute providing that, if the testator is unable to sign his name for any reason other than the extremity of his last sickness, the will shall be subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless incapacitated from doing so, must be strictly complied with<sup>68</sup> Under such statute, a mark made by a testator who cannot sign for any reason, in conjunction with compliance with the other statutory requirements, is sufficient<sup>69</sup> This provision was intended to embrace cases where the testator is unable to act, whether from lack of education or from physical weakness or disability,<sup>70</sup>

56. Ind.—Rook v Wilson, 41 NE 311, 142 Ind 24, 51 Am SR 163 68 C J p 656 note 88

57. Ark.—Miller v Mitchell, 275 S W 2d 3 68 C J p 656 note 89

58. Mo.—Simpson v. Simpson, 27 Mo 288 68 C J p 656 note 90

59. ND.—McKee v Buck, 4 NW 2d 652, 72 ND 86 Tex.—Guest v. Guest, Civ App, 235 S W 2d 710, error refused no reversible error—Short v Short, Civ App, 67 S W 2d 425

60. Mass.—Chase v Kittredge, 11 Allen 49, 53, 87 Am D 687

61. Md.—Quimby v Greenhawk, 171 A 59, 166 Md 335 NY.—In re Romaniw's Will, 296 N Y S 925, 163 Misc 481. 68 C J p 656 note 92.

62. NY.—In re Stegman's Will, 234 N Y S 239, 133 Misc 745, affirmed 235 N Y S 890, 227 App Div 647

63. Wis.—In re Mueller's Will, 205 NW 814, 815, 188 Wis 183, 42 A L R 951 68 C J p 656 note 94

64. Cal.—In re Cecala's Estate, 208 P 2d 436, 92 Cal App 2d 834

65. Cal.—In re Guilfoyle, 31 P 553, 96 Cal 598, 22 L R A 370

66. La.—Succession of Davis v Richardson, 77 So 2d 524, 226 La 887 68 C J p 656 note 96

Statement that a physical cause prevented testatrix from signing will was sufficient La.—Succession of Davis v Richardson, supra

67. La.—Hennessey's Heirs v Woulfe, 22 So 394, 49 La Ann 1376

68. Pa.—In re Morris' Estate, 37 A

2d 506, 349 Pa 387—In re James' Estate, 198 A 4, 329 Pa 273

In re Bobbitt's Estate, Orph, 19 Erie Co 391

#### Close scrutiny

Fact that testator, who was educated, intelligent, and well-informed man, executed will by making mark, calls for closest scrutiny by court if questioned, especially when other circumstances cast cloud of suspicion about will, although such circumstance does not invalidate will Pa.—In re Kline's Estate, 186 A 364, 322 Pa 374

69. Pa.—In re Zakatoff's Estate, 81 A 2d 430, 367 Pa 542—In re Hunter's Estate, 196 A 35, 328 Pa 484 —In re Rosato's Estate, 185 A 197, 322 Pa 229, 114 A L R 1108. 68 C J p 656 note 99

70. Pa.—In re Zakatoff's Estate, 81 A 2d 430, 367 Pa 542. 68 C J p 656 note 1.

or for any psychological or emotional reason,<sup>71</sup> and it has been said that the sufficiency of the testator's reason for not signing his name is for his own determination and not for the determination of the court.<sup>72</sup> It is not necessary to show that the testator had in the past been without power to sign his name, but the document is sustainable if he is without power presently to do so for other reasons,<sup>73</sup> such as loss of eyesight<sup>74</sup> or the use of his hands.<sup>75</sup> If the other requirements of execution are present, the proof that at some prior time deceased could write will not make the statute inapplicable.<sup>76</sup> Under this statute the testator's name must be signed with his authority in his presence and he must affix his mark,<sup>77</sup> and the execution of a will by mark alone is insufficient,<sup>78</sup> unless the testator is in extremis.<sup>79</sup> The authority or direction to subscribe may be express, or it may be implied from the attending circumstances.<sup>80</sup> Nevertheless, in order to establish implied authority in another from the signing of a will in the testator's presence, it must appear that the testator knew the nature of the document,<sup>81</sup> and that he saw, or was in a position to see, the signing of his name.<sup>82</sup> The order in which the mark is affixed and the name subscribed is immaterial in so far as the validity of the will is concerned.<sup>83</sup> However, implied authority may be shown by the placing of a mark by the tes-

tator on the paper after his name is written thereon.<sup>84</sup>

### c. Assistance in Making Mark

The fact that the testator is physically assisted in making his mark does not affect the validity of the execution of the will, and the act is his own with the assistance of another, and not the act of another under authority from him.

The fact that the testator is physically assisted in making his mark does not affect the validity of the execution of the will,<sup>85</sup> although when in health he could write.<sup>86</sup> The act is his own with the assistance of another, and not the act of another under authority from him.<sup>87</sup> The extent of the aid given is immaterial,<sup>88</sup> and it is not necessary to prove an express request from the testator for such assistance.<sup>89</sup> One who assists the testator in signing his name by mark is not required to subscribe the will as a witness thereof by a statute providing that every person who shall sign the testator's name to any will shall also subscribe his own name as a witness to the will.<sup>90</sup>

## § 173. — Signing for Testator by Another

- a In general
- b By attesting witness
- c. By beneficiary under will

### a. In General

It is a rule of very general, but not universal, appli-

- 71 Pa.—In re Zakatoff's Estate, *supra*
- Pa.—In re Rosato's Estate, 185 A 197, 322 Pa 229, 114 A L R 1108
- 72. Pa.—In re Zakatoff's Estate, 81 A 2d 430, 367 Pa 542—In re Rosato's Estate, 185 A 197, 322 Pa 229, 114 A L R 1108
- 73. Pa.—In re Carmello's Estate, 137 A 734, 289 Pa 554
- 74. Pa.—Brehony v Brehony, 137 A 260, 289 Pa 267—Novicki v O'Mara, 124 A 672, 280 Pa 411
- 75 Pa.—Girard Trust Co. v. Page, 127 A 458, 282 Pa 174
- 76. Pa.—In re Hughes' Estate, 133 A 645, 286 Pa 466  
68 C J p 656 note 5
- 77. Pa.—In re Cohen's Estate, 51 A 2d 704, 356 Pa 161—In re James' Estate, 198 A 4, 329 Pa 273—In re Hunter's Estate, 196 A 35, 328 Pa 484  
In re Kluchinsky's Estate, 107 A 2d 446, 176 Pa Super 197  
In re Bobbitt's Estate, 30 Pa Dist & Co 659—In re Zoltek's Estate, 22 Pa Dist & Co 721—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252  
In re Robert's Estate, Orph, 60 Dauph Co. 220—In re Marcovitch's

- Estate, Orph, 43 Sch Leg Rec 216
- In re Kostovik's Estate, Orph, 87 Pittsb Leg J 134  
68 C J p 656 note 6
- 78. Pa.—In re Hunter's Estate, 196 A 35, 328 Pa 484
- 79. Pa.—In re Wilson's Estate, 88 Pa Super 556  
In re Bobbitt's Estate, 30 Pa Dist & Co 659—In re Hunter's Estate, 29 Pa Dist & Co 528, affirmed 196 A 35, 328 Pa 484
- 80. Pa.—In re Cohen's Estate, 51 A 2d 704, 356 Pa 161—In re Morris' Estate, 37 A 2d 506, 349 Pa 387—In re James' Estate, 198 A 4, 329 Pa 273—In re Hunter's Estate, 196 A 35, 328 Pa 484  
In re Kluchinsky's Estate, 107 A 2d 446, 176 Pa Super 197  
In re Robert's Estate, Orph, 60 Dauph Co 220  
68 C J p 656 note 7
- 81. Pa.—In re Hughes' Estate, 133 A 645, 286 Pa 466
- 82. Pa.—In re Kelly's Estate, 160 A 454, 306 Pa 551—In re Hughes' Estate, 133 A 645, 286 Pa 466
- 83 Pa.—In re Cassell's Estate, 6 A 2d 60, 334 Pa 381  
In re Drew's Estate, 32 Pa Dist & Co 297—In re Zoltek's Estate, 22

- Pa Dist & Co 721—In re Picconi's Estate, 4 Pa Dist & Co 245

- 84. Pa.—In re Drew's Estate, 32 Pa Dist & Co 297  
68 C J p 656 note 8

- 85. Ohio—In re Ryan's Will, 9 Ohio Supp 29

- Pa.—McAlarney v Ziegler, Com Pl, 33 Luz Leg Reg 361

- Wis.—In re Wilcox' Estate, 254 N W 529, 215 Wis 341  
68 C J p 657 note 11

- 86. Minn.—In re Jernberg's Estate, 190 N W 990, 153 Minn 458

- 87. Pa.—In re Cozzens' Will, 61 Pa 196

- Wis.—In re Wilcox' Estate, 254 N W 529, 215 Wis 341

- 88. Pa.—Brehony v Brehony, 8 Pa Dist & Co 601, affirmed 137 A 260, 289 Pa 267

**Touching of pen** by testatrix when another made her mark to will held sufficient participation in the act, to make the mark that of testatrix and not the scrivener

- Wis.—In re Wilcox' Estate, 254 N W 529, 215 Wis 341

- 89. Pa.—In re Cozzens' Will, 61 Pa 196

- 90 Wash—Points v Nier, 157 P 44, 91 Wash 20, Ann Cas 1918A 1046

cation that it is not essential to the validity of a will that it be signed by the testator himself, but that it may be signed for the testator, in his presence, by some one else at his direction, and unless the statute otherwise provides, the direction may be implied.

It is a rule of very general, but not universal,<sup>91</sup> application that it is not essential to the validity of a will that it be signed by the testator himself.<sup>92</sup> In most jurisdictions it has been uniformly held that the will may be signed for the testator, in his presence, by some one else at his request or at his direction,<sup>93</sup> and that, too, whether the testator is able to write his name or not,<sup>94</sup> although it would undoubtedly be better that he should sign his own name if able to do so.<sup>95</sup> The other requirements being met, it has been held that any signature or mark made as and for the testator's completed signature and adopted by him as such is sufficient.<sup>96</sup> The effect is the same as though written by the testator himself,<sup>97</sup> and it is not necessary for him

to attach his mark to give validity to the will when so signed.<sup>98</sup> If the statute so provides, the request or direction must be express,<sup>99</sup> and mere knowledge of the testator that his name is being signed by another,<sup>1</sup> or that the signing was acquiesced in, or assented to, by the testator<sup>2</sup> will not be sufficient. It must appear that the testator gave direction to the third person for writing his name, consciously and explicitly, and in the free exercise of his faculties.<sup>3</sup> However, in the absence of a statutory requirement of express direction, the testator's direction and authority to sign for him need not be express, but may be implied.<sup>4</sup> Any expression or act signifying the desire to have the will signed is sufficient.<sup>5</sup> While it may be wise as a practical matter that the one who signs the testator's name also signs his own, this is not essential to the validity of the will,<sup>6</sup> except where there is a statutory requirement to that effect.<sup>7</sup>

91. N J—In re McElwaine's Will, 18 N J Eq 499  
68 C J p 657 note 17

92. Ill—In re Elkerton's Estate, 44 N E 2d 148, 380 Ill 394

93. Ark—Graves v Bowles, 101 S W 2d 176, 193 Ark 546

Ky—Darnaby v Halley's Ex'r, 208 S W 2d 299, 306 Ky 697—Weiss v Hanscom, 205 S W 2d 485, 305 Ky 687

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153

Neb—In re Smith's Estate, 266 N W 611, 130 Neb 739

N Y—In re Lewis' Estate, 80 N Y S 2d 757, 193 Misc 183—In re Romanow's Will, 296 N Y S 925, 163 Misc 481—In re Lawler's Will, 49 N Y S 2d 955, 182 Misc 67

N C—Paul v Davenport, 7 S E 2d 352, 217 N C 154

N D—In re Lyons' Estate, 58 N W 2d 845, 79 N D 595—In re Starke's Estate, 271 N W 131, 67 N D 178

Ohio—Sherman v Johnson, 112 N E 2d 326, 159 Ohio St 209

Pa—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252  
In re Gingrich's Estate, Orph, 58 Dauph Co 282—McAlarney v Ziegler, Com Pl, 33 Luz Leg Reg 361

S D—In re McNair's Estate, 38 N W 2d 449, 72 S D 604

Tex—Davenport v Minshew, Civ App, 104 S W 2d 951, error refused

Vt—In re Moon's Will, 176 A 410, 107 Vt 92

68 C J p 657 note 19

Testator's agent may subscribe the will

N Y—In re Silverman's Will, 97 N Y S 2d 490, 198 Misc 274.

In re Gallagher's Will, 123 N Y S 2d 912.

94. Pa—Stricker v Groves, 5 Whart 386

In re Vosburg's Will, 9 Pa Co 243

95. Pa—Stricker v Groves, 5 Whart 386

68 C J p 657 note 21

#### Forgery

Under circumstances of particular case it was said that if the signature to the purported will was not in the handwriting of the testator, the instrument was necessarily a forgery

Ariz—Sanders v Sanders, 79 P 2d 523, 52 Ariz 156

96. Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153

A typewritten signature typed by a person in the presence of the testator and by his direction may be sufficient

Cal—In re Moore's Estate, 206 P 2d 413, 92 Cal App 2d 120

97. Ind—Herbert v. Berrier, 81 Ind 1

Mich—In re Canterbury's Estate, 165 N W 747, 198 Mich 743

98. Ky—Sechrest v Edwards, 4 Metc 163

Mich—In re Canterbury's Estate, 165 N W 747, 198 Mich 743

The fact that testator affixes his mark is immaterial where the will is properly signed for the testator by another

N D—In re Starke's Estate, 271 N W 131, 67 N D 178

99. Vt—In re Moon's Will, 176 A 410, 107 Vt 92

Wis—In re Wilcox' Estate, 254 N W 529, 215 Wis 341

68 C J p 658 note 24

#### Affirmative answer to question

(1) An affirmative answer by testator to party's unambiguous question,

as to whether it was all right for him to sign testator's name to will, constituted an "express direction" to the party to sign the testator's name within statute authorizing person to sign for the testator by testator's express direction

Pa—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

(2) So, where a scrivener asked the testator if the nurse should sign, and he said "Yes," the signing was done under his express direction

Mass—Steele v Marble, 109 N E 357, 221 Mass 485

1. Minn—Waite v Frisbie, 47 N W. 1069, 45 Minn 361, affirmed 51 N. W 217, 48 Minn 420

Neb—Murry v Hennessy, 67 N W. 470, 48 Neb 608

2. Neb—Murry v Hennessy, supra.

3. Neb—In re McCoy's Will, 89 N. W 665, 64 Neb 150

4. US—Welch v Kirby, Mo, 255 F 451, 166 CCA 527, certiorari denied 39 S Ct 386, 249 US 612, 63 L Ed 801

Mo—St Louis Hospital Ass'n v Williams' Ex'r, 19 Mo 609

Pa—In re Dolff's Estate, Orph, 30 West L J 47

5. US—Welch v Kirby, Mo, 255 F 451, 166 CCA 527, certiorari denied 39 S Ct 386, 249 US 612, 63 L Ed 801

6. N D—In re Starke's Estate, 271 N. W 131, 67 N D 178

68 C J p 658 note 30

7. Ark—Graves v Bowles, 101 S. W 2d 176, 193 Ark 546

Statement of subscription at testator's request

Under a statute providing that any person who shall sign the testator's name to a will shall subscribe his own name as a witness and state that

*Agent signing his own name instead of testator's.* Under some statutes it has been held that the signing of the will by the agent in his own name and not that of the testator is insufficient, the will must be signed in the name of the testator.<sup>8</sup>

#### b. By Attesting Witness

An attesting witness may properly sign the testator's name for him, and failure to comply with a statute providing that one who signs the testator's name to a will must also sign his name as a witness may invalidate the will, unless the statute otherwise provides.

An attesting witness may properly sign the testator's name for him.<sup>9</sup> Statutes providing that one who signs the testator's name to a will shall also sign his name as a witness to the will have been held to be mandatory, and a noncompliance therewith invalidates the will,<sup>10</sup> unless the statute expressly provides that such noncompliance shall not affect the validity of the will,<sup>11</sup> or unless the statute although imposing a penalty for noncompliance therewith provides that such noncompliance shall not affect the validity of the will.<sup>12</sup>

#### c. By Beneficiary under Will

The signing of the testator's name to the will by a beneficiary therein will not invalidate it if it is shown that the beneficiary acted at the testator's request, although it may cast suspicion on the document.

The signing of the testator's name to the will by a beneficiary therein will not invalidate it if it is shown that the beneficiary acted at the testator's request.<sup>13</sup> However, this circumstance casts a sus-

picion on the document, and places the burden on the beneficiary to prove clearly that the testator understood the instrument and signed it voluntarily and knowingly.<sup>14</sup>

#### § 174. — Signing with Assistance of Another

The signature is not rendered invalid by the fact that another guided the hand of the testator when he signed the will, and such act is the testator's own, and not the act of another done under the authority of the testator.

The signature is not rendered invalid by the fact that another guided the hand of the testator when he signed the will.<sup>15</sup> This is not in violation of a statute requiring the will to be signed at the end thereof,<sup>16</sup> and the extent of the aid does not affect the validity of the signature if the signing is in any degree an act of the testator, acquiesced in and adopted by him.<sup>17</sup> Such act is the testator's own, performed with the assistance of another, and not the act of another done under the authority of the testator,<sup>18</sup> and in consequence a statute providing that every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request, has no application, and a noncompliance therewith does not affect the validity of the will.<sup>19</sup> In order to uphold the validity of such signature it is not necessary that an express request for the assistance be given.<sup>20</sup> It may be inferred from the

he subscribed the testator's name at his request, where the testator's name is signed to his will by his direction and he does nothing more, thereby adopting such signature as his subscription, the person so signing for the testator must also sign his own name as a witness and state that he signed the testator's name at his request.

Ark—In re Cornelius' Will, 14 Ark 675

8. Philippine—Guison v. Concepcion, 5 Philippine 551  
68 C J p 658 note 33

9. ND—In re Starke's Estate, 271 NW 131, 67 ND 178  
68 C J p 658 note 34

10. Ark—In re Cornelius' Will, 14 Ark 675  
68 C J p 658 note 36

11. Okl—In re Me-hun-kah's Estate, 189 P 867, 78 Okl 214  
68 C J p 658 note 37

12. NY—Hollenbeck v Van Valkenburgh, 5 How Pr 281

13. Tenn—Walker v. Verble, 5 Tenn Civ A 651.

Subscription by testatrix' husband held to constitute due execution

NY—In re Lewis' Estate, 80 NYS 2d 757, 193 Misc 183

14. Tenn—Walker v Verble, 5 Tenn Civ App 651.

15. Ill—In re Kehl's Estate, 73 NE 2d 437, 397 Ill 251

Ky—Prichard v Kitchen, 242 SW 2d 988

Me—Corpus Juris quoted in In re Cox' Will, 29 A 2d 281, 285, 139 Me 261

Mont—In re Sales' Estate, 89 P 2d 1043, 108 Mont 202

Neb—Corpus Juris cited in In re Kaiser's Estate, 34 NW 2d 366, 373, 150 Neb 295

NY—In re Romanow's Will, 296 NYS 925, 163 Misc 481

Or—In re Fletcher's Estate, 32 P 2d 123, 147 Or 139  
68 C J p 659 note 41

Assistance in making mark see supra § 172

16. Pa—Brehony v Brehony, 137 A 260, 289 Pa 267  
68 C J p 659 note 42

17. Me—Corpus Juris quoted in In re Cox' Will, 29 A 2d 281, 285, 139 Me 261.

NY—In re Bitzer's Will, 208 NYS 824, 124 Misc 432

18. Me—Corpus Juris quoted in In re Cox' Will, 29 A 2d 281, 139 Me 261

Neb—Corpus Juris cited in In re Kaiser's Estate, 34 NW 2d 366, 373, 150 Neb 295  
68 C J p 659 note 44

Where testator directed another to sign will in his behalf and placed his hand on pen as such other person wrote testator's name in proper place, signature became testator's own and had same effect as though written by testator himself  
Ky—Prichard v Kitchen, 242 SW 2d 988

19. Me—Corpus Juris quoted in In re Cox' Will, 29 A 2d 281, 285, 139 Me 261  
68 C J p 659 note 45

20. Me—Corpus Juris quoted in In re Cox' Will, 29 A 2d 281, 285, 139 Me 261

Neb—Corpus Juris cited in In re Kaiser's Estate, 34 NW 2d 366, 373, 150 Neb 295

Pa—Vandruuff v. Rinehart, 29 Pa 232

circumstances of the case<sup>21</sup> It is necessary, however, that it should appear that the testator, at the time of requesting or receiving the aid in the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature<sup>22</sup> A will is not legally executed if the testator's signature is procured by some one else holding his hand, and if he is not in a condition to know what is being done<sup>23</sup>

### § 175. — Seal or Stamp as Signature

English cases dealing with the validity of a seal or a stamp as a signature to a will are collected in 68 C J p 659 notes 50-52

Printed, lithographed, or typewritten signature as sufficient see supra § 171

Examine Pocket Parts for later cases.

### § 176. — Time of Signing

The general, but not universal, rule is that to give validity to the will the signing by the testator must precede in point of time the signing by the witnesses, and that, if one or all of the witnesses sign before the testator affixes his signature, the will is void, but, although there

is authority to the contrary, the fact that part or all of the witnesses sign before the testator is regarded as immaterial when the witnesses and the testator sign at practically the same time and place, in each other's presence, as part of one continuous and complete transaction

The general, but not universal,<sup>24</sup> rule is that to give validity to the will the signing by the testator must precede in point of time the signing by the witnesses, and that, if one or all of the witnesses sign before the testator affixes his signature, the will is void,<sup>25</sup> the view being taken that the attestation of witnesses is "of a past transaction,"<sup>26</sup> and that, until the signature of the testator has been affixed to the will, there is nothing to attest,<sup>27</sup> and that, for some period, longer or shorter, as the case may be, those signatures certify what is not true<sup>28</sup> In a number of jurisdictions, the general rule applies even where the signing by the testator and the signing by the witnesses are a part of one and the same transaction<sup>29</sup> In a number of other jurisdictions, however, the fact that part or all of the witnesses sign before the testator is regarded as immaterial when the witnesses and the testator sign at practically the same time and place, in each other's presence, and as part of one continuous and complete transaction,<sup>30</sup> although in jurisdictions

21. Me—*Corpus Juris* quoted in *In re Cox's Will*, 29 A 2d 281, 285, 139 Me 261  
Va—*McMechen v McMechen*, 17 W Va 683, 41 Am R 682

22. Nev—*In re Gordon's Estate*, 161 P 717, 40 Nev 300

23. Ala—*Whitsett v. Belue*, 54 So 677, 172 Ala 256

#### 24. In Ohio

(1) It has been held that a will which is subscribed by witnesses in the presence of the testator on one occasion and subscribed by the testator in their presence on a later occasion, is deemed to have been attested by the subscribing witnesses at the time of the testator's subscription and is validly executed under a statute requiring wills to be signed by the party making it or by some other person in his presence and by his direction, and to be attested and subscribed in the presence of such party by witnesses who saw the testator subscribe, or heard him acknowledge his signature  
Ohio—*Bloechle v Davis*, 8 NE 2d 247, 132 Ohio St 415

(2) However, a more recent court of appeals decision, without reference to the decision in the preceding note, adopts the view that a testatrix must sign her name to will before witnesses are requested to sign their names, or at least the signing must be one continuous transaction,

for otherwise witnesses would have no signature to attest  
Ohio—*In re Borgman's Estate*, App, 105 NE 2d 69

25. Ill—*Brehe v. Wilkie*, 26 NE 2d 475, 373 Ill 409  
Mich—*In re Kahl's Estate*, 270 NW 787, 278 Mich 561

NJ—*James v Wendehack*, 63 A 2d 710, 1 NJ Super 203  
*In re Kugler's Will*, 1 A 2d 642, 124 NJ Eq 309

*In re Wheary's Estate*, 14 A 2d 489, 18 NJ Misc 436

NC—*In re Franks' Will*, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315—*In re McDonald's Will*, 13 SE 2d 239, 219 NC 209—*Paul v Davenport*, 7 SE 2d 352, 217 NC 154

68 C J p 660 note 56

#### In Texas

(1) It has been held that to authorize the probate of an instrument as a will it must be shown that the testator signed the instrument before the witnesses signed to attest his signature

Tex—*Kveton v. Keding*, Civ App, 286 SW 673

(2) However, it has been said that the testator may sign before or after the witnesses sign

Tex—*Ludwick v Fowler*, Civ App, 193 SW 2d 692, error refused no reversible error

26. NJ—*Lacey v Dobbs*, 50 A 497,

63 NJ Eq 325, 92 Am SR 667, 55 LRA 580

NY—*Jackson v. Jackson*, 39 NY 153

27. NC—*In re Franks' Will*, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315—*Paul v Davenport*, 7 SE 2d 352, 217 NC 154  
68 C J p 660 note 58

28. NY—*Jackson v Jackson*, 39 NY 153

29. NJ—*James v Wendehack*, 63 A 2d 710, 1 NJ Super 203  
68 C J p 660 note 60

The mere fact that testator acknowledges that the will is his in the presence of the attesting witnesses immediately after all of the signatures are affixed is of no legal significance

NJ—*James v Wendehack*, supra

30. DC—*Clark v Turner*, 183 F 2d 141, 87 US App DC 54—*Billings v Woody*, 167 F 2d 756, 83 US App DC 219, certiorari denied *Mathews v Woody*, 69 S Ct 46, 333 US 822, 93 L Ed 377

Ill—*Brelie v Wilkie*, 26 NE 2d 475, 373 Ill 409

NC—*In re Franks' Will*, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315—*Corpus Juris* cited in *In re McDonald's Will*, 13 SE 2d 239, 240, 219 NC 209

68 C J p 660 note 61.

Signing or acknowledging signature of will by testator in presence of witnesses generally see *infra* § 188

where this view prevails, it is conceded that the orderly and far better way is for the signature of the testator to precede in time the signature of the witnesses.<sup>31</sup> An instrument propounded as a will, which was signed by the testator after the witnesses subscribed the will and out of their presence, is void.<sup>32</sup>

## § 177. — Place of Signature

- a. In general
- b. Signature at end of will

### a. In General

Where the statute requires no more than that the will shall be in writing and signed, it is immaterial where the testator's signature was placed, if it was placed there with the intention of authenticating the instrument.

Where the statute relating to signing requires no more than the statute of frauds, that is, mere-

ly that the will shall be in writing and be signed, it is immaterial where the testator's signature was placed, if it was placed there with the intention of authenticating the instrument.<sup>33</sup> It has accordingly been held that, if intended as a signature, a signing by the testator of his name at the beginning of the will,<sup>34</sup> in the margin,<sup>35</sup> in the body of the will,<sup>36</sup> in the attestation clause,<sup>37</sup> at the commencement of the will and in the attestation clause,<sup>38</sup> or after the attestation clause,<sup>39</sup> will be sufficient. It is essential, however, that the signature, whatever its local position, must have been made with the design of authenticating the instrument and that the testator should have contemplated no further signing.<sup>40</sup> It has been held that whether a signature not signed at the end of the will is intended as a signature to the will is a ques-

### Signing not part of same transaction

Where witness signed will in the afternoon and testatrix signed it the following night, but not in the presence of the witness and testatrix subsequently acknowledged to the witness that testatrix signed it, the signing by the testatrix and by the witness could not be construed as a part of the same "transaction."

NC—In re McDonald's Will, 13 SE 2d 239, 219 NC 209

### In New York

(1) It has been held that while as a general rule the witnesses should sign after the testator, the rule may be departed from under circumstances which show a complete compliance with the statute in one transaction, even though the testator signs last. NY—In re Jones' Estate, 285 NYS 894, 157 Misc 847—In re Barry's Estate, 194 NYS 895, 119 Misc 102—Matter of Haber's Will, 192 NYS 616, 118 Misc 179

(2) It has also been declared that where the witnesses have signed in advance of the testator, their signatures may conceivably become an attestation of his subscription, if it be thereafter supplied.

NY—In re Jones' Estate, 285 NYS 894, 157 Misc 847—Matter of Baldwin, 124 NYS 612, 67 Misc 329, affirmed 126 NYS 1121, 142 App Div 904, affirmed 95 NE 1122, 202 NY 548

(3) However, it has been held by high authority, without qualification, that the signature of the testator must precede that of the witnesses. NY—Jackson v Jackson, 39 NY 153

(4) It has been said that in the case last cited the facts do not clearly appear that the transaction constituted one simultaneous act on the

part of the testator and the subscribing witnesses.

NY—In re Jones' Estate, 285 NYS 894, 157 Misc 847

31. DC—Billings v Woody, 167 F 2d 756, 834 US App DC 219, certiorari denied Mathews v Woody, 69 SCt 46, 335 US 822, 93 L Ed 377

68 CJ p 661 note 62.

32. Ala—Reynolds v Massey, 122 So 29, 219 Ala 265

Ariz—In re Brashear's Estate, 96 P 2d 747, 54 Ariz 430

### After subscription by one witness

Where purported will was unsigned at time of attestation by one witness and witness was waiting on customer on opposite side of store when testator, whose back was then turned, subsequently signed will, which was then attested by a second witness who had observed testator affix his signature, will was not validly executed and not entitled to probate, since first witness attested only an unexecuted writing. Mich—In re Kahl's Estate, 270 NW 787, 278 Mich 561

33. Ala—Plemons v Tarpey, 78 So 2d 385, 262 Ala 209

Mass—Porter v Ballou, 21 NE 2d 237, 303 Mass 234

Mo—Potter v Richardson, 230 SW 2d 672, 360 Mo 661

NJ—In re Potts' Estate, Co., 61 A 2d 649

NC—Paul v Davenport, 7 SE 2d 352, 217 NC 154

W Va—Black v Maxwell, 46 SE 2d 804, 131 W Va 247

68 CJ p 661 note 65

Place of signature of holographic wills see *infra* § 205

Location of name is merely an evidentiary fact relating to intent to make document effective as will

Mo—Potter v Richardson, 230 SW 2d 672, 360 Mo 661

34. Ala—Plemons v Tarpey, 78 So 2d 385, 262 Ala 209

Wis—In re Home's Will, 284 NW 766, 231 Wis 227, rehearing denied 285 NW 754, 231 Wis 227—*Corpus Juris cited in* In re Lagershausen's Estate, 272 NW 469, 471, 224 Wis 479

68 CJ p 661 note 66

### Signature in exordium clause of typed will

Where entire will was typewritten, fact that signature was written rather than typed in the exordium clause would indicate that it was intended as an authenticating signature, if, in fact, it was placed there by testatrix.

Ill—Yowell v Hunter, 85 NE 2d 674, 403 Ill 202

35. Ala—Plemons v Tarpey, 78 So 2d 385, 262 Ala 209

36. NY—In re McCalip's Will, 119 NYS 2d 55, applying law of District of Columbia

NC—Paul v Davenport, 7 SE 2d 352, 217 NC 154

68 CJ p 661 note 67

37. NJ—In re Drake's Will, 192 A 428, 15 NJ Misc 484

NY—In re Matter of Acker, 5 Dem Surr 19

38. Mass—Meads v Earle, 91 NE 916, 205 Mass 553, 29 LRA, NS, 63

Mich—In re Norris' Estate, 191 NW 238, 221 Mich 430, 29 ALR 884

39. Ind—Hallowell v Hallowell, 88 Ind 251

Mo—Potter v Richardson, 230 SW 2d 672, 360 Mo 661

40. Mo—Catlett v. Catlett, 55 Mo 330

NJ—In re Potts' Estate, Co., 61 A 2d 649



tion of fact to be answered and controlled by the testimony in each case<sup>41</sup>

In *Virginia* it is provided by statute that wills shall be signed "in such a manner as to make it manifest that the name is intended as a signature" In construing this statute it is held that no will is sufficiently signed unless it appears affirmatively from the position of the signature, as at the foot or end, or from other internal evidence equally convincing that the testator designed, by the use of the signature, to authenticate the instrument<sup>42</sup> The finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible either to prove or disprove it,<sup>43</sup> and then the signature is only an authentication as to so much of the will as it was designed to authenticate<sup>44</sup> It has been held that the mere writing of the testator's name at the commencement of the will is not of itself a signature to the will as it does not indicate finality of intention to authenticate the concluding act of disposition of the testator's property<sup>45</sup> Nevertheless it is not necessary to satisfy the requirements of the statute that it should be signed at the foot or end of the will, but it will be sufficient if signed in such manner as to afford internal evidence of authenticity equally convincing<sup>46</sup>

41. *Miss*—*Better v Hirsch*, 76 So 555, 115 *Miss* 614

42. *Va*—*Fenton v Davis*, 47 SE 2d 372, 187 *Va* 463—*McElroy v Rolston*, 34 SE 2d 241, 184 *Va* 77—*Hamlet v Hamlet*, 32 SE 2d 729, 183 *Va* 453—*Presbyterian Orphans Home v Bowman*, 182 SE 551, 165 *Va* 484

68 C J p 661 note 73

#### After attestation clause

Attestation clause is no part of will, and fact that testator's signature appears after it is unimportant, only necessity being that it must appear on face of document that party signing did in fact intend to sign in capacity of testator

*Va*—*Presbyterian Orphans Home v Bowman*, supra

43. *Va*—*Fenton v Davis*, 47 SE 2d 372, 187 *Va* 463—*McElroy v Rolston*, 34 SE 2d 241, 184 *Va* 77—*Warwick v Warwick*, 10 SE 843, 86 *Va* 596, 6 LRA 775

44. *Va*—*Fenton v Davis*, 47 SE 2d 372, 187 *Va* 463

45. *Va*—*Hamlet v Hamlet*, 32 SE 2d 729, 183 *Va* 453  
68 C J p 661 note 75

#### Name in second paragraph

The placing of testator's name at beginning of second paragraph declaring will to be his last and revoking any other wills made by him, aft-

er paragraph merely explaining why he was rewriting his previous wills, did not indicate that name was intended as signature to will  
*Va*—*Hamlet v Hamlet*, supra

46. *Va*—*Hall v Brigstocke*, 58 SE 2d 529, 190 *Va* 459, 19 ALR 2d 921—*Fenton v Davis*, 47 SE 2d 372, 187 *Va* 463

68 C J p 661 note 76

47. *Cal*—*In re Jordan's Estate*, 184 P 2d 165, 81 *Cal App* 2d 419—*In re Chase's Estate*, 124 P 2d 895, 51 *Cal App* 2d 353

*Kan*—*In re Bond's Estate*, 153 P 2d 912, 159 *Kan* 249—*In re Williams' Estate*, 150 P 2d 386, 158 *Kan* 734, opinion adhered to 153 P 2d 906, 159 *Kan* 232

*NY*—*In re Winters' Will*, 98 NYS 3d 312, 277 *App Div* 24, motion denied 95 NE 2d 43, 301 *NY* 680, affirmed 98 NE 2d 477, 302 *NY* 666, motion denied 100 NE 2d 43, 302 *NY* 845

*In re Robinson's Will*, 103 NYS 2d 967, 201 *Misc* 439—*In re Frickey's Will*, 96 NYS 2d 825, 198 *Misc* 716, reversed on other grounds *In re Frickey's Estate*, 114 NYS 2d 270, 280 *App Div* 880—*In re Goettel's Will*, 55 NYS 2d 61, 184 *Misc* 155

*In re Gagen's Will*, 46 NYS 2d 215

*ND*—*In re Lyons' Estate*, 58 NW 2d 845, 79 *ND* 595

#### b. Signature at End of Will

- (1) Necessity
- (2) Purpose and construction of statutes
- (3) Sufficiency of compliance with requirements

##### (1) Necessity

In many states statutes require that wills be signed by the testator at the end, and it has very generally been held that noncompliance with the requirement renders a will void in toto, except as the statute otherwise provides

As shown supra subdivision a of this section, where the statute requires no more than that the will shall be in writing and signed, it is immaterial where it is signed However, in many states statutes now expressly require that wills shall be signed or subscribed by the testator at the end, and it has very generally been held that noncompliance with the requirement renders a will void in toto,<sup>47</sup> and not entitled to probate,<sup>48</sup> except as it is expressly provided by statute that the presence of any writing after the signature does not invalidate that which precedes it<sup>49</sup> So, also, where the statute requires the testator to "subscribe" the will, it is held that he must sign the will at the end, the view being taken that there is no difference in the mean-

*Pa*—*In re Baldwin's Estate*, 55 A 2d 263, 357 *Pa* 432—*Friese v Friese*, 9 A 2d 404, 336 *Pa* 248—*In re Friese's Estate*, 9 A 2d 401, 336 *Pa* 241

*In re Dietterich's Estate*, 193 A 158, 127 *Pa Super* 315

*Staszewski v Peoples-Pittsburgh Trust Co*, 55 *Pa Dist & Co* 549, 94 *Pittsb Leg J* 41

*In re Thorn's Estate*, *Orph*, 3 *Chest Co* 25—*In re Emert's Estate*, *Orph*, 4 *Fiduciary* 221—*In re Shiffner's Estate*, *Orph*, 48 *Lanc Rev* 433—*In re Gatto's Estate*, *Orph*, 97 *Pittsb Leg J* 379—*In re Miller's Estate*, *Orph*, 56 *York Leg Rec* 177

*SD*—*In re McNair's Estate*, 38 *NW* 2d 449, 72 *SD* 604

*Utah*—*In re Alexander's Estate*, 139 P 2d 432, 104 *Utah* 296

68 C J p 662 note 78

48. *NY*—*In re Gagen's Will*, 46 NYS 2d 215

*Pa*—*In re Baldwin's Estate*, 55 A 2d 263, 357 *Pa* 432—*In re Coyne's Estate*, 37 A 2d 509, 349 *Pa* 331

*In re Shiffner's Estate*, *Orph*, 48 *Lanc L Rev* 433—*In re Miller's Estate*, *Orph*, 56 *York Leg Rec* 177  
68 C J p 662 note 79.

49. *Pa*—*In re Casto's Estate*, 73 *Pa Dist & Co* 306, 38 *Del Co* 20, 1 *Fiduciary* 37

*In re May's Estate*, *Orph*, 24 *Erie Co* 74.

ing of the word "subscribe" and the phrase "sign at the foot or end thereof" 50

## (2) Purpose and Construction of Statutes

The purposes of the statutes requiring the testator's name to be signed at the end of the will are that it shall appear from the face of the instrument that the testator's intent was consummated and that the instrument was complete, and to prevent fraud. While it has been said that these statutes are subject to strict construction, it has also been held that they are to be construed liberally in favor of the will.

The purposes of the statutes requiring the testator's name to be signed at the end of the will are first, that it shall appear from the face of the instrument itself that the testator's intent was consummated and that the instrument was complete,<sup>51</sup> and second, to prevent or lessen the opportunity for fraudulent or unauthorized alterations or additions to the will.<sup>52</sup> These statutes, it has been said, are subject to strict construction,<sup>53</sup> and should not be frittered away by lax interpretation or by the ingrafting of exceptions.<sup>54</sup> On the other hand, it has been held that these provisions are to be construed liberally in favor of the will,<sup>55</sup> and do not require that form be raised above substance, in order to destroy a will.<sup>56</sup> The statutory requirements will not be extended by judicial construction.<sup>57</sup> In accordance with principles considered supra § 167 c, it is the intent of the legislature, and not that of the testator, which is to be considered in determining whether the statute has been complied with in the signing of the will,<sup>58</sup> although the application of this principle in some cases will work hardship and thwart the intended disposition of property.<sup>59</sup>

It is better that this should happen under a proper construction of the statutes, it was said, "than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills."<sup>60</sup> In accordance with these principles, if the signing of the will is not in compliance with the statutory requirements, the will is void regardless of the testator's intention in good faith to make a valid disposition of his property.<sup>61</sup>

## (3) Sufficiency of Compliance with Requirements

- (a) In general
- (b) Signature preceding provisions of testamentary character
- (c) Signature preceding matter not of dispositive or material character
- (d) Signature preceding clauses relating to administration
- (e) Signature preceding matter which might affect construction of will
- (f) Blank spaces in body or at end of will
- (g) Effect of marginal clauses
- (h) Signature following or in attestation clause
- (i) Nontestamentary clauses intervening between testamentary clauses and signature
- (j) Signature to will and schedule attached thereto
- (k) Signed or unsigned codicils

50 Ky—Soward v Soward, 1 Duv 126, 129

68 C J p 662 note 80

**Under provision that will executed without state** in mode prescribed by law of place of execution shall be of same force and effect as if executed in mode prescribed by laws of forum, provided will is in writing and subscribed by testator, "subscribed" means signed at the end

N Y—In re Marques' Will, 123 N Y S 2d 877

51. Cal—In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703

Pa—In re Baldwin's Estate, 55 A 2d 263, 357 Pa 432—In re Brown's Estate, 32 A 2d 22, 347 Pa 244

68 C J p 662 note 82

### Change prior rule

It has been said that the purpose was to change the rule followed in some jurisdictions that the name of the testator written anywhere in the will in his own handwriting is a signature provided he stated that he intended it to be such.

Kan—In re Bond's Estate, 153 P 2d 912, 159 Kan 249

52. Ark—Weems v Smith, 237 SW 2d 880, 218 Ark 554

Cal—In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703

N Y—In re Mackris' Estate, 124 N Y S 2d 891—In re Hildreth's Will, 36 N Y S 2d 938

Ohio—Sherman v Johnson, 112 NE 2d 326, 159 Ohio St 209

In re Mazurie, 3 Ohio Supp 63

Pa—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—In re Brown's Estate, 32 A 2d 22, 347 Pa 244

68 C J p 662 note 83

53. N Y—In re Costello's Will, 114 N Y S 2d 525

Pa—In re Brown's Estate, 32 A 2d 22, 347 Pa 244

68 C J p 662 note 84

54. Pa—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—In re Brown's Estate, 32 A 2d 22, 347 Pa 244

68 C J p 662 note 85

55. N Y—In re Rivers' Will, 58 N Y S 2d 589

56. Cal—In re Chase's Estate, 124 P 2d 895, 51 Cal App 2d 353

N Y—In re Field's Will, 97 NE 881, 204 N Y 448, 39 L R A, N S, 1060, Ann Cas 1913C 842

57. N Y—In re Rivers' Will, 58 N Y S 2d 589

58. Cal—In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703

Kan—In re Bond's Estate, 153 P 2d 912, 159 Kan 249

N Y—In re Costello's Will, 114 N Y S 2d 525

Pa—In re Brown's Estate, 32 A 2d 22, 347 Pa 244

In re Dietterich's Estate, 193 A 158, 127 Pa Super 315

68 C J p 663 note 87

59. Ohio—Irwin v Jacques, 73 NE 683, 71 Ohio St 395, 69 L R A 422

60. N Y—In re Andrews' Will, 56 NE 629, 162 N Y 1, 5, 76 Am SR 294, 48 L R A 662, 30 N Y Civ Proc 377, 5 Prob Rep Ann 401

61. N Y—In re Andrews' Will, supra

68 C J p 663 note 90.

## (a) In General

According to some decisions, the end of the will is the "logical end" of the testator's disposition of his property, wherever that end manifestly appears on the paper, and not the point which is spatially farthest removed from the beginning, but there must be a sequence of pages or paragraphs which relates to its logical and internal sense, and the signature must be placed at the sequential end.

According to some decisions, although the end of the writing in point of space may, in most cases, be taken as the end of the disposition of the testator's property for the purpose of determining whether the will has been signed at the end in compliance with statutory requirements,<sup>62</sup> the end of the will, within the meaning of such statutes, is the "logical end" of the testator's disposition of his property, wherever that end manifestly appears on the paper, and not the point which is spatially farthest removed from the beginning,<sup>63</sup> or, as otherwise expressed, the end of the will is the end of the testamentary or dispositive provisions,<sup>64</sup> or the physical termination of the testamentary dispositions which constitute the will, and not the foot or physical end of the sheet of paper on which the will is written.<sup>65</sup> It has been said that presumptively the

bottom or end of the sheet on which the will is written is the right place for the signature to show the full expression of the testator's wishes, "but it is only evidence and must give way to evidence of a different intent,"<sup>66</sup> and that in whatever order of pages or sheets a will may be written, it is to be read according to the obvious inherent sense and adaptation of parts.<sup>67</sup> Nevertheless, where the foregoing doctrine prevails, there must be a sequence of pages or paragraphs which relates to its logical and internal sense,<sup>68</sup> the signature must be placed at the sequential end,<sup>69</sup> and this end must not permit the substitution or interpolation of pages in advance unless they are connected as indicated.<sup>70</sup> In New York, in a limited number of decisions of the lower courts, it has been held, in accordance with the views heretofore stated, that the end of a will, within the meaning of the statutes under consideration, is the "logical" and not the physical end.<sup>71</sup> However, the decisions of the court of appeals and numerous decisions of the lower courts have declared either directly or by necessary inference that the end of the will, within the meaning of the statute, is the physical end, and that if the will is not signed at the physical end, it is

62. Pa.—Stinson's Estate, 77 A 807, 228 Pa 475, 139 Am SR 1014, 30 L.R.A.N.S., 1173—Appeal of Baker, 107 Pa 381, 52 Am R 478  
68 C.J. p 663 note 91

63. Pa.—In re Baldwin's Estate, 55 A 2d 263, 357 Pa 432—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—In re Casto's Estate, Pa Orph., 73 Pa Dist & Co 306, 38 Del Co 20, 1 Fiduciary 37  
In re Gatto's Estate, Orph., 97 Pittsb Leg J 379  
68 C.J. p 663 note 92

"The end meant by this provision is the logical end of the language used, which shows that the testamentary purpose has been fully expressed"  
Pa.—In re Swire's Estate, 73 A 1110, 225 Pa 188

Pa.—In re Baldwin's Estate, Orph., 95 Pittsb Leg J 473, affirmed 55 A 2d 263, 357 Pa 432

64. Cal.—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419—In re Chase's Estate, 124 P 2d 895, 51 Cal App 2d 353

NY.—In re Mackris' Estate, 124 N Y S 2d 891  
Ohio.—In re Lorenz, 11 Ohio Supp 62

65. Cal.—In re Seaman's Estate, 80 P 700, 146 Cal 455, 106 Am SR 53, 2 Ann Cas 726  
In re Chase's Estate, 124 P 2d 895, 51 Cal App 2d 353

The true test to determine whether a decedent has subscribed his name

at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution

Cal.—Estate of Seaman, 80 P 700, 146 Cal 455, 106 Am St Rep 53, 2 Ann Cas 726

In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703

66. Pa.—In re Swire's Estate, 73 A 1110, 225 Pa 188, 191

In re Casto's Estate, 73 Pa Dist & Co 306, 38 Del Co. 20, 1 Fiduciary 37

67. Pa.—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—Appeal of Baker, 107 Pa 381, 52 Am R 478

**Two-page will signed on top page**

Where an instrument offered for probate consisted of two unnumbered pages, attached by a removable clip, the top page of which bore a direction with respect to substitute executors and signatures of the testator and witnesses and the second page the usual matter introductory to a will and directions for the disposition of testator's property, such instrument was not necessarily incapable of being a valid will because not signed by the testator at the end thereof as required by statute fixing the physical requirements of a will

Ohio.—Lyon v Lyon, App., 34 NE 2d 281—Chandler v Dockman, 8 Ohio App 113

68. Pa.—In re Baldwin's Estate, 55 A 2d 263, 357 Pa 432—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—In re Brown's Estate, 32 A 2d 22, 347 Pa 244—In re Bryen's Estate, 195 A 17, 328 Pa 122

In re Dietterich's Estate, 193 A 158, 127 Pa Super 315  
68 C.J. p 663 note 96

69. Pa.—In re Baldwin's Estate, 55 A 2d 263, 357 Pa 432—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—In re Maginn's Estate, 122 A 264, 278 Pa 89, 30 A L R 413

In re Koenig's Estate, 22 Pa Dist & Co 275, 40 Dauph Co 102

70. Pa.—In re Baldwin's Estate, 55 A 2d 263, 357 Pa 432  
68 C.J. p 663 note 98

**When will consists of separate sheets** of paper not physically fastened, whether the will is signed at the end as required by statute must be determined in the light of the particular facts

Pa.—In re Baldwin's Estate, supra

71. NY.—In re Peiser's Will, 140 N Y S 844, 79 App Div 668  
68 C.J. p 663 note 99

**The end of the language**, not the paper on which it is written, is the end of the will

NY.—In re Golden's Will, 300 N Y S 2d 737, 165 Misc 205, affirmed 3 N Y S 2d 886, 253 App Div 919

In re Curtiss' Will, 41 N Y S 2d 420—In re Hildreth's Will, 36 N Y S 2d 938

void<sup>72</sup> Nevertheless, in applying this principle, under the New York statute and another state statute identical therewith, it has been held that the natural and physical end of a will is where the draftsman stopped writing in the consecutive order of composition, and if the will may be read without turning backward or skipping a part and then looking forward again in order to have its sense connected and continuous, it will be considered as signed at the natural and physical end of the will, if when thus read the signature is found at the end,<sup>73</sup> although if material dispositive parts of a will follow the signature, and it is necessary to skip a part, and turn backward, and then to look forward, in order to have the sense connected and continuous, the will is not signed at the end and is invalid<sup>74</sup>

### (b) Signature Preceding Provisions of Testamentary Character

A will is not signed at the end where the signature is followed by any provision of a testamentary character, and such provisions will avoid the entire instrument, except as it is otherwise provided by statute

A will is not signed at the end where the signature is followed by any provision or provisions of a testamentary or dispositive character,<sup>75</sup> and such provisions will avoid the entire instrument,<sup>76</sup> except as it is otherwise provided by statute<sup>77</sup> A dispositive clause following the signature will invalidate the will although the property therein disposed of is of inconsiderable value<sup>78</sup> It has been held, however, where a dispositive clause is found beneath the signature of the testator, that the presumption is, in the absence of evidence to the contrary, that the clause was added after the execution of the will, and that so much of the will as precedes the signature is valid<sup>79</sup>

72 N Y—In re Andrews' Will, 56 N E 529, 162 N Y 1, 76 Am SR 294, 48 L R A 662, 30 N Y Civ Proc 377, 5 Prob Rep Ann 401

68 C J p 663 note 1

73 Cal—In re Chase's Estate, 124 P 2d 895, 51 Cal App 2d 353

N Y—In re Golden's Will, 300 N Y S 737, 165 Misc 205, affirmed 3 N Y S 2d 886, 253 App Div 919—In re Murphy's Estate, 289 N Y S 952, 160 Misc 353

In re Reid's Will, 47 N Y S 2d 426  
—In re Hildreth's Will, 36 N Y S 2d 938

68 C J p 664 note 2.

#### Three page will signed on second

A paper writing which was a will form whereon blanks were filled in by testatrix who wrote on first page as far as it gave her room without trespassing on printed words and then continued on third page and, finishing dispositive paragraphs, returned to second page, where testatrix signed will, would be admitted to probate, as against contention that writing was not signed at the end of the will N Y—In re Golden's Will, 300 N Y S 737, 165 Misc 205, affirmed 3 N Y S 2d 886, 253 App Div 919

**Instrument consisting of sheet of paper folded in half so as to make four pages with fold to left, where writing began on first folded sheet, continued on fourth folded sheet, and, with sheet turned over unfolded, began again at top of page and continued to bottom, where it was signed, was held "signed at the end"** N Y—In re Murphy's Estate, 289 N Y S 952, 160 Misc 353

#### Loose sheets

(1) Where purported will of testatrix consisted of printed form with blanks filled by typewriting and a

loose typewritten sheet which was connected in thought sequence with second page of printed form by broken sentence, and evidence showed that testatrix read will in logical sequence and signed will at bottom of second page of printed form and loose sheet was thereafter stapled to third page of printed form by secretary of draftsman, instead of where it logically belonged, signature was affixed at end of will as required by statute

N Y—In re Costello's Will, 114 N Y S 2d 525

(2) Four unfastened sheets containing dispositive matter in testator's handwriting and numbered by him consecutively from 3 to 6, inclusive, which were found between inside pages of stationer's form consisting of a single sheet folded horizontally so as to form four pages on which testator after certain dispositions had written "continued on page 3" followed immediately by printed clause for appointment of executrix, testimonium clause with signatures of testator and witnesses and attestation clause signed by witnesses, were intended to be inserted preceding clause appointing executrix, and will when read in natural and consecutive order was subscribed by testator "at the end" thereof as required by statute

N Y—In re Reid's Will, 47 N Y S 2d 426

74. N Y—In re Robinson's Will, 103 N Y S 2d 967, 201 Misc 439  
68 C J p 664 note 3

75. Cal—In re Moore's Estate, 206 P 2d 413, 92 Cal App 2d 120—In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703—In re Jordan's Es-

tate, 184 P 2d 165, 81 Cal App 2d 419

N Y—In re Robinson's Will, 103 N Y S 2d 967, 201 Misc 439

In re Mackris' Estate, 124 N Y S 2d 891—In re Begun's Will, 123 N Y S 2d 782—In re Rivers' Will, 58 N Y S 2d 589

Ohio—In re MacNealy's Will, 14 Ohio Supp 28

Okla—Munson v Snyder, 275 P 2d 249  
Pa—In re Coyne's Estate, 37 A 2d 509, 349 Pa 331—In re Brown's Estate, 32 A 2d 22, 347 Pa 241

68 C J p 664 note 4

76. Cal—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

N Y—In re Tyner's Will, 245 N Y S 206, 138 Misc 192

In re Begun's Will, 123 N Y S 2d 782

77. Pa—In re Casto's Estate, 73 Pa Dist & Co 306, 38 Del Co 20, 1 Fiduciary 37

In re May's Estate, Orph, 24 Erie Co 74

78. N Y—Corpus Juris cited in In re Begun's Will, 123 N Y S 2d 782, 784

68 C J p 665 note 7

79. Ky—Corpus Juris cited in Parrott v Parrott's Adm'x, 110 S W 2d 272, 274, 270 Ky 544

Pa—Taylor's Estate, 79 A 632, 230 Pa 346, 36 L R A, N S, 66

**A dispositive clause on the reverse side of a sheet of a will on which testatrix' signature appeared did not invalidate the will, since clause presumably was intended to be a codicil, and since failure to sign codicil did not invalidate original will**

Ky—Parrott v Parrott's Adm'x, 110 S W 2d 272, 270 Ky 544

## (c) Signature Preceding Matter Not of Dispositive or Material Character

A will is considered signed at the end where matter following the signature is not of a dispositive or material character

A will is considered as being signed at the end where matter following the signature is not of a dispositive or material character<sup>80</sup> In other words, to deny that the subscription of a will is the end thereof, material provisions must be found following the signature<sup>81</sup>

## (d) Signature Preceding Clauses Relating to Administration

Although there is authority to the contrary, it has been held that a will is not signed at the end when the signature is followed by a clause appointing an executor, unless the appointing clause was written after the signing of the will, but a will may be considered as signed at the end although the signature is followed by other clauses relating to administration.

In some jurisdictions it is held that a will is signed at the end within the statutory requirement although such signature is followed by a clause appointing an executor,<sup>82</sup> and the ground assigned for this rule is that, under the applicable statutes, the ap-

pointment of an executor by the will is not essential to its validity,<sup>83</sup> and that in these circumstances the portion of the paper preceding the signature constitutes a complete will<sup>84</sup> However, this doctrine has been denied in other jurisdictions, where it is held that when a will is written with a final clause appointing an executor and the signature of the testator precedes such clause, the will is not signed at the end thereof,<sup>85</sup> especially where the subscribing witnesses signed at the actual end of the will<sup>86</sup> The reason assigned is that the appointment of an executor is a material and integral part of the will<sup>87</sup> It has been held, however, that although the testator's signature precedes a clause appointing an executor, the signature is nevertheless at the end of the will when the appointing clause was written subsequently to the signing of the will<sup>88</sup> In these circumstances the clause, it is said, is in the nature of an unexecuted codicil and it is void, but it does not invalidate the will<sup>89</sup> In the absence of evidence as to when it was written, the presumption is that such an addition to the will was made after the signature of the testatrix and that of the subscribing witnesses had been put on the paper<sup>90</sup>

<sup>80</sup> Ark—Weems v Smith, 237 SW 2d 880, 218 Ark 554

Kan—In re Ellis' Estate, 210 P 2d 417, 168 Kan 11

Ky—Parrott v Parrott's Adm'x, 110 SW 2d 272, 270 Ky 544

NY—In re Marques' Will, 123 NYS 2d 877

68 C J p 665 note 9

The presence of minor provisions below testator's signature, failure of which provisions for other reasons would not render instrument invalid, does not invalidate it, and where testatrix used term, "I bequeath," in all dispositive items of main part of will before her signature, and term, "I give and bequeath," in residuary clause, word "desire," in statement after her signature that "I desire" named person "to have my yellow gold watch," should be given no dispositive intent, but should be construed as a request having no effect on remainder of instrument, in view of relative insignificance of property mentioned in such statement

Ohio—In re MacNealy's Will, 14 Ohio Supp 28

Unsigned testimonium and attestation clauses following signature at conclusion of testamentary direction are without effect with respect to question of whether will was signed at end

Pa—In re Griffith's Estate, 57 A 2d 893, 358 Pa 474

<sup>81</sup> NY—In re Serveira's Will, 200 NYS 464, 205 App Div 686.

<sup>82</sup> Cal—In re McCullough's Estate, 1 Myr Prob 76

Ky—Ward v Putnam, 85 SW 179, 119 Ky 889, 27 Ky L 367

<sup>83</sup> Cal—In re McCullough's Estate, 1 Myr Prob 76

Ky—Ward v Putnam, 85 SW 179, 119 Ky 889, 27 Ky L 367

<sup>84</sup> Cal—In re McCullough's Estate, 1 Myr Prob 76

<sup>85</sup> NY—In re Winters' Will, 98 NYS 2d 312, 277 App Div 24, motion denied 95 NE 2d 43, 301 NY 680, affirmed 98 NE 2d 477, 302 NY 666, motion denied 100 NE 2d 43, 302 NY 845

In re Foster's Will, 51 NYS 2d 930

68 C J p 665 note 14.

In Pennsylvania

(1) The rule is as stated in the text

Pa—Appeal of Wineland, 12 A 301, 118 Pa 37, 4 Am SR 571

In re Morgan's Estate, 12 Pa Dist 341

(2) However, under a statute so providing, the presence of a provision for the appointment of an executor after the signature to a will does not invalidate that which precedes the signature

Pa—In re May's Estate, Orph, 24 Erie Co 74

<sup>86</sup> NY—In re Van Tuij's Will, 166 NYS 153, 99 Misc 618

68 C J p 665 note 15

<sup>87</sup> NY—In re Winters' Will, 98 NYS 2d 312, 277 App Div. 24, mo-

tion denied 95 NE 2d 43, 301 NY 680, affirmed 98 NE 2d 477, 302 NY 666, motion denied 100 NE 2d 43, 302 NY 845

68 C J p 665 note 16

<sup>88</sup> NY—In re Foster's Will, 51 NYS 2d 930

68 C J p 665 note 17.

In Pennsylvania

(1) The rule stated in the text applies

Pa—In re Teed's Estate, 74 A 646, 225 Pa 633, 133 Am SR 896

68 C J p 665 note 17

(2) However, the implied limitation no longer applies under a statute providing that a provision for the appointment of an executor after the signature to a will, whether written before or after the execution thereof, does not invalidate that which precedes the signature

Pa—In re May's Estate, Orph, 24 Erie Co 74

<sup>89</sup> Pa—In re Morgan's Estate, 12 Pa Dist 341

<sup>90</sup> In Pennsylvania

(1) The rule stated in the text has been enunciated by the supreme court

Pa—In re Teed's Estate, 74 A 646, 225 Pa 633, 133 Am SR 896

(2) An earlier lower court decision, however, held that the presumption is that the clause was written at the time of or before the execution of the will

Pa—In re Morgan's Estate, 12 Pa Dist 341.

*Other clauses* A will is considered as having been signed at the end although it contains a blank for the appointment of an executor which was not filled in at the time of the execution of the will,<sup>91</sup> or although it precedes a clause relating to the compensation of executors,<sup>92</sup> or providing that the executor shall not be required to give bond<sup>93</sup> A fortiori, the signature will be considered at the end of the will where a clause relating to compensation of executors was written after the testator's signature by a stranger without his knowledge, as this amounted to a mere spoliation of the will<sup>94</sup> However, a signature is not at the end of the will where it is followed by a clause giving the executors a power of sale of property designated, the proceeds thereof to be devoted to liquidating any deficiency that may arise in cash bequests made by the will<sup>95</sup>

(e) Signature Preceding Matter Which Might Affect Construction of Will

Whether the addition of matter after the signature which might affect the construction of the will invalidates it does not appear to have been definitely settled.

Whether the addition of matter after the signature which might affect the construction of the will invalidates it does not appear to have been definitely settled<sup>96</sup>

(f) Blank Spaces in Body or at End of Will

Notwithstanding a blank space left in the body of the will, or between the dispositive part of the will and the signature, the signature is nevertheless subscribed at the end of the will, although, according to some authorities, the will may be invalidated where the blank is unreasonably large

Notwithstanding a blank space left in the body of the will,<sup>97</sup> or between the dispositive part of the will and the signature,<sup>98</sup> the signature is nevertheless subscribed at the end of the will within the statutory requirement, although it has been said that this is imprudent as affording an opportunity for fraudulent practice<sup>99</sup> This rule has been applied in cases where a blank space was left at the foot of the sheet on which the will was written and the signature written on the reverse side thereof,<sup>1</sup> and where the will so completely filled a sheet of legal cap as not to leave room at the bottom for the signature, and the signature was written on a marginal line leaving a space between the signature and the margin of the sheet<sup>2</sup>

*Extent of space* In one case in which the blank space was in the body of the will it was held that a "long" space did not affect the validity of the will, thus indicating that whether the space was small or extensive was considered of no importance<sup>3</sup> A blank space of one,<sup>4</sup> two,<sup>5</sup> or three<sup>6</sup> lines between

91. NY—In re *Serveira's Will*, 200 NYS 464, 205 App Div 636 68 CJ p 666 note 20

92. NY—In re *McCombe's Estate*, 205 NYS 780, 123 Misc 318 68 CJ p 666 note 21

93. Ohio—*Baker v Baker*, 37 NE 125, 51 Ohio St 217 68 CJ p 666 note 22

94. Ark—*Musgrove v Holt*, 240 S W 1068, 183 Ark 355

95. NY—In re *Blair's Will*, 32 NYS 845, 84 Hun 581, affirmed 46 NE 1145, 152 NY 645

96. In Ohio it was said obiter "it would be difficult, if not impossible, to lay down a general rule which would embrace the suggestions and requests of the testator and of the attesting witnesses are afterwards subscribed, without affecting the validity of the instrument But such suggestions or requests so written should not be of a dispositive nature, nor contain anything likely to affect the construction of the will" Ohio—*Baker v Baker*, 37 NE 125, 51 Ohio St 217, 222.

In Pennsylvania

(1) It was apparently held that a paper which contained, after the signature of the testator, a clause stating his reasons for making the devise, which clause was not signed at the end thereof, was not a valid will Pa—*Hays v Harden*, 6 Pa 409

(2) However, in a later decision (the judge who wrote the opinion in both cases being the same), it was said that the report of the case in *Hays v Harden*, supra, was imperfect, and it was said that a statement of reasons for making the subsequent devise which might have influenced the construction of the will, together with an additional devise subsequent to the signature, invalidated the will Pa—Appeal of *Wikoff*, 15 Pa 281, 53 Am D 597

97. Ark—*Musgrove v Holt*, 240 S W 1068, 183 Ark 355 Ky—*Lucas v Brown*, 219 SW 796, 187 Ky 502

98. Ky—*Fritchard v Kitchen*, 242 SW 2d 988 Ohio—*Graham v Tucker*, App, 47 NE 2d 801 In re *Lorenz*, Prob, 11 Ohio Supp 62 68 CJ p 666 note 28

99. Ky—*Lucas v Brown*, 219 SW 796, 187 Ky 502 68 CJ p 666 note 29

1. Pa—In re *Morrow's Estate*, 54 A 313, 204 Pa 479 68 CJ p 666 note 30

Blank marked out with ink

Where will was written on printed form with dispositive provisions on front side, with only blank part not used in writing the will marked out with ink lines, and testimonium paragraph on reverse side followed by testator's signature, will was in compliance with statutory requirement that it be "subscribed at end" thereof by testator himself Okl—*Munson v Snyder*, 275 P 2d 249

2. Ky—*Graham v Edwards*, 173 S W 127, 163 Ky 771

3. Ark—*Musgrove v Holt*, 240 SW. 1068, 183 Ark 355

4. Cal—In re *Seaman's Estate*, 80 P 700, 146 Cal 455, 106 Am SR 53, 2 Ann Cas 726 and note, 10 Prob Rep Ann 255

5. NY—In re *Dayger's Will*, 47 Hun 127, affirmed 18 NE 480, 110 NY 666

Pa—In re *Morrow's Estate*, 54 A 313, 204 Pa 479

6. Ky—*Lucas v Brown*, 219 SW 796, 187 Ky 502

the end of the will and the signature will not affect its validity. It has also been held that the name of the testator written "a short distance below the body of the will" is subscribed at the end thereof.<sup>7</sup> In some decisions in which the blank space was at the end of the will, it was in effect held<sup>8</sup> or said<sup>9</sup> that the fact that considerable space intervenes between the end of the will and the signature is of no importance and does not affect the validity of the will. However, other decisions apparently opposed to this view, while recognizing that no general rule can be laid down as to what constitutes an unnecessary and unreasonable blank space between the conclusion of the will and the testator's subscription, and that each case must depend on its own peculiar facts and circumstances,<sup>10</sup> have held or said that the blank space may be so unnecessarily and unreasonably large as to invalidate the will.<sup>11</sup> The signature, it has been said, should be so near to the concluding words of the instrument as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes.<sup>12</sup>

#### (g) Effect of Marginal Clauses

A will is signed at the end notwithstanding clauses of a testamentary character are written in the margin where they are so numbered as to show they are to be read in relation to other provisions and the connected sense is entirely clear.

A will is signed at the end notwithstanding clauses of a testamentary character are written in

the margin of a page of the will, where these clauses are so numbered as to show where they are to be read in relation to the other provisions and the connected sense is entirely clear.<sup>13</sup> However, a will having on the last page a dispositive clause written in the margin extending lengthwise on the page and not connected with the body of the instrument by any reference to indicate where the marginal matter is to be read in relation to the other provisions is not signed at the end,<sup>14</sup> although the marginal matter was written at the request of the testator and before he attached his signature under the body of the will.<sup>15</sup> A marginal insertion, a part of which comes below the signature, will not invalidate the will, where it merely declares a distribution which the law itself would decree with the provision omitted, and is wholly immaterial.<sup>16</sup>

#### (h) Signature Following or in Attestation Clause

The signature of a testator following the attestation clause is a signing at the end, and although there is authority to the contrary, it has been held that a signing of the testator's name in the attestation clause with the intent of executing the will is a signing at the end of the will.

The signature of a testator following the attestation instead of the testimonium clause is a signing at the end of the will and meets the requirement of the statute.<sup>17</sup> A fortiori, a valid execution of the will cannot be defeated by the act of the witnesses in inserting their signatures above that of the testator after he has signed.<sup>18</sup> So, although there is authority to the contrary,<sup>19</sup> it has been held

7. Cal—In re Dutcher's Estate, 157 P 242, 172 Cal 488

8. Ohio—Mader v Apple, 89 NE 37, 80 Ohio St 691, 131 AmSR 719, 23 L.R.A.N.S 515  
68 CJ p 667 note 37

9. NY—In re Dayger's Will, 47 Hun 127, 129, affirmed 18 NE 480, 110 NY 666  
68 CJ p 667 note 38

10. Ky—Lucas v Brown, 219 SW 796, 187 Ky 502  
Soward v Soward, 1 Duv 126

11. Cal—In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703  
68 CJ p 667 note 40

12. Cal—In re Seaman's Estate, 80 P 700, 146 Cal 455, 106 AmSR 53, 2 Ann Cas 726 and note, 10 Prob Rep Ann 255  
In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703

13. Pa—In re Swire's Estate, 73 A 1110, 225 Pa 188  
In re Hueston's Estate, 73 Pa Dist. & Co 258, 37 Del Co 387.

14. Ohio—Irwin v Jacques, 73 NE 683, 71 Ohio St 395, 69 L.R.A. 422  
68 CJ p 667 note 44

15. Ohio—Irwin v Jacques, supra.  
16. NY—In re Gibson's Will, 113 NYS 266, 128 App Div 769

17. Ky—McCue v Turner, 68 SW 2d 415, 252 Ky 849  
Mo—Corpus Juris cited in Wright v McDonald, 233 SW 2d 19, 24, 361 Mo 1  
Ohio—Graham v Tucker, App, 47 NE 2d 801

In re Mazurie, 3 Ohio Supp 63  
Pa—In re Morrow's Estate, 54 A 313, 204 Pa 479  
Collins' Estate, 29 Pa Dist 814  
In re O'Malley's Estate, Orph, 100 Pittsb Leg J 76  
68 CJ p 667 note 47

Signature of witness between concluding sentence of will and signature of testatrix does not destroy validity of will  
Pa—In re O'Malley's Estate, 88 A 2d 69, 370 Pa 281

18. Cal—In re Dutcher's Estate, 157 P 242, 172 Cal 488

#### Attestation on page preceding last page

Where will was handwritten on an ordinary sheet of paper folded once so as to make four pages and the provisions ended at the bottom of the fourth page and were followed by the signature of the decedent, leaving no room for attestation, which was found in order on the third page, the decedent subscribed the instrument at the end thereof NY—In re Lubitz' Will, 136 NYS. 2d 901, 207 Misc 33

#### 19. In Ohio

(1) It has been held that a will is not signed at the end thereof by the party making it, when it is written by the party making it, on a printed blank form containing a testimonium clause with blanks for the name of the place and the date of execution, which he fills, and immediately following this a blank line for the signature of the maker, which he leaves blank, although he has written his name in the attestation clause, immediately following the testimonium clause, in a blank

that a signing of the testator's name in the attestation clause with the intent of executing the will is a signing at the end of the will,<sup>20</sup> the view being taken that the attestation clause forms no necessary part of the will.<sup>21</sup> Nevertheless, a signature occurring in the attestation clause for the purposes of the attestation clause cannot be considered a subscription to the will where there is nothing to show that the testator made it with such intention and where it was not made or acknowledged in the presence of the witnesses.<sup>22</sup> An intention to make a will does not show that the testator's name appearing in the attestation clause was intended to be a subscription.<sup>23</sup>

(i) Nontestamentary Clauses Intervening between Testamentary Clauses and Signature

A will is signed at the end although clauses not of a testamentary character intervene between clauses of a testamentary character and the signature.

A will is signed at the end although clauses not of a testamentary character intervene between clauses of a testamentary character and the signature.<sup>24</sup>

(j) Signature to Will and Schedule Attached Thereto

Where the body of a will referred to a schedule attached thereto, and the body of the will was signed at the end and the schedule was also signed, the statutory requirement was satisfied.

Where the body of a will referred to a schedule attached thereto, and the body of the will was signed and attested at the end, and the schedule was attached, and referred to the will, and it was also signed and attested, the will was within the statutory requirement that wills be signed at the end thereof.<sup>25</sup> Where a will is signed at the end of the dispositive provisions, a subsequent page containing a list of the testatrix' property without any dispositive directions will be disregarded.<sup>26</sup>

(k) Signed or Unsigned Codicils

The fact that a codicil following the will is not signed does not affect the validity of the will, and where a will and a codicil thereto are both legally executed, the fact that the codicil was written in the blank space between the last dispositive item and the testimonium clause does not invalidate the instrument.

The fact that a codicil following the will is not signed does not affect the validity of the will where the latter is properly signed at the end, although the codicil itself is inoperative for want of a signa-

left for the name of the testator, and may have intended such act as a signing

Ohio—Sears v Sears, 82 NE 1067, 77 Ohio St 104, 17 L R A N S 353, 11 Ann Cas 1008  
Herbster v Pincombe, 10 Ohio App 322

(2) However, the Sears case was distinguished in a case in which the testator's signature appeared twice in the attestation clause under circumstances where it could be read only once as a part of the attestation clause, the court taking the view that the other signature could have meaning only as a signature to the will  
Ohio—Gliddings v Schmuck, 20 Ohio Cir Ct, N S, 142

(3) In another case a will was upheld in which the signature appeared in the attestation clause  
Ohio—In re Nicholson's Estate, 2 Ohio N P, N S, 189

In Pennsylvania

(1) The view has been taken that a signature contained in the attestation clause does not satisfy the requirement of a signing at the end  
Pa.—In re Churchill's Estate, 103 A. 533, 260 Pa 94

In re Bridge's Estate, 13 A 2d 125, 139 Pa Super 606

In re Glover's Estate, 80 Pa. Dist & Co 310, 1 Fiduciary 639, 68 Montg Co 61.

(2) The statutory proviso that presence of dispositive or testamentary words or the appointment of an executor after signature of a will, whether written before or after execution thereof, shall not invalidate that which precedes signature, does not affect the rule

Pa.—In re Bridge's Estate, supra.

(3) However, the Churchill case, cited supra paragraph (1), has been distinguished and a signing in the attestation clause upheld where the signature appeared in the first line of an otherwise unused attestation clause and no place was indicated by the draftsman for the testator's signature

Pa.—In re Donaldson's Estate, 16 Pa Dist & Co 653

20 Cal.—In re Tonneson's Estate, 185 P 2d 78, 81 Cal App 2d 703—  
In re Morey's Estate, 171 P 2d 131, 75 Cal App 2d 628

Fla.—In re Schiele's Estate, 51 So 2d 287

N Y.—In re Rivers' Will, 58 N Y S 2d 589

Okl.—Coplin v Anderson, 281 P 2d 186

68 C J p 667 note 49

21 N Y.—In re Matter of De Hart's Will, 122 N Y S 220, 67 Misc 13—  
In re Matter of Noon's Will, 65 N Y S 568, 31 Misc 420

22 N Y.—In re Rudolph's Estate, 167 N Y S 760, 180 App Div. 486

23 N Y.—In re Rudolph's Estate, supra

24. Ark.—Owens v Douglas, 181 S W 896, 121 Ark 448

After agreement with wife

Where will consisting of three pages, the first of which contained dispositions, the second a testimonium and attestation clause terminating midway on page, and the third an agreement between testator and wife respecting mutual wills and containing no dispositive provisions, was signed by witnesses after attestation clause, but by testator only at bottom of third page, will was subscribed by testator and witnesses at end thereof in accordance with statutory requirement, and fact that subscriptions of testator and witnesses were not contiguous did not affect validity of will

N Y.—In re Mackris' Estate, 124 N Y S 2d 891

Signature before attestation clause was sufficient compliance with statutory requirement, an attestation clause declaring that document is a will being at most a publication, and not of itself a testamentary disposition

Kan.—In re Ellis' Estate, 210 P 2d 417, 168 Kan 11

25. N Y.—In re Brand, 73 N Y S 1073, 68 App Div 225

26. N Y.—In re Marques' Will, 123 N Y S 2d 877.



ture, since the two are separate instruments<sup>27</sup> If this were not so, it has been said, a codicil whereby the previous provisions of a will were intended to be canceled or modified would operate as a revocation of the will itself, which can only be done in the manner indicated by statute<sup>28</sup> So, where a will and the codicil thereto are both legally executed, the fact that the codicil was written in the blank space between the last dispositive item and the testimonium clause does not invalidate the instrument.<sup>29</sup> It has also been held that, where the testatrix procured a notary to draw her will, and, after making several bequests, made a charitable bequest in what the notary designated as a codicil and addition to the will, the latter, when made at the same time, is to be regarded as a continuation of the will itself, so that the signatures of the testatrix and her witnesses are properly placed at the end of the act, and the writing of this additional bequest did not amount to a turning aside to another act, so as to render the will invalid<sup>30</sup>

# § 178. Reading of Will by or to Testator

As a general rule it is not necessary that the will be read by or to the testator, but it is sufficient if it is shown that its contents were known to, and approved by, him at the time of execution, as where it is executed substantially in accordance with his instructions

As discussed supra § 130, it is indispensable to the validity of the will that the testator should know and understand its contents Nevertheless, the general rule is that it is not necessary that the will be read by or to the testator, but it is sufficient if it is shown that its contents were known to, and approved by, him at the time of execution,<sup>31</sup> as where it is executed substantially in accordance with his instructions,<sup>32</sup> in which event it may be considered as sufficient evidence that the testator was acquainted with its contents.<sup>33</sup> It has been held,

however, if the case is one in which the person who writes the will takes a large benefit under it, then, in order to show that the testator knew the contents of the will, that it is necessary to prove that the will was read to him, or read by him, or that he gave instructions for such a will, or to prove some other fact or facts equal as evidence to one of these,<sup>34</sup> and that, where a will, as drafted, introduces substantial variations from the testator's instructions and is not read by or to him, or its contents or variations from the instructions not otherwise explained to him, the will is void,<sup>35</sup> although if he knew of and approved the alterations, he adopts them by the execution of the will, and it should be confirmed.<sup>36</sup>

*Reading in presence of witnesses.* As considered supra § 130, knowledge of the contents of a will must be shown where the testator is blind and cannot read it However, the presence of the witnesses during the reading of the will to a blind testator is not necessary, in the absence of any statutory requirement to that effect<sup>37</sup> Although statutes require a will which has been dictated to be read in the presence of the subscribing witnesses, if the proof of a will being read over to the testator in the presence of the witnesses is furnished by the instrument itself, it is immaterial in what manner proof is furnished<sup>38</sup>

# § 179. Seal

In the absence of a special statutory requirement, it is not essential that a will be executed under seal.

In the absence of special statutory requirement, it is not essential that a will, either of real or personal property, be executed under seal<sup>39</sup> A scroll is sufficient as a seal in executing a power requiring a seal for valid execution<sup>40</sup>

27 Ky—Parrott v Parrott's Adm'x, 110 SW2d 272, 270 Ky 544 68 C J p 668 note 56

Whether added shortly after will was signed, or after lapse of long period of time, matter following signature and date on will, which was evidently added as the result of an afterthought, did not invalidate will Ky—Parrott v Parrott's Adm'x, supra

28. Pa.—In re Smith's Estate, 9 Pa Co 333, 20 Phila 94

29. Ohio—In re Lorenz, 11 Ohio Supp 62 Clark v Carpenter, 32 Ohio C A 87

30. La.—Oglesby v Turner, 50 So 859, 124 La 1084.

31. Ark—Meek v Bledsoe, 253 S W 2d 369, 221 Ark 395 Ky—Taliaferro v King, 279 SW2d 793

Neb.—In re Bose's Estate, 285 NW 319, 136 Neb 156

SD—In re Rowlands' Estate, 18 N W 2d 290, 70 SD 419 68 C J p 668 note 61

32. Ky—Taliaferro v King, 279 S W 2d 793 68 C J p 668 note 62

A will written in the presence of testator according to his dictation is valid although not read to or by him

Neb.—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Bose's Estate, 285 NW 319, 136 Neb 156

33. N J—Day v Day, 3 N J. Eq 549.

34. Ga.—Hughes v Meredith, 26 Ga 325, 71 Am D 127

35. Minn.—Waite v Frisbie, 47 N W 1069, 45 Minn 361, 51 NW 217, 48 Minn 420 68 C J p 669 note 65

36. Del.—Davis v Rogers, 6 Del 44 68 C J p 669 note 66

37. Ga.—Martin v Mitchell, 28 Ga 382

Pa.—In re Mealey's Will, 11 Phila 161

38. La.—Forstall v Forstall, 3 Mart NS 367—Seghers v. Atheman, 1 Mart. NS, 73

39. Wis.—Kessler v Olen, 281 NW 691, 228 Wis 662 68 C J p 669 note 71

40. Va.—Pollock v. Glassell, 2 Gratt. 439, 43 Va 439.

## § 180. Revenue Stamp

Although a statute requires a revenue stamp to be affixed to a will, a will is not rendered invalid because no stamp is placed on it at the time of execution

Although a statute requires a revenue stamp to be affixed to a will, a will is not rendered invalid because no stamp is placed on it at the time of execution<sup>41</sup> It is the duty of the register to do it at the expense of the executor, before he issues letters testamentary<sup>42</sup>

## § 181. Acknowledgment

- a. In general
- b. Under act of congress relating to Five Civilized Tribes
- c. Under other acts of congress

## a. In General

In the absence of any statutory requirement to that effect, it is not essential that a will be acknowledged before an officer authorized to take acknowledgments, but an acknowledgment will not vitiate a will

In the absence of any statutory requirement to that effect, it is not essential that a will be acknowledged before an officer authorized to take acknowledgments<sup>43</sup> Although a certificate of acknowledgment of a will is unnecessary and useless for any purpose as an official certificate,<sup>44</sup> the affixing of a certificate of acknowledgment to a sufficiently executed and attested will is considered nothing more than surplusage and does not vitiate it.<sup>45</sup>

## b. Under Act of Congress Relating to Five Civilized Tribes

Under federal statutes relating to the Five Civilized

Tribes, a will of a full-blood Indian devising realty which disinherits persons who would otherwise take by descent is void unless acknowledged and approved by a designated officer.

Under federal statutes having to do with the Five Civilized Tribes and providing that "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner, or a judge of a county court of the State of Oklahoma," a will disinheriting persons who would otherwise take by descent is void unless acknowledged before, and approved by, one of the officers therein designated,<sup>46</sup> and the facts of acknowledgment and approval must both be certified by the officer on the will and appear on it when probated and placed of record.<sup>47</sup> In the absence of such certificate the will is invalid, notwithstanding the commissioner testified that the acknowledgment was duly made, but the certificate thereof inadvertently omitted, parol evidence not being admissible to prove the fact of acknowledgment or approval.<sup>48</sup>

*Persons protected by statute* Since the statute is limited in its terms to "parent, wife, spouse, or children" of a full-blood Indian, it has no application to grandchildren, great-grandchildren, or other relations further removed, and a full-blood Indian may make a will disinheriting them although not ac-

41. Pa—Werstler v Custer, 46 Pa 502

42. Pa—Werstler v Custer, supra 68 C J p 669 note 77

43. Miss—Gore v Dace, 127 So 901, 157 Miss 221

68 C J p 669 note 78

44. US—Keely v Moore, App D C, 25 S Ct 169, 196 US 38, 49 L Ed 376

45. Miss—Gore v Dace, 127 So 901, 157 Miss 221

68 C J p 669 note 80

**Sufficiency of acknowledgment as immaterial**

Where will has been properly executed prior to attempted acknowledgment of will by testator, fact that certificate attesting to acknowledgment was executed by witnesses out of presence of testator, was immaterial

Ky—Taliaferro v King, 279 SW 2d 793

46. US—Caesar v Burgess, CCA Okl, 103 F 2d 503.

Okl—Parnacher v Hawkins, 222 P 2d 362, 203 Okl 387—Hayes v Thornsborough, 69 P 2d 664, 180 Okl 357—Yargee v Yargee, 42 P 2d 868, 171 Okl 219

68 C J p 670 note 82

Legal disabilities of Indians in making wills generally see supra § 7

**Officers should be informed of facts and circumstances surrounding execution of the will so that they can approve or refuse to approve if in their judgment facts justify approval or disapproval**

Okl—Parnacher v Hawkins, 222 P. 2d 362, 203 Okl 387

**Sufficiency of acknowledgment**

(1) Acknowledgment, showing testatrix appeared before county judge and acknowledged her execution of instrument and that county judge on acknowledgment certified his approval of will is sufficient; technical certificate of acknowledgment provided by state statute to entitle

instrument affecting realty to be recorded not being required

Okl—Yargee v Yargee, 42 P 2d 868, 171 Okl 219

(2) Other acknowledgments held sufficient

Okl—Proctor v Harrison, 125 P 479, 34 Okl 181

47. US—Caesar v Burgess, CCA Okl, 103 F 2d 503

Okl—Kemp v Turnbull, 174 P 2d 384, 198 Okl 27

68 C J p 670 note 83

**Certificate on a separate sheet of paper attached to the will and not endorsed on the will itself held valid**

US—Parnacher v. Mount, C A Okl, 207 F 2d 788, certiorari denied 74 S Ct. 515, 347 US 917, 98 L Ed 1073, rehearing denied 74 S Ct 626, 347 US 940, 98 L Ed 1089

48. US—Davis v Williford, Okl, 46 S Ct 547, 271 US 484, 70 L Ed 1048

Okl—In re Baptiste's Will, 237 P. 854, 110 Okl 267.

knowledge before, and approved by, one of the officers designated in the statute <sup>49</sup>

*"Disinherit" defined and explained.* The term "disinherit," as used in the statute, means an act by which a person deprives his heirs who, without such act, would inherit <sup>50</sup> A will of a full-blood Indian "disinherits," within the contemplation of the act, if, without the approval required, it thereby deprives, or seeks to deprive, parent, wife, spouse, or children of any estate which they would have inherited in case of his intestacy. <sup>51</sup> Disinheritance results invalidating a will not acknowledged and approved as provided by the statute where tracts devised to each child by the will of a full-blood Indian are not of substantially the same value at the date of the testator's death, <sup>52</sup> or where the land devised to the wife is of less value than that which she would have inherited by the law of descent then in force, such value to be determined as of the date of the testator's death <sup>53</sup> On the other hand, if at the date of the death of a testator the lands devised to the beneficiaries are of substantially the same value, the will is not invalid as disinheriting either of them <sup>54</sup>

*Necessity for compliance with state laws governing execution* The statutes under consideration do not confer an absolute right of disposition of Indian property without regard to the law of the state where it was located, and the will of a full-blood Indian must be executed with the same formalities of the statute law of the state as are required of any other citizens of whatever degree of blood or nationality <sup>55</sup>

*Whether acknowledgment and approval an element of execution and attestation* While some of the earlier decisions were to the contrary, <sup>56</sup> it is now settled that the approval and acknowledg-

ment of the will of a full-blood Indian, as provided for by the federal statute, are not an element of execution and attestation required by the Oklahoma statutes, <sup>57</sup> and are not within the purview of the jurisdiction of a probate court of Oklahoma in admitting a will to probate under the laws of that state <sup>58</sup> Hence, admitting the will to probate does not involve the determination of the question whether or not the will has been acknowledged in the manner required by the act of congress, <sup>59</sup> and a judgment probating a will which has not been acknowledged as required by the statute does not operate to disinherit the heirs, <sup>60</sup> or bar them from presenting their claim that the will was invalid under the provisions of the act of congress <sup>61</sup> Although the will has been admitted to probate no title to property is conveyed thereby, if it was not valid under the federal statute <sup>62</sup>

### c. Under Other Acts of Congress

Under various acts of congress the right of Indians to dispose of property by will is conditioned on the will being made and executed in accordance with regulations of the secretary of the interior and being approved by him.

Under the act of congress relating to the disposition of property by Osage Indians, it is not incumbent on the secretary of the interior to approve the will of an Osage Indian although the will was in strict accordance with the laws of the state <sup>63</sup> Where, by will, and with approval of the secretary of the interior, an adult Osage Indian disposes of all her separate property, in equal shares to her surviving husband and four children by former marriages, a state court is without jurisdiction to alter such will so as to give one third of such property to the surviving husband, the validity of the will not being questioned except as to the division made of the property <sup>64</sup> So long as the will

49 U.S.—Berry v Brokeshoulder, CCA Okl, 162 F 2d 651  
Okl—In re Sixkiller, 32 P 2d 936, 168 Okl 302  
68 C J p 670 note 85

#### Divorced wife not protected

Where duly enrolled full-blood Choctaw Indian disinherited his wife by will executed in proper form, but not acknowledged as required by federal statute, and thereafter divorced his wife so that he died unmarried and without issue or parent, will was valid and effective to pass title to allotted lands devised therein  
Okl—Frost v Davis, 79 P 2d 600, 182 Okl 593

50. Okl—Anglin v Patterson, 248 P 632, 121 Okl 106  
68 C J p 670 note 86

51. Okl—Kemp v. Turnbull, 174 P

2d 384, 198 Okl 27—Hayes v Thornsborough, 69 P 2d 664, 180 Okl 357  
68 C J p 670 note 87

52. Okl—Coats v Riley, 7 P 2d 644, 164 Okl 291

53 Okl—Battiest v Wolf, 223 P 661, 97 Okl 212

54 Okl—Copeland v Johnson, 224 P 986, 101 Okl 228

55. U.S.—Caesar v Burgess, CCA Okl, 103 F 2d 503  
Okl—Parnacher v Hawkins, 222 P 2d 362, 203 Okl 387  
68 C J p 670 note 91

56. Okl—In re Byford's Will, 165 P 194, 65 Okl 159—Homer v McCurtain, 138 P 807, 40 Okl 406

57. U.S.—Caesar v Burgess, CCA Okl, 103 F 2d 503

Okl—Phillips v Smith, 100 P 2d 249, 186 Okl 636

68 C J p 670 note 93

58. Okl—Phillips v Smith, supra—Coats v Riley, 7 P 2d 644, 164 Okl 291

59. Okl—Coats v Riley, supra—Armstrong v Letty, 209 P 168, 85 Okl 205

60. Okl—Armstrong v Letty, supra

61. Okl—Coats v Riley, 7 P 2d 644, 164 Okl 291

62. Okl—Coats v Riley, supra

63 Okl—In re Wah-Shah-She-Me-Tsa-He's Estate, 239 P. 177, 111 Okl 177, 179

68 C J p 671 notes 99, 1  
Legal disabilities of Indians in making wills generally see supra § 7

64. Okl—In re Wah-Shah-She-Me-Tsa-He's Estate, supra.

stands, the disposition of the property made by its terms must also stand, since the court cannot make a new will or direct a different division of the property from that made by the testatrix with the approval of the secretary of the interior<sup>65</sup> Under an act of congress relating to Indian allottees generally, their right to dispose of restricted and trust property by will free from the limitations of state law is conditioned on the will being made and executed in accordance with the regulations of the secretary of the interior and being approved by him<sup>66</sup> The secretary may set aside approval of the will on the ground of fraud in the execution or procurement of the will within the time limited by statute,<sup>67</sup> and he may set aside the approval at any time on the ground of lack of testamentary capacity, undue influence, or failure to comply with the rules and regulations in connection with the execution of the will, or on the ground of fraud, failure of subordinate officers to report the true facts to the secretary, or other like grounds whereby approval of the will was induced<sup>68</sup> Considering the scope of the jurisdiction conferred on the secretary over the restricted estates of Indians, a liberal rule of interpretation should be adopted for the proper administration of such estates<sup>69</sup> In a proper case a court of equity may correct a mistake made by the secretary in approving a will<sup>70</sup>

## § 182. Attestation and Subscription by Witnesses

- a In general
- b Definitions and distinctions
- c. Facts which witnesses attest; duty of witnesses

### a. In General

The attestation and subscription by witnesses, where required, must be in accord with the formalities and solemnities prescribed by the applicable statute

The attestation and subscription by the witnesses, where required, must be in accord with the formalities and solemnities prescribed by the applicable statute<sup>71</sup>

Under some statutes so providing no formal attestation is necessary,<sup>72</sup> and any form of signing the will with the intention of acting as a witness is sufficient<sup>73</sup>

*What papers must be produced.* In order to have an effective attestation, where a will is on separate sheets, all should be produced at the time of attestation<sup>74</sup>

### b. Definitions and Distinctions

"Attestation" with respect to wills is the act of witnesses in seeing that those things exist and are done which the attestation clause declares were done and which the statute requires, and it has been distinguished from "subscription"

65. Okl.—In re Wah-Shah-She-Me-Tsa-He's Estate, *supra*

66 U.S.—Hanson v Hoffman, CCA Okl., 113 F 2d 780  
68 C.J. p 671 note 4

67. U.S.—Hanson v Hoffman, *supra*

68. U.S.—Hanson v Hoffman, *supra*  
**Exclusive jurisdiction**

So long as Indian's allotments and trust property remained under administrative control of secretary he had exclusive jurisdiction to reconsider and inquire into and set aside approval of Indian's will  
U.S.—Hanson v. Hoffman, *supra*.

**Lack of full hearing**

The secretary of the interior is authorized to set aside the approval of an Indian's will more than a year after the death of the Indian and to grant a rehearing, which was not based on fraud, but sought on the ground that a full and complete hearing was not had before the examiner of inheritance  
D.C.—Nimrod v. Jandron, 24 F 2d 613, 58 App D.C. 38

69. D.C.—Nimrod v Jandron, *supra*

70 **Extrinsic fraud not essential**

Where proceeding before secretary

of interior resulting in approval of will of deceased Indian was ex parte it was not essential that fraud be extrinsic to authorize court of equity to correct mistake by determining that party holding legal title to deceased Indian's land should hold it as trustee for another

U.S.—Hanson v Hoffman, CCA Okl., 113 F 2d 780

71. Tex.—Ludwick v Fowler, Civ App, 193 S.W. 2d 692, error refused no reversible error

### Applicability of particular statutes

Statute prescribing that will be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator, and not statute defining in general terms a subscribing witness, is controlling in execution of wills  
Or—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75

### Statutes held applicable to Indians

The Oklahoma statute requiring a will to be subscribed by testator in presence of two attesting witnesses each of whom must sign his name as a witness at end of will at request and in presence of testator applies to the will of a full-blood

Indian in that state under Oklahoma law

U.S.—Caesar v Burgess, CCA Okl., 103 F 2d 503

72. Va.—French v Beville, 62 S.E. 2d 883, 191 Va. 842—Ferguson v Ferguson, 47 S.E. 2d 346, 187 Va. 581

73. Va.—French v Beville, 62 S.E. 2d 883, 191 Va. 842—Ferguson v Ferguson, 47 S.E. 2d 346, 187 Va. 581

74. Tenn.—Gass' Heirs v Gass' Ex'rs, 3 Humphr 278

### Only certain pages admitted to probate

Where witnesses at time of execution of will had seen only last two sheets which they signed and it appeared from text and physical make-up of six sheets propounded as will, including three containing paragraphs from one to nine and three containing paragraphs fourth, fifth, sixth and seventh and the testimonium and attestation clauses, that testatrix had sought to draw a new instrument, the first three sheets were not entitled to be admitted to probate.

N.J.—In re Gorrell's Estate, 19 A 2d 334, 19 N.J. Misc 168

"Attestation" with respect to wills is the act of witnesses in seeing that those things exist and are done which the attestation clause declares were done and which the statute requires.<sup>75</sup> It consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature of the testator was made and acknowledged in their presence,<sup>76</sup> and it is also a declaration that they bear witness and certify to the facts required by law to make a valid will.<sup>77</sup>

*"Attestation" and "subscription" compared and distinguished* While the words "attestation" and "subscription," as used with respect to wills, are virtually synonymous,<sup>78</sup> and attestation ordinarily involves subscription,<sup>79</sup> the two acts are separate and distinct, attestation being a mental operation, an act of the senses, while subscription is a mechanical one, an act of the hand.<sup>80</sup>

To "attest" the signature of a testator means to take note mentally that the signature exists as a fact.<sup>81</sup>

An "attesting witness" is one who signs his name to an instrument for the purpose of proving and identifying it or who signs with the intention of being considered a witness to an act in question.<sup>82</sup>

### c. Facts Which Witnesses Attest; Duty of Witnesses

In attesting a will, the witnesses are required to see that those things exist and are done which the statutes require to exist or be done in order to make a valid will, and their attestation generally requires and imports their belief that the testator is of testamentary capacity and that there is no fraud.

In attesting a will, the witnesses are required to see that those things exist and are done which the statutes require to exist or be done in order to make the instrument in law the will of the testator.<sup>83</sup> Thus, attestation by persons who have a personal knowledge that the will was signed by the testator or testatrix, or by some other person under his or her direction in his or her presence, constitutes a certification that the signature was genuine.<sup>84</sup>

*Testamentary capacity of testator.* It is a rule of general application that, in addition to attesting to the due execution of the will by the testator, the attesting witnesses must satisfy themselves,<sup>85</sup> or at least entertain the belief,<sup>86</sup> that the testator is of sound mind and memory, at the time of the execution thereof.<sup>87</sup> The rationale of the rule is that one who signs his name to a will as a witness there-

75. Md—McIntyre v Saltysiak, 109 A 2d 70, 205 Md 415—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614

#### Other definitions

(1) The act of witnessing the performance of the statutory requirements to a valid execution of the will

Tex—Zaruba v Schumaker, Civ App, 178 S W 2d 542

(2) The act of witnessing an instrument in writing at the request of the party making it, and subscribing to it as a witness

Mich—In re Fowle's Estate, 290 N W 883, 292 Mich 500

(3) The act of witnessing the actual execution of a paper, and subscribing one's name as a witness to that fact

Ga.—Bloodworth v McCook, 17 S E 2d 73, 193 Ga 53

76 Ga.—Bloodworth v. McCook, supra 6 C J p 554 note 6

77. Iowa—In re Pike's Will, 267 N W 680, 221 Iowa 1102 6 C J p 554 note 7

78. Colo—International Trust Co v Anthony, 101 P 781, 45 Colo 474, 22 L R A, N S, 1002, 16 Ann Cas 1087 6 C J p 554 note 7 [a]

79. Minn—Tobin v Haack, 81 N W 758, 79 Minn 101, 106. 6 C J p 554 note 7 [b].

80. Neb—In re Aden's Estate, 279 N W 794, 796, 134 Neb 810

Va—French v Beville, 62 S E 2d 883, 191 Va 842—Ferguson v Ferguson, 47 S E 2d 346, 187 Va. 581 6 C J p 554 note 7 [b]

"To attest the publication of a paper as a last will and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication, but to subscribe a paper published as a will is only to write on the same paper the names of the witnesses, for the sole purpose of identification"

Tenn—Ragsdale v Hill, 269 S W 2d 911, 918, 37 Tenn App 671

81. Ala—Whitt v Forbes, 64 So 2d 77, 80, 258 Ala 580

82. Va—Ferguson v Ferguson, 47 S E 2d 346, 187 Va. 581

83. Cal—In re La Mont's Estate, 248 P 2d 1, 39 Cal 2d 566

Colo—In re McGary's Estate, 258 P 2d 770, 127 Colo 495

Neb—Corpus Juris quoted in In re Kaiser's Estate, 34 N W 2d 366, 372, 150 Neb 295—In re Aden's Estate, 279 N W 794, 134 Neb 810—Corpus Juris quoted in In re Smith's Es-

tate, 266 N.W 611, 613, 130 Neb 739

Tenn—Ragsdale v Hill, 269 S W 2d 911, 37 Tenn App 671

Va—French v Beville, 62 S E 2d 883, 191 Va. 842—Ferguson v Ferguson, 47 S E 2d 346, 187 Va. 581 68 C J p 673 note 22

*True function of witnesses to wills is to prove due execution and that is done by identification of the signatures of the testator and themselves*

Me—In re Paradis' Will, 87 A 2d 512, 147 Me 347

84. Wash—In re Cronquist's Estate, 274 P 2d 585, 45 Wash 2d 344

85. Colo—In re McGary's Estate, 258 P 2d 770, 127 Colo 495

Miss—Fortenberry v Herrington, 196 So 232, 188 Miss 735

ND—Corpus Juris quoted in Stormon v Weiss, 65 N W 2d 475, 502

Wash—Corpus Juris cited in In re Mitchell's Estate, 249 P 2d 385, 395, 41 Wash 2d 326

68 C J p 673 note 23

Lack of knowledge of mental capacity of testator as affecting competency of witness see infra § 185 a.

86. Ill—In re Rutledge's Will, 125 NE 2d 683, 5 Ill App 2d 355.

87. ND—Corpus Juris quoted in Stormon v Weiss, 65 N W 2d 475, 502

68 C J p 673 note 24.

of declares that the testator is mentally capable of making the will,<sup>88</sup> for certainly no credible person of intelligence would attest such an instrument if he knew, or had reasonable cause to believe, that testamentary capacity was wanting<sup>89</sup> Hence, if the witnesses think the testator lacking in capacity to make a will, they should refuse their attestation<sup>90</sup>

On the other hand, it has also been held that while it is highly desirable that attesting witnesses should satisfy themselves as to the testamentary capacity of the testator,<sup>91</sup> it is not a duty imposed by law,<sup>92</sup> so that the failure on their part to determine that he had the necessary capacity,<sup>93</sup> or to testify to his testamentary capacity,<sup>94</sup> will not invalidate the will, and such failure goes only to the credibility of the witness<sup>95</sup> Where nothing appears to the contrary, witnesses to a will may assume that the testator is sane, and has testamentary

capacity<sup>96</sup>

*Absence of fraud* It is also the duty of the witnesses to see that no fraud is committed on the testator and that the act of the testator is his free and voluntary act.<sup>97</sup>

### § 183. — Necessity and Purpose

In general, attestation and subscription by witnesses are essential to the validity of wills.

While at common law it is not essential to the validity of a will that it should be attested<sup>98</sup> or subscribed<sup>99</sup> by witnesses, in most jurisdictions attestation and subscription by witnesses are, by statute, made essential to the validity of wills of both real and personal property<sup>1</sup>

The fact that statutes contain both the words "attest" and "subscribe" is of no special significance<sup>2</sup> The essential element is subscription of

88. Mo—Baxter v Bank of Belle, of Belle Maries County, 104 SW 2d 265, 340 Mo 952

ND—Corpus Juris quoted in Stormon v Weiss, 65 NW 2d 475, 502 Pa—In re Rife's Will, Orph, 59 York Leg Rec 169—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

Va—Tate v Chumbley, 57 SE 2d 151, 190 Va. 480  
68 CJ p 673 note 25

89 ND—Corpus Juris quoted in Stormon v Weiss, 65 NW 2d 475, 502  
SC—Mordecai v Canty, 68 SE 1049, 86 SC 470

90 ND—Corpus Juris quoted in Stormon v Weiss, 65 NW 2d 475, 502  
68 CJ p 673 note 27

**Circumstances held not to show venality**

Attesting witnesses to will could not under the circumstances be charged with venality or intentional failure to comply with requirement that subscribing witnesses decline to act if in their opinion the testator is not possessed of testamentary capacity  
Or—In re Lambert's Estate, 114 P 2d 125, 166 Or 529

91 Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326

92. Wash—In re Mitchell's Estate, supra

93. Wash—In re Mitchell's Estate, supra.

**Will could not be rejected on the ground that two of the three subscribing witnesses gave no thought when signing it to whether the testator was of sound mind**

Me—In re Paradis' Will, 87 A 2d 512, 147 Me 347

94. Ga—Huff v Huff, 41 Ga. 696  
SC—Mordecai v Canty, 68 SE 1049, 86 SC 470

95. Ga—Huff v Huff, 41 Ga. 696

96. Ill—In re Rutledge's Will, 125 NE 2d 683, 5 Ill App 2d 355  
SC—Mordecai v Canty, 68 SE 1049, 86 SC 470

97. NY—In re Martin's Will, 144 NYS 174, 82 Misc 574  
68 CJ p 673 note 28

98. Pa—In re Hildebrand's Estate, 47 Dist & Co 537, 28 North Co 406

Tenn—Ragsdale v Hill, 269 SW 2d 911, 37 Tenn App 671  
68 CJ p 671 notes 9, 10 [d] (4)

99. Pa—In re Hemphill's Estate, Orph, 24 Erie Co 349—In re O'Malley's Estate, Orph, 100 Pittsb Leg J 76

68 CJ p 671 note 10 [d] (4)

1. Ala—Arrington v Brown, 178 So 218, 235 Ala 196

Ariz—In re Miller's Estate, 92 P 2d 335, 54 Ariz 58

Ark—Stewart v Tucker, 188 SW 2d 125, 208 Ark 612

Cal—In re Krause's Estate, 117 P 2d 1, 18 Cal 2d 623

Fla—In re Watkins' Estate, 75 So 2d 198

Iowa—In re Pike's Will, 267 NW 680, 221 Iowa 1102

Ky—Pirtle v Kirkpatrick, 181 SW 2d 425, 297 Ky 785

La—Corpus Juris quoted in Soileau v Ortego, 180 So 496, 498, 189 La. 713

Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md. 614

Mass—Day Trust Co v Malden Sav Bank, 105 NE 2d 363, 328 Mass 576.

Mont—In re Watts' Estate, 160 P 2d 492, 117 Mont 505

Neb—In re Smith's Estate, 266 N W 611, 130 Neb 739

NY—In re Frickey's Will, 96 NY S 2d 825, 198 Misc 716, reversed on other grounds In re Frickey's Estate, 114 NYS 2d 270, 280 App Div 880—In re Speyer's Estate, 27 NYS 2d 603, 176 Misc 419—In re McCabe's Estate, 27 NYS 2d 127, 176 Misc 286

In re Berkowitz's Will, 76 NYS 2d 596—In re Bradbury's Estate, 53 NYS 2d 948

NC—Paul v Davenport, 7 SE 2d 352, 217 NC 154

Or—Tiggelbeck v Russell, 213 P 2d 156, 187 Or. 554—In re Demaris' Estate, 110 P.2d 571, 166 Or 36

Tex—Duggan v Benny, Civ App, 205 SW 2d 329—Redmond v Redmond, Civ App, 127 SW 2d 309, error refused.

Wash—In re Browne's Estate, 74 P 2d 913, 193 Wash 166

W Va—Nelson v Ratliffe, 69 SE 2d 217, 137 W Va. 27—Clark v Sperry, 25 SE 2d 870, 125 W Va. 718

68 CJ p 671 note 10

**Necessity of attestation and subscription by witnesses as to holographic will see infra § 200**

**Addition to will, following name and addresses of witnesses, purporting to give certain liberty bonds to decedent's brother, written and subscribed by decedent after execution of will, but not attested, was of no effect, and played no part in determining validity of balance of instrument as will**

NY—In re Begun's Will, 123 NYS 2d 782

2. Ga—Bloodworth v McCook, 17 S E 2d 73, 193 Ga. 53

their names by the witnesses,<sup>3</sup> and subscription is necessary under statutes merely requiring the will to be "witnessed"<sup>4</sup> or "attested,"<sup>5</sup> the view being taken that either of these terms is broad enough to include subscription

The statutes requiring attestation or subscription are mandatory,<sup>6</sup> and subject to strict construction<sup>7</sup>

**Purpose of requirement** It has been variously stated that the purpose of the requirement of attestation or subscription and their attendant formalities is to remove uncertainty as to the execution of wills and to safeguard testators against frauds and impositions,<sup>8</sup> to provide against false and fraudulent wills and to afford means of determining their authenticity,<sup>9</sup> to establish that all legal steps necessary to make the will a legal instrument have been taken,<sup>10</sup> to determine the capacity of the testator to make the will,<sup>11</sup> or to prevent the diversion of a decedent's estate from those who would take it under the statutes of descent and distribution, except in those instances where the decedent has clearly and deliberately expressed an intention so to divert it<sup>12</sup> It has also been held that the purpose of requiring subscription by witnesses, as distinguished from attestation, is to identify

the paper offered for probate as the same instrument which was executed by the testator in the presence of the witnesses<sup>13</sup>

**Wills disposing of both real and personal property** Where there is no statutory requirement that wills of personalty be attested, a will which is insufficient as a devise of real property because it is not attested in accordance with statutory requirements may nevertheless be sufficient as to personalty bequeathed thereby,<sup>14</sup> if the dispositions of realty and personalty are separable and independent,<sup>15</sup> although it has been said that it is a question of fact whether the testator intended that his will should stand as to personalty, even though invalid as to realty, the presumption being that he did<sup>16</sup> The foregoing doctrine, however, does not apply where it is specially provided by statute that any will in writing which purports a disposition of both real and personal property, that shall not be attested and subscribed as is prescribed by statute as a devise of lands, shall not be approved and allowed as a testament of personal property only<sup>17</sup>

**Charitable testamentary gifts** Attesting witnesses are not necessary under some statutes in order to validate charitable testamentary gifts<sup>18</sup>

3. Iowa.—In re Pike's Will, 267 N W 680, 221 Iowa 1102
4. Iowa.—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103 68 C J p 672 note 12
- Witnesses to gifts to subscribing witness**  
Under statute providing that all gifts made in a will to a subscribing witness shall be wholly void unless there be two other competent witnesses to the same, two other competent subscribing witnesses are required, and not merely two other persons who can testify to facts showing the execution of the will in conformity with the statute, as the phrase "witness to a will" has a well-settled meaning, and means one who has attested the will by subscribing his name thereto, and mere bystanders are not witnesses to the will, much less competent witnesses  
Wis.—In re Johnson's Will, 183 NW 888, 889, 175 Wis. 1
5. Colo.—International Trust Co v Anthony, 101 P 781, 45 Colo 474, 22 L R A, NS, 1002, 16 Ann Cas 1087 68 C J p 672 note 13  
"Attestation" and "subscription" compared and distinguished see supra § 182 b
6. La.—Corpus Juris quoted in Soileau v Ortego, 180 So 496, 498, 189 La. 713.  
Or.—In re Demaris' Estate, 110 P 2d 571, 166 Or 36 68 C J p 672 note 15
7. Colo.—In re McGary's Estate, 258 P 2d 770, 127 Colo 495  
La.—Corpus Juris quoted in Soileau v Ortego, 180 So 496, 498, 189 La. 713  
NY.—In re Levanti's Will, 252 NY S 497, 141 Misc 248
8. Md.—Shane v. Wooley, 113 A. 652, 138 Md 75 68 C J p 672 note 14
9. Cal.—In re La Mont's Estate, 248 P 2d 1, 39 Cal 2d 566
10. Fla.—In re Watkins' Estate, 75 So 2d 194
11. Miss.—Coward v Cowart, 51 So 2d 775, 211 Miss 459
12. Ohio.—Sherman v Johnson, 112 NE 2d 326, 159 Ohio St 209
13. Tenn.—Ragsdale v Hill, 269 S W 2d 911, 37 Tenn App 671  
Va.—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581
14. Fla.—In re Block's Estate, 196 So 410, 143 Fla 163  
Tenn.—Burrow v Lewis, 142 S W 2d 758, 24 Tenn App 253—Fransioli v Podesta, 113 S W 2d 769, 21 Tenn App 577—Taylor v Taylor, 14 Tenn App 101 68 C J p 672 note 18
15. Tenn.—Orgain v Irvine, 43 S W. 768, 100 Tenn 193
16. Miss.—Fatheree v Lawrence, 33 Miss 585  
**Effect of unexecuted attestation clause**  
Where a will disposing of real and personal property concludes with an unexecuted attestation clause, even though witnesses are unnecessary to make it effective as to personalty attempted to be bequeathed, a slight presumption arises that will is incomplete and does not reflect testator's true intent, but the presumption, being slight, may be overcome by circumstances of the same degree  
Fla.—In re Blocks' Estate, 196 So 410, 143 Fla 163
17. Mass.—Kendall v. Kendall, 24 Pick 217 68 C J p 673 note 21
18. Pa.—In re Spain's Estate, 193 A 262, 327 Pa. 226, 111 A L R 902  
**Power of legislature to dispense with witnesses**  
The Legislature had the power to enlarge the power of disposition by testatrix of property owned by her at her death and to eliminate the formality of attesting witnesses notwithstanding testatrix' execution of will prior to statutory change having such effect, since no right vested prior to testatrix' death  
Pa.—In re Spain's Estate, supra.

*Will executed by mark.* Under some statutes subscribing witnesses are required where a will is executed by the testator by mark.<sup>19</sup>

### § 184. — Number of Witnesses

It is essential to the validity of a will that it be subscribed by the number of witnesses prescribed by statute, but attestation by more than the required number does not invalidate an otherwise good attestation.

The number of witnesses requisite to the validity of a will is a matter of statutory regulation which must be complied with,<sup>20</sup> and unless subscribed by the number designated by the statute the will is invalid<sup>21</sup> and not entitled to probate<sup>22</sup>

On the other hand, if the will is signed by the requisite number of witnesses the statutory requirement is satisfied,<sup>23</sup> and in such case, the fact that in the body of the will two were named to act as

witnesses, while the will was signed by one of them only, is of no consequence<sup>24</sup>

*Excessive number of witnesses* Attestation by more than the required number of witnesses does not invalidate an attestation otherwise good,<sup>25</sup> since this neither adds to, nor detracts from, what has already been done<sup>26</sup> It is immaterial that the unnecessary witness was incompetent to prove its execution,<sup>27</sup> or failed to comply with the statutory requirement that his name be signed in the presence of the testator<sup>28</sup> or of the other attesting witnesses,<sup>29</sup> or was not present at the execution of the will, and signed it without the testator's request<sup>30</sup>

### § 185. — Competency of Witnesses

- a In general
- b Interested witnesses generally
- c. devisees or legatees

#### Under former Pennsylvania statute

(1) A will leaving real or personal estate for religious or charitable purposes was required to be attested to by two witnesses

Pa.—In re Beck's Estate, 29 Pa Dist & Co 417

In re Jull's Estate, Orph, 100 Pittsb Leg J 11  
68 C J p 671 note 10 [d]

(2) A charitable bequest in holographic will was inoperative, where will was not witnessed

Pa.—In re Rapson's Estate, 179 A 436, 318 Pa 587

19 Pa.—In re Cohen's Estate, 51 A 2d 704, 356 Pa 161

In re Gray's Estate, Orph, 12 Fay LJ 175

#### Statute held valid

Pa.—In re DeLecce's Estate, 67 Pa Dist & Co 236

20 Iowa.—In re Hagemeyer's Estate, 58 NW 2d 1, 244 Iowa 703—  
In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103

Ohio.—Roosa v Wickward, 105 NE 2d 454, 90 Ohio App 213

#### Will executed by mark

(1) Applicable statutory provisions prescribing the number of subscribing witnesses necessary for a valid will executed by mark must be complied with

Pa.—In re DeLecce's Estate, 67 Pa Dist & Co 236

In re Gray's Estate, Orph, 12 Fay LJ 175

(2) Whether direction and authority to subscribe testator's name to will executed by mark is express or implied, that such direction was given and that testator's name was subscribed in his presence must be proved by two or more competent witnesses, each of whose testimony must be complete, independently of the

other's as to circumstances and acts which statute makes essential

Pa.—In re Cohen's Estate, 51 A 2d 704, 356 Pa 161

In re O'Neill's Estate, Orph, 3 Sch Reg 233

21. Ill.—In re Kent's Estate, 122 NE 2d 229, 4 Ill 2d 81

Md.—Stuart v Foutz, 45 A 2d 98, 185 Md 401

Mich.—In re Shattuck's Estate, 37 NW 2d 555, 324 Mich 568

Mo.—Brownfield v Brownfield, 249 SW 2d 389, 41 ALR 2d 387

NH.—In re Amor's Estate, 112 A 2d 665

NJ.—In re Amsden's Will, 191 A 801, 121 NJ Eq 571

NY.—In re Semler's Will, 28 NYS 2d 390, 176 Misc 687

NC.—In re Ellis' Will, 69 SE 2d 25, 235 NC 27

Pa.—In re DeLecce's Estate, 67 Pa Dist & Co 236

Tex.—Krahl v Lehmann, 277 SW 2d 792, reversed on other grounds,

Sup, Lehmann v Krahl, 285 SW 2d 179—Scandurro v. Beto, Civ App,

234 SW 2d 695  
68 C J p 674 note 33

#### Proper number present but not subscribing

Will, which was executed by testator in presence of two witnesses, who saw testator place his signature thereon, and to whom he declared that the will was his last will and testament, was invalid in view of fact that only one of such witnesses subscribed his name to the will

Fla.—In re Watkins' Estate, 75 So 2d 194

22. Ga.—Gay v Sanders, 28 SE 1019, 101 Ga 601

#### Signing prevented by emergency

Where testatrix, while in the hospital with a serious illness from which she subsequently died, dictated

her will and requested physician and another to sign as witnesses and physician proceeded to sign and, due to a choking spell of the testatrix, other person went to look for a nurse and failed to sign the document and testatrix never had sufficient capacity subsequently to transact business and the other person never affixed her signature to the document, document could not be probated as a will for lack of compliance with the Uniform Wills Act

Tenn.—Ball v Miller, 214 SW 2d 416, 31 Tenn App 271

23 Iowa.—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103

#### Personal property

Under Connecticut law, although three witnesses are required to pass any estate, two witnesses are sufficient as to a will or codicil relating only to personal property

NY.—In re Simmons' Will, 132 NY S 2d 795

24 Kan.—Baker v Hickman, 273 P 480, 127 Kan 340, 68 ALR 743

25. Ala.—Jones v Brook, 63 So 978, 184 Ala 115

68 C J p 674 note 36

26. NY.—In re Sizer's Will, 113 NYS 210, 129 App Div 7, affirmed 88 NE 1132, 195 NY 528

27. Ind.—Wisehart v Applegate, 88 NE 501, 172 Ind 313

68 C J. p 674 note 38

28 Ala.—Jones v Brook, 63 So 978, 184 Ala. 115

29. Miss.—Gore v Ligon, 63 So 188, 105 Miss 652

Philippine—Gillesania v Menasalvas, 13 Philippine 116

30. Md.—Greenhawk v Quimby, 184 A 485, 170 Md 280

Pa.—Scattergood v Kirk, 43 A 1030, 192 Pa. 263



- d Spouse or relative of beneficiary
- e Spouse or relative of testator
- f. Executors and persons interested through executors
- g Trustees and persons interested through trustees
- h Persons interested through corporate beneficiaries
- i. Other interested persons
- j. Judicial and administrative officers, attorneys

#### a. In General

Attesting witnesses are required to be competent at the time of the execution of the will; and generally, all persons are competent as witnesses to a will who are legally competent to be sworn and able to testify in a court to the facts which they attest.

Statutes relating to witnesses require that the witnesses shall be "competent" or "credible,"<sup>31</sup> and the courts have uniformly held that the words "credible" and "competent" are synonymous, the word "credible" meaning "competent"<sup>32</sup> Hence, the mere fact that a subscribing witness may be

unworthy of belief in public estimation does not make him not "credible" within the contemplation of the statute if he is otherwise competent<sup>33</sup> The competency of a witness to subscribe a will as an attesting witness is to be determined by the rules of the common law unless it is otherwise provided by statute,<sup>34</sup> and on the other hand if the matter of competency is regulated by statute, competency must be tested by the statute and not by the common law<sup>35</sup>

Generally speaking, all persons are competent as witnesses to a will who are legally competent to be sworn and able to testify in a court of justice to the facts to which they attest in subscribing their names to the will<sup>36</sup> In other words, such persons are competent as witnesses to a will as are not legally disqualified to testify in a court of justice,<sup>37</sup> as by reason of mental incapacity,<sup>38</sup> interest,<sup>39</sup> the commission<sup>40</sup> or conviction<sup>41</sup> of a crime, want of religious belief,<sup>42</sup> or other causes excluding them from testifying generally,<sup>43</sup> or rendering them incompetent in respect of the particular subject matter or in the particular suit<sup>44</sup>

31. Tex—Krahl v Lehmann, Civ App, 277 SW 2d 792, error granted Competency of witnesses to prove nuncupative wills see *infra* § 216

32. Ill—In re Kent's Estate, 122 NE 2d 229, 4 Ill 2d 81—Hill v Chicago Title & Trust Co, 152 NE 545, 322 Ill 42

Me—Appeal of Look, 152 A. 84, 129 Me 359

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153—King v King, 134 So 827, 161 Miss 51

Tex—Krahl v Lehmann, Civ App, 277 SW 2d 792, error granted—Scandurro v Beto, Civ App, 234 SW 2d 695—Ford v Ross, Civ App, 150 SW 2d 144—Moos v First State Bank of Uvalde, Civ App, 60 SW 2d 888

68 CJ p 674 note 44—15 CJ p 1347 note 19

#### Early controversy

The term "credible" as used in statutes concerning attestation of wills has, at one time or another, given occasion to great controversy, and many opinions have been to the effect that credible involves more than "competency"

SC—Snelgrove v Snelgrove, 4 SC. Eq 274

33. Miss—King v. King, 134 So 827, 161 Miss 51

34. Mass—O'Connell v. Dow, 66 NE 788, 182 Mass 541  
68 CJ p 675 note 54

Statute leaving common law in effect

Under Oklahoma statutes provid-

ing that common law, as modified by Constitution, statutes, decisions, and conditions, shall remain in force in aid of general statutes, that no person shall be disqualified as a witness by reason of his interest in action, and that nothing contained in latter section should affect existing laws relating to attestation of execution of wills, common-law rule governs in Oklahoma in respect of a person's competency to act as an attesting witness

US—Caesar v Burgess, CCA, 103 F 2d 503

35. Colo—White v Bower, 136 P 1053, 56 Colo 575, Ann Cas 1917A 835

36. Tex—Krahl v Lehmann, 277 SW 2d 792, reversed on other grounds, Sup, Lehmann v Krahl, 285 SW 2d 179—Ford v Ross, Civ App, 150 SW 2d 144—Moos v First State Bank of Uvalde, Civ App, 60 SW 2d 888

Va—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581—Salyers v Salyers, 45 SE 2d 481, 186 Va. 927

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326

68 CJ p 675 note 45

37. Ill—Hill v Chicago Title & Trust Co, 152 NE 545, 322 Ill 42

68 CJ p 675 note 46

38. Ill—Hill v Chicago Title & Trust Co, *supra*.

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326  
68 CJ p 675 note 47.

39. DC—Peters v Peters, 78 F 2d 215, 64 App DC 331

Ill—Hill v Chicago Title & Trust Co, 152 NE 545, 322 Ill 42

Tex—Scandurro v Beto, Civ App, 234 SW 2d 695

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326

68 CJ p 675 note 48

40. Ill—Hill v Chicago Title & Trust Co, 152 NE 545, 322 Ill 42

68 CJ p 675 note 49

41. Mass—Sparhawk v Sparhawk, 10 Allen 155

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326

42. Conn—Curtiss v. Strong, 4 Day 51, 4 Am R 179

68 CJ p 675 note 51.

43. Ill—Hill v Chicago Title & Trust Co, 152 NE 545, 322 Ill 42

68 CJ p 675 note 52.

44. Ill—Hill v Chicago Title & Trust Co, 152 NE 545, 322 Ill 42  
—In re Noble's Will, 15 NE 850, 124 Ill 266

#### Signature as witness to mark

The mere fact that signature of person who prepared the will was accompanied by words "witness to mark" did not disqualify him from being a subscribing witness

Md—Van Meter v Van Meter, 39 A. 2d 752, 183 Md. 614.

*Age of witness; infants* In passing on the capacity of a subscribing witness to testify, for purposes of determining his competency, limitations as to age are no different from the tests applied to witnesses actually called in trials of actions or proceedings generally.<sup>45</sup> It follows that the infancy of a subscribing witness is not of itself sufficient to invalidate a will,<sup>46</sup> and the test of his competency should be his capacity or intelligence, his appreciation of the difference between truth and falsehood, and his understanding of the obligations of an oath.<sup>47</sup> Accordingly, if a witness is old enough to receive a just impression of the facts surrounding the execution of the will and to relate them truthfully and with a reasonable degree of accuracy, he is competent.<sup>48</sup> However, it has also been held that a person under fourteen is presumed incompetent as a witness, but the presumption may be rebutted.<sup>49</sup>

*Capacity to see, hear, and write* A defect of sight or hearing does not render a person incompetent as a witness to a will, but such infirmity can only be considered as operating on the effect of his testimony.<sup>50</sup> One is not rendered incompetent to witness a will by the fact that he cannot write.<sup>51</sup>

*Acquaintance with testator.* While it is in all cases very desirable that the subscribing witnesses

to a will shall be personally acquainted with the testator,<sup>52</sup> especially where the issue of testamentary capacity is involved, as in the case of very aged people,<sup>53</sup> it has nevertheless been held or said that a stranger to the testator is not incompetent to act as a witness,<sup>54</sup> unless a statute requires that the witness be personally acquainted with the testator.<sup>55</sup> Nevertheless, one attesting a will should satisfy himself of the identity of the testator<sup>56</sup> and of his capacity to make a will,<sup>57</sup> but it has been held that while it is helpful for an attesting witness to have knowledge of the mental capacity of the person executing a will,<sup>58</sup> it is not necessary that the witness have such knowledge in order to be competent to sign as a witness,<sup>59</sup> and the fact that an attesting witness knows very little about the testamentary capacity of the testator does not disqualify him.<sup>60</sup>

*Time at which competency must exist.* The competency and interest of the attesting witnesses are to be tested as of the date of execution of the will and the making of the attestation,<sup>61</sup> and not at the time when it is presented for probate.<sup>62</sup> Accordingly, incompetency, subsequent to attesting the will, from whatever cause, does not impair or in any way affect its validity,<sup>63</sup> or prevent the probate and allowance of the will, if it is otherwise

45. NY—In re Tannenbaum's Estate, 278 NYS 253, 154 Misc 828 Ohio—In re Halterman's Will, 12 Ohio Supp 150

68 C J p 675 note 47 [a] (3)

46. NY—In re Tannenbaum's Estate, 278 NYS 253, 154 Misc 828 68 C J p 675 note 47 [a] (1)

47. NY—In re Tannenbaum's Estate, supra.

48. Ohio—In re Halterman's Will, 12 Ohio Supp 150

**Particular infants held competent witnesses**

(1) Will was not invalid because one of subscribing witnesses was infant, where at time of attesting will infant was few months under age of seventeen years, was a stenographer employed by attorney who drafted instrument and was keen and intelligent, whose testimony was convincing

NY—In re Tannenbaum's Estate, 278 NYS 253, 154 Misc 828

(2) A girl thirteen years and two months old, who had a general idea of the nature of a will and who impressed the other subscribing witness at the time as understanding the nature of the transaction, was competent at the time of the execution of the will to act as a subscribing witness and to testify with refer-

ence to its execution at hearing on application for the probate thereof Ohio—In re Halterman's Will, 12 Ohio Supp 150

49. NH—Carlton v Carlton, 40 N H 14

50. La—Major v Esneault, 7 La Ann 51

51. Kan—Schnee v Schnee, 60 P 738, 61 Kan 643 68 C J p 675 note 57

52. Vt—In re Moxley's Will, 152 A 713, 103 Vt 100

53. Mo—Dunkeson v. Williams, 242 SW 653 68 C J p 676 note 59

54. Vt—In re Moxley's Will, 152 A 713, 103 Vt 100 68 C J p 676 note 60

55. Puerto Rico—Bardeguet v Registrar of Guayama, 27 Puerto Rico 200 68 C J p 676 note 61

56. NJ—In re Bernhardt's Estate, Prerog, 143 A 92 68 C J p 676 note 62.

57. NY—Brinckerhoof v Remsen, 8 Paige 488, affirmed 26 Wend 325, 37 Am D 251

Duty of attesting witness with respect to mental capacity of testator see supra § 182 c.

58. Wis—In re Zych's Will, 28 NW 2d 316, 251 Wis 108

59. Wis—In re Zych's Will, supra

60. Fla—In re James' Estate, 191 So 830, 140 Fla. 463

61. US—Caesar v Burgess, CCA. Okl, 103 F 2d 503

Ill—In re Kent's Estate, 122 NE 2d 229, 4 Ill 2d 81

Okl—Corpus Juris cited in Howard v Fields, 156 P 2d 139, 142, 195 Okl 180

Va—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581—Salysers v Salysers, 45 SE 2d 481, 186 Va. 927

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326 68 C J p 676 note 64

62. US—Caesar v Burgess, CCA. Okl, 103 F 2d 503

Okl—Corpus Juris cited in Howard v Fields, 156 P 2d 139, 142, 195 Okl 180

68 C J p 677 note 65

63. Ind—Wisehart v Applegate, 88 NE 501, 172 Ind 313

68 C J p 677 note 66

#### **Insanity**

Where witness to testator's signature under statute was adjudged insane more than three months after execution of will, will was not invalid as a matter of law

Ohio—Shupp v Farrar, 88 NE 2d 924, 85 Ohio App 366

satisfactorily proved,<sup>64</sup> although an interest acquired after execution of the will may be shown for the purpose of impeaching the testimony of the witness.<sup>65</sup> Conversely, although there is some authority to the contrary,<sup>66</sup> it has very generally been held that, if at the time of the execution of the will an attesting witness was incompetent, nothing occurring after can make him competent,<sup>67</sup> and that he cannot by release, assignment, or other act render himself competent,<sup>68</sup> unless it is otherwise provided by statute.<sup>69</sup>

### b. Interested Witnesses Generally

Except as the rule has been abrogated or modified by statute, interest will render a person incompetent as a witness to a will, and the true test of interest is whether the witness will gain or lose financially as the direct result of the proceeding or whether the record will be legal evidence against him in some other action.

By the common law interest rendered a person incompetent as a witness to a will, and such is the rule except where it has been abrogated or modified by statute,<sup>70</sup> and the rule is particularly applicable in those jurisdictions in which it has been incorporated into statute.<sup>71</sup> A witness, incompetent by reason of interest, it has been said, is not "credible."<sup>72</sup>

On the other hand, by statute in some jurisdictions, incompetency by reason of interest has been abolished as to all classes of interested witnesses,<sup>73</sup> or the effect of the statutes is to render subscribing witnesses to a will competent irrespective of

any "interest in the event" which might disqualify such witness in another type of proceeding.<sup>74</sup> Where this is true, a creditor of the testator has been held competent to act as subscribing witness,<sup>75</sup> and in many jurisdictions, as appears infra subdivision c of this section, statutes avoid a bequest or devise to a witness and render him a competent witness.

*Test of interest* Interest of itself, without regard to its nature or bearing on the issue, has never operated to exclude a witness from giving evidence,<sup>76</sup> and the true test of interest is whether the witness will gain or lose financially<sup>77</sup> as the direct result of the proceeding,<sup>78</sup> or whether the record will be legal evidence against him in some other action.<sup>79</sup> It has very generally been held that the interest which will disqualify an attesting witness must be a present, direct, certain, and vested interest, and not one which is remote, indirect, uncertain or contingent,<sup>80</sup> and where the interest is remote and of a doubtful nature, the objection goes to the credit, and not to the competency, of the witness.<sup>81</sup> On the other hand any direct pecuniary interest, however minute, will disqualify a witness.<sup>82</sup>

In Maine, the rule stated above, as to the test of interest, was apparently approved in the early decisions,<sup>83</sup> but under later decisions, while it is recognized that a direct, certain, and pecuniary interest is a beneficial interest which will disqualify an attesting witness,<sup>84</sup> it is further held, contrary to

64. Minn.—In re Holt's Will, 57 N W 219, 56 Minn 33, 45 Am SR 434, 22 LRA 481

65. Ill.—In re Delavergne's Will, 102 NE 1081, 259 Ill 589

66. Colo.—Wehrkamp v Burnett, 256 P 630, 82 Colo 5

67. Miss.—Rucker v. Lambdin, 20 Miss 230

68. Ohio—Vrooman v. Powers, 24 NE 267, 47 Ohio St 267, 8 LRA 39

68 C J p 677 note 71

69. Mo.—Grimm v Tittman, 20 SW 664, 113 Mo 56

68 C J p 677 note 72

70. Tex.—Scandurro v Beto, Civ App, 234 SW 2d 695

68 C J p 677 note 73

71. Purpose of statute

(1) The purpose of statute requiring will to be attested by disinterested witnesses is to save competency of witness even at expense of benefit which he might otherwise receive under will

Iowa.—In re Puckett's Estate, 38 N W 2d 593, 240 Iowa 986

(2) The purpose of a statutory requirement of disinterested witness-

es to will is to provide that the testator may be entirely free from importunity of interested persons and that a witness may be available to testify as to the mental condition of the testator

Neb.—In re Aden's Estate, 279 NW 794, 134 Neb 810

72. Me.—Appeal of Richburg, 92 A 2d 724, 148 Me 323

NH.—Lord v Lord, 58 NH 7, 42 Am R 565

Tex.—Scandurro v Beto, Civ App, 234 SW 2d 695

73. Mich.—In re Ferguson's Estate, 295 NW 318, 295 Mich 576

Va.—Salyers v Salyers, 45 SE 2d 481, 186 Va 927

68 C J p 677 note 75

74. NY.—In re George's Estate, 25 NYS 2d 333, 175 Misc 804

75. Va.—Salyers v Salyers, 45 SE 2d 481, 186 Va 927

76. Ill.—Fisher v Spence, 37 NE 314, 150 Ill 253, 41 Am SR 360

68 C J p 677 note 77

77. Tex.—Scandurro v. Beto, Civ App, 234 SW 2d 695

78. Mass.—Boston Safe Deposit &

Trust Co v Bacon, 118 NE 906, 229 Mass 585

68 C J p 677 note 78

79. Ill.—Scott v Couch, 111 NE 272, 271 Ill 395, LRA 1916D 179

68 C J p 678 note 79

80. Colo.—In re Ainsworth's Estate, 79 P 2d 1045, 102 Colo 392

Del.—In re Kemp's Will, 186 A 890, 7 W W Harr 514

DC.—Peters v Peters, 78 F 2d 215, 64 App DC 331

NH.—In re Amor's Estate, 112 A 2d 665

Wyo.—Corpus Juris quoted in In re Lane's Estate, 58 P 2d 415, 421, 50 Wyo 119, rehearing denied 60 P 2d 360, 50 Wyo 119

68 C J p 678 note 80

81. Ky.—Berry v Hamilton, 10 B Mon 129

Mass.—Hawes v Humphrey, 9 Pick 350, 20 Am R 481

82. Mass.—Crowell v Tuttle, 105 N E 980, 218 Mass 445

68 C J p 678 note 82

83. Me.—In re Marston, 8 A 87, 79 Me 25

68 C J p 678 note 84

84. Me.—Appeal of Look, 152 A 84,

the general trend of authority, that even an indirect, uncertain, and contingent interest may be a beneficial interest if it has a present appreciable pecuniary value so that the witness may reasonably be said to gain financially because of it<sup>85</sup> Where there is a disqualifying interest it is that fact, and not the measure of the value of the interest, which controls<sup>86</sup>

### c. Devisees or Legatees

While it is generally held, apart from statute, that devisees or legatees, because of their interest, are incompetent to act as attesting witnesses, under statutes forfeiting the devises or legacies they may be competent witnesses, and under some statutes they are made competent without avoidance of the devise or legacy.

In accordance with the principles considered supra subdivisions a and b of this section, it has very generally,<sup>87</sup> but not universally,<sup>88</sup> been held, in the absence of statute providing otherwise, that devisees or legatees, because of their interest, are incompetent to act as witnesses to wills and that a will attested by legatees or devisees is void unless, excluding them as witnesses, there are a sufficient number of competent witnesses to satisfy the statutory requirements. This situation, however, was remedied by the English parliament by the enactment of legislation which rendered void devises or legacies to witnesses to wills and made them competent subscribing witnesses, thus avoiding the sacrifice of the will except as to the devises or legacies to the witnesses<sup>89</sup> Accordingly, in many states a witness to a will who is also a devisee or legatee is now a competent subscribing witness to a will,

although prevented from taking any benefit thereunder, either by reason of the adoption of the English statutes as a part of the common law of the state or the enactment of statutes of a similar import,<sup>90</sup> and such is now also the rule in the Philippines by virtue of express statutory provision<sup>91</sup>

By statute in some states a legatee or devisee is made a competent attesting witness and the devise or bequest to him is not avoided by reason of his interest,<sup>92</sup> and the fact that he is the chief beneficiary,<sup>93</sup> or even the sole beneficiary,<sup>94</sup> does not affect the operation of this rule

The right of an attesting or subscribing witness to take under a will is discussed supra § 102.

*Release or assignment of interest* In accordance with the view that a witness to a will must be competent at the time of the execution of the will, discussed supra subdivision a of this section, it is the rule, unless it is otherwise provided by statute,<sup>95</sup> that a legatee or devisee who is a subscribing witness cannot become a competent subscribing witness by releasing his claim thereunder, and the will is not well executed notwithstanding such release<sup>96</sup> In some jurisdictions it has been held that while a witness who releases his claim may thereby become a competent attesting witness, such result cannot be achieved by his assignment of his claim to another<sup>97</sup>

*Presence of legatees* A statute providing that a will cannot be witnessed by one of the legatees does not mean that the presence of a legatee when the will is made shall render the will invalid<sup>98</sup>

129 Me 359—Appeal of Cox, 137 A 771, 126 Me 256, 53 A L R 208

85 Me—Appeal of Richburg, 92 A 2d 724, 148 Me 323

68 C J p 678 note 86

86 Me—Appeal of Richburg, supra

87 Pa.—In re Polinchuk's Estate, Orph, 90 Pittsb Leg J 579

Wis.—In re Repush's Will, 44 NW 2d 240, 257 Wis 528

68 C J p 678 note 88

Under English common law, will was void where legatee or devisee named therein was subscribing witness and will could not be probated without his testimony

NY—In re Smith's Estate, 300 NY S 1057, 165 Misc 36

88. Md—Shaffer v Corbett, 3 Harr & H 513

68 C J p 678 note 89

89. N.Y.—In re Dwyer, 182 NYS 64, 192 App Div 72

In re Smith's Estate, 300 NYS 1057, 165 Misc 36

90. Iowa—In re Puckett's Estate, 38 NW 2d 593, 240 Iowa 986

Ky—Clark v Johnson, 105 SW 2d 576, 268 Ky 591

NY—In re Dwyer, 182 NYS 64, 192 App Div 72

In re Smith's Estate, 300 NYS 1057, 165 Misc 36

Tex—Krahl v Lehmann, Civ App, 277 SW 2d 792, error granted

68 C J p 679 note 93

#### Financial or pecuniary interest

Under statute rendering void any beneficial interest given under will to party who is subscribing witness, term "beneficial interest" means a financial or pecuniary interest.

NJ—In re Rogers' Estate, 83 A 2d 268, 15 NJ Super 189

91. Philippine—Caluya v Domingo, 27 Philippine 330

92. Va.—Ferguson v. Ferguson, 47 SE 2d 346, 187 Va. 581—Salyers v

Salyers, 45 SE 2d 481, 186 Va 927—Epes' Adm'r v Hardaway, 115

SE 712, 135 Va. 80

68 C J p 679 note 95

93. Md—Harris v Pue, 39 Md 535

94. Ala—Snider v Burks, 4 So 225, 84 Ala 53

Del—Hudson v Flood, 94 A 760, 28 Del 450

95. Ark—Rockafellow v Rockafellow, 93 SW 2d 321, 192 Ark 563

Tex—Scandurro v. Beto, Civ App, 234 SW 2d 695

68 C J p 679 note 99

#### Revocation by court

Devisee under the will, who was a subscribing witness, was not a competent witness unless she relinquished or court revoked her pecuniary interest under the will

Tex—Scandurro v Beto, supra.

96. NC—Allison v Allison, 11 NC 141

97. Pa—Haus v Palmer, 21 Pa 296, overruling In re Appeal of Search, 13 Pa 108

98 La—Succession of Guglielmo, 105 So 12, 158 La. 917.

*Part cut out of will* It has been held that a legatee and devisee under a paragraph cut out of a will is fully qualified to testify as to the contents of such paragraph after formally renouncing the interest<sup>99</sup>

#### d. Spouse or Relative of Beneficiary

While a husband or wife is not, at common law, a competent attesting witness of a will making the other a beneficiary, under various statutes modifying the rule the husband or wife of a beneficiary may be a competent witness. A relative of a beneficiary is not an incompetent witness.

At common law, under the rule that husband or wife shall not testify in a cause in which the other was interested, discussed in the CJS title Witnesses § 75, also 70 C J p 118 note 68-p 120 note 75, a husband or wife is not a competent attesting witness to a will making the other a beneficiary,<sup>1</sup> although it has been held in at least one jurisdiction that a statutory prohibition against a husband or wife testifying for or against the other in civil actions is not applicable to the probating of a will, which is a "special proceeding" rather than a "civil action."<sup>2</sup> So also, a wife is not a competent witness to a will making her husband a beneficiary where by statute the wife takes half of the estate of the husband of which he was seized during coverture on his death without issue, since she is by virtue of this statute "beneficially interested"<sup>3</sup> However, under various statutes modifying the common-law rule, or providing that a husband or

wife has no interest in property bequeathed to his or her spouse, a husband or wife is now a competent witness to a will by which his or her spouse is made a beneficiary,<sup>4</sup> but these statutes are not to be given a retroactive effect,<sup>5</sup> notwithstanding the language of the statutes, since such a construction would in effect be to recognize the power of the legislature to deprive persons of property rights without due process of law.<sup>6</sup>

The right of the spouse of an attesting or subscribing witness to take under a will is discussed supra § 103.

*Release or forfeiture of beneficiary's claim* It has been held that the husband or wife of a beneficiary in a will is not rendered competent by the release by the beneficiary of all rights under the will,<sup>7</sup> although the rule is otherwise in some jurisdictions.<sup>8</sup> So in some jurisdictions it is held that the incompetency of husband or wife as an attesting witness to a will by which his or her spouse is made a beneficiary is not removed by statutes which declare void beneficial legacies, devises, or other beneficial interests given by will to attesting witness, and render them competent attesting witnesses,<sup>9</sup> although in others the contrary view has been maintained<sup>10</sup>

*Relatives.* The fact that a relative of the attesting witness takes under the will does not render the witness incompetent,<sup>11</sup> particularly in a jurisdic-

99. N Y—In re Parker's Will, 165 N Y S 702, 100 Misc 219

At common law a legatee and devisee was competent to prove contents of paragraph cut out of will without renunciation of benefits N Y—In re Parker's Will, supra

1. U S—Caesar v Burgess, CCA Okl, 103 F2d 503

Kan—Corpus Juris cited in In re Williams' Estate, 150 P2d 336, 340, 158 Kan 734, opinion adhered to 123 P2d 906, 159 Kan 232 68 C J. p 679 note 4

2. Ark—Rockafellow v Rockafellow, 93 S W 2d 321, 192 Ark 563

3. Me—Appeal of Clark, 85 A. 517, 114 Me 105, Ann Cas 1917A 837

4. Cal—In re Hartman's Estate, 68 P 2d 744, 21 Cal App 2d 266

Ga—Bryant v Bryant, 51 S E 2d 797, 204 Ga. 747

Kan—In re Williams' Estate, 150 P 2d 336, 158 Kan 734, opinion adhered to 123 P2d 906, 159 Kan 232

Okl—Howard v Fields, 156 P 2d 139, 195 Okl 180

Tex—Corpus Juris cited in Krah v Lehmann, Civ App., 277 S W 2d 792, error granted

68 C J p 680 note 10.

#### Necessity of relinquishment by beneficiary

Motion that beneficiary of will be required to elect whether she would relinquish the devise and bequest to her and thus make her husband a competent attesting witness to will was properly overruled, since husband was a competent attesting witness

Kan—In re Williams' Estate, 150 P 2d 336, 158 Kan 734, opinion adhered to 123 P2d 906, 159 Kan 232

#### Where husband required to join as party

Where one of the witnesses to a will was the husband of one of the legatees thereunder, he was not an incompetent witness, even though the statute required him to be joined as a party in a will contest

Tex—Lehmann v Krah, Sup, 285 S W 2d 179

5. Ill—Rowlett v Moore, 96 NE 835, 252 Ill 436, Ann Cas 1912D 346

Vt—Giddings v. Turgeon, 4 A. 711, 58 Vt. 106.

6. Ill—Rowlett v Moore, 96 NE 835, 252 Ill 436, Ann Cas 1912D 346

68 C J p 681 note 12

7. U S—Caesar v Burgess, CCA Okl, 103 F2d 503

Ill—Fisher v Spence, 37 NE 314, 150 Ill 253, 41 Am SR 360

8 Ark—Rockafellow v Rockafellow, 93 S W 2d 321, 192 Ark 563

9. NH—Hodgman v Kittredge, 32 A 158, 67 NH 254, 68 Am SR. 661

68 C J p 680 note 8.

10. N Y—Jackson v. Durland, 2 Johns Cas 314

68 C J p 680 note 9

11. Mich—In re Ferguson's Estate, 295 NW 318, 295 Mich. 576

68 C J p 681 note 13

Mother of the principal beneficiary in a will was a competent attesting witness where mother was not a beneficiary, since it could not be said that the bequest to her son brought to her a direct and immediate "beneficial interest" under the will

Mich—In re Ferguson's Estate, 295 NW. 318, 295 Mich. 576.

tion in which an interest, such as would disqualify a witness in another type of proceeding, is held not to disqualify a subscribing witness to a will<sup>12</sup>

#### e. Spouse or Relative of Testator

The spouse of one making a will is not a competent witness to the will unless statute so provides; but the fact that one is related to the testator does not disqualify him as witness.

In accordance with the common-law rule that husbands and wives could not in any case be admitted as witnesses for or against each other independently of the question of interest,<sup>13</sup> the husband or wife of one making a will is not a competent witness to the will,<sup>14</sup> unless it is otherwise provided by statute<sup>15</sup> Also, in some jurisdictions, a spouse is disqualified from attesting the will of the other spouse, under a statute requiring credible witnesses not beneficially interested under the will<sup>16</sup>

*Relatives* In the absence of statute providing otherwise, the mere fact that one is related to the testator does not disqualify him from witnessing the will,<sup>17</sup> and his competency to attest the will is not affected by a statute defining rules of construction and providing that, "when a person is required to be disinterested or indifferent in a matter in which other persons are interested, a relationship to either of such persons by consanguinity or affinity within the sixth degree by the rules of the civil law or within the degree of second cousin inclusive, except by the written consent of the par-

ties, will disqualify"<sup>18</sup>

#### f. Executors and Persons Interested through Executors

In most jurisdictions, an executor not otherwise interested in a will is a competent attesting witness, and the competency of persons interested through the executor, such as a spouse, or in the case of a corporation or firm, a stockholder, director, or member, generally depends on the rule applicable to the executor

Subject to exceptions in some jurisdictions, as considered below, as a general rule, in most jurisdictions, an executor not otherwise interested in a will is a competent attesting witness.<sup>19</sup>

*Basis or theory of general rule.* In many of these jurisdictions the courts proceed on the theory that the office is a mere naked trust<sup>20</sup> More specifically, the rule is based on the theory that the executor takes no beneficial<sup>21</sup> or pecuniary,<sup>22</sup> legal, certain, immediate,<sup>23</sup> present,<sup>24</sup> direct,<sup>25</sup> and vested<sup>26</sup> interest under the will, such as is essential to disqualify him under the test discussed supra subdivision b of this section In addition, the basis of the rule is that the fact that compensation is allowed him by statute for his services is not such an interest as will disqualify him to attest the will,<sup>27</sup> because the benefits which accrue to him are derived not from the will but from the statute providing the compensation,<sup>28</sup> and because the right to commissions does not accrue until the performance of the services and does not take effect by relation to the time of attestation<sup>29</sup> Under this view, the

12 NY—In re George's Estate, 25 NYS 2d 333, 175 Misc 804

13 Mass—Pease v Allis, 110 Mass 157, 14 Am R 591

14 Mass—Pease v Allis, supra

*Evidence act* retains common-law disqualification of husband and wife to testify as witnesses for or against each other and renders either husband or wife unable to attest the other's will

Ill—In re Kent's Estate, 122 NE 2d 229, 4 Ill 2d 81

15 Ind—Pritchard v Pritchard, 177 NE 502, 93 Ind App 89  
68 CJ p 684 note 83

16 Me—Appeal of Richburg, 92 A 2d 724, 148 Me 323

17 Me—Jones v Larrabee, 47 Me 474  
68 CJ p 684 note 84

18 Me—Jones v Larrabee, supra  
68 CJ p 684 note 85

19 Cal—In re La Mont's Estate, 248 P 2d 1, 39 Cal 2d 566

Mich—In re Ferguson's Estate, 295 NW 318, 295 Mich 576

NH—Leonard v Stanton, 36 A 2d 271, 98 NH 113.

Va—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581—Salyers v Salyers, 45 SE 2d 481, 186 Va 927  
68 CJ p 681 note 17

#### Under English common law

Miss—Lloyd v Goodwin, 20 Miss 223  
68 CJ p 681 note 14

*Executor of nonintervention will* was not disqualified as attesting witness

Wash—In re Wiltzius' Estate, 253 P 2d 954, 42 Wash 2d 149

#### Executor with power of appointment

Where testator by paragraphs of will directed his executor to dispose of all his clothing and other personal articles and effects as executor in his sole discretion might deem best, and by subsequent paragraph gave executor full power to sell and in any way deal with property of estate during its administration, executor was given a power of appointment over such property, and consequently was a person beneficially interested in will and was not competent to be one of the three attesting witnesses to will

Me—Appeal of Richburg, 92 A 2d 724, 148 Me 323

20. Pa—Snyder v Bull, 17 Pa. 54

21 Mass—Lord v Miller, 178 NE 649, 277 Mass 308  
68 CJ p 681 note 19

22. Minn—Geraghty v Kilroy, 114 NW 838, 103 Minn 286

23 Minn—Geraghty v Kilroy, supra  
Miss—Rucker v Lambdin, 20 Miss 230

24 NH—Stewart v Harriman, 56 NH 25, 22 Am R 408

25 Ark—Fontaine v Fontaine, 277 SW 867, 169 Ark 1077

26 NH—Stewart v Harriman, 56 NH 25, 22 Am R 408

27. Mich—In re Ferguson's Estate, 295 NW 318, 295 Mich 576

Va—Salyers v Salyers, 45 SE 2d 481, 186 Va 927  
68 CJ p 681 note 26

28. Ark—Fontaine v Fontaine, 277 SW 867, 169 Ark 1077  
68 CJ p 682 note 27

29. Miss—Rucker v Lambdin, 20 Miss 230  
68 CJ p 682 note 28

rule is not changed by a statute providing that no person examined as a witness concerning the execution of a will shall after such examination receive any benefit from any appointment made to him by such will, since the word "appointment" necessarily refers to some appointment coupled with a beneficial interest<sup>30</sup>

In other jurisdictions, where the executor is held to be a competent attesting witness, the decisions are based on special statutory provisions which make parties who take an interest under a will competent witnesses to prove it,<sup>31</sup> or which make a person interested in the event of the suit, or matter to be determined, competent as a witness,<sup>32</sup> or which render the appointment of an executor void where he is also an attesting witness,<sup>33</sup> or which make all persons competent to attest a will except such as are excepted therein, executors not being named among the persons excepted<sup>34</sup>

*Executor held incompetent as attesting witness* In some jurisdictions the rule in respect of the competency of executors as attesting witnesses is not in accord with that heretofore stated, as where it is held that, by reason of the fact that the local statute provides for commissions for the executor, he has such a direct financial interest in the probate of the will as to disqualify him by reason of such interest<sup>35</sup> Under this view, the competency of an executor is placed in the same class as that of a legatee or devisee<sup>36</sup> Nevertheless, by provisions of another local statute, he may be compelled, if his testimony is needed, to resign his executorship and testify as to the execution of the will<sup>37</sup>

*Nature of estate as real or personal* In some jurisdictions it has been held that an executor is com-

petent to attest a will of real estate,<sup>38</sup> but not a will of personal estate because the statutes of these states give an executor commissions on the personality;<sup>39</sup> and it has further been held that the competency of the executor is not restored by the Statute of 25 George II c 6 in force in one of these states because the statute has no application to wills of personal property<sup>40</sup> In accordance with principles considered supra subdivision a of this section, he is not a competent witness although he renounces his executorship,<sup>41</sup> or releases all right to commissions<sup>42</sup>

*Wives of executors* In jurisdictions where an executor is a competent witness to a will, the wife of an executor is a competent witness<sup>43</sup> However, in jurisdictions where the executor is not a competent witness, neither is his wife,<sup>44</sup> nor is she rendered competent by the renunciation by her husband of the trust<sup>45</sup>

*Stockholder, officer, director, or member of firms or corporations appointed executors* In jurisdictions where executors are held competent as attesting witnesses, a stockholder,<sup>46</sup> or a stockholder and director,<sup>47</sup> or officer,<sup>48</sup> of a corporation appointed executor is also a competent witness to the will

On the other hand, in jurisdictions where an executor is not a competent attesting witness, a stockholder of a corporation appointed executor of a will,<sup>49</sup> or an officer thereof,<sup>50</sup> is not a competent attesting witness, although like executors, he may be compelled to testify to a will in which event the appointment as executor will be void<sup>51</sup> Where executors were members of a firm to which an attesting witness belonged and they agreed that all fees earned by any member of the firm in any trust

30. Ark—Fontaine v Fontaine, 277 SW 867, 169 Ark 1077

31. Md—Estep v Morris, 38 Md 417

32. Del—In re Spiegelhalter's Will, 39 A 465, 17 Del 5  
In re Lecarpentier's Will, 91 A 204, 10 Del Ch 503

33. Mo—Murphy v Murphy, 24 Mo 526

34. Ga—Baker v Bancroft, 5 SE 46, 79 Ga 672

La—Davenport v Davenport, 41 So 240, 116 La 1009, 114 Am SR 575

35. Ill—Lawndale Nat Bank of Chicago v Kaspar Am State Bank, 6 NE 2d 670, 288 Ill App 555  
68 CJ p 682 note 34

36. Ill—Fearn v Postlethwaite, 88 NE 1057, 240 Ill 626

37. Ill—Fearn v Postlethwaite, su-

pra—Jones v Grieser, 87 NE 295, 238 Ill 183, 15 Ann Cas 787

38. NC—Tucker v Tucker, 27 NC 161

68 CJ p 682 note 37

39. NC—Gunter v Gunter, 48 NC 441

68 CJ p 682 note 38

40. SC—Workman v Dominick, 34 SCL 589—Taylor v Taylor, 30 SCL 531

41. NC—Gunter v Gunter, 48 NC 441

68 CJ p 682 note 41

42. NC—Gunter v Gunter, supra  
68 CJ p 682 note 42

43. Mich—In re Ferguson's Estate, 295 NW 318, 295 Mich 576

68 CJ p 683 note 58

44. Ill—Rowlett v Moore, 96 NE 835, 252 Ill 436, Ann Cas 1912D

346—Fearn v Postlethwaite, 88 NE 1057, 240 Ill 626

45. Ill—Rowlett v Moore, 96 NE 835, 252 Ill 436, Ann Cas 1912D 346

NC—Hue v McConnell, 47 NC 455

46. Pa—In re Baughman's Estate, 126 A 53, 281 Pa 23  
68 CJ p 682 note 44

47. Pa—In re Archambault's Estate, 162 A 801, 308 Pa 549

48. Del—In re Lecarpentier's Will, 91 A 204, 10 Del Ch 503

49. Ill—Olson v Larson, 153 NE 337, 320 Ill 50—Scott v O'Connor-Couch, 111 NE 272, 270 Ill 395, L R A 1916D 179.

50. Ill—Boyd v McConnell, 70 NE 649, 209 Ill 396

51. Ill—Olson v Larson, 153 NE 337, 320 Ill 50.

relation should accrue to the firm, such witness was disqualified by interest to attest the will,<sup>52</sup> nor would his subsequent release of all interest in the office of the executor in managing the estate qualify him so as to sustain the will,<sup>53</sup> since so far as pecuniary interest is concerned, it is the same as that of an executor<sup>54</sup>

*Employees of executors* The fact that the witnesses to a will were employed by the executor does not render them incompetent or alter their position as credible witnesses required by the statute<sup>55</sup> Thus, an employee of a corporation is a disinterested witness to the execution of a will, in which the corporation was named as executor of a fund, the income of which was bequeathed to charity,<sup>56</sup> and even assuming that an executor had a disqualifying interest by reason of some discretionary powers exercisable under the terms of the will, employees of the executor would be competent attesting witnesses, since their interest as such would be in no sense proprietary and would be too indefinite, uncertain, remote, and contingent to affect their competency as witnesses<sup>57</sup>

*Attorney for executor* The fact that one of the attesting witnesses is employed as an attorney for the executor and trustee does not affect his competency<sup>58</sup>

#### g. Trustees and Persons Interested through Trustees

In most jurisdictions a trustee named by the will, who has no further interest than compensation for acting as such, is a competent attesting witness, and the competency of stockholders, officers, and directors of a corporate trustee depends on the rule applicable to the trustee.

As in the case of executors, taking no interest under the will, discussed supra subdivision f of this section, it is the general rule, subject to exceptions in some jurisdictions,<sup>59</sup> that a trustee named by the will, who takes no beneficial interest under it, is a competent attesting witness,<sup>60</sup> and that a trustee who has no further interest than compensation for acting as such is not thereby rendered incompetent to act as an attesting witness<sup>61</sup>

*Particular interest of trustee* In accordance with the principles governing the determination of what constitutes interest, discussed supra subdivision b of this section, a trustee is not an interested witness where, by provisions of the will creating the trust, the trustee is to pay over dividends on certain stock only on performance by the beneficiary of designated conditions,<sup>62</sup> because the interest which disqualifies a witness from attesting the will must be a present, certain, and vested one, not uncertain, remote, or contingent<sup>63</sup> On the other hand, a trustee is not "disinterested" where the powers given him are not the usual duties imposed on a trustee, but he is given unlimited discretion to allot the income among such charities as to him may seem wise.<sup>64</sup>

*Stockholders, directors, and officers* Where a trustee is regarded as a competent witness, a stockholder in a corporation named as trustee,<sup>65</sup> or a stockholder and director therein,<sup>66</sup> or a stockholder and officer,<sup>67</sup> or a stockholder, treasurer, and trust officer,<sup>68</sup> is a competent witness, but where the interest of a corporate trustee is such that it would not be regarded as a competent witness, neither its managers or officers, nor its stockholders will be regarded as competent attesting witnesses,<sup>69</sup> the same

52. Ill—Smith v Goodell, 101 NE 255, 258 Ill 145

53. Ill—Smith v Goodell, supra

54. Ill—Smith v Goodell, supra

55. Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

56. Pa—In re Jeanes' Estate, 77 A 824, 228 Pa 537

57. Cal—In re Haupt's Estate, 252 P 597, 200 Cal 147

58. Wyo—In re Lane's Estate, 58 P 2d 415, 50 Wyo 119, rehearing denied 60 P 2d 360, 50 Wyo 119

**Appointment directed by will; compensation**

Attorney who drew will and was an attesting witness was not incompetent to testify to its execution, although will directed that he be appointed attorney for executor, but would be precluded from receiving any financial remuneration under the will.

Ill—In re Cohen's Estate, 279 Ill App 605

59. Ill—Lawndale Nat Bank of Chicago v Kaspar Am State Bank, 6 NE 2d 670, 288 Ill App 555

**Appointment of trustee invalidated**

Where testator gives all his estate to a bank in trust, will is not void because stockholders of bank are only attesting witnesses, but provision appointing the bank as trustee is void, and inasmuch as the court will not permit a trust to fail for want of a trustee, a competent trustee should be appointed, as well as an administrator de bonis non

Ill—Lawndale Nat Bank of Chicago v Kaspar Am State Bank, supra

60. NH—Leonard v Stanton, 36 A 2d 271, 93 NH 113

68 CJ p 683 note 62

61. NJ—Corpus Juris cited in In re Rogers' Estate, 83 A 2d 268, 277, 15 NJ Super 189

68 CJ p 683 note 63

62. Pa—In re Jeanes' Estate, 77 A 824, 228 Pa 537

63. Pa—In re Jeanes' Estate, supra

64. Pa—In re Palethorp's Estate, 94 A 1066, 249 Pa 411—In re Palethorp's Estate, 94 A 1060, 249 Pa 389

65. Mass—Rockland Trust Co v Bixby, 142 NE 107, 247 Mass 449

Pa—In re Baughman's Estate, 126 A 58, 281 Pa 23

66. Pa—In re Archambault's Estate, 162 A 801, 308 Pa 549

67. Pa—In re Jeanes' Estate, 77 A 824, 228 Pa 537

Tex—Moos v First State Bank of Uvalde, Civ App, 60 SW 2d 888

68. Pa—In re Gageby's Estate, 141 A 842, 293 Pa 109

69. Pa—In re Palethorp's Estate, 94 A 1066, 249 Pa 411—In re



test of disinterestedness being applicable to both trustees and stockholders of trustees<sup>70</sup>

*Employees.* An employee of a corporation named as trustee for a charity by the will providing therefor is a competent attesting witness as having no substantial or legal interest therein,<sup>71</sup> and it is immaterial that the will provides a stated compensation for the trustee.<sup>72</sup>

#### b. Persons Interested through Corporate Beneficiaries

- (1) In general
- (2) Persons interested through municipal beneficiaries
- (3) Persons interested through charitable or religious associations

##### (1) In General

Employees of a corporation which is a beneficiary under a will are not incompetent as attesting witnesses.

In accordance with the rules governing the determination of what constitutes interest with respect to the competence of an attesting witness, discussed supra subdivision b of this section, it has been held that the employees of a corporation which is a beneficiary under the will are not incompetent as attesting witnesses,<sup>73</sup> since their interest in the will is not sufficiently present, certain, definite, and vested<sup>74</sup>

##### (2) Persons Interested through Municipal Beneficiaries

Generally residents and taxpayers of a municipal corporation are competent attesting witnesses to a will making a devise or bequest to the municipality.

While there is some authority to the contrary,<sup>75</sup> it is very generally held that an inhabitant or taxpayer of a municipal corporation is a competent witness to a will making a devise or bequest to

such municipality for charitable, religious, or educational purposes<sup>76</sup> The interest of the taxpayer in the gift it has been said is not certain and direct,<sup>77</sup> and vested,<sup>78</sup> but is so contingent and remote that it does not disqualify him as a witness<sup>79</sup>

#### (3) Persons Interested through Charitable or Religious Associations

Subject to some exceptions, membership or similar interest in an educational, religious, or charitable corporation or association does not ordinarily disqualify one from acting as attesting witness to a will making a gift to such corporation or society

Membership in an educational, religious, or charitable corporation or association is not ordinarily held to disqualify the member from acting as witness to a will making a gift to such corporation or society to be applied to the uses for which it was organized,<sup>80</sup> and it has been held that the fact that the member may have a contingent interest in the property thereof on its possible dissolution does not affect the rule<sup>81</sup> At most the fact of membership goes only to the credibility of the witness<sup>82</sup> The interest of such witness, it is said, is not a present, direct, certain, and vested pecuniary interest,<sup>83</sup> which, as appears supra subdivision b of this section, is necessary for the purpose of disqualifying an attesting witness

Under statutes which render void devises or legacies to witnesses to wills and make a devisee or legatee a competent witness to the will, discussed supra subdivision c of this section, a bequest to a religious institution is not rendered invalid because it was attested by a priest who received a bequest for the saying of masses for the testator<sup>84</sup>

*Statutes expressly relating to religious or charitable gifts.* It has been held under a statute requiring a will making a bequest or devise to any body politic or to any person in trust for religious or

Palethorp's Estate, 94 A. 1060, 249 Pa 389

70 Pa.—In re Baughman's Estate, 126 A 58, 281 Pa 23  
68 C J p 683 note 73

71. Pa.—In re Carson's Estate, 90 A 719, 244 Pa. 401—In re Jeanes' Estate, 77 A. 824, 228 Pa. 537

72. Pa.—In re Carson's Estate, 90 A 719, 244 Pa. 401

73. Colo.—In re Ainsworth's Estate, 79 P 2d 1045, 102 Colo 392

74. Colo.—In re Ainsworth's Estate, supra

#### Occasional receipt of bonuses

Corporation's employees, who had from time to time received a bonus from corporation financial condition of which would be improved by will

which canceled a mortgage debt from corporation to testatrix, did not have such a "present, certain and definite" interest as would disqualify them as attesting witnesses and thus void the will, which voidance would result because of insufficient attestation  
Colo.—In re Ainsworth's Estate, supra

75. Conn.—Starr v Starr, 2 Root 303  
68 C J p 684 note 86

76. Mass.—Hitchcock v Shaw, 35 N E 671, 160 Mass 140  
68 C J p 684 note 87

77. Vt.—In re Potter's Will, 95 A. 646, 89 Vt 361  
68 C J p 684 note 88.

78. Vt.—In re Potter's Will, supra.

79 Mass.—Hitchcock v Shaw, 35 N E 671, 160 Mass 140

80 Mass.—Rockland Trust Co v Bixby, 142 N E 107, 247 Mass 449  
68 C J p 684 note 91

81. Iowa.—Quinn v Shields, 17 N W 437, 62 Iowa 129, 49 Am R 141

82. Ga.—Jones v. Habersham, 63 Ga 146

83 Mass.—Rockland Trust Co v Bixby, 142 N E 107, 247 Mass. 449  
68 C J. p 685 note 94

84. Ky.—Clark v Johnson, 105 S W. 2d 576, 268 Ky 591.

charitable uses to be attested by two credible, and at the same time, disinterested, witnesses, that one who at the time of attesting the will had an interest in a charitable or religious institution to be benefited by the will is not a competent attesting witness,<sup>85</sup> and, while the disqualifying interest must be certain,<sup>86</sup> it is not essential that such interest be a matter of personal benefit to the witness in order to disqualify him.<sup>87</sup> Such a statute disqualifies those who have charge of, and are responsible for, the business and financial affairs of the institution.<sup>88</sup> However, a member of an advisory board provided for by the will to assist the trustee named therein in managing the charity provided for is a competent attesting witness,<sup>89</sup> as is also a lay member of a church who can do nothing which will divert the church property from the uses with which it is impressed, although he is a member with the right to vote in the conduct of its affairs,<sup>90</sup> and a ruling elder of a church whose duties in connection with the church were limited to matters of doctrine and discipline, and who had no voice in the management of the church property,<sup>91</sup> and, since it is essential, in order to disqualify an attesting witness, that his incompetency should have existed at the time of the execution of the will, as appears *supra* subdivision a of this section, one who was not a director at the time of attesting the will, because the charity provided for was not then incorporated, is a competent attesting witness.<sup>92</sup>

In accordance with principles governing the determination of interest, considered *supra* subdivision b of this section, a witness is not disqualified by reason of interest in the charity where such interest is remote, uncertain, and contingent, and not a vested, certain, and present one.<sup>93</sup> Hence, one who does not possess but merely has a capacity of obtaining the legal right to share in the benefits of a charitable bequest is a competent attesting wit-

ness.<sup>94</sup> It has also been held that one is a competent witness to a will who contributes to a charity for which the will provides a legacy,<sup>95</sup> or who as a matter of public spirit or public interest was captain of a team to collect funds for a charitable corporation to which a bequest was made,<sup>96</sup> or who took a general friendly interest therein,<sup>97</sup> and that an employee of a charitable institution to which property has been bequeathed is a competent witness to the will.<sup>98</sup>

Formerly, a charitable bequest in a will was defeated where one of the attesting witnesses was a legatee under the will, although not interested in the charitable gift,<sup>99</sup> the view being taken that an interest in any part of the will is such as will disqualify the witness for the purpose of attestation.<sup>1</sup> However, by an amendment of the statute defining a disinterested witness as one "not interested in such religious or charitable use," and providing that the act is not intended to apply to a witness interested in some other devise, bequest, or gift in the same instrument, the fact that one of the attesting witnesses was interested in certain of the charities provided for by the will does not vitiate bequests to charities in which the witness was not interested.<sup>2</sup> This amendment, however, has no retroactive effect.<sup>3</sup>

*Guarantor of mortgage* It has been held that, where a bequest is made to a church on condition that it be applied to the reduction of a mortgage on the church property, a guarantor of the mortgage note by reason of direct pecuniary interest is not a competent witness to the will,<sup>4</sup> although the amount due on the note is small and greatly exceeded by the value of the mortgaged property.<sup>5</sup>

### 1. Other Interested Persons

Competency as an attesting witness has been adjudicated with respect to the devisee of a power of sale, the guardian of a beneficiary under the will, and heirs at law.

The competency of a witness to subscribe a will

85. Pa.—In re Crozer's Estate, 145 A 697, 296 Pa 48  
68 C.J. p 685 note 96

86. Pa.—In re Crozer's Estate, 145 A 697, 296 Pa 48

87. Pa.—In re Crozer's Estate, *supra*  
68 C.J. p 685 note 98

88. Pa.—In re Crozer's Estate, *supra*  
68 C.J. p 685 note 99

89. Pa.—In re Johnson's Estate, 94 A 1082, 249 Pa 339  
68 C.J. p 685 note 1

90. Pa.—In re Aiken's Estate, 153 A 190, 103 Pa Super 279  
68 C.J. p 685 note 2.

91. Pa.—In re Darlington's Estate, 137 A 268, 289 Pa 297

92. Pa.—In re Gageby's Estate, 141 A 842, 293 Pa 109

93. Pa.—In re Ralston's Estate, 139 A 129, 290 Pa 374—In re Chan-non's Estate, 109 A 756, 266 Pa 417.

94. Pa.—In re Ralston's Estate, 139 A 129, 290 Pa 374  
68 C.J. p 685 note 8

95. Pa.—In re Evans' Estate, 29 Pa Co 282

96. Pa.—In re Kisner's Estate, 99 A 168, 254 Pa 597  
68 C.J. p 685 note 10.

97. Pa.—In re Kisner's Estate, *supra*

98. Pa.—Appeal of Combs, 105 Pa 155

99. Pa.—In re Arnold's Estate, 94 A 1076, 249 Pa 348  
68 C.J. p 686 note 13

1. Pa.—In re Kessler's Estate, 70 A 770, 221 Pa 314, 128 Am SR 741, 15 Ann Cas 791

2. Pa.—In re Palethorp's Estate, 94 A 1066, 249 Pa 411—In re Leech's Estate, 84 A 594, 236 Pa 57

3. Pa.—In re Leech's Estate, *supra*

4. Mass.—Crowell v Tuttle, 105 N E 980, 218 Mass. 445

5. Mass.—Crowell v. Tuttle, *supra*.

has been adjudicated with respect to various persons interested or connected with the will or the estate in some way <sup>6</sup>

**Guardians** There is some diversity of opinion on the question of whether a guardian of a beneficiary under a will is a competent attesting witness to the will. Thus, it has been held that he has no such interest under the will as will disqualify him,<sup>7</sup> and the competency of a guardian as an attesting witness has been upheld under a statute removing incompetency of interested witnesses.<sup>8</sup> On the other hand, it was held without discussion or statement of reasons in a memorandum decision of a federal court that a guardian is not a competent attesting witness to a will.<sup>9</sup>

**Heirs** An heir at law of a testator, who is disinherited by the will either in whole or in part, is a competent witness to attest the will,<sup>10</sup> because the interest which will disqualify a witness is a beneficial interest,<sup>11</sup> and because it is against the interest of the heir, in these circumstances, to support the will.<sup>12</sup> There is also authority to the effect that an heir is a competent witness to the will as having at the time of attestation no interest in the lands devised because the testator could have alienated the land and might have married and had issue, which would have destroyed any possibility which the witness had of inheriting the lands.<sup>13</sup>

#### 6. Devisees of powers

A devise to one of a power to sell land does not give him such an interest in the land as disqualifies him from being an attesting witness to the will.

NC—Tucker v Tucker, 27 NC 161

7. Me—Appeal of Look, 152 A 84, 129 Me 359

68 CJ p 686 note 77

8. Md—Estep v Morris, 38 Md 417

9. US—Williams v Wells, CCDC, 29 FCas No 17,746, 1 Hayw & H 116

10. Wis—In re Hoppe's Will, 78 N W 183, 102 Wis 54

68 CJ p 686 note 19

11. Wis—In re Hoppe's Will, supra 68 CJ p 686 note 20

12. W Va—Coffman v Hedrick, 9 S E 65, 32 W Va 119

68 CJ p 686 note 21

13. NC—Old v Old, 15 NC 500

14. Me—Patten v Tallman, 27 Me 17

68 CJ p 686 note 23.

15. Me—Patten v Tallman, supra

16. Me—Patten v. Tallman, supra

#### j. Judicial and Administrative Officers; Attorneys

A probate judge may be an attesting witness, as may officers who executed acknowledgments of the signature of the testator or the witnesses, and attorneys of the testator or one who drew his will.

A judge of probate is a competent attesting witness to a will,<sup>14</sup> and his act in attesting the will does not divest him of jurisdiction of proceedings for the probate thereof,<sup>15</sup> even conceding his incapacity to testify when the will is presented for probate before himself.<sup>16</sup>

A register of wills is competent to testify as an attesting witness to a will, although disqualified by organic law to probate it, and he may testify as an attesting witness to the probate of the will in another tribunal having jurisdiction.<sup>17</sup>

Officers who executed acknowledgments of the signature of the testator or the witnesses,<sup>18</sup> such as a justice of the peace,<sup>19</sup> notary public,<sup>20</sup> a county clerk,<sup>21</sup> a sindaco,<sup>22</sup> or a member of the board of supervisors,<sup>23</sup> are competent attesting witnesses. As appears infra § 191 b, the fact that a justice or notary took the acknowledgment of the testator and signed in his official capacity does not affect the validity of his signature as a witness to the will.

An attorney employed and acting as the legal adviser of the testator,<sup>24</sup> or who drew the will under his instructions,<sup>25</sup> is a competent attesting witness.

17. Del—In re Lecarpentier's Will, 91 A 204, 10 Del Ch 503

18. Iowa—Hull v Hull, 89 NW 979, 117 Iowa 738

Miss—Murray v Murphy, 39 Miss 214

19. NH—In re Amor's Estate, 112 A 2d 665

68 CJ p 686 note 28

20. Tenn—Ragsdale v Hill, 269 S W 2d 911, 37 Tenn App 671, applying Mississippi law.

Va—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581

68 CJ p 686 note 29

21. Tex—Franks v. Chapman, 64 Tex 159

22. US—Adams v De Cook, CC Cal, 1 FCas No 51, McAll 253, affirmed 23 How 353, 16 LEd 539

Cal—Tevis v Pitcher, 10 Cal 465

23. Miss—Bolton v Bolton, 64 So 967, 107 Miss 84

24. Wyo—In re Lane's Estate, 58 P 2d 415, 50 Wyo 119, rehearing denied 60 P 2d 360, 50 Wyo 119

68 CJ p 686 note 34

25. Ala—Schieffelin v Schieffelin, 28 So 687, 127 Ala 14

Ill—In re Cohen's Estate, 279 Ill App 605

Or—In re Andersen's Estate, 235 P 2d 869, 192 Or 441—In re Meiers Estate, 224 P 2d 572, 190 Or 140

Wash—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258

**Attorney acting through interpreter**

Attorney who did not understand Polish, and who drafted will, through the help of an interpreter for a woman who spoke only Polish, was authorized under statute to attest the will.

Wis—In re Zych's Will, 28 NW 2d 316, 251 Wis 108

**Attorney and executor**

Will was not invalid because attorney who drew up will and who was named as an executor and trustee therein was one of subscribing witnesses.

NH—Leonard v Stanton, 36 A 2d 271, 93 NH 113.

**Wife of attorney and executor**

The wife of the attorney who prepared a will and was nominated executor therein was a competent attesting witness.

Mich—In re Ferguson's Estate, 295 NW. 318, 295 Mich. 576.

The competency of an attorney for the executor is considered *supra* subdivision f of this section

*One who writes the testator's name at his request is a competent witness*<sup>26</sup>

## § 186. — Request of Testator for Attestation and Subscription

- a Necessity
- b Requisites and sufficiency

### a. Necessity

As a general rule, attestation and subscription by witnesses is required to be at the request of the testator.

It is a rule of general application that attestation and subscription by witnesses shall be at the request of the testator,<sup>27</sup> and this is so both under statutes containing an express requirement to that effect,<sup>28</sup> and under statutes which contain no such requirement, but which provide for "attestation" or "attestation and subscription" in the presence of the testator,<sup>29</sup> or that the will shall be "witnessed" by two competent persons<sup>30</sup> However, it has been held in some jurisdictions not containing an express statutory requirement to that effect, that a will does not fail merely because it

was subscribed by the witness voluntarily, rather than at the request of the testator<sup>31</sup>

The object of the statutory requirement is that an officious signing by witnesses, without any privity of the testator, should not be recognized as sufficient<sup>32</sup>

### b. Requisites and Sufficiency

- (1) In general
- (2) Request by third person

#### (1) In General

It is not necessary that the request be formal or that it be made at any particular time, nor need it be expressly made, it being sufficient that a request may be implied from the conduct of the testator or the circumstances attending the transaction

To satisfy the requirement that attestation and subscription by witnesses shall be at the request of the testator, no formal or particular form of request is necessary,<sup>33</sup> it being immaterial how the request is conveyed to the witnesses as long as it appears that there was such a request,<sup>34</sup> and that it was the free and intelligent act of the testator<sup>35</sup> Moreover, it is not essential that an express request be made, but it will be sufficient that it may be implied,<sup>36</sup> and it may be implied from the acts

26 SC—*Dx parte Leonard*, 18 SE 216, 39 SC 518, 22 LRA 302  
68 CJ p 686 note 36

27 Iowa—*Burgan v Kinnick*, 281 NW 734, 225 Iowa 804

Mont—*Miller v Talbott*, 139 P 2d 502, 115 Mont 1

Tenn—*Howell v Brown*, 7 Tenn App 380

Nuncupative wills see *infra* § 215

28 Ark—*Hendry v Wilson*, 151 S W 2d 683, 202 Ark 580

Cal—*In re Jiantos' Estate*, 228 P 2d 60, 102 Cal App 2d 736

NY—*In re Rothstein's Will*, 112 N YS 2d 716

ND—*Collins v Stroup*, 3 NW 2d 742, 71 ND 679

Okl—*In re Atohka's Estate*, 282 P 2d 737—*In re Sawyer's Estate*, 209 P 2d 864, 202 Okl 21—*In re Jones' Estate (Choctaw 7012)*, 121 P 2d 574, 190 Okl 123—*In re Belmore's Estate*, 113 P 2d 817, 189 Okl 86

68 CJ p 687 note 39

29 Ill—*In re Calo's Estate*, 115 N E 2d 778, 1 Ill 2d 376

NC—*In re Kelly's Will*, 174 SE 453, 206 NC 551.

#### Mandatory provision

Statute requiring that will must be signed by two witnesses at request of testator is mandatory and must be complied with to give validity to will and entitle it to probate  
Ark—*Graves v Bowles*, 101 SW 2d 176, 193 Ark 546

29. Ill—*In re Calo's Estate*, 115 N E 2d 778, 1 Ill 2d 376

NC—*In re Kelly's Will*, 174 SE 453, 206 NC 551.

Or—*In re Christofferson's Estate*, 190 P 2d 928, 183 Or 75

Tenn—*Miller v Thrasher*, 251 SW 2d 446, 36 Tenn App 88

68 CJ p 687 note 40

30. Iowa—*In re Droge's Will*, 249 NW 209, 216 Iowa 331

31 Mich—*In re Cosgrove's Estate*, 287 NW 456, 290 Mich 258, 125 ALR 410

32 NY—*Gilbert v Knox*, 53 NY 125—*Peck v Cary*, 27 NY 9, 84 Am D 220

33 Ala—*Fulks v Green*, 20 So 2d 787, 246 Ala 392

Iowa—*Corpus Juris cited in* *In re Klein's Estate*, 42 NW 2d 593, 596, 241 Iowa 1103—*Burgan v Kinnick*, 281 NW 734, 225 Iowa 804

NY—*In re Weil's Will*, 52 NYS 2d 375

Okl—*In re Atohka's Estate*, 282 P 2d 737—*In re Sawyer's Estate*, 209 P 2d 864, 202 Okl 21—*In re Jones' Estate (Choctaw 7012)*, 121 P 2d 574, 190 Okl 123—*In re Belmore's Estate*, 113 P 2d 817, 189 Okl 86

Tenn—*Condry v Coffey*, 12 Tenn App 1—*Howell v Brown*, 7 Tenn App 380

68 CJ p 687 note 43

"If a formal request

was necessary to be proved, in all cases, and the witnesses were required to recollect the fact, so far

as to be able to swear to it after any considerable lapse of time, not

one will in ten would be adjudged to be valid"

NY—*Nelson v McGiffert*, 3 Barb Ch 158, 163, 49 Am D 170

#### Failure to use word "witness"

Fact that testator, when requesting one who witnessed execution of will to sign same, failed to use the word "witness" in requesting signature, or that testator may have been under mistaken belief that witness who is also named as executor, must sign will, did not preclude existence of sufficient authentication, since no proof of any specific intent on part of testator with respect to particular capacity in which witness signed is necessary if formalities have been observed by witness

Cal—*In re La Mont's Estate*, 248 P 2d 1, 39 Cal 2d 566

34. Tenn—*Condry v. Coffey*, 12 Tenn App 1

35. Ark—*Payne v. Payne*, 16 SW 1, 54 Ark 415

68 CJ p 687 note 44

36 Ala—*Fulks v. Green*, 20 So 2d 787, 246 Ala 392

Cal—*In re Gray's Estate*, 201 P 2d 392, 89 Cal App 2d 478—*In re Emden's Estate*, 196 P 2d 627, 87 Cal App 2d 115—*In re Gray's Estate*, 171 P 2d 113, 75 Cal App 2d 386—*In re Norswing's Estate*, 118 P 2d 858, 47 Cal App 2d 730

Del—*In re Kemp's Will*, 186 A 890, 7 W W Harr 514.

or conduct of the testator,<sup>37</sup> and from the facts and circumstances attending the transaction<sup>38</sup>

In accordance with the above rules, the requirement that the testator must have requested the witnesses to sign has been held to have been satisfied by his asking that the witnesses be sent for to attest the execution of the will,<sup>39</sup> by their signing the will in his presence and with his knowledge and without objection on his part,<sup>40</sup> especially when the testator knew that the witnesses were present for that purpose,<sup>41</sup> or is shown to have been seeking witnesses to attest his will,<sup>42</sup> by affirmative response by word or act to a question as to

whether the testator wanted the will attested,<sup>43</sup> by the reading of the attestation clause in the testator's presence after signing by the witnesses,<sup>44</sup> or by any other act or conduct on the part of the testator, or other evidence which would show that the testator had knowledge of the attestation and consented thereto or acquiesced therein.<sup>45</sup> However, the mere physical presence of the testator during the signing by the witnesses is not of itself necessarily a compliance with the statutory requirement.<sup>46</sup>

*Single request to attest execution and publication.* Although the request to witness the execution and

Fla.—Gair v Lockhart, 45 So 2d 193  
Iowa—**Corpus Juris** cited in In re Klein's Estate, 42 NW 2d 593, 596, 241 Iowa 1103

Mo—Look v French, 144 SW 2d 128, 346 Mo 972

Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

NY—In re Mullenhoff's Will, 105 NYS 2d 675, 278 App Div 963  
In re Weil's Will, 52 NYS 2d 375

NC—In re Kelly's Will, 174 SE 453, 206 NC 551

Okl—In re Atohka's Estate, 282 P 2d 737—In re Sawyer's Estate, 209 P 2d 864, 202 Okl 21—In re Jones' Estate (Choctaw 7012), 121 P 2d 574, 190 Okl 123—In re Belmore's Estate, 113 P 2d 817, 189 Okl 86

SD—**Corpus Juris** cited in In re Ryan's Estate, 53 NW 2d 11, 12, 74 SD 359

Tenn—Miller v Thrasher, 251 SW 2d 446, 36 Tenn App 88—Howell v Brown, 7 Tenn App 380

Wis—In re Wnuk's Will, 41 NW 2d 294, 256 Wis 360  
68 CJ p 687 note 46

37. Cal—In re Gray's Estate, 201 P 2d 392, 89 Cal App 2d 478—In re Emden's Estate, 196 P 2d 627, 87 Cal App 2d 115—In re Gray's Estate, 171 P 2d 113, 75 Cal App 2d 386—In re Norswing's Estate, 118 P 2d 858, 47 Cal App 2d 730

Del—In re Kemp's Will, 186 A 890, 7 WW Harr 514

Iowa—**Corpus Juris** cited in In re Klein's Estate, 42 NW 2d 593, 596, 241 Iowa 1103

Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

NY—In re Mullenhoff's Will, 105 NYS 2d 675, 278 App Div 963

NC—In re Kelly's Will, 174 SE 453, 206 NC 551

Okl—In re Atohka's Estate, 282 P 2d 737—In re Sawyer's Estate, 209 P 2d 864, 202 Okl 21—In re Jones' Estate (Choctaw 7012), 121 P 2d 574, 190 Okl 123—In re Belmore's Estate, 113 P 2d 817, 189 Okl 86

SD—**Corpus Juris** cited in In re Ryan's Estate, 53 NW 2d 11, 12, 74 SD 359.

Tenn—Miller v Thrasher, 251 SW 2d 446, 36 Tenn App 88—Howell v Brown, 7 Tenn App 380

Wash—In re Chambers' Estate, 60 P 2d 41, 187 Wash 417  
68 CJ p 687 note 47

#### Request for preparation of will

Request of patient in bed in treatment room in physician's clinic that physician prepare will carried with it an implied request for an attestation

Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36

#### Handing pen to witness

Request to sign will may be implied where it was shown that testator having signed will himself handed pen to witness signing first, which witness, after having signed, handed pen to the other witness  
Or—In re Davis' Will, 142 P 2d 143, 172 Or 354

38. Cal—In re La Mont's Estate, 248 P 2d 1, 39 Cal 2d 566

Iowa—**Corpus Juris** cited in In re Klein's Estate, 42 NW 2d 593, 596, 241 Iowa 1103

Mo—Look v French, 144 SW 2d 128, 346 Mo 972

NY—In re Mullenhoff's Will, 105 NYS 2d 675, 278 App Div 963

NC—In re Kelly's Will, 174 SE 453, 206 NC 551

Tenn—Miller v Thrasher, 251 SW 2d 446, 36 Tenn App 88—Howell v Brown, 7 Tenn App 380

Wis—In re Lagershausen's Estate, 272 NW 469, 224 Wis 479  
68 CJ p 688 note 48

#### Facts held to show sufficient request

Facts that will provided for three witnesses and contained usual form of attestation clause, that testator's wife signed in his presence, and that testator retained possession of will were sufficient to establish that wife signed as a witness at testator's request, even though she testified testator did not expressly request her to sign as a witness

NY—In re Weil's Will, 52 NYS 2d 375

39. Ark—Rogers v. Diamond, 13 Ark 474

Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

40. Ala—Johnston v King, 35 So. 2d 202, 250 Ala 571—Fulks v. Green, 20 So 2d 787, 246 Ala 392

Del—In re Kemp's Will, 186 A 890, 7 WW Harr 514

Iowa—**Corpus Juris** cited in In re Klein's Estate, 42 NW 2d 593, 596, 241 Iowa 1103—In re Mathews' Estate, 12 NW 2d 162, 234 Iowa 188  
—Burgan v Kinnick, 281 NW 734, 225 Iowa 804

Ky—Tahaferro v King, 279 SW 2d 793

Mo—Look v French, 144 SW 2d 128, 346 Mo 972

NY—In re Mullenhoff's Will, 105 NYS 2d 675, 278 App Div 963

Or—In re Meier's Estate, 224 P 2d 572, 190 Or 140

Tenn—Hickey v Beeler, 171 SW 2d 277, 180 Tenn 31

Wis—In re Wnuk's Will, 41 NW 2d 294, 256 Wis 360—In re Lagershausen's Estate, 272 NW 469, 224 Wis 479  
68 CJ p 688 note 50

41. Wis—In re Meurer's Will, 44 Wis 392, 28 Am R 501

42. Ga—Slade v. Slade, 118 SE 645, 155 Ga 851

**Conduct of testator suggesting names of attesting witnesses and going to their place of business where will was read to them in testator's presence, after which it was signed by testator and witnesses in presence of each other was impliedly a request that they sign his will**

Tenn—Miller v Thrasher, 251 SW 2d 446, 36 Tenn App 88

43. Cal—In re Keizur's Estate, 148 P 2d 116, 64 Cal App 2d 117

68 CJ p 688 note 53

44. NY—Stewart's Will, 2 Redf Surr 77.

45. Mo—Bingaman v Hannah, 194 SW 276, 270 Mo 611

NY—In re Guck's Will, 54 NYS 2d 206

46. Okl—In re Atohka's Estate, 282 P.2d 737

the publication of a will are distinct acts in their nature, their performance may be joint or connected, and a single sentence uttered by the testator may import both a request to attest the execution and a publication.<sup>47</sup>

*A request made through the medium of an interpreter* that witnesses attest the execution of a will is a sufficient request,<sup>48</sup> especially where testimony that the testator's language was correctly interpreted was corroborated by circumstances and other evidence.<sup>49</sup>

*Summoning of witnesses by legatee* does not affect the validity of the execution of the will where the testator requested the witnesses to sign it as such.<sup>50</sup>

*Request made to only one witness* A request by the testator that one witness sign the will is a sufficient request for both when made in the presence of the other and when both witnesses were sent for by the testator,<sup>51</sup> or where the request was made by the testator in the presence of both witnesses and communicated by the witness to whom the request was made to the other witness.<sup>52</sup> It has been held that, where the testator requested one witness in the presence of the other to witness his will, and after signing it requested each of them to sign it, there was a sufficient request to witness it.<sup>53</sup>

*Time of making request* The request to witnesses to attest a will may be made before the testator has signed the will,<sup>54</sup> while he is signing it,<sup>55</sup> or after the witnesses have signed it, where these acts are parts of the same transaction.<sup>56</sup> It has been held that a request to a witness to attest a

will made on a day previous to the execution will be sufficient where the witness was present at the time the will was prepared, heard it read, heard the other witness requested to sign, and signed himself in the presence of the testator.<sup>57</sup>

## (2) Request by Third Person

The request for attestation of the will need not be made by the testator personally, but may be made by a third person if authorized by, or done with the knowledge and acquiescence of, the testator.

Generally, a request for subscribing witnesses to attest a will must be made by the testator or some one acting for him and in his presence.<sup>58</sup> Accordingly, it is not essential that the request be made by the testator himself, and it may be made by the draftsman of the will, the testator's attorney, professional advisor, or physician, a person superintending the execution of the will, one of the witnesses, or any other person present at the time of the execution of the will, provided this is authorized by, or done with the knowledge and acquiescence of, the testator.<sup>59</sup> Not even an act or motion indicating acquiescence by the testator in the request to the witnesses is necessary, where it is made in his presence, and he knows that the witnesses are signing in response to such request, and makes no objection, since under the circumstances his silence is a sufficient indication that the request is by his authority.<sup>60</sup>

*Mental capacity of testator.* Unless it appears that at the time a third person requested witnesses to sign the testator's will he knew of, and was mentally capable of understanding, the request, his acquiescence therein cannot be implied from his

47. N.Y.—Coffin v. Coffin, 23 N.Y. 9, 80 Am D 285.

68 C.J. p 688 note 56.

48. Okl.—Bell v. Davis, 155 P 1132, 55 Okl 121.

49. N.Y.—In re Dybalski's Will, 191 N.Y.S. 809, 199 App Div 677.

50. N.Y.—In re Herrmann's Will, 150 N.Y.S. 118, 87 Misc 476.

51. N.Y.—Coffin v. Coffin, 23 N.Y. 9.

52. Wash.—In re Miller's Estate, 262 P 646, 146 Wash 324.

53. N.Y.—Perham v. Cottle, 162 N.Y.S. 21, 98 Misc 48, affirmed 165 N.Y.S. 1106, 178 App Div 949.

54. Va.—Savage v. Bowen, 49 S.E. 668, 103 Va. 540, 68 C.J. p 689 note 68.

55. N.Y.—In re Haber's Will, 192 N.Y.S. 616, 118 Misc 179.

56. Va.—Savage v. Bowen, 49 S.E. 668, 103 Va. 540, 68 C.J. p 689 note 70.

94 C.J.S.—64.

57. N.Y.—Brady v. McCrosson, 5 Redf Surr 431.

58. Mo.—Look v. French, 144 S.W.2d 128, 346 Mo 972.

59. Colo.—Scott v. Leonard, 184 P.2d 138, 117 Colo 54—In re Maikka's Estate, 134 P.2d 723, 110 Colo 433. Iowa.—Burgan v. Kinnick, 281 N.W. 734, 225 Iowa 804.

Mich.—In re Kenealy's Estate, 59 N.W.2d 38, 336 Mich 657.

Mo.—Look v. French, 144 S.W.2d 128, 346 Mo 972.

N.Y.—In re Rothstein's Will, 112 N.Y.S.2d 716.

N.C.—In re Kelly's Will, 174 S.E. 453, 206 N.C. 551.

Or.—In re Christofferson's Estate, 190 P.2d 928, 183 Or 75.

Tenn.—Miller v. Thrasher, 251 S.W.2d 446, 36 Tenn App 88—Howell v. Brown, 7 Tenn App 380.

Tex.—Corpus Juris cited in Ludwick v. Fowler, Civ App, 193 S.W.2d 692,

694, error refused no reversible error.

Wis.—In re Lagershausen's Estate, 272 N.W. 469, 224 Wis 479, 68 C.J. p 688 note 60.

**Request by chief beneficiary of will** Ariz.—In re Robinette's Estate, 279 P.2d 716, 78 Ariz 301.

60. Iowa.—Burgan v. Kinnick, 281 N.W. 734, 225 Iowa 804, 68 C.J. p 689 note 61.

**Testator well educated**

Where testator, a man in possession of full mental faculties and of exceptional education, carefully read over and signed a will containing attesting clause, and in his presence and view and without objection the will was passed to witnesses, scrivener indicated by gesture where to sign, and witnesses signed, there was a sufficient implied request by testator to sign.

Mo.—Look v. French, 144 S.W.2d 128, 346 Mo 972.

silence,<sup>61</sup> or from an affirmative sign when asked if he requested the witnesses to sign the will,<sup>62</sup> and, if there is substantial evidence of the testator's mental incompetency at the time the will was made, the question as to whether he acquiesced in the request should be left to the jury.<sup>63</sup>

## § 187. — Publication

- a In general
- b Necessity and purpose
- c Requisites and sufficiency

### a. In General

"Publication" is the act of making it known in the presence of witnesses that the instrument to be executed is the last will and testament of the testator, and it is distinct from the subscription or acknowledgment by the testator.

"Publication" is the act of making it known in the presence of witnesses that the instrument to be executed is the last will and testament of the testator.<sup>64</sup> It signifies the act of declaring or making known to the witnesses that the testator understands and intends the instrument subscribed by him to be his last will and testament.<sup>65</sup>

61. NY—Heath v Cole, 15 Hun 100 63 C J p 689 note 62

62. NY—In re Lyman's Will, 36 N Y S 117, 14 Misc 352 68 C J p 689 note 63

63. Mont—In re Cummings' Estate, 11 P 2d 968, 92 Mont 185

64. Kan—In re Moore's Estate, 203 P 2d 192, 166 Kan 556—In re Koellen's Estate, 176 P 2d 544, 162 Kan 395

### Signing and attestation as "publication"

The signing by testator of a will devising real estate and attestation by at least two subscribing witnesses, as required by statute, is referred to as the "publication of the will," and is necessary to show the animus testandi.

Tenn—Fransoli v Podesta, 113 S W 2d 769, 21 Tenn App 577

65. Kan—Corpus Juris cited in In re Moore's Estate, 203 P 2d 192, 195, 166 Kan 556

68 C J p 689 note 74

Publication of nuncupative wills see infra § 215

66. NY—In re Banta's Will, 123 N Y S 2d 334, 204 Misc 985

68 C J p 694 note 29 [a]

Requirement that testator sign will in presence of witnesses or acknowledge signature or will in their presence see infra § 188

### Two separate acts

Statute relating to execution of wills requires that testator, by two

separate acts or by single act partaking of dual nature, acknowledge instrument as will and acknowledge writing thereon as subscription of will where subscription is not made in presence of witnesses

NY—In re Kilduff's Will, 280 N Y S 198, 155 Misc 509

67. Ala—Fulks v Green, 20 So 2d 787, 246 Ala 392

Del—In re Kemp's Will, 186 A. 890, 7 W W Harr 514

Ill—Bronson v Martin, 51 NE 2d 149, 384 Ill 129—In re Elkerton's Estate, 44 NE 2d 148, 380 Ill 394

Iowa—In re Hagemeyer's Estate, 58 N W 2d 1, 244 Iowa 703—Corpus Juris cited in In re Klein's Estate, 42 N W 2d 593, 597, 241 Iowa 1103—In re Mathews' Estate, 12 N W 2d 162, 234 Iowa 188—In re Harter's Estate, 294 N W 357, 229 Iowa 238

Kan—In re Moore's Estate, 203 P 2d 192, 166 Kan 556

Mich—In re Balk's Estate, 298 N W 779, 298 Mich 303

NY—In re Simmons' Will, 132 N Y S 2d 795, stating Connecticut law

Or—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75—In re Davis' Will, 142 P 2d 143, 172 Or 354

Tenn—Howell v Brown, 7 Tenn App 380

Wis—In re Zych's Will, 28 N W 2d 316, 251 Wis 108

68 C J p 690 note 75

68. Ill—In re Elkerton's Estate, 44 NE 2d 148, 380 Ill 394

*Subscription or acknowledgment as distinct*  
Publication is distinct from the subscription or acknowledgment by the testator.<sup>66</sup>

### b. Necessity and Purpose

Under statutes so requiring, but not otherwise, the testator must publish or declare the instrument to be his will to the attesting witnesses, so that it may be manifest that he knows what he is executing and to secure him against fraud.

It is a rule of general application that, in the absence of a statute requiring it, it is not necessary that the testator should publish his will,<sup>67</sup> or that the witnesses should know at the time they attested the will that the instrument was a will.<sup>68</sup> Moreover, it has very generally been held that publication of a will, or knowledge on the part of the witnesses that the instrument is a will, is not made necessary by statutes providing that wills shall be attested and subscribed by witnesses,<sup>69</sup> or requiring that the signature shall be made or the will acknowledged in the presence of witnesses.<sup>70</sup>

On the other hand, in many jurisdictions statutes now require that the testator publish or declare the instrument to be his will to the attesting witnesses at the time of attestation,<sup>71</sup> and that a

Iowa—Corpus Juris cited in In re Klein's Estate, 42 N W 2d 593, 597, 241 Iowa 1103

Kan—In re Koellen's Estate, 176 P 2d 544, 162 Kan 395

Ky—Taliaferro v King, 279 S W 2d 793

Mass—Barber v Henderson, 22 NE 2d 620, 304 Mass 3, 127 A L R 382

Ohio—Underwood v Ruthan, 128 N E 78, 101 Ohio St 306—Keyl v Feuchter, 47 NE 140, 56 Ohio St 424

In re Will of Maurer, 31 Ohio N P, N S, 247

Tenn—Howell v Brown, 7 Tenn App 380

Wis—In re Zych's Will, 28 N W 2d 316, 251 Wis 108

68 C J p 690 note 76

69. Kan—Humphrey v Wallace, 216 P 2d 781, 169 Kan 58—In re Randall's Estate, 204 P 2d 699, 167 Kan 62—In re Koellen's Estate, 176 P 2d 544, 162 Kan 395

Mich—In re Fowle's Estate, 290 N W 883, 292 Mich 500

68 C J p 690 note 77

70. Va—Beane v. Yerby, 12 Gratt 289, 53 Va 239

71. Ark—Leister v Chitwood, 225 S W 2d 936, 216 Ark 418

Cal—In re Krause's Estate, 117 P 2d 1, 18 Cal 2d 623

In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392—In re Norswing's Estate, 118 P 2d 858, 47 Cal App 2d 730

witness to the execution of a will must be conscious of the fact that he is such a witness at the time of the execution of the will <sup>72</sup>

**Purpose of requirement.** The principal purpose of the requirement that the testator publish or declare his will, where such requirement exists, is that it may be manifest that the testator knows what he is executing, <sup>73</sup> and to secure him against fraud and imposition <sup>74</sup> Stated otherwise, the reason for requiring publication is twofold: First, to furnish proof that the testator is under no misapprehension, whether by malicious contrivance or otherwise, as to the nature or identity of the instrument, <sup>75</sup> and, second, to impress on the witnesses the fact that, since the document is a will, they are expected to remember what occurred at its execution and be ready to vouch for its validity in court. <sup>76</sup>

**Knowledge of witnesses as substitute for publication** In general, it is imperative that the witnesses, at the time they attest, be informed in some way by the testator himself that the instrument he has subscribed is his will, and knowledge of this fact, derived from any other source or at any other

time, will not suffice <sup>77</sup> Thus, the ascertainment by the subscribing witnesses of the testamentary nature of the paper must not be conjectural or derived from accidental inspection, and the testamentary declaration must be open, and manifest, and intentional <sup>78</sup> However, it was held that there was a sufficient publication where a witness refused to sign the instrument without knowledge of its contents and thereupon was given the instrument by the testator and ascertained that it was his will, <sup>79</sup> and it has been held that where publication is not expressly required by the statute, an attestation is sufficient where it is shown that, notwithstanding the failure of deceased to declare the will to be his, the attesting witnesses knew that the paper subscribed by them was the will of decedent <sup>80</sup>

### c. Requisites and Sufficiency

- (1) In general
- (2) Time of publication
- (3) Other considerations

#### (1) In General

While the testator must communicate to the witnesses the fact that he understands the testamentary character of the instrument, no particular form of words or

Colo—In re Livingston's Estate, 77 P 2d 649, 102 Colo 148—Aquilini v Chamblin, 30 P 2d 325, 94 Colo 367

Mont—Miller v. Talbott, 139 P 2d 502, 115 Mont 1.

N J—In re Amsden's Will, 191 A 801, 121 N J Eq 571—In re Ferris' Will, 169 A 697, 115 N J Eq 115, affirmed 174 A 708, 117 N J Eq 20

In re Wheary's Estate, 14 A 2d 489, 18 N J Misc 436—In re Mes-sach's Estate, 1 A 2d 339, 16 N J Misc 407

N Y—In re Banta's Will, 128 N Y S 2d 334, 204 Misc 985—In re Mul-lenhoff's Will, 105 N Y S 2d 314, 199 Misc 83, reversed on other grounds 105 N Y S 2d 675, 278 App Div 963—In re Kilduff's Will, 280 N Y S 198, 155 Misc 509

N D—In re Baur's Estate, 54 N W 2d 891, 79 N D 113

Okl—In re Davis' Estate, 43 P 2d 115, 171 Okl 575—In re Bourassa's Estate, 41 P 2d 851, 171 Okl 64

S D—In re Kennedy's Estate, 23 N W 2d 797, 71 S D 264

Tenn—Lawrence v Lawrence, 250 S W 2d 781, 35 Tenn App 648  
68 C J p 691 note 79

**Statute must be literally construed**  
N J—In re Johnson's Will, 171 A 307, 115 N J Eq 249

#### Connotation of statute

Under statute requiring that will be in writing signed by testator and attested by two competent witnesses subscribing their names, witness-

ing of will connotes something more than mere attestation of an act or genuineness of signature, and embraces the attestation that writing is the will of testator, and accordingly witnesses must know, at the time, that they are attesting testator's will  
Mo—Wright v McDonald, 233 S W 2d 19, 361 Mo 1

#### Continuity of legislative and judicial requirement

Where legislature, cognizant of unbroken line of judicial decisions requiring compliance with each statutory formality with respect to conditions of admission of purported wills to probate had continued statutory requirements unchanged, that legislature at other times did not require publication of wills gave no warrant to ignore the legislative command

N Y—In re Pulvermacher's Will, 113 N E 2d 525, 305 N Y 378

72. Mo—Baxter v Bank of Belle, of Belle Maries County, 104 S W 2d 265, 340 Mo 952

#### Each of them must so understand

It is essential to the validity of an instrument offered as a will that each of the attesting witnesses understood that testator was promulgating instrument as his will at time of subscribing or acknowledging it  
Cal—In re Norswing's Estate, 118 P 2d 858, 47 Cal App 2d 730

73. N Y—In re Rothstein's Will, 112 N Y S 2d 716  
68 C J p 691 note 80

74. N Y—In re Felson's Will, 135 N Y S 2d 737, 206 Misc 988  
68 C J p 691 note 81

#### Precaution against signing other document

The purpose of the law in requiring the maker of a will to declare it to be his will is to avoid the possibility of his placing his signature on a document which purports to be a will in the belief that it is something else  
Cal—In re Gray's Estate, 171 P 2d 113, 75 Cal App 2d 386

75. N Y—In re Pulvermacher's Will, 113 N E 2d 525, 305 N Y 378

76. N Y—In re Pulvermacher's Will, supra

77. Cal—In re Emden's Estate, 196 P 2d 627, 87 Cal App 2d 115  
68 C J p 691 note 82

78. N Y—In re Pulvermacher's Estate, 111 N Y S 2d 474, 203 Misc 705, reversed on other grounds In re Pulvermacher's Will, 116 N Y S 2d 110, 280 App Div 575, reversed on other grounds 113 N E 2d 525, 305 N Y 378, affirmed in part and reversed in part on other grounds 114 N E 2d 474, 305 N Y 923  
Wilson v Hetterick, 2 Bradf Surr 427

79. N Y—In re Koecher's Estate, 271 N Y S 707, 151 Misc 50

80. DC—Peters v Peters, 78 F 2d 215, 64 App DC 331



actions is necessary, and communication by word, act, or conduct, may be sufficient.

Where a statute provides that a will must have been published by the testator, the requirement demands that the testator must understand that the instrument which he is about to execute is a testamentary disposition of his property,<sup>81</sup> and he must, at the time, communicate to witnesses that he does so understand it.<sup>82</sup> However, to constitute a valid publication of a will, no particular form of words or actions is necessary,<sup>83</sup> a substantial compliance with the statutory requirements in this regard being sufficient.<sup>84</sup>

Any communication to the witnesses, either by word, act, signs, or conduct, which makes it certain that the testator means the paper which he signs to be his will, is sufficient.<sup>85</sup> It is, however, absolutely essential that it be made to appear unequivocally that the testamentary character of the

instrument was communicated by the testator to the witnesses,<sup>86</sup> and that as between the testator and the witnesses there was some meeting of the minds on the understanding that the instrument was the will of the testator,<sup>87</sup> and the requirement of publication is not satisfied simply by the subscription or acknowledgment by the testator in the presence of the attesting witnesses.<sup>88</sup>

The fact of publication may be inferred or not from all the circumstances attending the execution of the will,<sup>89</sup> and depends on the peculiar circumstances of each case.<sup>90</sup>

*Facts held to constitute sufficient publication*  
There is a sufficient publication where the testator declares in the presence of the witnesses that the instrument is his will,<sup>91</sup> where he declares the instrument is his will in the presence of witnesses and asks them to sign it as witnesses,<sup>92</sup> where he

81. Ark—Leister v. Chitwood, 225 S W 2d 936, 216 Ark 418  
N Y—In re Pulvermacher's Will, 113 NE 2d 525, 305 N Y 378

82. Ark—Leister v. Chitwood, 225 S W 2d 936, 216 Ark 418  
N Y—In re Pulvermacher's Will, 113 NE 2d 525, 305 N Y 378

83. Ark—Leister v. Chitwood, 225 S W 2d 936, 216 Ark 418  
Cal—In re Norswing's Estate, 118 P 2d 858, 47 Cal App 2d 730  
Colo—In re Maikka's Estate, 134 P 2d 723, 110 Colo 433—Aquilini v Chamblin, 30 P 2d 325, 94 Colo 367

Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

N J—In re DuBois' Estate, 76 A 2d 33, 9 N J Super 280

N Y—In re Pulvermacher's Will, 113 NE 2d 525, 305 N Y 378

In re Mullenhoff's Will, 105 N Y S 2d 314, 199 Misc 83, reversed on other grounds 105 N Y S 2d 675, 278 App Div 963

In re Clarke's Estate, 51 N Y S 2d 291

Okl—In re Bourassa's Estate, 41 P 2d 851, 171 Okl 64

S D—*Corpus Juris* cited in In re Ryan's Estate, 53 NW 2d 11, 12, 74 S D 359

68 C J p 691 note 85

84. N Y—In re Pulvermacher's Estate, 111 N Y S 2d 474, 203 Misc 705, reversed on other grounds In re Pulvermacher's Will, 116 N Y S 2d 110, 280 App Div 575, reversed on other grounds 113 NE 2d 525, 305 N Y 378, affirmed in part and reversed in part on other grounds 114 NE 2d 474, 305 N Y 923

In re Fowler's Will, 93 N Y S 2d 904

68 C J p 691 note 86.

#### Variances with circumstances

Substantial compliance with statute governing publication of wills depends on each individual case reasoned to its own conclusion.

N Y—In re Felson's Will, 135 N Y S 2d 737, 206 Misc 988

85. Cal—In re Gray's Estate, 201 P 2d 392, 89 Cal App 2d 478—In re Emden's Estate, 196 P 2d 627, 87 Cal App 2d 115—In re Gray's Estate, 171 P 2d 113, 75 Cal App 2d 386—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392—In re Norswing's Estate, 118 P 2d 858, 47 Cal App 2d 730

Colo—In re Maikka's Estate, 134 P 2d 723, 110 Colo 433—Aquilini v Chamblin, 30 P 2d 325, 94 Colo 367

Ill—In re Elkerton's Estate, 44 NE 2d 148, 380 Ill 394

Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

Mo—Potter v Ritchardson, 230 S W 2d 673, 360 Mo 661

Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132—In re Silver's Estate, 38 P 2d 277, 98 Mont. 141

N J—In re DuBois' Estate, 76 A 2d 33, 9 N J Super 280

In re Ferris' Will, 169 A. 697, 115 N J Eq 115, affirmed 174 A. 708, 117 N J Eq 20.

N Y—In re Martin's Estate, 60 N Y S 2d 777, 270 App Div 875

In re Felson's Will, 135 N Y S 2d 737, 206 Misc 988—In re Mullenhoff's Will, 105 N Y S 2d 314, 199 Misc 83, reversed on other grounds 105 N Y S 2d 675, 278 App Div 963

In re Clarke's Estate, 51 N Y S 2d 291

Okl—In re Davis' Estate, 43 P 2d 115, 171 Okl 575

S D—*Corpus Juris* cited in In re Ryan's Estate, 53 NW 2d 11, 12, 74

S D 359—In re Kennedy's Estate, 23 NW 2d 797, 71 S D 264

Wis—In re Lagershausen's Estate, 272 NW 469, 224 Wis 479.

68 C J p 691 note 87

86. Cal—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392

N J—In re Wheary's Estate, 14 A 2d 489, 18 N J Misc 436—In re Mes-sach's Estate, 1 A 2d 339, 16 N J Misc 407

N Y—In re Pulvermacher's Will, 113 NE 2d 525, 305 N Y 378

68 C J p 692 note 88

87. N Y—In re Pulvermacher's Will, supra

In re Fowler's Will, 93 N Y S 2d 904

88. N Y—In re Pulvermacher's Will, 113 NE 2d 525, 305 N Y 378

In re Banta's Will, 128 N Y S 2d 334, 204 Misc 985

89. Ark—Leister v. Chitwood, 225 S W 2d 936, 216 Ark 418—Anthony v College of the Ozarks, 180 S W 2d 321, 207 Ark 212

N Y—In re Mullenhoff's Will, 105 N Y S 2d 314, 199 Misc 83, reversed on other grounds 105 N Y S 2d 675, 278 App Div 963

90. Ark—Anthony v College of the Ozarks, 180 S W 2d 321, 207 Ark 212

N Y—In re Felson's Will, 135 N Y S 2d 737, 206 Misc 988

91. N Y—Auburn Theological Seminary v Calhoun, 25 N.Y. 422, 82 Am D 369

In re Connor's Will, 100 N Y S 2d 879

Tenn—Ragsdale v Hill, 269 S W 2d 911, 37 Tenn App 671

92. N Y—In re Jones' Estate, 285 N Y S 894, 157 Misc 847—In re Bassett's Will, 146 N.Y.S. 842, 84 Misc 656.

states to the witnesses that he has written out a paper so that his matters could be attended to in case anything happened to him<sup>93</sup> or makes similar statements,<sup>94</sup> where he replies in the affirmative to a question asked him as to whether the instrument is his will,<sup>95</sup> where he responds affirmatively to a statement describing the document as a testamentary instrument,<sup>96</sup> where he requests persons present to witness his will,<sup>97</sup> where he replies in the affirmative to a question as to whether he wants persons present to witness his will,<sup>98</sup> where he acquiesces in the statements or request of another acting in his behalf,<sup>99</sup> where he makes a scroll or seal after his signature to the will in the presence of the witnesses,<sup>1</sup> where he requests witnesses to sign the will and takes steps to have the will deposited with the county judge,<sup>2</sup> or where a testator unable to speak at all, or only with difficulty, communicates by signs or by words, to some unintelligible, that the paper being executed is a will<sup>3</sup>

There is also a sufficient publication where the will is read to the testator in the presence of the witnesses, and the testator indicates his approval of it,<sup>4</sup> or where the witness was requested to sign the instrument at the testator's instance, and the instrument bore on its face evidences of a testa-

mentary intent and was read to the testator in the presence of the witnesses<sup>5</sup> Where, in the presence of the witnesses, the testator requests someone to draw up the will, describes the provisions to be included, and then reads and signs the document so prepared, there is a sufficient publication,<sup>6</sup> and a fortiori the writing of the will by a witness at the request of the testator, embodying therein the disposition the testator desired to make of his property, and the signing of the will by the testator, was a sufficient publication<sup>7</sup>

*Facts held not to constitute sufficient publication*  
There is not a sufficient publication where the words or conduct of the testator in the particular circumstances cannot be reasonably interpreted as communicating the instrument as a last will<sup>8</sup> A fortiori, there is no publication where the testator purposely withholds from the witnesses the fact that the document signed was a will<sup>9</sup> The conduct of a deaf testator in nodding his head to a written declaration that the instrument was a will was held not to constitute a valid publication where one of the witnesses saw the nod to the paper containing the declaration but was ignorant of its contents and the other witness, aware of the declaration, saw no nod, although looking<sup>10</sup>

Tenn.—Hickey v Beeler, 171 S W 2d 277, 180 Tenn 31

93 N Y—In re Palmer's Will, 87 N Y S 249, 42 Misc 469

#### 94 Signing his life away

Where witness to will was requested by testatrix to sign document as her witness and was told that testatrix had to go to the hospital and was signing her life away, testatrix indicated that she was making a will and asking subscribing witness to witness it

Ill.—In re Elkerton's Estate, 44 N E 2d 148, 380 Ill 394

95 N Y—In re Kilduff's Will, 280 N Y S 198, 155 Misc 509  
68 C J p 692 note 92

96. N Y—In re Rothstein's Will, 112 N Y S 2d 716

97. N J—In re Breining's Estate, 59 A 561, 68 N J Eq 553.  
68 C J p 692 note 93

98. N Y—In re Voorhis' Will, 26 N E 935, 125 N Y 765, 4 Silv A 328  
68 C J p 692 note 94

99. Tex.—Ludwick v Fowler, Civ App, 193 S W 2d 692, error refused no reversible error.  
68 C J p 692 note 95

1. N J—In re Halton's Estate, 161 A 809, 111 N J Eq 143.

2. Neb.—In re Aye's Estate, 120 N W 491, 84 Neb 16

3. N Y—In re Beckett's Will, 8 N E 506, 103 N Y 167

4. N Y—In re Mullenhoff's Will, 105 N Y S 2d 314, 199 Misc 83, reversed on other grounds 105 N Y S 2d 675, 278 App Div 963

#### Read in English and in foreign language

Where will, including attestation clause and paragraph reciting that testator declared writing to be his last will and testament, was read to testator in English and in foreign language familiar to him, testator's statement that he understood will, and his request that named persons sign as witnesses, was held to show that testator declared that writing was his last will and testament  
Colo.—Aquilini v Chamblin, 30 P 2d 325, 94 Colo 367

5. Mo.—Murphy v. Clancy, 163 S W. 915, 177 Mo App 429

6. N Y—In re Rathke's Will, 124 N Y S 2d 218

Okl.—In re Bourassa's Estate, 41 P 2d 851, 171 Okl 64

7. Miss.—Green v. Pearson, 110 So 862, 145 Miss 23

8. Ill.—In re Lagow's Will, 62 N E 2d 469, 391 Ill 72  
68 C J p 692 note 2

#### Particular conduct and circumstances

(1) Where deceased at time of execution of instrument asked bank safe deposit vault guards to witness his signature and stated that he was going on a trip and that he had some instructions to be carried out if anything happened to him, neither deceased's statements, the surrounding circumstances nor relationship of vault guards to deceased necessarily informed guards, who did not know character of instrument, that instrument was a will, and hence there was no publication of instrument necessary for probate as will

N Y—In re Pulvermacher's Will, 113 N E 2d 525, 305 N Y. 378

(2) A will which was drawn by the principal beneficiary thereof, on behalf of alleged testator to whom or by whom the will was not read at time of its execution in the presence of two witnesses who signed at the request of beneficiary's wife without testator ever having stated that instrument was his will was properly denied admission to probate  
Colo.—In re Livingston's Estate, 77 P 2d 649, 102 Colo 148

9. Or.—Richardson v Orth, 66 P 925, 69 P. 455, 40 Or 252  
68 C J p 693 note 3

10 N J—In re Ferris' Will, 169 A 697, 115 N J Eq 115, affirmed 174 A 708, 117 N J Eq 20.

## (2) Time of Publication

Publication may be made before, during or after the signing of the instrument by the testator, but must be made before the signing by the witnesses

It is well settled that the time when the testator declares the document to be his will in relation to the time when he signs is of no importance,<sup>11</sup> and therefore such publication or declaration may be made before signing, while in the act of signing, or after signing, as long as it is done on "the same occasion and as a part of the same transaction."<sup>12</sup> What constitutes "the same occasion and the same transaction" is a matter of judicial determination in each particular case, dependent on the facts thereof and incapable of being governed by any general rule.<sup>13</sup> Thus, the publication of the will to the second witness some three weeks after its execution in the presence of the first witness was a proper publication,<sup>14</sup> and on the other hand it was held not sufficient that the testator on a subsequent occasion, several weeks after its execution, stated to the witnesses that the instrument signed by him was his will.<sup>15</sup>

*In relation to signing by witness* In general, the requirement is that the publication or declaration be made before the signing by the witnesses,<sup>16</sup> and the attempt of the testator to complete the will after he and the witnesses have signed it, without republication, renders the will void.<sup>17</sup> However, there is a sufficient compliance with the statute in reference to the execution of wills, where the declaration and acknowledgment are made before the witness has completed his signature as an attesting witness and on the same occasion.<sup>18</sup>

*Publication to witnesses separately* Publication

may be made to the witnesses at different times and when they are apart from each other.<sup>19</sup>

*Completeness of publication at time of executing will* It is not essential to a valid publication that the words or acts of publication be at the time complete in and of themselves, but it is sufficient if the publication is made definite and complete by reference on the part of the testator to a former conversation between him and the witnesses.<sup>20</sup>

## (3) Other Considerations

Publication must be made to the number of witnesses required by statute, but it is not necessary that the witnesses should know the contents or provisions of the will.

In addition to the requirements with respect to the time of publication, discussed supra subdivision c(2) of this section, various other elements have been considered in connection with the requirement in some jurisdictions that a will must be published by the testator.<sup>21</sup> Thus, there is no publication unless the witnesses are cognizant of it,<sup>22</sup> and a person who, from inattention or abstraction, is unconscious of what is being done and said when a will is published does not witness it and cannot testify that it is published.<sup>23</sup>

*Number of witnesses to whom publication made* Publication must be made to the number of witnesses required by statute<sup>24</sup> or the will cannot be admitted to probate.<sup>25</sup> Where one of the attesting witnesses did not know that the instrument was intended by the testator as his will the instrument is insufficient and not admissible to probate,<sup>26</sup> and if one of the necessary witnesses does not understand the language of the testator and the declaration for publication by the testator must be translated to him,

11. N.Y.—In re Baumann's Will, 148 N.Y.S. 1049, 85 Misc. 656, 68 C.J. p. 693 note 9.

12. N.J.—In re Halton's Estate, 161 A. 809, 111 N.J.Eq. 143, 68 C.J. p. 693 note 10.

13. N.Y.—In re Feldman's Will, 91 N.Y.S.2d 596, 195 Misc. 632.

14. N.Y.—In re Feldman's Will, supra.

15. N.Y.—Matter of Dale's Will, 9 N.Y.S. 306, 56 Hun. 169, affirmed 32 N.E. 649, 134 N.Y. 614.

16. N.J.—In re Wheary's Estate, 14 A.2d 489, 18 N.J.Misc. 436.

17. D.C.—Patten v. Pinkney, 50 F.2d 989, 60 App. DC 224.

18. N.Y.—In re Phillips' Will, 98 N.Y. 267.

19. N.Y.—In re Feldman's Will, 91 N.Y.S.2d 596, 195 Misc. 632.

Okla.—Corpus Juris quoted in Moore v. Glover, 163 P.2d 1003, 1007, 1008, 68 C.J. p. 693 note 8.

20. N.J.—Robbins v. Robbins, 26 A. 673, 50 N.J.Eq. 742, 68 C.J. p. 693 note 14.

21. **Visibility of signature**

It has been held that it is not an indispensable condition to the publication of a will that the instrument with the signature visible be physically present at the time.

N.Y.—In re Martin's Estate, 60 N.Y.S.2d 777, 270 App. Div. 875.

22. N.Y.—In re Beckett's Will, 8 N.E. 506, 103 N.Y. 167, Irwin v. Irwin, 1 Redf. Surr. 495.

23. N.J.—Robbins v. Robbins, 26 A. 673, 50 N.J.Eq. 742.

24. Cal.—In re Norswing's Estate, 118 P.2d 858, 47 Cal. App. 2d 730.

Ky.—Lowrance v. Moreland, 221 S.W.2d 62, 310 Ky. 533.

N.J.—In re Wheary's Estate, 14 A.2d 489, 18 N.J.Misc. 436.

N.D.—Collins v. Stroup, 3 N.W.2d 742, 71 N.D. 679, 68 C.J. p. 693 note 4.

25. Cal.—In re Norswing's Estate, 118 P.2d 858, 47 Cal. App. 2d 730. Ky.—Lowrance v. Moreland, 221 S.W.2d 62, 310 Ky. 533.

Mont.—Miller v. Talbott, 139 P.2d 502, 115 Mont. 1, 68 C.J. p. 693 note 5.

26. **Instrument entitled "will"**

Where one of the attesting witnesses to an instrument offered by nephew and sister did not know that instrument, which had the word "Will" written at top of page, was intended by testator as his will, instrument was not executed as required by statute and could not be admitted to probate.

Cal.—In re Norswing's Estate, 118 P.2d 858, 47 Cal. App. 2d 730.

the statutory requirement is not satisfied, and the will is void<sup>27</sup> If, however, the number of witnesses required by statute understood from the declaration that the instrument was his will, the requirements are satisfied, although another attesting witness did not understand the language in which the declaration was made<sup>28</sup>

*Knowledge of witnesses of contents of will*  
Whether or not publication of a will is required, it is not necessary that the witnesses should read or know the contents or provisions of the will,<sup>29</sup> in the absence of a statutory requirement to that effect<sup>30</sup> Thus, it is not necessary that a will be read to or by the testator in the presence of the witnesses<sup>31</sup> Indeed it is rarely the case that a witness is informed of the contents of an instrument which he attests,<sup>32</sup> as most testators desire to have the contents of their will remain unknown until it is presented for probate,<sup>33</sup> and, as has been said, inquiry by a subscribing witness as to the contents of the will would be considered a most impertinent and offensive curiosity<sup>34</sup>

*Want of publication or defective publication as affected by attestation clause* Recitals in a formal and perfectly executed attestation clause are not sufficient to show due execution of the will where

there is positive evidence that there was no publication or that the publication was defective,<sup>35</sup> especially where the contents of the attestation were not made known to one of the witnesses signing it<sup>36</sup>

## § 188. — Signing or Acknowledging Signature or Will by Testator in Presence of Witnesses

- a Necessity
- b Requisites and sufficiency of signing
- c Requisites and sufficiency of acknowledgment
- d Number of witnesses to signature or acknowledgment

### a. Necessity

Subject to some exceptions, it is commonly held that the testator is required either to sign the will in the presence of the witnesses or, in the alternative, to acknowledge to them his signature or his will

Except as appears below, it is the general rule, under statutes expressly so providing, or so construed or applied, that the requirement is that the testator either sign the will in the presence of the witnesses, or, in the alternative, acknowledge to them, in some jurisdictions, his "signature,"<sup>37</sup> or,

27 Okl.—In re Tiger's Will, 221 P 441, 91 Okl 103  
68 C J p 693 note 6

28 Okl.—In re Klufa's Estate, 188 P 329, 78 Okl 13

29 Ala.—Fulks v Green, 20 So 2d 787, 216 Ala 392

Iowa.—In re Puckett's Estate, 38 N W 2d 593, 240 Iowa 936

Ky.—Taliaferro v King, 279 S W 2d 793—Singleton v Singleton, 107 S W 2d 273, 269 Ky 330

Me.—In re Cox' Will, 29 A 2d 281, 139 Me 261

Mo.—Callaway v Blankenbaker, 141 S W 2d 810, 346 Mo 383—McClellan v Owens, 74 S W 2d 570, 335 Mo 884, 95 A L R 711

Or.—In re Christofferson's Estate, 190 P 2d 928, 183 Or 75—In re Davis' Will, 142 P 2d 143, 172 Or 354

Pa.—In re Ryan's Estate, Orph, 34 Del Co 380—In re Schwartz' Estate, Orph, 58 Pittsb Log J 295, affirmed 16 A 2d 374, 340 Pa 170

S D.—In re Rowlands' Estate, 18 N W 2d 290, 70 S D 419

Tenn.—Howell v Brown, 7 Tenn App 380

Tex.—Leeder v Leeder, Civ App, 161 S W 2d 1112, error refused

Va.—Redford v Booker, 185 S E 879, 166 Va 561

68 C J p 694 note 17.

30 La.—Hebert's Heirs v Hebert's Legatees, 11 La 361  
68 C J p 694 note 18

31 Iowa.—In re Klein's Estate, 42 N W 2d 593, 241 Iowa 1103  
Neb.—In re Bose's Estate, 285 N W 319, 136 Neb 156

32 Ala.—Garrett v Heflin, 13 So 326, 98 Ala 615, 39 Am SR 89

33. Or.—In re Heaverne's Estate, 246 P 720, 118 Or 308

34 Pa.—In re Hand's Estate, 4 Pa Co 446

35 N J.—Darnell v Buzby, 26 A 676, 50 N J Eq 725, affirmed 31 A 382, 52 N J Eq 337  
68 C J p 694 note 22

36. N J.—Darnell v Buzby, supra

37. Ala.—Little v Sugg, 8 So 2d 866, 243 Ala 196—Green v Davis, 153 So 240, 228 Ala 162

Ark.—Hendry v Wilson, 151 S W 2d 683, 202 Ark 530

Cal.—In re Gray's Estate, 171 P 2d 113, 75 Cal App 2d 386—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392

Colo.—In re McGary's Estate, 258 P 2d 770, 127 Colo 495

Iowa.—In re Hagemeier's Estate, 58 N W 2d 1, 244 Iowa 703—In re Klein's Estate, 42 N W 2d 593, 241 Iowa 1103—In re Harter's Estate, 294 N W 357, 229 Iowa 238—In re Pike's Will, 267 N W 680, 221

Iowa 1102—In re McElderry's Estate, 251 N W 610, 217 Iowa 268  
Mass.—Flynn v Prindleville, 98 N E 2d 267, 327 Mass 266

N J.—In re Taylor's Estate, 100 A 2d 346, 28 N J Super 220—In re DuBois' Estate, 76 A 2d 33, 9 N J Super 280

In re Wheary's Estate, 14 A 2d 489, 18 N J Misc 436

N Y.—In re Banta's Will, 128 N Y S 2d 334, 204 Misc 985—In re Robinson's Will, 103 N Y S 2d 967, 201 Misc 439—In re Goettel's Will, 55 N Y S 2d 61, 184 Misc 155

In re Foster's Will, 90 N Y S 2d 892—In re Smith's Will, 67 N Y S 2d 801

N C.—In re Franks' Will, 56 S E 2d 668, 231 N C 252, rehearing denied 57 S E 2d 315, 231 N C 736—In re Etheridge's Will, 49 S E 2d 480, 229 N C 280

N D.—Collins v Stroup, 3 N W 2d 742, 71 N D 679

Ohio.—Blagg v Blagg, 9 N E 2d 901, 55 Ohio App 518

Wis.—In re Wnuk's Will, 41 N W 2d 294, 256 Wis 360—In re Johnston's Will, 273 N W 512, 225 Wis 140  
68 C J p 694 note 20

Subscription or acknowledgment as distinct from publication see supra § 187 a.

### Strict adherence required

Cal.—In re Juanitos' Estate, 228 P 2d 60, 102 Cal App 2d 736

in other jurisdictions, his "will"<sup>38</sup> Accordingly, while in some jurisdictions it is not required that the testator subscribe to the will in the presence of the attesting witnesses,<sup>39</sup> it is nevertheless held that, in the absence of subscription in the presence of the witnesses, the testator must, in some way, acknowledge, and the witnesses should be advised, that the instrument which they subscribe is his will,<sup>40</sup> and the signature his signature<sup>41</sup>

Under the above rules, it is not necessary to the validity of the execution of the will that both of the acts mentioned in the statutes or decisions should be performed<sup>42</sup> Thus, it has very generally been held that the statutory requirements are satisfied where the testator signs in the presence of wit-

nesses,<sup>43</sup> or, as appears infra subdivision b of this section, procures some one else to sign his name in their presence, or where, in the alternative, without signing in their presence, the testator acknowledges his signature to the witnesses,<sup>44</sup> or acknowledges the instrument to be his act or deed,<sup>45</sup> or where the testator acknowledges the "will" instead of the "signature," when by express statutory provision<sup>46</sup> or judicial construction<sup>47</sup> it is made an alternative to signing in the presence of the witnesses

*Signing in presence of witnesses as absolute requirement.* In some jurisdictions there is a mandatory requirement, without any alternative, that the testator must sign the will in the presence of the attesting witnesses<sup>48</sup> In New Mexico the statute

#### At least substantial compliance required

N Y—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985

#### Denial of probate for noncompliance

(1) Where testatrix did not subscribe her name to will in presence of attesting witnesses or acknowledge that instrument had been signed by her or by her authority or declare that it was her will, will was denied probate on ground of failure to satisfy statutory requirements for execution and attestation of wills Cal—In re Klaus's Estate, 117 P 2d 1, 18 Cal 2d 623

(2) Where testatrix did not sign or cause her name to be signed to purported will or acknowledge her signature thereto in the presence of two attesting witnesses present at the same time as required by statute, purported will was not entitled to probate

Fla—In re Neil's Estate, 39 So 2d 801

33 Ky—Barton's Adm'r v Barton, 244 SW 2d 770  
68 CJ p 695 note 30

#### Acknowledge "same"

Under some statutes, the requirement is that the will shall be attested by witnesses "who saw the testator subscribe or heard him acknowledge the same"

Kan—Humphrey v Wallace, 216 P 2d 781, 169 Kan 58—In re Bond's Estate, 153 P 2d 912, 159 Kan 249

39 Tenn—Morrow v Person, 259 SW 2d 665, 195 Tenn 370

Tex—Venner v Layton, Civ App, 244 SW 2d 852, error refused no reversible error—Guest v Guest, Civ App, 235 SW 2d 710, error refused no reversible error—Ludwick v Fowler, Civ App, 193 SW 2d 692, error refused no reversible error

#### Requirement of attestation in presence of testator

Statute requiring attestation of will in presence of testator does not require that testator shall subscribe

to the will in the presence of attesting witnesses

Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614

Mich—In re Cytacki's Estate, 292 NW 489, 293 Mich 555—In re Burwitz's Estate, 261 NW 121, 272 Mich 16—In re Nosek's Estate, 201 NW 884, 229 Mich 259

Miss—Phifer v McCarter, 76 So 2d 258

Mo—Callaway v Blankenbaker, 141 SW 2d 810, 346 Mo 383

40 Ill—In re Lagow's Will, 62 NE 2d 469, 391 Ill 72—Bronson v Martin, 51 NE 2d 149, 384 Ill 129

Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614

Mich—In re Nosek's Estate, 201 NW 884, 229 Mich 559

68 CJ p 695 note 31

41 Miss—Phifer v. McCarter, 76 So 2d 258

42 Ill—In re Lagow's Will, 62 NE 2d 469, 391 Ill 72

Kan—In re Bond's Estate, 153 P 2d 912, 159 Kan 249

Ky—Rybolt v Futrell, 176 SW 2d 269, 296 Ky 158

68 CJ p 695 note 32

43. Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192

Ark—Meek v Bledsoe, 253 SW 2d 369, 221 Ark 395

Kan—In re Williams' Estate, 150 P 2d 336, 158 Kan 734, opinion adhered to 153 P 2d 906, 159 Kan 232

Ky—Rybolt v Futrell, 176 SW 2d 269, 296 Ky 158

Tenn—Hickey v Beeler, 171 SW 2d 277, 180 Tenn 31

68 CJ p 695 note 33.

44 Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

Miss—Austin v Patrick, 176 So 714, 179 Miss 718

NJ—In re Kugler's Will, 1 A 2d 642, 124 NJ Eq 309

NY—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985—In re Goet-

tel's Will, 55 NYS 2d 61, 184 Misc. 155

In re McCulp's Will, 119 NYS 2d 55, applying District of Columbia law

NC—In re Etheridge's Will, 49 SE 2d 480, 229 NC 280

Tenn—Howell v Brown, 7 Tenn.App 380

Wis—In re Lagershausen's Estate, 272 NW 469, 224 Wis 479

68 CJ p 695 note 35

45. Ill—In re Lagow's Will, 62 NE 2d 469, 391 Ill 72

46. Ky—Barton's Adm'r v Barton, 244 SW 2d 770—Darnaby v Haller's Ex'r, 208 SW 2d 299, 306 Ky 697—Rybolt v Futrell, 176 SW 2d 269, 296 Ky 158

68 CJ p 695 note 36

47. Md—Woodstock College of Baltimore County v Hankey, 99 A 962, 129 Md 675

68 CJ p 696 note 37

48 Utah—In re Alexander's Estate, 139 P 2d 432, 104 Utah 296

#### Acknowledgment as not equivalent to signing

Acknowledgment by testatrix to subscribing witnesses to will that testatrix had previously signed the will was not equivalent to signing the will in presence of witnesses as required by statute

Utah—In re Alexander's Estate, supra

#### "Personal knowledge" of witnesses

Under statute requiring that a will be attested by two or more competent witnesses, a "witness" is one who has personal knowledge of some fact or transaction, that is, that the will was signed by the testator or testatrix or by some other person under his or her direction in his or her presence, and where the two persons who signed as witnesses had not seen decedent sign the will or any one sign for him, witnesses did not have requisite personal knowledge as to genuineness of signature on will, and, hence, will was not

relating to the execution of wills expressly requires that the witnesses shall "see the testator sign the will, or some one sign it for him at his request,"<sup>49</sup> and it has been held that this statute has not been repealed by later legislation relating to the execution of wills<sup>50</sup> Similarly, in the Philippines the rule is absolute that one who makes a will must sign his name in the presence of the witnesses,<sup>51</sup> and it was said that while the first part of the statute regulating the subject does not expressly require that the testator sign the will in the presence of the attesting witnesses, the second part thereof does require that fact to appear in the attestation clause<sup>52</sup>

### b. Requisites and Sufficiency of Signing

There is some difference of opinion as to whether the witnesses must actually see the testator write his name in order to satisfy the requirement that the signing be in their presence

While some authorities require that, in order to constitute a signing of a will within the presence of the witnesses, the witnesses must actually see the testator write his name, or have their attention directed to the actual signing while it was taking place,<sup>53</sup> it has been held that if the will is signed in the presence of the witnesses who have adequate opportunity to see the testator sign, the statutory requirements are satisfied, even though they may not have actually seen him sign, by reason of inattention or other cause,<sup>54</sup> as where one of the witnesses refrained from looking at the testator while signing for fear it would make him nervous<sup>55</sup> The signing will be considered as having taken place in the presence of a witness, although he was in an adjoining room, if from such a position he could see the

testator sign after his attention had been drawn to what was going on<sup>56</sup>

*Signing by third person of testator's name* at his request and in the presence of the witnesses may be a sufficient compliance with the statutory requirements<sup>57</sup>

*Necessity for seeing signature.* It has been held that if a testator signs his will in the presence of attesting witnesses who saw him in the act of writing, attestation by them is good although they do not see his signature and although the testator does not acknowledge it<sup>58</sup>

### c. Requisites and Sufficiency of Acknowledgment

- (1) In general
- (2) Acknowledgment that instrument is will
- (3) Request to witnesses to sign
- (4) Seeing or opportunity to see signature
- (5) Time of acknowledgment

#### (1) In General

It is not necessary that the acknowledgment be in any particular formal words, or in words at all, provided the testator indicates to the witnesses with unmistakable certainty that the signature is his or that the instrument is his act

If the will was not signed by the testator in the presence of witnesses, he must make known to them in some manner that his name appearing on the instrument was signed thereto by him,<sup>59</sup> or he should in some way acknowledge the instrument to them as his act, where this form of acknowledgment is per-

"attested" within statute requiring attestation by two or more competent witnesses

Wash—In re Cronquist's Estate, 274 P 2d 585, 45 Wash 2d 344

49 N M—In re Riedlinger's Will, 16 P 2d 549, 37 N M 18

50. N M—In re Riedlinger's Will, supra

51. Philippine—In re Nepomuceno's Estate, 28 Philippine 638—Yap Tua v Yap Ca Kuan, 27 Philippine 579

52. Philippine—In re Nepomuceno's Estate, 28 Philippine 638

53. N Y—In re Crull's Estate, 207 N Y S 775, 124 Misc 134, affirmed 211 N Y S 908, 214 App Div 849 Pa—In re Marcovitch's Estate, Orph, 43 Sch Leg Rec 216.

#### Conscious presence

The phrase "in the presence of," as used in statute requiring that will be subscribed or acknowledged by testator in presence of both attesting witnesses at same time, means

conscious presence, not merely actual physical presence of witness without realization of what is transpiring, and is not synonymous with witness' being in same room as testator and another witness at time of their signatures of will

Cal—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392

54. N Y—Peck v Cary, 27 N Y 9, 84 Am D 220 68 C J p 696 note 42

55. N Y—In re Bedell's Will, 12 N Y S 96, 2 Conn Surr 328

56. N Y—Spaulding v Gibbons, 5 Redf Surr 316

57. Ala—Towles v Pettus, 12 So 2d 357, 244 Ala. 192

Ky—Pritchard v Kitchen, 242 S W 2d 988

Pa—In re Dolf's Estate, Orph, 30 West L J, 47 68 C J p 696 note 46

58. Mass—Le Blanc v Coombes, 91 N E 2d 222, 325 Mass 431

59. Mass—Corpus Juris cited in Barber v Henderson, 22 N E 2d 620, 621, 304 Mass 3, 127 A L R 382

Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

N J—In re Taylor's Estate, 100 A 2d 346, 28 N J Super 220—In re DuBois' Estate, 76 A 2d 33, 9 N J Super 280

N Y—In re Banta's Will, 128 N Y S 2d 334, 204 Misc. 985

N C—In re Franks' Will, 56 S E 2d 668, 231 N C 252, rehearing denied 57 S E 2d 315, 231 N C 736

Ohio—Roosa v Wickward, 105 N E 2d 454, 90 Ohio App 213

In re Wood's Will, Prob, 67 N E 2d 11

68 C J p 696 note 49

The word "acknowledge" means that testator admits the subscription is his, placed there freely and intentionally for a signature

N D—Collins v Stroup, 3 N W 2d 742, 71 N D 679

missible.<sup>60</sup> However, it is not necessary that the acknowledgment be in any particular formal words, or in words at all, but may be by acts or conduct, provided the testator indicates to the witnesses, with unmistakable certainty, that the signature is his,<sup>61</sup> or that the instrument is his act,<sup>62</sup> and this is the rule even where the statute provides that the will shall be attested by witnesses who "saw the testator subscribe or heard him acknowledge the same."<sup>63</sup>

In any event, where the testator acknowledges his signature in some way other than by spoken words, the acknowledgment must be made in some unmistakable manner.<sup>64</sup> A signature which is not identified to the attesting witnesses by the testator cannot be said to have been acknowledged by him as required by statute.<sup>65</sup>

*Acknowledgment of mark or subscription by third person* Where the signing is by mark, or the testator's name is subscribed to the will by another at his request, in the presence of witnesses, an acknowledgment by him to the witnesses that he had so executed the will is a sufficient compliance with the statutory requirements.<sup>66</sup> However, where the

circumstances of the signing by mark, and the subscription of the name of the testator by a third person, are unknown to the witnesses, an acknowledgment by the testator is not sufficient to establish a proper execution of the will where there are specific statutory requirements with respect to signing by mark.<sup>67</sup> Certainly, where a testator lapses into unconsciousness after giving directions to another to sign the will for him and is never conscious of the fact that it was signed, there can be no acknowledgment of the signature.<sup>68</sup> On the other hand, it has been held that even though the subscription of the name of the testator by a third person is not done in the presence of the witnesses, the subscription may be properly attested where the testator acknowledges to the witnesses that the instrument is his will and expresses his testamentary intentions.<sup>69</sup>

*Acknowledgment through Third Person* It is not necessary that the testator should by his own words acknowledge the signature, but the words of acknowledgment may proceed from another and will be regarded as those of the testator if the circumstances show that he adopted them and the person

60. Ill—In re Lagow's Will, 62 N E 2d 469, 391 Ill 72  
Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614—Woodstock College of Baltimore County v Hankey, 99 A 962, 129 Md 675

61. Ala—Plemons v Tarpey, 78 So 2d 385, 262 Ala 209—Fulks v Green, 20 So 2d 787, 246 Ala. 392  
Ark—Anthony v College of the Ozarks, 180 SW 2d 321, 207 Ark 212

Cal—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392  
Ill—In re Lagow's Will, 62 NE 2d 469, 391 Ill 72

Mass—Corpus Juris cited in Barber v Henderson, 22 NE 2d 620, 621, 304 Mass 3, 127 ALR 382—Finucane v Finucane, 193 NE 553, 289 Mass 101

Miss—Phifer v McCarter, 76 So 2d 258

Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 738

Ohio—Roosa v Wickward, 105 NE 2d 454, 90 Ohio App 213

In re Wood's Will, Prob, 67 NE 2d 11

68 CJ p 696 note 51.

62 Ark—Anthony v College of the Ozarks, 180 SW 2d 321, 207 Ark 212

Ill—Bronson v Martin, 51 NE 2d 149, 384 Ill 129

Md—Van Meter v Van Meter, 39 A 2d 752, 183 Md 614.

Miss—Phifer v. McCarter, 76 So 2d 258

68 CJ p 696 note 52

63 Kan—Humphrey v Wallace, 216 P 2d 781, 169 Kan 58

64. Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

65. NY—In re Banta's Will, 128 N YS 2d 334, 204 Misc 985

#### Test of sufficiency of identification

Acknowledgment by testator of signature on will must include same identification of written words as necessarily exists when attesting witness sees testator write

NY—In re Banta's Will, supra.

#### Identification held insufficient

Where one of the subscribing witnesses did not enter room where testator lay in bed, but will was handed to her in another room by scrivener, and neither immediately before or after time she signed will was any word said to her by testator or any act done by him, which could be considered an acknowledgment of his subscription, will was not properly executed

NY—In re Banta's Will, supra.

66 Miss—Miller v. Miller, 51 So 210, 96 Miss 526

68 CJ p 697 note 53

67. Pa—In re James' Estate, 198 A 4, 329 Pa 273

#### Necessary conditions held not established

An "acknowledgment" by testatrix that a document is her will does

not meet statutory requirement that, where will is executed by a mark and name of testatrix written by another person, the name be subscribed in testatrix' presence and by her direction and authority, since the acknowledgment amounts merely to a statement involving a conclusion of law and does not establish the existence of the facts and fulfillment of the conditions on which the validity of will depends

Pa—In re James' Estate, supra

#### Testator's name signed by one witness

Where one witness subscribed decedent's name to will in decedent's presence and at her request and decedent then made her mark thereon in absence of any other person, and where several days later decedent asked two other persons to sign paper and they signed at designated place on paper so folded that they did not see contents or name or mark of decedent and they were not informed that they were signing a will, the instrument could not be probated as a will notwithstanding testatrix subsequently acknowledged that instrument was her will

Pa—In re James' Estate, supra

68 NY—Sanders v Stiles, 2 Redf Surr 1

69. Ill—In re Kehl's Estate, 73 N E 2d 437, 397 Ill 251

Tex—Gainer v Johnson, Civ App, 211 SW 2d 789—Franklin v Martin, Civ App, 73 S.W 2d 919, error refused.

speaking them was acting for the testator with his assent <sup>70</sup>

## (2) Acknowledgment That Instrument Is Will

A declaration by the testator to the witnesses that the instrument is his will is generally considered to be a sufficient acknowledgment of his signature.

A declaration by the testator to the witnesses that the instrument is his will is generally considered to be a sufficient acknowledgment of his signature,<sup>71</sup> and a will is validly "attested" by a witness in the presence of the testator if the testator acknowledges the signature previously placed thereon by exhibiting the paper to the witness and declaring it to be his will.<sup>72</sup> Thus, the acknowledgment of an instrument as a will imports an acknowledgment of the signature, under a statute which requires that the will be subscribed by the testator and attested and subscribed in his presence by witnesses, who saw the testator subscribe or heard him acknowledge the same,<sup>73</sup> or under a statute which provides that the subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority.<sup>74</sup>

On the other hand, a mere declaration or acknowledgment that a paper is the testator's will is not an acknowledgment of his signature under a statute which not only requires an acknowledgment of the signature, but also an acknowledgment of the will,<sup>75</sup> the view being taken that it is the subscrip-

tion and not merely the instrument which the statute requires to be acknowledged.<sup>76</sup>

## (3) Request to Witnesses to Sign

A mere request by the testator to witness an instrument or the signature thereto may be a sufficient acknowledgment of the will or the signature.

Except in so far as appears *infra* subdivision c (4) of this section, the courts have generally held or said that a mere request by the testator to witness an instrument or the signature thereto is a sufficient acknowledgment of the will or signature to satisfy the requirements of the statute.<sup>77</sup> Thus, a mere request by the testator to witnesses to attest his will is a sufficient acknowledgment of his signature under a statute which requires signing by the testator in the presence of the witnesses or an acknowledgment by him that it is his act or deed,<sup>78</sup> or under a statute providing that the subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of the attesting witnesses,<sup>79</sup> and under a statute providing that subscription shall be made or "the will acknowledged" by the testator in the presence of the witnesses, the acknowledgment of a will has been implied from a request to witnesses to attest the signature.<sup>80</sup> Even where the statute requires both an acknowledgment of the signature and an acknowledgment of the will, the words of the testator asking the witnesses to sign as witnesses to his will may constitute an acknowledgment of his signature.<sup>81</sup>

70. Cal—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392  
Iowa—In re McElderry's Estate, 251 NW 610, 217 Iowa 268

NJ—In re Kinane's Estate, 42 A 2d 865, 136 N J Eq 595  
68 C J p 699 note 89

71. Ill—Brehle v Wilkie, 26 NE 2d 475, 373 Ill 409

Wis—In re Home's Will, 284 NW 766, 231 Wis 227, rehearing denied 285 NW 754, 231 Wis 227  
68 C J p 697 note 57

**Facts held sufficient acknowledgment of will**

Where testator had signed will outside of presence of witnesses, but presented will to them for their signatures stating it was his will, and one witness read it aloud in the presence of testator and other witness, and then both witnesses signed will in testator's presence, testator had sufficiently indicated to witnesses that document was his will, and that signature was his signature  
Miss—Phifer v McCarter, 76 So 2d 258.

72. Mass—Barber v Henderson, 22 NE 2d 620, 304 Mass 3, 127 A L R.

382—Nunn v Ehlert, 106 NE 163, 218 Mass 471, L R A 1915B 87  
Nickerson v Buck, 12 Cush 332

73. Ohio—Eggleston v. Gardner, 16 Ohio Cir Ct NS 455

74. Ark—Anthony v College of the Ozarks, 180 SW 2d 321, 207 Ark 212

Cal—In re Flentjen's Estate, 182 P 2d 579, 80 Cal App 2d 731—In re Gray's Estate, 171 P 2d 113, 75 Cal App 2d 386

Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

**Signature necessarily acknowledged**  
A testator's acknowledgment of will necessarily acknowledges testator's signature thereon to attesting witnesses

Mont—In re Bragg's Estate, *supra*

75. NJ—In re Gorrell's Estate, 19 A 2d 334, 19 N J Misc 168  
68 C J p 697 note 61

Acknowledgment of will and signature as to holographic will see *infra* § 205

76. NY—In re Abercrombie's Will, 48 NYS 414, 24 App Div. 407.

77. Del—In re Kemp's Will, 186 A. 890, 7 W W Harr 514

Mass—Finucane v Finucane, 193 N E 553, 289 Mass 101  
68 C J p 697 note 66

78. Ill—Harp v Parr, 48 NE 113, 188 Ill 459—Hobart v Hobart, 39 NE 581, 154 Ill 610, 45 Am SR 151

**79. In California**

(1) The rule stated in the text prevails.

Cal—In re Abbey's Estate, 191 P 893, 183 Cal 524  
In re Gray's Estate, 171 P 2d 113, 75 Cal App 2d 386

(2) However, it has also been held that a request to the witnesses to witness the will did not constitute an acknowledgment of the testator's signature

Cal—In re Taney's Estate, Myr. Prob 210  
68 C J p 697 note 70

80. Ky—Robertson v Robertson, 24 SW 2d 282, 232 Ky 572  
68 C J p 697 note 69

81. NJ—In re Gorrell's Estate, 19 A 2d 334, 19 N J Misc 168



It is not essential that the testator expressly request the witnesses to attest the instrument in order to effect a valid acknowledgment thereof, where the circumstances are such as to effect an implied request<sup>82</sup>

*Request to sign instrument signature of which is visible* Under statutes providing that subscription must be made by the testator in the presence of the witnesses or acknowledged by him to have been so made, where the testator requests witnesses to subscribe their names to an instrument not executed in their presence,<sup>83</sup> or executed in the presence of less than the number required by statute,<sup>84</sup> which instrument he declares to be his will, and the signature is plainly visible on the instrument, there is a sufficient acknowledgment of the signature. Even where the testator does not acknowledge the nature of the instrument, such a request is a sufficient compliance with the statutory requirements where the witnesses can see the document and the signature,<sup>85</sup> since the production of the instrument and the request that the witnesses sign import that the signature is that of the testator and that he acknowledges the signature to be his.<sup>86</sup>

#### (4) Seeing or Opportunity to See Signature

Authorities differ as to whether, where a testator acknowledges an instrument which he has already signed, it is essential that the witnesses should see or be given an opportunity to see his signature.

In some jurisdictions, if the signature of the tes-

tator is already on the will, and he acknowledges the instrument as his will to the witnesses, it is not essential that the witnesses should see or be given an opportunity to see his signature,<sup>87</sup> at least in the absence of any attempt to conceal the writing.<sup>88</sup> Such is the rule under a statute which requires signing by the testator in the presence of the witnesses or an acknowledgment by him that it is his act or deed,<sup>89</sup> or under a statute which provides that the subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority,<sup>90</sup> or a statute providing that subscription shall be made or "the will acknowledged" by the testator in the presence of the witnesses.<sup>91</sup>

On the other hand, in some jurisdictions in order that there may be a valid acknowledgment of the signature, the witnesses must see the signature or be given an opportunity to see it.<sup>92</sup> Thus, it has been held that the witnesses must see or be given an opportunity to see the signature of the testator in order to constitute a valid acknowledgment under a statute providing that subscription of a will shall be made by the testator in the presence of each of the subscribing witnesses, or shall be acknowledged by him to have been so made to each of the subscribing witnesses.<sup>93</sup> Where this view prevails, if the testator's signature is covered or otherwise concealed so the witnesses cannot see it, the attestation is invalid.<sup>94</sup> The decisions proceed on the

#### 82. Passing of will among witnesses

Where one attesting witness in the presence and hearing of testator gives will to the other witness to sign, there is a sufficient "acknowledgment" by testator of execution of instrument to constitute a valid attestation without testator himself requesting the second witness to sign.

Ill—Bronson v Martin, 51 NE 2d 149, 384 Ill 129

83. NY—In re Walton's Estate, 135 NYS 2d 690, 206 Misc 908

Ohio—In re Wood's Will, Prob., 67 NE 2d 11

68 CJ p 698 note 72

84. NY—In re Look, 7 NYS 298, 54 Hun 635, affirmed 27 NE 408, 125 NY 762

85. Ark—Anthony v College of the Ozarks, 180 SW 2d 321, 207 Ark 212

Ohio—Blagg v Blagg, 9 NE 2d 991, 55 Ohio App 518

#### Witnesses separately attesting

Where testatrix stated to first attesting witness that instrument was her will and witness recognized testatrix' signature, and testatrix told second attesting witness that first witness had signed and second at-

testing witness recognized testatrix' signature and that of first attesting witness, will was sufficiently executed to be admitted to probate.

Kan—Humphrey v Wallace, 216 P 2d 781, 169 Kan 58

86. Ohio—Blagg v Blagg, 9 NE 2d 991, 55 Ohio App 518

87. DC—Betts v Lonas, 172 F 2d 759, 84 US App DC 206

Ill—Bronson v Martin, 51 NE 2d 149, 384 Ill 129—In re Elkerton's Estate, 44 NE 2d 148, 380 Ill 394—Brelie v Wilkie, 26 NE 2d 475, 373 Ill 409

Mass—Corpus Juris cited in Barber v Henderson, 22 NE 2d 620, 621, 304 Mass 3, 127 ALR 382

Wis—In re Home's Will, 284 NW 766, 231 Wis 227, rehearing denied 285 NW 754, 231 Wis 227.

68 CJ p 698 note 77

#### 88. In Massachusetts

(1) The rule stated in the text prevails.

Mass—Barber v Henderson, 22 NE 2d 620, 304 Mass 3, 127 ALR 382, distinguishing and limiting effect of Leatherbee v Leatherbee, 141 NE 669, 247 Mass 138—Nunn v Ehler, 106 NE 163, 218 Mass 471, LRA 1915B 87.

(2) Previously, the rule was to the contrary.

Mass—Nunn v Ehler, supra.

68 CJ p 698 note 80 [a.]

89. Ill—Hoover v Keller, 171 NE 163, 339 Ill 126

68 CJ p 698 note 78

90. Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

91. Ky—Robertson v Robertson, 24 SW 2d 282, 232 Ky 572

92. Iowa—In re Harter's Estate, 294 NW 357, 229 Iowa 288

Or—Richardson v Orth, 66 P 925, 69 P 455, 40 Or 252.

93. NY—In re Banta's Will, 128 NYS 2d 334, 204 Misc. 985.

68 CJ p 698 note 83

#### Not indispensable condition

However, it has been held that there is no indispensable condition to the acknowledgment of a subscription to the will that the instrument with the signature visible, be physically present at the time.

NY—In re Martin's Estate, 60 N.Y. S 2d 777, 270 App Div. 875

94. Or—Richardson v Orth, 66 P. 925, 69 P 455, 40 Or. 252.

68 CJ p 698 note 84.

theory that it is the subscription and not the instrument which must be acknowledged, and that a signature which is neither seen nor identified can in no proper sense be said to have been acknowledged by the mere statement that it had been affixed to a paper which was characterized as a will<sup>95</sup>

It has been held that there is a sufficient compliance with the rule if the witnesses either saw the signature or had the opportunity of doing so,<sup>96</sup> and the instrument should not be refused probate because, through ignorance, carelessness, or indifference, the witnesses did not look closely to see the signature<sup>97</sup> However, it may be required that the signature be called to the attention of the attesting witnesses when the acknowledgment of the subscription is made<sup>98</sup>

### (5) Time of Acknowledgment

The acknowledgment by the testator must be subsequent to the signing of the instrument by him, and must precede the signing by the witnesses.

The acknowledgment by the testator must be subsequent to the signing of the instrument by him,<sup>99</sup> or practically simultaneous with such signing,<sup>1</sup> but it will be presumed in the absence of evidence to the contrary that he had signed it, signature being necessary to make it a will, and his request that witness sign being equivalent to acknowledging that the testator had signed it<sup>2</sup>

*In relation to signing by witnesses.* In jurisdictions where the signing of the will by the testator before signing thereof by the witnesses is indispensable to its validity, as discussed supra § 176, acknowledgment by the testator of his signature when not made in the presence of the witnesses must precede in point of time the signing by the

witnesses,<sup>3</sup> and the will is invalid if one of the witnesses affixes his signature before the testator has acknowledged his signature<sup>4</sup>

### d. Number of Witnesses to Signature or Acknowledgment

The signature or acknowledgment must be made in the presence of the required number of witnesses, but generally need not be made in the presence of all of them at the same time

The signature or acknowledgment must be made in the presence of as many witnesses as are required by statute,<sup>5</sup> and this requirement cannot be overlooked or waived<sup>6</sup> However, it has generally,<sup>7</sup> although not universally,<sup>8</sup> been held that it need not be made in the presence of all of them at the same time Hence, it is sufficient if the signature is made in the presence of part of the witnesses and acknowledged in the presence of the others<sup>9</sup>

## § 189. — Subscription by Witnesses in Presence of Testator

- a Necessity and purpose
- b Requisites and sufficiency in general
- c Presence in room or house
- d Effort or change of position necessary
- e Subsequent acknowledgment of signature in presence of testator
- f What testator must see or be able to see
- g Blind testator

### a. Necessity and Purpose

It is generally required by statute, in order to prevent imposition and fraud, that wills be attested and subscribed by the witnesses in the presence of the testator.

While in some jurisdictions there is no such re-

95. N Y—In re Abercrombie's Will, 48 NYS 414, 24 App Div 407

96. N Y—In re Laudy's Will, 55 N E 914, 161 N Y 429  
68 C J p 698 note 87

97. N Y—In re Laudy's Will, supra  
68 C J p 699 note 88

98. N Y—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985

99. Ill—Valentine v Second Baptist Church of Chicago, 127 NE 178, 293 Ill 71

Ky—Robertson v Robertson, 24 S W 2d 282, 232 Ky 572

1 Ky—Robertson v Robertson, supra.

2 Ill—Valentine v Second Baptist Church of Chicago, 127 NE 178, 293 Ill 71.

3. N J—In re Wheary's Estate, 14 A 2d 489, 18 NJ Misc. 436  
68 C.J. p 699 note 94

4. N J—In re Sutterlin's Will, 132 A 115, 99 NJ Eq 363  
68 C.J. p 699 note 95

5. Cal—In re Jianito's Estate, 228 P 2d 60, 102 Cal App 2d 736—In re Lynch's Estate, 161 P 2d 24, 70 Cal App 2d 392

Ky—Lowrance v Moreland, 221 S W 2d 62, 310 Ky 533

N J—In re Kugler's Will, 1 A 2d 642, 124 NJ Eq 309

In re Wheary's Estate, 14 A 2d 489, 18 NJ Misc 436.

N Y—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985

ND—Collins v. Stroup, 3 NW 2d 742, 71 ND 679

Va—French v Beville, 62 SE 2d 883, 191 Va. 842

68 C J p 699 note 97

6. N Y—In re Redway's Will, 265 N YS 848, 238 App Div 653.

7. Mont—In re Woodburn's Estate, 273 P 2d 391

N Y—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985

ND—Collins v Stroup, 3 NW 2d 742, 71 ND 679

Okl—Moore v Glover, 163 P 2d 1003, 196 Okl 177

68 C.J. p 699 note 1

8. Cal—In re Krause's Estate, 117 P 2d 1, 18 Cal 2d 623

N J—In re DuBois' Estate, 76 A 2d 33, 9 NJ Super 280

In re Kugler's Will, 1 A 2d 642, 124 NJ Eq 309

68 C J p 699 note 2

9. Ky—Darnaby v Halley's Ex'r, 208 SW 2d 299, 306 Ky 697.

N Y—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985

ND—Collins v Stroup, 3 NW 2d 742, 71 ND 679

68 C.J. p 700 note 3.

quirement,<sup>10</sup> it is very generally held, under statutes to that effect, that wills are required to be attested and subscribed by the witnesses in the presence of the testator.<sup>11</sup> These statutes are mandatory in character<sup>12</sup> and must be strictly adhered to,<sup>13</sup> and, unless substantially complied with, the will is void<sup>14</sup>. This rule, of course, requires the will to be subscribed in the presence of the testator by as many witnesses as are required by statute, and, if fewer of the witnesses subscribe in his presence, the will is void<sup>15</sup>.

*Purpose of statutes* The purpose of these statutes is to prevent imposition and fraud,<sup>16</sup> to insure identity,<sup>17</sup> to enable the testator to know that the witnesses have actually signed the instrument he intends as his will,<sup>18</sup> and to prevent the substitution of some other writing in place thereof<sup>19</sup>.

### b. Requisites and Sufficiency in General

While some decisions have held it to be indispensable that the signing by the witnesses occur where the testator could see it if he chose to do so, others have held it to be sufficient that they sign within the hearing, knowledge, and understanding of the testator.

Many decisions have held that, in order to satisfy the requirements of statutes requiring witnesses to subscribe the will in the presence of the testator, it is indispensable that the signing occur where the testator as then circumstanced could see witnesses signing their names to the instrument if he chose to do so,<sup>20</sup> unless he was blind<sup>21</sup>. Accordingly, the witness should be actually within the reach of the testator's organs of sight, and the requirements of the statute are not satisfied if he cannot see the act of signing, but merely concludes from the surrounding circumstances and from what he understands is going on that an attestation is taking place.<sup>22</sup> However, if the testator is able to see the witnesses sign the will if he chooses, the requirements of the statute are satisfied whether or not he avails himself of the opportunity to do so.<sup>23</sup> In other words, the power to see and actual sight are equivalent and convertible terms.<sup>24</sup>

On the other hand, a number of decisions have adopted a less stringent rule than that stated above, substantial compliance with the statute being suffi-

- 10 N.Y.—In re Roe's Will, 143 N YS 999, 82 Misc 565  
68 CJ p 700 note 5
11. Del.—In re Kemp's Will, 186 A 890, 7 WW Harr 514  
Ga.—Whitfield v Pitts, 53 SE 2d 549, 205 Ga. 259  
Ky.—Prichard v Kitchen, 242 SW 2d 988—Darnaby v Halley's Ex'r, 208 SW 2d 299, 306 Ky 697—Rybolt v Futrell, 176 SW 2d 269, 296 Ky 158  
Mass.—Putnam v Neubrand, 109 N E 2d 123, 329 Mass 453  
Mich.—In re Cytacki's Estate, 292 NW 489, 293 Mich 555  
Miss.—Phifer v McCarter, 76 So 2d 258  
N.J.—In re Cook's Estate, 179 A 259, 118 NJ Eq 288, 99 ALR 551  
N.C.—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 736  
Or.—In re Demaris' Estate, 110 P 2d 571, 166 Or 36  
Pa.—In re Morris' Estate, Orph., 21 Wash Co 120  
Tenn.—Hickey v Beeler, 171 SW 2d 277, 180 Tenn 31  
Tex.—Venner v Layton, Civ App, 244 SW 2d 852, error refused no reversible error—Gainer v Johnson, Civ App, 211 SW 2d 789—Zaruba v Schumaker, Civ App, 178 SW 2d 542  
W Va.—Wade v Wade, 195 SE 339, 119 W Va 596, 115 ALR 686.
- In Arkansas  
(1) Under the statute enacted in 1949, the rule stated in the text prevails.
- Ark.—Meek v Bledsoe, 253 SW 2d 369, 221 Ark 395  
(2) Prior thereto it was not required that wills shall be attested and subscribed in the presence of the testator  
Ark.—In re Cornelius' Will, 14 Ark 675  
68 CJ p 700 note 5 [a]
12. Or.—In re Demaris' Estate, 110 P 2d 571, 166 Or 36  
68 CJ p 700 note 10
13. Cal.—In re Jianitos' Estate, 228 P 2d 60, 102 Cal App 2d 736
14. Ill.—Hackett v Hicks, 53 NE 2d 742, 322 Ill App 76  
Mont.—Miller v Talbott, 139 P 2d 502, 115 Mont 1  
Neb.—In re Cagle's Estate, 270 NW 664, 132 Neb 47  
N.Y.—In re Banta's Will, 128 NYS 2d 334, 204 Misc 985, applying Quebec law  
ND.—Collins v Stroup, 3 NW 2d 742, 71 ND 679  
68 CJ p 700 notes 11, 12
15. Ky.—Catlett v Satterfield, 251 SW 659, 199 Ky 617.  
68 CJ p 700 note 13
16. Ky.—McKee v McKee's Ex'r, 160 SW 261, 155 Ky 738  
68 CJ p 700 note 6
- To prevent diversion of estate  
The reason for the formalities is to prevent the diversion of the estate of a decedent from those who would take it under statutes of descent and distribution, except where decedent has clearly and deliberately expressed an intention to so divert it
- Ohio.—Sherman v Johnson, 112 NE 2d 326, 159 Ohio St 209
17. Ky.—McKee v McKee's Ex'r, 160 SW 261, 155 Ky 738  
68 CJ p 700 note 7
18. US.—Welch v Kirby, Mo., 255 F 451, 166 CCA 527, certiorari denied 39 S Ct 386, 249 US 612, 63 L Ed 801  
68 CJ p 700 note 8.
19. Kan.—Kitchell v. Bridgeman, 267 P 26, 126 Kan 145  
68 CJ p 700 note 9
20. Ill.—Walker v Walker, 174 NE 541, 342 Ill 376  
68 CJ p 701 note 21
21. Mich.—Aikin v Weckerly, 19 Mich 482  
Wis.—In re Downie's Will, 42 Wis 66  
Signing in presence of blind testator see *infra* subdivision g of this section
22. Ill.—Walker v Walker, 174 NE 541, 342 Ill 376  
68 CJ p 701 note 24
23. Ill.—Bronson v Martin, 51 NE 2d 149, 384 Ill 129  
Mo.—Callaway v Blankenbaker, 141 SW 2d 810, 346 Mo 383  
68 CJ p 701 note 25
24. Va.—Nock v. Nock's Ex'rs, 10 Gratt 106, 51 Va. 106  
"If actual sight were requisite if a man did but turn his back or look off, though literally present by being at the spot where the thing was done, the attestation would be invalid"  
N.C.—Bynum v. Bynum, 33 N.C. 632, 637.

cient<sup>25</sup> Thus, in determining whether the statutory requirement of subscription by the witnesses in the presence of the testator has been satisfied, due regard must be had to the circumstances of each particular case,<sup>26</sup> since the statute does not require absolutely that the witnessing must be done in the actual sight of the testator or even within his range of vision,<sup>27</sup> and if they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence<sup>28</sup>

In some instances, under the "conscious presence rule," discussed below, the testator need not actually view the act of signing by the witnesses, provided they sign within his hearing, he knows what is being done, and the signing by the testator and the witnesses constitute one continuous transaction<sup>29</sup> In others, the subscribing witnesses are regarded as subscribing in the testator's presence, if their position and that of the testator, and their proximity to him, are such that, but for some physical infirmity which did not otherwise affect him, he could see or hear what they were doing, and if he knew and was conscious of and understood what took place<sup>30</sup>

"*Conscious presence.*" In general the words "presence of testator" in the statutes requiring wills

to be subscribed by witnesses in the presence of the testator mean a "conscious" presence<sup>31</sup> Thus, it is essential that the testator be mentally capable of recognizing and actually conscious of the act performed before him,<sup>32</sup> and it is not sufficient that the testator and witnesses be merely present together at the same time and place<sup>33</sup> In accordance with these principles, the subscription is not made in the testator's presence, if at the time of subscribing, from sleep or other cause, he is unconscious of the act of subscribing,<sup>34</sup> and is no longer possessed of the essential element of intelligent consciousness without which there can be no valid will<sup>35</sup> Conversely, it has been held that the witnesses are in his presence whenever they are so near he is conscious where they are and what they are doing through any of his senses<sup>36</sup>

### c. Presence in Room or House

Depending on the circumstances, a subscription in the same room where the testator is or in another room or house may be sufficient to satisfy the statutory requirements

Depending on the circumstances, a subscription either in the same room where the testator is or in another room or house may be sufficient to satisfy the requirements of the statute,<sup>37</sup> since, as the reason for requiring subscription to be in the presence

25 Mich—In re Lane's Estate, 251 NW 590, 265 Mich 539  
Okl—Moore v Glover, 163 P 2d 1003, 196 Okl 177

26 Mich—In re Cytaclack's Estate, 292 NW 489, 293 Mich 555—In re Lane's Estate, 251 NW 590, 265 Mich 539—Cook v Winchester, 46 NW 106, 81 Mich 581, 8 L R A 822

#### Particular circumstances to be considered

In determining whether testator was aware that signatures of witnesses to will were being written in another room, court could consider fact that testator had asked physician to prepare will and that both physician and his wife, witnesses, were present when testator signed, and where testator was on bed in treatment room with door open into waiting room and physician witnessed will in consultation room on the opposite side of waiting room with door open and in presence of testator's relatives, contestants of will, were circumstances which could properly be considered in determining whether physician who could not be seen by testator when signing will signed in presence of testator  
Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36

27 Mich—In re Cytaclack's Estate, 292 NW 489, 293 Mich 555—In re

Lane's Estate, 251 NW 590, 265 Mich 539—Cook v Winchester, 46 NW 106, 81 Mich 581, 8 L R A 822

Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36

28. Kan—Kitchell v Bridgeman, 267 P 26, 126 Kan 145

Mich—In re Cytaclack's Estate, 292 NW 489, 293 Mich 555—In re Lane's Estate, 251 NW 590, 265 Mich 539—Cook v Winchester, 46 NW 106, 81 Mich 581, 8 L R A 822

Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36

29. Cal—In re Tracy's Estate, 182 P 2d 336, 80 Cal App 2d 782

30 Mass—Raymond v Wagner, 59 NE 811, 178 Mass 315—Riggs v Riggs, 135 Mass 238, 46 Am R 464

31. Cal—In re Tracy's Estate, 182 P 2d 336, 80 Cal App 2d 782  
68 C J p 701 note 15

32. Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36  
68 C J p 701 note 16

33. Va—Chappell v Trent, 19 SE 314, 90 Va 849

34. Va—Chappell v Trent, supra.  
68 C J p 701 note 18

35. Va—Chappell v Trent, supra

36. NH—Healey v Bartlett, 59 A.

617, 73 NH 110, 6 Ann Cas 413 and note

Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36

37. Mich—In re Cytaclack's Estate, 292 NW 489, 293 Mich 555—In re Lane's Estate, 251 NW 590, 265 Mich 539—Cook v Winchester, 46 NW 106, 81 Mich 581, 8 L R A 822

68 C J p 702 note 30

#### Statutory requirements held satisfied

Where testator lying on bed in treatment room of physician's clinic requested physician to prepare will and physician went through adjoining waiting room in which testator's relatives were waiting, and into consultation room leaving doors open and typed will and took it to testator and explained contents, and testator signed in presence of physician and began signing before physician's wife left room, and later physician and wife in consultation room with doors open so that testator could see physician's wife but not the physician, signed as witnesses, within range of view of testator's relatives in adjoining waiting room, physician and wife substantially complied with requirements of statute requiring witnesses to subscribe in "presence of testator"  
Or—In re Demaris' Estate, 110 P 2d 571, 166 Or 36.

of the testator is precisely the same whether the subscription is in the same room or a different room, the law will apply the same test of presence to both cases<sup>38</sup> There is, however, a distinction between a subscription in the same room with the testator and a subscription in another room, in that the first is prima facie a subscription in the presence of the testator,<sup>39</sup> whereas, if the subscription is in another room, the presumption is that the witnesses did not subscribe in the presence of the testator<sup>40</sup> However, in neither case is the presumption conclusive,<sup>41</sup> and it is subject to rebuttal<sup>42</sup> and must yield to proof<sup>43</sup>

It is well settled that the signing of a will by witnesses in another room is sufficient if the testator sees or could see the witnesses sign if he chooses to do so<sup>44</sup> Thus, the moment the range of vision becomes unobstructed, the distinction between the same room and different rooms ceases, the partition wall is broken down, and the two rooms are turned into one<sup>45</sup> On the other hand, if the signing in another room is outside of the testator's range of vision, it is not signed in the presence of the testator and is insufficient<sup>46</sup>

Conversely, a signing may be out of the presence of the testator even though it actually takes place in the same room<sup>47</sup> Thus, although the will is signed in the same room, it is not signed in the testator's presence if the signing is done in a clandestine and fraudulent manner.<sup>48</sup>

*Testator in conveyance near house in which will is signed.* It has been held that the statutory requirement that the witnesses sign the will in the presence of the testator is not complied with where the testator was in a parked automobile and the witnesses were inside a building through which the testator might have seen the witnesses, but could

not have seen the will<sup>49</sup> Certainly, if a change of position on his part was necessary to enable him to see the witnesses sign, the will was not signed in his presence<sup>50</sup>

#### d. Effort or Change of Position Necessary

Decisions differ as to whether it is essential that the testator be able to see the signing by the witnesses without effort or change of position, and the effect of physical inability to make such a change of position.

In some decisions it is either held or said without qualification that, in order to satisfy the statutory requirement that a will be signed by the witnesses in the presence of the testator, it is indispensable that he shall be able, without effort and without change of position, to see the act of signing<sup>51</sup> and that it is of no consequence that he was physically able to change his position so as to see the act of signing<sup>52</sup> In other decisions a will is subscribed in a testator's presence where, by moderate effort on his part, or without any material change of position, he could have seen the act of signing, and had the physical capacity to make the effort or change of position,<sup>53</sup> where he had the physical ability to change his position and by doing so could have seen the proceeding,<sup>54</sup> or where some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceeding<sup>55</sup>

*Physical incapacity to change position.* The weight of authority is to the effect that whether the signing is in the same room or in another room, if it is impossible for the testator to see the witnesses sign the will without changing his position, and he is physically incapable of doing so

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| <p>38. Mich.—In re Cytacki's Estate, 292 NW 489, 293 Mich. 555—In re Lane's Estate, 251 NW 590, 265 Mich 539—Cook v Winchester, 46 NW 106, 81 Mich. 581, 8 L.R. A 822<br/>68 C.J. p 702 note 31</p> <p>39. Ky.—Poindexter's Adm'r v Alexander, 125 SW 2d 981, 277 Ky 147<br/>68 C.J. p 702 note 32</p> <p>40. Ky.—Poindexter's Adm'r v Alexander, 125 SW 2d 981, 277 Ky 147<br/>68 C.J. p 702 note 33</p> <p>41. Ga.—Lamb v Girtman, 26 Ga 625<br/>68 C.J. p 702 note 34.</p> <p>42. Ga.—Lamb v. Girtman, 26 Ga 625</p> <p>43. Miss.—Watson v. Pipes, 32 Miss 451.</p> | <p>Va.—Neil v Neil, 1 Leigh 6, 28 Va 6</p> <p>44. Cal.—In re Tracy's Estate, 182 P 2d 336, 80 Cal App 2d 782—In re Jacobs' Estate, 76 P 2d 128, 24 Cal App 2d 649<br/>Ky.—Poindexter's Adm'r v Alexander, 125 SW 2d 981, 277 Ky 147<br/>68 C.J. p 702 note 37</p> <p>45. Va.—Nock v Nock's Ex'rs, 10 Gratt 106, 120, 51 Va 106, 120</p> <p>46. Ill.—Hackett v Hicks, 53 NE 2d 742, 322 Ill App 76<br/>Ky.—Poindexter's Adm'r v Alexander, 125 SW 2d 981, 277 Ky. 147<br/>68 C.J. p 703 note 39</p> <p>47. Ky.—Poindexter's Adm'r v. Alexander, supra.</p> <p>48. Ill.—Ambre v Weishaar, 74 Ill 109<br/>N.C.—Bynum v Bynum, 33 N.C. 632.</p> | <p>49. Ala.—Green v. Davis, 153 So 240, 228 Ala. 162.</p> <p>50. Ill.—Walker v Walker, 174 NE 541, 342 Ill 376</p> <p>51. Ill.—Walker v Walker, 174 NE 541, 342 Ill 376<br/>68 C.J. p 703 note 44</p> <p>52. S.C.—Reynolds v. Reynolds, 28 SCL 253, 40 Am.D 599.<br/>68 C.J. p 703 note 45</p> <p>53. Md.—Brittingham v Brittingham, 127 A 737, 147 Md. 153<br/>68 C.J. p 703 note 46</p> <p>54. Miss.—Walker v. Walker, 7 So 491, 67 Miss 529—Watson v. Pipes, 32 Miss 451</p> <p>55. Mich.—Maynard v. Vinton, 26 N W 401, 59 Mich 139, 149, 60 Am R 276—Arkin v. Weckerly, 19 Mich. 482, 504.</p> |
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without assistance, and on this account he does not see the witnesses subscribe, the will is not witnessed in his presence,<sup>56</sup> and the fact that the testator might have caused himself to be moved into a position where he might have seen the witnesses subscribe does not affect the operation of this rule.<sup>57</sup> Moreover, the rule has been extended to cases where the testator, although physically capable of changing his position so as to see the witnesses sign the will, could not do so without endangering his life and disobeying the instructions of his physician.<sup>58</sup>

On the other hand, notwithstanding the testator's physical incapacity to change his position so that he may see the witnesses sign the will, it may be considered as signed in his presence where it is signed within his line of vision, if he had been able to look a few feet from him and where he could hear all that was said and knew and understood all that was done.<sup>59</sup> Similarly a will has been regarded as attested in the presence of the testator if he understood and was conscious of what the witnesses were doing when they signed the will and could, if it had not been for his physical infirmities, readily have changed his position so that he could have seen and heard what they were doing when they wrote their names, if he had been so disposed.<sup>60</sup>

The effect of the blindness of the testator is discussed *infra* subdivision g of this section.

*Change of position necessary to avoid seeing subscription.* Obviously, a will is subscribed in the presence of the testator where he is so situated that he is obliged to see the witnesses sign unless he closes his eyes or changes his position by turning his head away.<sup>61</sup>

#### e. Subsequent Acknowledgment of Signature in Presence of Testator

Authorities differ as to whether the statutory requirement that the testator witness the attestation is satisfied where the witnesses, subsequent to their signing outside the presence of the testator, acknowledge their signatures in his presence.

Generally, statutes requiring wills to be subscribed

by the witnesses in the presence of the testator are not satisfied by their signing the will outside of his presence and subsequently acknowledging their signatures in his presence,<sup>62</sup> even though this is done with the testator's assent and approval.<sup>63</sup> In contradiction of the foregoing views, a recognition to the testator by the witnesses of their signatures immediately after subscription has been considered a substantial and satisfactory compliance with the requirements of the statute,<sup>64</sup> and in some jurisdictions where the act of signing by the witnesses was within the hearing, knowledge, and understanding of the testator, although not within his sight, and in addition thereto there was an acknowledgment of their signatures by the witnesses, assented to, and approved by, the testator, the subscription was regarded as in the presence of the testator.<sup>65</sup>

#### f. What Testator Must See or Be Able to See

Authorities differ as to just how much the testator must be able to see of the actual signing of the will by the witnesses.

In numerous decisions it is held or stated without qualification that the testator must see or be able to see the witnesses in the act of subscribing the will,<sup>66</sup> in order that he may satisfy himself by ocular demonstration that they are witnessing the very paper he designed to be his last will.<sup>67</sup> Thus, the statutory requirement is not complied with where the testator was in such a position relative to the witnesses that he could have seen the witnesses but could not have seen the will,<sup>68</sup> and a will was not signed in the presence of the testator where the testator could have seen only the backs of the witnesses as they sat writing but could not have seen their faces, arms, or hands, or the paper on which they wrote.<sup>69</sup>

On the other hand, it has been held that where the testator can see enough of the act of signing to know that the witnesses and the will are in his presence and that the former are signing their names as witnesses, the statutory requirement is sufficiently complied with, although the bodies of the wit-

56 Mich—Maynard v Vinton, 26 N W 401, 59 Mich 139, 149, 60 Am R 276

68 C J p 704 note 49

57 Va—Neil v Neil, 1 Leigh 6, 28 Va 6

68 C J p 704 note 50

58 NC—Jones v Tuck, 48 NC 202

68 C J p 704 note 51

59 Mass—Riggs v Riggs, 135 Mass 238, 46 Am R 464

68 C J p 704 note 52.

60. NH—Healey v Bartlett, 59 A 617, 73 NH 110, 6 Ann Cas 413

68 C J p 704 note 53

61. Va—Baldwin v Baldwin's Ex'r, 81 Va. 405, 59 Am R 669

62. Tenn—Eslick v Wodicka, 215 SW 2d 12, 31 Tenn App 333

68 C J p 704 note 56, p 705 note 58

63. Tenn—Eslick v Wodicka, 215 SW 2d 12, 31 Tenn App 333

68 C J p 705 note 57

64. Va—Sturdivant v. Birchett, 10 Gratt 57, 51 Va 57

68 C J p 705 note 59

65. Mich—Cook v Winchester, 46 NW 106, 81 Mich 581, 8 L R A 822 and note, followed in Cunningham v Cunningham, 83 NW 58, 80 Minn. 180, 81 Am SR 256, 51 L R A 642

66. Ga—Reed v Roberts, 26 Ga 294, 300, 71 Am D 210

68 C J p 705 note 61

67 Ala—Hill v Barge, 12 Ala 687

68. Ala—Green v Davis, 153 So 240, 228 Ala 162

69 NC—Graham v Graham, 32 N. C 219.

nesses, when the signing is done, are between the testator and the table, so that he cannot see the pen or the letters traced by it, or, probably, the hand holding the pen<sup>70</sup> Moreover, a similar conclusion has been reached where it was held that if the witnesses were in the range of the testator's vision, the will will be considered as having been signed in his presence, although the testator could not see their forearms and writing hands, and the paper itself<sup>71</sup> The statutory requirement was considered sufficiently complied with where the testator could see the motion of the pen on the paper, although he could not distinguish the letters the pen was forming<sup>72</sup>

### g. Blind Testator

While, in determining whether the statutory requirement has been satisfied, some decisions use the same test with respect to blind testators as with those who can see, other decisions require that a blind testator must be made aware, by senses other than sight, of the subscription by the witnesses

Some decisions hold that the statutes providing that wills shall be subscribed by the witnesses in the presence of the testator require neither more nor less in the case of a blind testator than of one who can see<sup>73</sup> Thus, a will is signed in the presence of a testator who is blind where he could have seen the same had he not been blind,<sup>74</sup> even though the will was signed in a room connected by an open archway with the room occupied by the testator<sup>75</sup> In one decision a signing of the will in the same

room with the testator was signing in his presence and satisfied the requirements of the statute<sup>76</sup>

Other decisions formulate a stricter rule, and it is either held or said that if the testator is blind the superintending control, which in other cases is exercised by sight, must be transferred to the other senses by means of which he must be made aware that the witnesses subscribed the will in his presence<sup>77</sup> However, if this requirement is satisfied the will will be considered as having been subscribed in his presence<sup>78</sup>

### § 190 — Signing by Witnesses in Presence of Each Other

While it is not generally required that the attesting witnesses should subscribe their names in the presence of each other, some jurisdictions expressly so require by statute

In most jurisdictions, since no requirement to that effect is contained in the applicable statutes, it is not necessary that the attesting witnesses should subscribe their names in the presence of each other<sup>79</sup> However, in those jurisdictions in which the statutes expressly require that the will shall be subscribed by the attesting witnesses in the presence of each other, if this requirement is not complied with, the will is void<sup>80</sup>

Even where the requirement exists, it is not necessary that all the attesting witnesses should actually see each other sign the will, but it will be

<sup>70</sup> *Okl—Corpus Juris* quoted in *Moore v Glover*, 163 P 2d 1003, 1006, 1007, 196 *Okl* 177 68 *CJ* p 705 note 64

<sup>71</sup> *Okl—Corpus Juris* quoted in *Moore v Glover*, 163 P 2d 1003, 1006, 1007, 196 *Okl* 177 68 *CJ* p 705 note 65

<sup>72</sup> *NJ—Ayres v Ayres*, 12 A 621, 43 *NJEq* 585

*Okl—Corpus Juris* quoted in *Moore v Glover*, 163 P 2d 1003, 1006, 1007, 196 *Okl* 177

<sup>73</sup> *US—Welch v Kirby*, Mo, 255 F 451, 166 *CCA* 527, certiorari denied 39 *St Ct* 386, 249 *US* 612, 63 *LEd* 801

<sup>74</sup> *US—Welch v Kirby*, supra 68 *CJ* p 705 note 68

<sup>75</sup> *US—Welch v Kirby*, supra

<sup>76</sup> *Va—Boyd v Cook*, 3 *Leigh* 32, 30 *Va* 32

<sup>77</sup> *NC—In re Allred's Will*, 86 *SE* 1047, 170 *NC* 153, *LRA* 1916C 946, *Ann Cas* 1916D 788 68 *CJ* p 706 note 72

<sup>78</sup> *NC—In re Allred's Will*, supra 68 *CJ* p 706 note 73

<sup>79</sup> *Cal—In re Armstrong's Estate*, 64 *P2d* 1003, 8 *Cal2d* 204

*Ga—Whitfield v Pitts*, 53 *SE2d* 549, 205 *Ga* 259

*Ky—Darnaby v Halley's Ex'r*, 208 *SW2d* 299, 306 *Ky* 697

*Miss—Phifer v McCarter*, 76 *So* 2d 258—*Austin v Patrick*, 176 *So* 714, 179 *Miss* 718

*Mont—In re Woodburn's Estate*, 273 *P2d* 391

*NJ—In re Cook's Estate*, 179 *A* 259, 118 *NJEq* 288, 99 *ALR* 551

*NY—In re Connor's Will*, 100 *NY* 2d 879

*NC—In re Franks' Will*, 56 *SE2d* 668, 231 *NC* 252, rehearing denied 57 *SE2d* 315, 231 *NC* 736

*Ohio—McFadden v Thomas*, 96 *N* *E2d* 254, 154 *Ohio St* 405

*Okl—Corpus Juris* quoted in *Moore v Glover*, 163 *P2d* 1003, 1007, 196 *Okl* 177

*Pa—In re Ryan's Estate*, *Orph*, 34 *DelCo* 380

*Tex—Venner v Layton*, *Civ App*, 244 *SW2d* 852, error refused no

reversible error—*Gainer v Johnson*, *Civ App*, 211 *SW2d* 789—

*Ludwick v Fowler*, *Civ App*, 193 *SW2d* 692, error refused no re-

versible error—*Zaruba v Schumaker*, *Civ App*, 178 *SW2d* 542

68 *CJ* p 706 note 74

<sup>80</sup> *NY—In re Banta's Will*, 128 *NYS2d* 334, 204 *Misc* 985, applying Quebec law

*W Va—Wade v Wade*, 195 *SE* 339, 119 *W Va* 596, 115 *ALR* 686 68 *CJ* p 706 note 75

#### In Tennessee

(1) Under a statute so providing, the rule stated in the text is now applicable

*Tenn—Hickey v Beeler*, 171 *SW2d* 277, 180 *Tenn* 31

*Eslick v Wodicka*, 215 *SW2d* 12, 31 *Tenn App* 333

(2) The statute applies to personalty as well as to realty

*Tenn—Fann v Fann*, 208 *SW2d* 512, 186 *Tenn* 127

(3) The statute so requiring has been held valid

*Tenn—McClure v Wade*, 235 *SW2d* 835, 34 *Tenn App* 154, 28 *ALR2d* 104

(4) Formerly the rule was otherwise

*Tenn—Morrow v Person*, 259 *SW2d* 665, 195 *Tenn* 370

*Howell v Brown*, 7 *Tenn App* 380

68 *CJ* p 706 note 74

sufficient that they have the opportunity to do so and could have seen each other sign if they had looked in the direction where the act of signing was being performed<sup>81</sup> However, this much is necessary, and if one of the witnesses was in another room where his vision was necessarily impeded by a curtain, the statutory requirement is not satisfied<sup>82</sup>

*Acknowledgment of signatures in presence of each other* While it has been held that where the attesting witnesses are required to sign the will in the presence of each other, the requirement is not satisfied by their acknowledgment in the presence of each other of their signatures previously and separately made,<sup>83</sup> there is also some authority to the contrary<sup>84</sup>

### § 191. — Requisites and Sufficiency of Subscription by Witnesses in General

#### a In general

#### b Signature of person taking acknowledgment of will

#### a. In General

Generally, in order for one to become an attesting witness he must be aware of the character of the act and must subscribe his name with the intention of signing as a witness.

In order for a person to become an attesting witness he must be aware of the character of the act which he is called on to perform, and must subscribe his name with the intention of signing as a witness<sup>85</sup> Thus, the facts and circumstances attending

his signing must show that he is signing as a subscribing witness and not for some other purpose.<sup>86</sup> However, if the surrounding facts and circumstances indicate that he is signing as a witness, his secret intention not to act as a witness,<sup>87</sup> or his private belief that he is acting in some other capacity,<sup>88</sup> does not make the will invalid.

On the other hand, according to some cases there is nothing in the statutes which requires proof of a specific intent to act solely as a witness,<sup>89</sup> and no such intent is necessary where the person who is relied on as a witness observed all of the events to which he is required to attest, and signed the instrument<sup>90</sup> Accordingly, it does not necessarily follow that one did not sign as a witness merely because he also intended his signature to serve another purpose<sup>91</sup>

*Hand of witness guided by another* On the theory that there is actual physical participation by him in the act of signing, a will has been considered properly subscribed where the hand of the witness was guided by another in making the signature<sup>92</sup> In one decision such subscription was sufficient, even though the witness was at the time able to write his name<sup>93</sup>

*Signing of testator's name followed by signature of person so signing* Where one subscribes the testator's name and adds his own name to indicate that it was he who wrote the testator's name, he will not be regarded as a witness to the will unless the facts and circumstances show that he signed as a subscribing witness and not only as an amanuensis<sup>94</sup> Thus, while one who signs the

81 Philippine—Nera v Rimando, 18 Philippine 450  
68 C J p 706 note 76

82 Philippine—Nera v Rimando, supra

83. Tenn—Eslick v Wodicka, 215 S W 2d 12, 31 Tenn App 333

84. *Acknowledgment of one witness' signature*

Where testator and one witness, ten days after having affixed their signatures to will in each other's presence, went to place of business of second witness, who affixed his signature as a witness subsequent to testator's acknowledgment of will and identification of his signature, and first witness' acknowledgment and identification of his signature, first witness' acknowledgment, in absence of any indicia of fraud or misunderstanding, was tantamount to actual writing of his name in presence of testator and other witness as required by statute

W Va—Wade v Wade, 195 S E 339, 119 W Va 596, 115 A L R 686.

85. Ky—Darnaby v Halley's Ex'r, 208 S W 2d 299, 306 Ky 697—Love v Gibbs, 117 S W 2d 987, 273 Ky 775

N Y—In re Hammer's Estate, 72 N Y S 2d 636, affirmed 72 N Y S 2d 410, 272 App Div 822  
68 C J p 707 note 78

86 Ky—Love v Gibbs, 117 S W 2d 987, 273 Ky 775

87. Ky—Love v Gibbs, supra

88. *Witness signing as executor*

Where testator told witness that instrument was will and requested witness to sign it, and witness saw testator sign and affixed his own signature in testator's presence, and in presence of another witness, witness could testify to authenticity of document and to circumstances surrounding its execution, and his signature served to identify it, and will was properly authenticated even though witness may have thought he was signing in capacity of executor  
Cal—In re La Mont's Estate, 248 P 2d 1, 39 Cal 2d 566

*Witness to testator's signature by mark*

Fact that a person signed as a witness to the testator's signature because the testator signed by mark does not affect the validity of the subscription by the witness

Tex—Saathoff v Saathoff Civ App, 101 S W 2d 910, error refused

89. Cal—In re La Mont's Estate, 248 P 2d 1, 39 Cal 2d 566

90 Cal—In re La Mont's Estate, supra

91. Ky—Love v Gibbs, 117 S W 2d 987, 273 Ky 775  
68 C J p 707 note 79

92. NH—Lord v. Lord, 58 NH 7, 42 Am R 565  
68 C J p 708 note 4

93 NC—In re Pope's Will, 52 S E. 235, 139 NC 484, 111 Am S R 813, 7 L R A, N S, 1193 and note, 4 Ann. Cas 635  
68 C J p 708 note 6

94. Ky—Darnaby v Halley's Ex'r, 208 S W 2d 299, 306 Ky 697—Love



testator's name at his request and also subscribes his own immediately after it with the word "By" as a prefix thereto may be considered a subscribing witness,<sup>95</sup> there is also authority to the contrary,<sup>96</sup> and it has further been held that on this state of facts the person so subscribing is not an attesting witness, even though the word "witness" follows the subscription of his name<sup>97</sup>

*Signing surname of testator or of another witness*

In one jurisdiction where the statute requires a witness to a will to "sign his name as a witness," where a witness inadvertently signed his own initials and the surname of the testator, the will was insufficiently executed, the view being taken that under this provision attesting witnesses shall sign and sign only in one way, by affixing their names<sup>98</sup> In another jurisdiction under a statute identical in its provisions a directly opposite conclusion has been reached, and it was held that a will, to the attestation clause of which one of the witnesses signed the testator's name, instead of his own name, the act having been done animo attestandi, and without any fraud or intent wrongfully to personate another person, should be admitted to probate<sup>99</sup> So, also, in another jurisdiction where the statute requires wills to be "subscribed" by witnesses, it has been held that, where one witness in subscribing the will wrote his Christian name but completed the writing by inadvertently setting down the initial and sur-

name of another witness whose signature preceded his, there was a sufficient subscription<sup>1</sup>

*Failure to write place of residence.* Although a statute requires that the witnesses to a will write opposite their names their place of residence, on penalty of a designated amount recoverable by suit of any person interested in the property disposed of by the will, the failure of the witnesses to write their addresses after their names does not affect the validity of its execution or incapacitate the witnesses to testify thereto<sup>2</sup> With respect to penal liability under this statute, it has been held that the word "residence" does not require the addition of a street number and that the statute is sufficiently complied with where a witness stamped opposite his name with a small seal the words "Notary Public, New York County."<sup>3</sup>

**b. Signature of Person Taking Acknowledgment of Will**

In general, a will is properly attested by one empowered to take acknowledgments of written instruments, even though his signature is preceded by a certificate of acknowledgment.

Generally, where one vested with the power to take acknowledgments of written instruments is asked by a testator to attest his will,<sup>4</sup> or to take the testator's acknowledgment thereof,<sup>5</sup> the will is properly attested by him as a witness, even though the signature is preceded by a certificate of acknowledg-

v Gibbs, 117 SW 2d 987, 273 Ky 775

95. Ark—Abraham v. Wilkins, 17 Ark 292

**Signatures following attestation clause**

A scrivener, who prepared a will and wrote names of testator and one subscribing witness who were unable to write and under name of testator wrote "by" his own name, manifested intent to affix signature as attesting witness and not merely as amanuensis for testator, where attestation clause after which signatures were affixed recited "we at his request sign our names here and too in his presence as attesting witnesses" Ky—Love v Gibbs, 117 SW 2d 987, 273 Ky 775

**Dual intent of a person signing an attestation clause to serve both as witness and as scrivener for testator would not invalidate execution of will**

Ky—Love v Gibbs, supra

96. Va—Peake v Jenkins, 80 Va 293

97. Miss—Burton v. Brown, 25 So 61  
68 C J p 709 note 19.

98. Cal—In re Walker's Estate, 42 P 815, 1082, 110 Cal 387, 52 Am SR 104, 30 L R A 460

99. N Y—In re Jacobs' Will, 132 N YS 481, 73 Misc 162  
68 C J p 709 note 21

1. Mass—Smith v Buffum, 115 NE 669, 226 Mass 400, L R A 1917D 897  
68 C J p 709 note 22

2. N Y—In re Phillips, 98 NY 267  
In re Wallace's Will, 265 NYS 898, 148 Misc 867

3. N Y—Bossie v Edelson, 134 NY S 615, 76 Misc 234.

4. N Y—In re Douglas' Will, 83 N YS 2d 641, 193 Misc 623—In re McAvish's Estate, 293 NYS 246, 161 Misc 887

Va—French v Beville, 62 SE 2d 883, 191 Va 842  
68 C J p 709 note 23

Competence, as attesting witnesses, of officers executing acknowledgments of signatures of testator and witnesses see supra § 185 j

**Signature as deputy clerk**

A will not wholly written by testator but subscribed and acknowledged by testator before two witnesses was not invalid because one of witnesses signed document in his official ca-

capacity as deputy clerk, since under statute relating to manner of executing a will all that was required of witness was to sign his name and fact that he attached more writing than was necessary did not vitiate his signature

Kv—Madden v. Cornett, 160 SW 2d 607, 290 Ky 268.

5. Cal—In re Montgomery's Estate, 201 P 2d 569, 89 Cal App 2d 664  
Tex—Saathoff v Saathoff, Civ App, 101 SW 2d 910, error refused

Va—*Corpus Juris* cited in Ferguson v Ferguson, 47 SE 2d 346, 353, 187 Va 581  
68 C J p 709 note 24

**Certification by notary public**

Where notary public saw testator make his mark on will in presence of one who signed as a witness in presence of testator and notary, and the notary certified that mark had been made by testator who was unable to write his name because of nervousness and signed certification as notary public in presence of testator and such witness, the will so executed was entitled to probate as one duly executed in the presence of two competent subscribing witnesses

Va—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581.

ment Such attestation may be sufficient where the acknowledgment was not at the request but with the consent of the testator <sup>6</sup>

These decisions proceed on the theory that the certification of the facts that the testator acknowledged the instrument to be his will and that the signature was his are appropriate to the attestation of the instrument,<sup>7</sup> that the taking of the acknowledgment by the officer and attaching his signature to the certificate are necessarily done for the purpose of evidencing the fact that he had witnessed the execution of the will,<sup>8</sup> and that the certificate being superfluous and useless must be considered as surplusage which cannot have the effect of impairing the signature or vitiating the attestation <sup>9</sup>

*Officer not signing as witness* The fact that the officer who was requested to take the acknowledgment believed that he was not asked to sign as a witness and that he did not undertake to do so does not ordinarily impair the validity of his signature as a witness <sup>10</sup> However, it has been held that where the character in which a person signs is merely that of a notary public purporting to take an oath, his signing is not in compliance with the statute <sup>11</sup>

## § 192. — Signing by Mark, Initials, Fictitious Name, or Description

A witness may effectually subscribe his name to a will by mark as well as by writing his name therein

While a subscribing witness, like the testator himself, signs most appropriately by subscribing his name in his own handwriting, and there is much reason why a witness intelligent and able-bodied enough to do this should be chosen to perform the of-

fice,<sup>12</sup> it is nevertheless well settled, except as it may be otherwise provided by statute,<sup>13</sup> that, just as a will may be validly executed by the testator by mark, as discussed supra § 172, a witness may effectually subscribe his name by mark as well as by writing his name therein <sup>14</sup> The reason of the rule allowing the testator to sign by mark applies equally to the subscribing witness,<sup>15</sup> and it has been held that the failure of the person writing the witness' name to sign his own name as witness of the fact that he so wrote the name does not invalidate a signing by mark, although the statute provides that a "signature" is to be held to "include mark, when the person cannot write, his name being written near it, and witnessed by the person who writes his name as a witness" <sup>16</sup>

*Initials, fictitious name* A witness may subscribe his name by initials,<sup>17</sup> or even by a fictitious name if used without the purpose of impersonating another <sup>18</sup>

## § 193. — Signing of Witness' Name by Third Person at his Request

Decisions differ as to whether the signing of the name of the witness in his presence and at his request by another constitutes a sufficient subscription of the will, without the making of any mark or any other physical act on his part

According to some decisions, the signing of the name of the witness in his presence and at his request by another constitutes a sufficient subscription of the will without his performance of any physical act, such as making his mark or touching the pen, or having his hand guided by the person subscribing at his request,<sup>19</sup> and such signing may be done by another attesting witness <sup>20</sup> In at least

6. RI—Merrill v Boal, 132 A 721, 47 RI 274, 45 ALR 830

7. US—Keely v Moore, App DC, 25 S Ct 169, 196 US 38, 49 L Ed 376  
68 C J p 710 note 26

8. Ark—Payne v Payne, 16 SW 1, 54 Ark 415  
68 C J p 710 note 27

9. Iowa—In re Bybee's Estate, 160 NW 900, 179 Iowa 1089  
68 C J p 710 note 28

### Imperfect certificate

Fact that notary who was requested to sign will as a witness and who intended to sign as a witness made an imperfect certificate when he signed the will, to effect that the other witness was a witness to the signature of the testator, did not invalidate will

Va—French v Beville, 62 SE 2d 883, 191 Va. 842.

10. NH—Tilton v Daniels, 109 A 145, 79 NH 368, 8 ALR 1073  
68 C J p 710 note 29

11. NY—In re Hammer's Estate, 72 NYS 2d 636, affirmed 72 NYS 2d 410, 272 App Div 822

### Particular circumstances held within rule

Where the preponderance of the evidence showed that the testatrix asked a notary public to sign the will, and to take the oath of herself and the other witness, and put his seal on, and the notary administered the oath to the other witness and signed his name under the ordinary jurat, the evidence does not show an intention that the notary should and did subscribe as an attesting witness to the codicil

NY—In re McDonough's Estate, 193 NYS 734, 201 App Div 203

12. Ark—Davis v Semmes, 9 SW 434, 51 Ark 48

Tenn—Simmons v Leonard, 18 SW 280, 91 Tenn 183, 30 AmSR 875

13. Ala—Wade v Cole, 77 So 234, 200 Ala 691  
68 C J p 707 note 94

14. Ky—Love v Gibbs, 117 SW 2d 987, 273 Ky 775  
68 C J p 707 note 95

15. Ark—Davis v Semmes, 9 SW 434, 51 Ark 48  
NY—Morris v Kniffin, 37 Barb 336

16. Ark—Davis v Semmes, 9 SW 434, 51 Ark 48  
68 C J p 708 note 99

17. NH—Lord v Lord, 58 NH 8, 42 Am R 565  
68 C J p 708 note 1.

18. NH—Lord v Lord, supra

19. Kan—Schnee v Schnee, 60 P 738, 61 Kan 643  
68 C J p 708 note 7

20. SC—Smythe v Irick, 24 SE 69,

one decision the rule was applied, although the witness whose name was signed by another was able to write.<sup>21</sup> In another instance, failure of the person so signing it to affix his own signature as an attesting witness did not invalidate the will.<sup>22</sup>

On the other hand, in other decisions, in direct opposition to the foregoing views, it is considered that notwithstanding the will is signed by a witness at his request and in his presence, it is not a valid subscription unless the witness also makes his mark to the signature as written or otherwise physically partakes in the act of signing.<sup>23</sup> In one decision, where on the facts established it was not necessary to go as far as the decisions just considered, it was held that one of the subscribing witnesses to the will cannot sign the name of another who himself was "well able to write," and who does not participate in the act of signing.<sup>24</sup>

*Signing by person incompetent to be witness*  
One physically incompetent to become a subscribing witness cannot effectually perform the act of subscription through a person who was legally incompetent by reason of interest to attest the will as a witness in his own name and right.<sup>25</sup>

*Witness incapable of seeing signature of testator*  
In jurisdictions where it is essential that the witness see or have the opportunity of seeing the testator's signature, as discussed supra § 188 c (4), the signing by another of the name of a witness having eyesight too poor to write his own name or see any signature on the paper is ineffectual.<sup>26</sup>

## § 194. — Time of Affixing Signatures

It is not generally necessary that the witnesses sign their names at the same time, and it is sufficient that they sign as part of the same transaction.

With reference to each other it is not necessary, unless the statute so requires, that the witnesses sign their names at the same time,<sup>27</sup> and it is sufficient that the required number of witnesses signed as part of the "same transaction,"<sup>28</sup> what constitutes the "same occasion and the same transaction" being a matter of judicial determination in each case, dependent on the facts thereof, and incapable of being governed by any general rule.<sup>29</sup>

Whether or not it is essential that the signing of the will by the testator shall precede the signing of the witnesses is discussed supra § 176.

## § 195. — Place of Signatures

- a In general
- b Requirement of signatures at end of will

### a. In General

In general, unless it is otherwise provided by statute, the particular place on the instrument at which the attesting witnesses affix their signatures is immaterial.

While the proper place for the signatures of the attesting witnesses is somewhere underneath the signature of the testator,<sup>30</sup> in general, unless it is otherwise provided by statute, the particular place on the instrument at which they affix their signatures is immaterial, provided they sign with the intent of witnessing the whole will.<sup>31</sup> Accordingly, a will

46 SC 299, 57 Am SR 684, 32 LR A 77

Va—Jesse v Parker's Adm'rs, 6 Gratt 57, 47 Va 57, 52 Am D 102

21. Ky—Upchurch v Upchurch, 16 B Mon 102

22. Okl—Wolber v Rose, 218 P 323, 92 Okl 100

23. Tenn—Bush v McFarland, 29 S W 899, 94 Tenn 538, 45 Am SR 760, 27 L R A 662  
68 C J p 709 note 11

24. Ala—Riley v Riley, 36 Ala 496

25. Tenn—Simmons v Leonard, 18 S W 280, 91 Tenn 183, 30 Am SR 875  
68 C J p 709 note 14

26. NY—In re Losee's Will, 34 N Y S 1120, 13 Misc 298  
68 C J p 709 note 16

27. NY—In re Maylone's Will, 93 N Y S 2d 828

NC—In re Franks' Will, 56 SE2d 668, 231 NC 252, rehearing denied  
57 SE2d 315, 231 NC 736

Pa.—In re Ryan's Estate, Orph, 34 Del Co 380

68 C J p 710 note 34

28. NY—In re Feldman's Will, 91 N Y S 2d 596, 195 Misc 632

29. NY—In re Feldman's Will, supra

Twenty-three days later was held under particular circumstances to be part of the same transaction  
NY—In re Feldman's Will, supra

30. Va—French v Beville, 62 SE2d 883, 191 Va 842

**Literal meaning of "subscribe"**

The word "subscribe" as used in statutory provision that witnesses shall "subscribe" will in presence of testator means to write underneath  
Va—French v Beville, supra

31. Ala—Plemons v Tarpey, 78 So 2d 385, 262 Ala 209—Hughes v Merchants Nat Bank of Mobile, 53 So 2d 386, 256 Ala 88

DC—Clark v Turner, 183 F 2d 141, 87 US App DC 54

Ga—Bloodworth v McCook, 17 SE 2d 73, 193 Ga 53

68 C J p 710 note 37

**Will held duly attested**

Will signed by testatrix by her mark was held duly attested by two witnesses as required by law, notwithstanding signature of one was next to signature which was not attacked and was not under words "Witness to Mark," and notwithstanding use of word "witness" instead of "witnesses," especially in view of affidavit of witness whose signature was attacked that he and other witness were present and saw testatrix sign will, and that each signed at her request and in her presence and in presence of each other  
Tex—Mortgage Bond Corp of New York v Haney, Civ App., 105 SW 2d 488, error refused

**Signatures not contiguous**

Fact that the signatures of the testator and the subscribing witnesses are not contiguous does not

is properly attested, although the witnesses signed above instead of below the words designating attestation,<sup>32</sup> or although they sign in and not after the attestation clause,<sup>33</sup> or although one signs above and the other below the attestation clause,<sup>34</sup> or although the witnesses signed towards the beginning of the instrument<sup>35</sup> However, except in so far as an exception may be recognized in the case of holographic wills, as discussed *infra* § 205, it is essential to the validity of a will that, where a statute expressly fixes the location of the signatures of the attesting witnesses, the statutory provision must be complied with<sup>36</sup>

*Signing each sheet or page of will* While it has been said to be the better practice to have each separate sheet of the will attested and subscribed by the attesting witnesses,<sup>37</sup> and in some jurisdictions such a requirement is contained in the applicable statutes,<sup>38</sup> in the absence of any statutory requirement to that effect, it is not necessary<sup>39</sup>

*Signing on separate sheet* The attestation of the witnesses, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet<sup>40</sup> However, if it is

so connected the attestation will be sufficient,<sup>41</sup> and no particular mode of fastening the papers together is required<sup>42</sup> Thus, it may be sufficient that they are pasted together,<sup>43</sup> or folded together,<sup>44</sup> or fastened together by eyelets at the top,<sup>45</sup> or by a clipless fastener<sup>46</sup> However, the attestation may also be considered sufficient even though it is on a separate sheet of paper not physically connected with the rest of the will, where it is connected by express reference and by internal sense, by coherence, and by adaptation of parts<sup>47</sup>

*Signing carbon copy* Where the witnesses signed a carbon copy of the will, but failed to sign the ribbon copy, the latter would be ineffective as a testamentary disposition<sup>48</sup>

#### b. Requirement of Signatures at End of Will

In some jurisdictions, the attesting witnesses are required to sign at the end of the will, the "end" meaning the physical end of the will, or the place on the instrument at which the dispositive provisions terminate

In some jurisdictions the statutes expressly require the attesting witnesses to sign at the end of the will,<sup>49</sup> and in others, statutes requiring wills to be

affect the validity of a will otherwise correctly executed

N Y—In re Mackris' Estate, 124 N Y S 2d 891

32 Ga—Bloodworth v McCook, 17 SE 2d 73, 193 Ga 53

Md—Moale v Cutting, 59 Md 510

33 Tex—Franks v Chapman, 61 Tex 159

34 N Y—In re McAvish's Estate, 293 NYS 246, 161 Misc 887

35 Ala—Hughes v Merchants Nat Bank of Mobile, 53 So 2d 386, 256 Ala 88

36 Mo—Potter v Ritchardson, 230 S W 2d 672, 360 Mo 661

37 Pa—In re Morris' Estate, Orph., 21 Wash Co 120

Va—Home v Bowman, 182 SE 551, 165 Va 484

68 C J p 707 note 81

38. In the Philippines it is expressly provided by statute that the witnesses shall sign each and every page of the will on the left margin, and a failure to comply with the statutory requirement vitiates the will

Philippine—In re Saguinsin's Estate, 41 Philippine 875

68 C J p 707 note 83

39 Va—Presbyterian Orphans Home v Bowman, 182 SE 551, 165 Va 484

68 C J p 707 note 82

40. Md—Shane v Wooley, 113 A 652, 138 Md 75

Pa—In re Brawdy's Estate, Orph., 25 West L J 86

#### Signature on envelope containing will

Writing which purported to be the will of decedent, which was executed by decedent, folded and sealed in an envelope, the face of which envelope was inscribed "my last will and testament" followed by witnesses' signatures under such inscription, was not entitled to probate because paper on which witnesses affixed their signatures was not physically attached to paper purporting to be the will and witnesses had not affixed their signatures to will itself

D C—In re Lee's Estate, D C, 80 F Supp 293

#### Signatures on record of delivery of will

Where testator in Italy declared to a notary that within packet he held was his will, written, dated, and transcribed in his own handwriting, and notary accepted delivery of packet to keep in his files and notary proceeded to draw in his own handwriting minutes of delivery and testator, notary and witnesses then subscribed minutes of delivery, entire procedure was insufficient to constitute a valid attestation of will so as to admit will to probate in New Jersey, since minutes of delivery were not a part of will and witnesses did not themselves sign or attest will itself

N J—In re Di Persia's Estate, 75 A 2d 833, 9 N J Super 576

41. N Y—In re Cogan's Will, 168 NYS 937, 101 Misc 652

Tenn—Ragsdale v Hill, 269 S W 2d 911, 37 Tenn App 671

68 C J p 707 note 85

42. N Y—In re Collins, 5 Redf Surr 20

43. N Y—In re Collins, supra

44. Miss—Bolton v Bolton, 64 So 967, 107 Miss 84

45 Cal—In re Moro's Estate, 190 P 168, 183 Cal 29, 10 A L R 422

46 Okl—In re Dunlap's Will, 209 P 651, 87 Okl 95

47. Ala—Johnston v King, 35 So 2d 202, 250 Ala 571

Sufficiency of one will on separate sheets of paper generally see supra § 162

#### Signing of foreign "protocol"

Where notary public in Germany filled in a separate instrument of attestation or a "protocol" on official printed form referring to testatrix' will and "protocol" was then signed by testatrix, three witnesses and notary public, all in each other's presence, there was compliance with statutory requirement that witnesses to will shall subscribe their names "thereto" in testator's presence, even though protocol was not actually attached to will

Ala—Johnston v. King, 35 So 2d 202, 250 Ala 571

48. N Y—In re Epstein's Will, 136 NYS 2d 884

49 Cal—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

N Y—In re Lubitz' Will, 136 NYS

"subscribed" by the attesting witnesses require them to sign at the end of the will<sup>50</sup>

*What constitutes signing at end of will* To satisfy the statutory requirement of signing at the end of the will, the witnesses must sign at the physical end of the will,<sup>51</sup> and that end is reached when the will is read in natural and consecutive method of reading, without turning backward or skipping a part in order to have the sense of the will connected and continuous<sup>52</sup> The signatures of the witnesses are held to be at the "end" of the will, when they immediately follow the attestation clause,<sup>53</sup> or even

where they immediately precede it,<sup>54</sup> or, although they are on one side of a sheet of paper, and the testamentary provisions and the testator's signature are on the other, concluding near the bottom of the page<sup>55</sup>

Stated otherwise, the "end" of the will means that place on the instrument at which the dispositive provisions terminate<sup>56</sup> Accordingly, a will is not signed at the end by attesting witnesses where their signatures precede provisions of a testamentary or dispositive character,<sup>57</sup> and it is of no consequence that the dispositive provision was shown to have

2d 901, 207 Misc 33—In re Robinson's Will, 103 NYS 2d 967, 201 Misc 439—In re Frickey's Will, 96 NYS 2d 825, 198 Misc 716, reversed on other grounds In re Frickey's Estate, 114 NYS 2d 270, 280 App Div 880—In re Schmitt's Will, 61 NYS 2d 569, 187 Misc 409—In re Scheck's Estate, 14 NYS 2d 946, 172 Misc 236

In re Begun's Will, 123 NYS 2d 782—In re Murphy's Estate, 46 NYS 2d 677

68 C.J. p 711 note 41

#### Purpose of statutory requirement

(1) Purpose of statute requiring that will be witnessed at the end is to prevent fraud and to surround testamentary dispositions with such safeguards as will protect them from alteration, and although its provisions should not be carried beyond policy of framers, such policy should not be defeated by judicial construction

N.Y.—In re Roughgarden's Will, 295 NYS 355, 162 Misc 455

(2) Purpose of statutory requirement that subscribing witnesses sign at end of will is to prevent fraudulent additions to will before or after its execution

N.Y.—In re Mackris' Estate, 124 NYS 2d 891

#### Statute should be strictly construed

N.Y.—In re Oltmann's Will, 34 NYS 2d 190, 178 Misc 174.

50. N.C.—Paul v Davenport, 7 SE 2d 352, 217 NC 154

68 C.J. p 711 note 42

51. N.Y.—In re Oltmann's Will, 34 NYS 2d 190, 178 Misc 174

#### Apparent from inspection

The statutory provision requiring the attestation clause to be at the end of the will, requires that it shall follow the last clause of the will and the testator's signature in such manner that it is apparent from an inspection of the will, without reference to any other evidence, that it was the purpose to attest the will at the end thereof

Cal.—In re Moro's Estate, 190 P 168, 169, 183 Cal 29, 10 ALR 422

#### Attestation on separate page of folded sheet

Where will was handwritten on an ordinary sheet of paper folded once so as to make four pages of equal size and the provisions ended at the bottom of the fourth page and were followed by the signature of the decedent leaving no room for the attestation of the subscribing witnesses which were found in order on the third page, witnesses subscribed the instrument "at the end thereof" as required by law

N.Y.—In re Lubitz' Will, 136 NYS 2d 901, 207 Misc 33

52. N.Y.—In re Oltmann's Will, 34 NYS 2d 190, 178 Misc 174

53. N.Y.—In re Beck's Will, 39 NYS 810, 6 App Div 211, affirmed 49 NE 1093, 154 NY 75

54. N.Y.—In re Haber's Will, 192 NYS 616, 118 Misc 179

55. N.Y.—In re Dayger's Will, 47 Hun 127, affirmed 18 NE 480, 110 NY 666

56. Cal.—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

N.Y.—In re Oltmann's Will, 34 NYS 2d 190, 178 Misc 174—In re Levanti's Will, 252 NYS 497, 499, 141 Misc 248

In re Mackris' Estate, 124 NYS 2d 891

57. Cal.—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

N.Y.—In re Robinson's Will, 103 NYS 2d 967, 201 Misc 439—In re Scheck's Estate, 14 NYS 2d 946, 172 Misc 236

In re Mackris' Estate, 124 NYS 2d 891—In re Murphy's Estate, 46 NYS 2d 677

68 C.J. p 711 note 46

#### Strict application of rule

The law that where signature of a testator or of necessary witness is written above matter which is dispositive, operative, material, or important, the subscription is not at end of instrument, and instrument is therefore invalid as a will, will be strictly applied, and applies to holographic instruments.

N.Y.—In re Begun's Will, 123 NYS 2d 782

#### Matter on reverse side of sheet

(1) Where face of instrument purporting to be a will was duly executed by testator and attested by two witnesses, but matter written on the back of instrument by testator was undated and his signature at the end thereof was not attested by any witnesses, such writing on the back of instrument was not admissible to probate as a will

N.Y.—In re Frickey's Will, 96 NYS 2d 825, 198 Misc 716, reversed on other grounds In re Frickey's Estate, 114 NYS 2d 270, 280 App Div 880

(2) However, in declaring instrument offered as will to be validly executed where matter appears on reverse side after signatures of testator and witnesses, court has duty to exercise due care in view of importance of reasons for statute requiring will to be witnessed at end and desire of courts to carry out intent of statute, and, under statute requiring that will be witnessed at the end, instrument consisting of one sheet on which testatrix and witnesses appended signatures and on reverse side of which testatrix disposed of furniture, cut off beneficiaries who might attempt to cause trouble or litigation and empowered executors to rent property and gave them power of sale, was held required to be denied probate, since matter appearing after signature on reverse side of sheet was important matter of dispositive nature

N.Y.—In re Roughgarden's Will, 295 NYS 355, 162 Misc 455.

(3) Will, written on a printed form, first page of which contained blank space, followed by testator's signature and attestation clause, was not signed at the end, as required by statute, where such blank space, intended for bequests, would not contain all the bequests and part of them were put on the back of the form, with notation on margin, "Continued on back"

N.Y.—In re Lowden's Estate, 175 NYS 591, 106 Misc 707.

been added before the execution of the will<sup>58</sup> Thus, a will is not signed at the end by attesting witnesses where their signatures are followed by a postscript with certain additional instructions to the executor,<sup>59</sup> nor is a will signed at the end by attesting witnesses where their signatures precede a clause appointing executors,<sup>60</sup> or giving the executors power to sell designated land and devote the proceeds to the liquidation of any deficiency in the interest of cash bequests under the will<sup>61</sup> However, a will is properly executed where the signatures of the subscribing witnesses are followed by written or printed matter, but such matter is not in the nature of a testamentary or dispositive character<sup>62</sup>

*Blank space between conclusion of will and signatures* The decisions all agree that a will may be considered as signed by the witnesses at the end, although there is a blank space between the conclusion of the will and the signatures<sup>63</sup> In some decisions it is either held<sup>64</sup> or said<sup>65</sup> that the amount of space intervening between the conclusion of the will and the signatures is of no importance Other decisions, however, are opposed to this view, and, although they recognize that no general rule can be laid down as to what constitutes an unnecessary and un-

reasonable blank space between the conclusion of the will and the subscription of the witnesses,<sup>66</sup> hold that a blank space may be so unnecessarily and unreasonably large as to invalidate the will<sup>67</sup>

### § 196. — Attestation Clause

An attestation clause, which is a certificate certifying as to the facts and circumstances attending the execution of a will, is useful and customary, but is not ordinarily essential to the validity of a will otherwise properly executed.

The "attestation clause" of a will, which term has been variously defined as a certificate certifying as to the facts and circumstances attending the execution of a will,<sup>68</sup> or the formal, nonmaterial, and nondispositive provision which, although forming part of a will, is not necessary to the validity thereof,<sup>69</sup> has as its purpose to preserve in permanent form a memorandum of the facts attending the execution of the will so that, in case of the death of the attesting witnesses, or a failure of memory or deliberate misrepresentation on their part, the facts may still be proved<sup>70</sup>

An attestation clause is useful for the aforementioned purpose,<sup>71</sup> and is prima facie evidence of the validity of the will, provided it recites a compliance

58 Cal—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

Del—Owens v Bennett, 5 Del 367

59. Cal—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

60. N Y—In re Winters' Will, 98 N Y S 2d 312, 277 App Div 24, motion denied 95 NE 2d 43, 301 N Y 680, affirmed 98 NE 2d 477, 302 N Y 666, motion denied 100 NE 2d 43, 302 N Y 845

In re Nies, 13 N Y St 757

61. N Y—In re Blair's Will, 32 N Y S 845, 84 Hun 591, affirmed 46 N E 1145, 152 N Y 645

#### 62 Disposal of remains

A will directing disposal of testator's remains is admissible to probate even though such direction follows subscription, as it neither affects disposition of testator's estate, nor appoints executor or guardian, and hence is not testamentary in character

N Y—In re Scheck's Estate, 14 N Y S 2d 946, 173 Misc 236

#### Agreement between testator and wife with respect to mutual wills

Where will consisting of three pages, the first of which contained dispositions, the second a testimonium and attestation clause terminating midway on page, and the third an agreement between testator and wife with respect to mutual wills and containing no dispositive provisions, was signed by witnesses after at-

testation clause, will was subscribed by witnesses at end thereof in accordance with statutory requirement, and fact that subscriptions of testator and witnesses were not contiguous did not affect validity of will

N Y—In re Mackris' Estate, 124 N Y S 2d 891

#### Diagram not referred to in will

Where will made complete disposition of realty without recourse to a diagram purported to be incorporated therein and two subscribing witnesses signed immediately below and to left of testatrix' signature on fifth page of will and also signed following attestation clause on sixth page, even though the witnesses failed to affix their signature beneath the diagram on seventh page signed by testatrix, the will was signed by witnesses "at the end" as required by statute

N Y—In re Schmitt's Will, 61 N Y S 2d 569, 187 Misc 409

63 N Y—In re Singer's Will, 44 N Y S 606, 19 Misc 679

68 C J p 711 note 50

64. N Y—In re Singer's Will, supra 68 C J p 711 note 51

65. N Y—In re Gilman's Will, 38 Barb 364

68 C J p 711 note 52

66 Ky—Soward v Soward, 1 Duv 126

67. Cal—In re Seamen's Estate, 80

P 700, 146 Cal 455, 106 Am SR 53, 2 Ann Cas 726

68 C J p 711 note 54

68 Mont—In re Bragg's Estate, 76 P 2d 57, 106 Mont 132

"Attestation clause" defined generally see 7 C J S p 693 notes 74, 75

"Perfect attestation clause" is one that asserts performance of all acts required to be done to make valid testamentary disposition

N J—In re Johnson's Will, Prerog, 171 A 307, 309, 115 N J Eq 249—In re Beggan's Will, 59 A 874, 68 N J Eq 572

69 N Y—In re Mackris' Estate, 124 N Y S 2d 891

70. Del—In re Kemp's Will, 186 A 890, 7 W W Harr 514

Kan—In re Wallace's Estate, 149 P 2d 595, 158 Kan 633

N J—In re DuBois' Estate, 76 A 2d 33, 9 N J Super 280

68 C J p 711 note 56

71 Cal—In re Pitcairn's Estate, 59

P 2d 90, 6 Cal 2d 730

Md—Van Meter v Van Meter, 39 A

2d 752, 183 Md 614

N Y—In re Frechette's Will, 133 N

Y S 2d 80

68 C J p 711 note 57, p 712 note 60

Recitals of attestation clause are to be considered in arriving at intent of signers

Ky—Love v Gibbs, 117 SW 2d 987, 273 Ky 775

with all the formalities of execution and is signed by the witnesses, as discussed *infra* § 411. Moreover, it is customary,<sup>72</sup> and is considered the better practice.<sup>73</sup> However, except in so far as it may be required under statutory provisions,<sup>74</sup> its existence is not necessary to the valid execution of the will,<sup>75</sup> provided there is evidence to establish that there was a proper attestation by witnesses in other respects.<sup>76</sup> The only evidence which the will itself need bear of a proper and sufficient attestation is the signature of the witnesses.<sup>77</sup>

As no attestation clause is necessary, such a clause in a will may be disregarded as surplusage.<sup>78</sup> Accordingly, the form of such a clause is immaterial,<sup>79</sup> and it is no valid objection to a will that an attestation clause unnecessarily added to the will is defective, erroneous, or incomplete in its recitals of the facts necessary to the execution of the will,<sup>80</sup> or is not supported by the evidence,<sup>81</sup> and no harm is done by the incorporation of some of the words of the attestation clause in the will proper.<sup>82</sup> Furthermore, the failure of the subscribing witnesses to read the attestation clause will not defeat the proper execution of the instrument as a will.<sup>83</sup>

*In the Philippines*, while, under earlier statutes, it

was of no consequence that the attestation clause was defective or even absent,<sup>84</sup> it is now the rule, under statutes which require an attestation clause and provide that "the attestation shall state the number of sheets of pages used, upon which the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name, under his express direction, in the presence of three witnesses, and the latter witnessed and signed the will and all pages thereof in the presence of the testator and of each other," and provide that the will shall be disallowed if not so executed and attested, that the will is distinct and different from the attestation,<sup>85</sup> and the statutory requirements are mandatory.<sup>86</sup> Accordingly, an attestation clause is necessary and essential to the validity of the will,<sup>87</sup> and in the absence thereof the will cannot be admitted to probate.<sup>88</sup>

The attestation clause must be made in strict conformity with the requirements of the statute, and where it fails to show on its face a full compliance with those requirements, the defect constitutes sufficient ground for the disallowance of the will,<sup>89</sup> and the facts which must be recited therein cannot be proved by any evidence other than the attestation clause itself.<sup>90</sup> Accordingly, it must state

- 72.** Iowa—*In re Early's Estate*, 13 N W 2d 328, 234 Iowa 570.
- 73.** Iowa—*In re Early's Estate*, *supra*.
- 74.** Colo—*In re McGary's Estate*, 258 P 2d 770, 127 Colo 495.
- Document held void**  
A document described therein as signer's will was insufficient on its face, in absence of attestation clause, to constitute will, and was void for all purposes.  
Colo—*In re McGary's Estate*, *supra*.
- 75.** Cal—*Corpus Juris* cited in *In re Pitcairn's Estate*, 59 P 2d 90, 92, 6 Cal 2d 730.  
*In re Stone's Estate*, 133 P 2d 483, reheard 138 P 2d 710, 59 Cal App 263.  
Del—*In re Kemp's Will*, 186 A 890, 7 W W Harr 514.  
Ga—*Whitfield v Pitts*, 53 S E 2d 549, 205 Ga 259.  
Iowa—*In re Klein's Estate*, 42 N W 2d 593, 241 Iowa 1103—*In re Early's Estate*, 13 N W 2d 328, 234 Iowa 570—*In re Mathews' Estate*, 12 N W 2d 162, 234 Iowa 188.  
Md—*Van Meter v Van Meter*, 39 A 2d 752, 183 Md 614.  
Mich—*In re Fowle's Estate*, 290 N W 883, 292 Mich 500.  
Mo—*Burkland v Starry*, 234 S W 2d 608, 361 Mo 348.  
N M—*Corpus Juris* cited in *In re Akin's Estate*, 72 P 2d 21, 24, 41 N M 566.
- NY*—*In re Frechette's Will*, 133 N Y S 2d 80—*In re Mackris' Estate*, 124 N Y S 2d 891.  
ND—*Collins v Stroup*, 3 N W 2d 742, 71 ND 679.  
Ohio—*Graham v Tucker*, App, 47 NE 2d 801.  
*In re Mazurie*, 3 Ohio Supp 63.  
Va—*Ferguson v Ferguson*, 47 S E 2d 346, 187 Va 581.  
68 C J p 711 note 59, p 712 note 60.
- Neither formal nor informal statement required**  
Neither a formal attestation clause nor even words in addition to signatures of witness are prerequisite to a valid execution of a will.  
Ill—*Spangler v Bell*, 60 NE 2d 864, 390 Ill 152—*Barber v Barber*, 13 NE 2d 257, 368 Ill 215.
- 76.** Mont—*In re Watts' Estate*, 160 P 2d 492, 117 Mont 505.  
Wash—*In re Chambers' Estate*, 60 P 2d 41, 187 Wash 417.
- 77.** Ga—*Whitfield v Pitts*, 53 S E 2d 549, 205 Ga 259.  
Mo—*Burkland v Starry*, 234 S W 2d 608, 361 Mo 348.  
Necessity of attestation and subscription by witnesses see *supra* § 183.
- By subscribing will**, attesting witnesses impliedly vouch for its due execution, as fully as they would expressly if there were a complete attestation clause, although, with perhaps less force.  
Cal—*In re Pitcairn's Estate*, 59 P 2d 90, 6 Cal 2d 730.
- 78.** Ohio—*Graham v. Tucker*, App, 47 NE 2d 801.
- 79.** NY—*In re De Hart's Will*, 122 N Y S 220, 67 Misc 13.
- 80.** Mo—*Buchholz v Cunningham*, 100 S W 2d 446, 340 Mo 302.  
68 C J p 712 note 64.
- 81.** Kan—*Humphrey v Wallace*, 216 P 2d 781, 169 Kan 58.
- 82.** NY—*In re De Hart's Will*, 122 N Y S 220, 67 Misc 13.
- 83.** Iowa—*In re Klein's Estate*, 42 N W 2d 593, 241 Iowa 1103.  
Mont—*In re Bragg's Estate*, 76 P 2d 57, 106 Mont 132.
- 84.** Philippine—*Caluya v Domingo*, 27 Philippine 330.
- 85.** Philippine—*Fernandez v Vergel de Dios*, 46 Philippine 922.
- 86.** Philippine—*In re Neumark's Estate*, 46 Philippine 841.
- 87.** Philippine—*Rodriguez v Alcala*, 55 Philippine 150.  
68 C J p 712 note 70.
- 88.** Philippine—*Fernandez v Vergel de Dios*, 46 Philippine 922—*In re Uy Coque's Estate*, 43 Philippine 405.
- 89.** Philippine—*Quinto v Morata*, 54 Philippine 481.  
68 C J p 713 note 72.
- 90.** Philippine—*In re Pueblo's Estate*, 54 Philippine 481.  
68 C J p 713 note 73.

that the testator and the witnesses saw each other sign the will,<sup>91</sup> and it must also state the number of pages in the will,<sup>92</sup> and recite that the witnesses signed the will on each and every page thereof on the left margin in the presence of the testator, otherwise it is fatally defective and annuls the will.<sup>93</sup> However, in stating the necessary facts it is not necessary to use the exact language of the statute, and it will be sufficient if the facts appear in any manner intelligible from the attestation clause.<sup>94</sup>

Clerical errors, consisting in omission of words, will not vitiate the attestation clause where by giving it a reasonable construction the recitals will satisfy the statutory requirements.<sup>95</sup> The signature of the testator is not necessary in the attestation clause,<sup>96</sup> and the fact that the attestation clause is written on a separate page and not on the last page of the body of the document will not invalidate the will, where, if it had been written on the last page of the will in direct continuation of the body thereof, there would not have been sufficient space on that page for the signatures of the witnesses to the clause.<sup>97</sup>

## § 197 — Attestation of Erasures, Interlineations, and Substitutions

In general, alterations of a will by erasures, inter-

lineations, or substitutions are valid only when attested with the same formalities as the will itself.

While there is some authority to the contrary,<sup>98</sup> it has almost uniformly been held that alterations of a will by erasures, interlineations, or substitutions are valid and operative only when attested with the same formalities as the will itself.<sup>99</sup> It is sufficient to satisfy the requirements of the rule that the whole will in its altered state is properly attested,<sup>1</sup> or that the alterations alone be attested,<sup>2</sup> if properly brought to the attention of the attesting witnesses.<sup>3</sup>

Where interlineations are wholly immaterial and produce no alteration in the will,<sup>4</sup> or in no degree affect the dispositions thereof,<sup>5</sup> it has been held not to invalidate the will that they were made after one and before the other of the witnesses signed.

## § 198. Codicils

A codicil must be executed with the same formalities required in the execution of a will

A codicil, in order to be effective, must be executed with the same formalities as are requisite in the execution of a valid will,<sup>6</sup> but there is a sufficient execution where these requirements are complied with.<sup>7</sup>

91. Philippine—Nayve v Mojal, 47 Philippine 152

68 C J p 713 note 74

92. Philippine—In re Andradra's Will, 42 Philippine 180

68 C J p 713 note 75

93. Philippine—In re Hagoriles' Will, 50 Philippine 30

68 C J p 713 note 76

94. Philippine—Fernandez v Vergel de Dios, 46 Philippine 922

68 C J p 713 note 77

95. Philippine—In re Coronel's Will, 45 Philippine 216

96. Philippine—Fernandez v Vergel de Dios, 46 Philippine 922—In re Abangan's Will, 40 Philippine 476

97. Philippine—Villafior v Tobias, 53 Philippine 714

98. Ind—Wright v Wright, 5 Ind 389

68 C J p 713 note 82

99. N Y—In re Goettel's Will, 55 N Y S 2d 61, 184 Misc 155

Okl—In re Cravens' Estate, 242 P 2d 135, 206 Okl 174, 34 A L R 2d 615

Pa—In re Barnes' Estate, Orph, 24 Erie Co 219—In re Thomas' Estate, Orph, 53 York Leg Rec 33

68 C J p 713 note 83

Effect of alteration made subsequent to execution of will see supra § 166.

1. N C—Malloy v McNair, 49 N C 297

2. Md—Eschbach v Collins, 61 Md 478, 48 Am R 123

Notation in attestation clause held insufficient

Where notation is made in attestation clause to changes made in will by crossing out certain parts with typewriter, but none is made to extensive erasures in will, erasures will be considered unnoted and unexplained

Okl—In re Cravens' Estate, 242 P 2d 135, 206 Okl 174, 34 A L R 2d 615

3. Minn—In re Penniman's Will, 20 Minn 245, 18 Am R 245

68 C J p 713 note 86

4. N C—Bateman v Mariner, 5 N C 176

68 C J p 713 note 87

5. N C—Griggs v Williams, 51 N C 518

6. Kan—Humphrey v Wallace, 216 P 2d 781, 169 Kan 58

N Y—In re Macomber's Will, 80 N Y S 2d 776, 193 Misc 391, affirmed 87 N Y S 2d 308, 274 App Div 724

In re Simmons' Will, 132 N Y S 2d 795, applying Connecticut law—

In re Foster's Will, 90 N Y S 2d 892

N C—Paul v Davenport, 7 S E 2d 352, 217 N C 154

Ohio—In re Lorenz, 11 Ohio Supp 62

Or—Corpus Juris cited in Florey v Meeker, 240 P 2d 1177, 1187, 191 Or 257

Pa—In re Baker's Estate, 200 A 65, 331 Pa 33

S C—Stevens v Royalls, 77 S E 2d 198, 223 S C 510

Tex—Taylor v Dinsmore, Civ App, 114 S W 2d 269, error refused

Va—Fenton v Davis, 47 S E 2d 372, 187 Va 463

68 C J p 714 note 90

Form and contents of codicil see supra § 164

Holographic codicil see infra § 207

Mention in prior will as immaterial

Where, in addition to disposing of majority of testatrix' property, will contained clause stating that personal property of minor value was to be disposed of in accordance with direction contained in letter which testatrix wrote afterwards, the letter provided for, never having been legally executed as codicil to will, would have to be treated as surplusage

Mich—In re Greenman's Estate, 52 N W 2d 363, 332 Mich 646

7. Ind—Rice v Fletcher Sav & Trust Co, 22 N E 2d 809, 215 Ind 698

Iowa—In re Klein's Estate, 42 N W 2d 593, 241 Iowa 1103



As in the case of the will, as discussed supra § 170, the codicil must be signed by the testator,<sup>8</sup> at the end of the instrument,<sup>9</sup> and it must be signed in the presence of the witnesses or the signature must be acknowledged in their presence<sup>10</sup> If prepared by a third person and presented to him for signature, the testator should read it himself or it should be read to him<sup>11</sup>

So, also, it must be attested and subscribed in the presence of the testator by the number of witnesses designated by statute,<sup>12</sup> whose competency is governed by statutes prescribing the requirement for the execution of wills,<sup>13</sup> and publication thereof must be made by the testator<sup>14</sup>

*Date* A codicil or addition to a will need not always be separately dated if it has the appearance of having been written at the same time as the will itself<sup>15</sup> Where a codicil written on both sides of a single sheet letter head bore a date on the front side and a subsequent date on the back, where the codicil was signed by the testator, beneath the signature, such subsequent date is to be taken as that of execution<sup>16</sup>

## § 199. Delivery

Delivery is not essential to the execution or validity of a will

The delivery of a will, unlike a deed, is not essential to its execution or validity<sup>17</sup>

## D HOLOGRAPHIC, MYSTIC, AND NUNCUPATIVE WILLS

### § 200. Holographic Wills

Under some statutes, a holographic will, which is a will entirely written by the testator with his own hand, is valid

A "holographic will," sometimes called an "olo-

graphic will," may be defined as a will written entirely by the testator with his own hand<sup>18</sup> Under the express provisions of some statutes, such wills are valid,<sup>19</sup> provided they comply with the statutory

NJ—Elkinton v Brick, 15 A 391, 44 N J Eq 154, 1 L R A 161

NY—In re Peabody's Will, 109 NY S 2d 257, 279 App Div 326—In re Bosworth's Will, 55 N Y S 2d 422, 269 App Div 252

Pa—In re Sando's Estate, 66 A 2d 312, 362 Pa 1

#### Particular codicils held sufficiently executed

A codicil, typewritten in blank space above clause of will appointing executors after due execution thereof, signed by testatrix, and witnessed by witnesses who subscribed will, was executed in sufficient compliance with statute

NY—In re Johnson's Estate, 7 NY S 2d 81, 169 Misc 215

8. Ky—Parrott v Parrott's Adm'x, 110 SW 2d 272, 270 Ky 544

NY—In re Morgan's Will, 135 NY S 2d 321

NC—Paul v Davenport, 7 SE 2d 352, 217 NC 154

68 C J p 714 note 93

#### Query as to which side of sheet was signed

The action of a register of wills in admitting to probate as a codicil to a will only one side of a single sheet of paper, both sides of which bear holographic testamentary dispositions, the accepted side alone being signed at the end thereof, will be reversed on appeal where the inferences are equal as to which side was written first and where the bequests contained on the unsigned side are ones which testator might normally have been expected to make

Pa—In re Evans' Estate, 59 Pa Dist & Co 571, 63 Montg Co 154.

9 Pa—In re Maxwell's Estate, 18

Pa Dist & Co 111  
68 C J p 714 note 93

#### Signing held sufficient

(1) Where codicil was signed by testator at conclusion of his testamentary direction which substituted executors and trustees of his will, codicil was "signed at end thereof" as required by statute, notwithstanding that following signature appeared a dated, unsigned testimonium clause and an unsigned attestation clause

Pa—In re Griffith's Estate, 57 A 2d 893, 358 Pa 474

(2) The insertion of a codicil, properly signed and attested by a person of sound mind and not under any restraint between last dispositive item and testimonium clause of properly executed will, did not invalidate either original will or the codicil, and both were "signed at the end" as required by statute and would be admitted to probate as testator's last will

Ohio—In re Lorenz, 11 Ohio Supp 62

10. NY—In re Foster's Will, 90 NY S 2d 892

11. Va—Tucker v. Calvert, 6 Call 90, 10 Va 90

12. NY—In re Macomber's Will, 80 NY S 2d 776, 193 Misc 391, affirmed 87 NY S 2d 308, 274 App Div 724

In re Cannock's Will, 81 NY S 2d 42

NC—Paul v Davenport, 7 SE 2d 352, 217 NC 154

Pa—In re Thomas' Estate, Orph, 53 York Leg Rec 33

68 C J p 714 note 95

#### Subscription held proper

Codicil signed by two witnesses with the word "witness" following each signature was valid, although it had no attestation clause

Ark—Noblit v Noblit, 265 SW 2d 520, 223 Ark 220

13. Ind—Pfaffenberger v Pfaffenberger, 127 NE 766, 189 Ind 507

14. NJ—In re Gahagan's Estate, 89 A 771, 82 N J Eq 601.

68 C J p 714 note 97

15. La—Succession of Ledet, 128 So 273, 170 La 449—Lagrave v Merle, 5 La Ann 278, 52 Am D 589

16. NY—In re Sidenberg's Will, 187 NY S 414, 115 Misc 38

68 C J p 714 note 99

17. Tex—Payne v Brown, Civ App, 172 SW 2d 352, reversed on other grounds 176 SW 2d 306, 142 Tex 102—In re Brackenridge's Estate, Civ App, 245 SW 786, reversed on other grounds 267 SW 244, 270 S W 1001, 114 Tex 418

18. Alaska—In re Lanart's Estate, 9 Alaska 535

Ky—McNeill v McNeill, 87 SW 2d 367, 261 Ky 240

68 C J p 714 note 4

"Holograph" defined generally see 40 C J S page 417

19. Alaska—In re Holland's Estate, 10 Alaska 557

NC—In re Williams' Will, 1 SE 2d 857, 215 NC 259

#### In Tennessee

(1) Section of act of 1941 adopted to make uniform the execution of wills, which section deals with holographic wills, had effect of repealing

requirements,<sup>20</sup> strictly,<sup>21</sup> or at least substantially<sup>22</sup> If a holographic will does not comply with the statutory requirements therefor, it is void, no matter how clearly it conveys the wishes of the decedent<sup>23</sup> Statutes providing for holographic wills are procedural and remedial,<sup>24</sup> and are mandatory and not merely directory<sup>25</sup> It has been held that they must be strictly,<sup>26</sup> although reasonably,<sup>27</sup> construed to protect the rights of heirs at law,<sup>28</sup> but at the same time to give effect to their purpose<sup>29</sup>

*In absence of statutory recognition* Where the legislature in a particular jurisdiction has defined and prescribed the manner in which wills shall be executed, without making a distinct provision for holographic wills, such wills are invalid unless drawn and executed in conformity with the require-

ments as to other wills<sup>30</sup> although it has been said that the atmosphere surrounding a testamentary instrument wholly in the handwriting of the testator is such as to cause it to be accepted as his will with less strictness as to proof of a compliance with statutory formalities<sup>31</sup> In such jurisdictions no exception is recognized in favor of holographic wills with respect to attestation, acknowledgment, or publication,<sup>32</sup> and, if such requirements are not complied with, the instrument fails as a will<sup>33</sup> In some of these jurisdictions, however, the courts do not require the same strict compliance with these statutory requirements as is exacted in the case of other wills<sup>34</sup> Nevertheless, there must be a substantial compliance with the statute,<sup>35</sup> with the statutory requirements as to attestation,<sup>36</sup> signing in

much stricter statutory provisions relating to holographic wills  
Tenn—Smith v Smith, 232 S W 2d 338, 33 Tenn App 507

(2) Where statutory requirements are met, a holographic will is of equal dignity with one attested by subscribing witnesses  
Tenn—Campbell v Henley, 110 S W 2d 329, 172 Tenn 135  
Fransoli v Podesta, 113 S W 2d 769, 21 Tenn App 577

(3) Former statute was not applicable to will disposing of personalty  
Tenn—Druen v Hudson, 68 S W 2d 146, 17 Tenn App 428

(4) Under former statute authority to devise real property by holographic will was purely statutory  
Tenn—Campbell v Henley, 110 S W 2d 329, 172 Tenn 135

20. Cal—In re McNamara's Estate, 260 P 2d 182, 119 Cal App 2d 741  
ND—Johnson v Weldy, 54 N W 2d 829, 79 ND 80  
Okla—In re Paull's Estate, 254 P 2d 357, 208 Okl 195  
Tenn—Fransoli v Podesta, 134 S W 2d 162, 175 Tenn 340  
Pulley v Cartwright, 137 S W 2d 336, 23 Tenn App 690  
68 C J p 715 note 6

**Will held to comply with statute**  
La—Succession of Fujol v Manning, 59 So 2d 456, 221 La 466

21. Cal—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624  
In re Goldsworthy's Estate, 129 P 2d 949, 54 Cal App 2d 666

**Public policy** demands a strict enforcement of statutes requiring testamentary dispositions of property made by holographic wills  
Ky—Floyd v Christian Church Widows and Orphans Home of Kentucky, 176 S W 2d 125, 296 Ky 196, 151 A L R 1230.

22. Okla—In re Hail's Estate, 235 P 916, 106 Okl 124  
68 C J p 715 note 7

23. La—Succession of Torlage, 12 So 2d 683, 202 La 693  
68 C J p 715 note 8

24. NY—In re Thompson's Will, 76 N Y S 2d 742, 191 Misc 109

25. La—Succession of Muntz, 63 So 2d 426, 222 La 689  
NC—In re Jenkins' Will, 72 S E 1072, 157 NC 429, 37 L R A, N S, 842

Okla—In re Abrams' Will, 77 P 2d 101, 182 Okl 215

26. Utah—In re Yowell's Estate, 285 P 285, 75 Utah 312  
68 C J p 715 note 10

27. NC—In re Lowrance's Will, 155 S E 876, 199 NC 782—In re Jenkins' Will, 72 S E 1072, 157 NC 429, 37 L R A, N S, 842

28. NC—In re Jenkins' Will, supra

29. NC—In re Lowrance's Will, 155 S E 876, 199 NC 782  
68 C J p 715 note 13

**In the Philippines** a statute providing that wills executed by Spaniards or residents of the Islands before a certain date shall be valid whether the will be an opened, sealed, or verbal testament has been construed to include holographic wills  
Philippine—Kalaw v Virey, 38 Philippine 498

30. Ill—Corcoran v Williams, 271 Ill App 312

NY—In re Robinson's Will, 103 N Y S 2d 967, 201 Misc 439—In re Douglas' Will, 83 N Y S 2d 641, 193 Misc 623  
68 C J p 715 note 14

31. NY—In re Dodds' Will, 45 N Y S 2d 27, affirmed 48 N Y S 2d 622, 268 App Div 811, affirmed 61 NE 2d 448, 294 N Y 706  
68 C J p 715 note 15

32. NJ—In re Taylor's Estate, 100 A 2d 346, 28 N J Super 220  
68 C J p 715 note 16

33. NJ—In re Taylor's Estate, supra  
68 C J p 715 note 17

34. NY—In re Dodds' Will, 45 N Y S 2d 27, affirmed 48 N Y S 2d 622, 268 App Div 811, affirmed 61 NE 2d 448, 294 N Y 706  
68 C J p 715 note 18

35. NY—In re Pulvermacher's Will, 113 NE 2d 525, 305 N Y 378, remittitur amended on other grounds 114 NE 2d 474, 305 N Y 923  
In re Snyder's Estate, 277 N Y S 577, 154 Misc 156  
68 C J p 715 note 19

36. NY—In re Lurcy's Estate, 136 N Y S 2d 549, 207 Misc 179—In re Weinberger's Wills, 135 N Y S 2d 120, 206 Misc 770—In re Kosberg's Estate, 128 N Y S 2d 432, 205 Misc 496—In re Snyder's Estate, 277 N Y S 577, 154 Misc 156  
In re Frechette's Will, 133 N Y S 2d 80

Ohio—Keifer v Schuneman, 78 N E 2d 780, 82 Ohio App 285  
68 C J p 715 note 20

#### "At end of will"

Where decedent and one witness signed holographic document following dispositive directions at bottom of sheet of paper, and second attesting witness signed on left-hand margin of sheet above decedent's signature, execution of document did not comply with statute requiring two attesting witnesses to sign their names as witnesses at the "end of the will"

NY—In re Oltmann's Will, 34 N Y S 2d 190, 178 Misc 174

**Will held properly attested**, even though witnesses did not see testator sign it or see his signature

Wis—In re Johnston's Will, 273 N W 512, 225 Wis 140.

the presence of witnesses,<sup>37</sup> acknowledgment of signature to witnesses,<sup>38</sup> or publication of the will to them,<sup>39</sup> or the instrument will fail. As to whether the testator had signed the will before the attestation clause was written and before it had been presented to the witnesses to sign, it has been held that the fact that the instrument is holographic raises a presumption, to a greater extent than if the will had been prepared by another, that it was signed before those acts were performed.<sup>40</sup>

### § 201. — What Law Governs

The law of the domicile of the testator determines the validity of a holographic will as to personalty and the law of the situs governs as to realty.

In the absence of a statute providing otherwise the validity of a holographic will as to personal property is to be determined by the law of the testator's domicile,<sup>41</sup> and as to real property by the law of the jurisdiction wherein it is situated.<sup>42</sup> A statute providing that holographic wills may be made in or out of the state has been construed to mean that such wills are valid within such state wherever made,<sup>43</sup> and, under a statute providing that every testamentary instrument made out of the state shall be valid if made according to the forms provided by the law of the place where it was made or by the law of the place where the testator resided when it was made, a holographic will, not witnessed as required by the laws of the state wherein the real property is situated and of which the testator was a citizen, but valid under the laws of the foreign country where it was made and where the testator

resided, is valid to pass such real property.<sup>44</sup>

*Law at time of execution or at death* The diversity of opinion as to whether the validity of a will is dependent on the law in force at the time of the testator's death or the law in force at the date of the execution of the will, as discussed supra § 150, is also evident in the case of holographic wills, thus, while it has been held that the validity of the instrument will depend on the law at the time of the testator's death,<sup>45</sup> it has also been held that such validity is dependent on the law in force at the time of the execution of the will.<sup>46</sup>

### § 202. — Who May Make

Testamentary capacity to make a holographic will is governed by the general rules with respect to testamentary capacity.

General rules as to testamentary capacity have been held applicable to holographic wills.<sup>47</sup> On the theory that a general statute empowering all persons over a certain age and of sound mind to dispose of property by will does not include married women, it has been held that statutes which in general terms authorize holographic wills do not give the right to married women to make wills of this character.<sup>48</sup>

### § 203. — Testamentary Intent

It is essential to the validity of a holographic will that the testator intend to dispose of his estate.

Testamentary intent is necessary to the validity of a holographic will.<sup>49</sup> No particular words are nec-

37 N.Y.—In re Logasa's Estate, 293 N.Y.S. 116, 161 Misc. 774.

In re Cartoon's Will, 48 N.Y.S.2d 834.

68 C.J. p. 716 note 21.

38 N.Y.—In re Maylone's Will, 93 N.Y.S.2d 828.

68 C.J. p. 716 note 22.

#### Acknowledgment held sufficient

N.Y.—In re Dodds' Will, 45 N.Y.S.2d 27, affirmed 48 N.Y.S.2d 622, 268 App. Div. 811, affirmed 61 N.E.2d 448, 294 N.Y. 706.

39 N.Y.—In re Pulvermacher's Will, 113 N.E.2d 525, 305 N.Y. 378, remittitur amended on other grounds 114 N.E.2d 474, 305 N.Y. 923.

68 C.J. p. 716 note 23.

#### Publication held sufficient

N.Y.—In re Maylone's Will, 93 N.Y.S.2d 828—In re Dodds' Will, 45 N.Y.S.2d 27, affirmed 48 N.Y.S.2d 622, 268 App. Div. 811, affirmed 61 N.E.2d 448, 294 N.Y. 706.

#### Typewritten will

Although a will typewritten by testator personally is not strictly a "holographic will", law applicable to

holographic wills may apply with respect to publication.

N.Y.—In re Felson's Will, 135 N.Y.S.2d 737, 206 Misc. 988.

40 Mich.—Dougherty v. Crandall, 134 N.W. 24, 168 Mich. 281, 38 L.R.A., N.S., 161, Ann. Cas. 1913B 1300.

41 Ky.—Gourley v. Miller, 196 S.W.2d 360, 302 Ky. 759, stating Florida law.

N.Y.—In re Hansgig's Will, 94 N.Y.S.2d 26, 196 Misc. 948, stating North Carolina law.

Tenn.—Howell v. Moore, 14 Tenn. App. 594, stating Ohio law.

68 C.J. p. 716 note 27.

#### Domicile of origin

Where decedent was domiciled in Austria and temporarily resided in Orient during which time two holographic wills were executed, domicile of origin continued so that wills executed in accordance with laws thereof would be valid instruments to pass personalty in New York.

N.Y.—In re Hansgig's Will, 94 N.Y.S.2d 26, 196 Misc. 948.

42 Ark.—McPherson v. McKay, 181 S.W.2d 685, 207 Ark. 546.

Mont.—In re Gift's Estate, 232 P.2d 328, 125 Mont. 95.

N.Y.—In re Lurcy's Estate, 136 N.Y.S.2d 549, 207 Misc. 179.

68 C.J. p. 716 note 28.

43. La.—Succession of Butterworth, 196 So. 39, 195 La. 115.

68 C.J. p. 716 note 29.

44. Iowa.—Corpus Juris cited in Widney v. Hess, 45 N.W.2d 233, 239, 242 Iowa 342.

Md.—Lindsay v. Wilson, 63 A. 566, 103 Md. 252, 2 L.R.A., N.S., 408.

45. Cal.—In re Barker's Estate, 1 Myr. Prob. 78—In re McCloud's Estate, 1 Myr. Prob. 23.

46. Pa.—Packer v. Packer, 36 A. 344, 179 Pa. 580, 57 Am. S.R. 615, 2 Prob. Rep. Ann. 471.

47. Idaho.—Scott v. Harkness, 59 P. 556, 6 Idaho 736.

48. Idaho.—Scott v. Harkness, supra.

49. Cal.—In re Bloch's Estate, 248 P.2d 21, 39 Cal.2d 570—In re Gold-

essary to manifest the animus testandi,<sup>50</sup> thus, the paper need not refer to itself as a will.<sup>51</sup> A document may be good as a holographic will where it expresses the testator's testamentary desire although he did not consider it a will.<sup>52</sup> The fact that the

holographic instrument concerns itself with matters other than the disposition of property will not nullify its effect as a will,<sup>53</sup> but it may be considered in determining the intent of the writer.<sup>54</sup> Inquiry may be made into all relevant circumstances where

er's Estate, 193 P 2d 465, 31 Cal 2d 848

Ahlborn v Peters, 100 P 2d 542, 37 Cal App 2d 698

Okl—Hooker v Barton, 284 P 2d 708  
—Craig v McVey, 195 P 2d 753, 200 Okl 434

Tenn—Smith v Smith, 232 S W 2d 338, 33 Tenn App 507  
68 C J p 717 note 40

#### Intent held shown

(1) Particular instruments held to show testamentary intent

Alaska—In re Pearl's Estate, 11 Alaska 214—In re Holland's Estate, 10 Alaska 557

Cal—In re Wallace's Estate, 223 P 2d 284, 100 Cal App 2d 237

La—Succession of Smart, 36 So 2d 639, 214 La 63

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

Pa—In re Carlin's Estate, 36 Pa Dist & Co 702

Tenn—Pulley v Cartwright, 137 S W 2d 336, 23 Tenn App 690

Va—McElroy v Rolston, 34 S E 2d 241, 184 Va 77

(2) Where testator had suffered critical attacks of cardiac ailment and executed will in the form of a letter providing for disposition of property "in case of my sudden death," and testator actually died as result of similar attack less than a month later, intent was manifested that the letter should serve as his effective direction if he died without having made some subsequent and more formal testamentary disposition, and hence the will would be given effect

N Y—In re Krup's Will, 18 N Y S 2d 813, 173 Misc 632

(3) The quoted words in holographic instrument giving all of signer's property to her sister "without bond", together with signer's anxiety over keeping the instrument in her own possession and under seal until death, established testamentary intent

Miss—Estes v Estes, 27 So 2d 854, 200 Miss 541

(4) In letter by decedent to his future wife, statement that if he should die first he wanted her to have all he had was testamentary, and it would be presumed that he intended that on his death, his property should go to her

Tex—Ripley v Dearing, Civ App, 153 S W 2d 243, error refused

#### Intent held not shown

(1) Particular instruments held not to disclose testamentary intent.

Cal—In re Golder's Estate, 193 P 2d 465, 31 Cal 2d 848

La—Succession of Torlage, 12 So 2d 683, 202 La 693

Mont—In re Watts' Estate, 160 P 2d 492, 117 Mont 505

NC—In re Smith's Will, 10 S E 2d 676, 218 NC 161

Tenn—Howell v Moore, 14 Tenn App 594

Tex—Boyles v Gresham, Civ App, 260 S W 2d 144, reversed on other grounds 263 S W 2d 935

(2) Portion of letter alleged to be testamentary would not be probated as an holographic will, where it appeared that the portion was only a casual statement and not an important or principal part of letter, and letter stated "I want you to have what I leave", which did not clearly show present intent to make a testamentary disposition, and evidence did not show that during eleven years intervening between writing of letter and death of writer, the writer considered letter as a testamentary disposition

Okl—Craig v McVey, 195 P 2d 753, 200 Okl 434

(3) Note written by testator telling his brother to get possession of cottonseed and, if anything should happen to testator, to sell the cottonseed to brother's best advantage, was too indefinite to constitute holographic will

Miss—Gidden v Gidden, 167 So 785, 176 Miss 98

(4) A statement in a holographic instrument executed by decedent that "Everything is yours Darling" was not intended to operate as a devise of property to the wife of decedent, where from a reading of entire instrument, the sentence was apparently written to inform the wife that decedent devised his property to her

Tex—Hinson v Hinson, 280 S W 2d 731

(5) A holographic will providing that testatrix' heirs should keep "the vault in order" could not be construed as giving all of testatrix' estate to her legal heirs at law

Md—Rabe v McAllister, 8 A 2d 922, 177 Md 97

#### Use of several sheets of paper

Where instrument offered as a holographic will consists of more than one sheet of paper, it must be made clearly apparent that testator intended that together they should constitute his will

Okl—In re Paull's Estate, 254 P 2d 357, 208 Okl 195

50. Alaska—In re Lanart's Estate, 9 Alaska 535

Cal—In re Spencer's Estate, 197 P 2d 351, 87 Cal App 2d 591

N Y—In re Langer's Estate, 281 N Y S 866, 156 Misc 440

Tenn—Pulley v Cartwright, 137 S W 2d 336, 23 Tenn App 690

Tex—Warnken v Warnken, Civ App, 104 S W 2d 935, error dismissed

68 C J p 717 note 41

#### General rules of construction

The question whether holographic will was sufficient to dispose of the testator's estate was required to be determined by the general rules governing the construction of wills

Alaska—In re Lanart's Estate, 9 Alaska 535

#### Language need only be understandable

Alaska—In re Lanart's Estate, supra

Tenn—Nicley v Nicley, App, 276 S W 2d 497

Words "in case anything happens to me," in instrument offered as holographic will, may reasonably be construed to mean "in the event of my death," or "at my death," with respect to determination of question of testamentary intent

Tex—Thomason v Gwinn, Civ App, 184 S W 2d 542, error refused

51. Cal—In re Beaty's Estate, 81 P 2d 1002, 27 Cal App 2d 745

68 C J p 717 note 42

52. La—Succession of Valdez, App, 44 So 2d 151, rehearing granted 46 So 2d 521

Corpus Juris cited in Smith v Smith, 232 S W 2d 338, 341, 33 Tenn App 507

68 C J p 717 note 43

53. Cal—In re Golder's Estate, 193 P 2d 465, 31 Cal 2d 848

In re Spencer's Estate, 197 P 2d 351, 87 Cal App 2d 591

68 C J p 717 note 44

#### Provision for payment of debts and expenses

An instrument which met all statutory requirements for execution of a holographic will and nominated executors to serve without bond was entitled to probate as a holographic will, although it made no provision for disposition of testatrix' property other than directing payment of debts and funeral expenses

Okl—Reeves v Duke, 137 P 2d 897, 192 Okl 519, 147 A L R 634

54. Cal—In re Golder's Estate, 193 P 2d 465, 31 Cal 2d 848

the existence of testamentary intent is in doubt<sup>55</sup> Mere notes or memoranda for a will do not operate as a holographic will,<sup>56</sup> nor does an instrument which expresses an intent merely to do something in the future<sup>57</sup>

**Existence of previous will.** An instrument will not be given the effect of a holographic will where there exists a previously made and unrevoked will, unless it clearly appears from the language of the holographic paper that the testator intended to make further testamentary provision with respect to the

disposal of his estate,<sup>58</sup> or to explain, qualify, or modify the provisions of the will previously made<sup>59</sup>

## § 204. — Form

It is not essential to the validity of a holographic will that it be formal in character.

No particular form is ordinarily required to constitute a holographic will<sup>60</sup> Thus, it may be informally drawn,<sup>61</sup> and consist of more than one paper,<sup>62</sup> and it does not matter that one of such papers standing alone would not constitute a suffi-

In re Spencer's Estate, 197 P 2d 351, 87 Cal App 2d 591

55. Tenn—Smith v Smith, 232 S W 2d 338, 33 Tenn App 507

**Existence of fear of imminent death** by one who executed alleged holographic will is an important factor in determining whether there is testamentary intent

Cal—In re Spencer's Estate, 197 P 2d 351, 87 Cal App 2d 591

**Failure to provide for wife and child** In determining whether writer intended to make testamentary disposition of estate by letter addressed to mother, court could consider fact that no provision was made for writer's child or wife with whom he was then living, on friendly terms

Cal—In re Golder's Estate, 193 P 2d 465, 31 Cal 2d 848

**Circumstances surrounding the execution of will** may be considered

Cal—In re Swendsen's Estate, 111 P 2d 408, 43 Cal App 2d 551

56. Okl—Hooker v Barton, 284 P 2d 708

Tenn—Smith v Smith, 232 S W 2d 338, 33 Tenn App 507

**Fact that instrument was to be copied** by a stenographer did not indicate it was not a will where testatrix prepared and executed paper reciting that it was her last will and testament, named executrix, disposed of testatrix' property, and was otherwise drawn in form of will

Ky—Parrott v Parrott's Adm'x, 110 S W 2d 272, 270 Ky 544

57. Ark—Poff v Kaufman, 276 S W 2d 432

Cal—In re Spencer's Estate, 197 P 2d 351, 87 Cal App 2d 591

Miss—In re George's Estate, 45 So 2d 571, 208 Miss 734

S D—In re Zech's Estate, 20 N W 2d 229, 70 S D 622

58. Cal—In re Beebe's Estate, 258 P 2d 1101, 118 Cal App 2d 851—In re Spencer's Estate, 197 P 2d 351, 87 Cal App 2d 591

Tex—Crites v Faulkner, Civ App, 245 S W 2d 1013, error refused—Caywood v Caywood, Civ App, 216 S W 2d 821, error refused.

68 C J p 718 note 46.

### Lack of testamentary language

An instrument beginning with the words "supplementary to my last will which still stands as is" and which did not affirmatively state that it was intended to be a will and did not contain language ordinarily used to make disposition of property of which language the decedent was aware, was not a valid testamentary disposition of property

Tex—Hinson v. Hinson, 280 S W 2d 731

### Request to be administrator

Where ten months after writing letter to his son which made no reference to formal will and contained no declaration of revocation of formal will but expressed desire that his son be his "administrator," deceased went to his lawyer's office to see his will and told lawyer that will was "just the way I want it," letter did not effect revocation and was not holographic will

Mont—In re Hansen's Estate, 254 P 2d 1073, 126 Mont 522

59. Cal—White v Deering, 177 P 516, 38 Cal App 433

60. Alaska—In re Lanart's Estate, 9 Alaska 535

N Y—In re Langer's Estate, 281 N Y S 866, 156 Misc 440

Tenn—Pulley v Cartwright, 137 S W 2d 336, 23 Tenn App 690

Tex—Warnken v Warnken, Civ App, 104 S W 2d 935, error dismissed

Va—Moon v Norvell, 36 S E 2d 632, 184 Va 842

68 C J p 718 note 50

### Defectively executed instrument as holograph

(1) Purported will in testator's handwriting, although not entitled to probate as attested will because of alterations, was entitled to probate as holographic will

Va—Triplett's Ex'r v. Triplett, 172 S E 162, 161 Va 906

(2) Fact that testator intended to execute a nuncupative will under private signature, but failed to comply with requisite formalities for such a will because of lack of required number of witnesses, did not preclude treating the instrument exe-

cuted by testator as a valid olographic will

La—Succession of Eastmean, App, 6 So 2d 788

**Appointment of executor not required** Cal—In re Wallace's Estate, 223 P 2d 284, 100 Cal App 2d 237—In re Kaminski's Estate, 115 P 2d 21, 45 Cal App 2d 779

Tenn—Nicley v. Nicley, App, 276 S W 2d 497

### Instruments held sufficient in form

Cal—In re Halbert's Estate, 182 P 2d 266, 80 Cal App 2d 666

W Va—Rice v Henderson, 83 S E 2d 762

61. Alaska—In re Lanart's Estate, 9 Alaska 535

Cal—Mitchell v Donohue, 34 P 614, 100 Cal 202, 38 Am SR 279

Tex—Caywood v Caywood, Civ App, 216 S W 2d 821, error refused

62. Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

Tenn—Nicley v Nicley, App, 276 S W 2d 497—Richberg v Robbins, 228 S W 2d 1019, 33 Tenn App 66

68 C J p 718 note 52

### Fastening not required

Cal—In re Swendsen's Estate, 111 P 2d 408, 43 Cal App 2d 551

N J—In re Potts' Estate, Co, 61 A 2d 649

68 C J p 718 note 52 [a]

### Integration

(1) An undated, unsigned second page in deceased's handwriting and a signed undated third page in deceased's handwriting, both of which were written nine years after first page, which in itself was valid holographic will, which were all folded together were admissible to probate as valid holographic instruments under rule of integration on theory that testatrix adopted date on first page by her signature on third

Cal—In re Dumas' Estate, 210 P 2d 697, 34 Cal 2d 406

(2) Portion of instrument offered for probate as holographic will, which preceded date carried on reverse side of first sheet, and which provided for devise of home to a beneficiary, a bequest of money to another beneficiary, and for creation of trust for benefit of testator's chil-

cient will<sup>63</sup> It may likewise consist of separate writings or paragraphs on the same sheet of paper<sup>64</sup> It may properly be in the form of a letter,<sup>65</sup> or a letter and attached deed,<sup>66</sup> or entries in a diary,<sup>67</sup> or it may consist of script written in a book containing accounts<sup>68</sup> A writing on an envelope merely describing the contents of the envelope with the added statement that it had been opened and resealed by deceased does not of itself constitute a will incorporating by reference the two documents within<sup>69</sup> A paper not of testamentary character may be construed with one possessing that character only where the latter has by sufficient reference incorporated it within itself, thus giving it also a testamentary character<sup>70</sup>

**Abbreviations.** The fact that the testator instead of writing out certain words in full used abbreviations or figures of such character that the court would take judicial notice of their meaning will not vitiate an instrument as a will<sup>71</sup>

dren, constituted component part of will as testator intended to execute will, and part preceding such date was entitled to be admitted to probate along with part following such date, each part when taken together constituting entire will of testator Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

63. Cal—In re Dumas' Estate, 210 P 2d 697, 34 Cal 2d 406  
In re Miller's Estate, 17 P 2d 181, 128 Cal App 176

64. Va—Fenton v Davis, 47 SE 2d 372, 187 Va 463  
68 C J p 718 note 54

65. Cal—Brucks v Home Federal Sav & Loan Ass'n, 228 P 2d 545, 36 Cal 2d 845

Ky—McNeill v McNeill, 87 SW 2d 367, 261 Ky 240

Miss—In re Mey's Estate, 28 So 2d 125, 200 Miss 548

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

SD—In re Zech's Estate, 20 NW 2d 229, 70 SD 622

Tenn—Druen v Hudson, 68 SW 2d 146, 17 Tenn App 428

Utah—Ellerbeck v Haws, 265 P 2d 404, 1 Utah 2d 229  
68 C J p 718 note 55

#### Letters held testamentary

(1) Where stepmother had no children of her own and treated stepchildren as though they were her own children, and stepmother when elderly and in poor physical condition, wrote one of the stepchildren a letter, which was entirely written, dated, and signed by stepmother, and which stated that she wanted any worldly goods left at her death to be divided equally among the stepchildren, and that she expected to live

for a few more years, but that she saw no reason for putting everything off for someone else to tend to at the last minute, there was a valid holographic will

Mont—In re Van Voast's Estate, 266 P 2d 377, 127 Mont 450

(2) A holographic document in the form of a letter to particular person which provided how signer's property "should" be disposed of "in case of my sudden death," and executed with witnesses by a competent and unconstrained person, was testamentary in character and hence entitled to probate

NY—In re Krup's Will, 18 NYS 2d 813, 173 Misc 632

#### Letters held not testamentary

Ky—Bogges v McGaughey, 207 S W 2d 766, 306 Ky 319

Tex—Caywood v Caywood, Civ App, 216 SW 2d 821, error refused

66. Cal—Skerrett's Estate, 8 P 181 67 Cal 585

67 Alaska—In re Lanart's Estate 9 Alaska 535

Tenn—Reagan v Stanley, 11 Lea 316

68. NC—Brown v Eaton, 91 NC 26

69. Cal—In re Sullivan's Estate, 271 P 753, 94 Cal App 674

Signature on envelope see *infra* § 205

70. Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274

In re McNamara's Estate, 260 P 2d 182, 119 Cal App 2d 744

68 C J p 718 note 60

#### Instrument held invalid

Where testatrix had attempted to make a will and had a copy of a purported will and on the date of her death wrote a letter to a friend which

## § 205. — Execution

- a In general
- b Handwriting of testator
- c Dating
- d Signature
- e Attestation and subscription by witnesses

### a. In General

In order to be valid, a holographic will must be a complete and executed instrument, but absolute precision is not required.

An instrument offered as a holographic will must be a complete and executed document,<sup>72</sup> although absolute precision of execution is not necessary,<sup>73</sup> and all that is required is a clear showing on the face of the instrument of its execution in conformity with the law<sup>74</sup> Statutes authorizing holographic wills usually require that they be entirely in the

stated: "Take this to Judge Lamb and fix it so, etc.," the letter referred to fixing the copy of the will enclosed and it could not constitute a holographic will

Tenn—Hicks v Burdette, 10 Tenn App 492

71. La—Vanhile's Succession, 21 So 191, 49 La Ann 107, 62 Am SR 642

68 C J p 718 note 62

72 Cal—In re Brooks' Estate, 4 P 2d 148, 214 Cal 138

SD—In re McNair's Estate, 38 NW 2d 449, 72 SD 604

Tenn—Campbell v Henley, 110 SW 2d 329, 172 Tenn 135

#### Instruments held incomplete

Okl—Elrod v Purdin, 163 P 2d 209, 196 Okl 120

73 Alaska—In re Lanart's Estate, 9 Alaska 535

Cal—In re McMahon's Estate, 163 P 669, 174 Cal 423, LRA 1917D 778

In re Durlwanger's Estate, 107 P 2d 477, 41 Cal App 2d 750

**Position of words in holographic will are not usually material**  
NC—In re Goodman's Will, 50 SE 2d 34, 229 NC 444

74. Cal—In re McMahon's Estate, 163 P 669, 174 Cal 423, LRA 1917D 778

SD—In re McNair's Estate, 38 NW 2d 449, 72 SD 604

#### Instrument must be read in its entirety

Cal—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180

In re Beebee's Estate, 258 P 2d 1101, 118 Cal App 2d 851

Tex—Hinson v. Hinson, 280 SW 2d 731.

handwriting of the testator, dated, and signed by him as discussed *infra* this section. A failure in any one of these respects has been held to invalidate the will.<sup>75</sup>

**Punctuation** The lack of a period at the end of an instrument does not necessarily indicate that it remains unfinished,<sup>76</sup> particularly where numerous periods and other punctuation marks are omitted.<sup>77</sup>

### b. Handwriting of Testator

A holographic will must generally be wholly in the

handwriting of the testator, but the effect of appearance of matter not in his handwriting varies among the several jurisdictions.

It is generally required that a holographic will be wholly in the handwriting of the testator.<sup>78</sup> Rewriting of a portion thereof,<sup>79</sup> or alterations made by the testator,<sup>80</sup> do not affect an otherwise valid testamentary disposition. The document may be written in pencil,<sup>81</sup> or partly in ink and partly in pencil,<sup>82</sup> or at different times with different ink,<sup>83</sup> but a document written with a typewriter does not

**The identity of a holographic will** and the provisions thereof must be determined from the instrument itself.

Okl—Day v Williams, 85 P 2d 306, 184 Okl 117

75 La—Succession of Torlage, 12 So 2d 683, 202 La 693

#### Purpose

The statute providing that holographic will is one that is entirely written, dated, and signed by hand of testator was enacted to afford protection from danger of forgery of such a will not protected by safeguard of requirement of due attestation by competent witnesses.

Cal—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624

76 Cal—In re Brooks' Estate, 4 P 2d 148, 214 Cal 138

In re England's Estate, 259 P 956, 85 Cal App 486

77. Cal—In re Brooks' Estate, 4 P 2d 148, 214 Cal 138

In re England's Estate, 259 P 956, 85 Cal App 486

78 Alaska—In re Lanar's Estate, 9 Alaska 535

Ariz—In re Morrison's Estate, 103 P 2d 669, 55 Ariz 504

Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180

Idaho—In re Heazle's Estate, 240 P 2d 821, 72 Idaho 307

Ky—Stone v Stone, 93 S W 2d 617, 263 Ky 732

La—Succession of Torlage, 12 So 2d 683, 202 La 693—Succession of Butterworth, 196 So 39, 195 La 115

Succession of Jones, App, 38 So 2d 797

Mont—In re Gift's Estate, 232 P 2d 328, 125 Mont 95

NC—In re Wall's Will, 5 S E 2d 837, 216 NC 805

Tenn—Deitz v Gallagher, 88 S W 2d 993, 169 Tenn 435

Va—Ferguson v Ferguson, 47 S E 2d 346, 187 Va 581

Wash—In re Bauer's Estate, 105 P 2d 11, 5 Wash 2d 165

68 C J p 719 note 73.

#### Different handwriting

Instrument in which place and date were not in same handwriting as balance of instrument was a nullity as an olograph.

La—Succession of Jones, App, 38 So 2d 797

#### Jointly executed instruments

(1) Unwitnessed writing jointly executed by husband and wife in the handwriting of each of them could not be regarded as a holographic will because not written wholly by either of them.

Ky—Puckett v Hatcher, 209 S W 2d 742, 307 Ky 160

(2) Where instrument signed by decedent and wife and reciting "After our death we want" named beneficiary "to have what we've got" was wholly in decedent's handwriting except the wife's signature, the instrument could be probated as decedent's holographic will, since wife's signature was not part of decedent's will and could be disregarded.

Tenn—Jones v Myers, 154 S W 2d 245, 178 Tenn 24

(3) Where will, which was in handwriting of husband, and which purported to be will of husband and wife leaving their estates to the survivor, and which was signed by husband and wife, provided spaces for signatures of two witnesses, but no witnesses signed, the will was ineffective as a testamentary disposition on part of wife, but was nevertheless effective as to husband.

Tex—Taylor v Taylor, Civ App, 281 S W 2d 232, error refused no reversible error.

#### Language

A holographic will written in German language was valid and hence was properly admitted to probate.

Okl—Heupel v Heupel, 174 P 2d 850, 197 Okl 567

Tex—Dieckow v Schneider, Civ App, 83 S W 2d 417

#### Meaning of word "wholly"

Statute requiring a holographic will to be "wholly" in the handwriting of the testator does not use quoted word in its absolute, utter, and rigidly uncompromising sense.

Va—Bell v Timmins, 58 S E 2d 55, 190 Va 648

#### Instrument held valid

Where will was unambiguous and made a natural disposition of testator's property and was entirely in the handwriting of testator and was in proper order except for one broken sentence just before the signature of testator, which sentence did not affect any material part of the will, and jury found against contention that broken sentence indicated that a part of former will had been pasted to will in question, will was valid.

Ky—Bennett v Bennett's Ex'x, 198 S W 2d 301, 303 Ky 565

79. La—Succession of Reynolds, 71 So 2d 537, 224 La 975

80. Cal—In re Dumas' Estate, 210 P 2d 697, 34 Cal 2d 406

In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85

Va—Triplett's Ex'r v Triplett, 172 S E 162, 161 Va 906

#### Sequence of time

Where testatrix and bank officer with knowledge and acquiescence of testatrix made interlineations, changes, and additions on previously executed holographic will for purpose of affording memorandum for use of attorney and drawing more formal will, question of validity of will was not affected by sequence of time in which changes were made by testatrix or by bank officer.

Cal—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624

81. La—Succession of Jones, App, 38 So 2d 797

68 C J p 719 note 74

82 Ark—Musgrove v Holt, 240 S W 1068, 183 Ark 355

La—Succession of Smart, 36 So 2d 639, 214 La 63

Succession of Jones, App, 38 So 2d 797

83. Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

La—Succession of Reynolds, 71 So 2d 537, 224 La 975, certiorari denied Reese v Wood, 75 S Ct 39, 348 US 838, 99 L Ed 661—Succession of Smart, 36 So 2d 639, 214 La 63—Succession of Guiraud, 114 So 489, 164 La 620

satisfy the requirement,<sup>84</sup> even though it is signed by the testator<sup>85</sup>

*The effect of the appearance of matter not in the handwriting* of deceased in or on a document purporting to be a holographic will has been the subject of somewhat different rules in the various jurisdictions. In some it is held that the mere presence of printed matter on a testamentary paper does not render it invalid as a holographic will where such printing is no part of the writing and is disassociated therefrom,<sup>86</sup> nevertheless, if printed, typed, stamped words or figures,<sup>87</sup> or written matter not in the handwriting of the testator,<sup>88</sup> constitutes a part of the instrument, such matter will invalidate it as a holographic will. A similar rule is followed in other jurisdictions to the effect that an instrument partly printed is not a valid holographic will if the written provisions are not complete in themselves,<sup>89</sup> but the fact that the paper contains matter not in the testator's handwriting will not invalidate it where it appears that the printed words were not intended by the testator to form any part of his

will,<sup>90</sup> and are separate and distinct therefrom.<sup>91</sup> In still other jurisdictions it is the rule that, while all of the matter not in the handwriting of deceased will be disregarded,<sup>92</sup> particularly where it is merely surplusage,<sup>93</sup> where all of the words appearing on the paper in his handwriting are sufficient to constitute a will, the fact that other words not in his handwriting appear thereon will not defeat the intention of the testator otherwise expressed.<sup>94</sup>

*Stationer's will forms* It appears to be held generally that an instrument written on a stationer's will form by filling in the blank spaces is not a valid holographic will,<sup>95</sup> even though the matter written by decedent in his own hand would, standing alone, constitute a complete testamentary disposition.<sup>96</sup>

*The doctrine of incorporation by reference* applies to holographic wills,<sup>97</sup> and while in some jurisdictions the document referred to must be in the handwriting of the testator,<sup>98</sup> in at least one other, a previous testamentary document not in the handwriting of the testator may be so incorporated,<sup>99</sup>

84 Ky—Scott v Gastright, 204 S W 2d 367, 305 Ky 340, 173 A L R 565—Blankenship v Blankenship, 124 S W 2d 1060, 276 Ky 707—McNeill v McNeill, 87 S W 2d 367, 261 Ky 240

Tex—Dean v Dickey, Civ App, 225 S W 2d 999

Wash—In re Bauer's Estate, 105 P 2d 11, 5 Wash 2d 165  
68 C J p 719 note 77

85 Cal—In re Dreyfus' Estate, 165 P 941, 175 Cal 417, L R A 1917 F 391

86 Cal—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180  
In re Goldsworthy's Estate, 129 P 2d 949, 54 Cal App 2d 666—In re Durlwanger's Estate, 107 P 2d 477, 41 Cal App 2d 750  
68 C J p 719 note 80

87 Cal—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180

N C—Pounds v Litaker, 71 S E 2d 39, 235 N C 746  
68 C J p 719 note 81

88 Cal—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624

89 Ky—Blankenship v Blankenship, 124 S W 2d 1060, 276 Ky 707  
Utah—In re Yowell's Estate, 285 P 285, 75 Utah 312

Wash—*Corpus Juris* cited in In re Bauer's Estate, 105 P 2d 11, 14, 5 Wash 2d 165

90 Ky—Blankenship v Blankenship, 124 S W 2d 1060, 276 Ky 707  
68 C J p 719 note 83.

91. Utah—In re Yowell's Estate, 285 P 285, 75 Utah 312  
68 C J p 719 note 84

92. Va—Bell v Timmins, 58 S E 2d 55, 190 Va 648  
68 C J p 719 note 85

93 Tex—Maul v Williams, Com App, 69 S W 2d 1107, mandate conformed to, Civ App, 88 S W 2d 1087  
68 C J p 719 note 86

94. La—Girven v Miller, 52 So 2d 843, 219 La 252

Succession of Knight, App, 151 So 230

N C—Pounds v Litaker, 71 S E 2d 39, 235 N C 746—In re Goodman's Will, 50 S E 2d 54, 229 N C 444—In re Wallace's Will, 42 S E 2d 520, 227 N C 459—In re Parsons' Will, 178 S E 78, 207 N C 584

Tex—Maul v Williams, Com App, 69 S W 2d 1107, mandate conformed to, Civ App, 88 S W 2d 1087  
68 C J p 719 note 87

**Engraved monogram** on paper writing offered as holographic will could not be considered part thereof, and not being in decedent's handwriting could not be construed to be her signature, within meaning of statutes relating to holographic wills  
N C—Pounds v Litaker, 71 S E 2d 39, 235 N C 746

95. Cal—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180  
68 C J p 720 note 89

**Words and figures appearing at the beginning** of will and inserted in handwriting of deceased in blank spaces provided therefor in the printed form employed by deceased must be considered as well as latter

portion of instrument disposing of estate and entirely in deceased's handwriting and dated and signed by deceased

Cal—In re Bower's Estate, supra

96 Utah—In re Wolcott's Estate, 180 P 169, 54 Utah 165, 4 A L R 727

97 Cal—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Martin's Estate, 88 P 2d 234, 31 Cal App 2d 501

**Doctrine held not involved**

Cal—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624

98. Miss—Hewes v Hewes, 71 So 4, 110 Miss 826  
N C—In re Smith's Will, 10 S E 2d 676, 218 N C 161

**Typewritten will**

Where testatrix had not signed nor even seen typewritten will dictated by attorney in her presence, but she wrote entirely in her handwriting and signed a memorandum that 'will I dictated to attorney' was her last will and as she wished it, statute requiring subscribing witnesses if will is not "wholly written by the testator" was not satisfied by either instrument, or by both instruments taken together

Ky—Scott v Gastright, 204 S W 2d 367, 305 Ky 340, 173 A L R 565

99 Cal—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134

**Will of testator's wife** which was not in testator's handwriting could be incorporated and did not render testator's will invalid

Cal—In re Martin's Estate, 88 P 2d 234, 31 Cal App 2d 501



where the reference is unmistakable<sup>1</sup> Where another instrument, although referred to, is not intended to be incorporated, the fact that such other paper is not wholly in the testator's handwriting will not vitiate the holographic will<sup>2</sup>

### c. Dating

A holographic will must generally be completely dated in the testator's handwriting, but the date may appear in any part of the instrument

Although it is not necessary that a holographic will be dated where the statute does not require such formality,<sup>3</sup> by virtue of statutes in most jurisdictions a paper purporting to be a holographic will is not valid unless it is dated<sup>4</sup> wholly in the handwriting of the testator<sup>5</sup> This requirement is not satisfied by a recital of testator's age,<sup>6</sup> or of a date on which a prior testamentary instrument was executed<sup>7</sup> Except in jurisdictions following the rule

of liberal construction of holographic will statutes, considered supra § 200, which hold that the year and the month are sufficient to "date" the instrument,<sup>8</sup> it is generally held that the "date" required includes the year, month, and day, and that if any one of these is wanting the will is invalid,<sup>9</sup> and, where any part of the date is doubtful or uncertain, whether as to the day, month, or year, the instrument will fail as a holographic will<sup>10</sup> However, where one of the figures of the date has been surcharged or superimposed on another figure, in such manner that the exact date can be seen with certainty, the testament will not be invalidated<sup>11</sup> The sufficiency of the date of a holographic will must be determined from the face of the will alone, without any extrinsic evidence<sup>12</sup>

*Number of dates* A holographic paper does not fail as a will by reason of the fact that it bears two

1. Cal—In re Smith's Estate, 191 P 2d 413, 31 Cal 2d 563
  2. Tex—Adams v Maris, Com App, 213 S W 622
  3. Ariz—In re Morrison's Estate, 103 P 2d 669, 55 Ariz 504
  - NC—Pounds v Litaker, 71 S E 2d 39, 235 NC 746—In re Wallace's Will, 42 S E 2d 520, 227 NC 459—In re Parsons' Will, 178 S E 78, 207 NC 584
  - Tenn—*Corpus Juris* cited in Nicley v Nicley, App, 276 S W 2d 497, 499
  - Tex—Kramer v Crout, Civ App, 279 S W 2d 932, error refused, no reversible error  
68 C J p 720 note 94
  4. Alaska—In re Lanart's Estate, 9 Alaska 535
  - Cal—In re Dumas' Estate, 210 P 2d 697, 34 Cal 2d 406—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 124 A L R 624—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180  
In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300
  - Idaho—In re Heazle's Estate, 240 P 2d 821, 72 Idaho 307
  - La—Succession of Sarrazin, 65 So 2d 602, 223 La 286—Succession of Torlage, 12 So 2d 683, 202 La 693—Succession of Butterworth, 196 So 39, 195 La 115  
Succession of Lasseigne, App, 181 So 879—Succession of Mathews, App, 158 So 233
  - Mont—In re Gift's Estate, 232 P 2d 328, 125 Mont 95
  - ND—Johnson v Weldy, 54 N W 2d 829, 79 ND 80
  - Okl—In re Abrams' Will, 77 P 2d 101, 182 Okl 215  
68 C J p 720 note 96.
- Lost will**  
Fact that neither witness could recall exact day of month appearing in the date did not render purported lost will invalid as a holographic will, where witnesses testified that will was dated by testator  
Cal—In re Reynolds' Estate, 211 P 2d 608, 94 Cal App 2d 851
- Incorporation by reference**  
Omission of a date from an otherwise valid holographic will may not be supplied by a separate document where there is nothing to indicate that undated writing is to be read or construed as part of dated writing  
Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274  
In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300
5. Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570
  - Okl—In re Paull's Estate, 254 P 2d 357, 208 Okl 195  
68 C J p 720 note 97
  6. Cal—In re Martin's Estate, 58 Cal 530
  7. Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274
  8. Mont—In re Irvine's Estate, 139 P 2d 489, 114 Mont 577, 147 A L R 882  
Okl—In re Hall's Estate, 235 P 916, 106 Okl 124
- In absence of issue of capacity** to make will at particular time or as to which of several wills was last executed holographic will was not invalid because of failure of testatrix to specify date of month in which it was executed  
Miss—Estes v Estes, 27 So 2d 854, 200 Miss 541
9. Cal—*Corpus Juris* cited in In re Moody's Estate, 257 P 2d 709, 712, 118 Cal App 2d 300—In re Fritz's Estate, 227 P 2d 539, 102 Cal App 2d 385—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Schiff-
  - mann's Estate, 61 P 2d 331, 16 Cal App 2d 650—In re Maguire's Estate, 58 P 2d 209, 14 Cal App 2d 388
  - La—Succession of Lasseigne, App, 181 So 879
  - Mont—*Corpus Juris* quoted in In re Irvine's Estate, Mont, 139 P 2d 489, 498, 114 Mont 577
  - Okl—*Corpus Juris* cited in In re Abrams Will, 77 P 2d 101, 102, 182 Okl 215  
68 C J p 720 note 2
  10. La—Succession of Sarrazin, 65 So 2d 602, 223 La 286
  - Mont—*Corpus Juris* quoted in In re Irvine's Estate, Mont, 139 P 2d 489, 498, 114 Mont 577.  
68 C J p 720 note 3
- Instrument held valid**  
Olographic will containing on top line the word "April," and on second line the words and figures "I bequeath to my sister 20—1930," and on fourth line the words "All I have" was valid as having a date certain, as against contention that will was invalid because not properly dated in that "20—1930" might be day of month and year of execution, or it might be proportion of estate devised to sister  
La—Succession of Sutherland, 160 So 794, 181 La 1011
11. Cal—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85
  - La—Succession of Reynolds, 71 So 2d 537, 224 La 975, certiorari denied Reese v Wood, 75 S Ct 39, 348 US 838, 99 L Ed 661—Succession of McCay, 117 So 772, 166 La 681
  12. Cal—In re Schiffman's Estate, 61 P 2d 331, 16 Cal App 2d 650
  - La—Succession of Beird, 82 So 881, 145 La 756, 6 A L R 1452  
Succession of Lasseigne, App, 181 So 879.

dates, as it is not necessary that it be written on the same day at one time<sup>13</sup>

*Correctness of dates* While the date borne by a holographic will is assumed to be its true date,<sup>14</sup> the will is not invalidated by the giving of an erroneous date,<sup>15</sup> unless the date is so obviously unreasonable as to amount to no date at all<sup>16</sup>

*Time of dating* Ordinarily the testator may complete his holographic will by dating it properly even after he has finished making it<sup>17</sup>

*Place where will is written* is not included in the "date" required to be in the testator's handwriting,<sup>18</sup> hence, if the name of the place does not appear,<sup>19</sup> or appears in print,<sup>20</sup> it does not invalidate the date

*Position of date* The date may appear on any part of the instrument,<sup>21</sup> at the head,<sup>22</sup> at the foot,<sup>23</sup> in the body of the will,<sup>24</sup> or in the margin,<sup>25</sup> or even below the signature of the testator<sup>26</sup>

Where two separate clauses were written by the testator at the same time and constitute but a single instrument, a date at the beginning of the first clause will suffice for the whole instrument<sup>27</sup>

*The use of well-known abbreviations* of the year and month does not invalidate a will,<sup>28</sup> but where both of the figures, intended to represent the day and the month, are less than the number thirteen, such an abbreviation is insufficient because of the well recognized variance in the common abbreviation as to whether the day or the month is represented by the first figure<sup>29</sup>

#### d Signature

A holographic will must be signed by the testator. The position where the signature must appear on the instrument varies according to the statutory requirement

It is now generally held that a holographic instrument will not constitute a valid will unless it has been signed by the testator<sup>30</sup> Where the stat-

13 Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300—In re Schiffmann's Estate, 61 P 2d 331, 16 Cal App 2d 650

La—Picard v Succession of Picard, 155 So 11, 179 La 746—Succession of Cunningham, 77 So 506, 142 La 701

14 Cal—In re Carr's Estate, 209 P 2d 956, 93 Cal App 2d 750

15 Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

La—Love v Dawkins, 62 So 2d 399, 222 La 359

68 C J p 721 note 15

16 La—Succession of Buck, 23 So 2d 215, 208 La 556

68 C J p 721 note 16

17 Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85

La—Succession of Jones, App, 38 So 2d 797

68 C J p 721 note 17

18. US—Stead v Curtis, Cal, 191 F 529, 112 CCA 463, reheard 205 F 439, 123 CCA 507, certiorari denied 34 S Ct 775, 234 US 759, 58 L Ed 1580 and appeal dismissed 36 S Ct 221, 239 US 634, 60 L Ed 479

68 C J p 721 note 18

19. US—Stead v Curtis, supra  
NC—Pounds v Litaker, 71 SE 2d 39, 235 NC 746—In re Wallace's Will, 42 SE 2d 520, 227 NC 459—In re Parsons' Will, 178 SE 78, 207 NC 584.

20 La—Succession of Heinemann, 136 So 51, 172 La 1057

Robertson's Succession, 21 So 586, 49 La Ann. 868, 62 Am SR 672.

21. La—Zerega v Percival, 15 So 476, 46 La Ann 590

Where separate sheets of paper constituted a will, insufficiency or absence of a date in one part may be remedied by presence of a complete date in another part

Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

22 Cal—In re Moody's Estate, supra  
68 C J p 721 note 9

23 Cal—In re Moody's Estate, supra

La—Jones v Kyle, 123 So 306, 168 La 728

24. La—Jones v Kyle, supra

Question of intent

Recourse may not be had to a date appearing in body of an alleged holographic will in order to meet statutory requirement, if the date in body of instrument was not intended by testator to serve as date of instrument

Cal—In re Wunderle's Estate, 181 P 2d 874, 30 Cal 2d 274

In re Schiffmann's Estate, 61 P 2d 331, 16 Cal App 2d 650

25. Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

26. Cal—In re Moody's Estate, supra  
68 C J p 721 note 12

27. Cal—In re Olssen's Estate, 184 P 22, 42 Cal App 656

68 C J p 721 note 13

28. Cal—In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300

68 C J p 721 note 6

29. La—Succession of Lasseigne, App, 181 So 879

68 C J p 721 note 7

30 Alaska—In re Lanart's Estate, 9 Alaska 535

Ariz—In re Morrison's Estate, 103 P 2d 669, 55 Ariz 504

Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570—In re Towle's Estate, 93 P 2d 555, 14 Cal 2d 261, 121 A LR 624—In re Bower's Estate, 78 P 2d 1012, 11 Cal 2d 180

Idaho—In re Heazle's Estate, 240 P 2d 821, 72 Idaho 307

La—Succession of Torlage, 12 So 2d 683, 202 La 693—Succession of Butterworth, 196 So 39, 195 La 115

Succession of Lasseigne, App, 181 So 879

Mont—In re Gift's Estate, 232 P 2d 328, 125 Mont 95

ND—Johnson v Weldy, 54 NW 2d 829, 79 ND 80

Okl—In re Paull's Estate, 254 P 2d 357, 208 Okl 195

Pa—In re Barker's Estate, Orph, 4 Fiduciary 109

Va—Bell v Timmins, 58 SE 2d 55, 190 Va 648

68 C J p 721 note 23

At common law a holographic will of personalty without signatures or seal or witnesses was good

Me—Leathers v Greenacie, 53 Me 561

Md—Boyd v Boyd, 6 Gill & J 25

Time of signing

Fact that testatrix' signature may have been placed on will four days after the date stated in the will and as long after the body of the will was written would not prevent the will from being given effect as a holographic will

Cal—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85.

utes provide that a valid holographic will be signed at the end of the writing, or be "subscribed,"<sup>31</sup> the requirement must be fulfilled.<sup>32</sup> However, where the writing begins at the top and finishes on the last line of a sheet of legal cap, a signature on the margin line at the bottom of the page has been held to be a sufficient subscription under the statute.<sup>33</sup> In some jurisdictions where the statutes do not use the term "subscribing" it is held that the signature must nevertheless be at the end of the will,<sup>34</sup> but in other jurisdictions where the statutes contain the same or similar wording the requirement as to signing is satisfied when the signature of the testator appears in any part of the will,<sup>35</sup> providing it

evidences the execution and completeness of the instrument.<sup>36</sup> Thus, notwithstanding the usual place of signing and thereby evidencing the execution and completeness of a holographic will is at the end of the document,<sup>37</sup> the signature of the testator if found elsewhere may be a signature or token of execution,<sup>38</sup> if the circumstances warrant the positive and satisfactory inference.<sup>40</sup> The only evidence which will justify this conclusion must be found in and on the instrument itself,<sup>41</sup> and, in the absence of anything on the face of the paper to raise the inference that a name appearing elsewhere than at the end of the writing was intended as a signature in execution, the holographic document may not be

31 Miss—*Corpus Juris* quoted in *Baker v Baker's Estate*, 24 So 2d 841, 842, 199 Miss 388

32 Miss—In re George's Estate, 45 So 2d 571, 208 Miss 734—*Corpus Juris* quoted in *Baker v Baker's Estate*, 24 So 2d 841, 842, 199 Miss 388

68 C J p 722 note 25

#### Signing held sufficient

(1) Where signature of deceased in holographic testament appeared at end of all dispositive items only in phrase "I Clara M Smith, have subscribed my name this the 28 of August 1940" and was followed by attestation clause and instrument was intended to be decedent's testament and decedent acknowledged it as her testament before two competent witnesses who subscribed it, instrument was sufficiently "signed at the end" in accordance with statutory provision so as to entitle it to probate

Ohio—In re Smith's Will, 13 Ohio Supp 66

(2) Instrument written by testator, who possessed testamentary capacity, in ink on sheet of plain paper leaving house to housekeeper, was a valid holographic will, notwithstanding his signature appeared prior to concluding statement in instrument, and words "everything in it" appearing under his signature formed part of sentence before the signature

Ark—Weems v Smith, 237 SW 2d 880, 218 Ark 554

#### Postscript

Where owner of land wrote letter stating desire to give interest in land to addressee, and postscript in writer's handwriting stated that letter should prove addressee's ownership if writer died, but postscript was not followed by any signature, postscript was not "subscribed" as required of instruments to be probated as holographic wills

Miss—In re George's Estate, 45 So 2d 571, 208 Miss 734.

33. Ky—*Graham v Edwards*, 173 S W 127, 162 Ky 771

34 La—In re Poland's Estate, 68 So 415, 137 La 219  
In re Armant's Will, 9 So 50, 43 La Ann 310, 26 Am SR 183

35 Cal—In re Kinney's Estate, 104 P 2d 782, 16 Cal 2d 50  
In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300—In re Swendsen's Estate, 111 P 2d 408, 43 Cal App 2d 551

SD—*Corpus Juris* cited in In re McNair's Estate, 38 NW 2d 449, 455, 72 SD 604

Tenn—*Corpus Juris* cited in Nicley v Nicley, App, 276 SW 2d 497, 499

68 C J p 722 note 28

Portion above signature should be admitted to probate as testatrix' will, even though signatures of testatrix and subscribing witnesses precede clause bequeathing specified sums to named relatives

Cal—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

36. Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570  
In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300—In re Gardener's Estate, 190 P 2d 629, 84 Cal App 2d 394

Tenn—Campbell v Henley, 110 SW 2d 329, 172 Tenn 135  
68 C J p 722 notes 30–34

37 Cal—In re Brooks' Estate, 4 P 2d 148, 214 Cal 138  
68 C J p 722 note 30

38. Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570  
In re Moody's Estate, 257 P 2d 709, 118 Cal App 2d 300—In re Wallace's Estate, 223 P 2d 284, 100 Cal App 2d 237

NJ—In re Taylor's Estate, 95 A 2d 503, 25 N J Super 105, affirmed 100 A 2d 346, 28 N J Super 220

NC—In re Goodman's Will, 50 SE 2d 34, 229 NC 444

68 C J p 722 note 31

#### At the beginning

Cal—In re Kinney's Estate, 104 P 2d 782, 16 Cal 2d 50  
In re Kaminski's Estate, 115 P. 2d 21, 45 Cal App 2d 779

#### In body of instrument

Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570

#### In attestation clause and at beginning

Cal—In re Hout's Estate, 273 P 2d 45, 126 Cal App 2d 721

39 Cal—In re Gardener's Estate, 190 P 2d 629, 84 Cal App 2d 394

40. Cal—In re Gardener's Estate, supra  
68 C J p 722 note 32

#### Adoption

(1) Completeness of holographic will is sufficient evidence of testator's adoption of testator's name placed at the beginning of the declaration as the authenticating signature of testator and as a compliance with statute requiring such will to be "signed" by testator

Cal—In re Kinney's Estate, 104 P 2d 782, 16 Cal 2d 50

In re Gardener's Estate, 190 P 2d 629, 84 Cal App 2d 394

(2) Additions or alterations may be made in a holographic will if done in testator's handwriting without necessity of resigning on theory that old signature is adopted

Cal—In re Dumas' Estate, 210 P 2d 697, 34 Cal 2d 406

41. Cal—In re Gardner's Estate, 190 P 2d 629, 84 Cal App 2d 394

68 C J p 722 note 33

#### Intent

The name as placed on the will must be intended as a signature

Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570

Va—Hall v Brigstocke, 58 SE 2d 529, 190 Va 459, 19 ALR 2d 921

W Va—Black v Maxwell, 46 SE 2d 804, 131 W Va 247

#### Parol evidences held inadmissible

Cal—In re Bloch's Estate, 248 P 2d 21, 39 Cal 2d 570

deemed a valid will<sup>42</sup> Under statutes requiring that a valid holographic will be signed by the testator, a signature on an envelope in which an unsigned testamentary paper is inclosed is not generally a sufficient signing,<sup>43</sup> but the contrary has been held where the inscription and signature on the envelope has been considered as a part of the will and the statute did not require it to be subscribed<sup>44</sup>

**Necessity for legal name** It is not ordinarily required that one signing a holographic will affix his legal or true name,<sup>45</sup> and, where it is established that the signature is really that of the testator,<sup>46</sup> and it appears that he intended it to be a token of complete execution, the fact that he signs his first name,<sup>47</sup> an abbreviation of his name,<sup>48</sup> or merely his initials,<sup>49</sup> does not render the will invalid. Likewise, it will not be invalid if it be signed "father,"<sup>50</sup> or "mother,"<sup>51</sup> or by an affectionate name<sup>52</sup>

### e. Attestation and Subscription by Witnesses

Unless required by statute, a holographic will need not be attested or subscribed by witnesses

In most jurisdictions the formalities of attestation and subscription by witnesses are not necessary to the validity of a holographic will,<sup>53</sup> and the fact that an attestation clause<sup>54</sup> or the names of subscribing witnesses<sup>55</sup> appear on the instrument does not affect its validity, even though the attestation would be insufficient to validate a will requiring attestation,<sup>56</sup> unless the circumstances are such as to make it appear unfinished<sup>57</sup> Under a statute recognizing holographic wills and providing that they shall be proved in the same manner as other private writing it has been held that such a will must be witnessed by two competent witnesses as is required in the case of other wills<sup>58</sup> A devisee has been held a competent witness to prove a holographic will<sup>59</sup> and such a will may be probated on the evidence of

42 Va—Hall v Brigstocke, 58 SE 2d 529, 190 Va 459, 19 ALR 2d 921—McElroy v Rolston, 34 SE 2d 241, 184 Va 77—Hamlet v Hamlet, 32 SE 2d 729, 183 Va 453

W Va—Black v Maxwell, 46 SE 2d 804, 131 W Va 247  
68 CJ p 723 note 34

#### Signature in exordium clause

(1) The decisive question in determining whether instrument was "signed" and hence a will, within contemplation of statute, is not whether person intended instrument to be his will, but whether he intended name in exordium clause to be his signature or merely to serve as description

Ill—Hoffman v Hoffman, 18 NE 2d 209, 370 Ill 176

Miss—Baker v Baker's Estate, 24 So 2d 841, 199 Miss 388

(2) Where person in own handwriting writes purported will, and writes his name in exordium clause of instrument but fails to subscribe his name in order that instrument be "signed" within contemplation of statute of wills, name in exordium clause must be written or declared as an authenticating signature

Ill—Hoffman v Hoffman, supra

(3) Instrument signed by testatrix in the exordium clause and on top of each sheet would be admitted to probate as an olographic will signed in compliance with statute requiring olographic will to be signed by hand of testator, although instrument was not signed at end of last sheet, where examination of instrument established that will was regarded by testatrix as a completed document

S D—In re McNair's Estate, 38 NW 2d 449, 72 S D 604.

43 W Va—Black v Maxwell, 46 S E 2d 804, 131 W Va 247  
68 CJ p 723 note 35

44 NC—Alexander v Johnston, 88 SE 785, 171 NC 468  
68 CJ p 723 note 36

45 Pa—In re Kimmel's Estate, 123 A 405, 278 Pa 435, 31 ALR 678  
68 CJ p 723 note 37

46 Ark—Cartwright v Cartwright, 250 SW 11, 158 Ark 278

47 Pa—Knox's Estate, 18 A 1021, 131 Pa 220, 17 Am SR 798, 6 LR A 353  
68 CJ p 723 note 40

48 Ark—Cartwright v Cartwright, 250 SW 11, 158 Ark 278

Tex—Barnes v Horne, Civ App, 233 SW 859

49 Pa—In re Killough's Estate, Orph, 36 Del Co 30  
68 CJ p 723 note 42

50 Pa—In re Kimmel's Estate, 123 A 405, 278 Pa 435, 31 ALR 678

51 NC—In re Southerland's Will, 124 SE 632, 188 NC 325  
68 CJ p 723 note 44

52 Cal—In re Button's Estate, 287 P 964, 209 Cal 325  
68 CJ p 723 note 45

53 US—Lovskog v American Nat Red Cross, CCA Alaska, 111 F 2d 88

Ariz—Corpus Juris quoted in In re Morrison's Estate, 103 P 2d 669, 672, 55 Ariz 504

Ky—McNeill v McNeill, 87 SW 2d 367, 261 Ky 240

Tex—Taylor v Taylor, Civ App, 281 SW 2d 232, error refused no reversible error

68 CJ p 723 note 47

54 Ariz—Corpus Juris quoted in In re Morrison's Estate, 103 P 2d 669, 672, 55 Ariz 504  
68 CJ p 723 note 48

55 Ariz—Corpus Juris quoted in In re Morrison's Estate, 103 P 2d 669, 672, 55 Ariz 504

Cal—In re Spies' Estate, 194 P 2d 83, 49 Cal App 681

La—Succession of Eastman, App, 6 So 2d 788

Pa—In re Reynard's Estate, 82 Pa Dist & Co 529, 2 Fiduciary 457, 32 Wash Co 222

Tex—Kramer v Crout, Civ App, 279 SW 2d 932, error refused no reversible error—Price v Taliaferro, Civ App, 254 SW 2d 157, refused no reversible error

Va—Moyers v Gregory, 7 SE 2d 881, 175 Va 230

68 CJ p 723 note 49

#### Statement of notary

Presence on will of statement of notary public over his signature that the will was signed before him with date and venue, did not detract from the will's character as a holographic will

Cal—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85

56 Va—Perkins v Jones, 4 SE 833, 84 Va 358, 10 Am SR 863  
68 CJ p 724 note 50

57 Md—Barnes v Syester, 14 Md 507

68 CJ p 724 note 51

58 NJ—In re Taylor's Estate, 95 A 2d 503, 25 NJ Super 105, affirmed 100 A 2d 346, 28 NJ Super 220

Wyo—Neer v Cowhick, 31 P 862, 4 Wyo 49, 18 LR A 588

59 NC—Hampton v Hardin, 88 N C 592

68 CJ p 724 note 53.

an attesting witness who is a devisee without destroying the devise since the statute inhibiting the probate of wills on the testimony of an attesting witness named as devisee in the instrument does not apply to a will which may be probated without his testimony<sup>60</sup>

## § 206. — Deposit or Custody

Under some statutes, a holographic will must be found among the testator's valuable papers.

Where the statutes so provide, a holographic will, in order to be valid, must be found among the valuable papers or effects of the testator,<sup>61</sup> or must have been given to another for safekeeping,<sup>62</sup> with the knowledge of the testator and his intention to make it a will<sup>63</sup> In the absence of such requirement, a holographic will may be deposited any-

where and with any person,<sup>64</sup> but the fact that a will is found in such a place as to indicate that it was considered by deceased as a valuable instrument is a weighty circumstance in deciding whether the instrument is entitled to probate<sup>65</sup>

## § 207. — Codicil

A holographic codicil is valid where executed with testamentary intent and written, dated, and signed by the testator

A codicil like a will may be valid, although holographic in form,<sup>66</sup> if executed with testamentary intent<sup>67</sup> Although it has been held that a holographic codicil need not be executed in the same form as an original will,<sup>68</sup> it is invalid if not wholly in the handwriting of the testator,<sup>69</sup> or if not dated<sup>70</sup> and signed<sup>71</sup> by him There is authority to the ef-

60. Ky—Cromwell v Stevens, 278 S W 555, 212 Ky 209  
68 C J p 724 note 54

61. NC—In re Williams' Will, 1 S E 2d 857, 215 NC 259  
68 C J p 724 note 56

### What are valuable papers

Valuable papers consist of such as are regarded by decedent as worthy of preservation, and in his estimation of some value which depends much on condition and business and habits of decedent with respect to keeping valuable papers  
NC—In re Williams' Will, supra

### In Tennessee

(1) The act of 1941 relating to execution of wills and repealing all acts in conflict therewith was intended to cover whole subject involving execution of wills, and repealed the code section requiring holographic will to be found among testator's valuable papers or in hands of another for safekeeping

Tenn—Northcross v Taylor, 197 S W 2d 9, 29 Tenn App 438

(2) Under the former statute, the instrument was required to be found among the testator's valuable papers  
Tenn—Campbell v Henley, 110 S W 2d 329, 172 Tenn 135

Pulley v Cartwright, 137 S W 2d 336, 23 Tenn App 690—Fransioli v Podesta, 113 S W 2d 769, 21 Tenn App 577, affirmed 134 S W 2d 162, 175 Tenn 340—Howell v Mooie, 14 Tenn App 594

(3) An instrument which was found in the pocket of a coat which decedent had hung in a closet as a matter of routine on retiring was not found among his valuable papers  
Tenn—Fransioli v Podesta, supra

(4) A paper writing, kept by writer in her pocketbook, which evidence showed that she regarded as safest place to keep will, with all her mon-

ey and keys, was found among her "valuable papers" after her death  
Tenn—Pulley v Cartwright, supra

62. NC—In re Bennett's Will, 103 SE 917, 180 NC 5  
68 C J p 724 note 57

63. NC—In re Williams' Will, 1 S E 2d 857, 215 NC 259  
68 C J p 724 note 58

64. La—Succession of Butterworth, 196 So 39, 195 La 115

65. Tenn—Corpus Juris cited in Smith v Smith, 232 S W 2d 338, 342, 33 Tenn App 507  
68 C J p 724 note 59

66. Cal—In re Swendsen's Estate, 111 P 2d 408, 43 Cal App 2d 551  
68 C J p 724 note 61

### Presence of witnesses

(1) Codicil to which there were attesting witnesses was not "holographic," although written in long-hand

Ark—Noblit v. Noblit, 265 S W 2d 520

(2) Where testator's wife, to whom he had left his entire estate, predeceased testator, letter written by testator a month later to secretary of fraternal lodge stating that in case of his death it was his wish to bequeath a portion of fraternal insurance to his niece was properly admitted to probate as a codicil to testator's will, although including signature of a witness

Cal—In re Spies' Estate, 194 P 2d 83, 49 Cal App 681

67. Okl—Reeves v Duke, 137 P 2d 897, 192 Okl 519, 147 A L R 634  
Tenn—Northcross v Taylor, 197 S W 2d 9, 29 Tenn App 438

### Expression of desire

Olographic writing addressed to father, to whom son had devised his home and furniture, asking father to do him favor of giving one-half of proceeds from sale of house and fur-

niture to another, was not valid as codicil to will, since it simply expressed desire that father as devisee make certain use of property devised to him

Cal—In re Goldthwaite's Estate, 35 P 2d 1050, 140 Cal App 551

### Instrument held to disclose testamentary intent

Cal—In re Sargavak's Estate, 216 P 2d 850, 35 Cal 2d 93, 21 A L R 2d 307

68. La—Succession of Homan, 12 So 2d 649, 202 La 591

Tex—Pullen v Russ, Civ App, 209 S W 2d 630, error refused no reversible error

69. N J—In re Potts' Estate, Co, 61 A 2d 649

Okl—Johnson v Johnson, 279 P 2d 928

Tenn—Richberg v Robbins, 228 S W 2d 1019, 33 Tenn App 66  
68 C J p 725 note 62

70. Cal—In re Carr's Estate, 209 P 2d 956, 93 Cal App 2d 750—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

N J—In re Potts' Estate, Co, 61 A 2d 649

Okl—Johnson v. Johnson, 279 P 2d 928

68 C J p 725 note 63.

### Sufficiency of date

Instrument consisting of double sheet of foolscap paper containing dispositive clauses signed by deceased but not dated, and a codicil there-to signed by the deceased and dated "March nineteen hundred and thirty" was not sufficiently dated to qualify instrument as holographic will under statute

Cal—In re Maguire's Estate, 58 P 2d 209, 14 Cal App 2d 388

71. Cal—In re Jordan's Estate, 184 P 2d 165, 81 Cal App 2d 419

N J—In re Potts' Estate, Co, 61 A 2d 649.

fect that a holographic codicil is not vitiated by the fact that it was written on a stationer's will form, where it is complete and separate from the printed matter thereon.<sup>72</sup> It is of no materiality that the testator wrote the codicil on one of the sheets of the original will,<sup>73</sup> and it is not necessary to its validity that the testator refer to the writing as a codicil.<sup>74</sup> It has been held that a codicil bearing the same date as a holographic will, folded up with the will and signed by the testator, is a valid codicil although it does not expressly refer to the will.<sup>75</sup>

## § 208 Mystic Wills

Under provisions of the Louisiana Civil Code a testator may make a secret or mystic will by performing the acts prescribed by the statute

In order that a mystic, secret, or closed testament provided for by the Louisiana code may be valid, the testator must have complied with the requirements that such will be in an envelope, closed or sealed,<sup>76</sup> and presented so inclosed to a notary with a declaration by the testator in the presence of the number of witnesses prescribed by the statute that the paper contains his will,<sup>77</sup> whereupon the notary must have indorsed on the envelope a statement of the transaction signed by himself and the witnesses.<sup>78</sup>

## § 209. Nuncupative Wills

The nature, requisites, and validity of nuncupative wills are considered infra §§ 210-218

Examine Pocket Parts for later cases.

## § 210 — Definition, Nature, and Essentials in General

a In general

b Necessity of observing statutory requirements

### a. In General

A nuncupative will is one declared orally by the testator, in his last illness, and in contemplation of death. Testamentary capacity and intent must be present

A nuncupative will is one which is not written, but which is declared orally by the testator,<sup>79</sup> in his last illness, as discussed infra § 412, and in contemplation of death,<sup>80</sup> before a sufficient number of competent witnesses.<sup>81</sup>

*What law governs.* The validity of a nuncupative will of a United States citizen domiciled in a foreign country, executed and probated in the foreign country, is to be decided there according to its law.<sup>82</sup>

*Testamentary capacity* Testamentary capacity, as determined by the rules applicable to wills in general, is essential to the validity of a nuncupative will.<sup>83</sup>

Okl—Johnson v Johnson, 279 P 2d 928

W Va—Black v Maxwell, 46 SE 2d 804, 131 W Va 247  
68 C J p 725 note 64

### Place of signature

Under a paper writing constituting a holographic will of testator stating "I will all my personal property and insurance" to a designated person then followed by the testator's signature which was followed by "P S—real estate and government retirement—insurance I B E W" the document was a valid completed holographic instrument as far as the testator's personal estate was concerned but was insufficient to devise the testator's property appearing after his signature

Va—Fenton v Davis, 47 SE 2d 372, 187 Va 463

72. Va—Gooch v Gooch, 113 SE 873, 134 Va 21

73. NC—In re Goodman's Will, 50 SE 2d 34, 229 NC 444

Okl—Johnson v Johnson, 279 P.2d 928  
68 C J p 725 note 66.

74. Cal—In re Atkinson's Estate, 294 P 425, 110 Cal App 499,  
68 C J p 725 note 67.

75. Va—Perkins v Jones, 4 SE 833, 84 Va 358, 10 Am SR 863

76. La—Succession of Fertel, 25 So 2d 296, 209 La 655  
68 C J p 725 note 70

### Sealing or closing held sufficient

(1) Statute relating to "sealing" in connection with mystic wills was complied with where envelope containing mystic will was closed and sealed with mucilage on the flap and a sealing wafer was securely attached and the envelope was not tampered with or opened until presented for probate

La—Succession of Fertel, supra

(2) Other methods of closing held sufficient see 68 C J p 725 note 70 [a]—[c]

### 77. Number of witnesses

(1) Three

La—Succession of Fertel, supra

(2) Seven

La—Lewis' Heirs v His Executors, 5 La. 387

### Presentation

The sealed will need not be physically presented to the witnesses, it being sufficient that it be presented to the notary in their presence and

that they witness the making of the superscription and sign it

La—Succession of Fertel, 25 So 2d 296, 209 La 655

78. La—Stafford v Villain, 10 La 319  
68 C J p 725 note 72

79. Ariz—In re Taylor's Estate, 106 P 2d 492, 56 Ariz 211  
68 C J p 725 note 75

Weight and sufficiency of evidence in probate of nuncupative will see infra § 420

Oral wills of soldiers or mariners see infra § 219

### Codicil

A nuncupative will is not a will in writing or a codicil to a written will  
Kan—In re Grattan's Estate, 138 P 2d 497, 157 Kan 116

80. Ga—Harp v Adams, 82 SE 246, 142 Ga 5

81. Miss—Lee v Barrow, 126 So 648, 156 Miss 711

82. N Y—In re Baisholts' Estate, 66 N Y S 2d 358, 188 Misc 867, affirmed 67 N Y S 2d 687, 271 App Div 915

83. Md—Dorsey v Sheppard, 12 Gill & J 192, 37 Am D 77  
Pa—In re Yarnall's Will, 4 Rawle 46, 26 Am D 115

*Testamentary intent* As in the case of wills in general, a testamentary intent is essential to the validity of a nuncupative will,<sup>84</sup> and it is the rule in most jurisdictions that there must be not only the intent to make a will, but also the intent to make a nuncupative will,<sup>85</sup> which intent must exist at the time of making the will.<sup>86</sup> Testamentary intent to make a nuncupative will has been held to be lacking where the testator thought it was not lawful to make a will verbally,<sup>87</sup> or where it does not appear that he thought he was making a will when making the declaration.<sup>88</sup> Also, under the rule in most jurisdictions, an expressed desire of a person to make a written will,<sup>89</sup> or verbal directions for a written will,<sup>90</sup> or instructions dictated to but one person for the draft of a will which was not executed,<sup>91</sup> or a defectively executed written will,<sup>92</sup> or a disposition which is not testamentary in nature,<sup>93</sup> cannot be set up as a nuncupative will. The position has also been taken, however, that testamentary declarations may be established as a nuncupative will, if the requisites for such a will are present, even though the testator intended to give such declarations the form of a written will, where he was prevented from the completion of the execution of such will according to law by an act of God or some other cause which was not an intention to abandon or postpone such execution.<sup>94</sup>

#### b. Necessity of Observing Statutory Requirements

Since nuncupative wills are not favored by the law, strict compliance with statutory requirements is ordinarily essential to their validity.

Although nuncupative wills disposing of personal property were recognized at common law,<sup>95</sup> such wills are not favored in law,<sup>96</sup> except in the cases of oral wills of soldiers in actual military service and of mariners or seamen at sea, as considered *infra* § 219, and the power to make them has been greatly restricted by statute,<sup>97</sup> and they may be sustained only where they comply with the provisions of such statutes.<sup>98</sup> It is the general rule that there must be a strict compliance with the provisions of such statutes<sup>99</sup> in order to prevent fraudulent practices and the fabrication of wills.<sup>1</sup> Thus, a nuncupative will, as far as it is not against public policy and law, will be given full effect according to the intention of the testator,<sup>2</sup> but the clearly expressed wishes of the testator which are not valid as a nuncupative will under the statute will not be given effect even to prevent an escheat.<sup>3</sup> Where statutes require all wills to be in writing there can be no valid nuncupative will.<sup>4</sup>

*Place of making* Where the places at which nuncupative wills may be made are designated by statute, it is held that nuncupative wills made at places other than those so designated are invalid.<sup>5</sup>

84. Pa.—In re Buehrer's Estate, 37 A 2d 587, 349 Pa 353 68 C J p 728 note 4

85. Wash.—Brown v State, 151 P 81, 87 Wash 44, Ann Cas 1917D 604 68 C J p 728 note 5

86. Pa.—In re Rutt's Estate, 50 A 171, 200 Pa 549 68 C J p 728 note 6

87. Tenn.—Ridley v. Coleman, 1 Sneed 616

88. Pa.—In re Rutt's Estate, 50 A 171, 200 Pa 549 68 C J p 728 note 8

89. Wash.—Brown v State, 151 P 81, 87 Wash 44, Ann Cas 1917D 604 68 C J p 728 note 9

90. Tenn.—Miller v Ford, 1 Tenn App 618 68 C J p 728 note 10

91. NC.—Kennedy v Douglas, 66 S E 216, 151 NC 336

92. Ariz.—In re Taylor's Estate, 106 P 2d 492, 56 Ariz 211 Neb.—Godfrey v Smith, 103 NW 450, 73 Neb 756 68 C J p 728 note 12

93. Mo.—Starks v Lincoln, 291 S W 132, 316 Mo 483

94. Va.—Phoebe v Bogges, 1 Gratt 129, 42 Va 129, 42 Am D 543 68 C J p 728 note 14.

95. Ariz.—In re Taylor's Estate, 106 P 2d 492, 56 Ariz 211 68 C J p 725 note 80

96. Ariz.—In re Taylor's Estate, *supra* Pa.—In re McClellan's Estate, 189 A 315, 325 Pa 257 68 C J p 725 note 81

97. Tex.—McClain v Adams, 146 S W 2d 373, 135 Tex 627

98. Ariz.—In re Taylor's Estate, 106 P 2d 492, 56 Ariz 211 68 C J p 726 note 84

99. Pa.—In re McClellan's Estate, 189 A 315, 325 Pa 257 U.S.—Melon v Entidad Provincia Religiosa de Padres Mercedarios de Castilla, C A Puerto Rico, 189 F 2d 163

Tenn.—Miller v Ford, 1 Tenn App 618 68 C J p 726 note 85

#### Special requirements

Only in the case of nuncupative wills does the statute prescribe a form of solemnity for the execution of wills of personality different from the requirements of the common law.

Tenn.—Fransiol v Podesta, 134 S W 2d 162, 175 Tenn 340

1. NC.—Bundrick v Haygood, 11 S E 423, 106 NC 468—Smith v Smith, 63 NC 637

2. Ga.—Biggers v Gladin, 50 SE 2d 585, 204 Ga 481

3. Alaska.—In re Bradley's Estate, 10 Alaska 610

4. Wyo.—In re Thornton's Estate, 133 P 134, 21 Wyo 421 68 C J p 726 note 87

Nuncupative wills in Louisiana see *infra* § 218

5. Tenn.—Ray v Nanney, 114 S W 2d 51, 21 Tenn App 618 68 C J p 727 note 98

#### Purported will held insufficient

In an action to establish a purported nuncupative will where deceased became ill in his home and was removed to hospital where will was attempted to be made, a person who is suffering from his last illness in his home and from there removed to a hospital is not within the terms of the statute requiring will to be made in his home. He could make a disposition of his property only by formal will duly executed. Tenn.—Miller v Ford, 1 Tenn App 618

## § 211. — Persons Who May Make

Except where statutes restrict the making of nuncupative wills to specified classes of persons, the general rules applicable to wills determine who may make nuncupative wills

Subject to the rules peculiar to nuncupative wills with respect to the circumstances and occasion of making, the persons who may make nuncupative wills are determined by the rules governing who may make wills in general<sup>6</sup> Under statutes restricting persons who may make nuncupative or oral wills to soldiers in active military service and mariners or seamen at sea, as considered generally infra § 219, it has been held that a nuncupative will cannot be made by a person other than one of those specified by the applicable statute<sup>7</sup>

## § 212. — Circumstances and Occasion of Making

It is the general rule that a nuncupative will must be made by a person in his last illness. In some jurisdictions the testator must be in extremis without an opportunity to make a written will, elsewhere it is sufficient if the will is made in contemplation of death

It is the general rule, either under the provisions of statutes or otherwise, that a nuncupative will can be made only by a person in his last illness<sup>8</sup> Different constructions have been placed on the term "last illness," it being the rule in some jurisdictions that a nuncupative will is not valid unless it is made by a testator when he is in extremis, or overtaken

by sudden and violent illness, and has not time or opportunity to make a written will<sup>9</sup> Under this rule a valid nuncupative will cannot be made where a testator can dictate a written will and authorize another to sign it for him,<sup>10</sup> but the fact that a person who has been ill for a long time has had the opportunity to make a written will and has not done so, will not render invalid a nuncupative will made when his illness reaches a critical turn.<sup>11</sup> In other jurisdictions, however, the rule has been established that a nuncupative will is valid if made in contemplation of death, although not made in extremis, and although sufficient time and opportunity thereafter occurred to make a written will<sup>12</sup>

## § 213. — Property Which May Pass

Although there is authority to the contrary, it is the general rule that a nuncupative will passes only personalty. Authorities differ as to the effect of statutes limiting the amount of personalty which may be bequeathed

Although, according to some authority, both real and personal property may be passed by a nuncupative will,<sup>13</sup> it is the general rule that nuncupative wills pass personalty only, and not realty,<sup>14</sup> unless it is provided otherwise by statute<sup>15</sup> If the nuncupative will covers both real and personal property, it will be valid as to the personalty<sup>16</sup> Where the amount of personalty which may be bequeathed by nuncupative will is limited by statute, it has been held that the will is valid to dispose of

6 Idaho—Cannon v Seyboldt, 48 P 2d 406, 55 Idaho 796

Right and capacity to make a will in general see supra §§ 3-75

7. Alaska—In re Bradley's Estate, 10 Alaska 610

68 C J p 726 note 92

8. Ariz.—In re Taylor's Estate, 106 P 2d 492, 56 Ariz 311

Tenn.—Ray v Nanney, 114 S W 2d 51, 21 Tenn App 618

68 C J p 726 note 93

9 Miss—Schmitz v Summers, 174 So 569, 179 Miss 260

Pa.—In re Hunter's Estate, 196 A 35, 328 Pa 484

Tex.—McClain v Adams, 146 S W 2d 373, 135 Tex 627

68 C J p 726 note 94

### Necessity is sole justification

General rule requiring all wills to be in writing is intended to be as nearly universal as is possible, and nuncupation is not a matter of right, but of special indulgence as a last resort, and has no justification in law except necessity arising from testator's extreme illness

Pa.—In re McClellan's Estate, 189 A 315, 325 Pa 257

### Particular circumstances

(1) Where testator made nuncupa-

tive will while sick with illness of which he died, but neither testator nor his physician considered his condition mortally serious, will was invalid under statute requiring nuncupative wills to be made "in the time of last sickness"

Miss—Schmitz v Summers, 174 So 569, 179 Miss 260

(2) Where decedent was taken ill eighteen days before death and removed to hospital five days before death, expression of disposition of personalty, made during three-hour rational period two days before death and written down by nurse in presence of interne, whom nurse had summoned as another witness, when decedent, in response to nurse's question, expressed desire to make a will, was not a valid nuncupative will for lack of extremity of last sickness

Pa.—In re McClellan's Estate, 189 A 315, 325 Pa 257

(3) Nuncupative will made by testatrix two days before death while in bed suffering from a chronic weakness of the heart which ultimately caused her death was not admissible to probate as a valid will made at time of decedent's last sickness within meaning of statute, where testa-

trix subsequently was able to walk to store and transact business, and in point of fact had time, ability, and opportunity to prepare or have prepared a written will

Tex.—McClain v Adams, 146 S W 2d 373, 135 Tex 627

(4) Other particular circumstances see 68 C J p 727 note 94 [c]

10. Pa.—In re Shover's Estate, 101 A 862, 258 Pa 70

68 C J p 727 note 95

11. Ga.—Harp v Adams, 82 S E 246, 142 Ga 5

12. Wash.—In re Miller's Estate, 91 P 967, 47 Wash 253, 13 L R A, N S, 1092, 125 Am S R 904, 14 Ann Cas 1163

68 C J p 727 note 97

13 Idaho—Cannon v Seyboldt, 48 P 2d 406, 55 Idaho 796

14. N C.—In re Garland's Will, 76 S E 486, 160 N C 555.

68 C J p 728 note 15

15 N M.—Plomteaux v Solano, 176 P 77, 25 N M 24

68 C J p 729 note 16

16. Miss.—Caffey v Tindall, 56 So. 177, 99 Miss 851

68 C J p 729 note 17.



the personalty up to the statutory maximum,<sup>17</sup> but it has been held that such a will is wholly invalid<sup>18</sup> A testator who has made a written will disposing of his realty and a portion of his personalty, may thereafter make a valid nuncupative will disposing of such of his personalty as is not disposed of by the written will<sup>19</sup>

# § 214. — Execution in General

Any words showing clear testamentary intent are sufficient to make a nuncupative will, and answers to questions may be sufficient. The naming of an executor is not essential

In accordance with the rule applicable to wills in general as discussed supra § 155, no particular form of words need be used in making a nuncupative will<sup>20</sup> Any words used by the testator showing a clear testamentary intent will be sufficient<sup>21</sup> Questions asked of one who is making a nuncupative will, when asked solely for the purpose of ascertaining the testator's desire, will not render the will invalid,<sup>22</sup> and answers to questions as to the testator's testamentary intentions may amount to as full a manifestation of testamentary purpose as a declaration in full and formal words,<sup>23</sup> but when a will is made by interrogatories the court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition, than it would be in an ordinary case,<sup>24</sup> and it has been held that where the words were drawn from the testator by a person interested to establish them as a will,<sup>25</sup> or where the words spoken in reply were incoherent or without meaning,<sup>26</sup> or where no verbal reply was actually given,<sup>27</sup> there is not a valid nuncupative will. The words used must possess finality, and if it

appears from the language used that further dispositions of portions of the testator's property were contemplated there is not a valid nuncupative will<sup>28</sup>

*Naming of executor* In accordance with the rule applicable to wills in general, as considered supra § 134, it is not essential to the validity of a nuncupative will that it should name an executor<sup>29</sup>

# § 215. — Publication and Request to Witnesses

The testator must declare his words to be his will, and in most jurisdictions he must call on the witnesses, or some of them, to bear witness that it is his will.

The testator must in some form declare his words to be his will.<sup>30</sup>

Although there is authority to the contrary, in the absence of an express statutory requirement,<sup>31</sup> the publication must be made to all the required number of witnesses at the same time<sup>32</sup> It is the rule in most jurisdictions that the testator must also request the persons present or some of them to bear witness that it is his will,<sup>33</sup> but the position has also been taken that the testator need not call on witnesses to bear witness to his will<sup>34</sup> Where the calling on persons to bear witness is required, the request need not be in any particular form or in the language of the statute<sup>35</sup> Any form of expression, however imperfectly uttered, so that it conveys to the mind of those to whom it is addressed the idea that he desires them, or some of them, to bear witness to the disposition he is making of his property will be deemed a compliance with the statute in that respect<sup>36</sup> It is held under some statutes that the request need not be directed to all the witnesses necessary to attest the will, but that a request to one

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| <p>17. Iowa—Mulligan v Leonard, 46 Iowa 692<br/>68 C J p 729 note 19</p> <p>18. Ala.—Erwin v Hamner, 27 Ala 296<br/>68 C J p 729 note 20</p> <p>19. Kan.—In re Grattan's Estate, 138 P 2d 497, 157 Kan 116</p> <p>20. Ill.—Went v Chidester, 63 Ill 453</p> <p>21. Ohio—Kellner v Hagood, 177 N E 637, 39 Ohio App 351<br/>68 C J p 729 note 23</p> <p>22. Kan.—In re Snelling's Estate, 213 P 641, 113 Kan 151<br/>Md.—Dorsey v Sheppard, 12 Gill &amp; J 192, 37 Am D 77</p> <p>23. Ill.—Harrington v Stees, 82 Ill 50, 25 Am R 290<br/>N C.—Smith v Smith, 63 N C 637</p> <p>24. Md.—Dorsey v Sheppard, 12 Gill &amp; J 192, 37 Am D 77.</p> | <p>Miss—Andrews v Andrews, 48 Miss 220</p> <p>25. N C.—Brown v Brown, 6 N C 350</p> <p>26. Md.—Biddle v Biddle, 36 Md 630</p> <p>27. Ky.—Kelly v Kelly, 9 B Mon 553<br/>68 C J p 730 note 29</p> <p>28. Ill.—Morgan v Stevens, 78 Ill 287</p> <p>29. N C.—In re Haygood's Will, 8 S E 222, 101 N C 574<br/>68 C J p 731 note 60</p> <p>30. N C.—Bundrick v Haygood, 11 S E 423, 106 N C 468</p> <p>31. Ky.—Portwood v Hunter, 6 B Mon 538</p> <p>32. N C.—Wester v Wester, 50 N C 95<br/>Tenn.—Tally v Butterworth, 10 Yerg 501</p> | <p>33. Idaho—Cannon v Seyboldt, 48 P 2d 406, 55 Idaho 796<br/>Tenn.—Ray v Nanney, 114 S W 2d 51, 21 Tenn App 618<br/>68 C J p 730 note 34</p> <p><i>Ecogatio testum</i>, in the case of a nuncupative will, is a formal calling of witnesses to bear witness<br/>Neb.—Godfrey v Smith, 103 N W 450, 454, 73 Neb 756</p> <p>34. Iowa—Mulligan v Leonard, 46 Iowa 692</p> <p>35. Tex.—In re Douglass' Estate, Civ App, 126 S W 2d 61, reversed on other grounds McClain v Adams, 146 S W 2d 373, 135 Tex 627<br/>68 C J p 730 note 37</p> <p>36. Tex.—In re Douglass' Estate, Civ App, 126 S W 2d 61, reversed on other grounds McClain v Adams, 146 S W 2d 373, 135 Tex. 627.<br/>68 C J p 730 note 38.</p> |
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in the hearing of all will suffice<sup>37</sup> Under other statutes, the request must be directed to all the witnesses<sup>38</sup> It has been held that the request is insufficient if made in answer to a question, where the testator's intent to execute a formal testamentary act is not clearly shown<sup>39</sup> It is not necessary that the testator call on the witnesses by name<sup>40</sup>

## § 216. — Number and Competency of Witnesses

A nuncupative will must be made before the number of witnesses required by statute, and it must be proved by competent witnesses

Under statutes requiring that a nuncupative will be made before a specified number of witnesses, such a will is invalid unless the number of witnesses designated by the statute is present when the will is made<sup>41</sup> It has been held that the requisite number of witnesses must be present at the same time, and that it is not sufficient for the testator to declare his will first in the presence of one witness, and afterward in the presence of another,<sup>42</sup> on the other hand, a conclusion to the contrary was reached under a statute merely requiring proof of the will by two witnesses<sup>43</sup>

*Competency of witnesses* It is essential to the validity of a nuncupative will that it be proved by competent disinterested witnesses<sup>44</sup> A nuncupative will is invalid where any of the necessary witnesses are legatees under the will<sup>45</sup> The husband of a legatee,<sup>46</sup> or a person named as executor in the will,<sup>47</sup> is not a competent witness to the will It has been held that the witnesses to a nuncupative will must be competent at the time of execution of the

will, and if not competent at that time they cannot become so thereafter,<sup>48</sup> but it has also been held in some jurisdictions that a witness who is also a legatee may become competent by renouncing or releasing his interest under the will,<sup>49</sup> but not by assigning it to another<sup>50</sup>

## § 217. — Reduction to Writing

In some jurisdictions, a nuncupative will is not valid unless it is reduced to writing within a specified time, or proved on probate within a prescribed period

Under the English statute of frauds relating to nuncupative wills, which has been held to be law in some American jurisdictions, or under statutes in other jurisdictions which have closely followed the provisions of the English statute, it is held that a nuncupative will is not valid if not reduced to writing within the time specified by the statute after the making of the will, unless it is proved on probate within the period specified by the statute,<sup>51</sup> but it need not be so reduced to writing if probated within such specified time<sup>52</sup> It has been held that the nuncupative will as reduced to writing must be shown to, and approved by, each of the attesting witnesses within the period prescribed by statute for the reduction to writing,<sup>53</sup> but the position has also been taken that it is sufficient for the writing to be made by, or examined and approved by, one of the witnesses within the period prescribed by the statute for the reduction to writing, if all the witnesses concur in the accuracy of the writing at the hearing on probate<sup>54</sup> The words reduced to writing must be substantially the same as those spoken by the testator,<sup>55</sup> and the writing must show that all the requisites for the validity of a nuncupative will

37. Ga.—Jones v Robinson, 151 S E 8, 169 Ga 485  
68 C J p 730 note 39

38. NH.—Dockum v. Robinson, 26 NH 372  
68 C J p 731 note 40

39. NJ.—In re Male's Will, 24 A 370, 49 N J Eq 266  
Pa.—In re McClellan's Estate, 189 A 315, 325 Pa 257

40. Ill.—Weir v Chidester, 63 Ill 453  
NC.—Long v Foust, 13 SE 889, 109 NC 114

41. US.—Melon v Entidad Provincial Religiosa de Padres Mercedarios de Castilla, CA Puerto Rico, 189 F 2d 163  
Tenn.—Ray v Nanney, 114 SW 2d 51, 21 Tenn App 618  
68 C J p 731 note 46

42. Pa.—In re Yarnall's Will, 4 Rawle 46.

43. Ky.—Portwood v Hunter, 6 B Mon 538

44. US.—Melon v Entidad Provincial Religiosa de Padres Mercedarios de Castilla, CA Puerto Rico, 189 F 2d 163  
Tenn.—Ray v Nanney, 114 SW 2d 51, 21 Tenn App 618  
68 C J p 731 note 50

45. Neb.—Godfrey v Smith, 103 N W 450, 73 Neb 756, 10 Ann Cas 1128, 11 Prob Rep Ann 1  
68 C J p 731 notes 51, 52

### In Georgia

(1) It has been held that when an essential witness is the sole beneficiary of the alleged oral will, the devise to him is void and the will inoperative  
Ga.—Denmark v Rushing, 67 SE 2d 766, 208 Ga 557, 28 ALR 2d 766

(2) Other particulars of rule in Georgia see 68 C J p 731 note 52 [a]

46. Tex.—Jones v Norton, 10 Tex 120

47. Tex.—Watts v Holland, 56 Tex 54

48. Ohio.—Vrooman v Powers, 21 NE 267, 47 Ohio St 191, 8 L R A 39

49. NC.—Mathews v. Marchant, 20 NC 40  
68 C J p 731 note 57

50. Pa.—Haus v Palmer, 21 Pa 296

51. Tex.—Martinez v De Martinez, 48 SW 532, 19 Tex Civ App 661  
68 C J p 731 note 61, p 732 note 63

52. Tex.—Walker v Fields, Com App, 247 SW 272  
68 C J p 732 note 64

53. Md.—Welling v Owings, 9 Gill 467  
Tenn.—Miller v Ford, 1 Tenn App 618

54. Tex.—Walker v Fields, Com. App, 247 SW 272

55. Ohio.—Bolles v Harris, 34 Ohio St 38  
Pa.—Appeal of Taylor, 47 Pa 31

have been complied with,<sup>56</sup> but it has been held, in construing a statute, that only the nuncupative will itself, and not the prerequisites required for its validity, need be reduced to writing within the period prescribed by the statute for the reduction to writing.<sup>57</sup> However, under a statute providing absolutely that the testamentary dispositions of a nuncupative will must be reduced to writing within a specified time after the making thereof, there is authority for the view that the will is invalid unless the requisites for the validity of the will have also been reduced to writing within such time.<sup>58</sup> The reduction to writing is completed with the testamentary statement and the signatures of the witnesses,<sup>59</sup> and an attestation clause is mere surplusage.<sup>60</sup> Where a distinct and independent part of the nuncupative will has been omitted from the writing, such omission has been held not to vitiate the remainder of the will.<sup>61</sup>

## § 218. — Nuncupative Wills in Louisiana

- a In general
- b By public act
- c Under private signature
- d Validity of will in another form

### a. In General

In Louisiana a nuncupative will is one written by the testator or by another acting as his amanuensis.

Since in Louisiana all wills are required by statute to be in writing, the nuncupative will in that state has no similarity to other nuncupative or oral wills, but the term "nuncupative" contemplates a

declaration by the testator of his testamentary intentions, which must be reduced to writing either by the testator himself, or, at his dictation, by another acting as his amanuensis.<sup>62</sup> Nuncupative wills in Louisiana may be made by public act, as discussed *infra* subdivision b of this section, or by act under private signature, as discussed *infra* subdivision c of this section.

### b. By Public Act

A nuncupative will by public act is one dictated by the testator, written by the notary as dictated, and signed, all without interruption and in the presence of the witnesses. Such a will is considered full proof of itself and must, therefore, show on its face that it was made in full compliance with all the formalities required by statute.

A nuncupative testament by public act is full proof of itself,<sup>63</sup> and the advantage of this form of testament is conferred solely on the condition that, as to the manner of its confection, the instrument shall rigidly conform to the particular requirements of the law on that subject, and such conformity is of the very essence of the instrument and distinguishes it from other testaments which are not full proof of themselves.<sup>64</sup> A nuncupative testament by public act must bear on its face the evidence that all the formalities requisite to its validity have been observed.<sup>65</sup> In the execution of a nuncupative will by public act, the formalities provided by statute as requisites to the validity of such a will, as to the reception of the will by a notary public in the presence of a specified number of witnesses,<sup>66</sup> the dictation of the instrument by the testator,<sup>67</sup> and the writing thereof by the notary as it is dictated,<sup>68</sup>

56. DC—In re Askin's Estate, 20 DC 12

Pa.—Appeal of Taylor, 47 Pa 31

57. Md—Welling v Owings, 9 Gill 467

58. Ga—Felker v Taylor, 134 SE 52, 162 Ga 433

59. Ohio—Kellner v Hagood, 177 NE 637, 39 Ohio App 351

60. Ohio—Kellner v Hagood, *supra*

61. Va—Marks v Bryant, 4 Hen & M 91, 14 Va 91

62. La—Bordelon's Heirs v Baron's Heirs, 11 La Ann 676

63. La—Bihm v Bihm, 80 So 323, 144 La 260

68 CJ p 732 note 80

Recitals of nuncupative will by public act must be considered proved until disproved

La—Succession of Prejean, 71 So 2d 328, 224 La 921—Renfrow v McCain, 168 So 753, 185 La 135—Succession of Block, 59 So 29, 131 La 101

64. La—Bihm v Bihm, 80 So 323, 144 La 260

65. US—Fakouri v Cadais, CCA La, 147 F 2d 667, rehearing denied 149 F 2d 321, certiorari denied 66 SCt 54, 326 US 742, 90 LEd 443 68 CJ p 732 note 82

66. La—Succession of Gauthreaux, 139 So 322, 173 La 993 68 CJ p 732 note 83

67. La—Watson v Young, App, 34 So 2d 86 68 CJ p 733 note 84

"Dictate"

The term is used in a technical sense with respect to a nuncupative will, and means to pronounce orally what is destined to be written at the same time by another

La—Succession of Theriot, 38 So 471, 473, 14 La 611

Prendergast v Prendergast, 16 La Ann 219, 220, 79 Am D 575

Sufficiency of dictation

(1) Under statute requiring that a valid nuncupative testament must be dictated by testator and written by

notary as it is dictated, a writing, transcribed by a notary at the bedside of a sick and feeble testatrix from testamentary language that came from a slip of paper handed to notary, not by testatrix, but by a third party who admittedly had prepared it, was not "dictated" by testatrix and was a nullity as a will La—Watson v Young, App, 34 So 2d 86

(2) The notary may suggest appropriate phraseology to convey the testator's intention

La—Succession of Prejean, 71 So 2d 328, 224 La 921—Succession of Purkert, 167 So 444, 184 La 791 68 CJ p 733 note 84 [a] (6)

(3) Other decisions concerning sufficiency of dictation see 68 CJ p 733 note 84 [a]

68. La—Succession of Prejean, 71 So 2d 328, 224 La 921 68 CJ p 733 note 85

Identity of words unnecessary

Although nuncupative testaments by public act must be dictated by tes-

the reading of the will to the testator in the presence of the witnesses,<sup>69</sup> the signing of the will by the testator, or, if he does not know how, or is not able to sign, the mention by the notary of the cause which hinders him from signing,<sup>70</sup> the signing of the will by the witnesses,<sup>71</sup> and the fulfillment of all the necessary formalities at one time, without interruption, and without turning aside to other acts,<sup>72</sup> must be strictly observed for the will to be valid.

All the witnesses required by statute must be present at the dictation of the instrument,<sup>73</sup> and at the writing thereof,<sup>74</sup> and they must be able to hear and understand the dictation,<sup>75</sup> and to understand the language in which the will is written,<sup>76</sup> and to hear and understand the reading of the will to the testator.<sup>77</sup> It has been held that where the witnesses profess to hear and understand the dictation,

and make no request for a repetition or explanation of any of the words used, and voluntarily affix their signatures after hearing the instrument read as a whole, the will is sufficiently witnessed, even though the witnesses may not have understood or assimilated every word that was uttered.<sup>78</sup>

It is indispensable that the will should contain recitals by the notary showing that all the formalities requisite to its validity have been observed,<sup>79</sup> and no evidence is admissible to supply any deficiency in the instrument,<sup>80</sup> and such recitals cannot be dispensed with by agreement.<sup>81</sup> However, statutory requirements for execution of nuncupative wills by public act are exclusive and no formality which is not prescribed by statute need be shown.<sup>82</sup>

In the making of nuncupative wills by public act the notary acts in a quasi-judicial capacity,<sup>83</sup> and a legacy to him is invalid,<sup>84</sup> but a provision appointing

tator and written by notary as it is dictated, notary need not use testator's exact words in draft of will, and it is identity of thought, not of words, which the law requires

La—Succession of Prejean, *supra*—Successions of Gilbert, 64 So 2d 192, 222 La 840—Renfrow v McCain, 168 So 753, 185 La 135—Rostrup v Succession of Spicer, 165 So 307, 183 La 1087

68 C J p 733 note 85 [a]

69 La—Deballon v Fuselier, 106 So 559, 159 La 1044  
68 C J p 733 note 86

70. La—Rostrup v Succession of Spicer, 165 So 307, 183 La 1087

#### Sufficiency of signing

(1) Will nuncupative in form by public act was not invalid because name of testatrix, who made her usual mark, was signed by notary after being told by testatrix that she was unable to sign because of partial paralysis of right hand and arm

La—Rostrup v Succession of Spicer, *supra*

(2) Other decisions with respect to sufficiency of signing see 68 C J p 733 note 87

71. La—Bihm v Bihm, 80 So 323, 144 La 260  
68 C J p 733 note 88

72. La—Richard v Richard, 57 So 286, 129 La 967  
68 C J p 734 note 89

73. La—Richard v Richard, *supra*  
68 C J p 734 note 90

74 La—Richard v Richard, *supra*  
Alloway v Babineau, 8 La Ann 469

75. La—Succession of Gauthreaux, 139 So 322, 173 La 993.  
68 C J, p 734 note 92

76. La—Lataprie v Baudot, 92 So 776, 152 La 177  
68 C J p 734 notes 92 [a], 93

77. La—Succession of Gauthreaux, 139 So 322, 173 La 993

78 La—Succession of Beattie, 112 So 802, 163 La 831

79 La—Succession of Wilson, 148 So 1, 177 La 119  
68 C J p 734 note 96

#### What recitals necessary

(1) It must be recited that the will was read to the testator in the presence of the witnesses

La—Succession of Feitel, 175 So 72, 187 La 596

68 C J p 734 note 96 [a] (5)  
(2) Other recitals see 68 C J p 734 note 96 [a]

#### Recital held insufficient

Will by public nuncupative act reciting that testator appeared before notary and witnesses, that witnesses were present when will was read by notary to testator, and that there was no turning aside or other acts or any interruption or diversion in preparation or execution of will did not establish that witnesses were present when will was dictated to notary and by him reduced to writing as required by Louisiana law, the statement of notary that there was no interruption, diversion, or turning aside being merely his conclusion

US—Fakouri v. Cadais, C C A La., 149 F 2d 321

80 La—Succession of Wilson, 148 So 1, 177 La 119  
68 C J p 734 note 97

81. La—Succession of Dough, 5 Rob 503

82. La—Renfrow v McCain, 168 So 753, 185 La 135

Succession of Murray, 7 So 126, 40 La Ann 1109

#### Recitals held unnecessary

(1) Insertion of phrase "at my office" in nuncupative will did not affect testamentary dispositions on ground that in fact will was executed while testator was confined to his bed at home several miles from place where notary's office was located, since under statute notary need not specify exact place or location in parish where will is executed

La—Renfrow v McCain, 168 So 753, 185 La 135

(2) Notary was not required to state ages of witnesses to will nuncupative in form by public act

La—Rostrup v Succession of Spicer, 165 So 307, 183 La 1087

(3) Notary who, according to his certificate, was duly commissioned and sworn, was duly qualified, and hence failure to state that notary was duly qualified did not invalidate will nuncupative in form by public act

La—Rostrup v Succession of Spicer, *supra*

Succession of Marqueze, 23 So 106, 50 La Ann 66

(4) Other recitals held unnecessary see 68 C J p 734 note 96 [a] (11)–(15)

83. La—Succession of Purkert, 167 So 444, 184 La 791

84 La—Succession of Feitel, 175 So 72, 187 La 596—Succession of Purkert, 167 So 444, 184 La 791

#### Construction of will

If intention of testatrix in providing, in her nuncupative will by public act written by notary public whom she named executor, that balance of estate should go to executor to be given by him to any charities he might select, was to institute the notary public as her residuary legatee, such residuary clause was null, since notary public, being instituted

the officiating notary as the attorney to open and close the succession is not a legacy and is, therefore, valid <sup>85</sup>

### c. Under Private Signature

A nuncupative will by private act is one presented to the witnesses by the testator, read by the testator or one of the witnesses in the presence of all the witnesses, and signed by the testator and the witnesses.

A nuncupative testament under private signature, or by private act, need not bear on its face evidence of the fulfillment of any of the formalities requisite to its validity,<sup>86</sup> since the compliance with such formalities may be shown by oral evidence.<sup>87</sup> A strict compliance with the formalities requisite to the validity of a nuncupative testament under private signature, as provided by statute, as to the writing of the will,<sup>88</sup> or the presentation thereof by the testator,<sup>89</sup> as to the number<sup>90</sup> and competency<sup>91</sup> of the witnesses, and the reading<sup>92</sup> and signing<sup>93</sup>

of the will, must be observed. No formalities other than those prescribed by the statutes are necessary.<sup>94</sup>

One who drafts a nuncupative will by private act,<sup>95</sup> or one who is named therein as the attorney to probate it,<sup>96</sup> or a notary to whom the will was dictated,<sup>97</sup> may be a witness thereto, even though the notary is designated as the attorney for opening and closing the succession.<sup>98</sup>

### d. Validity of Will in Another Form

A will intended to be a nuncupative will by public act and invalid as such may nevertheless be valid as a nuncupative will by private act if it satisfies the requirements for the latter form of will.

Under a statute providing that it suffices for the validity of a testament that it be valid under any one of the forms prescribed by law, however defective it may be in the form under which the testator may have intended to make it, an instrument which is

as an heir, was incompetent to serve as notary public in making of will  
La—Succession of Purkert, *supra*

85. La—Succession of Fietel, 175 So 72, 187 La 596

86. La—Succession of Guidry, 65 So 319, 135 La 314

68 C.J. p 735 note 1

87. La—Succession of Guidry, *supra*  
68 C.J. p 735 note 2

88. La—De Bardelabon's Heirs v Averret, 11 La Ann 636  
68 C.J. p 735 note 3

89. La—Succession of Bush, 67 So 2d 573, 223 La 1008  
68 C.J. p 735 note 4

#### Answering question

If after the reading of the will the testator answers in the affirmative a question whether the paper read is his will, the presentation is sufficient  
La—Succession of Bush, *supra*  
68 C.J. p 735 note 4 [b] (5)

#### Manual presentation

It is not necessary for testator manually to present a nuncupative will by private act to the witnesses  
La—Succession of Bush, *supra*

Bouthemy v Dreux, 12 Mart., O.S., 639  
68 C.J. p 735 note 4 [b] (4)

90. La—Soileau v Ortego, 180 So 496, 189 La 713  
68 C.J. p 735 note 5

#### Residence of witnesses

(1) A nuncupative will, of which two of the six witnesses were residents of a parish other than that of the place where the will was received, was void for noncompliance with the mandatory provisions of the statute relating to the witnessing of nuncupative wills

La—Soileau v Ortego, *supra*.

(2) Witness to nuncupative will is competent if he actually resides temporarily in place where will is made  
La—Succession of Purdy v Klock, 155 So 394, 179 La 902

#### Where lesser number of witnesses permissible

(1) Under a statute providing that in the country it suffices for the validity of nuncupative testaments under private signature, if the testament is passed in the presence of three witnesses residing in the place where the testament is received, or of five witnesses residing out of that place, provided that in this case a greater number of witnesses cannot be had, it is held that such a will passed in the presence of three witnesses when a greater number could be obtained is invalid  
La—Succession of Sullivan, 151 So 190, 178 La 230  
68 C.J. p 735 note 5 [b] (1)

(2) It will not be considered that a greater number of witnesses could be obtained where the execution of the will would have been endangered thereby

La—Maria v Edwards, 1 Rob 359  
68 C.J. p 735 note 5 [b] (2)

91. La—Frith v Pearce, 29 So 809, 105 La 186  
68 C.J. p 736 note 6

92. La—Hollingshead v Sturgis, 21 La Ann 450  
68 C.J. p 736 note 7.

93. La—Stephens v Adger, 79 So 2d 491, 227 La 387  
68 C.J. p 736 note 8

94. La—Hollingshead v Sturgis, 21 La Ann 450  
68 C.J. p 736 note 7.

95. La—Hollingshead v Sturgis, 21 La Ann 450  
68 C.J. p 736 note 7.

96. La—Stephens v Adger, 79 So 2d 491, 227 La 387  
68 C.J. p 736 note 8

#### Signature by witnesses

(1) Article providing that whenever testator has written his testament or caused it to be written out of presence of witnesses, he shall

declare to them, and in their presence, that instrument contained his last will, does not require signing of nuncupative will by private act by witnesses in each other's presence or that it should be signed in numerical order without interruption

La—Stephens v Adger, *supra*

(2) Other matters concerning signing by witnesses see 68 C.J. p 736 note 8 [b]

94. La—Frith v Pearce, 29 So 809, 105 La 186  
68 C.J. p 736 note 9

95. La—Wood v Roane, 35 La Ann 865

96. La—Succession of Bush, 67 So 2d 573, 223 La 1008

97. La—Succession of Lombardo, 17 So 2d 303, 205 La 261—Succession of Fietel, 175 So 72, 187 La 596  
—Frith v Pearce, 29 So 809, 105 La 186

#### Residence

Where notary public who wrote will dictated by testator in parish of Orleans had filed for record with clerk of court of St Bernard parish a declaration of intention to change domicile but never actually resided in St Bernard parish, although he occupied a room there occasionally, and never recorded any declaration of change of domicile in parish of Orleans, where he lived and had law office, his domicile remained in parish of Orleans, and will was not invalid on ground that notary was not resident of parish where will was executed

La—Succession of Lombardo, 17 So 2d 303, 205 La 261

98. La—Succession of Fietel, 175 So 72, 187 La 596.

invalid as a nuncupative will by public act may be valid as a nuncupative will under private signature,<sup>99</sup> unless it fails to comply with the formalities requisite for either form of will<sup>1</sup>

### E. SOLDIERS' OR MARINERS' WILLS

#### § 219. Oral Wills

Under some statutes, a soldier in actual military service or a mariner at sea may make a valid oral will of personality.

Under some statutes, including those restricting the power to make informal wills to soldiers and mariners, a valid oral will can be made by any soldier in actual military service,<sup>2</sup> whether he is severely wounded at the time of making the will,<sup>3</sup> or is in good health, but in peril of death,<sup>4</sup> or merely about to depart to that which he thinks is peril of death<sup>5</sup> Under such statutes, it is also generally held that oral wills may be made by mariners or seamen at sea<sup>6</sup> It is not essential to the validity of an oral will of a soldier in active military service, or of a mariner at sea, that it be made when the testator

is in extremis,<sup>7</sup> or during his last illness,<sup>8</sup> or even that he be ill at all, when the will is made,<sup>9</sup> but the fact that the testator was sick may show that an act, which might not have had testamentary meaning if done in health, assumed the gravity and significance of a will when done by one confronted with death<sup>10</sup> It has been held that a valid oral will may be made by a soldier or seaman who is a minor,<sup>11</sup> but, under a statute providing that only persons of full age may make a will, no exception will be made in the case of a soldier or seaman.<sup>12</sup> A soldier who is not in actual military service, or a mariner or seaman who is not at sea, has no greater privileges in the making of an oral will than has any other person in the making of a nuncupative will<sup>13</sup>

99. La.—Succession of Bush, 67 So 2d 573, 223 La 1008—Succession of Lombardo, 17 So 2d 303, 205 La 261—Soileau v Ortego, 180 So 496, 189 La 713—Succession of Feitel, 175 So 72, 187 La 596  
68 C.J. p 736 note 10

1. La.—Succession of Feitel, supra King v Vairin, 28 La Ann 452

2. N.Y.—In re Kapp's Will, 77 N.Y.S 2d 922, 191 Misc 309  
68 C.J. p 736 note 15

#### Statute held irrelevant

Where member of armed forces executed formal written will, properly executed and witnessed, statute providing that soldier might dispose of chattels without regard to formalities was irrelevant to proceeding for probate of the will

Tex.—Hill v Joseffy, Civ App., 259 S.W 2d 760, error refused

#### What amounts to "actual military service"

(1) A United States soldier, captured after escape from Philippine Islands and imprisoned in Japanese prisoner of war camp was in military service on active duty  
N.Y.—In re Kapp's Will, 77 N.Y.S 2d 922, 191 Misc 309

(2) A nuncupative will executed in New York after soldier returned from overseas service prior to end of war, but while soldier was still a member of the army, was properly denied probate on ground that soldier was not in actual military service  
N.Y.—In re Dumont's Will, 13 N.Y.S 2d 239, 257 App Div 952, affirmed 25 N.E 2d 388, 282 N.Y. 606

(3) Other circumstances held to constitute or not to constitute actual

military service see 68 C.J. p 736 note 15 [c]

#### In New Jersey

(1) Under a 1952 statute a will, made by any person of eighteen years or upwards while in active military service as a member of the armed forces of the United States in time of war or in time of emergency, is valid if it is in writing  
N.J.—In re Knight's Estate, 93 A 2d 359, 11 N.J. 83

(2) Under a prior statute that "Disposition of movables, wages and personal estate may be made as heretofore by a soldier while in actual military service or by a mariner or seaman while at sea" it was said that a soldier might make an oral will  
N.J.—In re Sheridan's Estate, 34 A 2d 654, 21 N.J. Misc 473

3. Pa.—Henninger's Estate, 30 Pa. Dist 413

4. N.Y.—Botsford v Krake, 1 Abb. Pr. NS, 112  
68 C.J. p 736 note 17

5. N.Y.—In re Mallery's Will, 217 N.Y.S 489, 492, 127 Misc 784, affirmed 221 N.Y.S 859, 220 App Div 754  
68 C.J. p 736 note 18

6. N.Y.—In re O'Connor's Will, 121 N.Y.S 903, 65 Misc 403, 7 Mills Surr 319  
68 C.J. p 737 note 19

#### Construction of statute

Statute giving privilege of making a nuncupative will to a mariner while at sea is given a liberal construction  
N.Y.—In re McDonald's Estate, 37 N.Y.S 2d 945, 179 Misc 284

#### Who is mariner at sea

(1) Seaman about to depart on voyage to South American port, which was considered a safe run notwithstanding war conditions and remote peril of death by torpedoing, could not make an oral will before sailing  
N.Y.—In re Anderson's Estate, 46 N.Y.S 2d 128, 180 Misc 827

(2) While deceased was absent from ship without permission and in defiance of orders, he was not entitled to the privilege of making a nuncupative will  
N.Y.—In re McDonald's Estate, 37 N.Y.S 2d 945, 179 Misc 284

(3) Other persons held to be or not to be mariners at sea, see 68 C.J. p 737 note 19 [a] [b]

7. N.Y.—In re Mallery's Will, 217 N.Y.S 489, 127 Misc 784, affirmed 221 N.Y.S 859, 220 App Div 754—In re Mason's Will, 200 N.Y.S 901, 121 Misc 142

8. N.Y.—In re O'Connor's Will, 121 N.Y.S 903, 65 Misc 403, 7 Mills Surr 319  
68 C.J. p 737 note 21

9. N.Y.—Botsford v Krake, 1 Abb. Pr. NS, 112  
68 C.J. p 737 note 22

10. N.Y.—In re O'Connor's Will, 121 N.Y.S 903, 65 Misc 403, 7 Mills Surr 319

11. Pa.—Henninger's Estate, 30 Pa. Dist 413  
In re Morgan's Estate, Orph., 4 Fiduciary 561

12. Iowa.—In re Evans' Will, 188 N.W 774, 193 Iowa 1240

13. Okl.—Ray v. Wiley, 69 P 809, 11 Okl 720.

**Subject matter.** Unless provided otherwise by statute, as in the case of nuncupative wills in general, the oral will of a soldier or seaman will pass only personal property, and not realty<sup>14</sup> A statute which permits persons in active military, naval, or air service in time of war to dispose of a greater amount of personal property by nuncupative will than ordinary persons is valid<sup>15</sup>

**Form and attestation.** The courts have adopted a more liberal attitude toward the oral wills of soldiers made while in actual military service, or of mariners or seamen made while at sea, than they have toward nuncupative wills in general,<sup>16</sup> and it has been held that the formalities requisite to the validity of nuncupative wills in general need not be strictly complied with in the case of such an oral will of a soldier or mariner,<sup>17</sup> any words being sufficient if shown to have been spoken with testamen-

tary intent,<sup>18</sup> but the words spoken must be testamentary in character<sup>19</sup> Unless provided otherwise by statute, no particular number of witnesses is required for the attestation of such a will<sup>20</sup>

## § 220. Written Wills

A holographic will made by a soldier in actual military service, or a seaman at sea, may be valid although it does not comply with all the requisites of a formal will

In some jurisdictions, holographic wills made by soldiers in actual military service, or mariners at sea, may be valid although they lack the formalities required of ordinary formal wills<sup>21</sup> While the statutes governing such wills must be complied with,<sup>22</sup> this exception in favor of soldiers and seamen is to be liberally considered<sup>23</sup> It is essential to their validity that these wills, like all others, have been made with testamentary intent<sup>24</sup> A general provi-

14. Ind—Pierce v Pierce, 46 Ind 86

68 C J p 737 note 30

Property which may pass by nuncupative wills in general see supra § 213

15. Tenn—In re Holliday's Estate, 177 S W 2d 826, 180 Tenn 646

16. N Y—In re Mason's Will, 200 N Y S 901, 121 Misc 142

17. Pa—In re Buehrer's Estate, 37 A 2d 587, 349 Pa 353

In re Gromczuski's Estate, O'ph, 19 Erie Co 478, 51 York Leg Rec 186

68 C J p 737 note 32

**Regatio testium is unnecessary for nuncupative wills of mariners and sailors**

Pa—In re Buehrer's Estate, 37 A 2d 587, 349 Pa 353

18. N Y—In re Mason's Will, 200 N Y S 901, 121 Misc 142

68 C J p 737 note 33

19. Pa—In re Satar's Estate, 119 A 478, 275 Pa 420

### Statement held insufficient

Statements of fireman on ocean-going oil tanker to shipmate while sitting and talking about war and dangers incident thereto, that "If I get lost or anything" he wanted certain persons to have all his property, including insurance, did not under the circumstances, constitute nuncupative mariner's will so as to be entitled to probate, where person to whom statements were made testified that similar statements were made on other occasions

Pa—In re Buehrer's Estate, 37 A 2d 587, 349 Pa 353

20. Vt—Gould v Safford's Estate, 39 Vt 498

68 C J p 737 notes 35, 36

### In New York

(1) If a soldier's will is nuncupa-

tive, its execution and tenor must be proved by two witnesses

N Y—In re Zaiac's Will, 18 N E 2d 848, 279 N Y 545

68 C J p 737 note 35 [a] (1)

(2) The declaration of same matter to two different witnesses at different times complied with statute and could be admitted to probate as decedent's last will or used to corroborate decedent's letter purporting to make like disposition of property

N Y—In re Thompson's Will, 76 N Y S 2d 742, 191 Misc 109

68 C J p 737 note 35 [a] (2)

(3) Other particulars of New York rule see 68 C J p 737 note 35 [a] (3)

21. N J—In re Sheridan's Estate, 34 A 2d 654, 21 N J Misc 473

68 C J p 739 note 74

### History and nature of exception in favor of soldiers and mariners

(1) Under Roman, civil, and common law, soldiers in expedition as well as in active war service always received benefit of exemption from the requirements with respect to disposition of property by will

N J—In re Knight's Estate, 93 A 2d 359, 11 N J 83

(2) Other particulars see 68 C J p 738 note 40 [a]

22. N Y—In re Hickey's Estate, 184 N Y S 399, 113 Misc 261.

### Statute held inapplicable

Statute permitting disposition of chattels by soldier or mariner without ordinary formalities was irrelevant in proceeding for probate of formal written will.

Tex—Hill v Joseffy, Civ App, 259 S W 2d 760, error refused

### Proof of signature

Under a statute providing that signature of soldier's will must be proved by three witnesses, letters not so proved are invalid as a will.

N C—Wescott v First & Citizens Nat Bank of Elizabeth City, 40 S E 2d 461, 227 N C 39

### Writing held sufficient

A letter to his father, written by member of marine corps shortly before he died in battle, requesting father to keep the letter for reference, giving father "all the dope of what you are to do in the event of my getting in the way of a well aimed slug", including disposition of insurance, and stating "this letter will serve as your authority for the transfer of money to you", which letter was witnessed by commissioned officer, constituted a soldier's will

U S—Phoenix Mut Life Ins Co v Cummings, D C Mo, 67 F Supp 159

23. Cal—In re Taylor's Estate, 259 P 2d 1014, 119 Cal App 2d 574

Me—Leathers v Greenacre, 53 Me 561

N J—In re Knight's Estate, 93 A 2d 359, 11 N J 83

### Duration of privilege

The statutory provision granting persons in actual military service authority to execute holographic wills extends privilege during all of such service, and not merely after the effective date of the statute

N Y—In re Thompson's Will, 76 N Y S 2d 742, 191 Misc 109

24. N J—In re Sheridan's Estate, 34 A 2d 654, 21 N J Misc 473

Pa—In re McNelis' Estate, 22 Pa Dist & Co 486

### Instruments held to be testamentary in character

N J—In re Beck's Will, 58 A 2d 869, 142 N J Eq 15

N Y—In re McAllister's Will, 141 N Y S 2d 361, 207 Misc 884

68 C J p 738 note 44 [a]

### Matters held immaterial

Under statute relating to holographic wills made by soldiers while

sion requiring that a will must be made by a testator over twenty-one years of age has been held not to apply in the case of a soldier's will<sup>25</sup> Under a statute providing for informal disposition of personalty by soldiers and mariners, a soldier's informal will may dispose only of personalty<sup>26</sup> It has been held to be essential to the validity of such a will that the genuineness of the handwriting be established<sup>27</sup> Unless the statute provides otherwise, witnesses are not necessary to the validity of such wills,<sup>28</sup> and a seal is not required<sup>29</sup> A soldier's will validly made remains valid unless revoked by some act of the testator<sup>30</sup> and its validity is unaffected by the cessation of hostilities<sup>31</sup>

*Actual military service.* The statutes generally provide that a soldier must have been in actual military service at the time he executed a holographic testament if it is to be admitted to probate as a soldier's will<sup>32</sup> While a soldier does not have to have been in extremis when he made the will,<sup>33</sup> under some statutes he must have been in apprehen-

sion of death<sup>34</sup> He need not have been "in the face of the enemy,"<sup>35</sup> but it appears to be generally held that there must be actual warfare in the prosecution of which the soldier is at the time engaged<sup>36</sup> Thus, it has been determined that a soldier who is on an expedition,<sup>37</sup> or in the enemy country,<sup>38</sup> or engaged in the prosecution of war in a combat zone,<sup>39</sup> or about to depart on a campaign,<sup>40</sup> or who has embarked to join forces in active combat,<sup>41</sup> or who is stationed at a camp prior to embarkation,<sup>42</sup> or who is a prisoner of war,<sup>43</sup> is authorized to make a holographic will On the other hand, it has been held that a soldier is not in actual military service while on an initial furlough at his home before proceeding to training camp,<sup>44</sup> or while in camp with his regiment before starting for the front.<sup>45</sup>

*Mariner or seaman at sea.* A testator has been held not to be a mariner or seaman at sea when he was, at the time, a passenger on a ship on his way to take command of a river lighter<sup>46</sup>

## F. FRAUD, MISTAKE, AND UNDUE INFLUENCE

### § 221. In General

Fraud, mistake, or undue influence is a ground of objection to the validity of a will While fraud is separate and distinct from undue influence, it is often a mere question of terms, since undue influence may be exerted

through fraudulent representations, and it has been declared that undue influence is a species of fraud

A person has the right to make his own will, but he must represent his own purposes and not the

in actual military service, letter which was written by soldier to his sister and which showed animus testandi constituted a testamentary instrument, irrespective of whether soldier had had any assets to dispose of or effectively disposed of them by instrument, or had had an opportunity to execute a former will, or had been on eve of embarkation  
N Y—In re McAllister's Will, supra

25 N J—In re Knight's Estate, 93 A 2d 359, 11 N J 83  
Pa—In re Morgan's Estate, Orph, 4 Fiduciary 561

26 N J—In re Beck's Will, 58 A 2d 869, 142 N J Eq 15

27 N J—In re Sheridan's Estate, 34 A 2d 654, 21 N J Misc 473  
68 C J p 739 note 75

28. N J—In re Sheridan's Estate, supra

#### In New York

(1) The holographic will of a soldier in actual military service may be probated although unattested  
N Y—In re McAllister's Will, 141 N Y S 2d 361, 207 Misc 884

(2) Under prior statutes it was held that a soldier's holographic will must be subscribed by two witnesses.

N Y—In re Zaac's Will, 5 N Y S 2d 897, 255 App Div 709, 718, reversed on other grounds 18 N E 2d 848, 279 N Y 545  
68 C J p 739 note 77

29. N J—In re Sheridan's Estate, 34 A 2d 654, 21 N J Misc 473

30 N J—In re Beck's Will, 58 A 2d 869, 142 N J Eq 15

31. N J—In re Beck's Will, supra

32. N J—In re Knight's Estate, 93 A 2d 359, 11 N J 83  
In re Sheridan's Estate, 34 A 2d 654, 21 N J Misc 473

N Y—In re McAllister's Will, 141 N Y S 2d 361, 207 Misc 884—In re Thompson's Will, 76 N Y S 2d 742, 191 Misc 109

33. Vt—Van Deuzer v Gordon's Estate, 39 Vt 111

34 N Y—In re Hickey's Estate, 184 N Y S 399, 113 Misc 261

35. Vt—Van Deuzer v Gordon's Estate, 39 Vt 111

36. Vt—Van Deuzer v. Gordon's Estate, supra.  
68 C J p 739 note 55

#### Character of warfare

Statutory exemption from ordinary requirements as to wills is applica-

ble to persons in military service in Korean "police action"

N J—In re Knight's Estate, 93 A 2d 359, 11 N J 83

Pa—In re Morgan's Estate, Orph, 4 Fiduciary 561

37. Me—Leathers v. Greenacre, 53 Me 561  
68 C J p 739 note 56

38. Me—Leathers v Greenacre, supra  
68 C J p 739 note 58

39. N J—In re Beck's Will, 58 A 2d 869, 142 N J Eq 15

40. N J—In re Straulina's Estate, 134 A 88, 4 N J Misc 599.  
68 C J p 739 note 59

41. N J—In re Knight's Estate, 93 A 2d 359, 11 N J 83

42. N Y—In re McAllister's Will, 141 N Y S 2d 361, 207 Misc 884

43. N Y—In re Thompson's Will, 76 N Y S 2d 742, 191 Misc 109

44 N J—In re Sheridan's Estate, 34 A 2d 654, 21 N J Misc 473

45. Vt—Van Deuzer v Gordon's Estate, 39 Vt 111

46. R I—Warren v. Harding, 2 R I 133  
68 C J p 739 note 72.



purposes of others,<sup>47</sup> so that fraud,<sup>48</sup> mistake, as discussed *infra* § 223, or undue influence<sup>49</sup> in the making of a will is a ground of objection to its validity.

*Compared and distinguished.* Theoretically,<sup>50</sup> fraud is separate and distinct from undue influence,<sup>51</sup> since, when the former is exercised, the testator acts as a free agent, but is deceived into acting by false data, and when the latter is exercised, the mind of the testator is so overmastered that another will is substituted for his own.<sup>52</sup> It has also been stated that the difference between fraud and undue influence resides mainly in the conception that fraud is accomplished either by a

single or limited number of acts,<sup>53</sup> while undue influence usually embraces a course of conduct.<sup>54</sup> Both, however, are equally destructive of the validity of a will,<sup>55</sup> and it is often a mere question of terms, since undue influence may be exerted through fraudulent representations,<sup>56</sup> and it has been declared that undue influence is a species of fraud.<sup>57</sup>

Fraud may exist without undue influence being present,<sup>58</sup> except in so far as misrepresentation amounts to influence.<sup>59</sup> Fraud does not necessarily amount to force or coercion,<sup>60</sup> and there need be no pressure, such as is necessary to constitute influence.<sup>61</sup> The term "undue influence" seems to in-

47. Va—Redford v. Booker, 185 SE 879, 166 Va 561.

**Purported will**, which did not appear to be recognized or known by the testator as an instrument of his conscious and rational mind and free from the suspicion of manipulation by interested persons, did not constitute a valid will.

Tenn—Burrow v. Lewis, 142 SW 2d 758, 24 Tenn App 253

48. Ala—Tipton v. Tipton, 57 So 2d 94, 257 Ala 32

Ga—Stephens v. Brady, 73 SE 2d 182, 209 Ga 428—Terry v. Bufington, 11 Ga 337, 56 Am D 423  
NJ—In re Baker, 85 A 2d 505, 8 NJ 321

Or—In re Rosenberg's Estate, 246 P. 2d 858, 196 Or 219  
68 CJ p 740 note 79

"Undue influence" defined generally see Influence 43 CJS p 379 n 10 et seq

Revocation induced by fraud, mistake, and undue influence see *infra* §§ 284-286

49. Ala—Tipton v. Tipton, 57 So 2d 94, 257 Ala 32

Ga—Bowman v. Bowman, 55 SE 2d 298, 205 Ga 796

Iowa—Olsen v. Corporation of New Melleray, 60 NW 2d 832

Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173

Mass—O'Hearn v. O'Hearn, 97 NE 2d 734, 327 Mass 242

Or—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429—In re Porter's Estate, 235 P 2d 894, 192 Or 483

Tex—Olds v. Traylor, Civ App, 180 SW 2d 511, error refused

Wash—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

68 CJ p 740 note 81

50. Cal—In re Newhall's Estate, 214 P 231, 190 Cal 709, 28 ALR 778

51. Ga—Stephens v. Brady, 73 SE 2d 182, 209 Ga 428—Terry v. Bufington, 11 Ga 337, 56 Am D 423  
Mass—Wellman v. Carter, 190 NE 493, 286 Mass 237.

Mo—Gockel v. Gockel, 66 SW 2d 867, 92 ALR 784—Gordon v. Burris, 54 SW 546, 153 Mo 223

Wash—In re Dand's Estate, 247 P 2d 1016, 41 Wash 2d 158—**Corpus Juris cited in** In re Bottger's Estate, 129 P 2d 518, 528, 14 Wash 2d 676

68 CJ p 740 note 83

**Not synonymous**

(1) "Undue influence" and "fraud" are not synonymous terms

Ind—Van Ginkle v. Mooy, 10 NE 2d 759, 104 Ind App 282

68 CJ p 740 note 83 [a].

(2) Plea of undue influence is near akin to plea of actual fraud, but strictly speaking is not synonymous  
Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173

52. Iowa—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761

Mass—Wellman v. Carter, 190 NE 493, 286 Mass 237

Mo—Gockel v. Gockel, 66 SW 2d 867, 92 ALR 784

Or—**Corpus Juris cited in** In re Rosenberg's Estate, 246 P 2d 858, 863, 196 Or 219

Tenn—Cude v. Culbertson, 209 SW 2d 506, 30 Tenn App 2d 628

Wash—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

68 CJ p 740 note 84

53. NY—In re Chinsky's Will, 268 NYS 719, 150 Misc 274

54. Iowa—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761

NY—In re Chinsky's Will, 268 NYS 719, 150 Misc 274

55. Ga—Stephens v. Brady, 73 SE 2d 182, 209 Ga 428—Terry v. Bufington, 11 Ga 337, 56 Am D 423

Mass—Wellman v. Carter, 190 NE 493, 286 Mass 237

Mo—Gockel v. Gockel, 66 SW 2d 867, 92 ALR 784

56. Cal—In re Stoddard's Estate, 163 P 1010, 174 Cal 606.

68 CJ p 740 note 85.

57. Ind—Van Ginkle v. Mooy, 10 NE 2d 759, 104 Ind App 282

Mich—In re Sprenger's Estate, 60 N W 2d 430, 337 Mich. 514—In re

Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Kramer's Estate, 37 NW 2d 564, 324 Mich 626

—In re Reed's Estate, 263 NW 76, 273 Mich 334—Maynard v. Vinton, 26 NW 401, 59 Mich 139, 60 Am Rep 276

Mo—Gordon v. Burris, 54 SW 546, 153 Mo 223

NJ—In re Peppler's Will, 28 A 2d 474, 132 NJ Eq 421, affirmed 34 A 2d 291, 134 NJ Eq 160

NY—In re Chinsky's Will, 268 NYS 719, 150 Misc 274

Or—**Corpus Juris cited in** In re Rosenberg's Estate, 246 P 2d 858, 863, 196 Or 219—In re Newman's Will, 213 P 2d 137, 187 Or 641

Va—Mullins v. Coleman, 7 SE 2d 877, 175 Va. 235—Redford v. Booker, 185 SE 879, 166 Va. 561.

68 CJ p 740 note 86

**Constructive fraud**

Undue influence is a species of constructive fraud

Ala—Pilcher v. Surles, 81 So 585, 588, 202 Ala 643

Cal—Kenny v. Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed

Me—Appeal of Eastman, 194 A 586, 135 Me 233

**In most cases fraud is but part of a systematic attempt to deceive and overpower testator and is treated as undue influence**

Iowa—In re Hollis' Estate, 12 N. W 2d 576, 234 Iowa 761

**Fraud in inducement of dispositive instrument is not a distinct ground, wholly separate and apart from undue influence, for invalidating it**

Tex—Curry v. Curry, 270 SW 2d 208

58. Mo—Gockel v. Gockel, 66 SW 2d 867, 92 ALR 784

68 CJ p 740 note 87

59. Mo—Gockel v. Gockel, *supra*.  
68 CJ p 740 note 88

60. Ala—Council v. Mayhew, 55 So 314, 172 Ala. 295

61. Mo—Gockel v. Gockel, 66 SW 2d 867, 92 ALR 784—Gordon v. Burris, 54 SW. 546, 153 Mo. 223.

clude both fraud and coercion,<sup>62</sup> and it may be shown without evidence of physical force,<sup>63</sup> although it may be exercised by such means,<sup>64</sup> it may be shown without fraud,<sup>65</sup> although it may be exercised through fraud,<sup>66</sup> and it may be exerted to prevent the detection of fraud.<sup>67</sup> In order that false and fraudulent representations may enter as an element of undue influence, it is necessary that the misrepresentations be shown to have been intermingled with, or made the basis of, importunities and mental pressure on the testator.<sup>68</sup>

*Want of testamentary capacity* and undue influence are separate and distinct grounds on which a will may be impeached.<sup>69</sup>

## § 222. What Constitutes Fraud

Fraud, in order to invalidate a will, must be such as to induce the testator to make a disposition of his property which he would not otherwise have made and the testator must be actually deceived, intent to deceive

the testator is essential to actual fraud, but the particular moment of time when fraud was perpetrated may be immaterial. To give advice, persuade, or importune is not to defraud.

The fraud which will vitiate a will must be active, tortious, and deceitful, and not fraud of a constructive or resultant nature,<sup>70</sup> and it has been held not to differ from that required to vitiate an ordinary contract.<sup>71</sup> A will can be invalidated, either in whole or in part, on the ground of fraud, whether it is fraud in the inducement,<sup>72</sup> as where a beneficiary deceives the testator as to extrinsic facts which are material and known by the beneficiary to be false causing the execution of the will,<sup>73</sup> or fraud in the execution.<sup>74</sup> In order to invalidate the will, the deception must have been such as to have induced the testator to make a disposition of his property which he would not otherwise have made,<sup>75</sup> and, to constitute such, it must be shown that the testator was actually deceived.<sup>76</sup>

62. Mass—Whitcomb v Whitcomb, 91 NE 210, 205 Mass 310, 18 Ann Cas 410

63. Ind—Van Ginkle v Mooy, 10 N E 2d 759, 104 Ind App 282

Utah—In re Lavelle's Estate, 248 P 2d 372

W Va—Ritz v Kingdon, 79 SE 2d 123—Mullens v Lully, 13 SE 2d 634, 123 W Va 182—Snodgrass v Weaver, 199 SE 1, 120 W Va 444

68 CJ p 741 note 92

### Restraint

Under statute making lack of restraint a necessary condition to admission of will to probate, "restraint" is any action that deprives testatrix of the free exercise of her will, and is not restricted to physical restraint of the body

Kan—In re Faust's Estate, 96 P 2d 680, 150 Kan 784

64. Mass—Whitcomb v Whitcomb, 91 NE 210, 205 Mass 310, 18 Ann Cas 410

NY—In re Shaul's Will, 143 NYS 433, 158 App Div 348, affirmed 104 NE 1141, 210 NY 617

65. Mo—Smith v Williams, 221 S W 360

68 CJ p 741 note 94

66. Mich—Dodson v Dodson, 105 N W 1110, 142 Mich 586

67. Mich—Cooper v Harlow, 128 N W 259, 163 Mich 210

68. Cal—In re Newhall's Estate, 214 P 231, 190 Cal 709, 28 ALR 778

69. Kan—Corpus Juris cited in Stayton v Stayton, 81 P 2d 1, 4, 148 Kan 172

NY—In re Bossom's Will, 186 NYS 782, 195 App Div 339.

Testamentary capacity generally see supra §§ 15-30.

70. Tenn—Hager v Hager, 13 Tenn App 23

71. Cal—In re Newhall's Estate, 214 P 231, 190 Cal 709, 28 ALR 778

NH—Knox v Perkins, 163 A 497  
Attempted or intended revocation prevented by fraud see infra § 286  
What constitutes fraud in inception of contracts see Contracts §§ 153-167

72. DC—McCartney v Homquist, 106 F 2d 855, 70 App DC 334, 126 ALR 375

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

Wash—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

73. Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

Wash—In re Dand's Estate, 247 P 2d 1016, 41 Wash 2d 158—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

74. Wash—In re Bottger's Estate, supra

### Direct connection

Fraud must be directly connected with execution

Ark—In re McConnell's Estate, 257 SW 2d 34, 222 Ark 4—Davault v Parks, 79 SW 2d 68, 190 Ark 370—Alford v Johnson, 146 SW 516, 103 Ark 236—McCulloch v Campbell, 5 SW 590, 49 Ark 367

### Factum of will

Fraud warranting denial of probate must relate to factum of will  
NY—In re Moore's Will, 10 NYS 2d 491, 256 App Div 994

In re Walter's Will, 114 NYS 2d 477, reversed on other grounds 128 NYS 2d 25, 283 App Div 745

75. Cal—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563

DC—Duckett v Duckett, 134 F 2d 527, 77 US App DC 303.

Iowa—In re Hollis' Estate, 12 NW. 2d 576, 234 Iowa 761

NH—Leonard v. Stanton, 36 A 2d 271, 93 NH 113

NY—Corpus Juris cited in In re Beneway's Will, 71 NYS 2d 361, 366, 272 App Div 463

Mass—Morin v Morin, 124 NE 2d 251—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429—Mirick v Phelps, 8 NE 2d 749, 297 Mass 250—Neill v Brackett, 126 NE 93, 234 Mass 367

Wash—In re Dand's Estate, 247 P 2d 1016, 41 Wash 2d 158—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676

68 CJ p 741 note 2

76. Ala—Hornaday v First Nat Bank of Birmingham, 65 So 2d 678, 259 Ala 26

Colo—In re Holmes' Estate, 56 P 2d 1333, 98 Colo 360

Iowa—In re Hollis' Estate, 12 NW. 2d 576, 234 Iowa 761

NY—Corpus Juris cited in In re Beneway's Will, 71 NYS 2d 361, 366, 272 App Div 463

Wash—In re Dan's Estate, 247 P 2d 1016, 41 Wash 2d 158—In re Bottger's Estate, 129 P 2d 518, 14 Wash. 2d 676

68 CJ p 741 note 3

### Deception held practiced

Ark—In re McConnell's Estate, 257 SW 2d 34, 222 Ark 4—Davault v Parks, 79 SW 2d 68, 190 Ark 370—Alford v Johnson, 146 SW 516, 103 Ark 236

Fact that testator could not read does not justify setting will aside on ground of fraud

DC—Mann v. Cornish, 185 F 2d 423, 87 US App DC 110, certiorari denied 71 S Ct. 802, 341 US 932, 95 L Ed 1361.

Fraud sufficient to vitiate a will may consist of the intentional concealment of a material fact,<sup>77</sup> where there is a legal duty to disclose such fact<sup>78</sup> as where a confidential relationship exists between the testator and the beneficiary.<sup>79</sup> At common law, whether a false representation, not known to be false, but innocently made, is sufficient to justify vacating a will induced by it depends on the existence of a legal or equitable, and not merely moral, duty to tell the truth,<sup>80</sup> and if the parties are dealing at arms' length and no confidential relations exist or other duty owing to know and tell the truth, innocence and good faith in making a false representation, although acted on, are not a fraud,<sup>81</sup> and when no legal duty exists, the false representation must be knowingly or recklessly made.<sup>82</sup>

Fraud sufficient to vitiate a will may also consist of the wrongful altering of the will,<sup>83</sup> subscribing as a witness without being satisfied of the testator's soundness of mind,<sup>84</sup> entering into an agreement with the testator in bad faith and with no intention of performing it,<sup>85</sup> failing fully and properly to advise the testator,<sup>86</sup> and the assumption of a

false character,<sup>87</sup> although the mere misrepresentation as to marital state, which does not induce the legacy or devise, does not amount to fraud.<sup>88</sup> To persuade or importune merely is not to defraud,<sup>89</sup> neither is it a fraud to threaten or illtreat.<sup>90</sup>

It is no badge of fraud that the draftsman of the will was appointed executor,<sup>91</sup> or that the execution of the will was clothed in secrecy, where this is clearly attributable to the wishes of the testator.<sup>92</sup> Also, a mere misrepresentation to the testator of the extent of his estate has been held not to be fraudulent.<sup>93</sup> A beneficiary cannot be held guilty of fraud in failing to disclose facts of which he had no knowledge.<sup>94</sup> The fact that, if decedent had left no will, her husband would have been her sole heir has been held not to preclude the court from refusing probate of the second will procured by him through fraud, to the detriment of legatees under the first will.<sup>95</sup>

*Advice* given the testator by a beneficiary,<sup>96</sup> or by a third person without any inducement or solicitation on the part of the beneficiary,<sup>97</sup> has been held not to be fraud on the part of the beneficiary.

77 Or—*Corpus Juris* cited in *In re Rosenberg's Estate*, 246 P 2d 858, 863, 196 Or 219  
68 C J p 741 note 4

78 US—*Illinois State Trust Co v Conaty*, D C R I, 104 F Supp 729

#### After-acquired knowledge

Where scrivener of will after execution thereof and termination of employment for testator learned that testator's daughter had a child who was not provided for in will, scrivener had no duty to disclose to testator such after-acquired knowledge  
US—*Illinois State Trust Co v Conaty*, supra.

79 Cal—*In re Nutt's Estate*, 185 P 393, 181 Cal 522

Or—*In re Rosenberg's Estate*, 246 P 2d 858, 196 Or 219

Confidential relations as constituting undue influence see *infra* § 230

Presumptions arising from existence of confidential relations see *infra* § 239

**While confidential relationship might be an important circumstance to support a charge of fraud, a person occupying such relationship would not be prevented from exercising any influence whatever to obtain a benefit to himself, and such relationship alone would not afford a substitute for allegations of fact touching fraud**

Ga—*Marlin v Hill*, 15 SE 2d 473, 192 Ga 434

80 Ala—*Hornaday v First Nat Bank of Birmingham*, 65 So 2d 678, 259 Ala 26

81. Ala—*Hornaday v First Nat Bank of Birmingham*, supra

82. Ala—*Hornaday v First Nat Bank of Birmingham*, supra

83 NY—*Rollwagen v Rollwagen*, 3 Hun 121, 5 Thomps & C 402, affirmed 63 NY 504

84. NY—*Scribner v Crane*, 2 Paige 147, 21 Am D 81

85. Tex—*Morrison v Thoman*, 89 S W 409, 99 Tex 248  
Montgomery v Willbanks, Civ App, 202 SW 2d 851, error refused no reversible error

86. Mich—*Lyon v Dada*, 69 NW 654, 111 Mich 340  
68 C J p 741 note 8

#### Constructive fraud

US—*Greenwood v Greenwood*, D C Pa, 16 FRD 368, appeal dismissed, CA, 224 F 2d 318  
Pa—*In re Stirk's Estate*, 81 A. 187, 232 Pa. 98

87. Cal—*In re Carson's Estate*, 194 P 5, 184 Cal 437, 7 ALR 239  
68 C J p 741 note 9

88. NY—*In re Matter of Janes*, 33 NYS 968, 87 Hun 57, affirmed 46 NE 1148, 152 NY. 647

89. Md—*Davis v. Calvert*, 5 Gill & J 269, 25 Am D 282

90. Md—*Davis v Calvert*, supra.

91. Hawaii—*Matter of Ely*, 2 Hawaii 649

NY—*Coffin v Coffin*, 23 NY 9, 80 Am D 235

92. NY—*Coffin v Coffin*, supra

93. Ga—*Weathers v McFarland*, 22 SE 988, 97 Ga 266

94 Cal—*In re Shay's Estate*, 237 P 1079, 196 Cal 355  
68 C J p 741 note 16

#### False assumption of draftsman

Fact that lawyer advising testator with respect to will and drawing form of will went on false assumption that testator's second wife was mother of all testator's children could not impute fraud to wife  
Mo—*Gockel v Gockel*, 66 SW 2d 867, 92 ALR 784

95. Ga—*Churchill v Neal*, 82 SE 1065, 142 Ga 352

96 NY—*In re Cotter's Estate*, 40 NYS 2d 93, 180 Misc 399

#### Voluntary change

Where testator had voluntarily changed his residuary clause from a charitable trust in a preliminary draft of his will to an outright gift to his nephew and statements of rules of law given testator by his nephew and his attorney were correct, the will was not invalid on ground that the nephew had procured its execution by misrepresentation of the legal effect of its terms  
NY—*In re Cotter's Estate*, supra.

97. Tex—*Ater v. Moore*, Civ App, 231 SW 457.

*Intent of person perpetrating fraud* In the absence of bad faith,<sup>98</sup> it is essential to actual fraud that the misrepresentations be made with intent to deceive the testator,<sup>99</sup> or to induce him to execute the will.<sup>1</sup>

*Time of fraud.* Where the fraud was perpetrated before the execution of the will,<sup>2</sup> the particular moment of time when it was done has been held to be immaterial.<sup>3</sup>

*One mentally incompetent* to make a will cannot be the subject of fraud.<sup>4</sup>

*Extreme old age*, weakness of mind, and serious, disabling physical illness, may be a badge of fraud, especially where they concur with suspicious circumstances.<sup>5</sup>

## § 223. What Constitutes Mistake

Mistakes which will defeat the intention of the testator are sufficient to invalidate a will, but it is no ground of objection that the testator's knowledge of extrinsic circumstances was incorrect or incomplete. In the absence of a statute to the contrary, a mistake as to the hostility of heirs toward the testator, or the reason for which a testator dislikes the natural objects of his bounty, does not render a will invalid.

Mistakes which will defeat the intention of the testator,<sup>6</sup> such as mistakes as to what the will contains,<sup>7</sup> or as to the paper itself,<sup>8</sup> are sufficient to invalidate the will. Also, where the mistake clearly is such as to involve the whole will, or the actual physical identity of the instrument itself, total invalidity results.<sup>9</sup> It is no ground of objection to the validity of a will, however, that the testator's knowledge of extrinsic circumstances was incorrect or incomplete,<sup>10</sup> so that generally, a will is valid even though made by reason of a mistake of fact,<sup>11</sup> at least where the mistake does not concern the identity of the beneficiaries or of the property of which the will disposes,<sup>12</sup> but a mistake resulting from ignorance of a material fact which would, if carried into effect, defeat the manifest intention of the testator, will not be given effect.<sup>13</sup> Mistakes in the drafting of a will,<sup>14</sup> in the description of the lands devised,<sup>15</sup> as to the person nominated as executor,<sup>16</sup> or as to the legal effect of the will or its provisions,<sup>17</sup> which do not defeat the intention of the testator do not invalidate the will. In the absence of a statute to the contrary, a mistake as to the hostility of the heirs toward the testa-

98. Cal—In re Arnold's Estate, 82 P 252, 147 Cal 583.

68 C J p 742 note 19

99. Cal—In re Newhall's Estate, 214 P 231, 190 Cal 709, 28 A L R 778

68 C J p 742 note 20

### Promise to distribute estate

The validity of will is not imperiled by fraud when executed so as to give all or a substantial part of estate to one beneficiary on beneficiary's promise, honestly made, to carry out testator's wishes concerning intended beneficiaries

Cal—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106

68 C J p 742 note 20 [b]

1. Cal—In re Benton's Estate, 63 P 775, 131 Cal 472

2. Cal—In re Ricks' Estate, 117 P 532, 160 Cal 450

3. Cal—In re Newhall's Estate, 214 P 231, 190 Cal 709, 28 A L R 778

68 C J p 742 note 23

4. Ala—Johnston v Johnston, 57 So 450, 174 Ala 220

5. Va—Ferguson v Ferguson, 192 SE 774, 169 Va 77.

6. N Y—Christman v Roesch, 116 N Y S 348, 132 App Div 22, affirmed 92 NE 1080, 198 N Y 538

68 C J p 742 note 26

Right of action to reform will see infra § 334

Construction of will as to shares of beneficiaries where there is mistake in designation of shares see infra § 706

Power of court, in construing will, to change language to conform to

intent of testator see infra §§ 586, 606

Sufficiency of knowledge of contents for valid execution of will see supra § 130

7. W Va—Couch v Eastham, 27 W Va 796, 55 Am R 346

8. S C—In re King's Will, 128 SE 850, 132 SC 63

68 C J p 742 note 28

9. N Y—In re Goettel's Will, 55 N Y S 2d 61, 184 Misc 155

10. Colo—In re Holmes' Estate, 56 P 2d 1333, 98 Colo 360

Ga—Watkins v Jones, 193 SE 889, 184 Ga 831

68 C J p 742 note 29

Insane delusions with respect to natural objects of bounty see supra § 18

### Mistakes held insufficient to invalidate will

(1) Mistake as to existence of grandchild

U S—Illinois State Trust Co v Conaty, D C R I, 104 F Supp 729

(2) Mistake as to half-sister still living

N Y—In re Arnold's Estate, 107 N Y S 2d 356, 200 Misc 909, affirmed

122 N Y S 2d 804, 282 App Div 670, appeal denied 124 N Y S 2d 343, 282

App Div 837, reargument denied 117 NE 2d 920, 306 N Y 747

(3) Other mistakes see 68 C J p 742 note 29 [a]

11. Ga—Davis v Aultman, 33 SE 2d 317, 199 Ga 129

N Y—In re Reidy's Will, 106 N Y S 2d 270, 199 Misc 311

12. Ga—Davis v Aultman, 33 SE 2d 317, 199 Ga 129

13. La—Armorer v Case, 9 La Ann 288, 61 Am D 209

68 C J p 742 note 30

14. N Y—In re Allen's Will, 15 N Y S 2d 401, 257 App Div 718, re-

versed on other grounds 27 NE 2d 22, 282 N Y 492, reargument de-

denied 28 NE 2d 40, 283 N Y 643

68 C J p 742 note 31

15. Ill—Campbell v Campbell, 28 NE 1080, 138 Ill 612

16. N Y—In re Matter of Funn's Estate, 22 N Y S 1066, 1 Misc 280

17. N Y—In re Cotter's Estate, 40 N Y S 2d 93, 180 Misc 399

68 C J p 743 note 34.

### Approval of will

(1) If testator knew and approved contents of will, it is immaterial if he mistook legal effect of the language used or that he acted on mistaken advice of counsel, provided that advice was given in an honest belief that it was sound

N H—Leonard v Stanton, 36 A 2d 271, 93 N H 113

(2) Generally, if in drawing up a will by testator's instructions, the draughtsman, without reason or special directions, but in good faith introduces words the effect of which testator does not intelligently appreciate when will is read over to him, the words must stand as part of the will

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

N H—Leonard v Stanton, supra

tor, or the reason for which a testator dislikes the natural objects of his bounty, does not render a will invalid <sup>18</sup>

**Statutory provisions.** Under a statute providing that a will executed under a mistake of fact as to the existence or conduct of an heir is inoperative so far as such heir is concerned, it has been held that a mistake of fact as to the conduct of the heirs at law of the testator will render inoperative portions of the will disinheriting such heirs, where such mistakes are caused by false statements made by a beneficiary under the will,<sup>19</sup> or misrepresentations made by other persons <sup>20</sup> It is not incumbent on the heir to show, however, that he would have been favorably mentioned in the will but for such mistake <sup>21</sup> Such a statute has been held to rest on the principle of mistake of fact as to the existence of the heir at law,<sup>22</sup> and not on a mistake of law as to any doubtful question of the rules of descent <sup>23</sup> For example, there is no mistake within the meaning of the statute when the testator knows of the

existence of certain persons, but does not regard them as his heirs <sup>24</sup> The mistake, in order to be within the meaning of the statute, must be one of fact, not a mistake in reasoning from facts <sup>25</sup>

## § 224 What Constitutes Undue Influence

Generally, undue influence to avoid a will, must so overpower and subjugate the mind of the testator as to destroy his free agency and make him express the will of another rather than his own, and the mere presence of influence is not sufficient. Undue influence must be present or operative at the time of the execution of the will resulting in dispositions which the testator would not otherwise have made. In determining undue influence all facts and circumstances must be considered and no precise quantity of influence can be said to be necessary and sufficient in all cases.

It has been held impossible to describe with precision and exactness what is undue influence,<sup>26</sup> and what the quality and consent of the power of one mind over another must be to make it undue <sup>27</sup> Mere general or reasonable influence over a testator is not sufficient to invalidate a will; to have that effect the influence must be "undue" <sup>28</sup> While the

18. Ga.—Davis v Aultman, 33 SE 2d 317, 199 Ga 129

19. Ga.—Adams v Cooper, 96 SE 858, 148 Ga 339

20. Ga.—Adams v Cooper, supra.

21. Ga.—Mallery v Young, 25 SE 918, 98 Ga 728

22. Ga.—Jones v Habersham, 63 Ga. 146

23. Ga.—Jones v Habersham, supra

24. Ga.—Jones v Habersham, supra

25. Ga.—Dibble v Currier, 83 SE 949, 142 Ga 855, Ann Cas 1916C 1 68 C J p 743 note 39

26. Cal.—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, Cal App, 289 P 2d 641, hearing dismissed

Del.—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Ind.—Noyer v Ecker, App, 119 NE 2d 902

Mich.—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310

Neb.—**Corpus Juris** quoted in In re George's Estate, 15 NW 2d 80, 85, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915 —**Corpus Juris** quoted in In re Bowman's Estate, 9 NW 2d 801, 805, 143 Neb 440

N J.—In re Nixon's Will, 41 A 2d 119, 136 N J Eq 242—In re Neuman's Estate, 32 A 2d 826, 133 N J Eq 532 —In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

N Y.—In re Wood's Will, 300 NYS 1268, 253 App Div 78—In re Streb's Will, 288 NYS 334, 247 App Div 556

Tex.—Long v Long, 125 SW 2d 1034, 133 Tex. 96, mandate conformed to

129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

Olds v Traylor, Civ App, 180 S W 2d 511, error refused 68 C J p 743 note 40

**Undue influence must remain undefined by the courts**

Mich.—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Kramer's Estate, 37 NW 2d 564, 324 Mich 626—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102 —In re Reed's Estate, 263 NW 76, 273 Mich 334—Maynard v Vinton, 26 NW 401, 59 Mich 139, 60 Am Rep 276

### Causative factor

While undue influence is subtle, intangible, and merely psychic in its effects, so that its existence cannot be detected, weighed, or measured by instruments of science, human experience can, and courts will recognize it as the causative factor which may cause the execution of a highly unnatural will

Pa.—Withers v Withers, 70 A 2d 331, 363 Pa. 431—In re Quein's Will, 62 A 2d 909, 361 Pa. 133—In re Freed's Estate, 195 A 22, 327 Pa 572

27. Neb.—**Corpus Juris** quoted in In re George's Estate, 15 NW 2d 80, 85, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915 —**Corpus Juris** quoted in In re Bowman's Estate, 9 NW 2d 801, 805, 143 Neb 440 68 C J p 743 note 41.

28. Ky.—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1—Combs v Combs, 112 SW 2d 989, 271 Ky 543

Mich.—In re Grow's Estate, 299 NW 836, 299 Mich 133—In re Balk's

Estate, 298 NW 779, 298 Mich 303 —In re McIntyre's Estate, 159 N W 517, 193 Mich 257—In re Williams' Estate, 151 NW 731, 185 Mich 97

Minn.—In re Rasmussen's Estate, 69 NW 2d 630

Mo.—Welch v Welch, 190 SW 2d 936, 354 Mo 654—Hahn v Bruesseke, 155 SW 2d 98, 348 Mo 708—Look v French, 144 SW 2d 128, 346 Mo 972—Larkin v Larkin, 119 SW. 2d 351

Or.—Detsch v Detsch, 205 P 2d 180, 186 Or 1

Tex.—Kolb v Chandler, Civ App, 209 SW 2d 783

Wash.—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

68 C J p 743 note 42.

### Ordinary affairs of life

It is not sufficient to avoid will because of undue influence that testator was influenced by beneficiaries in ordinary affairs of life

Ark.—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167—Toombs v Blankenship, 221 S.W.2d 417, 215 Ark 551—Bollinger v Arkansas Val Trust Co, 151 SW 2d 675, 202 Ark 525—Purveyor v Purveyor, 94 SW 2d 695, 192 Ark 692—Lavenue v Lewis, 46 SW 2d 649, 185 Ark 159—McCulloch v. Campbell, 5 S W 590, 49 Ark 367

Okl.—In re Fletcher's Estate, 269 P 2d 349—King v Gibson, 249 P 2d 84, 207 Okl. 251—Barnes v Logston, 88 P.2d 361, 184 Okl 464—

rule as to what constitutes "undue influence" has been variously stated,<sup>29</sup> the substance of the different statements is that, to be sufficient to avoid a will, the influence exerted must be of a kind that

so overpowers and subjugates the mind of the testator as to destroy his free agency and make him express the will of another, rather than his own,<sup>30</sup>

In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Wheeler v Wade, 45 P 2d 66, 172 Okl 365—Canfield v Canfield, 31 P 2d 152, 167 Okl 590—In re Cook's Estate, 175 P 507, 71 Okl 94

**Some influence** may properly be used to procure execution of will Mich—In re Teller's Estate, 284 N W 696, 288 Mich 193—In re Cotcher's Estate, 264 N W 325, 274 Mich 154—Schneider v Vosburgh, 106 N W 1129, 143 Mich 476

#### **Mere influence**

In order to vitiate a will there must be something more than mere influence

Wash—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 444—In re Donaldson's Estate, 173 P 2d 159, 26 Wash 2d 72—Dean v Jordan, 79 P 2d 331, 194 Wash 661

**Doctrine of equity** concerning undue influence reaches every case and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed, and is applied when necessary to wills Nev—Pearson v Pearson, 201 P 2d 309, 65 Nev 717

29 N Y—Corpus Juris cited in In re Beneway's Will, 71 N Y S 2d 361, 366, 272 App Div 463  
68 C J p 743 note 43

#### **Various statements of elements of undue influence**

(1) "Undue influence" is that kind of influence or supremacy of one mind over another by which the latter is prevented from acting according to his own wish or judgment

Cal—In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720  
Me—In re Cox' Will, 29 A 2d 281, 139 Me 261

(2) Pressure, of whatever character, whether acting on fears or hopes, if so exerted as to overpower volition without convincing judgment is a species of constraint under which no will can be made

Conn—Lee v Horrigan, 98 A 2d 909, 140 Conn 232

(3) "Undue influence" in execution of will contemplates over-persuasion, coercion, or force that destroys or hampers the free agency and will power of a testator

Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—In re Starr's Estate, 170 So 620, 125 Fla 536

Ga—Ehlers v Rheinberger, 49 S E 2d 535, 204 Ga 226—Boland v Aycock, 12 S E 2d 319, 191 Ga 327

Mo—Early, Jr v Koelbel, 273 S W 2d 312—Glover v Bruce, 265 S W 2d 346—Baker v. Spears, 210 S W

2d 13, 357 Mo 601—Welch v Welch, 190 S W 2d 936, 354 Mo 654—Walter v Alt, 152 S W 2d 135, 348 Mo 53—Sehr v Lindemann, 54 S W 537, 153 Mo 276

(4) To authorize denial or revocation of probate of will on ground of "undue influence", there must be active use of such influence for purpose of execution of the will to such an extent as to coerce testator's mind, so that it cannot be said that testator was acting voluntarily of his own free will and volition

Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—In re Starr's Estate, 170 So 620, 125 Fla 536

(5) Association of the phrase "undue influence" with respect to invalidation of properly executed will in statute in the same context with the words "fraudulent practices upon testator's fears, affections, or sympathies, duress", shows that the influence spoken of, in order to be "undue influence", must be in the nature of fraud or duress

Ga—Boland v Aycock, 12 S E 2d 319, 191 Ga 327

(6) Influence obtained by flattery, importunity, superiority of will, mind, or character, or by whatever art that human thought, ingenuity, or cunning may employ which would give dominion over testator's will to such an extent as to destroy free agency or constrain him to do against his will what he is unable to refuse, is "undue influence" when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another

Ind—Van Ginkle v Mooy, 10 N E 2d 759, 104 Ind App 282

(7) The meaning of the word "undue" in the phrase "undue influence," is restricted and denotes something wrong, according to the standard of morals which the law enforces in relations of men, and in fact illegal, and qualifies the purpose with which influence is exercised or result which it accomplishes

Miss—Morris v Morris, 6 So 2d 311, 192 Miss 518

(8) Other statements see 68 C J p 743 note 43 [a]

30. US—MacKay v Costigan, C A Ill, 179 F 2d 125

Ala—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624

Ark—In re McConnell's Estate, 257 S W 2d 34, 222 Ark 4—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692—Davault v Parks, 79 S W 2d 68, 190 Ark 370

Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573—In re Motz's Estate, 69 P 294, 136 Cal 558

In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Hannam's Estate, 286 P 2d 208, 106 Cal App 2d 782—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139—In re McDaniel's Estate, 176 P 2d 952, 77 Cal App 2d 877—In re Mesner's Estate, 176 P 2d 70, 77 Cal App 2d 667—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re King's Estate, 146 P 2d 952, 63 Cal App 2d 365—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228—In re McCollum's Estate, 140 P 2d 176, 59 Cal App 2d 744—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Gill's Estate, 58 P 2d 734, 14 Cal App 2d 526—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367  
Del—Conner v Brown, 3 A 2d 64, 9 W V Harr 529

Fla—Marston v Churchill, 187 So 762, 137 Fla 154—In re Starr's Estate, 170 So 620, 125 Fla 536

Ga—Northwestern University v Crisp, 88 S E 2d 26, 211 Ga 636—Bailey v Bailey, 50 S E 2d 617, 204 Ga 556—Norman v Hubbard, 47 S E 2d 574, 203 Ga 530—Butler v Lashley, 29 S E 2d 508, 197 Ga 461—Marlin v Hill, 15 S E 2d 473, 192 Ga 434—Griffin v Barrett, 187 S E 828, 183 Ga 152—Trust Co of Georgia v Ivey, 173 S E 648, 178 Ga 629

Idaho—In re Lunders' Estate, 263 P 2d 1002, 74 Idaho 448

Ill—Sterling v Dubin, 126 N E 2d 718, 6 Ill 2d 64—Redmond v Steele, 126 N E 2d 619, 5 Ill 2d 602—Shevlin v Jackson, 124 N E 2d 895, 5 Ill 2d 43—Kolze v Fordtran, 107 N E 2d 686, 412 Ill 461—Lake v Seifert, 102 N E 2d 294, 410 Ill 444—Pepe v Caputo, 97 N E 2d 260, 408 Ill 321—Hockersmith v Cox, 95 N E 2d 464, 407 Ill 321—Ennis v Gale, 95 N E 2d 322, 407 Ill 215—

- Mosher v Thrush, 84 N E 2d 355, 402 Ill 355—De Marco v McGall, 83 N E 2d 313, 402 Ill 46—Tidholm v Tidholm, 74 N E 2d 514, 397 Ill 363—Challiner v Smith, 71 N E 2d 324, 396 Ill 106—Frese v Meyer, 63 N E 2d 768, 392 Ill 59—Knudson v Knudson, 46 N E 2d 1011, 382 Ill 492—Ryan v Deneen, 31 N E 2d 582, 375 Ill 452—Quatham v Schoon, 19 N E 2d 750, 370 Ill 606—Passenheim v Reinert, 1 N E 2d 69, 362 Ill 576—Ginsberg v Ginsberg, 198 N E 432, 361 Ill 499—Brownlie v Brownlie, 191 N E 268, 357 Ill 117, 93 A L R 1041
- Johnson v First Union Trust & Savings Bank, 273 Ill App 472
- Ind—Willett v Hall, 41 N E 2d 619, 220 Ind 310
- Ludwick v Banet, App, 124 N E 2d 214—Noyer v Ecker, 119 N E 2d 902—Workman v Workman, 46 N E 2d 718, 113 Ind App 245
- Iowa—Olsen v Corporation of New Melleray, Iowa, 60 N W 2d 832, 245 Iowa 407—In re Ransom's Estate, 57 N W 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 N W 2d 818, 242 Iowa 627—In re Klein's Estate, 42 N W 2d 593, 241 Iowa 1103—In re Soderland's Estate, 30 N W 2d 128, 239 Iowa 569—Shaw v Duro, 14 N W 2d 241, 234 Iowa 778—In re Hollis' Estate, 12 N W 2d 576, 234 Iowa 761—In re Eiker's Estate, 6 N W 2d 318, 233 Iowa 315—In re Brooks' Estate, 294 N W 735, 229 Iowa 485—Walters v Heaton, 271 N W 310, 223 Iowa 405—In re Johnson's Estate, 269 N W 792, 222 Iowa 787
- Kan—In re Hall's Estate, 195 P 2d 612, 165 Kan 465—Anderson v Anderson, 76 P 2d 825, 147 Kan 273
- Ky—Rough v Johnson, 274 S W 2d 376—Nunn v Williams, 254 S W 2d 698—Jackson v Feldhaus, 233 S W 2d 109, 313 Ky 552—Gay v Gay, 215 S W 2d 92, 308 Ky 539—Faulkes v Brummett's Adm'r, 204 S W 2d 493, 305 Ky 434—Teegarden v Webster, 199 S W 2d 728, 304 Ky 18—Kentucky Trust Co v Gore, 192 S W 2d 749, 302 Ky 1—Madden v Cornett, 160 S W 2d 607, 290 Ky 268—Ecken's Ex'x v Abbey, 141 S W 2d 863, 283 Ky 449—Combs v Combs, 112 S W 2d 989, 271 Ky 543—Clark v Johnson, 105 S W 2d 576, 268 Ky 591
- Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173
- Md—Sellers v Qualls, 110 A 2d 73—Stockslager v Hartle, 92 A 2d 363, 200 Md 544—Koppal v Soules, 56 A 2d 48, 189 Md 346—Grove v Spiker, 20 A 144, 72 Md 300
- Mass—Morin v Morin, 124 N E 2d 251—O'Brien v Collins, 53 N E 2d 222, 315 Mass 429—Mirick v Phelps, 8 N E 2d 749, 297 Mass 250—Wellman v Carter, 190 N E 493, 286 Mass 237
- Mich—In re Sprenger's Estate, 60 N W 2d 436, 337 Mich 514—In re Johnson's Estate, 40 N W 2d 163, 326 Mich 310—In re Kramer's Estate, 37 N W 2d 564, 324 Mich 626—In re Hannan's Estate, 23 N W 2d 222, 315 Mich 102—In re Hoffman's Estate, 2 N W 2d 442, 300 Mich 406—In re Grow's Estate, 299 N W 836, 299 Mich 133—In re Balk's Estate, 298 N W 779, 298 Mich 303—In re Teller's Estate, 284 N W 696, 238 Mich 193—In re Reed's Estate, 263 N W 76, 273 Mich 334—In re McKeand, 151 N W 731, 185 Mich 97
- Minn—In re Rasmussen's Estate, 69 N W 2d 630—Appeal of Borstad, 45 N W 2d 828, 232 Minn 365—In re Wilson's Estate, 27 N W 2d 429, 223 Minn 409—In re Marsden's Estate, 13 N W 2d 765, 217 Minn 1—In re Geske's Estate, 1 N W 2d 423, 211 Minn 447—In re Mazanec's Estate, 283 N W 745, 204 Minn 406—Mitchell v Mitchell, 44 N W 885, 43 Minn 73—Stockton v Thorn, 39 N W 143, 39 Minn 204
- Miss—Ward v Ward, 33 So 2d 294, 203 Miss 32
- Mo—Phelan v Gockel, 278 S W 2d 758—Early, Jr v Koelbel, 273 S W 2d 312—Glover v Bruce, 265 S W 2d 346—Been v Jolly, 247 S W 2d 840—Wright v Stevens, 246 S W 2d 817—Baker v Spears, 210 S W 2d 13, 357 Mo 601—Smith v Hughes, 200 S W 2d 360, 356 Mo 1—Welch v Welch, 190 S W 2d 936, 354 Mo 654—Hamilton v Steininger, 168 S W 2d 59, 350 Mo 698—Hahn v Brueske, 155 S W 2d 98, 348 Mo 708—Walter v Alt, 152 S W 2d 135, 348 Mo 53—Kadderly v Vossbrink, 149 S W 2d 869—Callaway v Blankenbaker, 141 S W 2d 810, 346 Mo 383—Larkin v Larkin, 119 S W 2d 351—Shaw v Butler, 78 S W 2d 420
- Powell v Raleigh, App, 244 S W 2d 387—O'Reilly v O'Reilly, App, 157 S W 2d 220—McGill v Wiltz, App, 148 S W 2d 822
- Neb—In re Maruska's Estate, 64 N W 2d 734, 158 Neb 723—In re O'Donnell's Estate, 64 N W 2d 116, 158 Neb 583—In re Fehrenkamp's Estate, 48 N W 2d 421, 154 Neb 488—In re Benson's Estate, 46 N W 2d 176, 153 Neb 824—In re Thompson's Estate, 44 N W 2d 814, 153 Neb 375—In re Farr's Estate, 33 N W 2d 454, 150 Neb 67—In re Scoville's Estate, 31 N W 2d 284, 149 Neb 415—In re Johnston's Estate, 25 N W 2d 526, 147 Neb 886—In re Inda's Estate, 19 N W 2d 37, 146 Neb 179—In re Goist's Estate, 18 N W 2d 513, 146 Neb 1—In re Keup's Estate, 18 N W 2d 63, 145 Neb 729—In re George's Estate, 15 N W 2d 80, 144 Neb 887, modified on other grounds 18 N W 2d 68, 144 Neb 915—In re Heinemann's Estate, 13 N W 2d 569, 144 Neb 442—In re Bowman's Estate, 9 N W 2d 801, 143 Neb 440—Lath-
- am v Schaal, 41 N W 354, 25 Neb 535
- N J—In re Davis' Will, 101 A 2d 521, 14 N J 166—In re Livingston's Will, 73 A 2d 916, 5 N J 65
- In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208—In re Filo's Will, 75 A 2d 517, 9 N J Super 146—In re Harr's Estate, 73 A 2d 76, 8 N J Super 3—In re Skewis' Will, 64 A 2d 892, 2 N J Super 114
- In re Nixon's Will, 41 A 2d 119, 136 N J Eq 242—In re Nixon's Estate, 37 A 2d 295, 135 N J Eq 117, affirmed 41 A 2d 119, 136 N J Eq 242—In re Neuman's Estate, 32 A 2d 826, 133 N J Eq 532—In re Pepler's Will, 28 A 2d 474, 132 N J Eq 421, affirmed 34 A 2d 291, 134 N J Eq 160—In re Raynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344—In re White's Estate, 20 A 2d 442, 129 N J Eq 566—In re Sullivan's Will, 8 A 2d 258, 126 N J Eq 182—In re Herrman's Estate, 3 A 2d 148, 124 N J Eq 542—In re McComb, 177 A 849, 118 N J Eq 119
- N Y—Smith v Keller, 98 N E 214, 205 N Y 39
- Corpus Juris cited in** In re Beneway's Will, 71 N Y S 2d 361, 366, 272 App Div 463—In re Ingamells' Will, 13 N Y S 2d 586, 257 App Div 1024—In re Wood's Will, 300 N Y S 1268, 253 App Div 78—In re Streb's Will, 288 N Y S 334, 247 App Div 556
- In re Chinsky's Will, 268 N Y S 719, 150 Misc 274
- In re O'Connor's Estate, 51 N Y S 2d 549
- N C—In re Kemp's Will, 67 S E 2d 672, 234 N C 495—In re Turnage's Will, 179 S E 332, 208 N C 130
- Ohio—Anthony v Abrams, 48 N E 2d 912, 72 Ohio App 16
- Okla—In re Fletcher's Estate, 269 P 2d 349—In re Martin's Estate, 261 P 2d 603—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Baker's Will, 248 P 2d 627, 207 Okl 158—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—Runnels v Burton, 214 P 2d 709, 202 Okl 406—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597—In re Jones' Estate (Choctaw 7012), 121 P 2d 574, 190 Okl 123—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Wheeler v Wade, 45 P 2d 66, 172 Okl 365—Canfield v Canfield, 31 P 2d 152, 167 Okl 590
- Or—In re Porter's Estate, 235 P 2d 894, 192 Or 483—**Corpus Juris cited in** In re Scott's Estate, 228 P 2d 417, 426, 191 Or 90—Detsch v Detsch, 205 P 2d 180, 186 Or 1—In re Lobb's Will, 160 P 2d 295, 177 Or 162—In re Kelly's Estate, 46 P 2d 84, 150 Or 598
- Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Cressman's Es-



irrespective of how little the influence, if the free agency is destroyed, it vitiates the will which is the result of it<sup>31</sup>

General influence, not brought to bear on the testamentary act, however strong or controlling, is not undue influence,<sup>32</sup> and if the instrument as

tate, 31 A 2d 109, 346 Pa. 400—In re Mohler's Estate, 22 A 2d 680, 343 Pa. 299—Kish v Bakaysa, 199 A 321, 330 Pa. 533

In re Matz' Estate, Orph., 39 Berks Co. 303—In re Schartel's Estate, Orph., 39 Berks Co. 249—In re Hkavc's Estate, Com Pl., 56 Dauph. Co. 22—In re Gluck's Estate, Orph., 43 Lack Jur. 101—In re Lockard's Will, Orph., 50 Lanc. L. Rev. 455—In re Hollinger's Estate, Orph., 58 York Leg. Rec. 17, affirmed 41 A 2d 554, 351 Pa. 364

RI—Brousseau v. Messier, 84 A 2d 608, 79 R.I. 106—Talbot v. Bridges, 173 A 72, 54 R.I. 337

SC—Smith v. Whetstone, 39 SE 2d 127, 209 SC 78

SD—In re Rowlands' Estate, 18 N.W. 2d 290, 70 SD 419—In re Armstrong's Estate, 272 NW 799, 65 SD 233

Tenn.—Cude v. Culberson, 209 SW 2d 506, 30 Tenn. App. 2d 628—Hager v. Hager, 13 Tenn. App. 23

Tex.—Boyer v. Pool, 280 SW 2d 564—Long v. Long, 125 SW 2d 1034, 133 Tex. 96, mandate conformed to 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex. 623

Taylor v. Taylor, Civ. App., 281 SW 2d 232, error refused no reversible error—Shoubrouek v. Welch, Civ. App., 271 SW 2d 704, refused no reversible error—Michalak v. Dzierzanowski, Civ. App., 270 SW 2d 276—Naihaus v. Feigon, Civ. App., 244 SW 2d 325, error refused no reversible error—Cruz v. Prado, Civ. App., 239 SW 2d 650—Navarro v. Rodriguez, Civ. App., 235 SW 2d 665—Thornburg v. Manskey, Civ. App., 219 SW 2d 720—Kölb v. Chandler, Civ. App., 209 SW 2d 783—Pullen v. Russ, Civ. App., 209 SW 2d 630, error refused no reversible error—Olds v. Traylor, Civ. App., 180 SW 2d 511, error refused—Hulme v. Jaschke, Civ. App., 168 SW 2d 326, error refused—Leeder v. Leeder, Civ. App., 161 SW 2d 1112, error refused—Bridges v. Howell, Civ. App., 122 SW 2d 665—Brodt v. Brodt, Civ. App., 91 SW 2d 837, error dismissed—Maul v. Williams, Civ. App., 88 SW 2d 1087, motion granted, Com. App., 78 SW 2d 164—Taylor v. Small, 71 SW 2d 895, error dismissed—In re Burns' Estate, 52 SW 98, 21 Civ. App. 512—Trezevant v. Rains, Civ. App., 19 SW 567

Utah—In re Lavelle's Estate, 248 P. 2d 372

Vt.—Central Hanover Bank & Trust Co. v. Froment, 49 A 2d 111, 114 Vt. 523

Va.—Croft v. Snidow, 33 SE 2d 208, 183 Va. 649—Mullins v. Coleman,

7 SE 2d 877, 175 Va. 235—Ferguson v. Ferguson, 192 SE 774, 169 Va. 77—Redford v. Booker, 185 SE 879, 166 Va. 561

Wash.—In re Soderstran's Estate, 213 P. 2d 949, 35 Wash. 2d 444—In re Kessler's Estate, 211 P. 2d 496, 35 Wash. 2d 156—In re Martinson's Estate, 190 P. 2d 96, 29 Wash. 2d 912—In re Donaldson's Estate, 173 P. 2d 159, 26 Wash. 2d 72—In re McGilligan's Estate, 170 P. 2d 661, 25 Wash. 2d 313—In re Bottger's Estate, 129 P. 2d 518, 14 Wash. 2d 676—In re Miller's Estate, 116 P. 2d 526, 10 Wash. 2d 258—In re Schaffer's Estate, 113 P. 2d 41, 8 Wash. 2d 517—Dean v. Jordan, 79 P. 2d 331, 194 Wash. 661—In re Larsen's Estate, 71 P. 2d 47, 191 Wash. 257

W Va.—Ritz v. Kingdon, 79 SE 2d 123—Mullens v. Lilly, 13 SE 2d 634, 123 W Va. 182—Ebert v. Ebert, 200 SE 331, 120 W Va. 722

Wyo.—In re Nelson's Estate, 266 P. 2d 238, 72 Wyo. 444—In re Anderson's Estate, 255 P. 2d 983, 71 Wyo. 238 68 C.J. p. 744 note 44

#### Imprisonment of body or mind

In order to constitute undue influence sufficient to void a will, there must be imprisonment of body or mind, fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery, or physical or moral coercion, to such a degree as to prejudice mind of testator, to destroy his free agency and to operate as a present restraint on him in making of will

Pa.—In re Kline's Estate, 115 A 2d 364, 352 Pa. 395—May v. Fidelity Trust Co., 99 A 2d 880, 375 Pa. 135—In re Franz' Estate, 84 A 2d 292, 368 Pa. 618—In re Queen's Estate, 62 A 2d 909, 361 Pa. 133—In re Ash's Estate, 41 A 2d 620, 351 Pa. 317—In re Hollinger's Estate, 41 A 2d 554, 351 Pa. 364—In re Geho's Estate, 17 A 2d 342, 340 Pa. 412—Wetzel v. Edwards, 16 A 2d 441, 340 Pa. 121—Shuey v. Shuey, 16 A 2d 4, 340 Pa. 27—In re Royer's Estate, 12 A 2d 923, 339 Pa. 423—In re Olshefski's Estate, 11 A 2d 487, 337 Pa. 420—Buhan v. Keslar, 194 A 917, 328 Pa. 312

In re Morrish's Estate, 40 A 2d 907, 156 Pa. Super. 394

In re Queen's Estate, Orph., 3 Chester Co. L.R. 305—In re Pearson's Estate, 35 Del. Co. 218—In re Porter's Estate, Orph., 4 Fay L.J. 37, affirmed 19 A 2d 731, 341 Pa. 476—In re Melvin's Estate, Orph., 45 Lack Jur. 229—In re King's Estate, Orph., 67 Montg. Co. 185, affirmed 87 A 2d 469, 369 Pa. 523—In re Butler's Estate, Orph., 64 Montg. Co. 161—In re Sassaman's Estate,

Orph., 26 North Co. 348—In re Kotlar's Estate, Orph., 24 Northumb. Leg. J. 252—In re Gayman's Estate, Orph., 21 Northumb. Leg. J. 149—In re Corne's Estate, Orph., 66 York Leg. Rec. 22

68 C.J. p. 744 note 44 [a]

#### Test

(1) The true test of undue influence is that such influence overcomes the will of testator without convincing the judgment

Cal.—In re Hettermann's Estate, 119 P. 2d 788, 48 Cal. App. 2d 263—In re Greuner's Estate, 87 P. 2d 872, 31 Cal. App. 2d 161

(2) The clarifying test of undue influence is whether testator felt "This is not my wish, but I must do it" N.J.—In re Weeks' Estate, 103 A 2d 43, 29 N.J. Super. 533

(3) The test of whether a will has been executed under the stress of undue influence is whether testator did what he wanted to do at time of execution of the will

Ohio—Lovelady v. Rhineland, 21 N.E. 2d 1001, 60 Ohio App. 493

31. N.J.—In re Reynolds' Estate, 27 A 2d 226, 132 N.J. Eq. 141, affirmed 32 A 2d 353, 133 N.J. Eq. 344—In re Sullivan's Will, 8 A 2d 258, 126 N.J. Eq. 182

N.Y.—In re Wood's Will, 300 N.Y.S. 1268, 253 App. Div. 78 68 C.J. p. 745 note 45

32. Cal.—In re Welch's Estate, 272 P. 2d 512, 43 Cal. 2d 173—In re Arnold's Estate, 107 P. 2d 25, 16 Cal. 2d 573—In re Estate of Leahy, 54 P. 2d 704, 5 Cal. 2d 301—In re Estate of Keegan, 72 P. 2d 828, 139 Cal. 123

In re Williams' Estate, 221 P. 2d 714, 99 Cal. App. 2d 302—In re Trefren's Estate, 194 P. 2d 574, 86 Cal. App. 2d 139—In re Fraser's Estate, 170 P. 2d 704, 75 Cal. App. 2d 99—In re Agnew's Estate, 151 P. 2d 126, 65 Cal. App. 2d 553—In re King's Estate, 146 P. 2d 952, 63 Cal. App. 2d 365—In re Clarke's Estate, 144 P. 2d 425, 63 Cal. App. 2d 228—In re Comino's Estate, 131 P. 2d 599, 55 Cal. App. 2d 806—In re Clark's Estate, 129 P. 2d 969, 55 Cal. App. 2d 85—In re Shields' Estate, 121 P. 2d 795, 49 Cal. App. 2d 293—In re Hettermann's Estate, 119 P. 2d 788, 48 Cal. App. 2d 263—In re Easton's Estate, 35 P. 2d 614, 140 Cal. App. 367

Okl.—Barnes v. Logston, 88 P. 2d 361, 184 Okl. 464—In re Ritter's Estate, 73 P. 2d 161, 181 Okl. 309—Canfield v. Canfield, 31 P. 2d 152, 167 Okl. 590

SD—In re Rowlands' Estate, 18 N.W. 2d 290, 70 SD 419

Tex.—Griffin v. Griffin, Civ. App., 271 SW.2d 714—Pullen v. Russ, Civ.



finally executed expresses the will, wish, and desires of the testator, the will is not void because of undue influence<sup>33</sup> In order to invalidate a will on the ground of the favored beneficiary's undue influence over the testator, such beneficiary's activity must be in procuring the execution of the will,<sup>34</sup> and it must not be referable solely to compliance with, or obedience to, the testator's voluntary

and untrammelled directions or instructions<sup>35</sup> The undue influence which will avoid a will must amount to moral or physical coercion or fraud<sup>36</sup> It must be, not legitimate influence which springs from natural affection, as discussed infra § 227, but malign influence springing from fear, coercion, or other causes depriving testator of freedom in the distribution of his property,<sup>37</sup> it must constrain the

App, 209 SW 2d 630, refused no reversible error—In re Burns' Estate, 52 SW 98, 21 Tex Civ App 512 68 C J p 745 note 46

33. Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173

Pa—In re Trump's Estate, Orph, 47 Dauph.Co 433.

Tex—Bridges v Howell, Civ App, 122 SW 2d 665

**Undue influence must be clearly apparent**

Fla—Marston v Churchill, 187 So 762, 137 Fla 154

**Undue influence held not shown**

Cal—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367

34. Ala.—Snellton v Gordon, 40 So 2d 95, 252 Ala 187—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624 NY—In re May's Estate, 55 NYS 2d 402, 184 Misc 336

**Undue influence must be used directly to procure will**

Ark—Floyd v Dillaha, 256 SW 2d 48, 221 Ark 805

Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173

In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 303—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

Okl—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Wheeler v Wade, 45 P 2d 66, 172 Okl 365

**Pressure must be brought to bear directly on the testamentary act**

Cal—In re Estate of Leahy, 54 P 2d 704, 5 Cal 2d 301—In re McDevitt's Estate, 30 P 101, 95 Cal 17

In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100—In re Clark's Estate, 129 P 2d 959, 55 Cal App 2d 85—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

NY—In re Barnes' Will, 134 NYS 2d 679, 284 App Div 743, motion dismissed 126 NE 2d 174, 308 NY

533, appeal denied 141 NYS 2d 844, 285 App Div 1216

**Domination must be exercised over very testamentary act itself**

NY—In re Ruef, 167 NYS 498, 180 App Div 203, affirmed 223 NY 582, 119 NE 1075

In re Stein's Estate, 21 NYS 2d 102, 174 Misc 465

35. Ala.—Lackey v Lackey, 76 So 2d 761, 262 Ala 45—Shelton v Gordon, 40 So 2d 95, 252 Ala 187—Hyde v Norris, 35 So 2d 181, 250 Ala 518—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624—Mindler v Crocker, 18 So 2d 278, 245 Ala. 578—Sikes v King, 141 So 555, 224 Ala 623—Zeigler v Coffin, 123 So 22, 219 Ala 586, 63 ALR 942—Jones v Brooks, 63 So 978, 184 Ala 115

**Assistance at testator's request**

(1) Where testator, while competent to do so, has determined to make will and to incorporate certain provisions in it, person assisting in procuring execution of will at testator's request is not exercising undue influence

Wis—In re Truehl's Will, 264 NW 254, 220 Wis 134

(2) Contacting, at request of testator, the attorney who prepared will, and procuring attendance of a witness at request of attorney did not constitute participation, as element of undue influence

Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

36. Ala.—Cox v Martin, 34 So 2d 463, 250 Ala 401

Cal—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

Ga.—Northwestern University v Crisp, 88 SE 2d 26, 211 Ga. 636—Butler v Lashley, 29 SE 2d 508, 197 Ga 461—Marlin v Hill, 15 SE 2d 473, 192 Ga 434—Griffin v Barrett, 187 SE 828, 183 Ga 152

Ind—Cooper v Cooper, 51 NE 2d 100, 114 Ind App 261—Workman v Workman, 46 NE 2d 718, 113 Ind App 245

Iowa—Olsen v Corporation of New Melleray, Iowa, 60 NW 2d 832, 245 Iowa 407—In re Soderland's Estate, 30 NW 2d 128, 239 Iowa 569—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761

Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173

Minn—In re Rasmussen's Estate, 69 NW 2d 630—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1

Neb—In re Fari's Estate, 33 NW 2d 454, 150 Neb 67—In re Keup's Estate, 18 NW 2d 63, 145 Neb 729—Latham v Schaal, 41 NW 354, 25 Neb 535

NJ—In re Livingston's Will, 73 A 2d 916, 5 NJ 65

In re Filo's Will, 75 A 2d 517, 9 NJ Super 146

In re Neuman's Estate, 32 A 2d 826, 133 NJ Eq 532—In re McComb, 177 A 849, 118 NJ Eq 119—Elkinton v Brick, 15 A 391, 44 NJ Eq 154, 1 LRA 161

NY—In re Streb's Will, 288 NYS 334, 247 App Div 556

In re Stein's Estate, 21 NYS 2d 102, 174 Misc 465

In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

NC—In re Kemp's Will, 67 SE 2d 672, 234 NC 495—In re Turnage's Will, 179 SE 332, 208 NC 130

Okl—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Canfield v Canfield, 31 P 2d 152, 167 Okl 590

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—In re King's Estate, 87 A 2d 469, 369 Pa 523

Tenn—Cude v Culbertson, 209 SW 2d 506, 30 Tenn App 2d 628

Tex—Bridges v Howell, Civ App, 122 SW 2d 665

W Va—Ritz v Kingdom, 79 SE 2d 123—Mullens v Lilly, 13 SE 2d 634, 123 W Va 182

Wis—In re Hickey's Will, 32 NW 2d 232, 252 Wis 542.

68 C J p 745 note 47.

37. Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167—In re McConnell's Estate, 257 SW 2d 34, 222 Ark 4—Floyd v Dillaha, 256 SW 2d 48, 221 Ark 805—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Parette v Ivey, 190 SW 2d

testator to do that which is against his will, but which from fear, desire for peace or some other feeling<sup>38</sup> than affection,<sup>39</sup> he is unable to resist. The fact that the testator was aware of the contents of the instrument that he signed is no answer to a charge of undue influence,<sup>40</sup> and undue influence

can be exerted even though the person complaining was provided for in the will.<sup>41</sup>

*Essential elements* The essential elements of undue influence have been held to be a susceptible testator,<sup>42</sup> another's opportunity to exert it,<sup>43</sup> a disposition to do so for an improper purpose,<sup>44</sup> the fact

441, 209 Ark 364—*Bollinger v Arkansas Val Trust Co*, 151 SW 2d 675, 202 Ark 525—*Davault v Parks*, 79 SW 2d 68, 190 Ark 370—*Lavenue v Lewis*, 46 SW 2d 649, 185 Ark 159—*Alford v Johnson*, 146 SW 516, 103 Ark 236—*McCulloch v Campbell*, 5 SW 590, 49 Ark 367

Kan—*Smith's Estate v Davis*, 212 P 2d 322, 168 Kan 210

SC—*Smith v Whetstone*, 39 SE 2d 127, 209 SC 78—*Floyd v Floyd*, 34 SCL 23, 49 Am D 626

38. Ala.—*Cox v Martin*, 34 So 2d 463, 250 Ala 401—*Kahalley v Kahalley*, 28 So 2d 792, 248 Ala 624—*Gilbert v Gilbert*, 22 Ala 529, 58 Am D 268

Ind—*Cooper v Cooper*, 51 NE 2d 100, 114 Ind App 261—*Workman v Workman*, 46 NE 2d 718, 113 Ind App 245

Or—In re *Porter's Estate*, 235 P 2d 894, 192 Or 483—In re *Estate of Allen*, 241 P 996, 116 Or 467

SC—*Smith v Whetstone*, 39 SE 2d 127, 209 SC 78—*Floyd v Floyd*, 34 SCL 23, 49 Am D 626

Tex—*Long v Long*, 125 SW 2d 1034, 133 Tex 96, mandate conformed to Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

*Griffin v Griffin*, Civ App, 271 SW 2d 714—*Black v Black*, Civ App, 240 SW 2d 458, error refused no reversible error—*Thompson v Townsend*, Civ App, 238 SW 2d 810, error refused no reversible error—*Gainer v Johnson*, Civ App, 211 SW 2d 739—*Bridges v Howell*, Civ App, 122 SW 2d 665

39. Ala.—*Cox v Martin*, 34 So 2d 463, 250 Ala 401—*Kahalley v Kahalley*, 28 So 2d 792, 248 Ala 624

40. NY—*Tyler v Gardiner*, 35 NY 559

In re *May's Estate*, 55 NYS 2d 402, 184 Misc 336

In re *Brooks' Will*, 120 NYS 596

41. NJ—In re *Peppler's Will*, 28 A. 2d 474, 132 NJ Eq 421, affirmed 34 A 2d 291, 134 NJ Eq 160—In re *Roffe*, 10 A 2d 739, 127 NJ Eq 110

42. Cal—In re *Estate of Graves*, 259 P 935, 202 Cal 258

In re *Hampton's Estate*, 103 P 2d 611, 39 Cal App 2d 488

Del—*Conner v Brown*, 3 A 2d 64, 9 WW Harr 529

Neb—In re *Maruska's Estate*, 64 N W 2d 734, 158 Neb 723—In re

*O'Donnell's Estate*, 64 NW 2d 116, 158 Neb 583—In re *Benson's Estate*, 46 NW 2d 176, 153 Neb 824—In re *Bainbridge's Estate*, 36 NW 2d 625, 151 Neb 142—In re *Farr's Estate*, 33 NW 2d 454, 150 Neb 67—In re *Scoville's Estate*, 31 NW 2d 284, 149 Neb 415—In re *Johnston's Estate*, 25 NW 2d 526, 147 Neb 886—In re *Woodward's Estate*, 23 NW 2d 75, 147 Neb 270—In re *Inda's Estate*, 19 NW 2d 37, 146 Neb 179—In re *Goist's Estate*, 18 NW 2d 513, 146 Neb 1—In re *Keup's Estate*, 18 NW 2d 63, 145 Neb 729—In re *George's Estate*, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915—In re *Bowman's Estate*, 9 NW 2d 801, 143 Neb 440—In re *Hagan's Estate*, 9 NW 2d 794, 143 Neb 459, 154 A LR 573

SD—In re *Rowlands' Estate*, 18 N W 2d 290, 70 SD 419

Wis—In re *Brzowsky's Estate*, 67 N W 2d 384, 267 Wis 510—In re *Beyer's Estate*, 55 N W 2d 401, 252 Wis 441—In re *Roehl's Will*, 53 N W 2d 180, 261 Wis 466—In re *Estate of Blied*, 51 N W 2d 482, 261 Wis 32—In re *Williams' Will*, 41 N W 2d 191, 256 Wis 338—In re *Feeley's Estate*, 33 N W 2d 139, 253 Wis 204—In re *Hickey's Will*, 32 N W 2d 232, 252 Wis 542—In re *King's Will*, 29 N W 2d 69, 251 Wis 269—In re *Faulks' Will*, 17 N W 2d 423, 246 Wis 319—In re *Scherrer's Estate*, 7 N W 2d 848, 242 Wis 211—In re *Raasch's Will*, 284 N W 571, 230 Wis 548—In re *Stanley's Will*, 276 N W 353, 226 Wis 354—In re *Leisch's Will*, 267 N W 268, 221 Wis 641—In re *Truehl's Will*, 264 N W 254, 220 Wis 134—*Will of Grosse*, 243 N W 465, 208 Wis 473 68 CJ p 746 note 49

There can be no fatally undue influence without a person incapable of protecting himself as well as a wrongdoer to be resisted

Ga—*Marlin v Hill*, 15 SE 2d 473, 192 Ga. 434

43. Ark—*Brown v Emerson*, 170 S W 2d 1019, 205 Ark 735—*Hyatt v Wroten*, 43 SW 2d 726, 184 Ark 847

Cal—In re *Estate of Graves*, 259 P 935, 202 Cal 258

In re *Hampton's Estate*, 103 P 2d 611, 39 Cal App 2d 488

Del—*Conner v Brown*, 3 A 2d 64, 9 WW Harr 529

Neb—In re *Maruska's Estate*, 64 N W 2d 734, 158 Neb 723—In re

*O'Donnell's Estate*, 64 NW 2d 116, 158 Neb 583—In re *Benson's Estate*, 46 NW 2d 176, 153 Neb 824—In re *Bainbridge's Estate*, 36 NW 2d 625, 151 Neb 142—In re *Farr's Estate*, 33 NW 2d 454, 150 Neb 67—In re *Scoville's Estate*, 31 NW 2d 284, 149 Neb 415—In re *Johnston's Estate*, 25 NW 2d 526, 147 Neb 886—In re *Woodward's Estate*, 23 NW 2d 75, 147 Neb 270—In re *Inda's Estate*, 19 NW 2d 37, 146 Neb 179—In re *Goist's Estate*, 18 NW 2d 513, 146 Neb 1—In re *Keup's Estate*, 18 NW 2d 63, 145 Neb 729—In re *George's Estate*, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915—In re *Bowman's Estate*, 9 NW 2d 801, 143 Neb 440—In re *Hagan's Estate*, 9 NW 2d 794, 143 Neb 459, 154 A LR 573

SD—In re *Rowlands' Estate*, 18 N W 2d 290, 70 SD 419

Wis—In re *Beyer's Estate*, 55 N W 2d 401, 262 Wis 441—In re *Roehl's Will*, 53 N W 2d 180, 261 Wis 466—In re *Estate of Bleid*, 51 N W 2d 482, 261 Wis 32—In re *Williams' Will*, 41 N W 2d 191, 256 Wis 338—In re *Feeley's Estate*, 33 N W 2d 139, 253 Wis 204—In re *Hickey's Will*, 32 N W 2d 232, 252 Wis 542—In re *King's Will*, 29 N W 2d 69, 251 Wis 269—In re *Faulks' Will*, 17 N W 2d 423, 246 Wis 319—In re *Scherrer's Estate*, 7 N W 2d 848, 242 Wis 211—In re *Raasch's Will*, 284 N W 571, 230 Wis 548—In re *Stanley's Will*, 276 N W 353, 226 Wis 354—In re *Leisch's Will*, 267 N W 268, 221 Wis 641—In re *Truehl's Will*, 264 N W 254, 220 Wis 134—In re *Schaefer's Estate*, 241 N W 382, 207 Wis 404

44. Cal—In re *Greuner's Estate*, 87 P 2d 872, 31 Cal App 2d 161

Del—*Conner v Brown*, 3 A 2d 64, 9 WW Harr 529

Neb—In re *Maruska's Estate*, 64 N W 2d 734, 158 Neb 723—In re *O'Donnell's Estate*, 64 N W 2d 116, 158 Neb 583—In re *Benson's Estate*, 46 NW 2d 176, 153 Neb 824—In re *Bainbridge's Estate*, 36 NW 2d 625, 151 Neb 142—In re *Farr's Estate*, 33 NW 2d 454, 150 Neb 67—In re *Scoville's Estate*, 31 NW 2d 284, 149 Neb 415—In re *Johnston's Estate*, 25 NW 2d 526, 147 Neb 886—In re *Woodward's Estate*, 23 NW 2d 75, 147 Neb 270—In re *Inda's Estate*, 19 NW 2d 37, 146 Neb 179—In re *Goist's Estate*, 18 NW 2d 513, 146 Neb 1—In re

of improper influence exerted<sup>45</sup> or attempted,<sup>46</sup> and the result showing the effect of such influence.<sup>47</sup> The preceding elements together with the additional factors that the provisions of the will were unnatural and that its dispositions were at variance with the intentions of the testator expressed both before and after the execution of the will have been held to show undue influence<sup>48</sup>. A bad or improper

motive is not an essential element of undue influence,<sup>49</sup> the only inquiry being whether the free agency of the disposing party was destroyed<sup>50</sup>

*Existence of, or opportunity to exercise, undue influence.* The mere existence of undue influence, or an opportunity to exercise it,<sup>51</sup> although coupled with an interest or motive to do so, is not sufficient,<sup>52</sup>

Keup's Estate, 18 NW 2d 63, 145 Neb 729—In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915—In re Bowman's Estate, 9 NW 2d 801, 143 Neb 440—In re Hagan's Estate, 9 NW 2d 794, 143 Neb 459, 154 ALR 573  
SD—In re Rowlands' Estate, 18 NW 2d 290, 70 SD 419  
Wis—In re Beyer's Estate, 55 NW 2d 401, 262 Wis 441—In re Roehl's Will, 53 NW 2d 180, 261 Wis 466—In re Estate of Blued, 51 NW 2d 482, 261 Wis 32—In re Williams' Will, 41 NW 2d 191, 256 Wis 338—In re Feeley's Estate, 33 NW 2d 139, 253 Wis 204—In re Hickey's Will, 32 NW 2d 232, 252 Wis 542—In re King's Will, 29 NW 2d 69, 251 Wis 269—In re Faulks' Will, 17 NW 2d 423, 246 Wis 319—In re Scherrer's Estate, 7 NW 2d 848, 242 Wis 211—In re Raasch's Will, 284 NW 571, 230 Wis 548—In re Stanley's Will, 276 NW 353, 226 Wis 354—In re Truehl's Will, 264 NW 254, 220 Wis 134  
68 CJ p 746 note 51

**"Disposition" to influence unduly** for purpose of procuring improper favor as an element necessary to establish undue influence means something more than a mere willingness by one to share to a greater extent than another in the distribution of a testator's estate, it means a willingness on part of a person to do something wrong or unfair, to bring about result favorable to himself and unjust to another, and grasping or overreaching characteristics  
Wis—In re Leisch's Will, 267 NW 268, 221 Wis 641

45. Ark—Davault v Parks, 79 S W 2d 68, 190 Ark 370

Cal—In re Estate of Graves, 259 P 935, 202 Cal 258—Estate of Calkins, 44 P 577, 112 Cal 296

In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488—In re Knight's Estate, 50 P 2d 475, 9 Cal App 2d 454

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Mass—Neill v Brackett, 126 NE 93, 234 Mass 367

46 Iowa—Olsen v. Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407

47. Ark—In re McConnell's Estate, 257 S W 2d 34, 222 Ark 4—Davault

v Parks, 79 S W 2d 68, 190 Ark 370

Cal—In re Estate of Graves, 259 P 935, 202 Cal 258

In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Minn—In re Wilson's Estate, 27 NW 2d 429, 223 Minn 409—In re Stephens' Estate, 293 NW 90, 207 Minn 597

Neb—In re Maruska's Estate, 64 NW 2d 734, 158 Neb 723—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Bainbridge's Estate, 36 NW 2d 625, 151 Neb 142—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67

—In re Scoville's Estate, 31 NW 2d 284, 149 Neb 415—In re Johnston's Estate, 25 NW 2d 526, 147 Neb 886

—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179

—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Keup's Estate, 18 NW 2d 63, 145 Neb 729—In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915

—In re Estate of Bowman, 9 NW 2d 801, 143 Neb 440—In re Hagan's Estate, 9 NW 2d 794, 143 Neb 459, 154 ALR 573

SD—In re Rowlands' Estate, 18 NW 2d 290, 70 SD 419

Wis—In re Beyer's Estate, 55 NW 2d 401, 262 Wis 441—In re Roehl's Will, 53 NW 2d 180, 261 Wis 466

—In re Estate of Blued, 51 NW 2d 482, 261 Wis 32—In re Williams' Will, 41 NW 2d 191, 256 Wis 338

—In re Feeley's Estate, 33 NW 2d 139, 253 Wis 204—In re Hickey's Will, 32 NW 2d 232, 252 Wis 542

—In re King's Will, 29 NW 2d 69, 251 Wis 269—In re Faulks' Will, 17 NW 2d 423, 246 Wis 319—In re Scherrer's Estate, 7 NW 2d 848, 242 Wis 211—In re Raasch's Will, 284 NW 571, 230 Wis 548—In re Stanley's Will, 276 NW 353, 226 Wis 354—In re Leisch's Will, 267 NW 268, 221 Wis 641—In re Truehl's Will, 264 NW 254, 220 Wis 134

68 CJ p 746 note 53

48. Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Estate of Yale, 4 P 2d 153, 214 Cal 115

In re Ostrander's Estate, 259 P 2d 999, 119 Cal App 2d 481—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302

**Among the factors important as** bearing upon the fact of undue influence are the opportunity to exercise it, active participation in preparation of the will by party exercising it, disinheritance of those whom decedent probably would have remembered in his will, singularity of the provisions of the will, and the exercise of influence to induce him to make the will in question  
Minn—In re Wilson's Estate, 27 NW 2d 429, 223 Minn 409

49. NC—In re Craven's Will, 86 S E 587, 169 NC 561

**Motive for exercise of undue influence held not enough**

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Andersen's Estate, 235 P 2d 869, 192 Or 411

50. NC—In re Craven's Will, 86 S E 587, 169 NC 561

**Age or general debility**

Whether undue influence has been exercised in persuading a testator to make a particular disposition of his property does not depend on his age or general debility, but rests on mental capacity and free agency

Mo—Larkin v Larkin, 119 S W 2d 351

51. Ky—Teegarden v Webster, 199 S W 2d 728, 304 Ky 18

Mich—In re Kenealy's Estate, 59 NW 2d 38, 336 Mich 657—In re Burwitz' Estate, 261 NW 121, 272 Mich 16

Mo—Glover v Bruce, 265 S W 2d 346—Hahn v Brueske, 155 S W 2d 98, 348 Mo 708—Rex v Masonic Home of Missouri, 108 S W 2d 72, 341 Mo 589—Neal v Caldwell, 34 S W 2d 104, 326 Mo 1146

Or—In re Detsch's Estate, 229 P 2d 264, 191 Or 161

SC—Smith v Whetstone, 39 S E 2d 127, 209 SC 78

52. Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419,

but such influence must be actually exerted on the mind of the testator with respect to the execution of the will in question<sup>53</sup>

**Time.** It is not necessary that the acts of undue influence be exercised or exerted at the exact time

of the making of the will,<sup>54</sup> and the person exercising such influence need not have been present at the time of the making thereof,<sup>55</sup> but it must be shown that such influence, whether exerted at the time of the making of the will<sup>56</sup> or prior thereto,<sup>57</sup> was operative at the time of its execution,<sup>58</sup> and was

83 Cal App 2d 534—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re King's Estate, 146 P 2d 952, 63 Cal App 2d 365—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367

53. Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573  
In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139—In re King's Estate, 146 P 2d 952, 63 Cal App 2d 365—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367

Iowa—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627  
Ky—Hurley v Blankinship, 229 SW 2d 963, 313 Ky 49, 21 A L R 2d 817—Clark v Johnson, 105 SW 2d 576, 268 Ky 591

Md—Stockslager v Hartle, 92 A 2d 363, 200 Md 544—Koppal v Soules, 56 A 2d 48, 189 Md 346

Mich—In re Hoffman's Estate, 2 N W 2d 442, 300 Mich 406

Mo—Glover v Bruce, 265 SW 2d 346—Smith v Hughes, 200 SW 2d 360, 356 Mo 1—Walter v Alt, 152 SW 2d 135, 348 Mo 53—Neal v Caldwell, 34 SW 2d 104, 326 Mo 1146

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Andersen's Estate, 235 P 2d 869, 192 Or 441

SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230  
68 C J p 746 note 56

54. Ind—Davis v Babb, 125 NE 403, 190 Ind 173

Ky—Combs v Combs, 112 SW 2d 989, 271 Ky 543

Md—Drury v King, 32 A 2d 371, 182 Md 64

Mo—Guidicy v Guidicy, 238 SW 2d 380, 361 Mo 1127

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230

68 C J p 747 note 57.

#### Overt acts

It is not necessary to show that overt acts of undue influence were done at time of execution of will

Mo—Baker v Spears, 210 SW 2d 13, 357 Mo 601—Mowry v Norman, 103 SW 15, 204 Mo 173

N J.—In re Reynolds' Estate, 27 A 2d

226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

Tex—Thompson v Townsend, Civ App, 238 SW 2d 810, error refused no reversible error—Kutchinsky v Zillion, Civ App, 183 SW 2d 237, error refused

#### Time

(1) The time at which undue influence is exerted is of no moment as long as its effect remains operative when the will is executed

N J.—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

(2) The force and coercion necessary to invalidate will need not be applied at any particular time

W Va.—Ritz v Kingdon, 79 SE 2d 123—Ebert v Ebert, 200 SE 831, 120 W Va 722

(3) The reasons for, and effects of, undue influence must be measured as of time of execution of testamentary instrument

Cal—In re Webster's Estate, 137 P 2d 751, 59 Cal App 2d 1

(4) The time when a will is made is the time of primary importance to be considered in any question of undue influence over the testator  
Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455

(5) With respect to question of undue influence, critical time of inquiry is that of preparation and signing of document, and if at that time undue influence is not operating, other circumstances in life of testator are not decisive on question of validity of will

Pa—In re Weber's Estate, 5 A 2d 550, 334 Pa 216

55. Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263—In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161

Ind—Copper v Copper, 51 NE 2d 100, 114 Ind App 261

Iowa—Walters v Heaton, 271 NW 310, 223 Iowa 405

68 C J p 747 note 58.

#### Oral persuasion

In order to exert undue influence in obtaining execution of a will, it is not necessary that the beneficiary of that influence be in the presence of the testator, if the circumstances are such that pressure may be exerted by means other than oral persuasion  
Cal—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563

56. Cal—Estate of Ricks, 117 P 532, 160 Cal 450

In re McDaniel's Estate, 176 P 2d 952, 77 Cal App 2d 877—In re Monks' Estate, 120 P 2d 167, 48 Cal App 2d 603, appeal dismissed Monks v Lee, 63 S Ct 50, 317 US 590, 87 L Ed 483, rehearing denied 63 S Ct 323, 317 US 711, 87 L Ed 566—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

Ky—Rough v Johnson, 274 SW 2d 376—Nunn v Williams, 254 SW 2d 698

Tenn—Corpus Juris cited in Cude v Culberson, 209 SW 2d 506, 523, 30 Tenn App 2d 628

68 C J p 747 note 59

Time to which evidence must be confined see *infra* § 245

**Undue influence which will invalidate a will** must be exercised at time of making will and the will must result therefrom

Tex—Bledsoe v Short, Civ App, 264 SW 2d 445, refused no reversible error—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25

57. Cal—In re Estate of Ricks, 117 P 532, 160 Cal 450

In re Monks' Estate, 120 P 2d 167, 48 Cal App 2d 603, appeal dismissed Monks v Lee, 63 S Ct 50, 317 US 590, 87 L Ed 483, rehearing denied 63 S Ct 323, 317 US 711, 87 L Ed 566—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

Ga—Adler v Adler, 61 SE 2d 824, 207 Ga 394—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga 247—Trust Co of Georgia v Ivey, 173 SE 648, 178 Ga 629

Ind—Davis v Babb, 125 NE 403, 190 Ind 173

Copper v Copper, 51 NE 2d 100, 114 Ind App 261

Ky—Rough v Johnson, 274 SW 2d 376—Nunn v Williams, 254 SW 2d 698

Mo—Guidicy v Guidicy, 238 SW 2d 380, 361 Mo 1127—Mowry v Norman, 103 SW 15, 204 Mo 173

Tex—Thompson v Townsend, Civ App, 238 SW 2d 810, error refused no reversible error—Kutchinsky v Zillion, Civ App, 183 SW 2d 237, error refused

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230

58. US—MacKay v Costigan, CA 111, 179 F 2d 125

Cal—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed—In re McDaniel's Estate, 176 P 2d

directly connected therewith<sup>59</sup> It must result in | down the volition of the testator at the very time the  
pressure which overpowered the mind and bore | will was made,<sup>60</sup> and in the very act of making the

- 952, 77 Cal App 2d 877—In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161
- Ga—Adler v Adler, 61 SE 2d 824, 207 Ga 394—Bailey v Bailey, 50 SE 2d 617, 204 Ga 556—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Norman v Hubbard, 47 SE 2d 574, 203 Ga 530—Butler v Lashley, 29 SE 2d 508, 197 Ga 461—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga. 247—Marlin v Hill, 15 SE 2d 473, 192 Ga 434—Boland v Aycock, 12 SE 2d 319, 191 Ga 327—Trust Co of Georgia v. Ivey, 173 SE 648, 178 Ga 629
- Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64—Shevlin v Jackson, 124 NE 2d 895, 5 Ill 2d 43—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Pepe v Caputo, 97 NE 2d 260, 408 Ill 321—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321—Ennis v Gale, 95 NE 2d 222, 407 Ill 215—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353—DeMarco v McGill, 83 NE 2d 313, 402 Ill 46—Tidholm v Tidholm, 74 NE 2d 514, 397 Ill 363—Challiner v Smith, 71 NE 2d 324, 396 Ill 106—Schlachter v Schlachter, 71 NE 2d 153, 396 Ill 184—Frese v Meyer, 63 NE 2d 768, 392 Ill 59—Downey v Lawley, 36 NE 2d 344, 377 Ill 298—Quathamer v Schoon, 19 NE 2d 750, 370 Ill 606—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041—Wickes v Walden, 81 NE 798, 228 Ill 56—Francis v Wilkinson, 35 NE 150, 147 Ill 370—Guild v Hull, 20 NE 665, 127 Ill 523
- Johnson v First Union Trust & Savings Bank, 273 Ill App 472
- Ind—Davis v Babb, 125 NE 403, 190 Ind 173
- Ludwick v Banet, App, 124 NE 2d 214—Copper v Copper, 51 NE 2d 100, 114 Ind App 261
- Iowa—Olsen v Corporation of New Mellerav, Iowa, 60 NW 2d 832, 245 Iowa 407—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Brooks' Estate, 294 NW 735, 229 Iowa 485—Walters v Heaton, 271 NW 310, 223 Iowa 405—In re Johnson's Estate, 269 NW 792, 222 Iowa 787
- Ky—Jackson v Feldhaus, 233 SW 2d 109, 313 Ky 552—Ecken's Ex'x v Abbey, 141 SW 2d 863, 283 Ky 449
- Combs v Combs, 112 SW 2d 989, 271 Ky 543
- La—Cormier v Myers, 65 So 2d 345, 223 La 259
- Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173
- Md—Drury v King, 32 A 2d 371, 182 Md 64
- Minn—In re Rasmussen's Estate, 69 NW 2d 630—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1
- Mo—Glover v Bruce, 265 SW 2d 346—Wright v Stevens, 246 SW 2d 817—Baker v Spears, 210 SW 2d 13, 357 Mo 601—State ex rel Smith v Hughes, 200 SW 2d 360, 356 Mo 1—Welch v Welch, 190 SW 2d 936, 354 Mo 654—O'Reilly v O'Reilly, 157 SW 2d 220—Kadderly v Vossbrink, 149 SW 2d 869—Larkin v Larkin, 119 SW 2d 351—Mowry v Norman, 103 SW 15, 204 Mo 173
- N J—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344
- Okl—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464
- Or—In re Fredricks' Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Southman's Estate, 168 P 2d 572, 178 Or 462
- Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523
- In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364—In re Henry's Estate, Orph, 52 York Leg Rec 177
- RI—Brousseau v Messier, 84 A 2d 608, 79 RI 106
- Tex—Thompson v Townsend, Civ App, 238 SW 2d 810, error refused no reversible error—Kutchinsky v Zillion, Civ App, 183 SW 2d 237, error refused—Cloudt v Hutcherson, Civ App, 175 SW 2d 643, error refused—Taylor v Small, Civ App, 71 SW 2d 895, error dismissed
- Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230
- Wis—In re Yahn's Estate, 45 NW 2d 702, 258 Wis 280, 25 ALR 2d 652 68 CJ p 747 note 59
- It is immaterial how undue influence is exercised, whether by solicitation, opportunity, flattery, putting in fear, or in some other manner, but whatever the means employed, the undue influence must have been in operation on testator's mind at the time of the execution of the will**
- Del—Conner v Brown, 3 A 2d 64, 9 WW Harr 529
59. U.S.—MacKay v Costigan, CA Ill, 179 F 2d 125
- Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167—Floyd v Dillaha, 256 SW 2d 48, 221 Ark 805—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Bollinger v Arkansas Val Trust Co, 151 SW 2d 675, 202 Ark 525—Puryear v Puryear, 94 SW 2d 695, 192 Ark 692—Davault v Parks, 79 SW 2d 68, 190 Ark 370—McCulloch v Campbell, 5 SW 590, 49 Ark 367
- Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64—Shevlin v Jackson, 124 NE 2d 895, 5 Ill 2d 43—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Pepe v Caputo, 97 NE 2d 260, 408 Ill 321—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321—Ennis v Gale, 95 NE 2d 222, 407 Ill 215—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353—DeMarco v McGill, 83 NE 2d 313, 402 Ill 46—Smith v Peters, 75 NE 2d 341, 398 Ill 108—Tidholm v Tidholm, 74 NE 2d 514, 397 Ill 363—Challiner v Smith, 71 NE 2d 324, 396 Ill 106—Schlachter v Schlachter, 71 NE 2d 153, 396 Ill 184—Frese v Meyer, 63 NE 2d 768, 392 Ill 59—Downey v Lawley, 36 NE 2d 344, 377 Ill 298—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041—Wickes v Walden, 81 NE 798, 228 Ill 56—Francis v Wilkinson, 35 NE 150, 147 Ill 370—Guild v Hull, 20 NE 665, 127 Ill 523
- Johnson v First Union Trust & Savings Bank, 273 Ill App 472
- Ind—Ludwick v Banet, App, 124 NE 2d 214—Copper v Copper, 51 NE 2d 100, 114 Ind App 261
- Neb—In re O'Donnell's Estate, 64 N. W 2d 116, 158 Neb 583—In re Thompson's Estate, 44 NW 2d 814, 153 Neb 375—In re Bainbridge's Estate, 36 NW 2d 625, 151 Neb 142
60. Cal—In re Lingenfelter's Estate, 241 P.2d 990, 38 Cal 2d 571—In re Estate of Arnold, 107 P 2d 25, 16 Cal 2d 573—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 581
- In re Lombardi's Estate, 276 P. 2d 67, 128 Cal App 2d 606—In re Kerr's Estate, 271 P 2d 234, 127 Cal App 2d 521—In re Dobrzynsky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Del Fosse's Estate, 154 P.2d 734, 67 Cal App 2d 490—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d 111—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Webster's Estate, 137 P 2d 751, 59 Cal App 2d 1—In re Rabinowitz' Estate, 135 P 2d 579,

instrument,<sup>61</sup> and the result cannot be influenced by later occurrences<sup>62</sup>

**Object** It must be shown that the undue influence was exercised with the object of procuring a will in favor of particular parties<sup>63</sup>

**Result** In order to invalidate the will, it must be shown that the undue influence resulted in the making of testamentary dispositions which the testator would not otherwise have made<sup>64</sup>

**Making of will** Influence which is exerted merely to induce the making of a will, while leaving the testator free from influence as to the provi-

sions of the will, is not undue influence in the legal sense<sup>65</sup>

**Quantity of influence.** Undue influence is not measured by degree or extent, but by its effect,<sup>66</sup> so that no precise quantity of influence can be said to be necessary and sufficient in all cases, as the amount necessarily varies with the circumstances of each case,<sup>67</sup> and especially it varies accordingly as the strength or weakness of the mind of each testator varies, as discussed *infra* § 233

**Elements for consideration.** In determining the question of undue influence, all facts and circumstances must be taken into consideration<sup>68</sup> The

58 Cal App 2d 106—In re Velladao's Estate, 88 P 2d 187, 31 Cal App 2d 355—In re Burns' Estate, 80 P 2d 77, 26 Cal App 2d 741—In re Short's Estate, 58 P 2d 186, 14 Cal App 2d 258  
N Y—In re Ingamells' Will, 13 N Y S 2d 586, 257 App Div 1024  
Okla—Canfield v Canfield, 31 P 2d 152, 167 Okl 590  
Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523  
Tex—Maul v Williams, Civ App, 88 S W 2d 1087, motion granted, Com App, 78 S W 2d 164—Leeder v Leeder, Civ App, 161 S W 1112, error refused.

**In order to vitiate a will,** there must be undue influence at the time of the testamentary act

Wash—In re Donaldson's Estate, 173 P 2d 159, 26 Wash 2d 72—In re McGilligan's Estate, 170 P 2d 661, 25 Wash 2d 313—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

61. Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—In re Geho's Estate, 17 A 2d 342, 340 Pa 412—Kish v Bakaysa, 199 A 321, 330 Pa 533—In re Tetlow's Estate, 112 A 758, 269 Pa 486—Kutus v Hager, 112 A 45, 269 Pa 103  
In re Gluck's Estate, Orph, 43 Lack Jur 101

Vt—Central Hanover Bank & Trust Co v Froment, 49 A 2d 111, 114 Vt 523

62. Cal—In re Webster's Estate, 137 P 2d 751, 59 Cal App 2d 1

**Quarrel between testatrix' brothers and testatrix' sister** with whom testatrix lived until her death could have no legal effect on will on ground that will was executed under undue influence, where quarrel took place after her death

Cal—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367.

63. U.S.—MacKay v Costigan, CA Ill, 179 F 2d 125  
Ark—Thiel v Mobley, 265 S W 2d 507, 223 Ark 167—In re McConnell's Estate, 257 S W 2d 34, 222 Ark 4—Floyd v Dillaha, 256 S W 2d 48, 221 Ark 805—Toombs v Blankenship, 221 S W 2d 417, 215 Ark 551—Parette v Ivey, 190 S W 2d 441, 209 Ark 364—Bollinger v Arkansas Val Trust Co, 151 S W 2d 675, 202 Ark 525—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692—Davault v Parks, 79 S W 2d 68, 190 Ark 370—Lavenue v Lewis, 46 S W 2d 649, 185 Ark 159—Alford v Johnson, 146 S W 516, 103 Ark 236—McCulloch v Campbell, 5 S W 590, 49 Ark 367  
Ill—Redmond v Steele, 126 NE 2d 619, 5 Ill 2d 602—Shevlin v Jackson, 124 NE 2d 895, 5 Ill 2d 43—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321—Ennis v Gale, 95 NE 2d 322, 407 Ill 215—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353—DeMarco v McGill, 83 NE 2d 313, 402 Ill 46—Tidholm v Tidholm, 74 NE 2d 514, 397 Ill 363—Challiner v Smith, 71 NE 2d 324, 396 Ill 106—Frese v Meyer, 63 NE 2d 768, 392 Ill 59—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041

Okla—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309  
Tex—In re Burns' Estate, 52 S W 98, 21 Tex Civ App 512  
Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230  
68 C J p 747 note 60

64. Cal—Estate of Calkins, 44 P 577, 112 Cal 296  
In re Knight's Estate, 50 P 2d 475, 9 Cal App 2d 454  
Iowa—Olsen v Corporation of New Melleray, 60 N W 2d 832  
N J—In re Weeks' Estate, 103 A 2d 43, 29 N J Super 533  
In re McComb, 177 A 849, 118 N J Eq 119  
Or—In re Hill's Estate, 256 P 2d 735,

198 Or 307—In re Lobb's Will, 160 P 2d 295, 177 Or 162  
Utah—In re George's Estate, 112 P. 2d 498, 100 Utah 230  
68 C J p 748 note 61

65. Me—In re Haley's Estate, 84 A. 2d 808, 147 Me 173  
Md—Struth v Decker, 59 A. 727, 100 Md 368  
Mo—Lindsay v Shaner, 236 S W 319, 291 Mo 297  
N Y—In re Seagrist's Will, 37 N Y S 496, 1 App Div 615 affirmed 48 NE 1107, 153 N Y 682  
In re Campbell's Will, 136 N Y S. 1086

Suggestion as to making of will see *infra* § 225

66. Me—In re Haley's Estate, 84 A 2d 808, 147 Me 173—In re Cox' Will, 29 A 2d 281, 139 Me 261—In re O'Brien's Appeal, 60 A 880, 881, 100 Me 156  
N J—In re Sullivan's Will, 8 A 2d 258, 126 N J Eq 182—Dumont v Dumont, 19 A 467, 46 N J Eq 223  
Utah—In re Lavelle's Estate, 248 P 2d 372

67. Ga—Fowler v Fowler, 28 S E 2d 458, 197 Ga 53  
Ind—Noyer v Ecker, App, 119 NE 2d 902—Van Ginkle v Mooy, 10 NE 2d 759, 104 Ind App 282  
N J—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344  
RI—Reynolds v Marsden, 197 A 193, 60 R I 91—Heroux v Heroux, 191 A 265, 58 R I 79

Tex—Long v Long, 125 S W 2d 1034, 133 Tex 96, mandate conformed to Civ App, 129 S W 2d 1206, error dismissed 138 S W 2d 798, 133 Tex 623

Wash—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912  
68 C J p 748 note 62

68. Ark—Brown v Emerson, 170 S W 2d 1019, 205 Ark 735—Hyatt v Wroten, 43 S W 2d 726, 184 Ark 847.

character of the transaction,<sup>69</sup> the physical and mental condition of the testator, as discussed *infra* § 233, the relationship of the parties,<sup>70</sup> the means of coercion or influence employed,<sup>71</sup> and the motive behind the influence,<sup>72</sup> are elements for consideration on the question of undue influence. Further, undue influence is determined not in the light of what the court deems just, but in the light of what the testator really desired,<sup>73</sup> as it may consist of anything which subordinates the will of the testator.<sup>74</sup>

*Injury to some one* According to some authority, the undue influence which will vitiate a will must be influence which materially injures some one,<sup>75</sup> so that, where the testator divided his property equally among his children, there can be no complaint of undue influence.<sup>76</sup>

*Unequal, unjust, or unnatural disposition.* The fact that the will of a testator of admitted testamentary capacity disposes of his property in an unnatural manner,<sup>77</sup> unjustly,<sup>78</sup> or unequally,<sup>79</sup> and

Cal—Kenny v. Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed.  
D C—Wiggins v Smith, 183 F 2d 831, 87 US App DC 112.  
Ga—Bowman v Bowman, 55 SE 2d 298, 205 Ga 796.

Iowa—Gregory v Proffit, 31 NW 2d 899, 239 Iowa 463.

Minn—In re Wilson's Estate, 27 NW 2d 429, 223 Minn 409—In re Stephens' Estate, 293 NW 90, 207 Minn 597.

N J—In re Filo's Will, 75 A 2d 517, 9 NJ Super 146—Hughes v Zeller, 65 A 2d 759, 3 NJ Super 146—In re Skewis' Will, 64 A 2d 892, 2 NJ Super 114.

In re Nixon's Will, 41 A 2d 119, 136 NJ Eq 242—In re Neuman's Estate, 32 A 2d 826, 133 NJ Eq 532—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344—Elkinton v Brick, 15 A 391, 44 NJ Eq 154, 1 LRA 161.

Tex—Pratt v Hayward, Civ App, 151 SW 2d 874—Russell v Boyles, Civ App, 29 SW 2d 891.  
68 CJ p 748 note 64.

**Active agency of chief beneficiary** in procuring a will, especially in absence of those having equal claim on bounty of testator, who is enfeebled by age and diseased, is a circumstance indicating the probable exercise of undue influence.

Ill—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160.

**Although a change of testamentary scheme** is an important circumstance on issue of undue influence, its force necessarily depends on its connection with other related facts.

N Y—In re Buttikofer's Will, 79 NY S 2d 252, affirmed 93 NY S 2d 920, 276 App Div 883.

#### **Fixed determination and purpose**

Will executed by a testator who had mind sufficient to appreciate the natural objects of his bounty, his duty to them, and to make a survey of his estate and to dispose of it according to a fixed determination and purpose would not be annulled on ground of undue influence.

Ky—Rueff v Light, 114 SW 2d 506, 272 Ky 449.

**Undue influence, as used in will contest, is relative**, that is, influence which reaches stage of being undue influence is not at all the same in every case, and, accordingly, every case must be viewed in its own particular setting.

Cal—In re Bucher's Estate, 120 P 2d 44, 48 Cal App 2d 465.

**Undue influence which will defeat a will** is largely a matter of inferences from circumstances surrounding testator, his life, character and mental condition and opportunity existing for exercise of improper control.

Neb—In re Bainbridge's Estate, 36 NW 2d 625, 151 Neb 142.

69. Fla—Gardiner v Goertner, 149 So 186, 110 Fla 377.

70. Fla—Gardiner v Goertner, *supra*.

Ga—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53—Peretzman v Simon, 196 SE 471, 185 Ga 681—Stephens v Bonner, 162 SE 383, 174 Ga 128.

Ind—Van Ginkle v Mooy, 10 NE 2d 759, 104 Ind App 282.

Minn—In re Stephens' Estate, 293 NW 90, 207 Minn 597.

N J—Elkinton v Brick, 15 A 391, 44 NJ Eq 154, 1 LRA 161.

Confidential, blood, and marital relationships as constituting undue influence see *infra* § 230.

#### **Grandchildren left destitute**

A testator's disposition of his property would not be disturbed if he were not unduly influenced, notwithstanding grandchildren for whom no provision was made were allegedly left destitute.

Mo—Larkin v Larkin, 119 SW 2d 351.

#### **Nieces**

Nieces, who were uncle's only heirs, seeking to set aside uncle's will on ground of undue influence by chief beneficiary did not have claim on, nor could they expect to be remembered by, uncle as by father, with respect to significance of uncle's almost entirely eliminating nieces from will.

Fla—Henson v Denniston, 169 So 624, 124 Fla 843.

71. N J—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344.

72. Wash—In re Hanson's Estate, 14 P 2d 702, 169 Wash 637.

73. Cal—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106.

Wis—In re Schaefer's Estate, 241 NW 382, 207 Wis 404.

#### **Questions presented**

In determining whether will was result of undue influence, question is whether it was desire of testator that his property should be disposed of after his death as disposed of by the will, question is not whether will is such a will as, in opinion of jury or court, testator should have made under circumstances.

Wyo—In re Anderson's Estate, 255 P 2d 983, 71 Wyo 238.

#### **Motive**

Motive prompting testator to make bequest need not be meritorious to avoid invalidation thereof on ground of undue influence, only essential being that will prompting bequest be that of testator.

Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598.

**Testator may take into account**, when considering his duties to relatives, past neglect, indifference, estrangement, and the like.

Aik—Werbe v Holt, 237 SW 2d 478, 218 Ark 476—Parette v Ivey, 190 SW 2d 441, 209 Ark 364.

74. Cal—In re Olson's Estate, 126 P 171, 19 Cal App 379.

75. N J—In re Tunison's Will, 90 A 695, 83 NJ Eq 277, affirmed 93 A 1087.

76. N J—In re Tunison's Will, *supra*.

77. Cal—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106—In re Burns' Estate, 80 P 2d 77, 26 Cal App 2d 741.

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444.

78. Cal—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106.

79. Iowa—In re Muhr's Will, 256 NW 305, 218 Iowa 867.



however much at variance with expressions by the testator concerning relatives or the natural objects of his bounty,<sup>80</sup> does not invalidate the will, unless undue influence was actually exercised on the testator

**Codicil** Where the codicil does not change the manner or extent of testamentary disposition in the will proper, it has been held that the question of undue influence must be determined solely by reference to acts bearing on the execution of the codicil<sup>81</sup>

## § 225. — Advice or Suggestions

Advice or suggestions addressed to the testator do not constitute undue influence unless so strongly and persistently urged that he is unable to resist adopting them

Mere advice or suggestions, addressed to the sound judgment of the testator and intelligently weighed and considered by him, do not constitute undue influence unless they are so strongly and persistently

urged that the testator is unable to resist adopting them,<sup>82</sup> although the will might not have been made but for such advice or persuasion,<sup>83</sup> and this is especially true where the suggestion is directed only to the making of a will in general and not as to what it should contain<sup>84</sup> The making of a will need not originate with the testator, provided he intended it as his own will and understandingly adopts it<sup>85</sup> The testator has a right to seek advice from third persons, even though they are not lawyers<sup>86</sup>

*Request of donor* that the recipient dispose of the property in a certain way is not undue influence<sup>87</sup>

## § 226. — Importunity, Persuasion, or Solicitation

Influence consisting of appeals, requests, entreaties, arguments, flattery, cajolery, persuasion, solicitations, or even importunity becomes "undue" only when it is extended to such a degree as to override and destroy the free agency of the testator

Every influence exerted on a testator is not undue influence,<sup>88</sup> and it is well settled that influence,

80. Cal—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d 111—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106—In re Buins' Estate, 80 P 2d 77, 26 Cal App 2d 741

Conformity of will to expressed intentions as affecting testamentary capacity see *infra* § 72

81. Cal—In re Horton's Estate, 17 P 2d 184, 128 Cal App 249

82. Cal—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed

Ill—Johnson v First Union Trust & Savings Bank, 273 Ill App 472

Ky—Faulkes v Brummett's Adm'r, 204 SW 2d 493, 305 Ky 434—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1

Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Kramer's Estate, 37 NW 2d 564, 324 Mich 626—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102—In re Reed's Estate, 263 NW 76, 273 Mich 334—Maynard v Vinton, 26 NW 401, 59 Mich 139, 60 Am R 276

Minn—In re Rasmussen's Estate, 69 NW 2d 630

Mo—Frank v Greenhall, 105 SW 2d 929, 340 Mo 1228

Neb—*Corpus Juris* cited in In re Farr's Estate, 33 NW 2d 454, 461, 150 Neb 67

NJ—McCoon v. Allen, 17 A 820, 45 N J Eq 708

NY—In re Barnes' Will, 134 NYS 2d 679, 284 App Div 743, motion dismissed 126 NE 2d 174, 308 NY 833, appeal denied 141 NYS 2d 844,

285 App Div 1216—In re Henderson's Will, 1 NYS 2d 871, 253 App Div 140, reargument denied, 1 NYS 2d 857, 253 App Div 869, motion granted 15 NE 2d 679, 278 NY 531

Or—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

Pa—In re Hausman's Estate, Orph., 26 Erie Co 26—In re Henry's Estate, Orph., 52 York Leg Rec 177

SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78

Tex—Barton v Bailey, Civ App, 202 SW 2d 277, error refused no reversible error

Wash—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912 68 C J p 749 note 74.

### Legal advice

In conferring with client on matters of bequest, attorney may suggest and advise when requested to do so, but from then on any effort to persuade or dissuade client takes on complexion of influence that may be found by a jury to be undue, particularly if object of bequest is also a client of attorney

Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407

**Suggestion with reference to wills,** is a term applied specially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view

La—Zerega v Percival, 15 So 476, 481, 46 La Ann 590, 606

83 Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Kramer's Estate, 37 NW 2d 564, 324 Mich 626—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102—In re Reed's Estate, 263 NW 76, 273 Mich 334—Maynard v Vinton, 26 NW 401, 59 Mich 139, 60 Am R 276

NY—Smith v Keller, 98 NE 214, 205 NY 39

In re O'Connor's Estate, 51 NYS 2d 549

68 C J p 749 note 75

84 NC—In re Lowe's Will, 104 S. E 143, 180 NC 140.

68 C J p 749 note 76

Influence exerted to induce the making of a will generally see *supra* § 224

85. NY—In re Fleischmann's Will, 163 NYS 426, 176 App Div 785

**In absence of fraud or duress,** a wife's will is still her will, and is not the result of undue influence within the statute, notwithstanding she comes to the state of mind where she decides to let her husband dictate its terms, provided she executes it as her will

Ga—Boland v. Aycock, 12 SE 319, 191 Ga 327.

86 Ill—Grantz v. Grantz, 145 NE 398, 314 Ill 243

68 C J. p 749 note 78

87. NY—In re Bogardus' Will, 190 NYS 535, 198 App Div 399

88. Ga—Northwestern University v. Crisp, 88 SE 2d 26, 211 Ga. 636



consisting of appeals, requests, entreaties, arguments, flattery, cajolery, persuasion, solicitations, or even importunity, is legitimate and becomes "undue," so as to invalidate the will, only when it is extended to such a degree as to override the discretion and destroy the free agency of the testator <sup>89</sup>

A will executed by the testator that he might secure peace at home and which disposed of property contrary to his wishes, if executed in the exercise of the testator's free agency, has been held not to be the result of undue influence <sup>90</sup>

N J—In re Livingston's Will, 73 A 2d 916, 5 N J 65

In re Raynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344—McCoon v Allen, 17 A 820, 45 N J Eq 708

Pa—In re Melvin's Estate, Orph, 45 Lack Jur 229

Tex—Long v Long, 125 S W 2d 1034, 133 Tex 96, mandate conformed to Civ App, 129 S W 2d 1206, error dismissed 138 S W 2d 798, 133 Tex 623

Shoubrouck v Welch, Civ App, 271 S W 2d 704, error refused no reversible error

Wash—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 444—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912

89. Cal—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed In re Tribbey's Estate, 135 P 2d 603, 53 Cal App 2d 100—In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

D C—MacMillan v Knost, 136 F 2d 235, 75 US App D C 261, certiorari denied 63 S Ct 32, 317 US 641, 87 L Ed 516

Ga—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Norman v Hubbard, 47 SE 2d 574, 203 Ga 530—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga 247

Ill—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353—Knudson v Knudson, 46 NE 2d 1011, 382 Ill 492—Ryan v Deneen, 31 NE 2d 582, 375 Ill 452—Quatham v Schoon, 19 NE 2d 750, 370 Ill 606

Johnson v First Union Trust & Savings Bank, 273 Ill App. 472

Iowa—In re Rogers' Estate, 47 N W 2d 818, 242 Iowa 627—In re Lochmiller's Estate, 30 N W 2d 136, 238 Iowa 1232—In re Estate of Hollis, 12 N W 2d 576, 234 Iowa 761—In re Brooks' Estate, 294 N W 735, 229 Iowa 485—Walters v Heaton, 271 N W 310, 223 Iowa 405—In re Johnson's Estate, 269 N W 792, 222 Iowa 787—In re Muhr's Will, 256 N W 305, 218 Iowa 867

Kan—Ginter v Ginter, 101 P 634, 79 Kan 721, 22 L R A, NS, 1024

Ky—Faulkes v Brummett's Adm'r, 204 S W 2d 493, 305 Ky 434—Kentucky Trust Co v Gore, 192 S W 2d 749, 302 Ky. 1—McAtee v. Mc-

Atee, 181 S W 2d 401, 297 Ky 865—Chrisman v Quick, 193 S W 13, 174 Ky 845

Mass—Wellman v Carter, 190 NE 493, 286 Mass 237

Mich—In re Sprenger's Estate, 60 N W 2d 436, 337 Mich 514—In re Johnson's Estate, 40 N W 2d 163, 326 Mich 310—In re Kramer's Estate, 37 N W 2d 564, 324 Mich 626—In re Hannan's Estate, 23 N W 2d 222, 315 Mich 102—In re Hoffman's Estate, 2 N W 2d 442, 300 Mich 406—In re Grow's Estate, 299 N W 836, 299 Mich 133—In re Balk's Estate, 298 N W 779, 298 Mich 303—In re Loomis' Estate, 265 N W 520, 275 Mich 43—In re Reed's Estate, 263 N W 76, 273 Mich 334—Maynard v Vinton, 26 N W 401, 59 Mich 139, 60 Am R 276

Neb—In re Maruska's Estate, 64 N W 2d 734, 158 Neb 723—In re Fehrenkamp's Estate, 48 N W 2d 421, 154 Neb 488—In re Thompson's Estate, 44 N W 2d 814, 153 Neb 375—In re Farr's Estate, 33 N W 2d 454, 150 Neb 67

N J—In re Livingston's Will, 73 A 2d 916, 5 N J 65

In re Raynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344—Elkinton v Brick, 15 A 391, 44 N J Eq 154, 1 L R A 161

N Y—In re Henderson's Will, 1 N Y S 2d 871, 253 App Div 140, motion granted 15 NE 2d 679, 278 N Y 531

In re O'Connor's Estate, 51 N Y S 2d 549

Ohio—Meyer v Geiger, App, 84 NE 2d 581—Lovellady v Rhinelander, 21 NE 2d 1001, 60 Ohio App 493

Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—In re Cookson's Estate, 188 A 904, 325 Pa 81

In re Rothermel's Estate, Orph, 36 Berks Co 79—In re Brooks' Estate, Orph, 27 Del Co 140—In re Hausman's Estate, Orph, 26 Erie Co 26—In re Singer's Estate, Orph, 45 Lanc L Rev 585—In re Morris' Estate, Orph, 21 Wash Co 120—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Henry's Estate, Orph, 52 York Leg Rec 177

S C—Smith v Whetstone, 39 SE 2d 127, 209 S C 78

Farr v. Thompson, 25 S C L 15.

Tenn—Hammond v Union Planters Nat. Bank, 222 S W 2d 377, 189 Tenn 93

Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628—Solari v Albertine, 193 S W 2d 111, 29 Tenn App 61—Fitch v American Trust Co, 4 Tenn App 87

Tex—Griffin v Griffin, Civ App, 271 S W 2d 714—Black v Black, Civ App, 240 S W 2d 458, error refused no reversible error—Pullen v Russ, Civ App, 209 S W 2d 630, error refused no reversible error—Barton v Bailey, Civ App, 202 S W 2d 277, error refused no reversible error—Bridges v Howell, Civ App, 122 S W 2d 665

Wash—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Zelinsky's Estate, 227 P 507, 130 Wash 165

W Va—Ritz v Kingdon, 79 SE 2d 123—Ebert v Ebert, 200 SE 831, 120 W Va 722

Wis—In re Dobson's Will, 46 N W 2d 758, 258 Wis 587  
68 C J p 749 note 80

#### Persuasion accompanied by fraud

If persuasion or importunity consists of, or is accompanied by, fraud or misrepresentation of material facts in procuring execution of will, the case falls under the statute which avoids a will procured by undue influence

Ga—Boland v Aycock, 12 SE 2d 319, 191 Ga 327

Urgings by daughters that son be omitted from will were not alone undue influence invalidating will  
Tenn—Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628

**Destruction of testator's free agency**, so as to invalidate will on ground of undue influence, may be accomplished by persuasion, importunities, force, threats or coercion of such character and degree that they cannot be resisted

Ind—Cooper v Cooper, 51 NE 2d 100, 114 Ind App 261.

90. Ala—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624

Ga—Boland v Aycock, 12 SE 2d 319, 191 Ga 327

68 C J p 750 note 81.

## § 227. — Kindness and Attention, Love and Affection

Influence arising from acts of kindness, attention, and congenial intercourse, love or affection or desire to gratify one beloved, which does not seek to control the mind of the testator, is not undue influence

Influence arising from mere acts of kindness, attention, and congenial intercourse, which operate to secure or retain the affection, esteem, or goodwill of the testator, and induce him to make the persons performing such kindly offices beneficiaries in his will, do not constitute undue influence,<sup>91</sup> unless such acts are carried out with the purpose and design of subjecting the mind of the testator to the influence and the direction of the person exercising the influence, and thus deprive the testator of his

free will, free act, and free agency<sup>92</sup> The application of this rule is not confined to relatives of the testator, but extends also to his friends<sup>93</sup> The influence arising from love, or affection, or desire to gratify one beloved, which does not seek to control the mind of the testator, is not undue influence<sup>94</sup>

## § 228. — Creation of Resentment and False Impressions in Mind of Testator

A will that is based on false statements and accusations to a testator concerning the natural objects of his bounty may be declared void for undue influence

Where a person makes false statements and accusations to a testator concerning the natural objects of the latter's bounty, with the intention and effect

91. Cal—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

D C—Barry v American Sec & Trust Co, 135 F 2d 470, 77 US App DC 351, 146 ALR 1204—MacMillan v Knost, 126 F 2d 235, 75 US App DC 261, certiorari denied 63 SCt 32, 317 US 641, 87 L Ed 516

Iowa—In re Soderland's Estate, 30 NW 2d 128, 239 Iowa 569

Ky—Nunn v Williams, 254 SW 2d 698—Faulkes v Brummett's Adm'r, 204 SW 2d 493, 305 Ky 434—Kentucky Trust Co v Gore, 192 SW 2d 749, 302 Ky 1—McAtee v McAtee, 181 SW 2d 401, 297 Ky 865

—Madden v Cornett, 160 SW 2d 607, 290 Ky 268—Ecken's Ex'r v Abbey, 141 SW 2d 863, 283 Ky 449—Karr v Karr's Ex'r, 141 SW 2d 279, 283 Ky 355—Combs v Combs, 112 SW 2d 989, 271 Ky 543—Whallen's Ex'r v Moore, 58 SW 2d 601, 248 Ky 348—Chrisman v Quick, 193 SW 13, 174 Ky 845

Me—Appeal of Eastman, 194 A 586, 135 Me 233

NJ—In re Alper's Will, 60 A 2d 320, 142 NJ Eq 529, affirmed 65 A 2d 736, 2 NJ 104—In re White's Estate, 20 A 2d 442, 129 NJ Eq 566

NY—In re Wharton's Will, 62 NY S 2d 169, 270 App Div 670, affirmed 76 NE 2d 328, 297 NY 671—In re Guidr's Will, 20 NYS 2d 240, 259 App Div 652, affirmed 30 NE 2d 723, 284 NY 680, reargument denied 32 NE 2d 829, 285 NY 540

Ohio—Lovelady v Rhinelander, 21 NE 2d 1001, 60 Ohio App 493

Okl—King v Gibson, 249 P 2d 84, 207 Okl 251—Canfield v Canfield, 31 P 2d 152, 167 Okl 590.

Or—Corpus Juris quoted in In re Scott's Estate, 228 P 2d 417, 426, 191 Or 90—In re Perry's Estate, 181 P 2d 783, 181 Or 332.

Pa—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420

In re Hausman's Estate, Orph 26 Erie Co 26—In re Lockard's Will, Orph, 50 Lanc L Rev 455—In re Miller's Estate, Orph, 35 West Co 11—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438—In re Henry's Estate, Orph, 52 York Leg Rec 177

RI—Talbot v Bridges, 173 A 72, 54 RI 337

W Va—Ritz v Kingdon, 79 SE 2d 123—Ebert v Ebert, 200 SE 331, 120 W Va 722

68 CJ p 750 note 82

92. Or—Corpus Juris quoted in In re Scott's Estate, 228 P 2d 417, 426, 191 Or 90

Pa—Keller v Keller, 86 A 1065, 239 Pa 467

93. Neb—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1

Ohio—Brown v Jacoby, 9 NE 2d 693, 55 Ohio App 250

Or—Corpus Juris quoted in In re Scott's Estate, 228 P 2d 417, 426, 191 Or 90

68 CJ p 750 note 84

### Friendship

(1) Mere kindly attentions of a close friend did not constitute exercise of undue influence on testatrix  
Or—In re Andersen's Estate, 235 P 2d 869, 192 Or 441

(2) Where mere acts of friendship are inducing cause of making of will, no undue influence is shown  
NY—In re Chinsky's Will, 268 NY S 719, 150 Misc 274

### Infatuation

Mere fact that testator was infatuated with principal beneficiary would not be sufficient to set aside will

Fla—Henson v Denniston, 169 So 624, 124 Fla 343

94. Ark—Thiel v Mobley, Ark, 265 SW 2d 507, 223 Ark. 167—In re McConnell's Estate, 257 S.W. 2d 34,

222 Ark 4—Floyd v Dillaha, 256 SW 2d 48, 221 Ark 805—Weirbe v Holt, 237 SW 2d 478, 218 Ark 476—Toombs v Blankenship, 221 S W 2d 417, 215 Ark 551—Shippen v Shippen, 211 SW 2d 433, 213 Ark 517—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Bollinger v Arkansas Val Trust Co, 151 SW 2d 675, 202 Ark 525—Purvey v Puryear, 94 SW 2d 695, 192 Ark 692—Davault v Parks, 79 SW 2d 68, 190 Ark 370—Lavenue v Lewis, 46 S W 2d 649, 185 Ark 159

Cal—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, App, 269 P 2d 641, hearing dismissed

Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—In re Starr's Estate, 170 So 620, 125 Fla 536

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64—Knudson v Knudson, 46 NE 2d 1011, 382 Ill 492—Quathamer v Schoon, 19 NE 2d 750, 370 Ill 606

Mo—Glover v Bruce, 265 SW 2d 346—Hahn v Bruesseke, 155 SW 2d 98, 348 Mo 708—Walter v Alt, 157 S W 2d 135, 348 Mo 53—Kaddery v Vossbrink, 149 SW 2d 869—Larkin v Larkin, 119 SW 2d 351—Beckmann v Beckmann, 52 SW 2d 818, 331 Mo 133—Teckenbrock v McLaughlin, 108 SW 46, 209 Mo 533

O'Reilly v O'Reilly, App, 157 S W 2d 220—Carl v Ellis, App, 110 S W 2d 805

NJ—In re White's Estate, 20 A 2d 442, 129 NJ Eq 566

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Darst's Will, 54 P 947, 34 Or 58

SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78

Floyd v Floyd, 34 SCL 23, 49 Am D 626

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

Tex—Bass v Bass, Civ App, 207 S W 2d 103, refused no reversible error

68 CJ p 750 note 85.

of alienating his affections and causing him to make certain testamentary dispositions of his property, the will may be declared void for undue influence, or fraud and undue influence combined.<sup>95</sup> It is essential, however, in order to avoid a will for undue influence of this nature, that the statements made be false,<sup>96</sup> that the testator be unable, through weakness of mind and body or concealment of the facts, to determine the falsity of the statements and resist the influence,<sup>97</sup> and that he rely and act on them rather than on other motives and inducements.<sup>98</sup> Where it is shown that the testator knew of the falsity of the representations and that he did not rely thereon, such attack fails.<sup>99</sup> A case of undue influence by a devisee over the testatrix with whom she lived, by false statements or suggestions, is not made out by mere proof that she acquiesced in the testatrix's views in respect of contestants, without proof that she knew, or at least had reason to believe, that the testatrix's prejudice was unwarranted by the facts.<sup>1</sup> Ordinarily, unkind words said about the contestant to the testator, not amounting to moral or physical coercion, do not constitute undue influence.<sup>2</sup>

## § 229. — Moral or Religious Teachings and Doctrines

Generally, the influence of the general doctrines of the church of which a testator is a member is not "undue" so as to avoid his will

95. DC—Duckett v Duckett, 134 F 2d 527, 77 US App DC 303  
68 C J p 751 note 86

### Artful misrepresentations

Wills procured by artful misrepresentations and fraudulent contrivances are void

SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78

Farr v Thompson, 25 SCL 15

96 NJ—In re Corblis' Will, 52 A. 996, affirmed 55 A 1132, 65 NJ Eq 768

Tenn—Corpus Juris quoted in Cude v Culberson, 209 SW 2d 506, 521, 30 Tenn App 2d 628

97 Tenn—Corpus Juris quoted in Cude v Culberson, 209 SW 2d 506, 521, 30 Tenn App 2d 628  
68 C J p 751 note 88

98 Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514

Tenn—Corpus Juris quoted in Cude v. Culberson, 209 SW 2d 506, 521, 30 Tenn App 2d 628  
68 C J p 751 note 89

99. Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

Accusations, which testator did not believe, against pretermitted son-in-law to the effect that son-in-law had poisoned wife did not invalidate will

either for fraud or undue influence  
Tenn—Cude v Culberson, supra

1. NJ—Zelozoskei v Mason, 54 A 97, 64 NJ Eq 327

2. Mich—In re Klink's Estate, 178 NW 14, 210 Mich 614

3. US—Newton v Carbery, DC, 18 F Cas No 10,189, 5 Cranch CC 626  
Mo—Minturn v Conception Abbey, App, 61 SW 2d 352

4. US—Thompson v Hawks, CC Ind, 14 F 902, 11 Biss 440

5. Wash—In re Hanson's Estate, 151 P 264, 87 Wash 113  
68 C J p 751 note 94

6. Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

Mo—Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148

7. Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

Ill—Wink v Hagen, 101 NE 2d 585, 410 Ill 158

Mo—Clark v Powell, 175 SW 2d 842, 351 Mo 1121

Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148

While the influence of the general doctrines of the church of which a testator is a member is not "undue," so as to avoid his will,<sup>3</sup> the influence of spiritualism is, where the testator allows it to dominate his whole life, and his belief is artfully used by a spirit medium to induce the making of a will in which she is the sole beneficiary,<sup>4</sup> and a belief in any religious creed, if played on by one designing to influence, and thereby influencing, the believer's testamentary disposition of his property, may constitute undue influence.<sup>5</sup>

## § 230. — Confidential and Personal Relations

a In general

b Personal relations

### a. In General

A confidential relation exists whenever trust and confidence is reposed by the testator in the integrity and fidelity of another, but the existence of such relation between the testator and the favored beneficiary, standing alone, does not necessarily constitute undue influence

With respect to undue influence on a testator, the terms "confidential relation" and "fiduciary relation" are synonymous,<sup>6</sup> and exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.<sup>7</sup> While blood relationship, is an important and material circumstance in considering

Fiduciary or confidential relations

Generally see Confidential 15 C J S p 821

As affecting contracts see Contracts § 132

Relating to trusts see Trusts § 151 b

### Similar statements

(1) To show fiduciary relationship, testator's special confidence and trust in, and domination and influence over him by, legatee must be proved

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64

(2) A confidential relation exists between testatrix and another when circumstances make it certain that parties do not deal on equal terms, and that one side exercises an overmastering influence over the other

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523

In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

(3) A confidential relation exists whenever relative position of parties is such that one has power and means to take advantage of or exercise undue influence over, the other  
Pa—In re Wilson's Estate, 72 A 2d 561, 364 Pa 488.

the question whether in fact a confidential relationship exists between testator and another,<sup>8</sup> consanguinity does not of itself create a fiduciary relationship between testator and beneficiary.<sup>9</sup> The existence of confidential relations between the testa-

tor and the favored beneficiary, standing alone, does not necessarily constitute undue influence,<sup>10</sup> although it may cause the court to examine the case with greater scrutiny,<sup>11</sup> and may, when coupled with other circumstances, raise a presumption of un-

In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37

In re Gayman's Estate, Orph, 21 Northumb Leg J 149

(4) Fiduciary relationship includes not only legal and technical relations, but is found wherever there is confidence reposed on one side and resulting superiority and influence on the other and such relationship may be moral, social, domestic or merely personal

Or—In re Perry's Estate, 181 P 2d 783, 181 Or 332

#### Conduct of business affairs

Fact that beneficiary of will had conducted testator's business affairs for several years did not of itself give rise to a fiduciary relationship Mich—In re Jennings' Estate, 55 N W 2d 812, 335 Mich 241

#### Dependency on another

Testatrix' dependency on another does not necessarily beget a confidential relation between testatrix and that other

I'a—In re King's Estate, 87 A 2d 469, 369 Pa 523

#### Preparation of will

Where proponent of will undertook to prepare testator's will making her sole beneficiary, having voluntarily assumed such a position of trust and confidence, proponent was bound by it

Cal—In re Rugani's Estate, 239 P 2d 500, 108 Cal App 2d 624

**Confidential relation held established**  
Mo—Machens v Machens, 263 SW 2d 724

Pa—In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37

In re Schwartz' Estate, Orph, 88 Pittsb Leg J 295, affirmed 16 A 2d 374, 340 Pa 170

**Confidential relation held not established**

NJ—In re Sullivan's Will, 8 A 2d 258, 126 N J Eq 182

8. Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

9. Cal—In re Welch's Estate, 273 P 2d 512, 43 Cal 2d 173—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

#### Parent and child

(1) A fiduciary relationship does not obtain between a parent and child

as a matter of law but must be proved by competent evidence

Ill—Pepe v Caputo, 97 NE 2d 260, 408 Ill 321

(2) A fiduciary relation between parent and child exists where there is confidence reposed on one side and resulting superiority and influence on the other side, and origin of relation is immaterial and may be legal, moral, social, domestic or merely personal, and if the confidence in fact exists and is reposed by one party and accepted by the other, the relation is fiduciary and equity will regard dealings between the parties according to the rules which apply to such relation

Ill—Pepe v Caputo, supra

10. Ark—Thiel v Mobley, 265 SW 2d 507, 223 Ark 167—Toombs v Blankenship, 221 SW 2d 417, 215 Ark 551—Bollinger v Arkansas Val Trust Co, 151 SW 2d 675, 202 Ark 525—Purvey v Puryear, 94 SW 2d 695, 192 Ark 692—Davault v Parks, 79 SW 2d 68, 190 Ark 370—Lavenue v Lewis, 46 SW 2d 649, 185 Ark 159—McCulloch v Campbell, 5 SW 590, 49 Ark 367  
Cal—In re Kemp's Estate, App, 190 P 2d 619—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135  
Ga—Bailey v Bailey, 50 SE 2d 617, 204 Ga 556—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Marlin v Hill, 15 SE 2d 473, 192 Ga 434

Ill—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499

Iowa—In re Soderland's Estate, 30 NW 2d 128, 239 Iowa 569

Mo—Powell v Raleigh, App, 244 SW 2d 387

Okl—In re Fletcher's Estate, 269 P 2d 349—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597—Barnes v Logston, 88 P 2d 361, 184 Okl 461—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Wheeler v Wade, 45 P 2d 66, 172 Okl 365—Canfield v Canfield, 31 P 2d 152, 167 Okl 590

Or—In re Detsch's Estate, 229 P 2d 264, 191 Or 161—In re Lobb's Will, 160 P 2d 295, 177 Or 162

Pa—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299

SD—In re Rowlands' Estate, 18 N W 2d 290, 70 SD 419

Wis—Corpus Juris cited in In re Faulks' Will, 17 NW 2d 423, 439, 246 Wis 319

68 C J p 751 note 96

#### Circumstance to consider

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219.

#### Attorney and client

(1) Mere existence of attorney and client relationship without more does not establish undue influence

NJ—In re Davis' Will, 101 A 2d 521, 14 N J 166.

Tenn—Hickey v Beeler, 171 SW 2d 277, 180 Tenn 31

Tex—Frost Nat Bank v Boyd, Civ App, 188 SW 2d 199, affirmed 190 SW 2d 497, 145 Tex 206, 168 A L R 1326

(2) Existence of confidential relation, such as attorney and client, affords peculiar opportunities for undue influence, and where dominant party in such relation is active either in preparation or execution of will, and is made beneficiary thereunder, suspicion of undue influence arises, but such suspicion does not amount to a presumption, and its weight is fully governed by other circumstances

Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407—Graham v Courtright, 161 N W 774, 180 Iowa 394

(3) Attorney's preparation of income tax returns for testatrix' son did not make the attorney an attorney in fact for son and did not disclose that testatrix' will, which was drawn by attorney and of which son was chief beneficiary was induced by undue influence

Ill—Pepe v Caputo, 97 NE 2d 260, 408 Ill 321

#### Scrivener of will also beneficiary

NJ—In re Sullivan's Will, 8 A 2d 258, 126 N J Eq 182  
68 C J p 751 note 96 [b]

11. Mass—Reilly v McAuliffe, 117 NE 2d 811, 331 Mass 144—Wellman v Carter, 190 NE 493, 286 Mass 237

SD—In re Rowlands' Estate, 18 N W 2d 290, 70 SD 419

Tex—Frost Nat Bank v Boyd, Civ App, 188 SW 2d 199, affirmed 190 SW 2d 497, 145 Tex 206, 168 A L R 1326

Wis—In re Sowka's Will, 19 NW 2d 898, 247 Wis 498—Corpus Juris cited in In re Faulks' Will, 17 NW 2d 423, 439, 246 Wis 319

68 C J p 751 note 97

#### Searching examination

Mass—Doggett v Morse, 12 NE 2d 867, 299 Mass 383.

It is physician's duty to exercise highest degree of good faith in dealing with patient, particularly in mak-

due influence, as discussed *infra* § 239, but the question must be determined, as in all other cases, by ascertaining whether the free agency of the testator has been destroyed<sup>12</sup> The mere fact that the confidential advisor's character was evil, and his motives, with respect to the testatrix, were sinister, is insufficient to establish undue influence<sup>13</sup> A will made on the faith of a promise of the beneficiary, honestly made, to dispose of the property in a specified manner is not obtained by undue influence<sup>14</sup>

### b. Personal Relations

It is natural and proper that persons occupying family relations should exercise some influence over each

other so that the influence of a child or spouse in the making of a will, in the absence of a showing that it was improperly exercised, does not invalidate the will Where the principal or sole beneficiary prepares the will, such beneficiary should insist that the testator procure independent advice.

Influence to make a particular provision in the will, which is not of such a character as to overcome the will of the testator, emanating from a spouse,<sup>15</sup> or relative,<sup>16</sup> who does not benefit by such provision, is not undue influence so as to vitiate the will The influence of a child<sup>17</sup> or spouse<sup>18</sup> to make a will in their favor, in the absence of a showing that it was improperly exercised,<sup>19</sup> does not vitiate the will, even though there

ing of patient's will devising most of his estate to physician

Wash—Foster v Brady, 86 F 2d 760, 198 Wash 13

12. Ga.—Bailey v Bailey, 50 SE 2d 617, 204 Ga 556—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226 Mich—Foshee v Krum, 52 NW 2d 358, 332 Mich 636

Wis—Corpus Juris cited in In re Faulks' Will, 17 NW 2d 423, 439, 246 Wis 319

68 CJ p 752 note 1

#### Appointment of attorney for estate

Fact that will provided that party shall be attorney in matter of probate thereof did not make him a beneficiary under rule permitting contest of will, where chief beneficiaries are active in procuring instrument to be executed

Cal—In re Hoover's Estate, 35 P 2d 188, 139 Cal App 753

#### Attorney-client

(1) In the law of wills the natural influence of the attorney over client may lawfully be asserted to obtain a will or legacy, as long as the testator thoroughly understands what he is doing, and is a free agent

Md—Sellers v Qualls, 110 A 2d 73

(2) The relationship between attorney and client is largely administrative, and relationship raising presumption of attorney's undue influence over client executing will drawn by attorney named as beneficiary therein arises only when attorney's mind is substituted for that of client

NJ—In re Nixon's Estate, 37 A 2d 295, 135 NJ Eq 117, affirmed 41 A 2d 119, 136 NJ Eq 242

(3) For an attorney to abuse obligation of responsibility to physically and mentally ill client, by permitting client to be mistaken to attorney's pecuniary advantage, is to make undue use of influence which trust relationship creates Where ninety-year-old ill testator stated that his personality did not amount to very

much, and that attorney who was to prepare will should take personality, attorney was required to make careful search for information for testator, and, being reasonably certain as to quantum of personality, was required to bring facts clearly to testator's mind, to make will valid

NJ—In re Heim's Will, 40 A 2d 651, 136 NJ Eq 138

#### Employment of attorney

Fact that principal beneficiary in consequence of confidential relation may have employed attorney to draw will, and furnished information as to what will should contain and kept will in safety deposit box without divulging contents thereof, would not invalidate will on ground of undue influence

Ga—Marlin v Hill, 15 SE 2d 473, 192 Ga 434

#### Supporting fact

Existence of a confidential relation is only to be regarded as supporting a charge of undue influence where, in addition to proof of such relation and of a benefaction to, or in the interest of, the fiduciary, there are further circumstances to show activity on beneficiary's part in procuring execution of the will

Mo—Powell v Raleigh, App, 244 S W 2d 387

13. NJ—In re Colton's Estate, 166 A 521, 11 NJ Misc 410

14. Cal—In re Everts' Estate, 125 P 1058, 163 Cal 449

In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106

15. NJ—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344

68 CJ p 752 note 4

16 Iowa—Convey v Murphy, 124 NW 1073, 146 Iowa 154

68 CJ p 752 note 5

17. Ill—Knudson v Knudson, 46 NE 2d 1011, 382 Ill 492

Md—Sellers v Qualls, 110 A 2d 73 68 CJ p 752 note 6

#### Equal division

Will dividing testatrix' estate approximately equally between testatrix' son and her daughter and son-in-law, and revoking a prior will primarily in favor of daughter and son-in-law, did not indicate that it was procured by undue influence on testatrix by son

Wis—In re Kaebisch's Will, 26 NW 2d 268, 249 Wis 629

18. Cal—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100

Ind—Cooper v Cooper, 51 NE 2d 100, 114 Ind App 261

Md—Sellers v Qualls, 110 A 2d 73

Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225

Or—Corpus Juris quoted in In re Detsch's Estate, 229 P 2d 264, 266, 191 Or 161

W Va—Ebert v Ebert, 200 SE 831, 120 W Va 722

68 CJ p 752 note 7.

#### Promise to wife

Alleged fact that testator promised his wife on her deathbed that he would not change the basic parts of his will did not per se indicate that the wife exercised undue influence on testator in the execution of his will

NJ—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344

A wife may legitimately urge on her husband her views of the manner in which he should dispose of his property by will, and if she is able to convince him that what she urges is the proper thing for him to do, or otherwise inspire in him a real desire to do it, a finding of undue influence cannot be based on her urgency

Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

19. Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225

Or—Corpus Juris quoted in In re Detsch's Estate, Or, 229 P 2d 264, 266, 191 Or 161

Tex—Craycroft v Crawford, Com App, 287 SW 275.

may be proof that such a provision would not have been made but for such importunity<sup>20</sup>

The mere fact that a wife guides or even dominates her husband, or has acquired an ascendancy over him, does not render his will, made in her favor, invalid<sup>21</sup> Indeed, it has been held to be natural and proper that persons occupying family relations should exercise some influence over each other and should remember each other in their wills,<sup>22</sup> and such influence is legitimate and should always exist and be encouraged<sup>23</sup> The influence of a spouse, however, may become undue if carried to the extent of overriding the testator's volition and destroying his free agency<sup>24</sup> The boundary where legitimate influence of a spouse ends and illegitimate persuasion or coercion begins varies with the circumstances of each case<sup>25</sup> It has been held that a particularly large bequest by a parent of a number of children to one having the opportunity unduly to influence the testator should be closely scrutinized<sup>26</sup>

**Independent advice** Where a testator retains an attorney to draft his will, making the attorney a beneficiary of a substantial portion of his estate,

such attorney should prompt and insist that the testator procure independent advice,<sup>27</sup> but independent advice which is incompetent, or perfunctory, or given without adequate knowledge of the situation, will not suffice<sup>28</sup> Independent advice does not necessarily mean the advice of a lawyer, but it may consist of the advice of a disinterested competent person disassociated from the interest of the proposed beneficiary<sup>29</sup> The obtaining of independent advice by the testator has also been required with respect to a will prepared by a sole or principal beneficiary other than an attorney<sup>30</sup>

Under at least one statute, in order to uphold the validity of a will written or prepared by the sole or principal beneficiary, who at the time was the confidential agent or legal adviser of the testator, or who at the time occupied any other position of confidence or trust towards him, it must appear that the testator read or knew the contents of such will and had independent advice with reference thereto,<sup>31</sup> and by independent advice it is meant the benefit of a private conference with a competent and disinterested person<sup>32</sup> If, however, any one of the

20. Ind—Cooper v Cooper, 51 NE 2d 100, 114 Ind App 261

Iowa—Perkins v Perkins, 90 NW 55, 116 Iowa 253, 7 Prob Rep Ann 690

Or—**Corpus Juris** quoted in In re Detsch's Estate, Or, 229 P 2d 264, 266, 191 Or 161

21. Okl—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Canfield v Canfield, 31 P 2d 152, 167 Okl 590

Or—**Corpus Juris** quoted in In re Detsch's Estate, Or, 229 P 2d 264, 266, 191 Or 161

68 C J p 752 note 10.

22 Ark—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692—Lavenue v Lewis, 46 S W 2d 649, 185 Ark 159 68 C J p 752 note 11

#### **Social and family relations**

Ind—Cooper v Cooper, 51 NE 2d 100, 114 Ind App 261

Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

Pa—In re Hausman's Estate, Orph, 26 Erie Co 26—In re Miller's Estate, Orph, 35 West Co 11

23. Ind—Cooper v Cooper, 51 NE 2d 100, 114 Ind App 261.

#### **Greater latitude**

In determining whether there has been undue influence which will vitiate a will, greater latitude is allowed between husband and wife with respect to persuasion or suggestion, because of the marital relation

N.J.—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344.

24 Ala—Cook v Morton, 1 So 2d 890, 241 Ala 188

Ark—Puryear v Puryear, 94 S W 2d 695, 192 Ark 692—Lavenue v Lewis, 46 S W 2d 649, 185 Ark 159

Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

Mo—Snell v Seek, 250 S W 2d 336, 363 Mo 225

N.J.—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

Ohio—Lovelady v Rhineland, 21 NE 2d 1001, 60 Ohio App 493

25. Mass—Emery v Emery, 111 N E 287, 222 Mass 439

26. Minn—In re Sperl's Estate, 103 NW 502, 94 Minn 421, 10 Prob Rep Ann 525

27. Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

28. Mass—Reilly v McAuliffe, 117 NE 2d 811, 331 Mass 144

#### **Independent advice held not received**

(1) Preparation of a will by attorney who shared offices with testatrix' attorney who was chief beneficiary of will, and who instructed the attorney preparing the will as to provisions to be included therein did not amount to independent advice, in determining whether the will was executed by undue influence

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162—In re Lobb's Will, 145 P 2d 808, 173 Or 414

(2) Fact that attorney who shared offices with testatrix' attorney who was chief beneficiary of will in pre-

paring will satisfied himself that testatrix was mentally competent and knew contents of will was not enough to constitute independent advice—In re Lobb's Will, 160 P 2d 295, 177 Or 162

29. Okl—Anderson v. Davis, 256 P 2d 1099, 208 Okl 477

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

30. Okl—Anderson v Davis, 256 P 2d 1099, 208 Okl 477

31. Kan—In re Arney's Estate, 254 P 2d 314, 174 Kan 64—In re Schipfel's Estate, 218 P 2d 192, 169 Kan 151—In re Kuhn's Will, 241 P 1087, 120 Kan 13

#### **Physician**

A will executed through efforts of testatrix' physician, who was also her confidential adviser, by which will such physician and another fiduciary became the principal beneficiaries, was invalid because of lack of independent legal advice with respect to effect of the will

Kan—In re Casida's Estate, 131 P 2d 644, 156 Kan 73

32. Kan—In re Kuhn's Will, 241 P 1087, 120 Kan 13

#### **Legal advice**

Such statute contemplates more than mere legal advice and does not require that the independent advice must be given by one admitted to the bar or by one shown to be well versed in all the intricacies of the subject of wills

Kan—Darby v Hart, 96 P 2d 653, 150 Kan 760.

conditions precedent does not exist, the questions whether the testator read or knew the contents of the will,<sup>33</sup> and had independent advice with reference thereto,<sup>34</sup> becomes immaterial. Such a statute, therefore, has no application where the will was not prepared by the sole or principal beneficiary,<sup>35</sup> or to a principal beneficiary, who at the time of the writing of the will was not the confidential agent or legal adviser of testator, and who did not occupy any other position of confidence or trust towards him.<sup>36</sup>

### § 231. — Unlawful or Improper Relations

Moral turpitude is not an essential element of undue influence, and the mere existence of illicit relations between the testator and a beneficiary does not constitute undue influence.

The mere existence of illicit relations does not constitute undue influence.<sup>37</sup> Moral turpitude is not an essential element of undue influence,<sup>38</sup> and the mere fact that some influence is exercised by a person sustaining an improper or adulterous relation to the testator does not invalidate a will, unless it is further shown that the influence destroys the testator's free agency,<sup>39</sup> although while the same amount of influence when exercised by a wife might

be proper, it may become "undue" when exercised by one occupying an improper and adulterous relation to the testator.<sup>40</sup> Such illegal relations are material only as bearing on the character of the beneficiary, which may be important in determining the effect of his influence.<sup>41</sup>

### § 232. — Threats

Threats to the testator producing fear and destroying his free agency constitute undue influence.

Threats of violence,<sup>42</sup> litigation,<sup>43</sup> criminal prosecution,<sup>44</sup> or other matters producing fear,<sup>45</sup> which place the mind of the testator in subjection and destroy his free agency, constitute undue influence and invalidate a will made as a result of them.

### § 233. — Mental Condition of Testator

The physical and mental condition of the testator is important in considering the existence of undue influence, since conduct which might be held insufficient to influence unduly a person of normal mental strength might be sufficient to operate on a failing mind. The mere fact that a testator is eccentric, or dislikes some of the natural objects of his bounty, does not establish undue influence.

Although undue influence presupposes testamentary capacity,<sup>46</sup> the physical and mental condition

33. Kan—In re Arney's Estate, 254 P 2d 314, 174 Kan 64

34. Kan—In re Arney's Estate, supra—In re Schippel's Estate, 218 P 2d 192, 169 Kan 151

35. Kan—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210—In re Horton's Estate, 118 P 2d 527, 154 Kan 269  
68 C J p 753 note 15

#### Token gift

Where scrivener was not the sole or principal beneficiary under will but received only a token gift thereunder, will was not invalid under statute on ground that testatrix had no independent advice.

Kan—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210

**Testamentary trustee** of major portion of testatrix' estate was not "principal beneficiary" of will within statute invalidating will prepared by "principal beneficiary" under certain conditions, where trustee's only personal pecuniary interest in estate was possible compensation for services as trustee.

Kan—In re Porter's Estate, 187 P 2d 520, 164 Kan 92

36. Kan—In re Horton's Estate, 118 P 2d 527, 154 Kan 269

37. Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

Tex—Holmes v Houston, Civ App, 241 S W 1039

Admissibility of evidence of such re-

lations before marriage see *infra* § 249

Weight given such relations see *infra* § 253

38. N C—In re Hurdle's Will, 129 S E 589, 190 N C 221

39. N J—In re Willford's Will, 51 A 501

68 C J p 753 note 19

40. Ind—Kessinger v Kessinger, 37 Ind 341

Pa—Dean v Negley, 41 Pa 312, 80 Am D 620

41. Cal—In re Ruffino's Estate, 48 P 127, 116 Cal 304

42. Mo—Gay v Gillilan, 5 S W 7, 92 Mo 250, 1 Am S R 712

68 C J p 753 note 22

43. N J—Moore's Ex'rs v Blauvelt, 15 N J Eq 367

68 C J p 753 note 23

44. N Y—In re Matter of Brunor, 47 N Y S 681, 21 App Div 265

45. N H—Ford v Ford's Estate, 197 A 824, 89 N H 292—Gaffney v Coffey, 124 A 788, 81 N H 300

68 C J p 753 note 25

46. Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155

Tex—Michalak v Dzierzanowski, Civ App, 270 S W 2d 276—Moore v Horne, Civ App, 136 S W 2d 638,

error dismissed, judgment correct

68 C J p 753 note 27

Admissibility of evidence of mental condition see *infra* § 246.

Weight to be given evidence of mental condition see *infra* § 258

#### Reason for rule

(1) "The underlying idea in 'undue influence' is that the will of another is substituted for that of the testator. If the testator have no will or testamentary capacity, there can be no substitution of another's will for that of the testator."

Idaho—Gwin v Gwin, 48 P 295, 298, 5 Idaho 271

Mo—*Corpus Juris* cited in Powell v Raleigh, App, 244 S W 2d 387, 389

(2) Undue influence in its essential elements has no real relation to mental incapacity, since mental incapacity implies lack of intelligent mental power to make a will, while undue influence implies within itself existence of a mind of sufficient mental capacity to make a will, if not hindered by dominant influence of another in such a way as to make the instrument speak the will of the person exercising undue influence, and not that of the testator.

Tex—Long v Long, 125 S W 2d 1034, 133 Tex 96, mandate conformed to, Civ App, 129 S W 2d 1206, error dismissed 138 S W 2d 798, 133 Tex 623

**Question of undue influence cannot be separated from question of testamentary capacity in a will contest**  
Iowa—Olsen v Corporation of New Melleray, 60 N W 2d 832, 245 Iowa 407—In re Rogers' Estate, 47 N.

of the testator is of primary importance in considering the existence of undue influence,<sup>47</sup> and that which would not be such undue influence as to avoid a will in the case of a person of sound mind, good health, and intelligence may be such when exercised on a person of failing mind, poor health, and other mental and bodily enfeeblements<sup>48</sup> Mere soundness of mind and body, however, does not imply immunity from undue influence<sup>49</sup> Notwithstanding the susceptibility of a weakened mental state to yield to undue influence, in order to invalidate a will because of such influence on a testator who is in such a mental state, it must be shown that in-

fluence was exerted which destroyed his free agency<sup>50</sup> Whether influence over an extremely aged testator, having a weak mind and suffering from serious, disabling physical illness, was such as to overcome his will and control, depends on the circumstances of each case.<sup>51</sup>

**Eccentricity.** The mere fact that a testator is highly eccentric, filthy, forgetful, miserly, or inattentive, does not compel a conclusion of susceptibility to undue influence<sup>52</sup>

**Dislikes.** The fact that the testator was prejudiced against, or had an aversion for, some of the natural objects of his bounty does not establish un-

V 2d 818, 242 Iowa 627—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Lochmiller's Estate, 30 NW 2d 136, 238 Iowa 1232—In re Telsrow's Estate, 22 NW 2d 792, 237 Iowa 672—In re Ensinger's Estate, 296 NW 814, 230 Iowa 80

#### Weight given testamentary capacity

Fact that testator was possessed of testamentary capacity at time of execution of alleged will, and that down to such time and even thereafter he was of keen and active mind, were considerations of great weight in determining testator's susceptibility to undue influence, but they were not conclusive

Mass—Livermore v Seward, 41 NE 2d 290, 311 Mass 389

47. Ark—Brown v Emerson, 170 S W 2d 1019, 205 Ark 735—Hyatt v Wroten, 43 SW 2d 726, 184 Ark 847

Cal—In re Leonard's Estate, 207 P 3d 66, 92 Cal App 2d 420

Iowa—Shaw v Duro, 14 NW 2d 241, 234 Iowa 778

Minn—In re Wilson's Estate, 27 N W 2d 429, 228 Minn 409—In re Stephens' Estate, 293 NW 90, 207 Minn 597

Mo—Powell v Raleigh, App, 244 S W 2d 387

NJ—In re Raynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

NY—In re White's Will, 114 N Y S 2d 431, 280 App Div 454

Okl—Anderson v Davis, 256 P 2d 1099, 208 Okl 477

Or—In re Brown's Estate, 108 P 2d 775, 165 Or 575

68 C.J. p 753 note 28.

#### Strength of mind

(1) Where eighty-four year old testatrix had a strong mind and will of her own, and no one had a dominant influence over her or was active in preparation or execution of will except as directed by her, there was no undue influence

Ala—Hyde v Norris, 35 So 2d 181, 250 Ala 518.

(2) One may by will dispose of his property as he sees fit, and he is entitled to act on his own prejudices, but the law is rigid in insisting that one of weak mind, whether from inherent causes or by reason of illness, shall not be imposed on by the art and craft of designing persons

Pa—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

(3) For a contestant to succeed in invalidating a will on ground of undue influence, there must be shown weakness of mind, and that the testator's desire was thwarted by the imposition of a stronger dominating influence

NJ—In re White's Estate, 20 A 2d 412, 129 N J Eq 566

(4) Where will appears to be more that of person who drew it, urged its execution and benefits therefrom, than that of testatrix, who was weak and feeble and had had no test made of her mental capacity, whole proceeding is open to suspicion that will was obtained by undue pressure

Va—Ferguson v Ferguson, 192 SE 774, 169 Va 77

**Very little difference exists** with respect to law which applies to principles of unsound mind and undue influence affecting validity of will

Cal—In re Hansen's Estate, 100 P 2d 776, 38 Cal App 2d 99

**Fact that testator could not read**

does not justify setting will aside on ground of undue influence

DC—Mann v Cornish, 185 F 2d 423, 87 US App DC 110, certiorari denied 71 S Ct 802, 341 US 932, 95 L Ed 1361

48. Cal—In re Little's Estate, 72 P 2d 213, 23 Cal App 2d 40

Ga—Northwestern University v Crisp, 88 SE 2d 26, 211 Ga 636—Bowman v Bowman, 55 SE 2d 298

205 Ga 796—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53—Boland v Aycock, 12 SE 2d 319, 191 Ga 327

Ind—Van Ginkle v Mooy, 10 NE 2d 759, 104 Ind App 282

Iowa—Olsen v Corporation of New Melleray, Iowa, 60 NW 2d 832, 245

Iowa 407—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Lochmiller's Estate, 30 NW 2d 136, 238 Iowa 1232—In re Telsrow's Estate, 22 NW 2d 792, 237 Iowa 672

NH—James v Staples, 174 A 59, 87 NH 49

NJ—Hughes v Zeller, 65 A 2d 759, 3 N J Super 146

Elkinton v Brick, 15 A 391, 44 N J Eq 154, 1 L R A 161

Or—In re Brown's Estate, 108 P 2d 775, 165 Or 575

Utah—In re Lavelle's Estate, 248 P 2d 372

68 C.J. p 748 note 63

Quantity of influence necessary to constitute undue influence see supra § 224

49. Cal—In re Little's Estate, 72 P 2d 213, 23 Cal App 2d 40—In re Olson's Estate, 126 P. 171, 19 Cal App 379

50. Ala—Smith v Smith, 56 So 949, 174 Ala 205

Ga—Boland v Aycock, 12 SW 2d 319, 191 Ga 327

**More old age** is not sufficient to invalidate a will from a parent or one in loco parentis to a child, although it is a fact to be considered in determining whether undue influence or persuasion was exercised

Md—Henkel v Alexander, 83 A 2d 866, 198 Md 311

**Policy of law** is to hold wills valid wherever possible, especially where testator is an old person, reasonably easily influenced, and forgetful

Fla—In re Starr's Estate, 170 So 620, 125 Fla 536

#### Deathbed will

Fact that the testator was on his deathbed when he executed a will is not a sufficient argument against its validity

NY—In re Brown's Estate, 257 N Y S 864, 143 Misc 688

51. Va—Ferguson v Ferguson, 192 SE 774, 169 Va 77.

52. Wyo—In re Nelson's Estate, 266 P.2d 238, 72 Wyo 444.



due influence,<sup>53</sup> unless the grievance was engendered or intensified by the beneficiary under the will<sup>54</sup>

### § 234. Subsequent Ratification of Will

In some jurisdictions, a will is not void where it appears that, after its execution, the testator recognized or ratified the will in some way, although there is also authority to the contrary

According to some authority, a will will not be declared void when it appears that, after the execution of the will, the testator became free from the fraud or undue influence and then recognized or ratified the will in some way,<sup>55</sup> as by leaving it uncanceled for a long time,<sup>56</sup> or by republishing the will<sup>57</sup> Where the testator has had the unhampered opportunity to revoke his will subsequent to the operation of an undue influence on him, but makes no change in it, the court as a general rule considers the effect of the testimony bearing on undue influence in a large measure destroyed<sup>58</sup> There is authority to the contrary, however, holding that a will once void for fraud or undue influence is always void unless it has been revived by republication<sup>59</sup>

### § 235. Origin of, and Persons Chargeable With, Undue Influence

In some jurisdictions undue influence may invalidate a will in favor of someone other than the person exerting such influence, although the beneficiary was ignorant

thereof Elsewhere, the influence must emanate from the beneficiaries or those interested in them

One charged with exercising undue influence over the testator need not be a beneficiary under the contested will,<sup>60</sup> and undue influence may invalidate a will in favor of someone other than the person exerting such influence<sup>61</sup> In some jurisdictions it has been held that a will may be invalidated because of undue influence of which the beneficiary was ignorant,<sup>62</sup> and that it is immaterial whether or not the influence was exerted at the request or with the consent of the beneficiary,<sup>63</sup> although elsewhere it has been held that, to vitiate a will, the influence must emanate from the beneficiaries or those interested in them<sup>64</sup> The exercise of effort which produces the will need not be by the beneficiary directly but may be through an agency,<sup>65</sup> or by a third person.<sup>66</sup>

In at least one jurisdiction it has been held that a boy twelve years of age could not be charged with undue influence<sup>67</sup> Persons may exercise undue influence in behalf of a charitable or religious institution so as to nullify a will made in pursuance thereof<sup>68</sup>

### § 236. Operation and Effect

Undue influence exercised by anyone, whether he or another gains by its exercise, renders worthless the will thus procured, but it is generally held that where some

53. Tex.—Dannenbauer v Messerer's Estate, Civ App., 62 S W 2d 235 68 C J p 754 note 31

54. Tex.—Dannenbauer v Messerer's Estate, supra

55. S C—Smith v Whetstone, 39 S E 2d 127, 209 S C 78

Fair v Thompson, 25 S C L 15

#### Approval not subject to influence

A claim that will was result of undue influence necessarily involves an inquiry into effect of the alleged influences on testator's mind, and his approval of the will at a time and place where he was not subject to such influences tends to rebut claim that will resulted from them

Conn.—Babcock v Johnson, 19 A 2d 416, 127 Conn 643

56. N J—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344 68 C J p 754 note 33

57. N J—In re Reynolds' Estate, supra

58. S C—Smith v Whetstone, 39 S E 2d 127, 209 S C 78

#### Mentally competent testator

Tenn.—Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628

59. Mich.—Haines v Hayden, 54 N W 911, 95 Mich 332, 35 Am S 566 68 C J p 754 note 34

Revival of will induced by undue influence by codicil see infra § 303

If a will is invalid when made, there can be no ratification of it even though, after discovery of the misrepresentation, the testator allows the will to stand

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

60. Ind.—Conner v First Nat Bank in Wabash, 76 N E 2d 262, 118 Ind App 173, rehearing denied 77 N E 2d 598, 118 Ind App 173—Workman v Workman, 46 N E 2d 718, 113 Ind App 245

#### Activity imputed to beneficiary

(1) Where a wife is active in obtaining the preparation and execution of a contested will making her husband sole beneficiary wife's activity is imputed to the husband

Cal.—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139

(2) It is not the law that confidential adviser who has opportunity to influence a testatrix and aids her in making of the will must directly benefit as a devisee thereunder for the burden of going ahead to shift to the protestants in the will contest and if the beneficiary is a spouse of the confidential advisor the activity of the latter may be imputed to the former.

Cal.—In re Lekos' Estate, 240 P 2d 387, 109 Cal App 2d 42

61. Md.—Sellers v Qualls, 110 A 2d 73

62. Ind.—Johnson v. Samuels, 114 N E 977, 186 Ind 56—Barr v Sumner, 107 N E 675, 109 N E 193, 183 Ind 402

63. Wash.—In re Hanson's Estate, 14 P 2d 702, 169 Wash 637

#### Participation by beneficiary

Where a will is procured by undue influence, it is not essential that the beneficiary participated in thus procuring it, and where it is so procured the intention to make a will is absent regardless of who may be the guilty agent

Ala.—Little v Sugg, 8 So 2d 866, 243 Ala 196

64. Ky.—Stutville's Ex'rs v Wheeler, 219 S W 411, 187 Ky 361 68 C J p 754 note 37.

65. Ky.—McKinney v Montgomery, 248 S W 2d 719—Stewart v Douglas, 29 S W 2d 637, 235 Ky 121

66. Ky.—McKinney v Montgomery, 248 S W 2d 719—Pinson v Stratton, 295 S W 859, 220 Ky 557

67. Ky.—Purdy's Adm'r v Evans, 160 S W 1071, 156 Ky 342

68. Mo.—Clark v Commerce Trust Co., 62 S W 2d 874, 233 Mo 243.

of the provisions of a will are void for fraud or undue influence the whole will is not necessarily rendered invalid, and the portions not affected may be given effect

Since a will is rendered invalid by fraud, or undue influence, as discussed supra § 221, or mistake, supra 223, the will is invalid even though the fraud or undue influence may have been exercised by only one of the beneficiaries,<sup>69</sup> or by persons who were not named in the will at all.<sup>70</sup> Undue influence exercised by anyone, whether he or another gains by its exercise, renders worthless the will thus procured,<sup>71</sup> and in legal effect, such an instrument is not a will at all.<sup>72</sup> The effect of declaring the whole will void because of undue influence is to render ineffectual a clause therein revoking all former wills.<sup>73</sup>

**Partial invalidity** In the absence of statutory provision to the contrary, it is generally held that, where some of the provisions of a will are void for fraud or undue influence, which can be separated

from the valid parts of the will without doing injustice to the beneficiaries,<sup>74</sup> or impairing the general intent of the testator,<sup>75</sup> the whole will is not rendered invalid, and the portions not affected with undue influence will be given effect.<sup>76</sup> Under a statute providing that, in a will contest case, the issue shall be made up whether or not the writing produced is the will of the testator, it has been held that the will produced must be free from undue influence in its entirety or it is not his will at all.<sup>77</sup>

**Noncontesting clause** Where a will is void because of undue influence, a provision therein prohibiting heirs from contesting it has been held also to be invalid.<sup>78</sup>

### § 237. Presumptions and Burden of Proof

As a general rule it will be presumed that neither fraud nor undue influence entered into the making of a will, and ordinarily the party who alleges fraud or undue influence has the burden of proof on these issues

69 Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

68 C J p 754 note 43.

70. Pa—In re Stirk's Estate, 81 A 187, 232 Pa 98  
68 C J p 754 note 44

71. Neb—Gidley v Gidley, 265 NW 245, 130 Neb 419

72. Or—In re Porter's Estate, 235 P 2d 894, 192 Or 483

73. Tex—**Corpus Juris** cited in Womack v Woodson, Civ App, 169 S W 2d 786, 787  
68 C J p 754 note 45

74. Iowa—**Corpus Juris** quoted in In re Ankeny's Estate, 28 NW 2d 414, 420, 238 Iowa 754—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761  
68 C J p 754 note 46

75. Iowa—**Corpus Juris** quoted in In re Ankeny's Estate, 28 NW 2d 414, 420, 238 Iowa 754  
68 C J p 754 note 47

#### Mistake

Where testatrix by her will left the residue of her estate in trust for the purchase of flowers for the family graves on stated occasions, and by codicil revoked two specific pecuniary bequests for the reason that they would invade the residue, and several years after her death it appeared that the residuary trust was more than sufficient to accomplish the trust purposes, it was held that the revocation of the pecuniary bequests was made under a mistake of fact and was therefore provisional, and there being ample funds available the specific legacies were ordered paid out

of principal, with interest on the legacies as provided by statute

Pa—In re Convey's Estate, 70 Pa Dist & Co 612, 66 Montg Co 94

76. Colo—In re Holmes' Estate, 56 P 2d 1333, 98 Colo 360

Conn—Pepin v Ryan, 47 A 2d 846, 133 Conn 12

Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407—**Corpus Juris** quoted in In re Ankeny's Estate, 28 NW 2d 414, 420, 238 Iowa 754

Md—Goertz v McNally, 44 A 2d 446, 185 Md 170

Mass—Wellman v Carter, 190 NE 493, 286 Mass 237

Neb—In re Kajewski's Estate, 279 NW 185, 134 Neb 485

NJ—**Corpus Juris** cited in Re Bartles' Will, 19 A 2d 17, 129 NJ Eq 280

Okla—In re Herrley's Estate, 276 P 2d 247.

Pa—In re Morrish's Estate, Orph, 60 Montg Co 130, reversed on other grounds 40 A 2d 907, 156 Pa Super 394

68 C J p 754 note 48

Partial probate see *infra* § 312

#### Entire will invalid

(1) Where will contest was tried and jury instructed on theory that entire will was invalid if it was procured by undue influence and contestee did not undertake to show which part of will was caused by undue influence, decree declaring will to be wholly invalid was not objectionable

Iowa—In re Ehker's Estate, 6 NW 2d 318, 233 Iowa 315

(2) Where contestant contended that entire will was invalid on ground of undue influence, but there was no

evidence that bequests to others than proponent were subject of any undue influence, instruction that if jury was reasonably satisfied that any of the bequests were not procured by undue influence, exercised by proponent on testatrix, jury could not find a verdict for contestant, on ground of undue influence was not erroneous

Ala—Shelton v Gordon, 40 So 2d 95, 252 Ala 187

(3) Generally, if the whole will is the result of the presence of undue influence, probate of the whole will must be refused

Cal—In re Webster's Estate, 110 P 2d 81, 43 Cal App 2d 6, rehearing denied 111 P 2d 355, 43 Cal App 2d 6

**Revocation clause**  
Fact that jury in will contests found that residuary clause of one of the wills was obtained by undue influence exercised by the residuary legatees, and devisees would not authorize the court in declaring as a matter of law that the revocation clause in such will and the clause appointing one of the devisees as executor were obtained by undue influence

Cal—In re Webster's Estate, *supra*

**False and fraudulent statement by one of two beneficiaries under will which induced execution thereof makes will void only as to beneficiary guilty of the fraud**

Iowa—In re Ankeny's Estate, 28 NW 2d 414, 238 Iowa 754—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761

77. Mo—McCarthy v Fidelity Nat. Bank & Trust Co, 30 S W 2d 19, 325 Mo. 727, 69 A L R 1122

78. Cal—In re Baker's Estate, 168 P. 881, 176 Cal 430.

As a general rule, neither fraud nor undue influence will be presumed,<sup>79</sup> but, on the contrary, where there is due execution of the will by a person of sound mind,<sup>80</sup> a lack of undue influence is presumed,<sup>81</sup> and the presumption is that the testator executed his will while free from restraint,<sup>82</sup> espe-

cially where he retains the will in his possession without attempting to cancel or destroy it.<sup>83</sup> It is the general rule that the burden of proof as to the issues of fraud or undue influence is on contestant or party who alleges their existence and exercise.<sup>84</sup> It is likewise true, strictly speaking, that this burden

79. Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806

Mich—In re Hannan's Estate, 23 N W 2d 222, 315 Mich 102—In re Reed's Estate, 263 N W 76, 273 Mich 334—Maynard v Vinton, 26 N W 401, 59 Mich 139, 60 Am Rep 276

Mo—Winn v Matthews, 137 S W 2d 632, 235 Mo App 337

N J—In re Nixon's Will, 41 A 2d 119, 136 N J Eq 242

N Y—In re Beneway's Will, 71 N Y S 2d 361, 272 App Div 463—In re Morrison's Will, 60 N Y S 2d 546, 270 App Div 552, affirmed 69 N E 2d 814, 296 N Y 652

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

W Va—Ebert v Ebert, 200 S E 831, 120 W Va 722

Wis—In re Knerim's Will, 68 N W 2d 545, 268 Wis 596—In re Maxcy's Estate, 46 N W 2d 479, 258 Wis 360—In re Kaebisch's Will, 26 N W 2d 268, 249 Wis 629

68 C J p 755 note 51

There must be proof of undue influence, either in fact or presumptively. Mo—Early v Koelbel, 273 S W 2d 312—Hamilton v Steininger, 168 S W 2d 59, 350 Mo 698

#### In Kentucky

(1) In considering whether a presumption of undue influence is ever created with a resulting shift in the burden of proof, it has been held that neither opportunity to exercise undue influence nor the existence of confidential relations between a testator and a beneficiary, or both are enough in and of themselves to justify the judicial conclusion that the instrument is not a freely executed will, nor is merely an unjust or unnatural disposition of an estate, or even the exclusion of a child who is normally the object of the testator's bounty, sufficient to justify that conclusion. These conditions, however, have a cumulative effect, and where the beneficiary exercised control of the testator and was actively concerned with the preparation of the will of one whose mental faculties were so impaired as to render him susceptible to selfish or improper influence, and the will is grossly unreasonable and plainly inconsistent with the testator's natural and moral duty to his family and is opposed to

his express purpose, the circumstances are indeed persuasive, and if all of these factors are present, there is a presumption of fact, although not conclusive, that the instrument was not executed by a free and unhampered will and a fixed purpose. This statement as to the rise of a presumption or inference of fact is but to say that it transfers the burden of persuasion to the proponents of the will. The unfolding of the story reaches a stage where reason suggests that conditions were not what they would have been normally. To avoid confusion, it may be interpolated that this presumption is not a presumption of law and does not relieve the contestants of continuing to carry the burden of proof. Ky—Gay v Gay, 215 S W 2d 92, 308 Ky 539

(2) In an earlier decision it was held that influence cannot be presumed and every presumption is indulged in favor of the will, and proof tending to establish the existence of undue influence must be adduced. Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 S W 2d 430, 292 Ky 318

80. Cal—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Fla—In re Aldrich's Estate, 3 So 2d 856, 148 Fla 121

Kan—Anderson v Anderson, 76 P 2d 825, 147 Kan 273

Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 S W 2d 430, 292 Ky 318—Higgs' Ex'x v Higgs' Ex'x, 150 S W 2d 681, 286 Ky 236

Neb—In re Heineman's Estate, 13 N W 2d 569, 144 Neb 442

Ohio—Goodwin v Basinger, 6 Ohio Supp 338

Okl—Myers v Myers, 266 P 452, 130 Okl 184

Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559—In re Ross' Estate, 49 A 2d 392, 355 Pa 112.

In re Melvin's Estate, Orph, 45 Lack Jur 229—In re Gayman's Estate, Orph, 21 Northumb Leg J 149—In re Hochberger's Estate, Orph, 63 York Leg Rec 25

Tenn—Burrow v Lewis, 142 S W 2d 758, 24 Tenn App 253

Tex—Frost Nat Bank v Boyd, Civ App, 188 S W 2d 199, affirmed 196 S W 2d 497, 145 Tex 206, 168 A L R 1326—Hulme v Jaschke, Civ App, 168 S W 2d 326, error refused

Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517.

68 C J p 755 note 52

81. Iowa—In re Huston's Estate, 27 N W 2d 26, 238 Iowa 297

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559—In re Queen's Estate, 62 A 2d 909, 361 Pa 133—In re Ross' Estate, 49 A 2d 392, 355 Pa 112—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Pusey's Estate, 184 A 844, 321 Pa 248, certiorari denied Lavelly v Young Women's Christian Ass'n of Pittsburgh, 57 S Ct 36, 299 U S 572, 81 L Ed 422, rehearing denied 57 S Ct 114, 299 U S 621, 81 L Ed 458

In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37

In re Gluck's Estate, Orph, 43 Lack Jur 101—In re Gayman's Estate, Orph, 21 Northumb Leg J 149—In re Hochberger's Estate, Orph, 63 York Leg Rec 25—In re Lauer's Estate, Orph, 58 York Leg Rec 157—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

#### Prior incompetency of testator

Where prior incompetency of a testator is shown, proponents of a will have the burden of proving that no undue influence was exerted at the time of preparation and execution of the will.

Pa—In re Schuhmacher's Estate, 58 Pa Dist & Co 561

82. Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Ky—Ramsey v Howard, 158 S W 2d 981, 289 Ky 389

Ohio—In re Blikenstetter's Will, 13 Ohio Supp 93

Pa—In re Seidel's Estate, 185 A 213, 322 Pa 142

Tenn—Burrow v Lewis, 142 S W 2d 758, 24 Tenn App 253

Tex—Frost Nat Bank v Boyd, Civ App, 188 S W 2d 199, affirmed 196 S W 2d 497, 145 Tex 206, 168 A L R 1326

Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517.

68 C J p 755 note 53

83. Mich—Pierce v Pierce, 38 Mich 412

84. Ala—Shelton v Gordon, 40 So 2d 95, 252 Ala 187—Cox v Martin, 34 So 2d 463, 250 Ala 401—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624—Street v Street, 22 So 2d 35, 246 Ala 683

Ariz—In re Westfall's Estate, 245 P 2d 951, 74 Ariz 181—In re Hesse's

- Estate, 157 P 2d 347, 62 Ariz 273—In re Morrison's Estate, 103 P 2d 669, 55 Ariz 504
- Ark—Jones v National Bank of Commerce in Memphis, 249 S W 2d 105, 220 Ark 665—Werbe v Holt, 237 S W 2d 478, 218 Ark 476—Walsh v Fairhead, 219 S W 2d 941, 215 Ark 218—Parette v Ivey, 190 S W 2d 441, 209 Ark 364—McWilliams v Neill, 155 S W 2d 344, 202 Ark 1087
- Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584
- In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Del Fosse's Estate, 154 P 2d 734, 67 Cal App 2d 490—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806—**Corpus Juris** quoted in In re Eakle's Estate, 91 P 2d 954, 958, 33 Cal App 2d 379—In re Burns' Estate, 80 P 2d 77, 26 Cal App 2d 741—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709
- Conn—Pepin v Ryan, 47 A 2d 846, 133 Conn 12
- Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529
- D C—Mann v Cornish, 185 F 2d 423, 87 US App D C 110, certiorari denied 71 S Ct 802, 341 US 932, 95 L Ed 1361
- Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—In re Aldrich's Estate, 3 So 2d 856, 148 Fla 121—Wartmann v Burlson, 190 So 789, 139 Fla 458
- Idaho—Swaringen v Swanstrom, 175 P 2d 692, 67 Idaho 245
- Ill—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Schlachter v Schlachter, 71 NE 2d 153, 396 Ill 184—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499
- Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Hadley's Estate, 45 NW 2d 140, 241 Iowa 1280—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Huston's Estate, 27 NW 2d 26, 238 Iowa 297—Shaw v Duro, 14 NW 2d 241, 234 Iowa 778—In re Heller's Estate, 11 NW 2d 586, 233 Iowa 1356—In re Behrend's Will, 10 NW 2d 651, 233 Iowa 812—In re Elker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Cocklin's Estate, 5 NW 2d 577, 232 Iowa 266
- Kan—In re Birney's Estate, 281 P 2d 1098, 177 Kan 624—In re Davis' Estate, 259 P 2d 211, 175 Kan 107—Smith's Estate v. Davis, 212 P 2d 322, 168 Kan 210—In re Walter's Estate, 208 P 2d 262, 167 Kan 627—In re Hall's Estate, 195 P 2d 612, 165 Kan 465—Anderson v Anderson, 76 P 2d 825, 147 Kan 273
- Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 S W 2d 430, 292 Ky 318—Higgs' Ex'x v Higgs' Ex'x, 150 S W 2d 681, 286 Ky 236—Martin v Combs, 145 S W 2d 108, 284 Ky 530
- Me—In re Cox' Will, 29 A 2d 281, 139 Me 261—In re Loomis' Will, 174 A 38, 133 Me 81
- Md—Koppal v Soules, 56 A 2d 48, 189 Md 346
- Mass—Morin v Morin, 124 NE 2d 251—Arcieri v Burke, 64 NE 2d 363, 319 Mass 21—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429—Viens v Viens, 19 NE 2d 306, 302 Mass 366—Mirick v Phelps, 8 NE 2d 749, 297 Mass 250—Briggs v Weston, 2 NE 2d 466, 294 Mass 452
- Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Kenealy's Estate, 59 NW 2d 38, 336 Mich 657—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Kramer's Estate, 37 NW 2d 564, 324 Mich 626—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102—In re Thiede's Estate, 4 NW 2d 47, 301 Mich 658—In re Getchell's Estate, 295 NW 360, 295 Mich 681—In re Livingston's Estate, 295 NW 343, 295 Mich 637—In re Brady's Estate, 295 NW 230, 295 Mich 472—In re Teller's Estate, 284 NW 696, 288 Mich 193—In re Haskell's Estate, 278 NW 668, 283 Mich 513—In re Cotcher's Estate, 264 NW 325, 274 Mich 154—In re Reed's Estate, 263 NW 76, 273 Mich 334
- Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn 365—In re Schumacher's Estate, 39 NW 2d 604, 229 Minn 382—In re Bergquist's Estate, 1 NW 2d 418, 211 Minn 380—In re Mazanec's Estate, 283 NW 745, 204 Minn 406
- Mo—Fletcher v Ringo, 164 S W 2d 904—Hahn v Brueseke, 155 S W 2d 98, 348 Mo 708—Larkin v Larkin, 119 S W 2d 351—Rex v Masonic Home of Missouri, 108 S W 2d 72, 341 Mo 589
- Doll v Fricke, 171 S W 2d 755, 237 Mo App 1148
- Neb—In re Maruska's Estate, 64 NW 2d 734, 158 Neb 723—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Benson's Estate, 46 NW 2d 176, 153 Neb 824—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67—In re Johnston's Estate, 25 NW 2d 526, 147 Neb 886—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Inda's Estate, 19 NW 2d 37, 146 Neb 179—In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915—In re Heineman's Estate, 13 NW 2d 569, 144 Neb 442—In re Bowman's Estate, 9 NW 2d 801, 143 Neb 440—In re Hagan's Estate, 9 NW 2d 794, 143 Neb 459, 154 A L R 573—In re Kajewski's Estate, 279 NW 185, 134 Neb 485—In re Alton's Estate, 258 NW 871, 128 Neb 411
- NJ—In re Davis' Will, 101 A 2d 521, 14 NJ 166—In re Hopper's Estate, 88 A 2d 193, 9 NJ 280—In re Livingston's Will, 73 A 2d 916, 5 NJ 65
- Kuruc v Kuruc, 93 A 2d 421, 23 NJ Super 584—In re Fleming's Estate, 89 A 2d 54, 19 NJ Super 565—In re Stroming's Will, 79 A 2d 492, 12 NJ Super 217—In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208
- In re Nixon's Will, 41 A 2d 119, 136 NJ Eq 242—In re Heim's Will, 40 A 2d 651, 136 NJ Eq 138—In re Neuman's Estate, 32 A 2d 826, 133 NJ Eq 532—In re Raynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344—In re White's Estate, 20 A 2d 442, 129 NJ Eq 566
- In re Looor's Will, 28 A 2d 281, 20 NJ Misc 376, affirmed 28 A 2d 288, 132 NJ Eq 316
- NY—In re Beneway's Will, 71 NY 2d 361, 272 App Div 463—In re Wharton's Will, 62 NY 2d 169, 270 App Div 670, affirmed 76 NE 2d 328, 297 NY 671—In re Morrison's Will, 60 NY 2d 546, 270 App Div 552, affirmed 69 NE 2d 814, 296 NY 652—In re Ingamells' Will, 13 NY 2d 586, 257 App Div 1024—In re Henderson's Will, 1 NY 2d 871, 253 App Div 140, reargument denied 1 NY 2d 857, 253 App Div 869, motion granted 15 NE 2d 679, 278 NY 531—In re Streb's Will, 288 NY 334, 247 App Div 556
- In re Bitterman's Estate, 118 NY 2d 859, 203 Misc 796, affirmed 122 NY 2d 622, 281 App Div 1024, appeal dismissed 115 NE 2d 434, 306 NY 563—In re Cotter's Estate, 40 NY 2d 93, 180 Misc 399—In re Wixelholc's Estate, 26 NY 2d 586, 176 Misc 100—In re Stein's Estate, 21 NY 2d 102, 174 Misc 465—In re Carpenter's Will, 12 NY 2d 724, 171 Misc 363—In re Vonhaus' Estate, 4 NY 2d 599, 167 Misc 660—In re Zimmerman's Will, 292 NY 236, 161 Misc 473, reversed on other grounds In re Zimmerman's Estate, 3 NY 2d 212, 254 App Div 630, motion denied In re Zimmerman's Will, 6 NY 2d 153, 254 App Div 826, affirmed 18 NE 2d 303, 279 NY 659, reargument denied 20 NE 2d 31, 280 NY 597—In re Martin's Estate, 273 NY 123, 151 Misc 94, affirmed In re Martin's Will, 276 NY 796, 243 App Div 513—In re Fraser's Estate, 271 NY 115, 150 Misc 588

—In re Chinsky's Will, 268 NYS 719, 150 Misc 274  
 In re Goldin's Will, 90 NYS 2d 601—In re Buttikofer's Will, 79 NYS 2d 252, affirmed 93 NYS 2d 920, 276 AppDiv 863—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580  
 NC—In re West's Will, 41 SE 2d 838, 227 NC 204—In re Atkinson's Will, 35 SE 2d 638, 225 NC 526—In re Holmes' Will, 32 SE 2d 614, 224 NC 830—In re Harris' Will, 11 SE 2d 310, 218 NC 459  
 ND—Stormon v Weiss, 65 NW 2d 475  
 Ohio—Spidel v Warrick, App, 78 NE 2d 746—McNeil v McNeil, App, 76 NE 2d 621  
 Goodwin v Basinger, 6 Ohio Supp 338  
 Or—In re Day's Estate, 257 P 2d 609, 198 Or 518—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429—In re Andersen's Estate, 235 P 2d 869, 192 Or 441—In re Detsch's Estate, 229 P 2d 264, 191 Or 161—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Perry's Estate, 181 P 2d 783, 181 Or 332—In re Southman's Estate, 168 P 2d 572, 178 Or 462—In re Lobb's Will, 145 P 2d 808, 173 Or 414—In re Courtney's Will, 143 P 2d 910, 172 Or 657—In re Brown's Estate, 108 P 2d 775, 165 Or 575—In re Knutson's Will, 41 P 2d 793, 149 Or 467  
 Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re O'Malley's Estate, 88 A 2d 69, 370 Pa 281—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559—In re Queen's Estate, 62 A 2d 909, 361 Pa 133—In re Ross's Estate, 49 A 2d 392, 355 Pa 112—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—Wetzel v Edwards, 16 A 2d 441, 340 Pa 121—Shuey v Shuey, 16 A 2d 4, 340 Pa 27—Buhan v Keslar, 194 A 917, 328 Pa 312—In re Cookson's Estate, 188 A 904, 325 Pa 81—In re Pusey's Estate, 184 A 844, 321 Pa 248, certiorari denied, Lavelly v Young Women's Christian Ass'n of Pittsburgh, 57 S Ct 36, 299 US 572, 81 L Ed 422, rehearing denied 57 S Ct 114, 299 US 621, 81 L Ed 458  
 In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37—In re Dible's Estate, 170 A 440, 112 Pa Super 23, reversed on other grounds 175 A 538, 316 Pa 553  
 In re Schuhmacher's Estate, 58 Pa Dist & Co 561—In re Rosenthal's Estate, 36 Pa Dist & Co 619—In re Prescott's Estate, 20 Pa Dist & Co 232, 15 Erie Co 252  
 In re Buck's Estate, Orph, 53 Dauph Co 412—In re Pearson's Estate, Orph, 35 Del Co 218—In re

O'Brien's Estate, Orph, 34 Del Co 493—In re Brooks' Estate, Orph, 27 Del Co 140—In re Porter's Estate, Orph, 4 Fay LJ 37, affirmed 19 A 2d 731, 341 Pa 476—In re Melvin's Estate, Orph, 45 Lack Jur 229—In re Chylak's Estate, Orph, 55 Lack Jur 129—In re Singer's Estate, Orph, 45 Lanc L Rev 585—In re Gayman's Estate, Orph, 21 Northumb Leg J 149—In re Hochberger's Estate, Orph, 63 York Leg Rec 25—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364  
 RI—Talon v Jackson, 19 A 2d 4, 66 RI 302—Heroux v Heroux, 191 A 265, 58 RI 79—Talbot v Bridges, 173 A 72, 54 RI 337  
 SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78  
 SD—In re Armstrong's Estate, 272 NW 799, 65 SD 233  
 Tenn—Hammond v Union Planters Nat Bank, 222 SW 2d 377, 189 Tenn 93  
 Haynes v Mullins, 209 SW 2d 278, 30 Tenn App 615  
 Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623  
 Griffin v Griffin, Civ App, 271 SW 2d 714—Sanders v Maxwell, Civ App, 265 SW 2d 683—Price v Tahaferro, Civ App, 254 SW 2d 157, refused no reversible error—Burns v Brown, Civ App, 248 SW 2d 1019, error refused—Venner v Layton, Civ App, 244 SW 2d 852, error refused—Black v Black, Civ App, 240 SW 2d 458, error refused no reversible error—Breedon v Miller, Civ App, 236 SW 2d 225—Pullen v Russ, Civ App, 209 SW 2d 630, refused no reversible error—Olds v Traylor, Civ App, 180 SW 2d 511, error refused—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused—Moore v Horne, Civ App, 136 SW 2d 638, error dismissed, judgment correct—Bridges v Howell, Civ App, 122 SW 2d 665—Jones v Selman, Civ App, 109 SW 2d 1003, error dismissed—Maul v Williams, Civ App, 88 SW 2d 1087  
 Vt—Central Hanover Bank & Trust Co v Froment, 49 A 2d 111, 114 Vt 523  
 Va—Savage v. Nute, 23 SE 2d 133, 180 Va 394  
 Wash—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—In re Swan's Estate, 74 P 2d 207, 192 Wash 627  
 W Va—Rice v Henderson, 83 SE 2d 762—Ritz v Kingdon, 79 SE 2d 123—Powell v Sayres, 60 SE 2d 740, 134 W Va 653—Mullens v Lilly, 13 SE 2d 634, 128 W Va 182  
 Wis—In re Sowka's Will, 19 NW 2d 898, 247 Wis 498—In re Faulks'

Will, 17 NW 2d 423, 246 Wis 319  
 —In re Ehike's Will, 11 NW 2d 497, 244 Wis 115—In re Sawall's Estate, 3 NW 2d 373, 240 Wis 265  
 —In re Stanley's Will, 276 N.W. 353, 226 Wis 354  
 68 CJ p 755 note 55

#### Prior wills

Where a will is being contested on the ground of undue influence and the proponent of the will introduces in evidence several earlier wills to establish that such wills were not substantially different from the latest will, the proponent did not have the burden of proving that the earlier wills were executed voluntarily and without undue influence. *Mo—Pulitzer v Chapman*, 85 SW 2d 400, 337 Mo 298

#### Will already admitted to probate

Where a will has been admitted to probate without contest, and subsequently a suit is brought to set aside the will on the ground of undue influence, the person seeking to set aside the will has the burden of proving the charge of undue influence by a preponderance of the evidence.

*Tex—Jowers v. Smith*, Civ App, 237 SW 2d 805

#### In Georgia

(1) On the issue of *devisavit vel non* the burden of proof in the first instance is on the propounder of the alleged will to make out a *prima facie* case by showing, together with other facts, that in making the will the testator acted freely and voluntarily.

*Ga—Langan v. Cheshire*, 65 SE 2d 415, 208 Ga 107—*Ehlers v Rheinberger*, 49 SE 2d 535, 204 Ga 226—*Butler v Lashley*, 29 SE 2d 508, 197 Ga 461

68 CJ p 755 note 55 [a] (1)

(2) Where this is done the burden of proof shifts to the caveator.

*Ga—Oxford v Oxford*, 71 SE 883, 136 Ga 589—*Langan v Cheshire*, 65 SE 2d 415, 208 Ga 107—*Ehlers v Rheinberger*, 49 SE 2d 535, 204 Ga 226—*Butler v Lashley*, supra.

(3) The same rules apply to a codicil to a will.

*Ga—Langan v Cheshire*, 65 SE 2d 415, 208 Ga 107.

(4) "*Devisavit vel non*" see 26 CJS p 1296 note 78

#### In Mississippi

(1) The burden of proof on the issue of undue influence is on the proponent of the will.

*Miss—Cheatham v Burnside*, 77 So 2d 719—*Bearden v Gibson*, 60 So 2d 655, 215 Miss 218—*O'Bannon v Heinrich*, 4 So 2d 208, 191 Miss 815—*Gathings v Howard*, 84 So 240, 122 Miss 355

68 CJ p 755 note 55 [c]

(2) In a proceeding contesting the validity of a will which has been admitted to probate the burden of

never shifts,<sup>85</sup> although, where the contestant establishes a prima facie case, the person charged with fraud or undue influence has the burden of meeting it.<sup>86</sup> Where the circumstances surrounding the

proof of undue influence which is on the proponent of the will only requires in the first instance that the proponent introduce evidence that the will has been admitted to probate

Miss—O'Bannon v Henrich, 4 So 2d 208, 191 Miss 815—Sheehan v Kearney, 21 So 41, 82 Miss 688, 35 LRA 102

(3) If the validity of a will which has not been admitted to probate is contested on the issue of undue influence the burden of proof of undue influence which is on the proponent of the will only requires that the proponent prove originally due execution of the will and the capacity of the testator to make a will, and this will raise a presumption that the will was voluntarily executed

Miss—Isom v Canedy, 88 So 485, 128 Miss 64

#### In Oklahoma

(1) The rule of the text is followed

Okl—In re Wadsworth's Estate, 273 P 2d 997—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597—Myers v Myers, 266 P 452, 130 Okl 184

(2) In an earlier case it was stated that the burden rests on the proponent of the will to prove not only the due execution of the will, but that the instrument was the free and voluntary act and will of the testatrix, and if the proponent fails to prove that the instrument was in fact executed as the free and voluntary act and the will of the testatrix, the court should deny the probate of the will

Okl—McCarty v Weatherly, 204 P 632, 85 Okl 123

85. Ala.—Shelton v Gordon, 40 So 2d 95, 252 Ala 187

Cal—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—*Corpus Juris* cited in In re Hansen's Estate, 100 P 2d 776, 785, 38 Cal App 2d 99—*Corpus Juris* quoted in In re Eakle's Estate, 91 P 2d 954, 958, 33 Cal App 2d 379

Colo—Gehm v Brown, 245 P 2d 865, 125 Colo 555

Idaho—Svaringen v Swanstrom, 175 P 2d 692, 67 Idaho 245

Ill—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160

NJ—In re Heim's Will, 40 A 2d 651, 136 N JEq 138

NY—In re Wharton's Will, 62 NY S 2d 169, 270 App Div. 670, affirmed 76 NE 2d 328, 297 NY 671—In re Morrison's Will, 60 NY S 2d 546, 270 App Div 552, affirmed 69 NE 2d 814, 296 NY 652

In re Carpenter's Will, 12 NY S 2d 724, 171 Misc. 363—In re Von-

haus' Estate, 4 NY S 2d 599, 167 Misc 660

In re Buttikofer's Will, 79 NY S 2d 252, affirmed, 93 NY S 2d 920, 276 App Div 863

Or—In re Day's Estate, 257 P 2d 609, 198 Or 518—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Detsch's Estate, 229 P 2d 264, 191 Or 161—In re Southman's Estate, 168 P 2d 572, 178 Or 462—In re Lobb's Will, 145 P 2d 808, 173 Or 414—In re Brown's Estate, 108 P 2d 775, 165 Or 575

Wis—In re Faulks' Will, 17 NW 2d 423, 246 Wis 319

68 CJ p 757 note 56

#### Primary and ultimate burden

The primary and ultimate burden of proving use of undue influence on a person executing a will devolves on party who alleges it

NJ—In re Fllo's Will, 75 A 2d 517, 9 N J Super 146

#### Ultimate burden on contestant

Even though a presumption of undue influence arises, the ultimate burden of producing conviction still must be discharged by the person contesting the validity of the will, but he has the benefit of the presumption of irregularity

Or—In re Rupert's Estate, 54 P 2d 274, 152 Or 649

#### Burden of proof always on contestant

When proof is made which is sufficient to create a presumption of undue influence it casts on the proponent, if he is to sustain the will, the necessity of showing that the execution of the will was the result of free deliberation on the part of the testator and of the deliberate exercise of his judgment, and not an imposition or wrong practiced by the trusted beneficiary, but this does not change the general rule, which is, that on the whole case, the burden of proof is on the contestant to establish undue influence by the whole evidence

Ill—Tidholm v Tidholm, 62 NE 2d 473, 391 Ill 19

NJ—In re Neuman's Estate, 32 A 2d 826, 133 N JEq 532

#### Burden not shifted to contestant

If the statutory requirements of due execution are made to appear, the burden ordinarily would rest on the contestant to go forward with the evidence, but if it appears that the draftsman of the will held a position of trust and confidence with the testator, and if he is a major beneficiary under the will, and if the testator was sick and inclined to yield readily to persuasion, there is a presumption of fraud, and in such a case neither the burden of proof nor the burden of producing evidence shift to the contestant.

Va—Croft v Snidow, 33 SE 2d 208, 183 Va 649—Barnes v Bess, 197 SE 403, 171 Va 1—Redford v Booker, 185 SE 879, 166 Va 561

86 Ala—Shelton v Gordon, 40 So 2d 95, 252 Ala 187—Little v Sugg, 8 So 2d 866, 243 Ala 196

Ariz—In re Westfall's Estate, 245 P 2d 951, 74 Ariz 181—In re Hesse's Estate, 157 P 2d 347, 62 Ariz 273

Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—*Corpus Juris* quoted in In re Eakle's Estate, 91 P 2d 954, 958, 33 Cal App 2d 379

Colo—Gehm v Brown, 245 P 2d 865, 125 Colo 555

Fla—In re Palmer's Estate, 48 So 2d 732

Ill—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160

RI—Talon v Jackson, 19 A 2d 4, 66 RI 302

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

Wis—In re Faulks' Will, 17 NW 2d 423, 246 Wis 319

68 CJ p 757 note 57

#### Failure to establish evidentiary requirements

If none of the evidentiary requirements necessary to create a presumption of undue influence are established, the burden of proof on that issue does not shift to the proponent of the will

Cal—In re Hiker's Estate, 194 P 2d 132, 8 Cal App 2d 680

#### Explanation of facts better known to proponent

The presumption of undue influence is of that class of presumptions by which a litigant is called on to make known facts more easily accessible to him than to his adversary, and, therefore, where a presumption of undue influence is created, the law puts on the proponent the burden of coming forward with credible evidence satisfactorily explaining his conduct, and stating what he knows as to the making of the will

NJ—In re Weeks' Estate, 103 A 2d 43, 29 N J Super 533

#### Use of technical terminology

The use of technical or other language which would not have been used by the testator himself raises no presumption of undue influence since it is common for wills to be drawn by some one other than the testator, and even though the words may be those of the scrivener, the disposition of the property is that of the one who adopts them, and if he understands the effect of the instrument as a whole, it is not

execution of a will are of such a nature that the law regards them with suspicion, it has been held that the burden shifts to the proponent, and that the proponent must thereupon affirmatively show the absence of undue influence <sup>87</sup>

*Testamentary capacity* being necessary before undue influence can have any operation, its existence will be assumed on an issue of undue influence <sup>88</sup>

material that he did not understand the meaning of all the words used  
Ky—Clark v Johnson, 105 SW 2d 576, 268 Ky 591

87. Tenn—Burrow v Lewis, 142 S W 2d 758, 24 Tenn App 253  
Vt—In re Moxley's Will, 152 A 713, 103 Vt 100

Va—Baines v Bess, 197 SE 403, 171 Va 1

Circumstances held to raise or not to raise presumption or inference of undue influence see *infra* §§ 238-244

#### Burden on beneficiary

There may be circumstances which will cast the burden of proof on the beneficiary

Or—In re Day's Estate, 257 P 2d 609, 198 Or 518—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429—In re Porter's Estate, 235 P 2d 894, 192 Or 483

#### Presumption of undue influence

Where the circumstances connected with the execution of a will are such as the law regards with suspicion, the burden of proof on the issue of undue influence is shifted to the proponent of the will, and he must show affirmatively that the will was not secured by such means, and, indeed it has been held that in such situation the law raises a presumption of undue influence, which establishes *prima facie* the existence of it, and is sufficient to defeat the will unless and until it is overcome by counter proof. Generally speaking, the doctrine is applicable where a relationship of trust and confidence obtains between the testator and the beneficiary, or where the latter has gained an influence or ascendancy over the former, and usually, but not always, it appears that the beneficiary has procured the will to be made or has advised as to its provisions, and there are certain modifications to the doctrine which affect the relationships of husband and wife, or parent and child

Vt—Central Hanover Bank & Trust Co v Froment, 49 A 2d 111, 114 Vt 523

#### Burden on proponent to meet *prima facie* case

Where circumstances raise a presumption that the will was procured

by undue influence, the proponents have the burden of meeting that *prima facie* case, but it is sufficient if they produce just enough evidence to counterbalance the *prima facie* case, and it is not necessary for them to prove the absence of undue influence by a preponderance of the evidence

Cal—In re Hampton's Estate, 131 P 2d 565, 55 Cal App 2d 543

#### Burden of going forward with proof

Although there is no presumption of undue influence, and no resulting shift in the burden of proof, there may be a shift in the burden of going forward with the evidence

Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318

#### Burden of proof and burden of going forward

Where presumption of undue influence is erected, both the burden of proof and the burden of going forward with proof shift to proponent and are identical and coincident, and proponent must establish by preponderance of proof that there is no undue influence

NJ—In re Weeks' Estate, 103 A 2d 43, 29 NJ Super 533

#### Contestant entitled to verdict

Proof that fiduciary relationship exists between testator and beneficiary who received a substantial benefit from will, that testator was dependent and devisee the dominant party and that testator reposed trust and confidence in beneficiary, or that preparation of will was procured by beneficiary, established *prima facie* the charge that execution of will was result of undue influence exercised by that beneficiary and such proof, standing alone, entitles contestant to a verdict

Ill—Tidholm v Tidholm, 62 NE 2d 473, 391 Ill 19

#### Clear and convincing proof required

In proceeding to contest will prepared by proponent and under which he profited, where relationship of trust and confidence existed between proponent and testatrix, the burden was on proponent to show by clear and convincing proof that proponent did not abuse the trust and confidence reposed in him

NJ—In re Peppier's Will, 28 A 2d 474, 132 NJ Eq 421, affirmed 34 A 2d 291, 134 NJ Eq 160.

## § 238. — Interest and Opportunity To Influence General

Merely because there is reason or opportunity to exert undue influence over a testator is not sufficient to raise the presumption or inference that such influence was in fact exercised

Mere interest, disposition, motive, or opportunity to exercise undue influence over a testator affords no presumption or inference that such influence was in fact exercised,<sup>89</sup> unless combined with circum-

88 Fla—Gardiner v Goertner, 146 So 186, 110 Fla 377  
68 CJ p 757 note 59

89 Cal—In re Hilker's Estate, 191 P 2d 132, 8 Cal App 2d 680—In re Kemp's Estate, App, 190 P 2d 619—In re Llewellyn's Estate, 183 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Hull's Estate, 116 P 2d 242, 63 Cal App 2d 135—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 483—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129—In re Knight's Estate, 50 P 2d 475, 9 Cal App 2d 451

Colo—Scott v Leonard, 184 P 2d 138, 117 Colo 54

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Ky—Gay v Gav, 215 SW 2d 92, 308 Ky 539—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318

Mich—In re Spienger's Estate, 60 NW 2d 436, 337 Mich 511—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Kramer's Estate, 87 NW 2d 561 324 Mich 626—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102—In re Livingston's Estate, 295 NW 343, 295 Mich 637—In re Reed's Estate, 263 NW 76, 273 Mich 334—In re Lacroix's Estate, 231 NW 319, 265 Mich 59

Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn 765—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289.

Mo—Aaron v Degnan, 272 SW 2d 216—Baker v Spears, 210 SW 2d 13, 357 Mo 601

Neb—In re Maruska's Estate, 64 NW 2d 734, 153 Neb 723—In re Fehrenkamp's Estate, 48 NW 2d 421, 154 Neb 488—In re Thompson's Estate, 44 NW 2d 814, 153 Neb 375—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Heineman's Estate, 13 NW 2d 569, 144 Neb 442

NJ—In re Fleming's Estate, 89 A 2d 54, 19 NJ Super 565

In re Heim's Estate, 39 A 2d 248, 22 NJ Misc 241, reversed on other grounds 40 A 2d 651, 136 NJ Eq 138

Ohio—Corpus Juris cited in Cave v McLean, 32 NE 2d 581, 584, 66 Ohio App 196.



stances tending to show its exercise in relation to the will<sup>90</sup>

### § 239 — Confidential and Personal Relations

Ordinarily the mere fact that a confidential or fiduciary relation exists between a testator and a person who benefits by the will does not create a presumption of undue influence with a resulting shift in the burden of proof, but the presumption may arise, and the burden of proof may shift, if, in addition, there are suspicious circumstances, such as the fact that the beneficiary actively participated in the procuring, preparation, or execution of the will, or the fact that the testator's mentality was impaired

While broad general statements have been made to the effect that the existence of a confidential relation between the testator and a beneficiary under his will creates a presumption of undue influence and casts the burden of showing freedom from restraint on the beneficiary,<sup>91</sup> the generally accepted rule is that a presumption of undue influence is not raised and the burden of proof is not shifted by the mere fact that a beneficiary occupies, with respect to the testator, a confidential or fiduciary relation,<sup>92</sup> such as that which exists with respect to

Okl—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597—Sporn's Estate v Herndon, 121 P 2d 602, 190 Okl 149—In re Jones' Estate, (Choctaw 7012), 121 P 2d 574, 190 Okl 123

Or—In re Perry's Estate, 181 P 2d 783, 181 Or 332

Pa—In re Snedeker's Estate, 84 A 2d 568, 368 Pa 607

Tenn—Solari v Albertine, 193 SW 2d 111, 29 Tenn App 61

Tex—Griffin v Griffin, Civ App, 271 SW 2d 714—Sanders v Maxwell, Civ App, 265 SW 2d 683—Black v Black, Civ App, 240 SW 2d 458, error refused no reversible error—Dreedon v Miller, Civ App, 236 SW 2d 225—Kolb v Chandler, Civ App, 209 SW 2d 783—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused—Long v Long, Civ App, 98 SW 2d 236, reversed on other grounds 125 SW 2d 1034, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623—Maul v Williams, Civ App, 88 SW 2d 1087

Utah—In re Lavelle's Estate, 248 P 2d 372

Wash—Foster v Brady, 86 P 2d 760, 198 Wash 13

68 C J p 758 note 61

90 Ohio—Corpus Juris cited in Cave v McLean, 32 NE 2d 581, 584, 66 Ohio App 196

Minn—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289

Utah—In re Lavelle's Estate, 248 P 2d 372

68 C J p 758 note 62

Necessity of exercise of influence see supra § 224

#### Combined with other circumstances

In determining the fact of undue influence, the court may consider the opportunity of exercising such influence, the active participation of the person in the preparation of the will, the confidential relationship between the beneficiary and the testator, the disinheritance of those whom the testator probably would have remembered in his will, the singu-

larity of the provisions of the will, and the exercise of influence or persuasion to induce the testator to make the will in question, and the existence of these conditions alone or combined only create a presumption or inference of undue influence Minn—In re Rasmussen's Estate, 69 NW 2d 630

91 Neb—In re Kajewski's Estate, 279 NW 185, 134 Neb 485—In re Lodge's Estate, 243 NW 781, 123 Neb 531

Okl—In re Harjoche's Estate, 146 P 2d 130, 193 Okl 631

Wis—Corpus Juris quoted in In re Faulks' Will, 17 NW 2d 423, 439, 246 Wis 319

68 C J p 758 note 63

#### Confidential relations creating presumption

The existence of a confidential relation between the testator and a legatee or devisee, such as guardian and ward, physician and patient, or spiritual adviser and layman gives peculiar opportunity for unduly influencing the mind of the testator and creates a presumption that such influence may have been exercised, and in such case the law casts on him the burden of showing that the will was the free and voluntary act of the testator

Tenn—Solari v. Albertine, 193 SW 2d 111, 29 Tenn App 61

#### Public policy requirements

"There is no public policy condemning the receipt of a bequest by one who stood in a fiduciary relationship to the giver. Such a policy would impose an unwarranted restriction on the testamentary alienation of property and would prevent a testator from bestowing gifts on his closest friends and confidants, who often have stronger than kinsmen's claims on his bounty. The law wisely casts upon a legatee standing in a confidential relation to a testator the burden of proving that he used no undue influence to secure the legacy and this rule satisfies all the applicable requirements of 'public policy' "

Pa—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299

#### Burden of showing good faith

If the beneficiary of the will is the proponent and occupies a confidential relationship with the testator, the burden of proof is on the proponent to establish affirmatively regularity of conduct and good faith on his part in connection with the execution of the will

Pa—In re Brindle's Estate, 60 A 2d 1, 360 Pa 53—In re Stewart's Estate, 47 A 2d 204, 354 Pa 288

In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37

#### Distinction between gifts inter vivos and bequests

(1) Under the rule which is applied to gifts inter vivos where the donee stands in a confidential relation with the donor, the burden of proof on the issue of undue influence shifts to the donee, but this is not the rule which is applied to testamentary dispositions of property

Ala—Hubbard v Moseley, 75 So 2d 658, 261 Ala 683—Scarborough v Scarbrough, 64 So 105, 185 Ala 468

Pa—In re Snedeker's Estate, 84 A 2d 568, 368 Pa 607

(2) Presumption of fraud or undue influence arising from confidential relation existing between donor or gift inter vivos and donee see Gifts § 65 f.

92 US—Acacia Mut Life Ins Co v Bathurst, DCNJ, 28 F Supp 781

Ark—Corpus Juris cited in Jones v National Bank of Commerce in Memphis, 249 SW 2d 105, 220 Ark 665

Cal—In re Arnold's Estate, 107 P 2d 25, 16 Cal 2d 573

In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—Kenny v Citizens Nat Trust & Sav Bank of Los Angeles, 269 P 2d 641, hearing dismissed—In re Wellauer's Estate, 236 P 2d 906, 107 Cal App 2d 268—In re Doty's Estate, 20 P 2d 823, 89 Cal App 2d 747—In re Fraser's Estate, 170 P 2d 704 75 Cal App 2d 99—In re Del Fosse's



- Estate, 154 P 2d 734, 67 Cal App 2d 490—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—In re King's Estate, 146 P 2d 952, 63 Cal App 2d 365—In re Bucher's Estate, 132 P 2d 257, 56 Cal App 2d 135—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488—In re Velladao's Estate, 88 P 2d 187, 31 Cal App 2d 355—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129
- Colo—Gehm v Brown, 245 P 2d 865, 125 Colo 555
- Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529
- DC—MacMillan v Knost, 126 F 2d 235, 75 US App DC 261, certiorari denied 63 S Ct 32, 317 US 641, 87 L Ed 516
- Fla—**Corpus Juris cited in** In re Aldrich's Estate, 3 So 2d 856, 860, 148 Fla 121—Marston v Churchill, 187 So 762, 137 Fla 154—In re Starr's Estate, 170 So 620, 125 Fla 536
- Ga—Marlin v Hill, 15 SE 2d 473, 192 Ga 434
- Ill—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Powell v Weld, 101 NE 2d 581, 410 Ill 198—Schlachter v Schlachter, 71 NE 2d 153, 396 Ill 184—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499
- Ind—Vance v. Grow, 190 NE 747, 206 Ind 614
- Iowa—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315
- Ky—Palmer v Richardson, 223 S W 2d 745, 311 Ky 190—Gay v Gay, 215 S W 2d 92, 308 Ky 539
- Neb—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Bowman's Estate, 9 NW 2d 801, 143 Neb 440
- Ohio—**Corpus Juris cited in** Cave v McLean, 32 NE 2d 581, 584, 66 Ohio App 196
- Okl—In re Martin's Estate, 261 P 2d 603—Anderson v Davis, 256 P 2d 1099, 208 Okl 477—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597
- Or—**Corpus Juris cited in** In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219—In re Meier's Estate, 224 P 2d 572, 190 Or 140—In re Perry's Estate, 181 P 2d 783, 181 Or 332—In re Lobb's Will, 160 P 2d 295, 177 Or 162—In re Lobb's Will, 145 P 2d 808, 173 Or 414
- Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Snedeker's Estate, 84 A 2d 568, 368 Pa 607—In re Ash's Estate, 41 A 2d 620, 351 Pa 317
- In re Pearson's Estate, Orph, 35 Del Co 218
- SD—In re Rowlands' Estate, 18 N W 2d 290, 70 SD 419.
- Tex—Firestone v Sims, Civ App, 174 S W 2d 279, error refused
- Utah—In re Lavelle's Estate, 248 P 2d 372
- Wis—**Corpus Juris quoted in** In re Faulks' Will, 17 NW 2d 423, 439, 246 Wis 319
- Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444
- 68 CJ p 758 note 64
- Principal beneficiary**
- It is established that mere confidential or family relations between a testator and a legatee are not alone sufficient to raise a presumption of undue influence so as to impose the burden of proof on the legatee, and the burden of proof in such an instance is on the contestant who charges it; but when a confidential relationship between the testator and the principal beneficiary is shown, a presumption of undue influence arises, and the burden then shifts to the proponent to prove that undue influence was not exercised
- Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—Wartmann v Burleson, 190 So 789, 139 Fla 458
- Something more than confidential relation**
- While the legal doctrine is recognized that where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, there is a presumption that he exercised undue influence, and the burden is on him to show that the will was not induced by his undue influence, this presumption is not generated alone by the existence of a confidential relationship, and the confidential relationship assumes probative importance when disclosed in conjunction with the facts that the provisions of the propounded instrument are unnatural or unjust, and that the alleged wrongdoer was active in procuring the writing to be executed. If the facts of injustice and activity on the part of the wrongdoer are not established, a denial of probate cannot be sustained
- Cal—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367
- Presumption where relation is fiduciary**
- When the ground of fraud or undue influence is pleaded, and the beneficiary occupies a confidential or fiduciary relation to the maker of the instrument, the burden rests on the beneficiary to show the fairness of the transaction by appropriate evidence, but a presumption of fraud or undue influence does not usually apply where confidence is reposed by one in another, such presumption of fraud properly applies to fiduciary relationships, such as guardian and ward, trustees, etc.
- Tex—Price v Tahaferro, Civ App, 254 S W 2d 157, refused no reversible error
- Confidential relation not ground for inference**
- The fact that the beneficiaries of a will are those by whom the testator was surrounded and with whom he stood in confidential relationship at the time of executing his will is no ground for inferring undue influence
- Ill—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576—Brownlie v Brownlie, 191 NE 263, 357 Ill 117, 93 ALR 1041
- Presumption of validity strengthened**
- The presumption in favor of the validity of a will should be increased rather than diminished from the circumstance that a bequest was made to one with whom the testator had maintained intimate and confidential relations during life
- Ind—Willett v Hall, 41 NE 2d 619, 220 Ind 310.
- In Missouri**
- (1) The rule of the text is followed
- Mo—Aaron v Degnan, 272 S W 2d 216—Norris v Bristow, 219 S W 2d 367, 358 Mo 1177, 11 ALR 2d 725—Larkin v Larkin, 119 S W 2d 351—Rex v Masonic Home of Missouri, 108 S W 2d 72, 311 Mo 589—Pulitzer v Chapman, 85 S W 2d 400, 337 Mo 298
- Doll v Fricke, 171 S W 2d 755, 237 Mo App 1148
- (2) For cases stating the rule which formerly prevailed see 68 C J 758 note 64 [a]
- In New Jersey**
- (1) The rule of the text is followed
- NJ—In re Hopper's Estate, 88 A 2d 193, 9 NJ 280—In re Livingston's Will, 73 A 2d 916, 5 NJ 65
- In re Fleming's Estate, 89 A 2d 54, 19 NJ Super 565—In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208—In re Filo's Will, 75 A 2d 517, 9 NJ Super 146
- In re Heim's Will, 40 A 2d 651, 136 NJ Eq 138—In re Neuman's Estate, 32 A 2d 826, 133 NJ Eq 532—In re White's Estate, 20 A 2d 442, 129 NJ Eq 566—In re Smalley's Estate, 2 A 2d 321, 124 NJ Eq 461, affirmed 8 A 2d 296, 126 NJ Eq 217
- (2) In earlier cases it was held that mere existence of a relation of trust and confidence between a testator and a beneficiary would create a presumption of undue influence, and would place the burden of proving that the will was the free act of the testator on the proponent
- NJ—In re Banvard's Estate, 89 A 1024, 83 NJ Eq 286, affirmed 92 A 1086, 83 NJ Eq 694—In re Davis' Will, 68 A 756, 73 NJ Eq 617.

a doctor or a physician,<sup>93</sup> guardian,<sup>94</sup> religious and spiritual adviser,<sup>95</sup> employer,<sup>96</sup> landlord,<sup>97</sup> or a close business relation,<sup>98</sup> such as that of partner,<sup>99</sup> principal,<sup>1</sup> or confidential business manager,<sup>2</sup> although the existence of such a relationship may demand a close judicial scrutiny<sup>3</sup>

On the other hand, it is the general rule in practically all jurisdictions that undue influence is presumed and the burden of proof shifted so as to require the beneficiary to produce evidence which at least balances that of the contestant, when, in addition to the confidential relation, there exist suspicious circumstances,<sup>4</sup> such as the fact that the

(3) However, it was held that the cases stating the earlier rule did not state the true rule, and such cases were disapproved in this particular N.J.—In re Nixon's Will, 41 A 2d 119, 136 N.J. Eq. 242

93. Ohio—**Corpus Juris** cited in *Cave v McLean*, 32 N.E.2d 581, 584, 66 Ohio App. 196

SD—In re Rowlands' Estate, 18 N.W.2d 290, 70 S.D. 419

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319  
68 C.J. p. 759 note 66

#### Physician and business manager

Even though it is shown that the confidential fiduciary relation of patient and his physician and business manager existed between the testator and a leading beneficiary, the burden of proof on the issue of undue influence was technically on the proponents of the will  
Fla.—In re Aldrich's Estate, 3 So.2d 856, 148 Fla. 121

#### Activity in procuring execution

Where principal beneficiary under will was testatrix' physician, principal beneficiary occupied a fiduciary relationship toward testatrix, but mere fact that such relationship existed was not sufficient to raise presumption against him of undue influence, in absence of showing that beneficiary was active in procuring drafting or execution of the will  
Fla.—In re Peters' Estate, 20 So.2d 487, 155 Fla. 453

#### Presumption offset by order of probate

If any presumption of undue influence arose by reason of the fact that the testator's physician was named beneficiary under the will, such presumption would be offset by the provision that an order of the probate court admitting the will to probate is prima facie evidence of the due attestation, execution, and validity of the will, and the contestant would still have the burden of showing the invalidity of the will by a preponderance of the evidence  
Ohio—Goodwin v Basinger, 6 Ohio Supp. 338

94. Ill.—Michael v Marshall, 66 N.E. 273, 201 Ill. 70

Ohio—**Corpus Juris** cited in *Cave v McLean*, 32 N.E.2d 581, 584, 66 Ohio App. 196

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319.

#### Other suspicious circumstances

The existence of a confidential relationship, such as that of guardian and ward, when taken in connection with other suspicious circumstances may justify a suspicion of undue influence so as to require the beneficiary to go forward with the proof and present evidence sufficient to overcome the adverse inference  
Or.—In re Southman's Estate, 168 P.2d 572, 178 Or. 462

95. Md.—Sellers v Qualls, 110 A.2d 73

SD—In re Rowlands' Estate, 18 N.W.2d 290, 70 S.D. 419

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319

#### Presumption of undue influence

There is a presumption of undue influence where a person devises property to one in such a confidential and fiduciary relationship as a priest

Mich.—In re Cotcher's Estate, 264 N.W. 325, 274 Mich. 154

96. Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319

68 C.J. p. 759 note 69

97. Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319

68 C.J. p. 759 note 70

98. Idaho—Swaringen v Swannstrom, 175 P.2d 692, 67 Idaho 245  
Okla.—Anderson v Davis, 256 P.2d 1099, 208 Okla. 477

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319

68 C.J. p. 759 note 71

99. Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319

68 C.J. p. 759 note 72

1. Idaho—Swaringen v Swannstrom, 175 P.2d 692, 67 Idaho 245

2. Iowa—Denning v Butcher, 59 N.W. 69, 91 Iowa 425

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 N.W.2d 423, 439, 246 Wis. 319

#### Confidential business relationship not shown

Evidence showing that the beneficiary was a real estate agent and had collected rents for testatrix and had sold her home, and that he had performed small friendly acts at the request of the testatrix, was insufficient to shift to the proponents

the burden of proving that the testatrix was not unduly influenced in making her will

Pa.—In re Morrish's Estate, 40 A.2d 907, 156 Pa. Super. 394.

3. S.D.—In re Rowlands' Estate, 18 N.W.2d 290, 70 S.D. 419

Utah.—In re Lavelle's Estate, 248 P.2d 372

#### Beneficiary caring for testator in last illness

A court must look with grave suspicion on cases where person experiencing last illness makes will in favor of one caring for such person and must scrutinize evidence and circumstances with extreme care to the end that the weak and incapable shall not be bent to the will of the greedy and artful

La.—Cormier v Myers, 65 So.2d 345, 223 La. 259

4. Cal.—In re Hampton's Estate, 103 P.2d 611, 39 Cal. App.2d 488—In re Burns' Estate, 80 P.2d 77, 26 Cal. App.2d 741—In re Lepori's Estate, 41 P.2d 970, 4 Cal. App.2d 761

Fla.—**Corpus Juris** cited in In re Aldrich's Estate, 3 So.2d 856, 860, 148 Fla. 121

Ind.—Munson v Quinn, 37 N.E.2d 693, 110 Ind. App. 277

Minn.—In re Olson's Estate, 35 N.W.2d 439, 227 Minn. 289

N.J.—In re Davis' Will, 101 A.2d 521, 14 N.J. 166—In re Hopper's Estate, 88 A.2d 193, 9 N.J. 280—In re Livingston's Will, 73 A.2d 916, 5 N.J. 65

In re Weeks' Estate, 103 A.2d 43, 29 N.J. Super. 533—In re Fleming's Estate, 89 A.2d 54, 19 N.J. Super. 565—In re Stroming's Will, 79 A.2d 492, 12 N.J. Super. 217—In re Gotchel's Estate, 76 A.2d 901, 10 N.J. Super. 208

In re Heim's Will, 40 A.2d 651, 136 N.J. Eq. 138

Neb.—In re Farr's Estate, 33 N.W.2d 454, 150 Neb. 67—**Corpus Juris** quoted in In re Kajewski's Estate, 279 N.W. 185, 188, 134 Neb. 485

Ohio.—In re Will of Maurer, 31 Ohio N.P. N.S. 247

Or.—In re Day's Estate, 257 P.2d 609, 198 Or. 518—In re Hill's Estate, 256 P.2d 735, 198 Or. 307—In re Rosenberg's Estate, 246 P.2d 858, 196 Or. 219—In re Ulrich's Estate, 242 P.2d 204, 194 Or. 429—In re Porter's Estate, 235 P.2d 894, 192 Or. 483—In re Meier's Estate, 224 P.2d 572, 190 Or. 140—In re Lobb's Will, 160 P.2d 295, 177 Or. 162—In re

beneficiary or person who benefits by the will took | part or participated in the preparation<sup>5</sup> or pro-

Lobb's Will, 145 P 2d 808, 173 Or 414

**S D—Corpus Juris cited in** In re Rowlands' Estate, 18 NW 2d 290, 293, 70 S D 419

Tenn—Haynes v Mullins, 209 SW 2d 278, 30 Tenn App 615

**Wis—Corpus Juris quoted in** In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319—In re Raasch's Will, 284 NW 571, 230 Wis 548

**Wyo—Corpus Juris quoted in** In re Nelson's Estate, 266 P 2d 238, 254, 72 Wyo 444

68 C J p 759 note 74

#### Lack of independent advice

A controlling or strong point is the fact that there is no showing that the testator had any independent advice in connection with a will which gives a principal part of his estate to a person with whom he had a highly confidential relationship

**Okla—Anderson v Davis**, 256 P 2d 1099, 208 Okl 477

#### Obtaining independent advice

Any presumption of undue influence arising out of the fiduciary relationship between testatrix and the principal beneficiary would be overcome by the fact that at the time the will was executed the testatrix had the benefit of legal and independent advice

**Mich—In re Teller's Estate**, 284 NW 696, 288 Mich 193

#### Executing will in unknown language

Where a confidential relation exists between the testatrix and the sole beneficiary, and it is shown that the will the testatrix executed was in English, a language she could neither read nor write, and that the will conformed to the law of California but not to the law of Germany although it was executed in Germany where the testatrix at all times resided, and the activity of the beneficiary in sending the drafts of the will to Germany for the testatrix to copy was shown, there would be a presumption of undue influence on the part of the beneficiary

**Cal—In re Pohlmann's Estate**, 201 P 2d 446, 89 Cal App 2d 563

#### Circumstances not sufficient to raise presumption

(1) Where a widow inherits the estate of her husband as sole heir at law, and the husband's former partner is administrator of the estate and in his administration perpetrates fraud on the widow, and subsequently the widow dies leaving a substantial portion of the estate to her husband's administrator, his fraud in the administration of the husband's estate would not create a presumption that he had exerted fraud or undue influence on the widow with respect to her own last will and testament

**Ga—Marlin v Hill**, 15 SE 2d 473, 192 Ga 434

(2) The fact that one of the beneficiaries had at times acted as investment counsel to the testatrix and had advised her on other matters would not raise a presumption of undue influence

**Vt—Central Hanover Bank & Trust Co v Froment**, 49 A 2d 111, 114 Vt 523

(3) Fact that testatrix was colored and beneficiary white would neither raise nor support an inference of undue influence justifying setting aside the will where beneficiary was a neighbor and friend and had interested herself in testatrix' welfare for several years

**Or—In re Perry's Estate**, 181 P 2d 783, 181 Or 332

#### Beneficiary retaining testator's will

(1) Where a confidential relation existed between the testator and the beneficiary it has been held that a presumption of undue influence may arise from the circumstance, among others, that the beneficiary retained the will in his possession

**Colo—Gehm v Brown**, 245 P 2d 865, 125 Colo 555

**Fla—In re Palmer's Estate**, 48 So 2d 732

**Pa—In re Dichter's Estate**, 47 A 2d 691, 354 Pa 444—**In re Stewart's Estate**, 47 A 2d 204, 354 Pa 288

(2) It has also been held that even though a confidential relation existed between the testator and the beneficiary, no presumption of undue influence would arise in consequence of the fact that the testator's will remained in the custody of the beneficiary

**Ga—Marlin v Hill**, 15 SE 2d 473, 192 Ga 434

**N J—In re Davis' Will**, 101 A 2d 521, 14 N J 166

**5. Cal—In re Arnold's Estate**, 107 P 2d 25, 16 Cal 2d 573

**In re Lombardi's Estate**, 276 P 2d 67, 128 Cal App 2d 606—**In re White's Estate**, 276 P 2d 11, 128 Cal App 2d 659—**In re Kerr's Estate**, 274 P 2d 234, 127 Cal App 2d 521—**In re Rugani's Estate**, 239 P 2d 500, 108 Cal App 2d 624—**In re Greenhill's Estate**, 221 P 2d 310, 99 Cal App 2d 155—**In re Merrick's Estate**, 209 P 2d 666, 93 Cal App 2d 624—**In re Leonard's Estate**, 207 P 2d 66, 92 Cal App 2d 420—**In re Doty's Estate**, 201 P 2d 823, 89 Cal App 2d 747—**In re Brown's Estate**, 200 P 2d 888, 89 Cal App 2d 496—**In re Kemp's Estate**, App, 190 P 2d 619—**In re Llewellyn's Estate**, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—**In re Fraser's Estate**, 170 P 2d 704, 75 Cal App 2d 99—

**In re Harkleroad's Estate**, 144 P 2d 88, 62 Cal App 2d 60—**In re Shields' Estate**, 121 P 2d 795, 49 Cal App 2d 293—**In re De Graaf's Estate**, 93 P 2d 199, 34 Cal App 2d 120—**In re Eakle's Estate**, 91 P 2d 954, 33 Cal App 2d 379—**In re Johnson's Estate**, 87 P 2d 900, 31 Cal App 2d 251—**In re Anderson's Estate**, 85 P 2d 212, 29 Cal App 2d 637—**In re Burns' Estate**, 80 P 2d 77, 26 Cal App 2d 741—**In re Mullen's Estate**, 47 P 2d 746, 8 Cal App 2d 684

**Colo—Gehm v Brown**, 245 P 2d 865, 125 Colo 555

**Fla—Corpus Juris cited in** In re Palmer's Estate, 48 So 2d 732, 733—**Corpus Juris cited in** In re Alldrich's Estate, 3 So 2d 856, 860, 148 Fla 121

**Ill—Redmond v Steele**, 126 NE 2d 619, 5 Ill 2d 602—**Wink v Hagen**, 101 NE 2d 585, 410 Ill 158—**Tidholm v Tidholm**, 62 NE 2d 473, 391 Ill 19

**Ind—Sweeney v Vierbuchen**, 66 NE 2d 764, 224 Ind 341

**Munson v Quinn**, 37 NE 2d 693, 110 Ind App 277

**Ky—Hollon's Ex'r v Graham**, 280 SW 2d 544—**Gay v Gay**, 215 SW 2d 92, 308 Ky 539

**Minn—In re Olson's Estate**, 35 NW 2d 439, 227 Minn 289

**Neb—Corpus Juris quoted in** In re Kajewski's Estate, 279 NW 185, 188, 134 Neb 485

**Okla—In re Fletcher's Estate**, 269 P 2d 349—**In re Martin's Estate**, 261 P 2d 603—**Anderson v Davis**, 256 P 2d 1099, 208 Okl 477—**In re Lillie's Estate**, 159 P 2d 542, 195 Okl 597

**Or—In re Day's Estate**, 257 P 2d 609, 198 Or 518—**In re Hill's Estate**, 256 P 2d 735, 198 Or 307—**In re Ulrich's Estate**, 242 P 2d 204, 194 Or 429—**Corpus Juris cited in** In re Porter's Estate, 235 P 2d 894, 898, 192 Or 483—**In re Andersen's Estate**, 235 P 2d 869, 192 Or 441—**In re Detsch's Estate**, 229 P 2d 264, 191 Or 161—**In re Scott's Estate**, 228 P 2d 417, 191 Or 90—**In re Meier's Estate**, 224 P 2d 572, 190 Or 140—**In re Perry's Estate**, 181 P 2d 783, 181 Or 332—**In re Lobb's Will**, 160 P 2d 295, 177 Or 162—**Corpus Juris cited in** In re Rupert's Estate, 54 P 2d 274, 285, 152 Or 649—**In re Knutson's Will**, 41 P 2d 793, 149 Or 467

**Pa—In re Weber's Estate**, 5 A 2d 550, 334 Pa 216

**In re Melvin's Estate**, Orph, 45 Lack Jur 229—**In re Baranowski's Estate**, Com Pl, 43 Lack Jur 86

**S D—Corpus Juris cited in** In re Rowlands' Estate, 18 NW 2d 290, 293, 70 S D 419

**Wash—In re Jaaska's Estate**, 178 P 2d 321, 27 Wash 2d 433.

curing<sup>6</sup> of the will, or actually drafted it or assisted | in its execution,<sup>7</sup> but the part taken by the ben-

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319

Wyo—**Corpus Juris** quoted in In re Nelson's Estate, 266 P 2d 238, 254, 72 Wyo 444

68 C J p 759 note 75

#### Doctrine to be applied with circumspection

The doctrine that it will be presumed that the beneficiary exercised undue influence on the testator where the evidence indicates that a confidential relationship existed between the two individuals, and that the beneficiary was actively concerned in the preparation of the will, will be applied with circumspection since it will be assumed that every testator has confidence in those to whom he makes a bequest or a devise, and in many of them he also, no doubt, reposes trust and reliance, and, in fact, all to whom a testator gives the larger bequests and devises invariably have won his confidence, and furthermore, it is not unlikely that the wife, son, daughter, and others in whom the testator has confidence will be in some manner concerned about the preparation of the will, especially if it is made in the course of an illness. The truth of the matter is that bequests and devises to those in whom the testator has confidence and who have won his affection are more likely to be free from undue influence than bequests and devises to others

Or—In re Knutson's Will, 41 P 2d 793, 149 Or 467

#### Suspicion not equivalent to presumption

The relations which excite suspicion in transactions inter vivos, that is, friendship, confidence and trust, affection, personal obligations, may and usually do justify and properly give direction to testamentary dispositions. All that can be said is the existence of a confidential relation, such as that of guardian and ward, religious advisor and layman, and the like, affords peculiar opportunity for unduly exercising influence over the mind, and where the dominant party, in such relation, initiates the preparation of the will or gives directions as to its contents to the scrivener or writes it himself, in other words, is active either in its preparation or execution, and is made a beneficiary thereunder, a suspicion arises that the benefaction may have resulted from the exertion of undue influence over the testator rather than from his free volition; but such suspicion does not amount to a presumption

Iowa—Olsen v. Corporation of New

Melleray, 60 NW 2d 832, 245 Iowa 407

#### Selection of attorney by beneficiary

(1) Where a confidential relation existed between the testator and the beneficiary a presumption of undue influence may arise from the circumstance that the beneficiary selected the attorney who drew the testator's will

Mo—Machens v Machens, 263 SW 2d 724

NJ—In re Smalley's Estate, 2 A 2d 321, 124 NJEq 461, affirmed 8 A 2d 296, 126 NJEq 217

Pa—In re Dichter's Estate, 47 A 2d 691, 354 Pa 444

(2) There will also be a presumption of undue influence where, in addition to selecting the attorney, the beneficiary dictates the terms of the will or provides the attorney with the necessary information

DC—Wiggins v Smith, 183 F 2d 831, 87 US App DC 112

Or—In re Day's Estate, 257 P 2d 609, 198 Or 518—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429

(3) It has been held that where a confidential relation existed between the testatrix and the principal beneficiary, no presumption of undue influence would arise because in consequence of such relation the beneficiary employed the attorney to draw the will and furnished the attorney with the information as to what the will should contain

Ga—Marlin v Hill, 15 SE 2d 473, 192 Ga 434

6. Ala—Street v Street, 22 So 2d 35, 246 Ala 683—Fulks v Green, 20 So 2d 787, 246 Ala 392—Mindler v Crocker, 18 So 2d 278, 245 Ala 578—Little v Sugg, 8 So 2d 866, 243 Ala 196—Cook v Morton, 1 So 2d 890, 241 Ala 188

Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Kerr's Estate, 274 P 2d 234, 127 Cal App 2d 521—In re Schlyen's Estate, 234 P 2d 211, 105 Cal App 2d 648—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Kemp's Estate, App. 190 P 2d 619—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106—In re Wolleb's Estate, 132 P 2d 864, 56 Cal App 2d 488—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488—In re Lepori's Estate, 41 P 2d 970, 4 Cal App 2d 761

Fla—Zinnser v Gregory, Fla, 77 So 2d 611—**Corpus Juris** cited in In re Aldrich's Estate, 3 So 2d 856, 860, 148 Fla 121

Ill—Redmond v Steele, 126 NE 2d 619, 5 Ill 2d 602—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Pow-

ell v Weld, 101 NE 2d 581, 410 Ill 198—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499

Mo—Larkin v Larkin, 119 SW 2d 351

Neb—**Corpus Juris** quoted in In re Kajewski's Estate, 279 NW 185, 188, 134 Neb 485

NJ—In re Castellano's Will, 171 A 139, 115 NJEq 356

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523

SD—**Corpus Juris** cited in In re Rowlands' Estate, 18 NW 2d 290, 293, 70 SD 419

Wash—Foster v Brady, 86 P 2d 760, 198 Wash 13—Dean v Jordan, 79 P 2d 331, 194 Wash 661

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319

Wyo—**Corpus Juris** quoted in In re Nelson's Estate, 266 P 2d 238, 254, 72 Wyo 444

68 C J p 760 note 76

#### Amanuensis a beneficiary

(1) From the fact that the testator's secretary, a beneficiary, wrote the will at the testator's dictation, thus merely responding to his commands, it cannot be urged that she was active in procuring the execution of the will

Ala—Council v Mayhew, 55 So 314, 172 Ala 295

(2) Even if a fiduciary relation existed between the testator and the beneficiary who was the testator's private secretary, such fact alone would not be sufficient to cast on her the burden of showing an absence of fraud and undue influence, and it would be necessary to show that she was in some way instrumental in procuring the execution of the will, and where all that is shown is that she performed ordinary secretarial duties in taking and transcribing notes and following the directions of the testator, such activities obviously cannot constitute a participation in the transaction within the meaning of the rule creating a presumption of undue influence

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64

7. Ala—Little v Sugg, 8 So 2d 866, 243 Ala 196

Cal—In re Chesney's Estate, 228 P 2d 46, 102 Cal App 2d 708—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154

Fla—**Corpus Juris** cited in In re Aldrich's Estate, 3 So 2d 856, 860, 148 Fla 121

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64

Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225.

eficiary must go to the substance of the testamentary act, and not to some mere formal matter,<sup>8</sup> and no presumption of undue influence will be raised where the activity of the beneficiary in the preparation, drafting, or execution of the will was in compliance with the request of the testator.<sup>9</sup> A

presumption of undue influence will arise if it is shown that, in addition to the confidential or fiduciary relation, the testator was dominated,<sup>10</sup> or controlled<sup>11</sup> by the beneficiary, or that the testator was weak-minded or in frail health and particularly susceptible to influence,<sup>12</sup> or that the provisions of

Doll v Fricke, 171 SW2d 755, 237 Mo App 1148  
**Neb—Corpus Juris quoted in** In re Kajewski's Estate, 279 NW 185, 188, 134 Neb 485  
 NJ—In re Heim's Will, 40 A 2d 651, 136 N J Eq 138  
 NC—McNeill v McNeill, 25 SE2d 615, 223 NC 178  
 Okl—In re Lillie's Estate, 159 P2d 542, 195 Okl 597  
 Or—In re Detsch's Estate, 229 P2d 264, 191 Or 161—In re Scott's Estate, 228 P2d 417, 191 Or 90—In re Perry's Estate, 181 P2d 783, 181 Or 332  
 Pa—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81  
 Tenn—Nobles v Farmer, 9 Tenn App 6  
 Wis—**Corpus Juris quoted in** In re Faulks' Will, 17 NW2d 423, 440, 246 Wis 319  
 Wyo—**Corpus Juris quoted in** In re Nelson's Estate, 266 P2d 238, 254, 72 Wyo 444  
 68 CJ p 760 note 77

**Undue activity by favored beneficiary**

Ala—Lackey v Lackey, 76 So 2d 761, 262 Ala 45—Hubbard v Moseley, 75 So 2d 658, 261 Ala. 683—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Hyde v Norris, 35 So 2d 181, 250 Ala 518

**Causing execution of will**

It must be shown that the fiduciary-beneficiary was active in some way which caused or assisted in causing the execution of the will  
 Mo—Baker v Spears, 210 SW2d 13, 357 Mo 601—Buckner v Tuggle, 203 SW2d 449, 356 Mo 718—Pulitzer v Chapman, 85 SW2d 400, 337 Mo 298

**Exclusion of others from testator's presence**

Where a confidential or fiduciary relation exists between the testator and a beneficiary who assisted in the preparation of the instrument and was present at its execution, the fact that other beneficiaries were excluded from the presence of the testator will give rise to a presumption of undue influence

Okl—Myers v Myers, 266 P 452, 130 Okl 184—Toombs v Matthesen, 241 P2d 937, 206 Okl 139

**Activities carried on from distance**

A beneficiary who stands in a confidential relation with the testatrix may carry on activities to procure the execution of the will from a great distance, as where the benefi-

ciary is in the United States and the testatrix is at all times in Germany, and a presumption or inference of undue influence may arise even though the beneficiary is not physically present at the time the will is executed

Cal—In re Pohlmann's Estate, 201 P2d 446, 89 Cal App2d 563

8 Cal—In re Welch's Estate, 272 P2d 512, 43 Cal2d 173

In re Dunne's Estate, 278 P2d 733, 130 Cal App2d 216—In re Kemp's Estate, 190 P2d 619—In re Llewellyn's Estate, 189 P2d 822, 83 Cal App2d 534, hearing denied 191 P2d 419, 83 Cal App2d 534—In re Hull's Estate, 146 P2d 242, 63 Cal App2d 135—In re King's Estate, 146 P2d 952, 63 Cal App2d 365—In re Comino's Estate, 131 P2d 599, 55 Cal App2d 806

Ill—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041

Okl—In re Martin's Estate, 261 P2d 603—In re Baker's Will, 248 P2d 627, 207 Okl 158—Toombs v Matthesen, 241 P2d 937, 206 Okl 139—**Corpus Juris cited in** In re Lillie's Estate, 159 P2d 542, 545, 195 Okl 597

68 CJ p 759 note 75 [a]

**More than physical assistance**

Where a confidential or fiduciary relation exists, the activity of the beneficiary in procuring the execution of the will that creates a presumption of undue influence is something more than mere physical assistance in making arrangements for the drawing and execution of the will

Mo—Snell v Seek, 250 SW2d 336, 363 Mo 225

**Attorney's advice on formal matter**

No presumption of undue influence arises from the fact that the testatrix followed her attorney's advice on a merely formal matter, the proper signature to use in the execution of the will

Pa—In re Mills' Estate, 79 Pa Dist & Co 417

**Beneficiary acting as messenger**

Where a beneficiary sustains a confidential relation with the testatrix and unduly profits by the will of the testatrix, a presumption of undue influence will arise if the beneficiary actively participates in procuring the execution of the will, but the activity required is something more than merely acting as a messenger between the testatrix and her attorney.

Cal—In re Ewan's Estate, 153 P2d 782, 67 Cal App2d 111

9 Ala—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 621—Fulks v Green, 20 So 2d 787, 246 Ala 392—Mindler v Crocker, 18 So 2d 278, 245 Ala 578

Okl—In re Martin's Estate, 261 P2d 603—Toombs v Matthesen, 241 P2d 937, 206 Okl 139—**Corpus Juris cited in** In re Lillie's Estate, 159 P2d 542, 545, 195 Okl 597  
 68 CJ p 759 note 75 [a]

10 Ala—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624

Ill—Redmond v Steele, 126 NE2d 619, 5 Ill2d 602—Tidholm v Tidholm, 62 NE2d 473, 391 Ill 19

NJ—In re Looi's Will, 28 A 2d 281, 20 NJ Misc. 376, affirmed 28 A 2d 288, 132 N J Eq 316

**Dominating confidential relation**

Ala—Lackey v Lackey, 76 So 2d 761, 262 Ala 45—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Hyde v Norris, 35 So 2d 181, 250 Ala 518—Street v Street, 22 So 2d 35, 246 Ala 683

**Beneficiary dominant party**

Where principal devisee is dominant party in fiduciary relationship with testatrix and procures will to be drawn, although undue influence is presumed, presumption may be overcome by competent evidence

Ill—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576

**Testator dominant party**

Where a confidential relation exists between the testator and the beneficiary, but the testator dominates the relation, there is no presumption of undue influence

NJ—In re Castellano's Will, 171 A 139, 115 N J Eq 356

11. Ky—Gay v Gay, 215 SW2d 92, 308 Ky 539

12. Cal—In re Abert's Estate, 204 P2d 347, 91 Cal App2d 50—In re Hilker's Estate, 194 P2d 132, 8 Cal App2d 680—In re Llewellyn's Estate, 189 P2d 822, 83 Cal App2d 534, hearing denied 191 P2d 419, 83 Cal App2d 534—In re Hampton's Estate, 103 P2d 611, 39 Cal App2d 488

Ky—Hollon's Ex'r v. Graham, 280 SW2d 544—Gay v Gay, 215 SW2d 92, 308 Ky 539

Md—Doyle v Rody, 25 A 2d 457, 180 Md 471

Minn—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289

Mo—Machens v. Machens, 263 SW. 2d 724.

the will are unnatural and unjust,<sup>13</sup> or that the | person designated as a recipient of benefits there-

Neb—**Corpus Juris** quoted in In re Kajewski's Estate, 279 NW 185, 188, 134 Neb 485

NJ—In re Smalley's Estate, 2 A 2d 321, 124 NJ Eq 461, affirmed 8 A 2d 296, 126 NJ Eq 217—In re Castellano's Will, 171 A 139, 115 NJ Eq 356

Or—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429

Pa—In re Wilson's Estate, 72 A 2d 561, 364 Pa 488—In re Lewis' Estate, 72 A 2d 80, 364 Pa 225—In re Dichter's Estate, 47 A 2d 691, 354 Pa 444—In re Hollinger's Estate, 41 A 2d 554, 351 Pa 364—In re Schwartz' Estate, 16 A 2d 374, 340 Pa 170—In re Dible's Estate, 175 A 538, 316 Pa 553

In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

In re McGowan's Estate, Orph, 3 Lebanon 12—In re Dugacki's Will, Com Pl, 31 North Co 145—In re Gayman's Estate, 21 Northumb Leg J 149

Wash—Foster v Brady, 86 P 2d 760, 198 Wash 13—Dean v Jordan, 79 P 2d 331, 194 Wash 661

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319

Wyo—**Corpus Juris** quoted in In re Nelson's Estate, 266 P 2d 238, 254, 72 Wyo 444

68 C J p 761 note 78

#### Weakened intellect

It has been held that the burden of proof shifts to the proponent only where there is evidence of weakened intellect

US—Greenwood v Greenwood, D C Pa, 16 F R D 366, appeal dismissed, C A, 224 F 2d 318

Pa—May v Fidelity Trust Co, 99 A 2d 880, 375 Pa 135—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Roberts' Estate, 94 A 2d 780, 373 Pa 7—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Snedeker's Estate, 84 A 2d 568, 368 Pa. 607—In re Queen's Estate, 62 A 2d 909, 361 Pa 133—In re Ash's Estate, 41 A 2d 620, 351 Pa 317—Buhan v Keslar, 194 A 917, 328 Pa 312—In re Geist's Estate, 191 A. 29, 325 Pa 401

In re Bhare's Estate, 88 Pa Dist & Co 191, 4 Fiduciary 246, 17 Som 1

In re Kerr's Estate, Orph, 85 Pittsb Leg J 825—In re Henry's Estate, Orph, 52 York Leg Rec 177

68 C J p 761 note 78 [a]

#### Weakness of body

Bodily weakness alone is not sufficient to shift the burden of proof on the beneficiary occupying a confidential relation to the testator, since one may be physically weak and yet have a perfectly sound and strong mind.

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Queen's Estate, 62 A 2d 909, 361 Pa 133

#### Enfeebled by age

The fact that a person is aged, decrepit, and somewhat enfeebled does not mean that he is easily controlled or managed, nor does it raise any inference that some interested person has gained the ascendancy over him, and dictated the terms of his will

NY—In re Streb's Will, 288 NYS 334, 247 App Div 556

#### Alcoholic

A presumption of undue influence may arise from the fact that the testatrix' mental condition was impaired from the excessive use of alcohol and that a confidential relation existed between her and the chief beneficiary, together with other suspicious circumstances

Fla—In re Palmer's Estate, 48 So 2d 732

#### Evidence which is insufficient on issue of capacity

(1) Although evidence of bodily infirmity and weakened mentality may not be sufficient to establish testamentary incapacity, a presumption of undue influence arises where a person standing in a confidential relation is benefited by a will which he has been instrumental in having executed

Pa—In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37

(2) A presumption of undue influence arises from such evidence where the person standing in the confidential relation and who is benefited by the will he has been instrumental in having executed, is a stranger to the blood of the testator

Pa—In re Queen's Estate, 62 A 2d 909, 361 Pa 133—In re Stewart's Estate, 47 A 2d 204, 354 Pa 288—In re Adams' Estate, 69 A 989, 220 Pa 531, 123 AmSR 721

In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

13 Cal—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129

Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Md—Doyle v Rody, 25 A 2d 457, 180 Md 471

Minn—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289

Mo—Machens v Machens, 263 SW 2d 724

Neb—**Corpus Juris** quoted in In re Kajewski's Estate, 279 NW 185, 188, 134 Neb 485

NJ—In re Weeks' Estate, 103 A 2d 43, 29 NJ Super 533

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319

68 C J p 761 note 79

#### Favored beneficiary

The "favored beneficiary" rule is to the effect that where a confidential relationship exists between a testator and a favored beneficiary, activity by the favored beneficiary in the preparation and execution of the will raises a presumption of undue influence and casts the burden of proof on the beneficiary, and within the meaning of this rule, a "favored beneficiary" is one who, in the circumstances of the particular case, has been favored over others having equal claim to the testator's bounty

#### Distribution not necessarily unjust

Provisions of a will are not to be considered unnatural or unjust so as to raise a presumption of undue influence because a legacy to a sister is substantially smaller than the legacy to a woman who had served the testator efficiently as housekeeper and nurse for a small wage, and with whom the testator maintained a confidential relation

Cal—In re Velladao's Estate, 88 P. 2d 187, 31 Cal App 2d 355

#### Transfer of property of another

Where testatrix is obligated by a valid oral contract to execute a will in favor of her son-in-law, but in violation of such contract she executes a will in favor of one who stands in a fiduciary relationship with her, there would be a presumption that the beneficiary under the will exerted undue influence on the testatrix

Cal—West v Stainback, 240 P 2d 366, 108 Cal App 2d 806

#### Claim of collateral heirs to testatrix' bounty

Where a confidential relation existed between testatrix and the beneficiary under the will, and where the next of kin of the testatrix were collateral heirs, the pretermitted next of kin, in order to show the will to be unnatural to create a presumption of undue influence, would be required to show affirmatively that they had peculiar or superior claims to the decedent's bounty

Cal—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367

#### Exclusion of natural object of testator's bounty

(1) Where the natural object of the testator's bounty is excluded

under unduly profited by the will<sup>14</sup>

Before there can be room for the application of any of these rules it is necessary to show that the facts and circumstances which it is contended create a presumption of undue influence were directly connected with the execution of the instrument and

were operating at the time the will was made,<sup>15</sup> and it is also necessary that there be a fiduciary or confidential relationship between the parties,<sup>16</sup> which was in existence at or prior to the time the will was made,<sup>17</sup> and that the person occupying such a relationship toward the testator take a substan-

from participation in his estate, where a stranger supplants children, and the will is in favor of the lawyer drawing and advising as to its provisions, or the guardian having charge of the testator's person and estate, or is in favor of a person occupying a clearly analogous position of trust, there is imposed on the proponents of the will, on the trial of the issue, the obligation of disproving the actual exercise of undue influence

Conn.—Pepin v Ryan, 47 A 2d 846, 133 Conn 12—In re Lockwood, 69 A 8, 80 Conn 513

(2) Where one standing in a confidential relation with the testatrix is the chief beneficiary under her will, slight circumstances of undue influence will cast the burden of proof on the beneficiary, and the burden of proof will shift to the beneficiary where it is shown that the testatrix, after consulting with the beneficiary's attorney, decided to take from the natural objects of her bounty what she had given them by her earlier wills, and conferred what she had thus taken away on the beneficiary

NJ—In re Smalley's Estate, 2 A 2d 321, 124 N J Eq 461, affirmed 8 A 2d 296, 126 N J Eq 217

14 Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Kerr's Estate, 274 P 2d 234, 127 Cal App 2d 521—In re Rugani's Estate, 239 P 2d 500, 108 Cal App 2d 624—In re Schlyen's Estate, 234 P 2d 211, 105 Cal App 2d 648—In re Chesney's Estate, 228 P 2d 46, 102 Cal App 2d 708—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Hilker's Estate, 194 P 2d 132, 8 Cal App 2d 680—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Harkleroad's Estate, 144 P 2d 88, 62 Cal App 2d 60—In re Webster's Estate, 137 P 2d 751, 59 Cal App 2d 1—In re Rabinowitz' Estate, 135 P 2d 579, 58 Cal App 2d 106—In re Bucher's Estate, 132 P 2d 257, 56 Cal App 2d 135—In re De Graaf's Estate, 93 P 2d 199, 34 Cal App 2d 120—In re Eakle's Estate, 91 P 2d 954, 33 Cal App 2d 379—In re Johnson's Estate, 87 P 2d 900, 31 Cal App 2d

251—In re Anderson's Estate, 85 P 2d 212, 29 Cal App 2d 637—In re Burns' Estate, 80 P 2d 77, 26 Cal App 2d 741—In re Jacobs' Estate, 76 P 2d 128, 24 Cal App 2d 619—In re Lepori's Estate, 41 P 2d 970, 4 Cal App 2d 761

#### One factor among others

Where it was shown that the relations between the beneficiary and the testatrix afforded the beneficiary an opportunity to control the testamentary act and the physical condition of testatrix was such as to permit of a subversion of her freedom of will, and the beneficiary was active in procuring the instrument to be executed, and in addition the beneficiary unduly profited under the provisions of the will, while none of these circumstances standing alone will have the effect of creating a presumption against the validity of the instrument, their probative force in combination is to impose on the proponent the obligation of presenting evidence of volition

Cal—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154

15 Idaho—Swaringen v Swannstrom, 175 P 2d 692, 67 Idaho 245 Ill—Redmond v Steele, 126 NE 2d 619, 5 Ill 2d 602—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041

Hughes v Williams, 20 NE 2d 860, 300 Ill App 108

Iowa—In re Hadley's Estate, 45 N W 2d 140, 241 Iowa 1280—In re Heller's Estate, 11 NW 2d 586, 233 Iowa 1356

Pa—In re Hollinger's Estate, 41 A 2d 554, 351 Pa 364—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299

In re Melvin's Estate, Orph., 45 Lack Jur 229

Tex—Breedon v. Miller, Civ App, 236 SW 2d 225

#### In connection with will

Undue influence must be proved in connection with the will and not other things

Mich—In re Hannan's Estate, 23 N W 2d 222, 315 Mich 102—In re Reed's Estate, 263 NW 76, 273 Mich 334—Maynard v. Vinton, 26

NW 401, 59 Mich 139, 60 Am Rep 276

Tex—Black v Black, Civ App, 240 SW 2d 458, error refused no reversible error

#### Time of exerting influence immaterial

A presumption of undue influence will not arise unless it is shown that the influence was operative at the time the will was executed, but the time the influence was exerted is of no moment as long as it remained effective at the time the will was executed

NJ—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed 32 A 2d 353, 133 N J Eq 344

#### No influence operating on testator

There could be no presumption of undue influence where it was shown that the testator could not be influenced so as to destroy his free agency, or induced to perform an act against his will as he had matured it in his mind

Ky—McAtee v McAtee, 181 SW 2d 401, 297 Ky 865

16. Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571 In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135 Ill—Gilbert v Oneale, 21 NE 2d 283, 371 Ill 427

Mich—In re Brady's Estate, 295 N W 230, 295 Mich 472—In re Evans' Estate, 277 NW 893, 283 Mich 275—In re Reynolds' Estate, 262 N W 649, 273 Mich 71—In re Flood's Estate, 259 NW 161, 270 Mich 655—In re Lacroix's Estate, 251 NW 319, 265 Mich 59

Pa—Wetzel v Edwards, 16 A 2d 441, 340 Pa 121

In re Boyd's Estate, 77 A 2d 662, 168 Pa Super 182

Va—Croft v Snidow, 33 SE 2d 208, 183 Va 649

Wis—Corpus Juris quoted in In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444. 68 C J p 761 note 80

17 Mich—In re Evans' Estate, 277 NW 893, 283 Mich 275. 68 C J p 758 note 63 [b].



tial<sup>18</sup> beneficial interest under the will,<sup>19</sup> but the fact that the person is designated by the will to be executor or trustee of the decedent's estate does not ordinarily constitute a beneficial interest within the meaning of this rule<sup>20</sup>

**Personal relationship** The influence of husband and wife over each other and their desire to provide

for each other by will being considered natural and legitimate, the burden of proof is not shifted, or a presumption of fraud or undue influence raised, by the fact that one is made a beneficiary in the will of the other,<sup>21</sup> although the testator or testatrix is dependent on the spouse,<sup>22</sup> or the will is made in accordance with the wishes of the spouse,<sup>23</sup> unless

18 Fla—Zinnser v Gregory, 77 So 2d 611

Ill—Redmond v Steele, 126 NE2d 619, 5 Ill2d 602—Tidholm v Tidholm, 62 NE2d 473, 391 Ill 19

Pa—In re Lewis' Estate, 72 A 2d 80, 364 Pa 225

**Unnaturally large share of estate**

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433—Foster v Brady, 86 P 2d 760, 198 Wash 13—Dean v Jordan, 79 P 2d 331, 194 Wash 661

**Where legacy is large**

Where a stranger to the blood procures a large legacy, that factor, taken together with the testator's weak mentality, will create a presumption of undue influence

Pa—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

19 Ala—Street v Street, 22 So 2d 35, 246 Ala 683—Fulks v Green, 20 So 2d 787, 246 Ala 392

Cal—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129

Ill—Ennis v Gale, 95 NE2d 322, 407 Ill 215

Minn—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289

Mo—Winn v Matthews, 137 SW 2d 632, 235 Mo App 337

Okl—In re Fletcher's Estate, 269 P 2d 349

Tex—Kolb v Chandler, Civ App, 209 SW 2d 783

Wis—**Corpus Juris** quoted in In re Faulks' Will, 17 NW 2d 423, 440, 246 Wis 319

68 C J p 761 note 81

**Benefaction as grounds for presumption**

While one of the bases for the permissible inference of undue influence is benefaction, some pecuniary benefit to be derived, directly or indirectly, under the will by the fiduciary, there must be something more than the existence of the fiduciary relation and the benefaction to or in the interest of the fiduciary

Mo—Baker v Spears, 210 SW 2d 13, 357 Mo 601—Rex v Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589—Pulitzer v Chapman, 85 SW 2d 400, 337 Mo 298

Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148

**Failure of beneficiary to profit**

Where a confidential relation exists between the person making the will

and the beneficiary under it, the beneficiary must show that the instrument was not induced by undue influence, but where it is shown that the one in the fiduciary relation did not profit by the transaction such proof becomes unimportant

Fla—Murrey v Barnett Nat Bank of Jacksonville, 74 So 2d 647

**Person acting for beneficiary**

It is not essential that the beneficiary be the one who exerted undue influence over the testator, and if the person whose actions are questioned stands in a confidential relation with the testator, a presumption of undue influence will arise if that person was acting for the beneficiary by express or implied authority, or pursuant to a common understanding

Ala—Little v Sugg, 8 So 2d 866, 243 Ala 196

**No necessity for direct benefit**

(1) It is not the law that the confidential adviser who has the opportunity to influence the testatrix, and aids her in making her will, must receive a direct benefit as a devisee or legatee under the will in order to shift the burden of going ahead with the evidence to the protestants of the will, and if the confidential adviser's spouse is the beneficiary the confidential adviser's activity will be imputed to his spouse, and if the confidential adviser is the agent or representative of the beneficiary, the activities of the confidential adviser will be imputed to the beneficiary

Cal—In re Lekos' Estate, 240 P 2d 387, 109 Cal App 2d 42

(2) If a confidential relation exists between a testator and the person who has been actively concerned in some way with the preparation and execution of the testator's will, a presumption of undue influence will arise if it is a member of that person's immediate family who is named as beneficiary in the will

Ind—Sweeney v Vierbuchen, 66 NE 2d 764, 224 Ind 341

20 Cal—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Del Fosse's Estate, 154 P 2d 734, 67 Cal App 2d 490

Fla—Zinnser v Gregory, 77 So 2d 611

Mo—Baker v Spears, 210 SW 2d 13, 357 Mo 601

Pa—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—Wetzel v Edwards, 16 A 2d 441, 340 Pa 121.

In re Bhare's Estate, 88 Pa Dist & Co 191, 4 Fiduciary 246, 17 Som 1

In re Griffith's Estate, Orph, 63 Montg Co 275

68 C J p 761 note 81 [a] (1), [c]

**Collateral benefits**

Where a trustee has been given full and supreme power and authority over valuable property during a life estate, it has been held that, by reason of the collateral benefits naturally following from the free and complete power, he is within the rule

Ala—Zeigler v Coffin, 123 So 22, 219 Ala 586, 63 A L R 942

**Large beneficiary as well as executor**

Where the will was executed through the intervention of a person who occupied a confidential relation toward the testatrix, and the person was made executor as well as a large beneficiary, the circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts on the person the burden of removing the suspicion by offering proof that the will was the free and voluntary act of the testator

NC—McNeill v McNeill, 25 SE 2d 615, 223 NC 178—In re Will of Everett, 68 SE 924, 925, 153 NC 83

21. Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488

Fla—Goertner v Gardiner, 170 So 112, 125 Fla 477, rehearing denied 170 So 844, 126 Fla 412

Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225

Neb—In re Thompson's Estate, 44 NW 2d 814, 153 Neb 375

NJ—In re Livingston's Will, 73 A 2d 916, 5 NJ 65

NC—In re Holmes' Will, 32 SE 2d 614, 224 NC 830

Or—In re Deitch's Estate, 229 P 2d 264, 191 Or 161

68 C J p 762 note 82

22 Ill—Meeker v. Meeker, 75 Ill 260

23 Cal—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100

68 C J p 762 note 84.



coupled with proof of coercion<sup>24</sup> So, also, no presumption of undue influence changing the burden of proof arises from the fact that between the testator and beneficiary there is blood<sup>25</sup> or family<sup>26</sup> relationship, as a relation of parent and child,<sup>27</sup> brother and sister,<sup>28</sup> and aunt or uncle and niece or nephew,<sup>29</sup> even though a confidential or fiduciary relation also exists,<sup>30</sup> unless circumstances indicating actual dominion are shown<sup>31</sup>

*Intimate and affectionate relation.* The mere fact that an intimate and affectionate relation existed between the testator and the beneficiary will not raise a presumption of undue influence,<sup>32</sup> although it has been held that the rule is otherwise where

the testator was a person of weak judgment and the legacy was very large<sup>33</sup>

*Attorney-client relationship* In accordance with the rule, stated in Attorney and Client § 127 a, that all transactions and dealings between an attorney and his client are, as against the attorney, prima facie fraudulent or presumed to have been obtained by undue influence, it has been held that if a testator makes a testamentary transfer of property to one who is acting as the testator's attorney, either in relation to the making of the will or generally, there is a presumption of undue influence which the attorney must rebut<sup>34</sup> On the other hand, it has been held that the mere fact that the confidential rela-

24 Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100  
68 C J p 762 note 85

**Rule of active participation and undue profit**

A confidential relationship exists between a husband and wife who are living together, within meaning of rule that where one who sustains a confidential relationship to testator actively participates in procuring execution of will and unduly profits by will, burden is on him to show that will was not induced by his undue influence

Cal—In re Schlyen's Estate, 234 P 2d 211, 105 Cal App 2d 648

25. Cal—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444

**Grandparent and grandchild**

The mere fact that the testatrix was the grandmother of the beneficiary, and that the parties lived together, would not create a presumption of undue influence

Tenn—Solari v Albertine, 193 S W 2d 111, 29 Tenn App 61

**Mother exerting influence in favor of children**

Where a testator had children by a first marriage and children by a second marriage, and the children by the second marriage are the principal beneficiaries under the will, the fact that the second wife engaged in a long course of conduct of partiality in favor of her children and to the prejudice of the children of the first marriage, would not shift the burden of proof of undue influence to the principal beneficiaries

N J—In re Reynolds' Estate, 27 A 2d 226, 132 N J Eq 141, affirmed, 32 A 2d 353, 133 N J Eq 344

26. Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—Wartmann v Burleson, 190 So 789, 139 Fla 458

27 Ala—Kahalley v Kahalley, 28 So 2d 792, 248 Ala. 624.

Cal—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85

Ill—Pepe v Caputo, 97 NE 2d 260, 408 Ill 321

Hughes v Williams, 20 NE 2d 860, 300 Ill App 108

Md—Koppal v Soules, 56 A 2d 48, 189 Md 346

Mich—In re Hannan's Estate, 23 N W 2d 222, 315 Mich 102

Pa—In re Cookson's Estate, 188 A 904, 325 Pa 81

In re Brooks' Estate, Orph, 27 Del Co 140—In re Chylak's Estate, Orph, 55 Lack Jur 129—In re Singcr's Estate, Orph, 45 Lanc L Rev 585

Tex—Firestone v Sims, Civ App, 174 S W 2d 279, error refused

68 C J p 762 note 86

**Dominance of parent presumed**

In will contest, it is presumed prima facie that in transactions between parent and child, parent is dominant party and that they are free from undue influence, and burden is on contestant to show that time and circumstances have reversed order of nature and that dominance of parent has been displaced by subservience to child

Ala—Lackey v Lackey, 76 So 2d 761, 262 Ala 45—Wilson v Payton, 37 So 2d 499, 251 Ala 411

**Confidential relationship**

Where, in addition to relationship of testator and child, there exists between the testator and the child a confidential relationship, as where the child attends to all of the testator's business, the rule of presumption with reference to confidential agents applies in will contest, not the rule with reference to parent and child

Or—In re Porter's Estate, 235 P 2d 894, 192 Or 483

**Child always residing with parent**

The fact that a child who is the sole beneficiary has always resided with the testator does not create a

presumption that the son exerted undue influence

N J—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208

28 N J—In re Skewis' Will, 64 A 2d 892, 2 N J Super 114

Tex—Price v Talaferro, Civ App, 254 S W 2d 157, refused no reversible error

68 C J p 762 note 87

29 Mich—In re Reynolds' Estate, 262 N W 649, 273 Mich 71

68 C J p 762 note 88

**Niece of testator's wife**

Ill—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444

30 Cal—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488

68 C J p 762 note 89

31. Cal—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Harkleroad's Estate, 144 P 2d 88, 62 Cal App 2d 60

68 C J p 762 note 90

32. Or—In re Comegys' Estate, 284 P 2d 758

68 C J p 762 note 91.

Kindness and attention as not raising presumption of undue influence see infra § 244

**Presumption against undue influence**

Ill—Redmond v Steele, 126 NE 2d 619, 5 Ill 2d 602—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Harp v Parr, 48 NE 113, 168 Ill 459

33. Ga—Walker v Hunter, 17 Ga 364

34 Cal—In re Corbett's Estate, 266 P 2d 935, 123 Cal App 2d 465—In re Phillip's Estate, 172 P 2d 377, 76 Cal App 2d 100

Okl—In re Harjoch's Estate, 146 P 2d 130, 193 Okl 631

Tenn—Solari v Albertine, 193 S W 2d 111, 29 Tenn App 61

68 C J p 758 note 63 [a] (1)

**In New Jersey**

(1) It has been held that a presumption of undue influence arises from the existence of the attorney and client relationship between the beneficiary and the testator, even

tionship which exists between a testator and the person who is beneficiary under the testator's will is that of attorney and client, does not, of itself, create a presumption that the bequest to the attorney-beneficiary was the result of undue influence,<sup>35</sup> and the fact that the attorney-beneficiary participated in the drawing of the will does not necessarily create

the presumption,<sup>36</sup> even though the will makes little or no provision for the natural objects of the testator's bounty,<sup>37</sup> but such a presumption may arise from the fact that the attorney-beneficiary actively participated in the procuring, preparation, or execution of the will.<sup>38</sup> In order to give rise to the presumption of undue influence the attorney must

though the attorney-beneficiary declined to take any part in the preparation or execution of the will, and the will was prepared and the execution attended by independent counsel  
N J—In re Hopper's Estate, 88 A 2d 193, 9 N J 280

(2) It has also been held that a presumption of undue influence arises from the existence of the attorney and client relationship between the beneficiary and the testator where the attorney-beneficiary was legal adviser in the preparation and execution of the will

N J—In re Bartles' Will, 13 A 2d 642, 127 N J Eq 472, amended on other grounds 19 A 2d 17, 129 N J Eq 280

(3) Under such circumstances the burden of proof is on the beneficiary-attorney

N J—In re Bartles' Will, 19 A 2d 17, 129 N J Eq 280

(4) In earlier cases it was held that an attorney who draws or actively participates in the making of his client's will, by which he substantially benefits, has the burden cast on him of establishing that it was not the result of undue influence

N J—In re Bishop's Will, 125 A 384, 96 N J Eq 595—Farnum v Boyd, 41 A 422, 56 N J Eq 766

(5) In a case where the confidential relationship between the testator and the beneficiary was that of attorney and client it was stated that there were New Jersey cases which would seem to hold that the mere existence of such relationship places the burden of proving that the will was the free act of the testator on the proponent, but the court further stated that, "This is not the true rule and these cases, as well as others, enunciating such rule (e g., In re Bishop's Will, 96 N J Eq 595, 125 A 384) are disapproved in this particular"

N J—In re Nixon's Will, 41 A 2d 119, 136 N J Eq 242

(6) Thus, the general rule that no presumption of undue influence arises because of the existence of a confidential relationship between a testator and the beneficiary under the testator's will has been applied in cases where the beneficiary was the attorney for the testator, and drafted and took part in the execution of the will, and it has been held that some

additional fact must be established to impose on the attorney-beneficiary the burden of proof

N J—In re Davis' Will, 101 A 2d 521, 14 N J 166

In re Nixon's Will, 41 A 2d 119, 136 N J Eq 242—In re Heim's Will, 40 A 2d 651, 136 N J Eq 138

(7) If in addition to the attorney and client relationship existing between the beneficiary and the testator, it is shown that the testator's mentality was so enfeebled that it could not well resist improper influence, or solicitude and action on the part of the dominant mind to see that the will was prepared and executed, or an arrangement for the presence of particular testamentary witnesses, or some such self-serving and suspicious element, the burden of proof will shift to the attorney who is the beneficiary under the will

N J—In re Heim's Will, supra

(8) Where a testatrix made members of the immediate family of her attorney the beneficiaries under her will, the fact that the will remained in her attorney's custody from the date of its execution until the death of the testatrix did not require a presumption of undue influence

N J—In re Davis' Will, 101 A 2d 521, 14 N J 166

35. Idaho—Swaringen v Swannstrom, 175 P 2d 692, 67 Idaho 245  
Iowa—In re Ankeny's Estate, 28 N W 2d 414, 238 Iowa 754

Ohio—Caswell v Lermann, 88 N E 2d 405, 85 Ohio App 200—Corpus Juris cited in Cave v McLean, 32 N E 2d 581, 584, 66 Ohio App 196

S D—In re Rowlands' Estate, 18 N W 2d 290, 70 S D 419

Wis—Corpus Juris quoted in In re Faulks' Will, 17 N W 2d 423, 439, 246 Wis 319

68 C J p 759 note 65

#### Suspicion not presumption

Existence of confidential relation, such as attorney and client, affords peculiar opportunities for undue influence, and where dominant party in such relation is active either in preparation or execution of will, and is made beneficiary thereunder, suspicion of undue influence arises, but such suspicion does not amount to a presumption

Iowa—Olsen v Corporation of New Melleray, 60 N W 2d 832, 245 Iowa 407.

36. N Y—In re Smith, 95 N Y 516

In re Moskowitz' Will, 107 N Y S 2d 853, 279 App Div 660, affirmed 106 N E 2d 68, 303 N Y 992, motion denied 107 N E 2d 84, 304 N Y 593  
—In re Rintelen's Will, 78 N Y S 1092, 77 App Div 142

In re Cotter's Estate, 40 N Y S 2d 93, 180 Misc 399

In re Little's Will, 45 N Y S 2d 751

N D—Stormon v Weiss, 65 N W 2d 475

37. N Y—In re Moskowitz' Will, 107 N Y S 2d 853, 279 App Div 660, affirmed 106 N E 2d 68, 303 N Y 992, motion denied 107 N E 2d 84, 304 N Y 593

In re Little's Will, 45 N Y S 2d 751

38. Cal—In re Estate of Witt, 245 P 197, 198 Cal 407

In re Johnson's Estate, 193 P 2d 782, 85 Cal App 2d 760—In re Keizur's Estate, 148 P 2d 116, 64 Cal App 2d 117

Ind—Sweeney v Vierbuchen, 66 N E 2d 764, 224 Ind 341

Md—Cook v Hollyday, 45 A 2d 761, 185 Md 656

Mich—In re Haskell's Estate, 278 N W 668, 283 Mich 513—Donovan v Bromley, 71 N W 523, 113 Mich 53

Okl—Anderson v Davis, 256 P 2d 1099, 208 Okl 477—Hunter v Bat-tiest, 192 P 575, 579, 79 Okl 248

Pa—In re Dible's Estate, 170 A 440, 112 Pa Super 23, reversed on other grounds 175 A 538, 316 Pa 553

#### Presumption imputable to other beneficiaries

If a presumption of undue influence arises against the attorney-beneficiary by reason of the fact that he drew the testator's will, the presumption of undue influence will be imputable to other beneficiaries even without proof of a common plan

Cal—In re Erickson's Estate, 35 P 2d 628, 140 Cal App 520, remittitur corrected 41 P 2d 939, 4 Cal App 2d 602

#### Presumption varies in strength

The presumption of undue influence which is created when it is shown that the attorney who drafted the will for his client is one of the chief beneficiaries varies in strength with the strength or weakness of the testator's mind

Or—In re Brown's Estate, 108 P 2d 775, 165 Or 575.

have unduly benefited by the testamentary provisions,<sup>39</sup> and generally it is not sufficient that the attorney is designated by the will to be executor,<sup>40</sup> or attorney for the executor.<sup>41</sup>

Although no presumption of undue influence may arise from the existence of the attorney and client relationship between the beneficiary and the testator, or from the fact that the attorney-beneficiary

participated in the drawing of the will, a will made by a client in favor of the client's attorney is regarded with great suspicion,<sup>42</sup> particularly if it excludes the natural objects of the testator's bounty,<sup>43</sup> and from such a will an inference of undue influence may be drawn,<sup>44</sup> and while the burden of proof of undue influence does not shift to the attorney-beneficiary, but remains throughout with

39 Cal—In re Frank's Estate, 32 P 2d 607, 1 Cal 2d 34  
In re Keizur's Estate, 148 P 2d 116, 64 Cal App 2d 117

**Bequest to charity**

No presumption of undue influence arises from the fact that the testator's will, which was drafted by the testator's attorney, makes a substantial provision for a charity in which the attorney is interested

Okl—In re Heitholt's Estate, 213 P 2d 865, 202 Okl 351—Kindt v Parmenter, 200 P 706, 83 Okl 116

**Bequest to cemetery association**

It has been held that there is no presumption of undue influence where a legacy was given to a cemetery association because the attorney who drew the will was the holder of a share of nominal value and was also a promoter and director

Mo—Barkley v Barkley Cemetery Assoc., 54 SW 482, 153 Mo 300

**Attorney friendly with beneficiary**

The fact that the attorney who drafted the will for the testator was but slightly acquainted with the testator, and was a friend of long standing with the beneficiary, does not constitute the attorney a beneficiary under the will so as to present a presumption of undue influence

Okl—In re Baker's Will, 248 P 2d 627, 207 Okl 158

**Member of attorney's family as beneficiary**

Where the confidential relationship which exists between the testator and the beneficiary is that of attorney and client, if the beneficiary has in some way been actively concerned in the preparation and execution of the will, such fact casts on the beneficiary the burden of disproving undue influence, and such rule should not only include the situation where the one actively concerned in the preparation and execution of the will is a beneficiary, but also where a member of such person's immediate family is named as a beneficiary

Ind—Sweeney v Vierbuchen, 66 NE 2d 764, 224 Ind 341

40 Cal—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134  
—In re Del Fosse's Estate, 154 P 2d 734, 67 Cal App 2d 490

D C—Millard v Matthews, 149 F 2d 292, 80 US App D C 123.

Mo—Shelton v McHaney, 92 SW 2d 173, 338 Mo 749  
Okl—Kindt v Parmenter, 200 P 706, 83 Okl 116

**Executor and trustee**

The appointment of attorney of testator as executor and the appointment of father-in-law of attorney as testamentary trustee, did not shift any burden of proof to proponents to show that will was not the result of fraud and undue influence, since the will by such appointments did not confer any benefits or advantage that would not be reaped by a stranger if so designated by testator

Mo—Gardine v Cottey, 230 SW 2d 731, 360 Mo 681, 18 ALR 2d 1100

41. Okl—In re Heitholt's Estate, 213 P 2d 865, 202 Okl 351

**Executor acting as attorney**

A provision of will, that should the executor, an attorney, act as such for the executor or trustee, he should receive such additional compensation as might be just and equitable, did not render the attorney a beneficiary so as to raise a legal presumption of undue influence

Ill—Pond v Hollett, 141 NE 403, 310 Ill 31

42. NY—In re Satterlee's Will, 119 NYS 2d 309, 281 App Div 251, motion denied 122 NYS 2d 96, 281 App Div 957—In re Wood's Will, 300 NYS 1268, 253 App Div 78

In re Patterson's Will, 132 NY S 2d 609, 206 Misc 268—In re Cotten's Estate, 40 NYS 2d 93, 180 Misc 399

In re Little's Will, 45 NYS 2d 751

ND—Stormon v Weiss, 65 NW 2d 475

**Guardian principal beneficiary**

Where will purportedly executed by one who has submitted to guardianship of person and estate is prepared by attorney for guardian and by its terms makes such guardian principal beneficiary, the court has duty of carefully scrutinizing the circumstances of purported execution

Or—In re Lambert's Estate, 114 P 2d 125, 166 Or 529

43 NY—In re Putnam's Will, 177 NE 399, 257 NY 140

In re Wood's Will, 300 NYS 1268, 253 App Div 78

In re Patterson's Will, 132 NY S 2d 609, 206 Misc 268  
In re Little's Will, 45 NYS 2d 751

**Investigation by jury**

Where an attorney takes part in the preparation and execution of his client's will which makes substantial provision for the attorney or members of his family and to the exclusion, in whole or in part, of the client's family, while there is no presumption of undue influence on the attorney's part, nevertheless in view of the jealous scrutiny to which the law has thought it wise to subject transactions of this kind it is proper that ordinarily an investigation by a jury be had

Mass—Mooney v McKenzie, 88 NE 2d 546, 324 Mass 685—Wellman v Carter, 190 NE 493, 286 Mass 237  
—Tarr v Vivian, 172 NE 257, 272 Mass 150

44. NY—In re Putnam's Will, 177 NE 399, 257 NY 140

In re Patterson's Will, 132 NYS 2d 609, 206 Misc 268

ND—Stormon v Weiss, 65 NW 2d 475

**Inference of undue influence**

An inference of undue influence ordinarily would be warranted by the bare fact that the will was drawn by or at the request of the beneficiary who was the legal adviser of the testator, and not related to him by blood or marriage

Tex—Oglesby v Harris, Civ App, 130 SW 2d 449, error dismissed, judgment correct

**Implication or presumption**

"Where there is evidence that the testator was old and feeble, and suffering from disease, and the will was drawn by the testator's attorney at law, and the attorney is named in the will as one of the residuary legatees, these are circumstances which will raise the implication or presumption that the will was procured by the undue influence of the attorney, or will, at least, require the proponents to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence by him may be determined"

Cal—In re Erickson's Estate, 85 P 2d 628, 630, 140 Cal App 520, remittitur corrected 41 P 2d 939, 4 Cal App 2d 602.

the contestant,<sup>45</sup> the burden of going forward with the evidence to overcome the inference of undue influence is cast on the attorney-beneficiary,<sup>46</sup> and it is incumbent on him to offer a satisfactory explanation that the will was freely and voluntarily made.<sup>47</sup>

No presumption or inference of undue influence arises from a will which benefits the testator's attorney if it is shown that in the making of the will

the testator had the benefit of independent legal advice,<sup>48</sup> particularly where the attorney who furnished the independent advice took part in the preparation and execution of the will.<sup>49</sup>

*Presumption one of fact* The presumptions which arise on the showing of a personal or confidential relation together with suspicious circumstances are presumptions of fact<sup>50</sup> which may be rebutted.<sup>51</sup> However, the effect of such rebutting testimony is

45 N.Y.—In re Putnam's Will, 177 N.E. 399, 257 N.Y. 140—In re Kindberg's Will, 100 N.E. 789, 207 N.Y. 220

In re Patterson's Will, 132 N.Y.S. 2d 609, 206 Misc. 268—In re Cotter's Estate, 40 N.Y.S. 2d 93, 180 Misc. 399

Or—In re Brown's Estate, 108 P.2d 775, 165 Or. 575

46 N.D.—Stormon v. Weiss, 65 N.W. 2d 475

47 N.Y.—In re Putnam's Will, 177 N.E. 399, 257 N.Y. 140—In re Kindberg's Will, 100 N.E. 789, 207 N.Y. 220—In re Smith, 95 N.Y. 516

In re Satterlee's Will, 119 N.Y.S. 2d 309, 281 App. Div. 251, motion denied 122 N.Y.S. 2d 96, 281 App. Div. 957—In re Wood's Will, 300 N.Y.S. 1268, 253 App. Div. 78—In re Rintelen's Will, 78 N.Y.S. 1092, 77 App. Div. 142

In re Patterson's Will, 132 N.Y.S. 2d 609, 206 Misc. 268—In re Cotter's Estate, 40 N.Y.S. 2d 93, 180 Misc. 399

In re Little's Will, 45 N.Y.S. 2d 751

48 N.Y.—In re Guidi's Will, 20 N.Y.S. 2d 240, 259 App. Div. 652, affirmed 30 N.E. 2d 723, 284 N.Y. 680, reargument denied 32 N.E. 2d 829, 285 N.Y. 540

In re Cotter's Estate, 40 N.Y.S. 2d 93, 180 Misc. 399

#### Preparation of will by attorney's associate

Where an attorney is informed by his client that she desires to make a will in the attorney's favor, and he has his office associate draft the will, the attorney furnishes the associate with the necessary information, and the testatrix is given no independent advice, there would be a presumption that the will was the result of undue influence, and the burden of proof would rest on the attorney to show that he did not abuse the confidence reposed in him and that the execution of the will was the free and voluntary act of the testatrix

Or—In re Lobb's Will, 160 P.2d 295, 177 Or. 162—In re Lobb's Will, 145 P.2d 808, 173 Or. 414

49. N.Y.—In re Guidi's Will, 20 N.Y.S. 2d 240, 259 App. Div. 652, affirmed 30 N.E. 2d 723, 284 N.Y. 680,

reargument denied 32 N.E. 2d 829, 285 N.Y. 540

In re Cotter's Estate, 40 N.Y.S. 2d 93, 180 Misc. 399

50 Ohio—Board of Ed. of Lynchburg Local School Dist. of Highland County v. Pendleton, 75 N.E. 2d 182, 80 Ohio App. 249

Okl.—In re Lillie's Estate, 159 P.2d 542, 195 Okl. 597  
68 C.J. p. 762 note 93

#### Inference of fact

Although it is frequently stated that a presumption of undue influence arises when it is shown that a confidential relation existed between testator and a beneficiary, and other suspicious circumstances are also shown, actually it is not a presumption which arises but only an inference of fact

Wyo.—In re Nelson's Estate, 266 P.2d 238, 72 Wyo. 444

51. Cal.—In re White's Estate, 276 P.2d 11, 138 Cal. App. 2d 659—In re Schlyen's Estate, 234 P.2d 211, 105 Cal. App. 2d 648—In re Merrick's Estate, 209 P.2d 666, 93 Cal. App. 2d 624—In re Hampton's Estate, 131 P.2d 565, 55 Cal. App. 2d 543

Fla.—In re Aldrich's Estate, 3 So. 2d 856, 148 Fla. 121

Okl.—In re Martin's Estate, 261 P.2d 603—In re Lillie's Estate, 159 P.2d 542, 195 Okl. 597

Or.—In re Rosenberg's Estate, 246 P.2d 858, 196 Or. 219—In re Dale's Estate, 179 P.2d 274, 92 Or. 57

Wash.—Dean v. Jordan, 79 P.2d 331, 194 Wash. 661

68 C.J. p. 762 note 94

Sufficiency of evidence to overcome presumption of undue influence see *infra* § 251

#### Balancing evidence essential

When a presumption of undue influence is raised by showing the existence of a confidential relationship, coupled with activity on the part of the proponent of a will, a prima facie showing of undue influence is thereby established which, in the absence of evidence to the contrary, necessarily has the effect of invalidating the will because it is then not the result of the free will or volition of the testator, and it logically follows that the presumption necessarily results in invalidating the will

on that account, and under such circumstances the presumption becomes controlling. To overcome that prima facie showing it becomes necessary for the proponent to rebut the presumption by evidence which, at least, will have the effect of balancing the prima facie showing, or the will must be denied probate

Cal.—In re Hansen's Estate, 100 P.2d 776, 138 Cal. App. 2d 99

#### Not conclusive presumption

A presumption of undue influence is by no means a conclusive presumption, but is one that may be overcome by evidence such as will lead the court to conclude that no undue influence was exerted

Okl.—In re Harjoche's Estate, 146 P.2d 130, 193 Okl. 631—In re Anderson's Estate, 286 P. 17, 142 Okl. 197.

#### Absence of rebutting evidence

The presumption of undue influence which arises from a confidential relation shifts the burden of proof to the proponents to overcome it. When the presumption is present and no evidence is offered to overcome it the court or jury is bound to find in accordance with the presumption. Whether this is a finding of fact or a conclusion of law is not material. It has some of the elements of both, but it is a rule of law and a rule of property which cannot lightly be cast aside. If the undue influence is thus proved to exist the contestants are entitled to a judgment

Cal.—In re Johnson's Estate, 87 P.2d 900, 31 Cal. App. 2d 251

#### No weight as evidence

Assuming that a fiduciary relationship existed between the testator and the beneficiary under his will, and that a presumption of undue influence resulted, the presumption would be rebuttable and there would be no shifting in the burden of proof, while the presumption would establish a prima facie case in the absence of testimony on the subject, it would have no weight as evidence, it would be rebuttable, and it could not be weighed against the evidence

Mich.—In re Jennings' Estate, 55 N.W. 2d 812, 335 Mich. 241—In re Haskell's Estate, 278 N.W. 668, 283 Mich. 513—In re Cotcher's Estate, 264 N.W. 325, 274 Mich. 154

not to make the presumption disappear, but to raise an issue for the jury.<sup>52</sup>

§ 240. — Unlawful or Improper Relations

No presumption of undue influence arises merely because there was an unlawful, meretricious, or adulterous relation between the testator and the person who benefits by the will

The fact that a testator or testatrix had maintained an unlawful, meretricious, or adulterous relation with a person receiving a legacy, or with a relative of such person, has been held not to authorize a presumption of undue influence by such person,<sup>53</sup> and, so too, the fact that a devisee was associated with the person making the will in an immoral environment<sup>54</sup> and was present at the execution of the will<sup>55</sup> has been held not to give rise to an inference of undue influence.

**Presumption varying in strength**

Because the presumption of undue influence is fortified by policy, the proponent must prove to the satisfaction of the trier of fact that there was no undue influence, but there are cases where the presumption is so heavily weighted with policy that the courts have demanded a sterner measure of proof than that usually obtaining on civil issues, and such is the situation where an attorney benefits by the will of his client, and especially where he draws it himself

NJ—In re Weeks' Estate, 103 A 2d 43, 29 NJ Super 533

52 Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Anderson's Estate, 85 P 2d 212, 29 Cal App 2d 637  
68 C J p 763 note 95

**Not rule of procedure**

Presumption of undue influence arising from proof of fiduciary relation in will contest is not a mere procedural rule but rests on substantial basis of fact or inference, and presumption, with its underlying facts or inferences, once being in case, can never disappear, but raises issue for jury

Mo—Pulitzer v Chapman, 85 S W 2d 400, 337 Mo 298

**Presumption destroyed**

Where presumption of undue influence in procuring execution of will arises from confidential relationship of parties and other circumstances evidence to the contrary which, if uncontradicted, is sufficient to support a finding, destroys the presumption, and the matter is then to be determined on all the facts freed from the presumption.

§ 241. — Writing or Preparation of Will by Beneficiary or Relative of Beneficiary

Undue influence is not necessarily presumed because a beneficiary took part in the preparation or execution of the testator's will, but the activity of the beneficiary may be such as to give rise to the presumption

A presumption of undue influence is not necessarily created because a beneficiary took part in the preparation of the testator's will,<sup>56</sup> or because of the presence of the beneficiary at the execution of the will,<sup>57</sup> particularly if the beneficiary was a relative of the testator,<sup>58</sup> and no presumption arises where the devise or bequest was to relatives of the person writing the will<sup>59</sup> However, a will drawn or executed under such conditions is subject to close judicial scrutiny,<sup>60</sup> and the active part taken by the beneficiary may be such that a presumption of undue influence will arise which the beneficiary will have the burden of rebutting,<sup>61</sup> and this is especially true

Wis—In re Faulks' Will, 17 N W 2d 423, 246 Wis 319

53. Cal—In re Spaulding's Estate, 187 P 2d 889, 83 Cal App 2d 15—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129

Iowa—Glider v Melinski, 25 N W 2d 379, 238 Iowa 140

Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

Pa—In re Porter's Estate, Orph, 4 Fay L J 37, affirmed 19 A 2d 731, 341 Pa 476—In re Wright's Estate, Orph, 91 Pittsb Leg J 401, 57 York Leg Rec 117, affirmed 34 A 2d 57, 348 Pa 76

68 C J p 763 note 96

54 Okl—In re Swartz's Will, 192 P 203, 79 Okl 191, 16 A L R 450

55. Okl—In re Swartz's Will, supra

56 Fla—Marston v Churchill, 187 So 762, 137 Fla 154—Theus v Theus, 161 So 76, 119 Fla 190—Gardiner v Goertner, 146 So 186, 110 Fla 377

NJ—In re Rein's Will, 50 A 2d 380, 139 N J Eq 122

Ohio—Cave v McLean, 32 N E 2d 581, 66 Ohio App 196

57 Ark—Jones v National Bank of Commerce in Memphis, 249 S W 2d 105, 220 Ark 665

Or—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Knutson's Will, 41 P 2d 793, 149 Or 467

58. US—Mackay v Costigan, C A Ill, 179 F 2d 125

Fla—Goertner v Gardiner, 170 So 112, 135 Fla 477, rehearing denied 170 So 844, 126 Fla 412

Ill—Hughes v Williams, 20 N E 2d 860, 300 Ill App 108

Mo—Snell v Seek, 250 S W 2d 336, 363 Mo 225

68 C J p 763 note 2

59. Cal—In re Relpl.'s Estate, 221 P 361, 192 Cal 451

68 C J p 763 note 3

60 Fla—Maiston v Churchill, 187 So 762, 137 Fla 154—Theus v Theus, 161 So 76, 119 Fla 190—Gardiner v Goertner, 146 So 186, 110 Fla 377

NY—In re Chinsky's Will, 270 N Y S 822, 151 Misc 129

**Proof of impairment of mind**

The rule of scrutiny that must attach to the conduct of a person who has written himself into a will as a legatee applied with special force where there was independent proof of impaired mind and volition of the testator

NY—In re Lasher's Estate, 2 N Y S 2d 204, 165 Misc 592

**Burden of proof on contestant**

Where the chief actor in the preparation and drafting of a will is the principal beneficiary, a duty of scrutiny by the trier of facts and a duty of explanation on the part of the beneficiary arise, but the burden of proof in such a case remains with the contestant

NY—In re Forsyth's Estate, 9 N Y S 2d 642, 169 Misc 1042

61. Ariz—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248—In re Westfall's Estate, 245 P 2d 951, 74 Ariz 181

Colo—Gehm v Brown, 245 P 2d 865, 125 Colo 555

Ill—Mitchell v Van Scoyk, 115 N E 2d 226, 1 Ill 2d 160

Pa—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

where the beneficiary writing the will also occupies a confidential relation to the testator, as discussed supra § 239

## § 242. — Unequal, Unjust, or Unnatural Disposition

As a general rule, the mere fact that a will makes unreasonable testamentary provisions, as where there is an unequal or unjust distribution of the estate among the natural objects of the testator's bounty, or where some or all of them are excluded from a share in the estate, does not create a presumption of undue influence and result in a shift in the burden of proof

An unjust will does not of itself raise a presumption of undue influence,<sup>62</sup> and ordinarily neither the unreasonableness of testamentary provisions,<sup>63</sup> nor

gross inequality in the distribution of the estate,<sup>64</sup> will raise a presumption of fraud or undue influence, or result in a shift in the burden of proof.<sup>65</sup> Furthermore, such a result does not follow from the mere fact that a will makes an unequal or unjust distribution of the testator's estate among the natural objects of his bounty,<sup>66</sup> or because the testator makes an unnatural disposition of his estate by excluding part or all of the natural objects of his bounty,<sup>67</sup> because an heir fails to get what was expected,<sup>68</sup> because a will makes a disposition of property which is not in accordance with the statutes of descent,<sup>69</sup> or because it provides more than would have been obtained under dower and homestead laws.<sup>70</sup> However, a will containing unjust

Tex—Taylor v Taylor, Civ App, 248 S W 2d 820  
68 C J p 763 note 99

### Sole or principal beneficiary

If a sole or principal beneficiary actively participated in the preparation of the will he must assume the burden of proof that he did not exert undue influence on the testator when the will is attacked on that ground

Okl—In re Martin's Estate, 261 P 2d 603

### Presence of other suspicious circumstances

A presumption of undue influence will arise if, in addition to the activity of the beneficiary in the preparation of the will, there are other suspicious circumstances, as, that the testator was old and feeble, that other children were omitted from the will, or that others having equal claim to the testator's bounty were not present when the will was executed

Ill—Friberg v Zeuschel, 41 NE 2d 512, 379 Ill 480

### Strength of presumption

One who benefits largely from a will made through his agency, in absence of others having equal claim to testator's bounty, is faced with presumption that he exercised undue influence, and strength of such presumption depends on condition of testator's mind when will was executed

Ill—Sulzberger v Sulzberger, 23 NE 2d 46, 372 Ill 240

62 Cal—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563

63 Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Mass—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429

Okl—Parnacher v Mount, 248 P 2d 1021, 207 Okl 275

64 Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318—Hale v Hale, 152 SW 2d 984, 287 Ky 271

Okl—Parnacher v Mount, 248 P 2d 1021, 207 Okl 275

65 Okl—Parnacher v Mount, supra 68 C J p 764 note 5

66 Ala—Lackey v Lackey, 76 So 2d 761, 262 Ala 45—Hubbard v Moseley, 75 So 2d 658, 261 Ala 683  
Cal—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135

DC—Mann v Coinish, 185 F 2d 423, 87 US App DC 110 certiorari denied 71 S Ct 802, 341 US 932, 95 L Ed 1361

Ky—Gay v Gay, 215 SW 2d 92, 308 Ky 539—Thomas v Thomas' Adm'r, 79 SW 2d 982, 258 Ky 236

Mich—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—Sullivan v Foley, 70 NW 322, 112 Mich 1

Minn—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1

Mo—Carl v Ellis, App, 110 SW 2d 805

NJ—In re Filo's Will, 75 A 2d 517, 9 NJ Super 146

RI—Talon v Jackson, 19 A 2d 4, 66 RI 302

Tex—Price v Tahaferro, Civ App, 254 SW 2d 157, refused no reversible error

Utah—In re Lavelle's Estate, 248 P 2d 372

68 C J p 763 note 4

67 Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173

In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465

Mich—In re Livingston's Estate, 295 NW 343, 295 Mich 637—In re Rowling's Estate, 289 NW 136, 291 Mich 218—In re Lacroix's Estate, 251 NW 319, 265 Mich 59

Miss—Hutchins v Barlow, 74 So 2d 870

Mo—McGill v Wiltz, App, 148 S W 2d 822

NJ—In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208

In re Looor's Will, 28 A 2d 281, 20 NJ Misc 376, affirmed 28 A 2d 288, 132 NJ Eq 316

NY—In re Moskowitz' Will, 107 NY 2d 853, 279 App Div 660, affirmed 106 NE 2d 68, 30 NY 992, motion denied 107 NE 2d 84, 304 NY 593

In re Buttikofer's Will, 79 NYS 2d 252, affirmed 93 NYS 920, 276 App Div 863

Pa—In re De Maio's Estate, 70 A 2d 339, 363 Pa 559

Vt—Central Hanover Bank & Trust Co v Froment, 49 A 2d 111, 114 Vt 523

Wis—In re Ehlko's Will, 11 NW 2d 497, 244 Wis 115

68 C J p 764 note 6

### Natural object of testator's bounty

(1) In testamentary law, the "natural object of testator's bounty" is whoever would take in the absence of a will

Conn—Page v Phelps, 143 A 890, 108 Conn 572

68 C J p 764 note 6 [a]

(2) Collateral heirs such as brothers and sisters are not included

Cal—In re Estate of Easton, 35 P. 2d 614, 140 Cal App 367

(3) Term does not necessarily include nephews and nieces

Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Jacobs' Estate, 76 P 2d 128, 24 Cal App 2d 649

68 Fla—Murrey v Barnett Nat Bank of Jacksonville, 74 So 2d 647

69 Ala—Cook v Morton, 1 So 2d 890, 241 Ala 188

Mich—In re Hannan's Estate, 23 NW 2d 222, 315 Mich 102—In re Reed's Estate, 263 NW 76, 273 Mich 334

70 Ala—Cook v Morton, 1 So 2d 890, 241 Ala 188

or unnatural provisions demands close judicial scrutiny,<sup>71</sup> and the proponents have the burden of giving some reasonable explanation of the unequal or unnatural provisions of the will where they are coupled with suspicious circumstances,<sup>72</sup> as where there is also evidence of weakness of mind on the part of the testator and fraud or undue influence on the part of the devisees,<sup>73</sup> or where the provisions of the will are grossly unreasonable, and plainly inconsistent with the testator's duty to his family.<sup>74</sup> An inference of undue influence may be drawn from a will which makes disproportionate gifts to strangers of the blood.<sup>75</sup> Furthermore, a will which makes an unnatural, unjust, or unfair distribution of the testator's estate by unduly benefiting those who have little or no claim by reason of relationship to the testator's bounty, and by excluding in whole or in part those who have a substantial claim by reason of relationship to the testator's bounty, may give rise to a presumption of fraud or undue influence,<sup>76</sup> but the rule that a large gift in a will to a stranger to the testator's blood raises a presumption of undue influence is to be invoked only where there is clear proof of the weakened intellect of the testator.<sup>77</sup>

#### § 243. — Discrepancy Between Will and Prior Will or Declared Intention

A presumption may arise that a will was the result of undue influence where there is a substantial discrep-

ancy between the provisions of the will and the testator's stated fixed intentions, whether the testator's intentions were expressed by a prior will or otherwise

A discrepancy between a fixed purpose of the testator, expressed in his declared intentions, and the provisions of the will, which are favorable to those in close relation to him at the time of its execution, and who have opportunity unduly to influence him, casts on the beneficiary the burden of showing that the will was not the product of undue influence,<sup>78</sup> but merely because a will varies from expressions of the testator with respect to his intentions concerning relatives or the natural objects of his bounty does not create a presumption of undue influence.<sup>79</sup> While the mere making of a new will materially changing the provisions of an old will has been held to raise no presumption of fraud,<sup>80</sup> particularly where cogent reasons for changing the prior provisions exist,<sup>81</sup> a will executed by the testator while ill and feeble, and containing unnatural provisions and differing from a former will or wills executed by him while in good health, must be shown by the beneficiaries to have been executed by the testator while free from restraint, before it will be held valid.<sup>82</sup>

#### § 244. — Kindness and Attention

Acts of kindness and attention toward the testator by a beneficiary under the will do not create a presumption of undue influence, or shift the burden of proof

Undue influence will not be presumed or the bur-

71. Ga.—Bowman v Bowman, 55 S E 2d 298, 205 Ga 796

Neb.—In re Bowman's Estate, 9 N W 2d 801, 143 Neb 440

72. Cal.—In re Nolan's Estate, 78 P 2d 456, 25 Cal App 2d 738

Fla.—Murrey v Barnett Nat Bank of Jacksonville, 74 So 2d 647—In re Gottschalk's Estate, 196 So 844, 143 Fla 371

Iowa.—In re Rogers' Estate, 295 N W 103, 229 Iowa 781

Ky.—Allen v Henderson, 184 SW 2d 885, 299 Ky 92—Franks' Ex'r v Bates, 128 SW 2d 739, 218 Ky 337 68 CJ p 764 note 7

##### Consideration of provisions

Provisions of a will which are claimed to be unnatural may be considered as an element supporting an inference of undue influence when the testament is attacked on that ground, and the claim is made that by reason of undue influence the testator was induced to make an unreasonable or unjust discrimination against some of his heirs at law

Cal.—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

73. Cal.—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50.

Fla.—In re Auerbacher's Estate, 41 So 2d 659

68 CJ p 764 note 8

74. Ky.—Gay v Gay, 215 SW 2d 92, 308 Ky 539—Allen v Henderson, 184 SW 2d 885, 299 Ky 92

Vt.—Central Hanover Bank & Trust Co v Froment, 49 A 2d 111, 114 Vt 523

75. Mass.—Livermore v Seward, 41 NE 2d 290, 311 Mass 389

76. Ariz.—In re Regaldo's Estate, 268 P 2d 973, 77 Ariz 180

NJ.—Hughes v Zeller, 65 A 2d 759, 3 NJ Super 146

77. Pa.—In re Lauer's Estate, 41 A 2d 552, 351 Pa 438

68 CJ p 764 note 8 [a]

78. Ariz.—In re Westfall's Estate, 245 P 2d 951, 74 Ariz 181

Cal.—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Hampton's Estate, 103 P 2d 611, 39 Cal App 2d 488

68 CJ p 764 note 9

79. Cal.—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135

DC.—Wiggins v Smith, 183 F 2d 831, 87 US App DC 112

Ky.—Gay v Gay, 215 SW 2d 92, 308 Ky 539

80. NY.—In re Buttikofer's Will, 79 NYS 2d 252, affirmed 93 NY S 2d 920 276 App Div 863—In re Streb's Will, 288 NYS 334, 247 App Div 556

Pa.—In re King's Estate, 87 A 2d 469, 369 Pa 523

Tex.—Black v Black, Civ App, 240 SW 2d 458, error refused no reversible error

Va.—Jenkins v Trice, 147 SE 251, 152 Va 411

##### Arbitrary change

The alteration of an existing will arbitrarily and without reason raises no presumption of undue influence

Del.—Conner v Brown, 3 A 2d 64, 9 WW Harr 529

##### Larger benefit under former will

There was no presumption of undue influence where the beneficiary received a greater amount under the former will

Pa.—In re Conway's Estate, 79 A 2d 208, 366 Pa 641

81. Cal.—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

82. Va.—Whitelaw's Ex'r v Sims, 19 SE 113, 90 Va 588. 68 CJ p 764 note 11.

den of proof shifted because of acts of kindness and attention by the beneficiary under a will <sup>83</sup>

## § 245. Admissibility of Evidence

- a. In general
- b. Circumstances attending execution of will
- c. Prior or subsequent wills

### a. In General

Where the grounds of objection to the validity of a will are fraud and undue influence, the evidence is per-

mitted to take a wide range, and it has been declared that every fact and circumstance, no matter how little its probative value, which throws light on these issues, is admissible.

Undue influence in the execution of a will is rarely susceptible of direct proof<sup>84</sup> Where the grounds of objection to the validity of a will are fraud and undue influence, the evidence is permitted to take a wide range and it has been declared that every fact and circumstance, no matter how little its probative value, which throws light on these issues is admissible,<sup>85</sup> and this is especially so

83 Fla.—Wartmann v Burleson, 190 So 789, 139 Fla 458—Maiston v Churchill, 187 So 762, 137 Fla 154—Gardiner v Goertner, 146 So 186, 110 Fla 377

Mich.—In re Thayer's Estate, 15 N W 2d 712, 309 Mich 473  
68 C J p 765 note 13

84 Or.—In re Newman's Will, 213 P 2d 137, 187 Or 641

85 Ala.—Whitt v Forbes, 64 So 2d 77, 258 Ala 580

Cal.—In re Carson's Estate, 194 P 5, 184 Cal 437, 17 A L R 239

Colo.—Ofstad v Sarconi, 252 P 2d 94, 126 Colo 565

Del.—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Ga.—Bowman v Bowman, 55 SE 2d 298, 205 Ga 796—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga 247—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53—Trust Co of Georgia v Ivey, 173 SE 648, 178 Ga 629

Idaho.—In re Lunders' Estate, 263 P 2d 1002, 74 Idaho 448

Ill.—Corpus Juris cited in Shelby Loan & Trust Co v Milligan, 24 NE 2d 157, 162, 372 Ill 397

Kan.—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Ky.—Teegarden v Webster, 199 S W 2d 728, 304 Ky 18—Welch's Adm'r v Clifton, 172 SW 2d 221, 294 Ky 514, 148 A L R 1220

Md.—Garner v Garner, 173 A 386, 167 Md 423

Minn.—In re Marsden's Estate, 13 N W 2d 765, 217 Minn 1

N C.—In re Lomax' Will, 39 SE 2d 388, 226 N C 498

Ohio.—Board of Education v Phillips, 134 NE 646, 103 Ohio St 622  
Spidel v Warrick, App, 78 NE 2d 746—McNeil v. McNeil, App, 76 NE 2d 621

Or.—In re Porter's Estate, 235 P 2d 894, 192 Or 483.

Tenn.—Hager v Hager, 66 SW 2d 250, 17 Tenn App 143

Tex.—Gunlock v Greenwade, Civ App, 280 SW 2d 610, error refused no reversible error—Davis v Williams, Civ App, 144 SW 2d 445, error dismissed 146 SW 2d 982, 136 Tex 27.

Wash.—In re Dand's Estate, 247 P 2d 1016, 41 Wash 2d 158—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912  
68 C J p 765 note 14

### Broad latitude allowed

Fla.—Hopkins v McClure, 45 So 2d 656

### Particular evidence held admissible

(1) Manner in which will was executed without independent advice  
Iowa.—In re Ankeny's Estate, 28 N W 2d 414, 238 Iowa 754

(2) Act of participation of person exercising influence in preparation of will

Minn.—In re Rasmussen's Estate, 69 N W 2d 630

(3) Testimony of attorney who drafted will

Mo.—Norris v Bristow, 219 SW 2d 367, 358 Mo 1177, 11 A L R 2d 725  
N C.—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 736

(4) Testimony of United States commissioner, who approved the will of an Indian, that deceased was not unduly influenced or under duress at the time he signed the will

Okl.—In re Harjo's Estate, 241 P 2d 373, 206 Okl 88

(5) Transactions between testator and legatee who is charged with fraud and undue influence

N Y.—In re Boyle's Will, 128 N Y S 2d 259, 205 Misc 497

(6) Circumstances surrounding testimony of daughter of residuary legatee

Iowa.—In re Ankeny's Estate, 28 N W 2d 414, 238 Iowa 754

(7) Testimony that attorney had stated to contestant that attorney had great influence over testator, and 'it might make you money in the long run to employ me'

Ind.—Workman v Workman, 46 N E 2d 718, 113 Ind App 245

(8) Testimony by representative of fidelity company who investigated embezzlement of decedent's office, during time deceased's daughter was employed there, that he could find no evidence or indication of daughter's connection with theft

Iowa.—Shaw v Duro, 14 N W 2d 211, 234 Iowa 778

(9) Where caveators undertook to show that the propounder had obtained tracts of land from testator without consideration, a statement signed by testator to the contrary  
N C.—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 736

(10) Evidence showing money in defendant's hands as administrator of the estate of testatrix' daughter prior to testatrix' death, to show the amount of property bequeathed to defendant where testatrix received the daughter's estate as an heir and bequeathed it to defendant.

Mo.—Clark v Powell, 175 SW 2d 842, 351 Mo 1121

(11) Fact that will was in possession of attorney and beneficiary

Iowa.—In re Ankeny's Estate, 28 N W 2d 414, 238 Iowa 754

(12) Vigorous campaign by principal beneficiary's family to maintain intimate relations with testator

Iowa.—In re Ankeny's Estate, supra

(13) Fact that testatrix did not retain services of attorney who had been her counsel for many years, but retained an attorney who had been employed by the chief beneficiary  
Wash.—In re Sinclair's Estate, 113 P 2d 65, 8 Wash 2d 611

(14) Failure of testator to receive his share from sale of jointly owned property

Ky.—Maxwell v Coles, 194 SW 2d 651, 302 Ky 297

(15) Stipulations which set forth transactions relating to the acquisition and conveyance of property of testator and proponent prior to the execution of the will

W Va.—Ebert v Ebert, 200 SE 831, 120 W. Va 722

(16) Confidential relationship between testator and person exercising influence

Minn.—In re Rasmussen's Estate, 69 N W 2d 630

(17) Question to contestant's wife as to whether she was told 'for what purpose you were brought down here



where the will was caused to be drawn by the sole beneficiary<sup>86</sup> Thus, evidence held to be admissible includes evidence of the state of things before and after the execution of the will,<sup>87</sup> the will itself, where the testator had mind sufficient to appreciate the natural objects of his bounty, make a survey of his estate, and dispose of it according to a fixed purpose,<sup>88</sup> wills executed by a third person, where it is relevant to the inquiry as to whether undue influence has been exercised over the testator,<sup>89</sup>

the existence of independent legal advice,<sup>90</sup> a change or failure to change the will, or a contemplated disposition of property,<sup>91</sup> and proponent's familiarity with legal phraseology in contrast with testator's ignorance<sup>92</sup>

Evidence which throws no light whatever on the question whether fraud or undue influence was exerted, and which is wholly immaterial and irrelevant, should be excluded<sup>93</sup> While the remoteness of evi-

or anything else," and testimony as to proponent's activities in preparing for another witness' trip to certain city and at attorney's office

Ala—Slagle v Halsey, 15 So 2d 740, 245 Ala 198

(18) Where contestants claiming undue influence showed testatrix's husband was materialistic, evidence of his charitableness was admissible  
Tex—Applegate v McFadin, Civ App, 20 SW 2d 396

#### Facts occurring after execution of will

(1) "It is quite well settled, of course, that the time when a will is made is the time of primary importance to be considered in estimating . . . any question of undue influence over the testator. However, evidence of conditions and circumstances existing after that time may be considered only to serve as an aid to determine the primary question"

Kan—In re Millar's Estate, 207 P 2d 483, 491, 167 Kan 455

(2) "The general rule is that pleading and proof of facts subsequent to the execution of the will are inadmissible on the charge that the instrument is the product of undue influence and fraud. In a given situation, particularly on an issue of actual fraud, no facts tending to prove such fraud are irrelevant if they reasonably bear upon that issue"

N Y—In re Carpenter's Will, 300 N YS 375, 376, 252 App Div 885

(3) Evidence of undue influence subsequent to execution of will is not properly admissible until there is competent evidence of undue influence at time will was executed, unless it follows so closely as to have evidentiary value

Neb—In re Heineman's Estate, 13 NW 2d 569, 144 Neb 442

(4) Addition by sole beneficiary of a seal to will after its execution could be considered as tending to establish beneficiary's effort to secure a valid will in his favor  
Pa—Klimmer v Dugacki, 51 A 2d 627, 356 Pa. 143

(5) Other decisions with respect to evidence of facts occurring after

execution of will see 68 C J p 765 note 14 [c]

86 Utah—In re Goldsherry's Estate, 81 P 2d 1106, 95 Utah 379, 117 A L R 1444—In re Miller's Estate, 88 P 338, 31 Utah 415

87 Ga—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Boland v Aycock, 12 SE 2d 319, 191 Ga 327—Brown v Kendrick, 135 SE 721, 163 Ga 149—Thompson v Davitte, 59 Ga 472

Okl—Porter v Porter, 35 P 2d 938, 168 Okl 645

83. Ky—Rueff v Light, 114 SW 2d 506, 273 Ky 449

89 RI—Heroux v Heroux, 191 A 265, 58 RI 79

#### Will of testator's deceased first wife

Will of testator's deceased first wife, who was mother of contestant, having been linked up in evidence with reciprocal will of testator made at the same time and with later will of testator in which he gave all his property to contestant, was relevant on issue of undue influence  
RI—Heroux v Heroux, supra

90. Cal—In re McDaniel's Estate, 176 P 2d 952, 77 Cal App 2d 877

91. Ala—Cook v Morton, 1 So 2d 890, 241 Ala 188

Cal—In re McDaniel's Estate, 176 P 2d 952, 77 Cal App 2d 877

Iowa—In re Ankeny's Estate, 28 N W 2d 414, 238 Iowa 754

Wis—In re Borzych's Estate, 66 N W 2d 164, 267 Wis 526

92 Colo—Lamborn v Kirkpatrick, 50 P 2d 542, 97 Colo 421

93. Ala—Miller v Whittington, 80 So 499, 202 Ala 406

Cal—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228

Colo—In re Ainsworth's Estate, 79 P 2d 1045, 102 Colo 392—In re Rentfro's Estate, 79 P 2d 1042, 102 Colo 400

Ga—McGahee v Phillips, 84 SE 2d 19, 211 Ga 118—Moore v Thornton, 179 SE 720, 180 Ga 533

Ill—Johnson v Bennett, 69 NE 2d 899, 395 Ill 389—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 A L R 1041

Iowa—Hansen v Waugh, 21 NW 2d 762, 237 Iowa 304

Md—Smeak v Perry, 199 A 788, 175 Md 73.

Mo—Fields v Luck, 74 SW 2d 35, 335 Mo 765

Neb—In re Johnston's Estate, 25 N W 2d 526, 147 Neb 886

Tex—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused

Wis—In re Schultz' Will, 36 NW 2d 698, 254 Wis 490  
68 C J p 765 note 22.

#### Particular evidence held inadmissible or properly excluded

(1) Fact that testatrix changed her will in favor of one with whom she took up domicile

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—Aggas v Munnell, 152 A 840, 302 Pa 78

(2) Evidence as to charges made or attempted to be made against estate by attorney through whose fraud will was alleged to have been executed

Mo—Shelton v McHaney, 92 SW 2d 173, 338 Mo 749

(3) Evidence that trustees under will refused to make beneficiary allowance out of estate while he was receiving allowance of five hundred dollars a month from his guardian  
Mo—Shelton v McHaney, supra

(4) Evidence that mother of named beneficiary had by fraud and undue influence induced unmarried testator to believe that named beneficiary was his illegitimate child, who was, in fact, probably child of third person

Miss—Provenza v Provenza, 29 So 2d 669, 201 Miss 836

(5) Evidence as to bad feeling between testatrix and her husband and that at times she and some of her daughters did not speak to him and evidence concerning disposition of the husband's estate

Ky—Ecken's Ex'x v Abbey, 141 S W 2d 863, 283 Ky 449

(6) Nurse's testimony that during testator's last illness "they said, 'Don't let anyone else in,'" was properly excluded in absence of showing that such instructions were given by person allegedly guilty of undue influence

Mo—Look v French, 144 SW 2d 128, 346 Mo 972

(7) Offer of proof in will contest in support of charge of undue influence that attorney who drew will

dence bears only on the weight of the evidence, and not on its admissibility,<sup>94</sup> evidence which is too remote in point of time to furnish any reasonable ground of inference that the testamentary act was affected by undue influence is not admissible.<sup>95</sup> Evidence relating to events which took place at a remote time from the execution of the will are admissible where there is evidence of events right up to a short time before the making of the will, and such evidence gives explanation to the more immediate events.<sup>96</sup>

**Mistake** The range of inquiry with respect to mistake is much more limited, it being held in some cases that parol evidence is not admissible to establish that a mistake was made in the will,<sup>97</sup> although

it has been held that parol evidence is admissible to prove that the testator executed the instrument through mistake.<sup>98</sup>

**Facts or circumstances occurring after death of testator** Facts or circumstances relevant to the issue of undue influence are admissible, although they occur after the death of the testator,<sup>99</sup> but irrelevant matters should be excluded.<sup>1</sup>

**Indirect evidence** The admission of indirect testimony of undue influence has been held to rest largely in the discretion of the trial court.<sup>2</sup>

**Circumstantial evidence** Circumstantial evidence is admissible to show that undue influence was exercised,<sup>3</sup> even though the beneficiary was not

and principal beneficiary were beneficiaries under will of testatrix' deceased husband

Cal—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41

(8) Admission of signature cards given to bank by a beneficiary and inventory filed in administration of estate which could throw no possible light on whether the testatrix had been unduly influenced

Ill—De Marco v McGill, 83 NE 2d 313, 402 Ill 46

(9) Evidence of divorce decree between decedent and beneficiary of the will

Ill—Johnson v Bennett, 69 NE 2d 899, 395 Ill 389

(10) As to what the community generally thought as to whether testator was especially influenced by his son to make the will

NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 736

(11) Court files consisting of application for order prescribing notice for probate filed two weeks after testatrix' death, notice of time fixed for probate signed by clerk of court, and petition by nominated executor's attorney for appointment of a special administrator

Iowa—In re Behrend's Will, 10 NW 2d 651, 233 Iowa 812

(12) Evidence as to value inheritance tax appraiser placed on personal property, for purpose of showing that beneficiary was preventing the state from getting the proper tax money

Cal—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228

94. Cal—In re Matter of Higgins' Estate, 104 P. 6, 156 Cal 257

Fla—Hopkins v. McClure, 45 So 2d 656

Mich—In re Balk's Estate, 287 NW 351, 289 Mich 703, 124 ALR 431—Estate of Lefevre, 61 NW 3, 102 Mich 568

**Evidence held admissible or improperly excluded**

(1) Testimony as to injunction proceedings brought by testator's guardian against principal beneficiary of will nine months after execution of will

Mich—In re Balk's Estate, 287 NW 351, 289 Mich 703, 124 ALR 431

(2) Limiting testimony as to undue influence and fraud practiced on deceased, to a period six months prior and six months subsequent to date of execution of will

Mich—In re Balk's Estate, supra

95 Colo—In re Shell's Estate, 63 P 413, 28 Colo 167

Fla—Hopkins v McClure, 45 So 2d 656

Ga—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Boland v Aycock, 12 SE 2d 319, 191 Ga 327

Md—Smeak v Perry, 199 A 788, 175 Md 73

Neb—In re Heineman's Estate, 13 NW 2d 569, 144 Neb 442

68 CJ p 766 note 23

**Evidence held too remote**

(1) Evidence of executor's arrest and conduct with testatrix some five to six years before will was executed

Cal—In re McDaniel's Estate, 176 P 2d 952, 77 Cal App 2d 877

(2) Where will was executed in 1951 testimony that testatrix' mother, who had died in 1946, had been a domineering type of person

Tex—In re Gray's Estate, Civ App, 279 SW 2d 938, error refused no reversible error

(3) Testimony of testatrix' former husband, relating to instances and observations prior to their separation in 1942, where will was executed in 1951

Tex—In re Gray's Estate, supra

(4) Where will was executed in 1951 testimony of witness who had not seen testatrix since 1940

Tex—In re Gray's Estate, supra.

**Evidence held not too remote**

Fla—Hopkins v McClure, 45 So 2d 656

96 Colo—In re Koch's Estate, 136 P 2d 673, 110 Colo 562

97 Ind—Pocock v Redinger, 9 NE 473, 108 Ind 573, 58 Am R 71

68 CJ p 766 note 24

98. Del—Hearn v Ross, 4 Del 46

99 Tenn—Burrow v Lewis, 142 S W 2d 758, 24 Tenn App 253

68 CJ p 766 note 26

**Request to leave room after testator's death**

Evidence that witness for proponent, after testator's death, requested everyone to leave the room except herself and husband of one of the beneficiaries "so they could pray for the body," was competent as showing a desire of proponent's witness to further conspiracy by placing will under testator's pillow where it was later found in order to make it appear that testator knew of and guarded will after its execution

Tenn—Burrow v Lewis, 142 SW 2d 758, 24 Tenn App 253

1. Ga—Chedel v Mooney, 123 SE 300, 158 Ga 297

68 CJ p 767 note 27

2. RI—Moran v Moran, 160 A 619, 52 RI 291

3. Mo—Smith v Smith, App, 196 SW 2d 5, opinion quashed on other grounds State ex rel Smith v. Hughes, 200 SW 2d 360, 356 Mo 1

NC—In re Lomax' Will, 39 SE 2d 388, 226 NC 498—In re Stephen's Will, 126 SE 738, 189 NC 267—In re Everett's Will, 68 SE 924, 153 NC 924

Ohio—Board of Education v Phillips, 134 NE 646, 103 Ohio St 622

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219—In re Porter's Estate, 235 P 2d 894, 192 Or 483—In re Lobb's Will, 145 P 2d

present when the will was executed<sup>4</sup> Such evidence must be inconsistent with any result other than the undue influence charged<sup>5</sup>

The range of inquiry may cover not only the provisions of the will itself, as discussed *infra* §§ 246-251, and the circumstances surrounding its execution, *infra* subdivision b of this section, but also the mental condition of the testator, *infra* § 246, the motive and opportunity of others to unduly influence him, *infra* § 250, his relations with persons benefited by, or excluded from, the will, *infra* § 249, and the acts and declarations of such persons, *infra* § 247, since, although none of these matters, standing alone, may be sufficient to establish the issues, nevertheless taken together they may have that effect

### b. Circumstances Attending Execution of Will

Relevant evidence of the circumstances attending the execution of the will is admissible to show that an undue advantage of the testator was taken at that time

Relevant<sup>6</sup> evidence of the circumstances attending the execution of the will is admissible to show that an undue advantage of the testator was taken at that time<sup>7</sup> The fact that the will was not read to

the testator and that he did not know its contents has been held admissible to show undue influence<sup>8</sup> Activity of the beneficiaries in procuring or superintending the making of the will has been held admissible<sup>9</sup>

*Codicil* Evidence that undue influence was exercised or sought to be exercised at the time of the execution of a codicil is admissible on the issue of undue influence at the time of the making of the will<sup>10</sup>

### c. Prior or Subsequent Wills

Although there is authority to the contrary, some jurisdictions allow former wills to be introduced in evidence on the issue of undue influence Under some circumstances a subsequent will may be admissible

In some jurisdictions former wills may be introduced in evidence for the purpose of showing the testamentary intent expressed in such instruments, the harmony or inconsistency of the provisions of the will in question with such intent being material in determining whether such will was made freely or under restraint,<sup>11</sup> and this rule applies to former wills which were not published<sup>12</sup> or which were

808, 173 Or 414—*In re Dale's Estate*, 179 P 274, 92 Or 57  
 Tex—*Welch v Shoubrouek*, Civ App, 260 S W 2d 84—*Scott v McKibban*, Civ App, 110 S W 2d 72, reversed on other grounds *McKibban v Scott*, 114 S W 2d 213, 131 Tex 182, 115 A L R 1421  
 Wash—*In re Martinson's Estate*, 190 P 2d 96, 29 Wash 2d 912  
 4. Tex—*Whatley v McKanna*, Civ App, 207 S W 2d 645, refused no reversible error  
 5. NY—*In re Van Ness' Will*, 139 N Y S 485, 78 Misc 592  
 6. Tex—*Robinson v Stuart*, 11 S W 275, 73 Tex 267  
 68 C J p 773 note 82  
 7. Ark—*Brown v Emerson*, 170 S W 2d 1019, 205 Ark 735  
 Colo—*Ofstad v Sarconi*, 252 P 2d 94, 126 Colo 565  
 Kan—*Smith v Salthouse*, 76 P 2d 836, 147 Kan 354  
 Ky—*Welch's Adm'r v Clifton*, 172 S W 2d 221, 294 Ky 514, 148 A L R 1220  
 Mo—*Corpus Juris cited in Norris v Bristow*, 219 S W 2d 367, 371, 358 Mo 1177  
 Or—*In re Newman's Will*, 213 P 2d 137, 187 Or 641  
 Tex—*Gunlock v Greenwade*, Civ App, 280 S W 2d 610  
 68 C J p 773 note 83

### Presence of beneficiary at making of will

The presence of beneficiary at the execution of the will may be considered.

Iowa—*Shaw v Duro*, 14 N W 2d 241, 234 Iowa 778  
 Mass—*Livermore v Seward*, 41 NE 2d 290, 311 Mass 389  
 68 C J p 773 note 83 [a]

### Peculiar circumstances

On the issue of undue influence, the rules of evidence take into account the peculiar circumstances surrounding the issue

Ga—*Bowman v Bowman*, 55 SE 2d 298, 205 Ga 796

### Understanding of English

(1) Testimony that testatrix could not understand English and conversations had to be explained to her in Jewish was admissible in connection with other evidence tending to show inability of testatrix to read and write  
 Ga—*Peretzman v Simon*, 196 SE 471, 185 Ga 681

(2) Other evidence held admissible see 68 C J p 773 note 83 [b]

8. Ill—*Wilbur v Wilbur*, 27 NE 701, 138 Ill 446

9. Cal—*In re Gallo's Estate*, 214 P 496, 61 Cal App 163

Colo—*Ofstad v Sarconi*, 252 P 2d 94, 126 Colo 565

Del—*Conner v Brown*, 3 A 2d 64, 9 W W Harr 529

Ill—*Sulzberger v Sulzberger*, 23 N E 2d 46, 372 Ill 240—*England v Fawbush*, 68 NE 526, 204 Ill 384  
 NY—*In re Roche's Will*, 278 NY S 929, 244 App Div 756

Tex—*Gunlock v Greenwade*, Civ App, 280 S W 2d 610

Wash—*In re Jaaska's Estate*, 178 P. 2d 321, 27 Wash 2d 433  
 68 C J p 773 note 38

### Connection with execution of will of testator's wife

Evidence to effect that will beneficiary had some connection with execution of a will by testator's wife on same day that testator's will was executed was admissible

Tex—*Welch v Shoubrouek*, Civ App, 260 S W 2d 84

10. Tex—*Cloudt v Hutcherson*, Civ App, 175 S W 2d 643, error refused

11. Cal—*In re Mullen's Estate*, 47 P 2d 746, 8 Cal App 2d 684

Colo—*Ofstad v Sarconi*, 252 P 2d 94, 126 Colo 565

Minn—*Corpus Juris cited in In re Osbon's Estate*, 286 NW 306, 310, 205 Minn 419

Or—*In re Rosenberg's Estate*, 246 P 2d 858, 196 Or 219—*In re Newman's Will*, 213 P 2d 137, 187 Or 641

Tex—*Burkett v Slauson*, Civ App, 256 S W 2d 179, error dismissed

W Va—*Ebert v Ebert*, 200 SE 831, 120 W Va 722

Wis—*In re Borzych's Estate*, 66 N W 2d 164, 267 Wis 526

68 C J p 773 note 87.

### Holographic will

Previously executed holographic will was admissible

Cal—*In re Hettermann's Estate*, 119 P 2d 788, 48 Cal App 2d 263

12. NC—*Love v Johnston*, 34 NC 355.

informally executed,<sup>13</sup> or to a mere draft of a will, which was not executed at all<sup>14</sup> Secondary evidence of the contents of a lost will is also admissible, where there is sufficient evidence of a search for the former will<sup>15</sup> According to other authority, prior wills are hearsay and as such are not admissible to prove undue influence<sup>16</sup>

**Codicil** The lapse of time between the execution of the will and the execution of the codicil may be considered<sup>17</sup>

**Subsequent will.** The fact that a subsequent will was a complete confirmation of the wishes of the testator, as expressed in his first will, may be taken as a circumstance tending to refute the charge of undue influence<sup>18</sup>

## § 246. — Physical and Mental Condition of Testator

The physical and mental condition of the testator,

together with his age, is, under an issue of undue influence, a proper subject for consideration by the jury, and evidence tending to show such condition is admissible.

Since the strength or weakness of mind of the testator and his susceptibility to influence are important in determining whether undue influence was exerted, as discussed supra § 233, the physical and mental condition of the testator, together with his age, is, under an issue of undue influence, a proper subject for consideration by the jury, and evidence tending to show such condition is admissible<sup>19</sup> For example, evidence of the testator's intoxication at the time of making the will,<sup>20</sup> the impairment of his mind by excessive use of alcohol,<sup>21</sup> his use of drugs,<sup>22</sup> or that drugs were administered prior to the execution of the will,<sup>23</sup> his oddities,<sup>24</sup> that he attempted to devise property not his own,<sup>25</sup> his advanced age,<sup>26</sup> the time elapsing between the execution of the will

13 Mo—Thompson v Ish, 12 SW 510, 99 Mo 160, 17 AmSR 552

14 Md—Dudderar v Dudderar, 82 A 453, 116 Md 605  
68 CJ p 774 note 90

15 Mass—McConnell v Wildes, 26 NE 1114, 153 Mass 487

16 Ind—Emry v Beaver, 137 NE 55, 192 Ind 471

17 NY—In re Bosson's Will, 186 NYS 782, 195 App Div 339

18 Cal—In re Easton's Estate, 35 P2d 614, 140 Cal App 367

19 Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192

Cal—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 520

In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161

Colo—Ofstad v Sarconi, 252 P 2d 94, 126 Colo 565

Del—Conner v Brown, 3 A 2d 64, 9 WW Harr 529

Ga—Brumelow v Hopkins, 29 SE 2d 42, 197 Ga 247—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53—Trust Co of Georgia v Ivey, 173 SE 648, 178 Ga 629

Idaho—In re Lunders' Estate, 263 P 2d 1002, 74 Idaho 448

Iowa—In re Hurlbut's Estate, 46 NW 2d 66, 242 Iowa 353—In re Soderland's Estate, 30 NW 2d 128, 239 Iowa 569—**Corpus Juris cited in** In re Telsrow's Estate, 22 NW 2d 792, 796, 237 Iowa 672—Shaw v Duro, 14 NW 2d 241, 234 Iowa 778

Ky—Hines v Price, 221 SW 2d 673, 310 Ky 758—Berryman v Sidwell, 129 SW 2d 154, 278 Ky 713—Thomas v Thomas' Adm'r, 79 SW 2d 982, 258 Ky 236

Md—Smeak v Perry, 199 A 788, 175 Md. 73.

Mass—Dayton v Glidden, 21 NE 2d 299, 303 Mass 268

Minn—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1

Miss—Halford v Hines, 79 So 2d 264

Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225—Larkin v Larkin, 119 SW 2d 351

NY—In re Carll's Will, 106 NYS 2d 363, 201 Misc 829

NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91

Pa—In re Cookson's Estate, 188 A 904, 325 Pa 81

In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc L Rev 585

Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, conformed to Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

Taylor v Taylor, Civ App, 248 SW 2d 820—Olds v Traylor, Civ App, 180 SW 2d 511, error refused—Taylor v Small, Civ App, 71 SW 2d 895, error dismissed

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517

Wis—In re Brzowsky's Estate, 67 NW 2d 384, 267 Wis 510—In re Lee's Will, 23 NW 2d 405, 249 Wis 59

68 CJ p 767 note 30

### Cessation of questioning

Evidence that house physician, just two hours before will was signed, ceased questioning testator because further questioning might cause his death was admissible

Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155.

### Critical list

Evidence that the testator was on the hospital's critical list, with his death expected at any moment, when he signed will, was admissible

Cal—In re Greenhill's Estate, supra

**Disease** Evidence showing disease affecting strength of mind of testator was admissible

Ga—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53

Ky—Duval v Duval, 60 SW 2d 351, 249 Ky 186

Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, conformed to, Civ App,

129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517

20 Cal—In re Cunningham's Estate, 52 Cal 465

Tex—Craycroft v Crawford, Com App, 285 SW 275, rehearing denied, Com App, 287 SW 244

21 Ky—Duval v Duval, 60 SW 2d 351, 249 Ky 186

22. Tex—Beadle v McCrabb, Civ. App, 199 SW 355, error refused

23 Cal—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155

Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517

24. Mass—Tarr v Tucker, 172 NE 257, 272 Mass 150

25. Vt—In re Buckman, 24 A 252, 64 Vt 313, 33 AmSR 930.

68 CJ p 767 note 35

26 Colo—Ofstad v Sarconi, 252 P 2d 94, 126 Colo 565

Ga—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53—Trust Co of Georgia v Ivey, 173 SE 648, 178 Ga 629.

and the testator's death,<sup>27</sup> the comparative ages of husband and wife, where undue influence by one of the spouses is alleged,<sup>28</sup> his will power,<sup>29</sup> his monthly bank balances,<sup>30</sup> his handwriting in correspondence of intelligent contents,<sup>31</sup> and his unhappy married life,<sup>32</sup> have been held admissible. Evidence of total mental incapacity,<sup>33</sup> what medicines the testator had been taking, where no claim is made that such medicines affected his free will,<sup>34</sup> his character in the community as one easily influenced,<sup>35</sup> his physical and mental condition at a time subsequent to the making of the will,<sup>36</sup> and disparity in ages between husband and wife,<sup>37</sup> have been held inadmissible. Evidence concerning the physical and mental condition of the testator before and after the actual date and time when the will was executed is admissible only in so far as it tends to show the testator's condition at the very time the will was made.<sup>38</sup>

*Incompetency proceedings* Where the issue of undue influence is presented, evidence of an entry of the probate court dismissing an application to have the testator adjudged incompetent is admissible,

and its exclusion is erroneous.<sup>39</sup> Evidence of the appointment of a guardian for the testator, an incompetent person, is also admissible on the issue of undue influence.<sup>40</sup>

## § 247. — Declarations of Testator

While declarations of the testator, made at the time of the execution of the will, or so near thereto as to be part of the *res gestæ*, are admissible in evidence to show fraud or undue influence, declarations made either before or after the execution of the will, but not part of the *res gestæ*, are mere hearsay and are not admissible as direct evidence of the exercise of fraud or undue influence. Such declarations may be received in evidence, however, to show the state and condition of the testator's mind.

Declarations of the testator, made at the time of the execution of the will, or so near thereto as to be part of the *res gestæ*, are admissible in evidence to show that a mistake was or was not made, or that fraud or undue influence was or was not exerted on him.<sup>41</sup> Declarations made either before or after the execution of the will, but not part of the *res gestæ*, are mere hearsay and are not admissible as direct evidence of the exercise of fraud or undue influence.<sup>42</sup> They may be received in evidence, how-

- NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91  
 Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623  
 Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517  
 68 CJ p 767 note 36  
 27. Cal—In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161  
 28. Ga—Trust Co of Georgia v Ivey, 173 SE 648, 178 Ga 629  
 29. Mo—Larkin v Larkin, 119 S W 2d 351  
 68 CJ p 767 note 37  
 30. Tex—Whitney v Murrie, Civ App, 264 SW 270  
 31. NY—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580  
 32. Cal—In re Lavinburg's Estate, 119 P 915, 161 Cal 536  
 33. Cal—In re Stone's Estate, 164 P 643, 174 Cal 778  
 68 CJ p 767 note 40  
 34. Conn—Appeal of Vivian, 50 A 797, 74 Conn 257  
 35. Ala—Moore v Spier, 80 Ala 129  
 36. Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444  
**Admission held error**  
 Admission of testimony that testatrix was feeble and could not rest and had blue marks on her body in 1935 or 1936 was error, where will was executed in 1933  
 Utah—In re Goldsberry's Estate, supra.  
 37. NC—In re Bradford's Will, 110 SE 586, 183 NC 1  
 38. Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534  
 39. Ohio—Rutledge v Inlow, 200 N E 204, 51 Ohio App 207  
 40. Ohio—Heath v Kosier, 61 NE 2d 728, 76 Ohio App 89  
**Contestee appointed guardian**  
 Ohio—Heath v Kosier, supra  
 41. Ala—Street v Street, 22 So 2d 35, 246 Ala 683  
 Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709  
 Mo—Clark v Powell, 175 SW 2d 842, 351 Mo 1121  
 NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91  
 Tex—Parr v Parr, Civ App, 207 S W 2d 187, refused no reversible error  
 68 CJ p 767 note 45  
 42. Ark—Floyd v Dillaha, 256 S W 2d 48, 221 Ark 805  
 Ga—Reid v Wilson, 65 SE 2d 913, 208 Ga 235—Moore v Thornton, 179 SE 720, 180 Ga 533  
 Ind—Allman v Malsbury, 65 NE 2d 106, 224 Ind 177—Barger v Barger, 48 NE 2d 813, 221 Ind

- 530—Loeser v Simpson, 39 NE 2d 945, 219 Ind 572  
 Evans v Evans, 96 NE 2d 688, 121 Ind App 101  
 Iowa—In re Rogers' Estate, 47 N W 2d 818, 242 Iowa 627—In re Hadley's Estate, 45 NW 2d 140, 241 Iowa 1280—In re Soderland's Estate, 30 NW 2d 128, 239 Iowa 569—Hansen v Waugh, 21 NW 2d 762, 237 Iowa 304—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Johnson's Estate, 269 NW 702, 222 Iowa 787  
 Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354  
 Ky—Welch's Adm'r v Clifton, 172 SW 2d 221, 294 Ky 514, 148 A. LR 1220  
 Mich—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Hoffman's Estate, 2 NW 2d 442, 300 Mich 406—In re Balk's Estate, 298 NW 779, 298 Mich 303  
 Mo—State ex rel Smith v Hughes, 200 SW 2d 360, 356 Mo 1  
 Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148  
 NJ—In re Alper's Will, 60 A 2d 320, 142 NJ Eq 529, affirmed 65 A 2d 736, 2 NJ 104—In re Nixon's Estate, 37 A 2d 295, 135 NJ Eq 117, affirmed 41 A 2d 119, 136 NJ Eq 242—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344  
 NY—In re Limberg's Will, 13 NE 2d 605, 277 NY 129  
 In re Phillips' Will, 85 NYS 2d 120, 193 Misc 1046, affirmed in part and reversed in part on other

ever, to show the state and condition of the tes- | tator's mind<sup>43</sup> Thus, they may be admitted to

grounds 93 NYS 2d 651, 276 App Div 821, affirmed in part and appeal dismissed in part on other grounds 95 NE 2d 52, 301 NY 696—In re Frank's Estate, 1 NYS 2d 482, 165 Misc 411  
 NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91  
 Ohio—McNeil v McNeil, App, 76 NE 2d 621  
 Okl—In re Shipman's Estate, 85 P 2d 317, 184 Okl 56  
 Or—In re Newman's Will, 213 P 2d 137, 187 Or 641  
 Pa—In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc L Rev 585  
 SD—In re Armstrong's Estate, 272 NW 799, 65 SD 233  
 Tenn—Wrinkle v Williams, 260 S W 2d 304, 37 Tenn App 27—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628  
 Tex—White v Smith, Civ App, 276 SW 2d 359, error dismissed—Bledsoe v Short, Civ App, 264 SW 2d 445, refused no reversible error—Naihaus v Feigon, Civ App, 244 SW 2d 325, error refused no reversible error—Stewart v Shoemaker, Civ App, 225 SW 2d 873, error refused no reversible error—Thornburg v Manskey, Civ App, 219 SW 2d 720—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25—Bonilla v Lujan, Civ App, 168 SW 2d 691—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused—Bethel v Yearwood, Civ App, 142 SW 2d 927, error dismissed, judgment correct—Jones v Selman, Civ App, 109 SW 2d 1003, error dismissed—Shofner v Shofner, Civ App, 105 SW 2d 418, error refused  
 Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444  
 Va—Savage v Nute, 23 SE 2d 133, 180 Va 394  
 W Va—Rice v Henderson, 83 SE 2d 762  
 Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444  
 68 CJ p 768 note 46

#### Particular statements held inadmissible

(1) Declarations of testator as to manner in which he disposed of his property  
 Ark—Durcher v Casey, 83 SW 2d 73, 190 Ark 1055  
 (2) Alleged declarations by testator to effect that party writing will had "bossed" testator about making will  
 Pa—Buhan v. Keslar, 194 A. 917, 328 Pa. 312  
 (3) Declaration to the effect that wife would not allow him to give

part of his property to children of his deceased daughter

Ky—McComas v Hull, 145 SW 2d 541, 284 Ky 654

(4) Statements to relative, that wife was insisting that testator sign will and that wife had signed paper before marriage agreeing to take only one-half of estate

Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

(5) Testimony as to what testatrix told witness with respect to statements made by testatrix' daughter to testatrix

Iowa—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761

(6) Other statements see 68 CJ p 768 note 46 [g]

43 Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192

Cal—In re Sproston's Estate, 52 P 2d 924, 4 Cal 2d 717

In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

Colo—Brantner v Papish, 126 P 2d 1032, 109 Colo 437

Conn—Babcock v Johnson, 19 A 2d 416, 127 Conn 643

DC—Duckett v Duckett, 134 F 2d 527, 77 US App DC 303

Fla—In re Burton's Estate, 45 So 2d 873

Ga—Reid v Wilson, 65 SE 2d 913, 208 Ga 235

Ill—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576

Ind—Barger v Barger, 48 NE 2d 813, 221 Ind 530

Iowa—In re Groen's Estate, 62 N W 2d 143, 245 Iowa 634—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Soderland's Estate, 30 NW 2d 128, 239 Iowa 569—Hansen v Waugh, 21 NW 2d 762, 237 Iowa 304—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761—In re Elker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Johnson's Estate, 269 NW 792, 222 Iowa 787

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Ky—Welch's Adm'r v Clifton, 172 SW 2d 221, 294 Ky 514, 148 A L R 1220—McComas v Hull, 145 SW 2d 541, 284 Ky 654

Mich—In re Hoffman's Estate, 2 N W 2d 442, 300 Mich 406—In re Balk's Estate, 298 NW 779, 298 Mich 303—In re Brady's Estate, 295 NW 230, 295 Mich 472

Mo—State ex rel Smith v Hughes, 200 SW 2d 360, 356 Mo 1—Look v French, 144 SW 2d 128, 346 Mo 972.

Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148

Neb—In re Bowman's Estate, 9 N W 2d 801, 143 Neb 440

NJ—In re Nixon's Estate, 37 A 2d 295, 135 NJ Eq 117, affirmed 41 A 2d 119, 136 NJ Eq 242—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344

NY—In re Lumberg's Will, 13 NE 2d 605, 277 NY 129

In re McCarthy's Will, 54 NYS 2d 591, 269 App Div 145, reargument denied 56 NYS 2d 514, one case, 269 App Div 838, affirmed 73 NE 2d 566, 296 NY 987—In re Norminton's Will, 27 NYS 2d 110, 261 App Div 1105

In re Boyle's Will, 128 NYS 2d 259, 205 Misc 497—In re Ittle-son's Estate, 94 NYS 2d 786, 197 Misc 786—In re Phillips' Will, 85 NYS 2d 420, 193 Misc 1016, affirmed in part and reversed on other grounds 93 NYS 2d 651, 276 App Div 821, affirmed in part and appeal dismissed in part on other grounds 95 NE 2d 52, 301 NY 696—In re Frank's Estate, 1 NYS 2d 482, 165 Misc 411

Ohio—McNeil v McNeil, App, 76 NE 2d 621

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

Tex—Stewart v Shoemaker, Civ App, 225 SW 2d 873, error refused no reversible error—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25—Bonilla v Lujan, Civ App, 168 SW 2d 691—In re Williams' Estate, Civ App, 135 SW 2d 1078  
 Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444

W Va—Rice v Henderson, 83 SE 2d 762

68 CJ p 769 note 47

#### Particular statements held admissible

(1) Evidence of testatrix' declarations that her attorney, who was chief beneficiary of will, offered testatrix a mink coat and kissed her, and that if testatrix were twenty or thirty years younger she would marry him  
 Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

(2) Testimony as to declarations made by testatrix within six months prior to making of will that testatrix desired to leave her property to husband

Cal—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 139

(3) Testimony of witness that he had heard testator remark many times that testator wanted his attorney to have his money because

prove or disprove his weakness of mind and consequent susceptibility to undue influence,<sup>44</sup> or his feelings and attitude toward, and relations with, persons mentioned in or excluded from his will,<sup>45</sup>

attorney had made the money for the testator

Md—Snyder v Cearfoss, 57 A 2d 786, 190 Md 151

(4) Evidence that testatrix prior to execution of holographic will, as requested by a son, made statements, prior to signing of will, that she did not wish to execute requested will leaving everything to the son, but that it was necessary for her to do so, so that son could get her out of foreign country and into the United States

Cal—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563

(5) Other statements see 68 C J p 769 note 47 [a]

44 Ala—Towles v Pettus, 12 So 2d 357, 244 Ala 192

Cal—In re Sproston's Estate, 52 P 2d 924, 4 Cal 2d 717

In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

DC—Duckett v Duckett, 134 F 2d 527, 77 US App DC 303

Ga—Reid v Wilson, 65 SE 2d 913, 208 Ga 235

Ind—Barger v Barger, 48 NE 2d 813, 221 Ind 530

Iowa—In re Groen's Estate, 62 N W 2d 143, 245 Iowa 634—In re Rogers' Estate, 47 N W 2d 818, 242 Iowa 627—In re Soderland's Estate, 30 N W 2d 128, 239 Iowa 569—

In re Hollis' Estate, 12 N W 2d 576, 234 Iowa 761—In re Eiker's Estate, 6 N W 2d 318, 233 Iowa 315

—In re Johnson's Estate, 269 N W 792, 222 Iowa 787

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Ky—Welch's Adm'r v Clifton, 172 SW 2d 221, 294 Ky 514, 148 ALR 1230—McComas v Hull, 145 SW 2d 841, 284 Ky 654

Md—Snyder v Cearfoss, 57 A 2d 786, 190 Md 151

Mo—State ex rel Smith v Hughes, 200 SW 2d 360, 356 Mo 1—Look v French, 144 SW 2d 128, 346 Mo 972

Neb—In re Bowman's Estate, 9 N W 2d 801, 143 Neb 440

NJ—In re Reynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344

NY—In re McCarthy's Will, 54 N Y S 2d 591, 269 App Div 145, reargument denied 56 N Y S 2d 514, one case, 269 App Div 836, affirmed 73 NE 2d 566, 296 NY 987—

In re Norminton's Will, 27 N Y S 2d 110, 261 App Div 1105

In re Frank's Estate, 1 N Y S 2d 482, 165 Misc 411

Ohio—McNeil v. McNeil, App, 76 NE 2d 621

Or—In re Lobb's Will, 145 P 2d 808, 173 Or 414

SD—In re Armstrong's Estate, 272 N W 799, 65 SD 233

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

Tex—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25—Bonilla v Lujan, Civ App, 168 SW 2d 691

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444

W Va—Rice v Henderson, 83 SE 2d 762

68 C J p 769 note 48

45 Cal—In re Sproston's Estate, 52 P 2d 924, 4 Cal 2d 717

In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563—In re Hettermann's Estate, 119 P 2d 788

48 Cal App 2d 263—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

DC—Duckett v Duckett, 134 F 2d 527, 77 US App DC 303

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Ky—McComas v Hull, 145 SW 2d 841, 284 Ky 654

Mo—State ex rel Smith v Hughes, 200 SW 2d 360, 356 Mo 1—Palm v Maguire, 146 SW 2d 636, 347 Mo 189

Doll v Fricke 171 SW 2d 755, 237 Mo App 1148

NY—In re Norminton's Will, 27 N Y S 2d 110, 261 App Div 1105

In re Boyle's Will, 128 N Y S 2d 259, 205 Misc 497—In re Frank's Estate, 1 N Y S 2d 482, 165 Misc 411

Ohio—McNeil v McNeil, App, 76 N E 2d 621

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

Tex—Stewart v Shoemaker, Civ App, 225 SW 2d 873, error refused no reversible error—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25

68 C J p 769 note 49

Testator's letters

(1) Testator's letters held admissible as manifestations of the state of his mind concerning objects of his bounty

Mo—Clark v Powell, 175 SW 2d 842, 351 Mo 1121

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

Tex—Jones v Selman, Civ App, 109 SW 2d 1003, error dismissed

68 C J p 769 note 49 [b]

(2) Carbon copy of letter from testator to his daughter containing on its face an original notation signed by him, held admissible, the

daughter having already received the original letter and the notation on the copy itself being an original

Tex—Cameron v Houston Land & Trust Co, Civ App, 175 SW 2d 468, error refused

Statements of deceased husband of testatrix

Statements made by deceased husband of testatrix concerning children excluded from mutual wills, executed before will in question, are admissible, where testatrix made similar statements when she executed her will

Ill—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041

Particular declarations held admissible

(1) Fact that testator called his children together, asked them to prepare a plan for division of his land among them, and agreed to plan

Mo—Welch v Welch, 190 SW 2d 936, 354 Mo 654

(2) Testimony that testatrix gave caveatrix a list of stocks and bonds, stating that testatrix wanted caveatrix to know what testatrix had and wanted caveatrix to protect every one and have every one treated like the others

Ga—Peretzman v Simon, 196 SE 471, 185 Ga 681

(3) Testatrix' declarations, voluntarily made out of presence of principal devisee, that she intended to and had willed her property to principal devisee because of his kindness

Ill—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576

(4) Testimony that testator had told witness that proponent had married good-for-nothing man and that testator would not help her as long as she lived with her husband

Tex—Scott v McKibban, Civ App, 110 SW 2d 72, reversed on other grounds McKibban v Scott, 111 SW 2d 213, 131 Tex 182, 115 ALR 1421

(5) Testimony that testator stated that sole beneficiary of codicil was simply beating life out of his wife

Tenn—Hager v Hager, 66 SW 2d 250, 17 Tenn App 143

(6) Declaration testator made to witness about a trip he had made to visit his daughter

Tex—Cameron v Houston Land & Trust Co, Civ App, 175 SW 2d 468, error refused

(7) Testimony that testator had stated that he was going to leave his property to his children and grandchildren

Tex—Barksdale v Dobbins, Civ App, 141 S.W 2d 1035, error refused

provided it is not incompetent as an invasion of the privacy of the marital relationship,<sup>46</sup> or his intentions as to how he should dispose of his property,<sup>47</sup> as these matters are important in determining whether the dispositions which he does make are natural and consistent, or are the products of fraud or undue influence. In some cases, where there has been other independent evidence of undue influence, declarations of the testator have been admitted as corroborative evidence,<sup>48</sup> and on the other hand, it is held that such declarations are admitted only as corroborative evidence, and cannot properly be received where there has been no foundation laid with other evidence.<sup>49</sup> Thus, where undue influence is shown by other evidence, the testator's declarations may be admitted in evidence, not to show the existence or exercise of such influence, but to show the effect it had on his mind.<sup>50</sup> When the courts do permit the declaration of a testator to be received in evidence, they do so with great caution

and confine it strictly to the purpose for which it is admitted.<sup>51</sup>

*Part of conversation.* Declarations of a testator are sometimes admitted on the ground that they are part of a conversation, the rest of which is competent,<sup>52</sup> as when the other party to the conversation was a legatee, as considered *infra* § 250.

*Letter from attorney to testator.* A letter from the attorney, who drafted the will, to the testator asking if the testator desired any further changes, becomes an approval of the will as drafted, where the testator makes no changes, and can be regarded as in the nature of a declaration by the testator that the will as written was consistent with the previously declared intention of the testator.<sup>53</sup>

*As to persons exerting influence.* Declarations of the testator which show that he was influenced by a person other than the one charged with procuring

(8) Other declarations see 68 C J p 769 note 49 [c]

46 Tenn—English v Ricks, 95 S W 189, 117 Tenn 73

47 Cal—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

Conn—Bahcock v Johnson, 19 A 2d 116, 127 Conn 643

Md—Snyder v Cearloss, 57 A 2d 786, 190 Md 151

Ohio—McNeil v McNeil, App, 76 NE 2d 621

Tex—Stewart v Shoemaker, Civ App, 225 SW 2d 873, error refused no reversible error

W Va—Rice v Henderson, 83 SE 2d 762

68 C J p 769 note 51

#### In Illinois

(1) It has been held that statements of an intention to dispose of the property substantially in the manner provided in the will are admissible

Ill—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353

68 C J p 769 note 51 [f] (1)

(2) Letters of deceased showing a rational, businesslike purpose to make a will in substantially the manner in which the one in question was made, renders competent the contents of earlier letters incorporated in the later letter, although the former, standing alone, are too remote in point of time to be competent

Ill—Baker v Baker, 67 NE 410, 202 Ill 595

(3) However, such declarations of a testator of an intention to dispose

of his property in a certain way are admissible only when they are in harmony with the provisions of the will, and are inadmissible when they are opposed thereto

Ill—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353

68 C J p 769 note 51 [f] (3)

48. Ala—Slagle v Halsey, 15 So 2d 740, 245 Ala 198

Pa—In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc L Rev 585

Tenn—Hager v Hager, 13 Tenn App 23

68 C J p 770 note 52

49. Iowa—In re Groen's Estate, 62 NW 2d 143, 245 Iowa 634—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Hadley's Estate, 45 NW 2d 140, 241 Iowa 1280—Shaw v Duro, 14 NW 2d 241, 234 Iowa 778—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Rogers' Estate, 295 NW 103, 229 Iowa 781

Ky—Welch's Adm'r v Clifton, 172 SW 2d 221, 294 Ky 514, 148 ALR 1220

NY—In re Limberg's Will, 299 NY 47, 252 App Div 779, reversed on other grounds 13 NE 2d 605, 277 NY 129

NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91

Pa—In re Sites' Estate, Orph, 60 Dauph Co 377

Tex—White v Smith, Civ App, 276 SW 2d 359, error dismissed—Bledsoe v Short, Civ App, 264 SW 2d 445, refused no reversible error—Nahhaus v Feigon, Civ App, 244 SW 2d 325, refused no reversible error—Stewart v Shoemaker, Civ App, 225 SW 2d 873, error refused no reversible error—Bonilla

v Lujan, Civ App, 168 SW 2d 691—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused—Bethel v Yearwood, Civ App, 142 SW 2d 927, error dismissed, judgment correct

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444

68 C J p 770 note 53

50 Iowa—In re Groen's Estate, 62 NW 2d 143, 245 Iowa 634—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Hadley's Estate, 45 NW 2d 140, 241 Iowa 1280—Shaw v Duro, 14 NW 2d 241, 234 Iowa 778—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Rogers' Estate, 295 NW 103, 229 Iowa 781—In re Johnson's Estate, 269 NW 792, 222 Iowa 787

Tex—Bledsoe v Short, Civ App, 264 SW 2d 445, refused no reversible error—Bonilla v Lujan, Civ App, 168 SW 2d 691—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444

68 C J p 770 note 54

51. Vt—In re Everett's Will, 166 A. 827, 105 Vt 291—Robinson v Hutchinson, 26 Vt 38, 60 Am D 298

52. Ind.—Corpus Juris quoted in Evans v Evans, 96 NE 2d 688, 690, 121 Ind App 104

NY—In re Potter's Will, 55 NE 387, 161 NY 84, 5 Prob Rep Ann 178

53. Ala—King v Aird, 38 So 2d 883, 251 Ala. 613.



the will by undue influence has been held to be inadmissible<sup>54</sup>

**Remoteness** Declarations made by the testator, in order to be admissible, must be made at a time not too remote from the making of the will<sup>55</sup> Where no time is fixed to indicate how long before the making of the will the declaration was made, such statement is not admissible<sup>56</sup> Declarations made a long time prior or subsequent to the time of the execution of the will may be inadmissible as too remote<sup>57</sup> The determination of whether or not a declaration is too remote has been held to rest somewhat within the discretion of the court,<sup>58</sup> and that remoteness was to be measured in terms of causation

and relation to the issue, rather than in terms of time<sup>59</sup>

## § 248. — Contents of Will and Unnaturalness of Provisions

The nature and contents of the provisions of the will may be considered in determining questions of fraud, mistake, or undue influence.

In passing on the questions of fraud, mistake, and undue influence, it is proper to consider the nature and contents of the provisions of the will itself<sup>60</sup> Thus, it is permissible to compare provisions of the will with other evidence to determine whether they are unjust, unequal, or unnatural, as such inequality or unnaturalness, or lack of it, bears on the question of fraud and undue influence,<sup>61</sup> although it is in-

54. Vt—In re Everett's Will, 166 A 827, 105 Vt 291

55. Tex—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25—Scott v McKibban, Civ App, 110 SW 2d 72, reversed on other grounds McKibban v Scott, 114 SW 2d 213, 131 Tex 182, 115 ALR 1421

### Held not too remote

Testimony that testator had stated about fifteen or sixteen months before he executed will in question how he was going to dispose of property, held not too remote

Tex—Baiksdale v Dobbins, Civ App, 141 SW 2d 1035, error refused

56 Ohio—Heath v Kosier, 61 NE 2d 728, 76 Ohio App 89

57. NY—In re Frank's Estate, 1 NYS 2d 482, 165 Misc 411

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444.

68 CJ p 771 note 59

### Time held too remote

(1) Seven or eight years

Cal—In re Ostrander's Estate, 259 P 2d 999, 119 Cal App 2d 481.

(2) More than ten years

Tex—In re Caruthers' Estate, Civ App, 151 SW 2d 946, error dismissed, judgment correct

(3) Other times see 68 CJ p 771 note 59 [a]

58. Ill—Huffman v Graves, 92 NE 289, 245 Ill 440

NY—In re McCarthy's Will, 54 NYS 2d 591, 269 App Div 145, reargument denied 56 NYS 2d 514, one case, 269 App Div 836, affirmed 73 NE 2d 566, 296 NY 987

59. DC—Pillow v Shields, 46 App DC 487

NY—In re Campbell's Will, 136 NYS 1086

60. Colo—Ofstad v Sarconi, 252 P 2d 94, 126 Colo. 555

Idaho—In re Lunders' Estate, 263 P 2d 1002, 74 Idaho 448

Ind—Workman v Workman, 46 NE 2d 718, 113 Ind App 245

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Minn—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1  
68 CJ p 771 note 63

61 Conn—Pepin v Ryan, 47 A 2d 846, 133 Conn 12

Ga—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53—Shaw v Fehn, 27 SE 2d 406, 196 Ga 661

Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407—Shaw v Duro, 14 NW 2d 241, 234 Iowa 778

Md—Garner v Garner, 190 A 243, 171 Md 603

Mass—Livermore v Seward, 41 NE 2d 290, 311 Mass 389

Minn—In re Rasmussen's Estate, 69 NW 2d 630—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1

Or—In re Rosenberg's Estate, 216 P 2d 858, 196 Or 219

Pa—In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc L Rev 585

SD—In re Rowlands' Estate, 18 NW 2d 290, 70 SD 419

W Va—Ebert v Ebert, 200 SE 831, 120 W Va 722

68 CJ p 771 note 64

### Nature of testamentary disposition

Nature of testamentary disposition, whether natural or unnatural, may be considered with other evidence as a circumstance to establish undue influence

Ark—Brown v. Emelson, 170 SW 2d 1019, 205 Ark 735

Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1

In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659

Del—Conner v Brown, 3 A 2d 64, 9 WW Harr 529

Idaho—In re Lunders' Estate, 263 P 2d 1002, 74 Idaho 448.

Ind—Workman v Workman, 46 NE 2d 718, 113 Ind App 245

Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407—In re Telsrow's Estate, 22 NW 2d 792, 237 Iowa 672—Shaw v

Duro, 14 NW 2d 241, 234 Iowa 778

—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315

Miss—Wallace v Harrison, 65 So 2d 456, 218 Miss 153—King v Rowan, 34 So 325, 82 Miss 1

Mo—Wade v Kirksville College of Osteopathy and Surgery, 270 SW 2d 811—Guidicy v Guidicy, 238 SW 2d 380, 361 Mo 1127

Carl v Ellis, App, 110 SW 2d 805

Neb—In re Bowman's Estate, 9 NW 2d 801, 143 Neb 440

Pa—In re McFadden's Estate, 108 A 2d 247, 177 Pa Super 37

Tex—Long v Long, 125 SW 2d 1034, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

Gunlock v Greenwade, Civ App, 280 SW 2d 610, error refused no reversible error—Naihaus v Feigson, Civ App, 214 SW 2d 325, error refused no reversible error—Olds v Traylor, Civ App, 180 SW 2d 511, error refused

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

68 CJ p 771 note 64 [c]

### Particular matters considered

(1) Fact that the beneficiary was a comparative stranger to testator  
Neb—In re Bainbridge's Estate, 36 NW 2d 625, 151 Neb 142

(2) Devise to strangers in blood, to the exclusion of testator's blood kin

NC—In re Franks' Will, 56 SE 2d 668, 231 NC 252, rehearing denied 57 SE 2d 315, 231 NC 736

(3) Devise to one child to exclusion of other children, in the absence

sufficient in itself to establish such matters as considered supra § 242, and hence is immaterial and incompetent in the entire absence of other evidence<sup>62</sup> Evidence denying<sup>63</sup> or sustaining<sup>64</sup> the existence of certain facts recited by way of inducement in the will is admissible Evidence tending to show the source of the property is admissible to sustain the reasonableness or unreasonableness of the will,<sup>65</sup> particularly where the testator was under an obligation to the person from whom the property was derived to make a certain disposition of the property<sup>66</sup> Evidence showing the motive or reason for the testator's disposition of his property is admissible<sup>67</sup>

*Financial condition of persons involved* Evidence showing the financial condition, and the extent of

the testator's estate, is admissible<sup>68</sup> According to some authorities, where it is shown that the testator knew of the financial circumstances of the various persons involved,<sup>69</sup> in passing on the justice or inequality of a will in so far as it bears on the question of fraud and undue influence, the financial condition of persons mentioned in, or excluded from, the will may be considered<sup>70</sup> For example, it is proper to admit evidence that such persons had property of their own,<sup>71</sup> or were entitled to receive a large amount under the will of another person,<sup>72</sup> or that they were in poor and straitened circumstances<sup>73</sup> This proof should be confined to a date corresponding with the execution of the will<sup>74</sup> However, there is other authority holding that evidence of the financial condition of such persons is inadmissible,<sup>75</sup> particularly where it is not clearly

of some reasonable ground for such preference

NC—In re Franks' Will, supra

(4) Devise of interest in realty in which testator had only a life estate, so that beneficiary received nothing by devise

Tex—Long v Long, 125 S W 2d 1034, 133 Tex 96, mandate conformed to Civ App, 129 S W 2d 1206, error dismissed 138 S W 2d 798, 133 Tex 623

(5) Beneficiary's receipt of unusually or unnaturally large part of estate

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

(6) Whether it was a usual thing for testatrix to bequeath her entire estate to her personal physician, where she had known physician for less than two years and there was no basis for such bounty

Cal—In re Bucher's Estate, 120 P 2d 44, 48 Cal App 2d 465

(7) Fact that will gives entire estate, except specific legacies to old friends, to person accused of undue influence, to exclusion of relatives

Fla—In re Donnelly's Estate, 188 So 108, 137 Fla 459

(8) Fact that testator's grandson was the natural recipient of testator's bounty and received nothing under the will, where there was independent evidence of undue influence

Iowa—In re Rogers' Estate, 295 N W 103, 229 Iowa 781

(9) Evidence of reduction and exclusion of bequest

Iowa—Olsen v Corporation of New Melleray, 60 N W 2d 832, 245 Iowa 407

*Cousins* are not normally or necessarily natural objects of the bounty of the testator

Tex—In re Gray's Estate, Civ App, 279 S W 2d 936, error refused no reversible error.

62 Iowa—In re Telsrow's Estate, 22 N W 2d 792, 237 Iowa 672—In re Eiker's Estate, 6 N W 2d 318, 233 Iowa 315—In re Rogers' Estate, 295 N W 103, 229 Iowa 781

Me—In re Paradis' Will, 87 A 2d 512, 147 Me 347

Mo—Wade v Kirksville College of Osteopathy and Surgery, 270 S W 2d 811

Carl v Ellis, App, 110 S W 2d 805

68 C J p 771 note 66

63 Minn—In re Will's Estate, 69 N W 1090, 67 Minn 335

68 C J p 772 note 67

64 Ga—Mosley v Fears, 68 SE 804, 135 Ga 71

68 C J p 772 note 68

65 Ga—Shaw v Fehn, 27 SE 2d 406, 196 Ga 661

Me—Corpus Juris quoted in In re Paradis' Will, 87 A 2d 512, 517, 147 Me 347

68 C J p 772 note 69

66 Me—Corpus Juris quoted in In re Paradis' Will, 87 A 2d 512, 517, 147 Me 347

68 C J p 772 note 70

*Mutual will*  
A mutual will executed by the testator and a former deceased wife is admissible

Ga—Shaw v Fehn, 27 SE 2d 406, 196 Ga 661

67 Me—Appeal of Ward, 164 A 889, 132 Me 19

68 C J p 772 note 71

68 Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Miss—Norman v Norman, 18 So 2d 130, 196 Miss 597

Ohio—McNeil v. McNeil, App, 76 NE 2d 621

69 Ill—O'Day v Crabb, 109 NE 724, 269 Ill 123

Tex—McDonald's Estate v McDonald, Civ App, 150 S W 593

70 Ga—Boland v Aycock, 12 SE 2d 319, 191 Ga 327

Iowa—Shaw v Duro, 14 N W 2d 241, 234 Iowa 778

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Kv—Martin v Combs, 145 S W 2d 108, 284 Ky 530

Mo—Larkin v Larkin, 119 S W 2d 351

68 C J p 772 note 73

"Especially is this true where the contestant is in close relationship to the testator, and claim is made that the provisions of the will are unnatural"

Neb—In re Bowman's Estate, 9 N W 2d 801, 803, 143 Neb 440

"There are, doubtless, cases in which such evidence [financial condition] is material In this case, evidence practically the same as that objected to was before the jury from other witnesses Under the peculiar circumstances of this case, it is difficult to appreciate its materiality If the mind of the testatrix was in the weakened condition alleged, and under the influence exerted over her, the financial situation of the respective parties could have no bearing on the matter"

Va—Ferguson v Ferguson, 192 S D 774, 781, 169 Va 77

71 Iowa—James v Fairall, 148 N W 1029, 168 Iowa 427

68 C J p 772 note 74

72 Mass—Davenport v Johnson, 65 NE 392, 182 Mass 269, 8 Prob Rep Ann 262

68 C J p 773 note 75

73 Ind—Gurley v. Park, 35 NE 279, 195 Ind 440

Iowa—Manatt v Scott, 76 N W 717, 106 Iowa 203

74 Ala—Garther v Phillips, 75 So 295, 199 Ala 689

75 Mich—In re Bailey's Estate, 153 N W 39, 186 Mich 677.

68 C J p 773 note 78.

shown what relation the persons excluded sustained to the testator<sup>76</sup> Evidence of the financial condition of persons who would not benefit from a finding of undue influence is properly excluded<sup>77</sup> The financial condition of the testator's acquaintances is inadmissible<sup>78</sup>

*Mere matters of construction* which may operate to defeat the testator's intent will not be considered in determining whether the instrument is or is not his will<sup>79</sup>

## § 249. — Relations between Testator and Persons Benefited by, or Excluded from, Will

Subject to some exceptions, evidence of the friendly

or hostile relations of the testator and the persons benefited by, or excluded from, the will is admissible to show that the will was the result of fraud or undue influence

Except when too remote in point of time<sup>80</sup> or when wholly unconnected with any other evidence showing the exercise of undue influence with respect to the testamentary act,<sup>81</sup> or subject to privilege, as that of husband or wife,<sup>82</sup> evidence of the friendly or hostile relations and dealings of the testator with the persons benefited by, or excluded from, the will is admissible to show the testator's state of mind and feelings toward such persons, and to shed light on the probability of the testator's will having been made in accordance with such state of mind or as the result of fraud or undue influence<sup>83</sup> Also, evidence of litigation between the

**76** Mich—Cooper v Harlow, 128 N W 259, 163 Mich 210

**77** Ga—McGahee v Phillips, 84 S E 2d 19, 211 Ga 118

**Testator's surviving mother and sister**

Where testator's wife, rather than his mother or sister, would benefit from a finding of undue influence, financial condition of mother and sister was properly excluded  
Ga—McGahee v Phillips, *supra*

**78** Mich—In re Merriman, 66 NW 372, 108 Mich 454

**79** Tenn—Gibson v Gibson, 9 Yerg 329

**80** Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514  
68 CJ p 774 note 95

**Evidence held too remote**

(1) Exhibits offered by contestants showing bank deposits and withdrawals during five year period between execution of will and death of testator, most of which occurred some years after execution of will, were too remote in time to execution of will, and were properly rejected, in view of fact that no evidence was offered of actual mishandling of testator's funds by proponents within reasonable period of time before or after execution of will

Mich—In re Sprenger's Estate, *supra*

(2) Other evidence held too remote see 68 CJ p 774 note 95 [a]

**81** Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 A L R 1444  
68 CJ p 774 note 96

**Bank deposits and withdrawals**

Exhibits offered by contestants showing bank deposits and withdrawals held irrelevant

Mich—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514

**Failure to live up to contract**

Testimony relating to theory that

proponent failed to live up to contract to take care of his mother in return for her willing him property was immaterial

Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 A L R 1444

**82** Miss—Ward v Ward, 87 So 153, 124 Miss 697

**83** Ala—Whitt v Forbes, 64 So 2d 77, 258 Ala 580—King v Aird, 38 So 2d 883, 251 Ala 613—Slagle v Halsey, 15 So 2d 740, 245 Ala 198—Little v Sugg, 8 So 2d 866, 243 Ala 196—Hale v Cox, 163 So 335, 231 Ala 22

Ark—Holloway v Parker, 122 SW 2d 563, 197 Ark 209, 119 A L R 1359

Colo—Ofstad v Saiconi, 252 P 2d 94, 126 Colo 565

Ga—Trust Co of Georgia v Ivey, 173 SE 648, 178 Ga 629

Idaho—In re Lunders' Estate, 263 P 2d 1002, 74 Idaho 448

Ill—Mitchell v Van Scoyk, 115 N E 2d 226, 1 Ill 2d 160

Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407

Kan—Smith v Salthouse, 76 P 2d 836, 147 Kan 354

Mo—Palm v Maguire, 146 SW 2d 636, 347 Mo 189

Ohio—McNeil v. McNeil, App, 76 NE 2d 621

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

Tex—Welch v Shoubrouek, Civ App, 260 SW 2d 84—Taylor v Small, Civ App, 71 SW 2d 895, error dismissed

Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 A L R 1444

68 CJ p 774 note 98

**Improper relations**

(1) As the relationship which arises out of illegal amours may provide favorable opportunities for the exertion of undue influence, proof

of the relationship is admissible when undue influence is charged

Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

(2) Other decisions with respect to improper relations see 68 CJ p 774 note 98 [a]

**Evidence held admissible**

(1) Alleged attempt by a brother of the contestants to poison testator  
Mich—In re Wallace's Estate, 20 N W 2d 801, 313 Mich 37

(2) Fact that testator and person charged with exercising undue influence lived together in same house  
Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

(3) Fact that testator lived apart a considerable time after executing will from the person alleged to have exercised the undue influence  
Minn—In re Wilson's Estate, 27 N W 2d 429, 223 Minn 409

(4) Confidential or fiduciary relationship between parties  
Del—Conner v Brown, 3 A 2d 64, 9 W W Harr 529

Ga—Moreland v Word, 74 SE 2d 82, 209 Ga 463—Fowler v Fowler, 28 SE 2d 458, 197 Ga 53

Md—Sellers v Qualls, 110 A 2d 73

Mo—Larkin v Larkin, 119 SW 2d 351

Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

(5) Claim for board, room, and nursing of testatrix filed against estate by beneficiary

Mo—Baker v Spears, 210 SW 2d 13, 357 Mo 601

(6) Agreement between testator and his son whereby testator was to make will in favor of son

Tex—Gunlock v Greenwade, Civ App, 280 SW 2d 610, error refused no reversible error

(7) Alleged fact that attorney charged nothing for his services to testatrix for drawing will, under which he was chief beneficiary, while maintaining on witness stand that

testator and the contestants or their near relatives is admissible<sup>84</sup> Evidence that the beneficiaries under the will had attempted to prejudice the mind of the testator against the contestants is admissible<sup>85</sup> Evidence of the domination of the testator by the beneficiary is admissible,<sup>86</sup> both as to domination before and after the execution of the will,<sup>87</sup> and even though such evidence relates to a remote period of time<sup>88</sup> Evidence is admissible to rebut any presumption of undue influence arising from a confidential relationship between the testator and the beneficiary<sup>89</sup>

**Truth of bad impressions** According to some authorities, where the fact that the testator had bad impressions concerning one of the natural objects of his bounty is alleged or proved, the truth<sup>90</sup> or falsity<sup>91</sup> of the subject matter of the impressions is competent evidence. According to other authority, in the absence of a showing that the testator's impressions were caused by the beneficiary's misrepresentation, evidence as to the falsity of the subject matter is inadmissible<sup>92</sup>

**Correspondence** Correspondence between the person who exerted the alleged undue influence and

the testator is admissible<sup>93</sup> Letters of the testator indicating his attitude and feelings toward the natural objects of his bounty are admissible,<sup>94</sup> although the portions of such letters which show the testator's feelings toward persons other than the beneficiary have been held inadmissible<sup>95</sup> Letters to a third person are not admissible<sup>96</sup>

**Improper relations before marriage** Evidence of the relations between the testator and his wife before marriage is generally excluded as being too remote to prove undue influence exerted to procure a will executed several years after the marriage<sup>97</sup>

**Relations with others** The relations between the proponent and others than the testator have been held to be inadmissible<sup>98</sup>

## § 250. — Acts, Motive, Character, Declarations, and Opportunity to Exercise Influence of Proponents and Beneficiaries

Evidence of the acts, motives, character, and declarations of the proponents or beneficiaries is admissible.

Evidence of acts of the proponents tending to

his contacts with testatrix were business ones only, was in itself some evidence on question of undue influence or by way of self-impeachment

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

(8) Where attorney who drafted will is left a portion of estate, it was competent to show in support of will that attorney had not drafted will as one isolated matter of employment, but had represented testator over a period of years

Ala—King v Aird, 38 So 2d 883, 251 Ala 613

(9) While ownership of property cannot be tried in will contest, when undue influence is issue therein, evidence of matters which are material as tending to create natural and legitimate influences on testator to devise his property as he did is admissible

Ala—Case v English, 52 So 2d 216, 255 Ala 555

(10) Other evidence held admissible see 68 C J p 774 note 98 [b]

### In California

(1) Testatrix's husband may introduce evidence to show absence of marital discord

Cal—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139.

(2) Evidence that proponent and another were, at time will was executed and had been for some years before, living together as man and wife, was admissible for purpose of

showing bias of the other in favor of the proponent

Cal—In re Wolleb's Estate, 132 P 2d 864, 56 Cal App 2d 488

(3) Other particulars of California rule see 68 C J p 774 note 98 [c]

84. Mich—In re Wallace's Estate, 20 N W 2d 801, 313 Mich 37 68 C J p 775 note 99

### Evidence held admissible

(1) Documentary evidence that testator had employed an attorney in earlier litigation with a contestant over property matters was admissible

Mich—In re Wallace's Estate, 20 N W 2d 801, 313 Mich 37

(2) Other evidence held admissible see 68 C J p 775 note 99 [a]

85. Cal—In re Gallo's Estate, 214 P. 496, 61 Cal App 163

86. Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 A L R 1444 68 C J p 775 note 2

### Purse strings

(1) Control of testator's purse string by proponent was highly relevant, material, and important

Or—In re Porter's Estate, 235 P 2d 894, 192 Or 483

(2) Bank statements of testatrix were properly admitted as having some relevancy in tending to show control of testatrix through control of her pocketbook notwithstanding their probative value, if any, was slight

Utah—In re Goldsberry's Estate, 81

P 2d 1106, 95 Utah 379, 117 A L R 1444

87. Vt—In re Everett's Will, 166 A 827, 105 Vt 291

88. Vt—In re Everett's Will, supra

89. SC—Mordecai v Canty, 68 SE 1049, 86 SC 470 68 C J p 775 note 5

90. Ala—Torrey v Burney, 21 So. 348, 113 Ala 496

Cal—In re Arnold's Estate, 82 P 252, 147 Cal 583

91. Ky—Phillips v Phillips, 148 S W 51, 149 Ky 206 68 C J p 775 note 7

92. Pa—Becker v Maurer, 2 Woodw 264

93. Ga—Moreland v Word, 74 S E 2d 82, 209 Ga 463

94. Mo—Clark v Powell, 175 S W 2d 842, 351 Mo 1121

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162

Tex—Cameron v Houston Land & Trust Co, Civ App, 175 S W 2d 468, error refused—Jones v Selman, Civ App, 109 S W 2d 1003, error dismissed 68 C J p 775 note 9

95. Tex—Robinson v Stuart, 11 S W 275, 73 Tex 267

96. Pa—Miller v Miller, 41 A 277, 187 Pa 572

97. Vt—In re Everett's Will, 166 A 827, 105 Vt 291 68 C J p 775 note 12

98. Md—Michael v Smith, 91 A 762, 124 Md 116

show the exercise of undue influence or fraud is admissible.<sup>99</sup> As circumstances tending in some slight degree to furnish ground for an inference of fraud or undue influence, it is proper to consider the character of the proponents and beneficiaries,<sup>1</sup> any interest or motive on their part unduly to influence the testator,<sup>2</sup> and facts and surroundings giving them an opportunity to exercise such influence.<sup>3</sup> Also it is generally proper to admit evidence, in so far as it tends to show fraud or undue influence, of their acts, conduct, and declarations in the presence of the

testator,<sup>4</sup> or the presence of another person, when done or said at the time of the execution of the will or so near thereto as to constitute a part of the *res gestæ*,<sup>5</sup> or where done after the execution of the will if tending to show a purpose of the one exercising the influence to keep the testator under control.<sup>6</sup> Evidence of none of these matters is admissible, however, when it is of such a character that it has no clear bearing on the questions of fraud and undue influence,<sup>7</sup> particularly if made after the

99 Ky—*Ellis v Moss*, 77 SW 2d 377, 257 Ky 168  
 NY—*In re Roche's Will*, 278 NYS 929, 244 App Div 756  
 68 CJ p 775 note 15

#### Evidence held admissible

(1) In general

Iowa—*Gregory v Proffit*, 31 NW 2d 899, 239 Iowa 463—*In re Rogers' Estate*, 295 NW 103, 229 Iowa 781

NH—*Ford v Ford's Estate*, 197 A 824, 89 NH 292

Tenn—*Hager v Hager*, 66 SW 2d 250, 17 Tenn App 143

(2) Asking wife of sole beneficiary of codicil, allegedly procured by fraud and undue influence, if she knew of beneficiary's conduct in withdrawing money from bank and burying it under house after he qualified as executor  
 Tenn—*Hager v Hager*, supra  
 68 CJ p 775 note 15 [f]

(3) Evidence tending to show that proponent sought to keep provisions of will from knowledge of the public, or from members of testator's family

Colo—*Ofstad v Sarconi*, 252 P 2d 94, 126 Colo 565

Tex—*Hickman v Hickman*, Civ App, 214 SW 2d 681, error refused no reversible error

(4) Evidence of attempts to dissuade contestant from contesting will  
 Tex—*Hickman v Hickman*, supra

(5) Evidence that after testator's death one of the beneficiaries removed and destroyed some of testator's personal papers

Iowa—*Gregory v Proffit*, 31 NW 2d 899, 239 Iowa 463

(6) Question to proponent on cross-examination as to how much proponent as conservatrix had immediately after appointment withdrawn from bank accounts of decedent, inventory signed and filed by proponent as conservatrix, her account as conservatrix, and evidence that as conservatrix she had paid to her attorney, who drew will, one thousand five hundred dollars for two months' services

Conn—*Doolittle v Upson*, 88 A 2d 334, 138 Conn 642.

1. Ga—*Moreland v Word*, 74 SE 2d 82, 209 Ga 463  
 68 CJ p 776 note 16

#### Bad character

(1) Evidence bearing on character of proponent of codicil allegedly procured by fraud and undue influence from incompetent testator, could be considered on theory that one mentally competent would not leave all of his estate to one who had been wayward and irresponsible  
 Tenn—*Hager v Hager*, 66 SW 2d 250, 17 Tenn App 143

(2) Other evidence with respect to bad character see 68 CJ p 776 note 16 [b]

2. Iowa—*Olsen v Corporation of New Melleray*, 60 NW 2d 832, 245 Iowa 407—*In re Telsrow's Estate*, 22 NW 2d 792, 237 Iowa 672  
 Minn—*In re Marsden's Estate*, 13 NW 2d 765, 217 Minn 1  
 68 CJ p 776 note 17

#### Evidence held admissible

(1) Conduct of widow toward testator's daughter by former marriage  
 Ala—*Hale v Cox*, 163 So 335, 231 Ala 22

(2) Evidence of sons concerning their treatment by testator's second wife.

NJ—*In re Reynolds' Estate*, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344

(3) In will contest, evidence that, before death of testator's father, testator's stepmother said that the father "just had a life interest in the estate, and that should Hollis die, she would be left penniless so far as the house was concerned," which evidence was offered to show motive and not to prove title, was properly admitted

NH—*Ford v Ford's Estate*, 197 A 824, 89 NH 292

(4) Where will was attacked as having been obtained by undue influence, court properly admitted testimony of caveatrix concerning quarrel between caveatrices and their sister, resulting in alleged animosity on part of sister that prompted her to exert alleged undue influence and make alleged fraudulent representations to testatrix resulting in execution of will.

Ga—*Moreland v Word*, 74 SE 2d 82, 209 Ga 463

3. Ala—*Hale v Cox*, 163 So 335, 231 Ala 22

Cal—*In re Wolleb's Estate*, 132 P 2d 864, 56 Cal App 2d 488

Del—*Conner v Brown*, 3 A 2d 64, 9 WW Harr 529

Iowa—*In re Telsrow's Estate*, 22 NW 2d 792, 237 Iowa 672

Minn—*In re Rasmussen's Estate*, 69 NW 2d 630—*In re Marsden's Estate*, 13 NW 2d 765, 217 Minn 1

NY—*In re Roche's Will*, 278 NYS 929, 244 App Div 756

*In re Boyle's Will*, 128 NYS 2d 259, 205 Misc 497

Tex—*Gunlock v Greenwade*, Civ App, 280 SW 2d 610, error refused no reversible error

Wash—*In re Jaaska's Estate*, 178 P 2d 321, 27 Wash 2d 433  
 68 CJ p 776 note 18

#### Consultation with attorney

In action to set aside a purported will on ground of defendant's undue influence over testatrix, evidence that defendant had consulted an attorney with reference to other matters was competent, where the attorney wrote the will and his relationship to defendant was a circumstance for consideration of jury

Mo—*Clark v Powell*, 175 SW 2d 842, 351 Mo 1121

4. Ga—*Moreland v Word*, 74 SE 2d 82, 209 Ga 463

68 CJ p 776 note 19

5. Pa—*In re Rife's Will*, Orph, 59 York Leg Rec 169

68 CJ p 776 note 20

6. Ill—*Lyman v Kaul*, 113 NE 941, 275 Ill 11

68 CJ p 776 note 21.

7. Iowa—*In re Brooke's Will*, 26 NW 2d 688, 238 Iowa 306

Pa—*In re Buck's Estate*, Orph, 53 Dauph Co 412

68 CJ p 777 note 22

#### Evidence held inadmissible or properly excluded

(1) Evidence that testator listened to wife's advice or importunity not to go to lodge meetings at night

Ala—*Cook v Morton*, 1 So 2d 890, 241 Ala 188.

execution of the will,<sup>8</sup> or is general in nature and not confined to any particular occasion,<sup>9</sup> or is too remote in point of time<sup>10</sup> Acts done some time after the execution of the will which reflect the attitude of the proponent of the will toward the contestant and the testator are admissible<sup>11</sup>

*Declarations of proponent or beneficiary* Declarations of a proponent or beneficiary evidencing some intention unduly to influence the testator are admissible,<sup>12</sup> although made before the execution of the will,<sup>13</sup> and admissions are clearly competent,<sup>14</sup> unless made by only one of several parties in interest,<sup>15</sup> and even in that case they are admissible, where the parties are so united in interest and purpose or are so joined together in a conspiracy, that the statement of one is binding on all.<sup>16</sup> Statements of the person charged with the exercise of undue influence, not made in the presence of the testator,

which tend to show his ill will toward the contestant,<sup>17</sup> the extent of his influence,<sup>18</sup> and the manner in which he purported to exercise his influence,<sup>19</sup> have been held admissible. Evidence of threats of the beneficiary against the contestant not made within the hearing of the testator is inadmissible.<sup>20</sup> A declaration by a devisee showing an intention to exercise undue influence has been held not to be rendered inadmissible by the death of declarant before the trial.<sup>21</sup> Where the will as executed conformed to the declared intention, the declaration has been held admissible although there was no evidence connecting the intent of the declarants and the acts of the testator.<sup>22</sup>

*Exclusion from testator's presence.* The fact that the proponents of the will excluded friends and relatives from the testator's presence<sup>23</sup> either before or after the execution of the will,<sup>24</sup> or failed to noti-

(2) Evidence that proponent, who was testator's widow and principal beneficiary, caused flowers sent by friends to be placed on the graves of some of her relatives after testator's funeral  
Mo—Look v French, 144 S W 2d 128, 346 Mo 972

(3) Letters tending to show that testator's wife, who until her own death was the proponent of the will, carried on illicit relations with another man while she was testator's wife, where it was not contended that testator ever knew or had any intimation of such relations  
Tex—Hulme v Jaschke, Civ App, 168 S W 2d 326, error refused

(4) Other evidence held inadmissible or properly excluded see 68 C J p 777 note 22 [c]

#### Admission held error

(1) Permitting questions to be asked and answered as to specific acts of moral delinquency, conviction, and imprisonment of sole beneficiary of codicil allegedly procured by fraud and undue influence was error  
Tenn—Hager v Hager, 68 S W 2d 250, 17 Tenn App 143

(2) Permitting question to be asked and answered as to whether testator knew before he executed codicil of specific acts of moral delinquency, conviction, and imprisonment of sole beneficiary was error  
Tenn—Hager v Hager, supra

8 Tex—Motley v Lawrence, Civ App, 283 S W 699  
Vt—In re Waterman's Will, 150 A 65, 102 Vt 443

9. Ill—Waterman v. Hall, 126 N E 139, 291 Ill 304  
68 C J p 777 note 24.

10 Tex—Jones v Selman, Civ App, 109 S W 2d 1003, error dismissed  
68 C J p 777 note 25.

94 C J S.—71

#### Evidence held too remote

(1) Fact that propounder may have submitted for probate a will and codicil sooner than might seem appropriate under the circumstances would have no bearing on issue of undue influence with respect to the will and codicil executed many years before  
Ga—Ehlers v Rheinberger, 49 S E 2d 535, 204 Ga 226

(2) Evidence that husband of testatrix discriminated against stepchildren in favor of own children between 1894 and 1908 was too remote to constitute evidence of motive to exercise undue influence to induce testatrix to bequeath estate to husband's children rather than to make equal division among all children under will made in 1930  
Tex—Jones v Selman, Civ App, 109 S W 2d 1003, error dismissed

(3) Other evidence see 68 C J p 777 note 25 [a]

11. Md—Kasten v Kasten, 157 A 533, 161 Md 409  
68 C J p 777 note 26

12. Iowa—In re Soderland's Estate, 30 N W 2d 128, 239 Iowa 569  
Tex—Whatley v McKanna, Civ App, 207 S W 2d 645, refused no reversible error  
68 C J p 777 note 27

#### Officer of religious society

Testimony as to declaration of person in charge of affairs of the society to which testator left greater part of his estate, which tended to show disposition on part of such person in behalf of society and to show his activity toward preparation of will, was admissible.

Iowa—Olsen v Corporation of New Melleray, 60 N W 2d 832, 245 Iowa 407.

13. SC—Ex parte McKie, 91 S E 978, 107 S C 57  
68 C J p 777 note 28

14. Tex—Whatley v McKanna, Civ. App, 207 S W 2d 645, refused no reversible error  
68 C J p 777 note 29

15. Ark—Milton v Jeffers, 243 S W 60, 154 Ark 516  
68 C J p 777 note 30

16. Tex—Scott v Townsend, 166 S W 1138, 106 Tex 322  
68 C J p 777 note 31

17. Iowa—Zinkula v Zinkula, 154 N W 158, 171 Iowa 287  
68 C J p 778 note 32

18. Tex—Scott v Townsend, 166 S W 1138, 106 Tex 322—Adams v. Adams, Civ App, 253 S W 605, error dismissed 278 S W 1114, 114 Tex 582

19. Tex—Scott v Townsend, 166 S W 1138, 106 Tex 322—Adams v. Adams, Civ App, 253 S W 605, error dismissed 278 S W 1114, 114 Tex 582

20. Mo—Garland v Smith, 28 S W 191, 29 S W 836, 127 Mo 567

21. SC—Ex parte McKie, 91 S E 978, 107 S C 57

22. SC—Ex parte McKie, supra.

23. Iowa—In re Soderland's Estate, 30 N W 2d 128, 239 Iowa 569  
N Y—In re Roche's Will, 278 N Y S 929, 244 App Div 756  
Ohio—McNeil v McNeil, App, 76 N E 2d 621  
68 C J p 778 note 40

24. Cal—In re Tibbett's Estate, 69 P 978, 137 Cal. 123, 8 Prob Rep Ann 102  
Ohio—McNeil v McNeil, App, 76 N E 2d 621.

fy the contestants of the testator's serious illness,<sup>25</sup> or of his death or funeral,<sup>26</sup> is admissible, but it has been held that it is necessary to introduce some evidence tending to connect the beneficiary with the exclusion of friends before such evidence is competent<sup>27</sup>

## § 251. Weight and Sufficiency of Evidence

Undue influence, invalidating a will induced thereby, must be established by a preponderance of the evidence, and according to some authorities, by clear, satisfactory, and convincing evidence

According to some authorities, a preponderance of the evidence is necessary and sufficient to establish undue influence in the execution of a will<sup>28</sup> However, in numerous cases, it has been said that undue influence, invalidating a will, must be established by clear, satisfactory, and convincing evidence<sup>29</sup> by compelling evidence,<sup>30</sup> or by the manifest weight of the evidence<sup>31</sup> In any event, undue influence in the execution of a will must be shown by substantial evidence<sup>32</sup> and evidence which merely raises a suspicion or conjecture that the will was the product of undue influence is insufficient,<sup>33</sup>

25 Cal—In re Gallo's Estate, 214 P 496, 61 Cal App 163

26 Cal—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 529

In re Krause's Estate, 163 P 2d 505, 71 Cal App 2d 719

27 Cal—In re Wickes' Estate, 72 P 902, 139 Cal 195, 8 Prob Rep Ann 727

28 Ariz—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248

Cal—In re Corbett's Estate, 266 P 2d 935, 123 Cal App 2d 465—In re Spaulding's Estate, 187 P 2d 889, 83 Cal App 2d 15

Md—Drury v King, 32 A 2d 371, 182 Md 64

Neb—In re Fehrenkamp's Estate, 48 NW 2d 421, 154 Neb 488—Parkening v Haffke, 46 NW 2d 117, 153 Neb 678—In re Thompson's Estate, 44 NW 2d 814, 153 Neb 375—In re Farr's Estate, 35 NW 2d 489, 150 Neb 615

N Y—In re Morrison's Will, 60 N Y S 2d 546, 270 App Div 552, affirmed 69 NE 2d 814, 296 N Y 652

Ohio—Spidel v Warrick, App, 78 N E 2d 746—McNeil v McNeil, App, 76 NE 2d 621—Brown v Jacoby, 9 NE 2d 693, 55 Ohio App 250

S D—In re Armstrong's Estate, 272 NW 799, 65 S D 233

Tenn—Hager v Hager, 13 Tenn App 23

Tex—Bell v Bell, Civ App, 248 SW 2d 978, error refused no reversible error—Firestone v Sims, Civ App, 174 SW 2d 279, error refused—Schelb v Sparenberg, Civ App, 111 SW 2d 324, affirmed 124 SW 2d 322, 133 Tex 17

68 C J p 778 note 47

Same standard as in case of inter vivos documents

The quality and sufficiency of testimony necessary to establish proof of undue influence are the same whether relating to wills or inter vivos documents

Pa—Withers v Withers, 70 A 2d 331, 363 Pa 431

29. Minn—In re Mazanec's Estate, 283 NW 745, 204 Minn 406

N J—In re Davis' Will, 101 A 2d 521, 14 N J 166—In re Livingston's Will, 73 A 2d 916, 5 N J. 65.

Kuruc v Kuruc, 93 A 2d 421, 23 N J Super 584

Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307

Pa—In re Lauer's Estate, 41 A 2d 552, 351 Pa 438—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—Shuey v Shuey, 16 A 2d 4, 340 Pa 27—In re Cookson's Estate, 188 A 904, 325 Pa 81

In re Meckley's Estate, Orph, 54 Lanc L Rev 173—In re Butler's Estate, Orph, 64 Montg Co 161—In re Queen's Estate, Orph, 3 Chester Co L R 305—In re O'Brien's Estate, Orph, 34 Del Co 493—In re Baynack's Estate, Orph, 36 Luz L Reg 121

Va—Redford v Booker, 185 SE 879, 166 Va 561—Mullins v Coleman, 7 SE 2d 877, 175 Va 235

Wash—In re Kinssies' Estate, 214 P 2d 693, 35 Wash 2d 723—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—Dean v Jordan, 79 P 2d 331, 194 Wash 661

Wis—In re Miller's Estate, 61 NW 2d 813, 265 Wis 420—In re Dobson's Will, 46 NW 2d 758, 258 Wis 587—In re Svendsen's Estate, 43 NW 2d 343, 257 Wis 335—In re Williams' Will, 41 NW 2d 191, 256 Wis 338—In re Feeley's Estate, 33 NW 2d 139, 253 Wis 204—In re King's Will, 29 NW 2d 69, 251 Wis 269—In re Zych's Will, 28 NW 2d 316, 251 Wis 108—In re Delmady's Will, 28 NW 2d 301, 251 Wis 98—In re Puls' Will, 18 NW 2d 321, 246 Wis 660—In re Faulks' Will, 17 NW 2d 423, 246 Wis 319—In re Kesich's Estate, 12 NW 2d 688, 244 Wis 374—In re Scherrer's Estate, 7 NW 2d 848, 242 Wis 211—In re Sawall's Estate, 3 NW 2d 373, 240 Wis 265

68 C J p 778 note 45

30. Pa—Williams v McCarroll, 97 A 2d 14, 374 Pa 281—In re Olshefski's Estate, 11 A 2d 487, 337 Pa 420

31 Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523—Buhan v Keslar, 194 A. 917, 328 Pa 312—In re Cook-

son's Estate, 188 A 904, 325 Pa 81

In re Rife's Will, Orph, 59 York Leg Rec 169—In re Gluck's Estate, Orph, 43 Lack Jur 101—In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc L Rev 585—In re Stephen's Estate, Orph, 17 Leh LJ 361

32. Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455

Mo—Winn v Matthews, 137 SW 2d 632, transferred 130 SW 2d 484, 235 Mo App 337

N Y—In re Streb's Will, 288 N Y S 334, 247 App Div 556

In re Bennett's Will, 109 N Y S 2d 315

Tex—Koger v Coker, Civ App, 111 SW 2d 357, error granted

Utah—In re Lavelle's Estate, 248 P 2d 372—In re George's Estate, 112 P 2d 498, 100 Utah 230

68 C J p 778 note 45 [a]

### Admissible evidence

Proof of undue influence as basis of setting aside a will must be made by introduction of evidence shown to be properly admissible in face of timely and proper objections made thereto

Mo—Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148

### Will not lightly set aside

Wills deliberately made by persons of sound mind are not to be lightly set aside on ground of undue influence

Wyo—In re Anderson's Estate, 255 P 2d 983, 71 Wyo 238

33. Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100

D C—Mann v Cornish, 185 F 2d 423, 87 US App DC 110, certiorari denied 71 S Ct 802, 341 US 932, 95 L Ed 1361

Minn—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1

N J—In re Neuman's Estate, 32 A 2d 826, 133 N J Eq 532.

but proof beyond a reasonable doubt is not required<sup>34</sup> It is not sufficient that the evidence be consistent with the hypothesis that the will was obtained by undue influence, but it is necessary that the evidence be inconsistent with a contrary hypothesis<sup>35</sup> The proof should be to the reasonable satisfaction of the jury, not to their satisfaction<sup>36</sup>

In determining whether a will was the product of undue influence, the evidence is to be considered as a whole<sup>37</sup> The testimony of the draftsman of the will, especially if he is an attorney, is always important in deciding the question of undue influence<sup>38</sup> Undue influence is established not by the number of witnesses, but by the character and force of their testimony<sup>39</sup> Evidence insufficient to

support a finding that the conduct of the person charged with exercising undue influence was improper will not support a finding that the execution of the will was induced by undue influence<sup>40</sup> A presumption or indicia of undue influence may be rebutted and explained<sup>41</sup> A failure to call the subscribing witness is a circumstance to be considered on the question of undue influence, but is not conclusive<sup>42</sup>

In many cases the evidence has been held sufficient to support a finding or verdict that the will was procured by undue influence or fraud and undue influence, or insufficient to support a finding that the will was not the product of undue influence or fraud and undue influence,<sup>43</sup> and in a large number of

NY—In re Streb's Will, 288 NYS 331, 247 App Div 556

Okl—Runnels v Burton, 214 P 2d 709, 202 Okl 406—In re Jones' Estate (Choctaw 7012), 121 P 2d 574, 190 Okl 123—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309—Canfield v Canfield, 31 P 2d 152, 167 Okl 590  
Pa—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Royer's Estate, 12 A 2d 923, 339 Pa 423—Buhan v Keslar, 194 A 917, 328 Pa 712

Tex—Burgess v Sylvester, 182 SW 2d 358, 143 Tex 25

Utah—In re Lavelle's Estate, 248 P 2d 372

Wash—In re Larsen's Estate, 71 P 2d 47, 191 Wash 257

W Va—Ritz v Kingdon, 79 SE 2d 123

**A mere conflicting inference** that testatrix was unduly influenced by beneficiary, if warranted, could not of itself impair or destroy a prima facie case for probate of will

Ohio—In re Elvin's Will, 66 NE 2d 629, 146 Ohio St 448

34 RI—Young v. Young, 185 A 901, 56 RI 401

35 Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173

In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

Ill—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041

NY—In re Henderson's Will, 1 NY S 2d 871, 253 App Div 140, reargument denied 1 NYS 2d 857, 253 App Div 869, motion granted 15 NE 2d 679, 278 NY 531

Pa—In re Lauer's Estate, Orph, 58 York Leg Rec 157, affirmed 41 A 2d 552, 351 Pa 438

Tenn—Corpus Juris cited in Cude v

Culberson, 209 SW 2d 506, 524, 30 Tenn App 628

W Va—Ritz v Kingdon, 79 SE 2d 123

68 CJ p 779 note 48

36 Ala—Miller v Whittington, 80 So 499, 202 Ala 400

37. Cal—In re Brown's Estate, 200 P 2d 888, 89 Cal App 2d 496

Neb—In re Bainbridge's Estate, 36 NW 2d 625, 151 Neb 142

Pa—In re Cookson's Estate, 188 A 904, 325 Pa 81

Tex—Nathaus v Feigon, Civ App, 244 SW 2d 325, error refused no reversible error

**Each case depends on its own particular facts**

NJ—In re Davis' Will, 101 A 2d 521, 14 NJ 166

38. Pa—In re Swenk's Estate, 81 Pa Dist & Co 504, 2 Fiduciary 465, 53 Lanc Rev 143

39 Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628

40. Ark—Bollinger v Arkansas Valley Trust Co, 151 SW 2d 875, 202 Ark 525—Pernot v King, 110 SW 2d 539, 194 Ark 896

DC—MacMillan v Knost, 126 F 2d 235, 75 US App DC 261, certiorari denied 63 S Ct 32, 317 US 641, 87 L Ed 516

Fla—In re Starr's Estate, 170 So 620, 125 Fla 536

41. Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Merrick's Estate, 209 P 2d 666, 93 Cal App 2d 624

**Evidence held sufficient**

To rebut presumption of undue influence

NJ—In re Weeks' Estate, 103 A 2d 43, 29 NJ Super 533

68 CJ p 722 note 94 [a]

42. Cal—In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161

43. US—In re Palmer's Will, DC Okl, 11 F Supp 301

Ala—Claburn v Mathews, 61 So 2d 83, 258 Ala 41

Cal—In re Sproston's Estate, 52 P 2d 924, 4 Cal 2d 717—In re Bishop's Estate, 39 P 2d 201, 2 Cal 2d 132

In re McGee's Estate, 284 P 2d 33, 44 Cal App 2d 321—In re Corbett's Estate, 266 P 2d 935, 123 Cal App 2d 465—In re Ostrander's Estate, 259 P 2d 999, 119 Cal App 2d 481—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Chesney's Estate, 228 P 2d 46, 102 Cal App 2d 708—In re Payne's Estate, 210 P 2d 916, 94 Cal App 2d 504—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139—In re O'Callaghan's Estate, 185 P 2d 659, 82 Cal App 2d 108—In re Mesner's Estate, 176 P 2d 70, 77 Cal App 2d 667—In re Harkleroad's Estate, 144 P 2d 88, 62 Cal App 2d 60—In re Webster's Estate, 137 P 2d 751, 59 Cal App 2d 1—In re Reiss's Estate, 123 P 2d 68, 50 Cal App 2d 398—In re Monks' Estate, 120 P 2d 167, 48 Cal App 2d 603, appeal dismissed Monks v Lee, 63 S Ct 50, 317 US 590, 87 L Ed 483, rehearing denied 63 S Ct 323, 317 US 711, 87 L Ed 566—In re Webster's Estate, 110 P 2d 81, 43 Cal App 2d 6, rehearing denied 111 P 2d 355, 43 Cal App 2d 6—In re Gill's Estate, 58 P 2d 734, 14 Cal App 2d 526—In re Mullen's Estate, 47 P 2d 746, 8 Cal App 2d 684

Colo—In re Porter's Estate, 240 P 2d 516, 125 Colo 16—In re Koch's Estate, 136 P 2d 673, 110 Colo 562

DC—Fowler v Guschewsky, CA, 221 F 2d 878—Dewey v Dewey, 195 F 2d 779, 90 US App DC 298—Wiggins v Smith, 183 F 2d 831, 87 US App DC 112—Martin v Staples, 164 F 2d 106, 82 US App DC 370—Duckett v Duckett, 150 F 2d 985, 80 US App DC 195

Fla—In re Palmer's Estate, 48 So 2d 732—In re Aueibacher's Estate, 41 So 2d 659—In re Gottschalk's Estate, 196 So 844, 143 Fla 371—In re Wilkins' Estate, 186 So 826, 136 Fla 86.



other cases, the evidence has been held insufficient to support a verdict or finding that the will was procured by undue influence or fraud and undue influence or sufficient to establish that the will was not the product of undue influence or fraud and undue influence,<sup>44</sup> or insufficient to establish that the

- Idaho**—In re Brown's Estate, 101 P 2d 11, 61 Idaho 320
- Ill**—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160—Wink v Hagen, 101 NE 2d 585, 410 Ill 158—Sulzberger v Sulzberger, 23 NE 2d 46, 372 Ill 240
- Iowa**—In re Telsrow's Estate, 22 NW 2d 792, 237 Iowa 672—In re Brooks' Estate, 294 NW 735, 229 Iowa 485
- Kan**—In re Casida's Estate, 131 P 2d 644, 156 Kan 73
- Ky**—Smith v Ridner, 168 SW 2d 559, 293 Ky 66—Kelly's Ex'r v Kelly, 149 SW 2d 17, 285 Ky 715
- Mass**—Reilly v McAuliffe, 117 NE 2d 811, 331 Mass 144—O'Hearn v O'Hearn, 97 NE 2d 734, 327 Mass 242
- Miss**—Cheatham v. Burnside, 77 So 2d 719—Blalock v Magee, 38 So 2d 708, 205 Miss 209
- Mo**—Gardine v Cotter, 230 SW 2d 731, 360 Mo 681, 18 ALR 2d 1100—Welch v Welch, 190 SW 2d 936, 354 Mo 654
- Neb**—In re Farr's Estate, 35 NW 2d 489, 150 Neb 615
- NJ**—In re Zalesky's Estate, 68 A 2d 174, 4 NJ Super 544  
In re Kuhn's Estate, 172 A 513, 116 NJ Eq 94
- NM**—Calloway v. Miller, 266 P 2d 365, 58 NM 124
- NY**—In re Lachat's Estate, 52 NY S 2d 451, 181 Misc 492, appeal dismissed 60 NY S 2d 236
- Okl**—Alarcon v Dick, 62 P 2d 475, 178 Okl 247
- Or**—In re Newman's Will, 248 P 2d 1069, 196 Or 376—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429—In re Cook's Estate, 148 P 2d 790, 174 Or 207—In re Kelly's Estate, 46 P 2d 84, 150 Or 598
- Pa**—In re Simon's Estate, 113 A 2d 266, 381 Pa 284—In re Wilson's Estate, 72 A 2d 561, 364 Pa 488—Klingner v Dugacki, 51 A 2d 627, 356 Pa 143—In re Stewart's Estate, 47 A 2d 204, 354 Pa 288—In re Freed's Estate, 195 A 2d 327, 354 Pa 572  
In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364
- RI**—Donovan v Potter, 37 A 2d 69, 70 RI 75—Heroux v Heroux, 191 A 265, 58 RI 79
- Tex**—Lee v Daugherty, Civ App, 281 SW 2d 192, error refused no reversible error—Gunlock v Greenwade, Civ App, 280 SW 2d 610, error refused no reversible error—Truelove v Truelove, Civ App, 266 SW 2d 491, error refused—Whately v. McKanna, Civ App, 207 S W 2d 645, refused no reversible error—Barksdale v Dobbins, Civ App, 141 SW 2d 1035, error refused—Nickel v Nickel, Civ App, 130 SW 2d 1085—Schelb v Sparenberg, Civ App, 111 SW 2d 324, affirmed 124 SW 2d 322, 133 Tex 17
- Utah**—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580
- Vt**—In re Brown's Estate, 45 A 2d 568, 114 Vt 380
- Wash**—In re Dand's Estate, 247 P 2d 1016, 41 Wash 2d 158—In re Kessler's Estate, 211 P 2d 496, 35 Wash 2d 156
- Wis**—In re Roehl's Will, 53 NW 2d 180, 261 Wis 466—In re Maxcy's Estate, 46 NW 2d 479, 258 Wis 360—In re Ratkowski's Will, 41 NW 2d 280, 256 Wis 376—In re Klofanda's Will, 36 NW 2d 71, 254 Wis 186—In re Kramer's Will, 36 NW 2d 64, 254 Wis 202—In re Hickey's Will, 32 NW 2d 232, 252 Wis 542—In re Mueller's Will, 28 NW 2d 367, 251 Wis 196—In re Sullivan's Will, 27 NW 2d 762, 250 Wis 624—In re Lee's Will, 23 NW 2d 405, 249 Wis 59—In re Raasch's Will, 284 NW 571, 230 Wis 548
- 68 C J p 779 note 50
- 44 US**—Mackay v Costigan, CA Ill, 179 F 2d 125
- Illinois State Trust Co v Conaty, D C R I, 104 F Supp 729**
- Ala**—Locke v Sparks, 81 So 2d 670—Hubbard v Moseley, 75 So 2d 658, 261 Ala 683—Allen v Jones, 65 So 2d 217, 259 Ala 98—Hornaday v First Nat Bank of Birmingham, 65 So 2d 678, 259 Ala 26—King v Aird, 38 So 2d 883, 251 Ala 613—Wilson v Payton, 37 So 2d 499, 251 Ala 411—Fulks v Green, 20 So 2d 787, 246 Ala 392—Dees v Metts, 17 So 2d 137, 245 Ala 370
- Ariz**—In re Regalado's Estate, 268 P 2d 973, 77 Ariz 180—In re O'Connor's Estate, 246 P 2d 1063, 74 Ariz 248
- Ark**—Dunklin v Black, 275 SW 2d 447—Baker v Wood, 267 SW 2d 765, 223 Ark 512—Thiel v Mobley, 265 SW 2d 507—In re McConnell's Estate, 257 SW 2d 34, 222 Ark 4—Jones v National Bank of Commerce in Memphis, 249 SW 2d 105, 220 Ark 665—Werbe v Holt, 237 S W 2d 478, 218 Ark 476—Walsh v Fairhead, 219 SW 2d 941, 215 Ark 218—Elrod v Broom, 217 SW 2d 246, 214 Ark 548—Blake v Simpson, 215 SW 2d 287, 214 Ark 263—Shuppen v Shuppen, 211 SW 2d 433, 213 Ark 517—Parette v Ivey, 190 SW 2d 441, 209 Ark 364—Gray v Fulton, 170 SW 2d 384, 205 Ark 675—McWilliams v. Neill, 155 SW 2d 344, 202 Ark 1087—Purvey v Puryear, 94 SW 2d 695, 192 Ark 692—Burcher v Casey, 83 SW 2d 73, 190 Ark 1055
- Cal**—In re Lingenfelter's Estate, 211 P 2d 990, 38 Cal 2d 571—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584  
In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Arnold's Estate, 273 P 2d 587, 127 Cal App 2d 256—In re Gill's Estate, 244 P 2d 724, 111 Cal App 2d 486—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Lekos' Estate, 240 P 2d 387, 109 Cal App 2d 42—In re Wellauer's Estate, 236 P 2d 906, 107 Cal App 2d 268—In re Dobrzensky's Estate, 232 P 2d 886, 105 Cal App 2d 134—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Hilker's Estate, 194 P 2d 132, 85 Cal App 2d 680—In re Kemp's Estate, 190 P 2d 619—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465—In re Phillips' Estate, 172 P 2d 377, 76 Cal App 2d 100—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re De Fosse's Estate, 154 P 2d 734, 67 Cal App 2d 490—In re Ewan's Estate, 153 P 2d 782, 67 Cal App 2d 111—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Kezsur's Estate, 148 P 2d 116, 64 Cal App 2d 117—In re Benson's Estate, 145 P 2d 668, 62 Cal App 2d 866—In re Clarke's Estate, 144 P 2d 425, 62 Cal App 2d 228—In re Johanson's Estate, 144 P 2d 72, 62 Cal App 2d 41—In re McCollum's Estate, 140 P 2d 176, 59 Cal App 2d 744—In re Tribbey's Estate, 135 P 2d 603, 58 Cal App 2d 100—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re De Graaf's Estate, 92 P 2d 199, 34 Cal App 2d 120—In re Klopstock's Estate, 88 P 2d 722, 31 Cal App 2d 568—In re Muller's Estate, 57 P 2d 994, 14 Cal App 2d 129—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709—In re Tamagno's Estate, 33 P 2d 38, 139 Cal App 69—In re Hopkins' Estate, 29 P 2d 249, 136 Cal App 590—In re Fuller's Estate, 28 P 2d 399, 135 Cal App 781
- Colo**—In re Piercen's Estate, 195 P 2d 725, 118 Colo 264—Scott v Leonard, 184 P 2d 138, 117 Colo 54—In re Brantner's Estate, 169 P 2d 326, 115 Colo 133
- Del**—Conner v Brown, 3 A 2d 64, 9 W W Harr 529
- Fla**—In re Baldrige's Estate, 74 So 2d 658—In re Wilcott's Estate, 66 So 2d 465, 40 ALR 2d 1399—In re Garrett's Estate, 60 So 2d 281—In re Ates' Estate, 60 So 2d 275—In re Eberhardt's Estate, 60 So 2d 271

- In re Barker's Estate, 52 So 2d 785—Hopkins v McClure, 45 So 2d 656—In re James' Estate, 191 So 830, 140 Fla 463—In re Donnelly's Estate, 188 So 108, 137 Fla 459—Marston v Churchill, 187 So 762 137 Fla 154—In re Starr's Estate, 170 So 620, 125 Fla 536—Goertner v Gardiner, 170 So 112, 125 Fla 477, rehearing denied 170 So 844, 126 Fla 412
- Ga—Tinnerman v Baldwin, 87 SE 2d 65, 211 Ga. 532—Bowles v Bowles, 86 SE 2d 318, 211 Ga. 461—Bassett v Hunter, 53 SE 2d 909, 205 Ga 417—Allen v Heys, 51 SE 2d 417, 204 Ga 635—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Smith v Davis, 45 SE 2d 609, 203 Ga 175—Pitman v Oliver, 193 SE 884, 184 Ga. 840—Griffin v Barrett, 187 SE 828, 183 Ga 152—Moore v Thornton, 179 SE 720, 180 Ga 533
- Idaho—Swaringen v Swanstrom, 175 P 2d 692, 67 Idaho 245
- Ill—Redmond v Steele, 126 NE 2d 619, 5 Ill 2d 602—Lake v Seiffert, 102 NE 2d 294, 410 Ill 444—Pepe v Caputo, 97 NE 2d 260, 408 Ill 321—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321—Mosher v Thrush, 84 NE 2d 355, 402 Ill 353—Smith v Peters, 75 NE 2d 341, 393 Ill 108—Challiner v Smith, 71 NE 2d 324, 396 Ill 106—Johnson v Bennett, 69 NE 2d 899, 395 Ill 389—Frese v Meyer, 63 NE 2d 768, 392 Ill 59—Passenheim v Reinert, 1 NE 2d 69, 362 Ill 576—Brownlie v Brownlie, 191 NE 268, 357 Ill 117, 93 ALR 1041
- Auerbach v Continental Ill Nat Bank & Trust Co of Chicago, 91 NE 2d 144, 340 Ill App 64—Johnson v First Union Trust & Savings Bank, 273 Ill App 472
- Ind—Ludwick v Banet, App, 124 NE 2d 214—Noyer v Ecker, App, 119 NE 2d 902—Munson v Quinn, 37 NE 2d 693, 110 Ind App 277
- Iowa—In re Groen's Estate, 62 NW 2d 143, 245 Iowa 634—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Brooke's Will, 26 NW 2d 688, 238 Iowa 306—Hoover v Hoover, 26 NW 2d 98, 238 Iowa 88—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761—In re Muhr's Will, 256 NW 305, 218 Iowa 867—Matthewson v Fahnstock, 251 NW 643, 217 Iowa 348
- Kan—In re Davis' Estate, 259 P 2d 211, 175 Kan 107—In re Arney's Estate, 254 P 2d 314, 174 Kan 64—In re Hurd's Estate, 233 P 2d 703, 171 Kan 375—In re Regle's Estate, 228 P 2d 722, 170 Kan 558—Smith's Estate v Davis, 212 P 2d 322, 168 Kan 210—In re Millar's Estate, 207 P 2d 483, 167 Kan 455—Wittman's Estate v Dickerson, 168 P 2d 541, 161 Kan 398—Walker v Anderson, 163 P 2d 359, 160 Kan 461—Stayton v Stayton, 81 P 2d 1, 148 Kan 172—Pierce v Pierce, 64 P 2d 576, 145 Kan 14—Brennan v Dennis, 57 P 2d 431, 143 Kan 919—Steward v Marker, 57 P 2d 75, 143 Kan 860
- Ky—Race v Stovens, 276 SW 2d 439—Tate v Tate's Ex'r, 275 SW 2d 597—Nunn v Williams, 254 SW 2d 698—Bennett v Kissinger, 231 SW 2d 74, 313 Ky 417—Hurley v Blankinship, 229 SW 2d 963, 313 Ky 49, 21 ALR 2d 817—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190—Leach v Alger, 194 SW 2d 164, 302 Ky 149—Allen v Henderson, 184 SW 2d 885, 299 Ky 92—Martin v Combs, 145 SW 2d 108, 284 Ky 530—Combs v Combs, 112 SW 2d 989, 271 Ky 543—Hanna v Eiche, 79 SW 2d 950, 258 Ky 282
- La—Succession of Prejean, 71 So 2d 328, 224 La 921—Successions of Gilbert, 64 So 2d 192, 222 La 840—Succession of Pizzatti, 50 So 2d 189, 218 La 549—Succession of Yeates, 35 So 2d 210, 213 La 541
- Me—In re Paradis' Will, 87 A 2d 512, 147 Me 347—In re Haley's Estate, 84 A 2d 808, 147 Me 173—Appeal of Heath, 79 A 2d 810, 146 Me 229—In re Cox' Will, 29 A 2d 281, 139 Me 261—Appeal of Eastman, 194 A 586, 135 Me 233
- Md—Stockslager v Hartle, 92 A 2d 363, 200 Md 544
- Mass—Roginska v Silverio, 109 NE 2d 836, 329 Mass 673—Industrial Trust Co v Sadler, 97 NE 2d 171, 327 Mass 759—Fleimonte v Bon-tempo, 77 NE 2d 2, 322 Mass 742—Greene v Cronon, 50 NE 2d 36, 314 Mass 336—Knowles v Newhall, 21 NE 2d 942, 303 Mass 385
- Mich—In re Padjan's Estate, 65 NW 2d 743, 340 Mich 277—In re Sprenger's Estate, 60 NW 2d 436, 337 Mich 514—In re Kenealy's Estate, 59 NW 2d 38, 336 Mich 657—In re Jennings' Estate, 55 NW 2d 812, 335 Mich 241—In re Johnson's Estate, 40 NW 2d 163, 326 Mich 310—In re Vreeland's Estate, 35 NW 2d 170, 323 Mich 316—In re Thayer's Estate, 15 NW 2d 712, 309 Mich 473—In re Getchell's Estate, 295 NW 360, 295 Mich 681—In re Livingston's Estate, 295 NW 343, 295 Mich 637—In re Evans' Estate, 277 NW 893, 283 Mich 275—Michels v Socall, 275 NW 658, 281 Mich 633—In re Leech's Estate, 269 NW 181, 277 Mich 299—In re Reed's Estate, 263 NW 76, 273 Mich 334—In re Lacroix's Estate, 251 NW 319, 265 Mich 59
- Minn—In re Rasmussen's Estate, 69 NW 2d 630—Appeal of Borstad, 45 NW 2d 828, 232 Minn 365—In re Schumacher's Estate, 39 NW 2d 604, 229 Minn 382—In re Meehan's Estate, 18 NW 2d 781, 220 Minn 1—In re Cunningham's Estate, 17 NW 2d 85, 219 Minn 80—In re Geske's Estate, 1 NW 2d 423, 211 Minn 447—In re Bergquist's Estate, 1 NW 2d 418, 211 Minn 380—
- In re Holmstrom's Estate, 292 NW 622, 208 Minn 19—In re Osbon's Estate, 286 NW 306, 205 Minn 419—In re Mazanec's Estate, 283 NW 745, 204 Minn 406
- Miss—Summer v Summer, 80 So 2d 35—Bearden v Gibson, 60 So 2d 655, 215 Miss 218—Fountain v Reid, 58 So 2d 666, 214 Miss 269—Wilburn v Williams, 11 So 2d 306, 193 Miss 831—O'Bannon v Henrich, 4 So 2d 208, 191 Miss 815
- Mo—Glover v Bruce, 265 SW 2d 346—Look v French, 144 SW 2d 128, 346 Mo 972—Larkin v Larkin, 119 SW 2d 351
- Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148—McGill v Wiltz, App, 148 SW 2d 822
- Mont—In re Choiniere's Estate, 156 P 2d 635, 117 Mont 65
- Neb—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67—In re Johnston's Estate, 25 NW 2d 526, 147 Neb 886—In re Woodward's Estate, 23 NW 2d 75, 147 Neb 270—In re Goist's Estate, 18 NW 2d 513, 146 Neb 1—In re Bose's Estate, 285 NW 319, 136 Neb 156
- NH—Leonard v Stanton, 36 A 2d 271, 93 NH 113
- NJ—In re Davis' Will, 101 A 2d 521, 14 NJ 166—In re Alper's Estate, 65 A 2d 736, 2 NJ 104
- In re Stroming's Will, 79 A 2d 492, 12 NJ Super 217—In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208—In re Harr's Estate, 73 A 2d 76, 8 NJ Super 3—In re Thomson's Will, 66 A 2d 540, 4 NJ Super 150
- In re Alper's Will, 60 A 2d 320, 142 NJ Eq 529, affirmed 65 A 2d 736, 2 NJ 104—Alper v Alper, 60 A 2d 880, 142 NJ Eq 547, affirmed 65 A 2d 937, 2 NJ 105, 7 ALR 2d 1350—In re Dyer's Will, 36 A 2d 868, 135 NJ Eq 58—In re Neuman's Estate, 32 A 2d 826, 133 NJ Eq 532—In re McComb, 177 A 849, 118 NJ Eq 119
- In re Loori's Will, 28 A 2d 281, 20 NJ Misc 376, affirmed 28 A 2d 288, 132 NJ Eq 316
- NY—In re White's Will, 114 NYS 2d 431, 280 App Div 454—In re Munsell's Will, 113 NYS 2d 176, 280 App Div 802—In re Moskowitz' Will, 107 NYS 2d 858, 279 App Div 660, affirmed 106 NE 2d 68, 303 NY 992, motion denied 107 NE 2d 84, 304 NY 593—In re Johnson's Will, 101 NYS 2d 154, 277 App Div 1130—In re Swing's Will, 93 NYS 2d 232, 276 App Div 844, affirmed 95 NE 2d 404, 301 NY 716—In re Morrison's Will, 60 NYS 2d 546, 270 App Div 552, affirmed 69 NE 2d 814, 296 NY 652—In re Yates' Will, 58 NYS 2d 883, 269 App Div 1009—In re Gatzke's Will, 58 NYS 2d 874, 269 App Div 1054—In re Hemmingway's Will, 40 NYS 2d 51, 266 App Div 697—In re Frankel's Will, 18 NYS 2d 353, 259 App Div. 778—In re Moore's Will,

10 NYS 2d 491, 256 App Div 994—In re Streb's Will, 288 NYS 334, 247 App Div 556

In re Walton's Estate, 135 NYS 2d 690, 206 Misc 908—In re Paterson's Will, 132 NYS 2d 609, 206 Misc 268—In re Boyle's Will, 128 NYS 2d 259, 205 Misc 497—In re Bitterman's Estate, 118 NYS 2d 859, 203 Misc 796, affirmed 122 NYS 2d 622, 281 App Div 1024, appeal dismissed 115 NE 2d 434, 306 NY 563—In re Richard's Will, 102 NYS 2d 984, 200 Misc 230—In re Landemann's Will, 80 NYS 2d 276, 191 Misc 285—In re Kaufman's Will, 67 NYS 2d 249, 187 Misc 637—In re Thomson's Will, 41 NYS 2d 416, 181 Misc 385

In re Charap's Will, 140 NYS 2d 92, affirmed Petition of Eakin, 145 NYS 2d 311—In re Goldberg's Will, 139 NYS 2d 71—In re Monahan's Will, 137 NYS 2d 100—In re Hall's Estate, 131 NYS 2d 639—In re Gallagher's Will, 123 NYS 2d 912—In re Connor's Will, 100 NYS 2d 879—In re Fiske's Will, 69 NYS 2d 655—In re Woehrl's Will, 53 NYS 2d 412—In re Buckley's Estate, 52 NYS 2d 292

NC—In re Cooper's Will, 25 SE 2d 166, 223 NC 34—In re Redding's Will, 5 SE 2d 544, 216 NC 497

Ohio—In re Elvin's Will, 66 NE 2d 629, 146 Ohio St 448

Green v Green, 90 NE 2d 170, 86 Ohio App 285—McNeil v McNeil, App, 76 NE 2d 621—Board of Ed of Lynchburg Local School Dist of Highland County v Pendleton, 75 NE 2d 182, 80 Ohio App 249—Dinnie v Schiele, 22 NE 2d 917, 61 Ohio App 511—Gillespie v Gray, App, 49 NE 2d 108

Okl—In re Dyer's Estate, 282 P 2d 243—In re Hicks' Estate, 276 P 2d 259—Munson v Snyder, 275 P 2d 249—In re Fletcher's Estate, 269 P 2d 349—In re Martin's Estate, 261 P 2d 603—Parnacher v Mount, 248 P 2d 1021, 207 Okl 275—In re Baker's Will, 248 P 2d 627, 207 Okl 158—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—Hicks v Cravatt, 235 P 2d 936, 205 Okl 105—Runnels v Burton, 214 P 2d 709, 202 Okl 406—In re Heitholt's Estate, 213 P 2d 865, 202 Okl 351—Howard v Fields, 156 P 2d 139, 195 Okl 180—Amos v Fish, 144 P 2d 967, 193 Okl 406—Harden v Harden, 134 P 2d 351, 192 Okl 131—Barnes v Logston, 88 P 2d 361, 184 Okl 464—In re Shipman's Estate, 85 P 2d 317, 184 Okl 56—In re Fice's Estate, 75 P 2d 476, 181 Okl 564—In re Nitey's Estate, 53 P 2d 215, 175 Okl 389—In re Harnoy's Estate, 46 P 2d 503, 172 Okl 580—Whoeler v Wade, 45 P 2d 66, 172 Okl 365—In re Sixkiller, 32 P 2d 936, 168 Okl 302

Or—In re Fredricks' Estate, 282 P 2d 352—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Ander-

sen's Estate, 235 P 2d 869, 192 Or 441—In re Detsch's Estate, 229 P 2d 264, 191 Or 161—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Beer's Estate, 222 P 2d 1005, 190 Or 15—Detsch v Detsch, 205 P 2d 180, 86 Or 1—In re Christoferson's Estate, 190 P 2d 928, 183 Or 75—In re Perry's Estate, 181 P 2d 783, 181 Or 332—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Wade's Estate, 149 P 2d 947, 174 Or 531—In re Courtney's Will, 143 P 2d 910, 172 Or 657—In re Davis' Will, 142 P 2d 143, 172 Or 354—In re Lilly's Estate, 78 P 2d 567, 159 Or 236—In re Mitchell's Estate, 76 P 2d 283, 158 Or 375—In re Knutson's Will, 41 P 2d 793, 149 Or 467

Pa—In re Kline's Estate, 115 A 2d 364, 382 Pa 395—May v Fidelity Trust Co, 99 A 2d 880, 375 Pa 135—In re O'Malley's Estate, 88 A 2d 69, 370 Pa 281—In re King's Estate, 87 A 2d 469, 369 Pa 523—In re Conway's Estate, 79 A 2d 208, 366 Pa 641—In re Lewis' Estate, 72 A 2d 80, 364 Pa 225—In re Ross' Estate, 49 A 2d 392, 355 Pa 112—In re Geho's Estate, 17 A 2d 342, 340 Pa 412—Wetzel v Edwards, 16 A 2d 441, 340 Pa 121—Shuey v Shuey, 16 A 2d 4, 340 Pa 27—In re Royer's Estate, 12 A 2d 923, 339 Pa 423—Kish v Bakaysa, 199 A 321, 330 Pa 533—Angeluzzi v Perrotti, 199 A 165, 330 Pa 322—In re Cookston's Estate, 188 A 904, 325 Pa 81—In re Moore's Estate, 176 A 241, 317 Pa 42—In re Taylor's Estate, 175 A 540, 316 Pa 557

In re Bhare's Estate, 88 Pa Dist & Co 191, 4 Fiduciary 246, 17 Som Leg J 1

In re Buck's Estate, Orph, 53 Dauph Co 412—In re Trump's Estate, Orph, 47 Dauph Co 433—In re Brooks' Estate, Orph, 27 Del Co 140—In re Secondino's Estate, Orph, 4 Fiduciary 337—In re McFadden's Will, Orph, 3 Fiduciary 611—In re Bruno's Estate, Orph, 61 Montg Co 195—In re Gluck's Estate, Orph, 43 Lack Jur 101—In re Melvin's Estate, Orph, 45 Lack Jur 229—In re Singer's Estate, Orph, 45 Lanc L Rev 585—In re Stephen's Estate, Orph, 17 Leh LJ 364—In re Hollinger's Estate, Orph, 58 York Leg Rec 17, affirmed 41 A 2d 554, 351 Pa 364

RI—Lomastro v Hamilton, 68 A 2d 39, 76 RI 114—Deighan v Hana-way, 14 A 2d 811, 65 RI 322—Talbot v Bridges, 173 A. 72, 54 RI 337

SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78

SD—In re Vetter's Estate, 66 NW 2d 519—In re Thorpe's Estate, 64 NW 2d 296—In re Armstrong's Estate, 272 NW 799, 65 SD 233

Tenn—Cude v Culberson, 209 SW 2d 506, 30 Tenn App 628—Northcross v. Taylor, 197 SW 2d 9, 29 Tenn

App 438—Fitch v American Trust Co, 4 Tenn App 87

Tex—Burgess v Sylvester, 182 SW 2d 358, 143 Tex 25—Boyer v Pool, 280 SW 2d 564—Boyd v Frost Nat Bank, 196 SW 2d 497, 145 Tex 206, 168 ALR 1326

White v Smith, Civ App, 276 SW 2d 359, error dismissed—Griffin v Griffin, Civ App, 271 SW 2d 714—Shoubrouek v Welch, Civ App, 271 SW 2d 704, refused no reversible error—Sanders v Maxwell, Civ App, 265 SW 2d 683—Tondre v Gerloff, Civ App, 257 SW 2d 158, refused no reversible error—Price v Tahafarro, Civ App, 254 SW 2d 157, refused no reversible error—Naihaus v Feigon, Civ App, 244 SW 2d 325, error refused no reversible error—Ward v Houseman, Civ App, 240 SW 2d 456, error refused—Thompson v Townsend, Civ App, 238 SW 2d 810, error refused no reversible error—Jowers v Smith, Civ App, 237 SW 2d 805—Breedon v Miller, Civ App, 236 SW 2d 225—Lynn v Jackson, Civ App, 216 SW 2d 649, refused no reversible error—Gainer v Johnson, Civ App, 211 SW 2d 789—Montgomery v Willbanks, Civ App, 202 SW 2d 851, error refused no reversible error—Barton v Bailey, Civ App, 202 SW 2d 277, error refused no reversible error—Firestone v Sims, Civ App, 174 SW 2d 279, error refused—Bonilla v Lujan, Civ App, 168 SW 2d 691—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused—Bethel v Yearwood, Civ App, 142 SW 2d 927, error dismissed, judgment correct—McKenzie v Grant, Civ App, 93 SW 2d 1160, error dismissed—Hardin v Hardin, Civ App, 66 SW 2d 362

Utah—In re Lavelle's Estate, 248 P 2d 372—In re George's Estate, 112 P 2d 498, 100 Utah 230—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444

Va—French v Beville, 62 SE 2d 883, 191 Va 842—Ferguson v Ferguson, 47 SE 2d 346, 187 Va 581—Croft v Snidow, 33 SE 2d 208, 183 Va 649

Wash—In re Matsas' Estate, 280 P 2d 678—In re Peters' Estate, 264 P 2d 1109, 43 Wash 2d 846—In re Wiltzius' Estate, 253 P 2d 954, 42 Wash 2d 149—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Mikelson's Estate, 217 P 2d 540, 41 Wash 2d 97—In re Chapman's Estate, 225 P 2d 883, 37 Wash 2d 682—In re Kinssies' Estate, 214 P 2d 693, 35 Wash 2d 723—In re Soderstran's Estate, 213 P 2d 949, 35 Wash 2d 448—Thilman v Thilman, 193 P 2d 674, 30 Wash 2d 743—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912—In re Whittier's Estate, 176 P 2d 281, 26 Wash 2d 833—In re Donaldson's Estate, 173 P 2d 159, 26 Wash 2d

will was the product of a mistake <sup>45</sup>

## § 252. — Personal, Confidential, or Fiduciary Relations between Testator and Beneficiary

The rules as to the weight and sufficiency of the evidence to establish undue influence in the execution of a will have been applied in the light of the relationship between the beneficiary and the testator.

In accordance with the conflict discussed supra § 239 as to whether the existence of a fiduciary or confidential relationship between the testator and a beneficiary under the will creates a presumption of undue influence, it has been held that, in the absence

of any other evidence, the fact that one in a fiduciary or confidential relation to the testator is benefited by his will may support a finding of undue influence,<sup>46</sup> although it is generally held that the mere fact of benefit in a will to one in a confidential<sup>47</sup> or fiduciary<sup>48</sup> relation to the testator is not sufficient, of itself, to warrant a conclusion that the execution of the will was induced by undue influence. However, as discussed supra § 230, such a situation excites suspicion, warranting a close scrutiny of the circumstances surrounding the execution of the will and slight evidence that such a beneficiary abused testator's confidence will invalidate the will.<sup>49</sup> The slightest suggestion of one in the

72—In re McGilligan's Estate, 170 P 2d 661, 25 Wash 2d 313—In re Kane's Estate, 145 P 2d 893, 20 Wash 2d 76—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Miller's Estate, 116 P 2d 526, 10 Wash 2d 258—In re Sinclair's Estate, 113 P 2d 65, 8 Wash 2d 611—In re Jolly's Estate, 85 P 2d 267, 197 Wash 349—In re Swan's Estate, 74 P 2d 207, 192 Wash 627—In re Bernhard's Estate, 74 P 2d 197, 192 Wash 546—In re McGhee's Estate, 62 P 2d 1336, 188 Wash 550

W Va—Rice v Henderson, 83 SE 2d 762—Ritz v Kingdon, 79 SE 2d 123—Ebert v Ebert, 200 SE 831, 120 W Va. 722

Wis—In re Knerim's Will, 68 NW 2d 545, 268 Wis 596—In re Draheim's Will, 66 NW 2d 172, 267 Wis 382—In re Borzych's Estate, 66 NW 2d 164, 267 Wis 526—In re Miller's Estate, 61 NW 2d 813, 265 Wis 420—In re Beyer's Estate, 55 NW 2d 401, 262 Wis 441—In re Blued's Estate, 51 NW 2d 482, 261 Wis 32—In re Bickner's Estate, 49 NW 2d 404, 259 Wis 425—In re Russell's Will, 44 NW 2d 231, 257 Wis 510—In re Schultz' Will, 36 NW 2d 698, 254 Wis 490—In re Bernhard's Will, 34 NW 2d 664, 253 Wis 521—In re Boston's Estate, 33 NW 2d 257, 253 Wis 8—In re Klossfanda's Will, 32 NW 2d 220, 252 Wis 511—In re King's Will, 29 NW 2d 69, 251 Wis 269—In re Delmady's Will, 28 NW 2d 301, 251 Wis 98—In re Sullivan's Will, 27 NW 2d 762, 250 Wis 624—In re Kintopp's Will, 27 NW 2d 481, 250 Wis 381—In re Peterson's Estate, 26 NW 2d 553, 250 Wis 158—In re Kaebisch's Will, 26 NW 2d 268, 249 Wis 629—In re Keirwin's Estate, 24 NW 2d 609, 249 Wis 248—In re Puls' Will, 18 NW 2d 321, 246 Wis 660—In re Kesich's Estate, 12 NW 2d 688, 244 Wis 374

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444—In re Anderson's Estate, 255 P 2d 983, 71 Wyo. 238 68 C.J. p 780 note 51.

45 Mo—Idle v Moody, 127 SW 2d 660, 344 Mo 594  
Wis—In re Blued's Estate, 51 NW 2d 482, 261 Wis 32

### Existence of child

In action for declaratory judgment determining rights of child, who was left out of maternal grandfather's will, in testator's estate, wherein child was held not qualified to take as pretermitted heir but it was contended that notwithstanding that, child could take on ground of mistake, evidence was insufficient to establish that testator ever knew or that he did not know of existence of child

U S—Illinois State Trust Co v Conaty, D C R I, 104 F Supp 729

46. Ky—Gay v Gay, 215 SW 2d 92, 308 Ky 539

NY—In re Smith's Will, 10 NY S 2d 775, 170 Misc 572

Admissibility of evidence of such relations see supra § 249

Personal, confidential relations between testator and beneficiary as constituting undue influence see supra § 230

### Evidence held sufficient

To establish confidential relationship

Cal—In re Rugani's Estate, 239 P 2d 500, 108 Cal App 2d 624—In re Chesney's Estate, 228 P 2d 46, 102 Cal App 2d 708—In re Leonard's Estate, 207 P 2d 66, 92 Cal App 2d 420—In re Wolleb's Estate, 132 P 2d 864, 56 Cal App 2d 488

Kan—In re Faust's Estate, 96 P 2d 680, 150 Kan 784

Or—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429

Pa—In re Hollinger's Estate, 41 A 2d 554, 351 Pa 364

68 C.J. p 784 note 88 [d] (5)

### Evidence held insufficient

To establish a confidential or fiduciary relationship

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

Ga—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226

Ill—Redmond v Steele, 126 NE 2d

619, 5 Ill 2d 602—Challiner v Smith, 71 NE 2d 324, 396 Ill 106  
Kan—In re Schippel's Estate, 218 P 2d 192, 169 Kan 151

Mich—In re Jennings' Estate, 55 NW 2d 812, 335 Mich 241

Minn—Appeal of Boisad, 45 NW 2d 828, 232 Minn 365

Mo—Larkin v Larkin, 119 SW 2d 351

Pa—In re Buck's Estate, Orph., 53 Dauph Co 412

68 C.J. p 784 note 87 [b] (1), note 88 [e] (1)

47 Ala—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624

Cal—In re Muller's Estate, 57 P 2d 991, 14 Cal App 2d 129

Ga—Bowman v Bowman, 55 SE 2d 298, 205 Ga 796—Norman v Hubbard, 47 SE 2d 574, 203 Ga 530—Brumbelow v Hopkins, 29 SE 2d 42, 197 Ga 247

Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn 365—In re Mazanec's Estate, 283 NW 745, 204 Minn 406

Mo—Aaron v Degnan, 272 SW 2d 216

Pa—In re Ash's Estate, 41 A 2d 620, 351 Pa 317

68 C.J. p 704 note 88

48 Mo—Aaron v Degnan, 272 SW 2d 216—Rex v Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589

68 C.J. p 785 note 89

49. Okl—Anderson v Davis, 256 P 2d 1099, 208 Okl 477

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219—In re Lobb's Will, 145 P 2d 808, 173 Or 414—In re Brown's Estate, 108 P 2d 775, 165 Or 575

68 C.J. p 784 note 87

### Specific acts

The conduct of a trusted advisor prior to making of will, in which he is named as beneficiary, may be such as to amount to undue influence voiding the will, without proof of specific acts of the advisor at time will was made

Mass—Doggett v Moise, 12 NE 2d 867, 299 Mass 383.

confidential relation of attorney to a testator, especially where such attorney is the beneficiary under the will, may constitute undue influence.<sup>50</sup> The fact that the testator was under the influence of another in the management and control of his business generally is insufficient to prove undue influence in the execution of the will.<sup>51</sup> A will by a physically or mentally infirm testator in favor of person having custody of testator, is regarded with suspicion.<sup>52</sup> Evidence of affection or intimacy between persons

related by blood or marriage does not establish undue influence.<sup>53</sup>

The rules as to the weight and sufficiency of the evidence to establish undue influence in the execution of a will have been applied where the relation between the testator and a beneficiary has been that of attorney and client,<sup>54</sup> physician and patient,<sup>55</sup> nurse and patient,<sup>56</sup> employer and employee,<sup>57</sup> landlord and tenant,<sup>58</sup> husband and wife,<sup>59</sup> persons who

**Where a will is unnatural in its terms** and favors one who occupied a relationship of special confidence to the testator, slight evidence of undue influence is sufficient to invalidate it

Or—In re Day's Estate, 257 P 2d 609, 198 Or 518—In re Meier's Estate, 224 P 572, 190 Or 140—In re Walther's Estate, 163 P 2d 285, 177 Or 282—In re Diggins' Estate, 149 P 73, 76 Or 341

**Evidence held sufficient**

To establish undue influence  
Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1

Minn—In re Wilson's Estate, 27 N W 2d 429, 223 Minn 409

Pa—In re Hollinger's Estate, 41 A 2d 554, 351 Pa 364

Utah—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

68 C J p 784 note 88 [d] (3), (4), (6), [e] (2)

**Evidence held insufficient**

To establish undue influence.  
Cal—In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Knight's Estate, 50 P 2d 475, 9 Cal App 2d 454

Mich—In re Jennings' Estate, 55 N W 2d 812, 335 Mich 241

Mo—Baker v Spears, 210 S W 2d 13, 357 Mo 601

Pa—In re Cressman's Estate, 31 A 2d 109, 346 Pa 400—In re Mohler's Estate, 22 A 2d 680, 343 Pa 299—In re Pledge's Estate, 17 A 2d 334, 340 Pa 529

68 C J p 784 note 87 [b] (2), 88 [d] (1), (2), 89 [a]

50. Okl—Hunter v Battiest, 192 P 575, 79 Okl 248

51. Tex—Small v Taylor, Civ App, 54 S W 2d 151

52. Ky—Hanna v Eiche, 79 S W 2d 950, 258 Ky 282

**Evidence held sufficient**

To establish undue influence  
Ala—Kellett v Cochran, 194 So 805, 239 Ala 313

**Evidence held insufficient**

To establish undue influence  
Ky—Ross v Lott, 184 S W 2d 977, 299 Ky 150

N J—In re Castellano's Will, 171 A 139, 115 N.J.Eq 356.

Or—In re Rosenberg's Estate, 246 P 2d 858, 196 Or 219

53. Minn—In re Marsden's Estate, 13 N W 2d 765, 217 Minn 1  
Tenn—Rogers v Hickam, 208 S W 2d 34, 30 Tenn App 504

54. Iowa—In re Ankeny's Estate, 28 N W 2d 414, 238 Iowa 754  
68 C J p 785 note 90

**Suspicion**

A will, made in favor of testatrix' lawyer to exclusion of natural object of her bounty, is viewed with great suspicion and, in absence of explanation, jury may be justified in drawing inference of beneficiary's undue influence over testatrix, but will is not invalid if fairly made  
N Y—In re Wharton's Will, 62 N Y S 2d 169, 270 App Div 670, affirmed 76 N E 2d 328, 297 N Y 671

**Will drafted by attorney for beneficiary**

The fact that the attorney who drew up a will may also have been the attorney for one charged with conspiring to influence the testator was held not to necessarily indicate undue influence on the part of such alleged conspirator

Ill—Johnson v First Union Trust & Savings Bank, 273 Ill App 472

**Absent any unnatural or unreasonable bequests**, even fiduciary relationship of attorney and client, plus disposition to seek funds for cause the attorney favors, will not prove undue influence

Iowa—Olsen v Corporation of New Melleray, 60 N W 2d 832, 245 Iowa 407

**Evidence held sufficient**

To establish confidential relationship

Cal—In re Johnson's Estate, 87 P 2d 900, 31 Cal App 2d 251

Okl—Hunter v Battiest, 192 P 575, 79 Okl 248

Or—In re Lobb's Will, 160 P 2d 295, 177 Or 162—In re Lobb's Will, 145 P 2d 808, 173 Or 414

68 C J p 785 note 90 [a]

**Evidence held insufficient**

To establish undue influence  
Idaho—Swaringen v Swanstrom, 175 P 2d 692, 67 Idaho 245

N J—In re Hopper's Estate, 88 A 2d 193, 9 N J 280

N Y—In re Wharton's Will, 62 N Y S 2d 169, 270 App Div 670, affirmed 76 N E 2d 328, 297 N Y 671  
Pa—In re Dible's Estate, 175 A 538, 316 Pa 553

55. Mo—Pritchard v Thomas, 192 S W 956  
68 C J p 785 note 91

**Evidence held sufficient**

To establish undue influence  
Cal—In re Bucher's Estate, 120 P 2d 44, 48 Cal App 2d 465—Zaremba v Woods, 61 P 2d 976, 17 Cal App 2d 309

Wash—Foster v Brady, 86 P 2d 760, 198 Wash. 13

**Evidence held insufficient**

To establish undue influence  
Fla—In re Peters' Estate, 20 So 2d 487, 155 Fla 453—In re Aldrich's Estate, 3 So 2d 856, 148 Fla 121.

**56. Evidence held insufficient**

To establish fraud and undue influence  
Cal—In re Garvey's Estate, 101 P 2d 551, 38 Cal App 2d 449

57. N Y—Matter of Halbert's Will, 37 N Y S 757, 15 Misc 308, 1 Gibb Surr 476

58. Pa—Tallman's Will, 23 A 986, 148 Pa 286

59. Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263

N C—In re Ball's Will, 33 S E 2d 619, 235 N C 91

Tenn—Rogers v Hickam, 208 S W 2d 34, 30 Tenn App 504.

68 C J p 785 note 95

**Evidence held sufficient**

To establish undue influence  
Cal—In re Teel's Estate, 154 P 2d 384, 25 Cal 2d 520

In re Hannam's Estate, 236 P 2d 208, 106 Cal App 2d 782—In re Schlyen's Estate, 234 P 2d 211, 105 Cal App 2d 648—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263.

Ind—Cooper v Cooper, 51 N E 2d 100, 114 Ind App 261.

Iowa—In re Farlow's Estate, 50 N W 2d 561, 243 Iowa 15.

Ky—McComas v Hull, 145 S.W.2d 841, 284 Ky 654

68 C J p 785 note 90 [b].

are pledged or engaged to marry,<sup>60</sup> parent and child,<sup>61</sup> brother and sister,<sup>62</sup> uncle or aunt and nephew or niece,<sup>63</sup> or guardian and ward,<sup>64</sup> or where the beneficiary was a spiritual adviser of the testator.<sup>65</sup> The general rules as to the weight and sufficiency of the evidence to establish undue in-

**Evidence held insufficient**

To establish undue influence  
 Ky—Combs v Combs, 112 SW 2d 989, 271 Ky 543  
 Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225  
 NJ—In re Livingston's Will, 73 A 2d 916, 5 NJ 65  
     In re Raynolds' Estate, 27 A 2d 226, 132 NJ Eq 141, affirmed 32 A 2d 353, 133 NJ Eq 344  
 NC—In re Ball's Will, 30 SE 2d 619, 225 NC 91  
 Ohio—Lovelady v Rhineland, 21 NE 2d 1001, 60 Ohio App 493  
 Okl—In re Lincoln's Estate, 94 P 2d 227, 185 Okl 464—Canfield v Canfield, 31 P 2d 152, 167 Okl 590  
 Tex—Koger v Coker, Civ App, 111 SW 2d 357—Jones v Selman, Civ App, 109 SW 2d 1003, error dismissed  
 Va—Mullins v Coleman, 7 SE 2d 877, 175 Va 235  
 68 CJ p 785 note 90 [c]

60. Miss—O'Bannon v Henrich, 4 So 2d 208, 191 Miss 815

**Evidence held insufficient**

To establish undue influence  
 Wis—In re Scherrei's Estate, 7 NW 2d 848, 212 Wis 211

61. Tex—Leahy v Timon, Civ App, 204 SW 1029, affirmed 215 SW 951, 110 Tex 73  
 68 CJ p 785 note 96

**Evidence held sufficient**

To establish undue influence  
 Cal—In re Abert's Estate, 201 P 2d 347, 91 Cal App 2d 50  
 Ga—Adler v Adler, 61 SE 2d 824, 207 Ga 394  
 Ind—Hoopengardner v Hoopengardner, 198 NE 795, 102 Ind App 172  
 Miss—Curry v Lucas, 180 So 307, 181 Miss 720  
 NJ—In re Peppler's Will, 28 A 2d 474, 132 NJ Eq 421, affirmed 31 A 2d 291, 134 NJ Eq 160  
 NY—In re Esposito's Estate, 36 N YS 2d 940  
 Tex—Schelb v Spatenberg, Civ App, 111 SW 2d 324, affirmed 124 SW 2d 322, 133 Tex 17  
 Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 ALR 1444  
 Wash—In re Bush's Estate, 81 P 2d 271, 195 Wash 416

**Evidence held insufficient**

To establish undue influence  
 Ala—Wilson v Payton, 37 So 2d 499, 251 Ala 411  
 Cal—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465—In re Merrick's Estate, 209 P 2d 666, 93 Cal App 2d 624—In re Grant's Estate, 47 P 2d 508, 8 Cal App 2d 232  
 Ga—Peavey v Crawford, 187 SE 13, 182 Ga 782, 107 ALR 828.

Ill—Tidholm v Tidholm, 74 NE 2d 514, 397 Ill 363—Schlachter v Schlachter, 71 NE 2d 153, 396 Ill 184—Tidholm v Tidholm, 62 NE 2d 473, 391 Ill 19  
 Hughes v Williams, 20 NE 2d 860, 300 Ill App 108  
 Ky—Rueff v Light, 114 SW 2d 506, 272 Ky 449  
 Mo—Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148  
 Neb—In re Fair's Estate, 33 NW 2d 454, 150 Neb 67—In re Enright's Estate, 271 NW 152, 132 Neb 111  
 NJ—Kuruc v Kuruc, 93 A 2d 421, 23 NJ Super 584—In re Fleming's Estate, 89 A 2d 54, 19 NJ Super 565—In re Fulo's Will, 75 A 2d 517, 9 NJ Super 146  
     In re White's Estate, 20 A 2d 412, 129 NJ Eq 566  
 Okl—King v Gibson, 249 P 2d 84, 207 Okl 251—In re Wilkins' Estate, 185 P 2d 213, 199 Okl 249  
 Tex—Leeder v Leeder, Civ App, 161 SW 2d 1112, error refused—Taylor v Small, Civ App, 71 SW 2d 895, error dismissed  
 Wis—In re Zych's Will, 28 NW 2d 316, 251 Wis 108

**Confidential relationship**

(1) Proof of fact that testatrix and beneficiary under testatrix' will are mother and son is proof of "confidential relationship" between the parties

Cal—In re Eakle's Estate, 91 P 2d 954, 33 Cal App 2d 379

(2) That testator lived in home of some of his children to whom he devised his property was not alone sufficient to establish "fiduciary" or "confidential relation" of the parties in determining whether will was executed by undue influence

Mo—Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148

(3) Evidence held to establish a confidential relationship

Cal—In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Trefren's Estate, 194 P 2d 574, 86 Cal App 2d 139  
 Or—In re Porter's Estate, 235 P 2d 894, 192 Or 483

(4) Evidence held not to establish a confidential relationship

NJ—In re Stroming's Will, 79 A 2d 492, 12 NJ Super 217

62. Mich—Lyon v Dada, 69 NW 654, 111 Mich 340

NJ—In re McLaughlin's Will, 59 A 892, 69 NJ Eq 479

**Evidence held insufficient to show undue influence**

Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173

Ill—Hoskinson v Lovelette, 5 NE 2d 219, 365 Ill 21  
 NJ—In re Skewis' Will, 64 A 2d 892, 2 NJ Super 114  
 68 CJ p 785 note 97 [a]

**Confidential relationship**

(1) Proof that a confidential relation existed between brothers and that one brother had an opportunity to guide the other brother in his testamentary act was in itself insufficient to support jury's finding of undue influence, in absence of proof that the influence destroyed free agency of testator

Cal—In re Kreher's Estate, 238 P 2d 150, 107 Cal App 2d 831

(2) Evidence held insufficient to establish confidential relationship

Cal—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534

Wash—In re McGilligan's Estate, 170 P 2d 661, 25 Wash 2d 313

**Evidence held insufficient**

(1) To establish undue influence  
 Fla—Thomas v Eakins, 194 So 249, 141 Fla 802

Ky—Schmidt v Eicher, 241 SW 2d 995

Mich—In re Reynolds' Estate, 262 NW 649, 273 Mich 71

Okl—In re Ritter's Estate, 73 P 2d 161, 181 Okl 309

68 CJ p 786 note 98 [a]

(2) To show a confidential relationship

Pa—In re King's Estate, 87 A 2d 469, 369 Pa 523

63. Fla—Thomas v Eakins, 194 So 249, 141 Fla 802

68 CJ p 786 note 98

**Evidence held sufficient**

To establish undue influence  
 Wash—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

64. Or—In re Southman's Estate, 168 P 2d 572, 178 Or 462

68 CJ p 786 note 99

**Evidence held insufficient**

To establish undue influence  
 Or—In re Southman's Estate, supra

65. Tex—Naihaus v Feigon, Civ App, 244 SW 2d 325, error refused no reversible error

68 CJ p 786 note 1

**Evidence held sufficient**

(1) To show undue influence  
 Cal—In re Brown's Estate, 200 P 2d 888, 89 Cal App 2d 496

(2) To establish a confidential relationship

Cal—In re Brown's Estate, supra

**Evidence held insufficient**

To show undue influence  
 Cal—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150.

fluence in the execution of a will have also been applied where the relations between the testator and the beneficiary were of a business<sup>66</sup> or friendly<sup>67</sup> nature

### § 253. — Unlawful, Improper, or Meretricious Relations between Testator and Beneficiary

The existence of improper, illicit, unlawful, or meretricious relations between the beneficiary and the testator is insufficient, of itself, to establish undue influence in the execution of the will

The mere existence of illicit, improper, unlawful, or meretricious relations between the testator and the beneficiary<sup>68</sup> or the beneficiary's mother<sup>69</sup> is insufficient of itself to prove fraud or undue influence, although the existence of such relations is an important fact to be considered by the jury along with other evidence of undue influence,<sup>70</sup> giving to other circumstances a significance which they might not otherwise have,<sup>71</sup> and much less evidence will be required to establish undue influence on the part of one holding wrongful and meretricious relations

with the testator<sup>72</sup> Thus, when such a relation is shown, and it also appears that the testator made a highly unnatural disposition of his property as a result of restraint, or any other agency which poisoned his mind, there is sufficient evidence of undue influence<sup>73</sup>

### § 254. — Direct or Indirect Benefit to Person Drawing or Assisting in Execution of Will

General rules have been applied as to the weight and sufficiency of the evidence to establish undue influence where the beneficiary drafted or participated in the preparation and execution of the will

Under the facts and circumstances of the particular case, the evidence has been held sufficient<sup>74</sup> or insufficient<sup>75</sup> to establish undue influence by a beneficiary who drafted or arranged for the preparation and execution of the will Unless such fact, under the rules discussed supra § 241, is sufficient to raise a presumption of undue influence, the fact, standing alone, that the beneficiary,<sup>76</sup> or that a

SD—In re Rowlands' Estate, 18 N W 2d 290

66 N.J.—In re Skewis' Will, 64 A 2d 892, 2 N.J. Super 114  
68 C.J. p 786 note 2

#### Evidence held insufficient

To establish undue influence  
Vt—Central Hanover Bank & Trust Co v Fiomont, 49 A 2d 111, 114 Vt 523

67 Ohio—In re Elvin's Will, 66 N E 2d 629, 146 Ohio St 448  
68 C.J. p 786 note 3, p 784 note 88 [a]

#### Evidence held insufficient

To establish undue influence  
D.C.—Mann v Cornish, 185 F 2d 423, 87 US App DC 110, certiorari denied 71 S Ct 802, 341 US 932, 95 L Ed 1361

Okl—In re Jones' Estate (Choctaw 7012), 121 P 2d 574, 190 Okl 123  
—In re DeVine's Estate, 109 P 2d 1078, 188 Okl 423

Wash—In re Chapin's Estate, 135 P 2d 445, 17 Wash 2d 196

68 Ala—Locke v Sparks, 81 So 2d 670

Cal—In re Spaulding's Estate, 187 P 2d 889, 83 Cal App 2d 15

Iowa—Corpus Juris quoted in Glider v Melinski, 25 NW 2d 379, 382, 238 Iowa 140

Ky—Rough v Johnson, 274 SW 2d 376

Utah—In re Lavelle's Estate, 248 P 2d 372

68 C.J. p 786 note 6

Presumption of undue influence arising from such relationship see supra § 231.

#### Evidence held insufficient

(1) To show the existence of a meretricious relationship

Pa—In re Wright's Estate, Orph, 91 Pittsb Leg J 401, 57 York Leg Rec 117, affirmed 34 A 2d 57, 348 Pa 76

(2) To establish a fiduciary relationship

Ill—Sterling v Dubin, 126 NE 2d 718, 6 Ill 2d 64

69 Iowa—Corpus Juris quoted in Glider v Melinski, 25 NW 2d 379, 382, 238 Iowa 140  
68 C.J. p 786 note 7

70. Iowa—Corpus Juris quoted in Glider v Melinski, 25 NW 2d 379, 382, 238 Iowa 140

Utah—In re Lavelle's Estate, 248 P 2d 372  
68 C.J. p 786 note 8

71 Iowa—Corpus Juris quoted in Glider v Melinski, 25 NW 2d 379, 382, 238 Iowa 140  
68 C.J. p 786 note 9

72 Ark—Hyatt v Wroten, 43 SW 2d 726, 184 Ark 847—Alford v Johnson, 146 SW 516, 103 Ark 236

73. Pa—Central Trust Co. v Boyer, 162 A 806, 308 Pa 402

74 Fla—Theus v Theus, 161 So 76, 119 Fla 190

Mass—Old Colony Trust Co v Yonge, 18 NE 2d 335, 302 Mass 49

NY—In re May's Estate, 55 NYS 2d 402, 184 Misc 336—In re Lasher's Estate, 2 NYS 2d 204, 165 Misc 592—In re Forsyth's Estate, 9 NYS 2d 642, 169 Misc 1042

Okl—In re Lillie's Estate, 159 P.2d 542, 195 Okl 597

Wash—In re Tate's Estate, 201 P 2d 182, 32 Wash 2d 252

Wis—In re Leisch's Will, 267 NW 269, 221 Wis 641  
68 C.J. p 787 note 12 [e], 13 [a], 14 [b]

75 Ark—Blake v Simpson, 215 S W 2d 287, 214 Ark 263

Cal—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571

In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 531 hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367

NY—In re Fitzgerald's Will, 74 NYS 2d 871, 273 App Div 776, affirmed 81 NE 2d 352, 298 NY 615

In re Cotter's Estate, 40 NYS 2d 93, 180 Misc 399

NC—In re Neal's Will, 181 SE 555, 208 NC 535

Or—In re Southman's Estate, 168 P 2d 572, 178 Or 462—Vantine v Heilig, 76 P 2d 1122, 159 Or 183

Pa—In re Kovolowski's Estate, Orph, 16 Som Leg J 122

Tex—Krahl v Lehmann, Civ App, 277 SW 2d 792, reversed on other grounds, Sup, Lehmann v Krahl, 285 SW 2d 179—Bethel v Yearwood, Civ App, 142 SW 2d 927, error dismissed, judgment correct—Oglesby v Harris, Civ App, 130 SW 2d 449, error dismissed, judgment correct

68 C.J. p 787 note 12 [b], 13 [b], 14 [c]

76. Fla—Theus v. Theus, 161 So 76, 119 Fla 190

NY—In re Gatzke's Will, 58 NY S 2d 874, 269 App Div. 1054.

68 C.J. p 787 note 12.



relative of the beneficiary,<sup>77</sup> drafted the will, or took an important part in its preparation and execution,<sup>78</sup> is insufficient to prove undue influence, but it is such a strong circumstance bearing on the probability that fraud or undue influence was exercised<sup>79</sup> that only slight additional proof is necessary to establish the issue.<sup>80</sup> It has been held that a will written or procured to be written by one largely benefited by it excites suspicion, and requires stricter scrutiny and stricter proof of the free agency of the testator.<sup>81</sup> Where the participation of the beneficiary in the preparation of the will raises a presumption of undue influence, the amount of proof required to overcome the presumption must depend on the circumstances of each case.<sup>82</sup> Under a statute requiring the testator to have independent advice where the will is prepared by the principal beneficiary, general rules apply as to the weight and sufficiency of the evidence to show compliance with the statute.<sup>83</sup> The participation of the beneficiary in the execution of the will may not rest on conjecture but must be established by evidence from which the necessary inferences can reasonably be drawn.<sup>84</sup>

The fact that the beneficiary selected the attorney who drew the will,<sup>85</sup> and procured the attesting witnesses thereto,<sup>86</sup> or was present<sup>87</sup> or absent<sup>88</sup> at the execution of the will, is alone insufficient to prove undue influence, although the absence of the person charged with exercising undue influence is not necessarily sufficient to prove that such influence was not exerted.<sup>89</sup> Moreover, the fact that the will was prepared by an attorney selected by the beneficiary and that the attorney never consulted the testator, but received all information from the beneficiary is a circumstance indicating undue influence.<sup>90</sup>

*Parent and child* The evidence has been held insufficient in particular cases to establish undue influence although the preparation and execution of a will in favor of the child were arranged by the child,<sup>91</sup> but the facts that a child occupying a fiduciary relationship with the testator was the active agent in having the will prepared,<sup>92</sup> that he procured its preparation by his agent, a stranger to the testator,<sup>93</sup> that he and his agent alone were present with her when it was drawn,<sup>94</sup> that the testator was the dependent party, and he the dominant party,<sup>95</sup> and that he profited substantially by the

#### Evidence held insufficient

To show that beneficiary participated in preparation or execution of will

Cal—In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720

77. Mo—Wright v Stevens, 246 S W 2d 817  
68 C J p 787 note 13

78. Fla.—Theus v Theus, 161 So 76, 119 Fla 190

N Y—In re Gatzke's Will, 58 N Y S 2d 874, 269 App Div 1054

Pa—In re Cookson's Estate, 188 A 904, 325 Pa 81

In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc Rev 585  
68 C J p 787 note 14

79. Fla.—Theus v. Theus, 161 So 76, 119 Fla 190

Ill—Sulzberger v Sulzberger, 23 N E 2d 46, 372 Ill 240

Md—Cook v Hollyday, 45 A 2d 761, 185 Md 656  
68 C J p 787 note 15

**Proof of planning and preparation of will is heart of an undue influence case**

Tex—Boyer v Pool, 280 S W 2d 564

80. Mass—Tarr v Tucker, 172 N E 257, 272 Mass 150

Mo—Muller v St Louis Hospital Assoc, 5 Mo App 390, affirmed 73 Mo 242

81. Ill—Sulzberger v Sulzberger, 23 N E 2d 46, 372 Ill 240—Barber

v Barber, 1 N E 2d 44, 362 Ill 634

N Y—In re Chinsky's Will, 270 N Y S 822, 151 Misc 129

Okl—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597  
68 C J p 788 note 18

82. Ill—Wunderlich v Buerger, 122 N E 827, 287 Ill 440  
68 C J p 788 note 19

83. Kan—Darby v Hart, 96 P 2d 653, 150 Kan 760

84. Kan—In re Arney's Estate, 254 P 2d 314, 174 Kan 64

Mo—Buckner v Tuggle, 203 S W 2d 449, 356 Mo 718

#### Evidence held sufficient

To show that will was prepared by beneficiary or one acting on his behalf

Mo—Pulitzer v Chapman, 85 S W 2d 400, 337 Mo 298

#### Evidence held insufficient

To show that will was prepared by beneficiary or by one acting on his behalf

Kan—In re Davis' Estate, 259 P 2d 211, 175 Kan 107

Or—In re Perry's Estate, 181 P 2d 783, 181 Or 332

85. Cal—In re Bacigalupi's Estate, 261 P 470, 202 Cal 450

68 C J p 788 note 21

86. Miss—Ward v. Ward, 87 So 153, 124 Miss 697

Pa—In re Chylak's Estate, Orph, 55 Lack Jur 129

87. Ill—Lake v Seiffert, 102 N E 2d 294, 410 Ill 444

Md—Koppal v Soules, 56 A 2d 48, 189 Md 346

Or—In re Southman's Estate, 168 P 2d 572, 178 Or 462  
68 C J p 788 note 23

88. Mass—Dresser v Dresser, 63 N E 12, 181 Mass 93

89. Fla—In re Eustis' Estate, 5 So 2d 254, 148 Fla 665

Ill—Frieberg v Zeutschel, 41 N E 2d 512, 379 Ill 480—Sulzberger v Sulzberger, 23 N E 2d 46, 372 Ill 240

NH—Ford v Ford's Estate, 197 A 824, 89 NH 292—Gaffney v Coffey, 124 A 788, 81 NH 300

Necessity of presence of person charged with exerting such influence at time of execution see supra § 224

90. Cal—In re Hartley's Estate, 31 P 2d 240, 137 Cal App 630

91. Mich—In re Thiede's Estate, 4 N W 2d 47, 301 Mich 658

Utah—In re George's Estate, 112 P 2d 498, 100 Utah 230

92. Ill—Yess v Yess, 99 N E 687, 255 Ill 414—England v. Burtle, 68 N E 526, 204 Ill 384

93. Ill—Yess v Yess, 99 N E 687, 255 Ill 414—Leonard v Burtle, 80 N E 992, 226 Ill 422

94. Ill—Yess v Yess, 99 N E 687, 255 Ill 414

68 C J p 788 note 29

95. Ill—Yess v. Yess, supra.



will,<sup>96</sup> particularly where the testator was enfeebled by old age and disease,<sup>97</sup> have been held to be circumstances tending to show the exercise of undue influence.

**Confidential relation** Under the facts and circumstances of the particular case, the evidence has been held sufficient<sup>98</sup> or insufficient<sup>99</sup> to establish undue influence where the will was prepared by, or under the guidance of, a beneficiary who stood in a confidential relationship with the testator. Thus, where the attorney who drafted the will was named executor or beneficiary, the evidence has been held sufficient<sup>1</sup> or insufficient<sup>2</sup> under the particular facts and circumstances to establish undue influence.

**Attesting witnesses** When the character of persons acting as attesting witnesses is implicated by any circumstances connecting them with the sole beneficiary, it has been held that their testimony of the testator's freedom from undue influence is entitled to little weight.<sup>3</sup>

**Lack of benefit** The fact that the person charged with having procured the execution of the will by the exercise of undue influence cannot derive any benefit from the will,<sup>4</sup> or receives less under the will in question than he received under a prior will,<sup>5</sup> has been held to be a strong circumstance showing the absence of undue influence.

**Lack of participation.** The fact that the beneficiaries did not actively participate in preparation or execution of the will is evidence that they did not unduly influence the testator.<sup>6</sup>

## § 255. — Unjust, Unequal, or Unnatural Provisions

Unjust, unnatural, or unequal provisions in a will are insufficient of themselves to establish that the execution of the will was induced by undue influence, but such provisions are a circumstance to be considered with other evidence of undue influence.

Unjust, unequal, or unnatural provisions in the will are insufficient alone to show undue influence.<sup>7</sup>

96 Ill.—Yess v Yess, supra—Leonard v Burtie, 80 NE 992, 226 Ill 422

97. Ill.—England v Fawbush, 68 NE 526, 204 Ill 384

98 Ill.—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160

Mo.—Clark v Powell, 175 SW 2d 842, 351 Mo 1121

Okl.—Anderson v Davis, 256 P 2d 1099, 208 Okl 477

Or.—In re Day's Estate, 257 P 2d 609, 198 Or 518—In re Rupert's Estate, 54 P 2d 274, 152 Or 649

Wash.—In re Jaaska's Estate, 178 P 2d 321, 27 Wash 2d 433

99 Cal.—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553

Fla.—In re Eustis' Estate, 5 So 2d 254, 148 Fla 665

Kan.—In re Ellis' Estate, 210 P 2d 417, 168 Kan 11

68 C J p 788 note 33, p 787 note 16 [a]

1. NY.—In re Zimmerman's Estate, 3 NYS 2d 212, 254 App Div 630, motion denied 6 NYS 2d 153, 254 App Div 826, affirmed 18 NE 2d 303, 279 NY 659, reargument denied 20 NE 2d 31, 280 NY 597  
In re Little's Will, 45 NYS 2d 751

Or.—In re Brown's Estate, 108 P 2d 775, 165 Or 575

### Unnatural disposition

(1) A will when made in favor of attorney who drafted it and to exclusion of natural objects of testator's bounty is viewed with great suspicion, and some proof is required beside the factum of the will before will can be sustained

NY.—In re Little's Will, 45 NYS 2d 751.

(2) Ordinarily, that a will was drawn under the direction of the sole beneficiary thereof, who was legal adviser of deceased, and that the will was unnatural in that those related to deceased by ties of blood were excluded from his bounty in favor of a stranger, are circumstances sufficient to warrant an inference of undue influence

Tex.—Oglesby v Harris, Civ App, 130 SW 2d 449, error dismissed, judgment correct

2. NJ.—In re Nixon's Will, 41 A 2d 119, 136 NJ Eq 242—In re Bartles' Will, 13 A 2d 642, 127 NJ Eq 472, amended on other grounds 19 A 2d 17, 129 NJ Eq 280—In re Sullivan's Will, 8 A 2d 258, 126 NJ Eq 182

NY.—In re Guidi's Will, 20 NYS 2d 240, 259 App Div 652, affirmed In re Guidi's Will, 30 NE 2d 723, 284 NY 680, reargument denied 32 NE 2d 829, 285 NY 540  
68 C J p 788 note 20

3. NY.—In re Van Ness' Will, 139 NYS 485, 78 Misc 592

4. Iowa.—In re Ransom's Estate, 57 NW 2d 89, 244 Iowa 343  
Ill.—Waterman v Hall, 126 NE 139, 291 Ill 304

NJ.—In re Herrman's Estate, 3 A 2d 148, 124 NJ Eq 542

Pa.—In re Patti's Estate, 1 A 2d 791, 133 Pa Super 81

5. NY.—In re Stern's Estate, 244 NYS 250, 137 Misc 668, affirmed 256 NYS 54, 235 App Div 60, affirmed 185 NE 762, 261 NY 617  
68 C J p 788 note 86

6. Cal.—In re Lepori's Estate, 41 P 2d 970, 4 Cal App 2d 761.

7 Cal.—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1

In re White's Estate, 276 P 2d 11, 128 Cal App 2d 659—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480

Ga.—Peavey v Crawford, 187 SE 13, 182 Ga 782, 107 ALR 828

Ill.—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321—Ginsberg v Ginsberg, 198 NE 432, 361 Ill 499

Ind.—Powell v Ellis, 105 NE 2d 348, 122 Ind App 700

Iowa.—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Lochmiller's Estate, 30 NW 2d 136, 238 Iowa 1232—In re Brooke's Will, 26 NW 2d 688, 238 Iowa 306

Ky.—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190—Ecken's Ex'x v Abbey, 141 SW 2d 863, 283 Ky 449—Combs v. Combs, 112 SW 2d 989, 271 Ky 543—Clark v Johnson, 105 SW 2d 576, 268 Ky 591—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352—Parks v Moore's Ex'r, 97 SW 2d 579, 265 Ky 678

Md.—Sellers v Qualls, 110 A 2d 73—Grant v Curtin, 71 A 2d 304, 194 Md 363

Me.—In re Paradis' Will, 87 A 2d 512, 147 Me 347

Mass.—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429.

Mich.—In re Grow's Estate, 299 NW 836, 299 Mich 133.

Minn.—In re Schumacher's Estate, 39 N.W.2d 604, 229 Minn. 382—In

This is true, although the testator gives the greater portion of a large estate to one of his children,<sup>8</sup> to his wife,<sup>9</sup> or husband,<sup>10</sup> or to strangers, to the exclusion of his own blood,<sup>11</sup> or although the natural objects of the testator's bounty receive less under the will than if he had died intestate.<sup>12</sup> An unjust, unequal, or unnatural disposition may be an important circumstance when considered with other evidence of undue influence,<sup>13</sup> and it has been held that, where a disposition is unaccountably unnatural, less evidence is required to establish undue influence.<sup>14</sup> According to some authority it is only when the will is grossly unreasonable in its provi-

sions, and plainly inconsistent with the testator's duty to his family, that, in case of doubt, the inequality can have any effect on the question of undue influence.<sup>15</sup> In determining the weight that should be given an unnatural disposition of the testator's property circumstances surrounding the execution of the will<sup>16</sup> and the extent to which the distribution deviates from a natural one<sup>17</sup> should be considered. Where a will is in accordance with the dictates of natural justice, it indicates a lack of undue influence and evidence of undue influence to nullify it must be strong.<sup>18</sup>

re Mazanec's Estate, 283 NW 745, 204 Minn 406

Mo—Kadderly v Vossbrink, 149 SW 2d 869—Look v French, 144 SW 2d 128, 346 Mo 972

Pa—In re Melvin's Estate, Orph., 45 Lack Jur 229

SC—Smith v Whetstone, 39 SE 2d 127, 209 SC 78

SD—In re Vetter's Estate, 66 NW 2d 519

Tex—Boyer v Pool, 280 SW 2d 564 Price v Taliaferro, Civ App, 254

SW 2d 157, refused no reversible error—Breedon v Miller, Civ App, 236 SW 2d 225—Burgess v Syl-

vester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25

—Cameron v Houston Land & Trust Co, Civ App, 175 SW 2d 468, error refused—In re Caruthers' Es-

tate, Civ App, 151 SW 2d 946, error dismissed, judgment correct—McKenzie v Grant, 93 SW 2d 1160, Civ App, error dismissed

Wis—In re Sawall's Estate, 3 NW 2d 373, 240 Wis 265

68 CJ p 789 note 38

Admissibility of evidence to show unnaturalness of provisions see supra § 248

Presumption, if any, arising from unnatural provisions see supra § 242

Weight given unnatural dispositions where combined with evidence of mental weakness see infra § 258

Mere inequality however great in distribution of property is no evidence of undue influence on the testator

Me—In re Paradis' Will, 87 A 2d 512, 147 Me 347

Minn—In re Mazanec's Estate, 283 NW 745, 204 Minn 406

8. Miss—Morris v Morris, 6 So 2d 311, 192 Miss 518

Mo—Larkin v Larkin, 119 SW 2d 351

68 CJ p 790 note 39

9. NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91—In re Bradford's Will, 110 SE 586, 183 NC 4

10. Mo—Snell v Seek, 250 S.W.2d 336, 363 Mo. 225.

11. Ariz—In re Hesse's Estate, 157 P 2d 347, 62 Ariz 273

NY—In re Streb's Will, 288 NYS 334, 247 App Div 556

Or—In re Perry's Estate, 181 P 2d 783, 181 Or 332

Tex—Nalhaus v Feigon, Civ App, 244 SW 2d 325, error refused no reversible error

Wis—In re Bernhard's Will, 34 NW 2d 664, 253 Wis 521.

68 CJ p 790 note 41

12. Ky—Gay v Gay, 215 SW 2d 92, 308 Ky 539

Mich—In re Livingston's Estate, 295 NW 343, 295 Mich 637.

68 CJ p 790 note 42

13. Ala—King v Aird, 38 So 2d 883, 251 Ala 613

Ark—Corpus Juris quoted in Brown v Emerson, 170 SW 2d 1019, 1021, 205 Ark 735

Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1—In re Lingene-

felter's Estate, 241 P 2d 990, 38 Cal 2d 571

In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Nolan's

Estate, 78 P 2d 456, 25 Cal App 2d 738

Iowa—In re Lochmiller's Estate, 30 NW 2d 136, 238 Iowa 1232

Ky—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190—Ecken's Ex'r v Abbey, 141 SW 2d 863, 283 Ky

449—Berryman v Sidwell, 129 S W 2d 154, 278 Ky 713—Clark v Johnson, 105 SW 2d 576, 268 Ky

591—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352

Mo—Guidicy v Guidicy, 238 SW 2d 380, 361 Mo 1127—Corpus Juris

cited in Norris v Bristow, 219 S W 2d 367, 371, 358 Mo 1177, 11 A L R 2d 725—Kadderly v. Voss-

brink, 149 SW 2d 869

Or—In re Kelly's Estate, 46 P 2d 84, 150 Or 598

SD—In re Vetter's Estate, 66 NW 2d 519—In re Armstrong's Estate, 272 NW 799, 65 SD 233

Tex—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d

358, 143 Tex 25

Wis—In re Kiofanda's Will, 36 NW 2d 71, 254 Wis 186

68 CJ p 790 note 44

**Close scrutiny**

A will containing unnatural provisions will be closely scrutinized

Neb—In re Bainbridge's Estate, 36 NW 2d 625, 151 Neb 142

14. Ark—Dunklin v Black, 275 SW 2d 447—Corpus Juris quoted in

Brown v Emerson, 170 SW 2d 1019, 1021, 205 Ark 735

Ga—Bowman v Bowman, 55 SE 2d 298, 205 Ga 796

68 CJ p 791 note 45

**Statutory provision**

Under statute authorizing testator to dispose of property not incon-

sistent with law or contrary to policy of state, but requiring will to be

closely scrutinized if testator bequeathed entire estate to strangers,

to exclusion of his wife and children, and requiring refusal of probate in

such case on "slightest evidence" of any undue influence or unfair dealing,

the quoted words mean "very slight"

Ga—Bowman v Bowman, supra. 68 CJ p 790 note 44 [d]

15. Ky—Palmer v Richardson, 223 SW 2d 745, 311 Ky 190.

68 CJ p 791 note 46.

**Only a make-weight**

Unequal distribution in will is only important in doubtful will con-

test cases and then only as make-weight

Pa—In re Cookson's Estate, 188 A 904, 325 Pa. 81

16. Ark—Corpus Juris quoted in Brown v Emerson, 170 SW 2d

1019, 1021, 205 Ark 735

SD—In re Whitman's Estate, 184 N W 975, 45 SD 14

17. Ark—Brown v Emerson, 170 S W 2d 1019, 205 Ark. 735

18. Ala—King v. Aird, 38 So 2d 883, 251 Ala 613

Ky—Berryman v Sidwell, 129 S W 2d 154, 278 Ky 713

Minn—In re Meehan's Estate, 18 N W 2d 781, 220 Minn 1.

Wis—In re Gunderson's Estate, 152 NW. 157, 160 Wis 468.

The fact that the will contained unnatural, unjust, or unequal provisions has been held under the particular facts and circumstances of the case to be sufficient<sup>19</sup> or insufficient<sup>20</sup> to establish undue influence

*What constitutes unnatural will* A will is unnatural in a legal sense only when it is contrary to what the testator, from his views, feelings, and intentions, would have been expected to make<sup>21</sup> When it is in accordance with such views, it is not unnatural, however much it may differ from the ordinary actions of men in similar circumstances<sup>22</sup> Whether a will which discriminates among the relatives of the testator is unnatural or unjust depends on their conduct toward the testator, his feelings toward them, and the financial condition of the respective parties<sup>23</sup> The mere fact that the testa-

tor makes provision for his spouse,<sup>24</sup> does not provide for all his children equally,<sup>25</sup> makes a larger bequest to one relative than to another,<sup>26</sup> or the fact that close friends are remembered rather than distant relatives,<sup>27</sup> does not necessarily render the will unnatural The nephews and nieces of the testator's deceased spouse are not the natural objects of his bounty<sup>28</sup>

## § 256. — Opportunity or Disposition to Exercise Undue Influence

Mere proof of opportunity to influence the mind of the testator is insufficient to establish undue influence

Although, in determining whether or not undue influence was exerted in procuring the will, the court should consider the opportunity of the parties to exercise such influence,<sup>29</sup> mere proof of opportunity

- 19 Ky—Berryman v Sidwell, 129 S W 2d 154, 278 Ky 713—Franks' Ex'r v Bates, 128 S W 2d 739, 278 Ky 337
- NJ—Hughes v Zeller, 65 A 2d 759, 3 N J Super 146
- Or—In re Jackson's Estate, 220 P. 2d 96, 189 Or 328
- Wis—In re Feeley's Estate, 33 N W 2d 139, 253 Wis 204
- 68 C J p 789 note 38 [g]
- 20 Ark—Toombs v Blankenship, 221 S W 2d 417, 215 Ark 551
- Cal—In re Kemp's Estate, App. 190 P 2d 619—In re Comino's Estate, 131 P 2d 599, 55 Cal App 2d 806—In re Jacobs' Estate, 76 P 2d 128, 24 Cal App 2d 649—In re Gill's Estate, 58 P 2d 734, 14 Cal App 2d 526
- Colo—In re Rentfro's Estate, 79 P 2d 1042, 102 Colo 400
- Fla—Wartmann v Burleson, 190 So 789, 139 Fla 458
- Ga—Ehlers v Rheinberger, 49 S E 2d 535, 204 Ga 226
- Ill—Logsdon v Logsdon, 104 N E 2d 622, 412 Ill 19
- Kan—Anderson v Anderson, 76 P 2d 825, 147 Kan 273
- Ky—Phillips v Johnson, 198 S W 2d 305, 303 Ky 574—Madden v Cornett, 160 S W 2d 607, 290 Ky 268
- Md—Koppal v Soules, 56 A 2d 48, 189 Md 346
- Neb—In re Maruska's Estate, 64 N W 2d 734, 158 Neb 723
- NY—In re Paul's Will, 100 N Y S 2d 734, 277 App Div 1156
- In re Buttikofer's Will, 79 N Y S 2d 252, affirmed 93 N Y S 2d 920, 276 App Div 863
- NC—In re Holmes' Will, 32 S E 2d 614, 224 NC 830
- Okl—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597
- Or—In re Meier's Estate, 224 P 2d 572, 190 Or 140
- Pa—In re Morrish's Estate, 40 A 2d 907, 156 Pa Super 394
- In re Troyer's Will, Orph., 52 Lanc L Rev 151.
- SD—In re Armstrong's Estate, 272 N W 799, 65 SD 233
- Tex—Jones v Selman, Civ App, 109 S W 2d 1003, error dismissed—Maul v Williams, Civ App, 38 S W 2d 1087
- Wis—In re Williams' Will, 41 N W 2d 191, 256 Wis 338—In re Truehl's Will, 264 N W 254, 220 Wis 134
- 68 C J p 789 note 38 [h], p 790 note 41 [c]
21. Ky—Clark v Johnson, 105 S W 2d 576, 268 Ky 591
- Pa—In re Ewart's Estate, 92 A 708, 246 Pa. 579
- Tenn—Cude v Culberson, 209 S W 2d 506, 30 Tenn App 628
- Utah—In re Lavelle's Estate, 248 P 2d 372
- Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444
22. Ky—Clark v Johnson, 105 S W 2d 576, 268 Ky 591
- Pa—In re Ewart's Estate, 92 A 708, 246 Pa. 579
- Tenn—Corpus Juris cited in Cude v Culberson, 209 S W 2d 506, 524, 30 Tenn App 628
- Utah—In re Lavelle's Estate, 248 P 2d 372
- Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444
- Wills held not to be unnatural**
- Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606
- Iowa—In re Lochmiller's Estate, 30 N W 2d 136, 238 Iowa 1232
- Ky—Madden v Cornett, 160 S W 2d 607, 290 Ky 268—Ecken's Ex'r v Abbey, 141 S W 2d 863, 283 Ky 449
- Md—Koppal v. Soules, 56 A 2d 48, 189 Md 346
- Mo—O'Reilly v O'Reilly, App., 157 S W 2d 220
- Neb—In re Coist's Estate, 18 N W 2d 513, 116 Neb 1
- NJ—In re Neuman's Estate, 32 A 2d 826, 133 N J Eq 532.
- NY—In re Streb's Will, 288 N Y S 334, 247 App Div 556
- NC—In re Holmes' Will, 32 S E 2d 614, 224 NC 830
- Okl—In re Lillie's Estate, 159 P 2d 542, 195 Okl 597
- Or—In re Andersen's Estate, 235 P 2d 869, 192 Or 441—In re Meier's Estate, 224 P 2d 572, 190 Or 140
- Tex—In re Caruthers' Estate, Civ App, 151 S W 2d 946, error dismissed, judgment correct
- Utah—In re Lavelle's Estate, 248 P 2d 372
- Wis—In re Borzych's Estate, 66 N W 2d 164, 267 Wis 526—In re Dawley's Estate, 49 N W 2d 432, 259 Wis 516
- Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444
- 68 C J p 791 note 49 [a]
- Distribution held unnatural**
- Conn—Maroncelli v Starkweather, 133 A 209, 104 Conn 419
- 68 C J p 791 note 49 [b]
23. Minn—In re Marsden's Estate, 13 N W 2d 765, 217 Minn 1
- 24 Mo—Snell v Seek, 250 S W 2d 336, 363 Mo 225
- NY—In re Santrucek, 145 N E 739, 239 N Y 59
25. Cal—In re Shay's Estate, 237 P 1079, 196 Cal 355
- NJ—In re Alper's Will, 60 A 2d 320, 142 N J Eq 529, affirmed 65 A 2d 736, 2 N J 104
- 26 Tex—Drewry v Armstrong, Civ. App., 233 S W 281
- 27 Pa—In re Llewellyn's Estate, 145 A 810, 296 Pa 74, 66 A L R 222
- 68 C J p 791 note 53
- 28 Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584
- In re Chesney's Estate, 228 P 2d 46, 102 Cal App 2d 708
29. Iowa—Corpus Juris cited in In re Telsrow's Estate, 22 N W 2d 792, 796, 237 Iowa 676.

to influence the mind of the testator,<sup>30</sup> even though | shown to be coupled with an interest,<sup>31</sup> motive,<sup>32</sup>

Ky—Bennett v Kissinger, 231 SW 2d 71, 313 Ky 417  
Okl—McCarty v Weatherly, 204 P 632, 85 Okl 123

#### Evidence held insufficient

To show opportunity to influence testator

Cal—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135

30 Cal—In re Welch's Estate, 272 P 2d 512, 43 Cal 2d 173—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 581—In re Easton's Estate, 35 P 2d 614, 140 Cal 367

In re De Mont's Estate, 282 P 2d 963, 132 Cal App 2d 720—In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Greenhill's Estate, 221 P 2d 310, 99 Cal App 2d 155—In re Kemp's Estate, App, 190 P 2d 619—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Lewis' Estate, 149 P 2d 51, 64 Cal App 2d 480—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85—In re Jacobs' Estate, 76 P 2d 128, 24 Cal App 2d 619

Ga—Whitfield v Pitts, 53 SE 2d 519, 205 Ga 259—Bailey v Bailey, 50 SE 2d 617, 204 Ga 556—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Brumelow v Hopkins, 29 SE 2d 42, 197 Ga 247—Ori v Blalock, 25 SE 2d 668, 195 Ga 863  
Ill—Logsdon v Logsdon, 104 NE 2d 622, 412 Ill 19

Iowa—In re Klein's Estate, 42 NW 2d 592, 211 Iowa 1103—In re Brooke's Will, 26 NW 2d 688, 238 Iowa 306—**Corpus Juris cited in** In re Telsrow's Estate, 22 NW 2d 792, 796, 237 Iowa 672—Walters v Heaton, 271 NW 310, 223 Iowa 405—In re Johnson's Estate, 269 NW 792, 222 Iowa 787

Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455—In re Hall's Estate, 195 P 2d 612, 165 Kan 465

Ky—Rough v Johnson, 274 SW 2d 376—Nunn v Williams, 254 SW 2d 698—Faulkes v Brummett's Adm'r, 204 SW 2d 493, 305 Ky 434—Philips v Johnson, 198 SW 2d 305, 303 Ky 574—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 202 Ky 318—Ecken's Ex'x v Abbey, 141 SW 2d 863, 283 Ky 449—Karr v Karr's Ex'r, 141 SW 2d 279, 283 Ky 355—Franks' Ex'r v Bates, 128 SW 2d 739, 278 Ky 337—Rueff v Light, 114 SW 2d 506, 272 Ky

449—Combs v Combs, 112 SW 2d 989, 271 Ky 543—Jackson's Ex'r v Semones, 98 SW 2d 505, 266 Ky 352—Parks v Moore's Ex'r, 97 SW 2d 579, 265 Ky 678—Hanna v Eiche, 79 SW 2d 950, 258 Ky 282  
Mass—Livermore v Seward, 41 NE 2d 290, 311 Mass 389—Foley v Philbrook, 15 NE 2d 452, 300 Mass 418

Mich—Foshee v Krum, 52 NW 2d 358, 332 Mich 636—In re Vieeland's Estate, 35 NW 2d 170, 323 Mich 316—In re Vallender's Estate, 17 NW 2d 213, 310 Mich 350—In re Thiede's Estate, 4 NW 2d 47, 301 Mich 658—In re Grow's Estate, 299 NW 836, 299 Mich 133—In re Getchell's Estate, 295 NW 360, 295 Mich 681—In re Brady's Estate, 295 NW 230, 295 Mich 472—In re Teller's Estate, 284 NW 696, 288 Mich 103—In re Cotcher's Estate, 264 NW 325, 274 Mich 154—In re La Liberte's Estate, 262 NW 278, 272 Mich 424—In re Lacroix's Estate, 251 NW 319, 265 Mich 59

Minn—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289—In re Meehan's Estate, 18 NW 2d 781, 220 Minn 1—In re Mazanec's Estate, 283 NW 745, 204 Minn 406

Miss—Halford v Hines, 79 So 2d 264  
Mo—Callaway v Blankenbaker, 141 SW 2d 810, 346 Mo 383

Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67—In re India's Estate, 19 NW 2d 37, 146 Neb 179

NJ—In re Gotchel's Estate, 76 A 2d 901, 10 N J Super 208—In re Filo's Will, 75 A 2d 517, 9 N J Super 146—In re Skewis' Will, 64 A 2d 892, 2 N J Super 114

In re Dyer's Will, 36 A 2d 368, 135 N J Eq 58

NY—In re Jones' Estate, 278 NYS 887, 155 Misc 49

Okl—Amos v Fish, 144 P 2d 967, 193 Okl 406—Canfield v Canfield, 31 P 2d 152, 167 Okl 590

Or—In re Scott's Estate, 228 P 2d 417, 191 Or 90—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Perry's Estate, 181 P 2d 783, 181 Or 332

Pa—In re Snedeker's Estate, 84 A 2d 568, 368 Pa 607—In re Cookson's Estate, 188 A 904, 325 Pa 81

In re Brooks' Estate, Orph, 27 Del Co 140—In re Porter's Estate, Orph, 4 Fay LJ 37, affirmed 19 A 2d 731, 341 Pa 476—In re Singer's Estate, Orph, 45 Lanc L Rev 585

RI—Lomastro v Hamilton, 68 A 2d 39, 76 RI 114

SD—In re Armstrong's Estate, 272 NW 799, 65 SD 233

Tenn—Hammond v Union Planters

Nat Bank, 222 SW 2d 377, 189 Tenn 93

Fitch v American Trust Co, 4 Tenn App 87

Tex—Black v Black, Civ App, 240 SW 2d 458, error refused no reversible error—Breedon v Miller, Civ App, 236 SW 2d 225—Navarro v Rodriguez, Civ App, 235 SW 2d 665—Cadena v Cadenas, Civ App, 223 SW 2d 678, error refused no reversible error—Thoinburg v Manskey, Civ App, 219 SW 2d 720—Kolb v Chandler, Civ App, 209 SW 2d 783—Burgess v Sylvester, Civ App, 177 SW 2d 271, affirmed 182 SW 2d 358, 143 Tex 25—In re Caruthers' Estate, Civ App, 151 SW 2d 946, error dismissed, judgment correct—Bethel v Yearwood, Civ App, 142 SW 2d 927, error dismissed, judgment correct—Jones v Selman, Civ App, 109 SW 2d 1003, error dismissed

Utah—In re Lavelle's Estate, 248 P 2d 372

Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517—In re Jolly's Estate, 85 P 2d 267, 197 Wash 349

W Va—Ritz v Kingdon, 79 SE 2d 123—Ebert v Ebert, 200 SE 831, 120 W Va 722

68 C J p 791 note 56

31. Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Easton's Estate, 35 P 2d 614, 140 Cal 367

In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Kemp's Estate, App, 190 P 2d 619—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150—In re Agnew's Estate, 151 P 2d 126, 65 Cal App 2d 553—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85

SD—In re Rowlands' Estate, 18 N 2d 290, 70 SD 419

Tex—Jones v Selman, Civ App, 109 SW 2d 1003

68 C J p 792 note 57

32. Cal—In re Finkler's Estate, 46 P 2d 149, 3 Cal 2d 584—In re Easton's Estate, 35 P 2d 614, 140 Cal 367

In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Kemp's Estate, App, 190 P 2d 619—In re Watkins' Estate, 184 P 2d 192, 81 Cal App 2d 465—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150—In re Agnew's Estate, 151 P 2d 126, 65

power,<sup>33</sup> intention,<sup>34</sup> disposition,<sup>35</sup> or solicitation,<sup>36</sup> to do so, or opportunity together with an unequal or unjust distribution of property,<sup>37</sup> does not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act<sup>38</sup>

Undue influence is established where it is shown that the testator was subject to such influence, that the opportunity to exercise it existed, that there was a disposition to exercise it, and the result appears to be the effect of such influence,<sup>39</sup> and where any three of these four elements are established, very

little evidence of the fourth element is required to prove undue influence<sup>40</sup>

## § 257. — Declarations of Testator and Others

While they may be significant in connection with other evidence, declarations of the testator should not be given conclusive weight on the issues of fraud and undue influence

In the absence of other evidence tending to prove fraud or undue influence, conclusive weight should not be given to declarations of the testator,<sup>41</sup> not contemporaneous with the making of the will,<sup>42</sup> as, for example, of a desire to destroy the will,<sup>43</sup> to

Cal App 2d 553—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135—In re Clark's Estate, 129 P 2d 969, 55 Cal App 2d 85  
 Kan—In re Hall's Estate, 195 P 2d 612, 165 Kan 465  
 Minn—In re Mazanec's Estate, 283 NW 745, 204 Minn 406  
 Neb—In re India's Estate, 19 NW 2d 37, 146 Neb 179  
 NJ—In re Gotchel's Estate, 76 A 2d 901, 10 NJ Super 208—In re Filo's Will, 75 A 2d 517, 9 NJ Super 146  
 Okl—Amos v Fish, 144 P 2d 967, 193 Okl 406  
 Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Perry's Estate, 181 P 2d 783, 181 Or 332  
 SD—In re Rowland's Estate, 18 NW 2d 290, 70 SD 419—In re Armstrong's Estate, 272 NW 799, 65 SD 233  
 68 CJ p 792 note 58  
**Evidence held insufficient**  
 To show motive  
 Tex—Jones v Selman, Civ App, 109 SW 2d 1003, error dismissed  
 33 Kan—In re Millar's Estate, 207 P 2d 483, 167 Kan 455  
 Okl—Amos v Fish, 144 P 2d 967, 193 Okl 406  
 34 NJ—In re Tunison's Will, 90 A 695, 83 NJ Eq 277, affirmed 93 A 1087  
 35 Iowa—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Telsrow's Estate, 22 NW 2d 792, 237 Iowa 676—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Brooks' Estate, 294 NW 735, 229 Iowa 485—Walters v Heaton, 271 NW 310, 223 Iowa 405—In re Johnson's Estate, 269 NW 792, 222 Iowa 787—Zinkula v Zinkula, 154 NW 158, 171 Iowa 287  
 Minn—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1

36. Iowa—*Corpus Juris* cited in Olsen v Corporation of New Melleray, 60 NW 2d 832, 840, 245 Iowa 407—*Corpus Juris* cited in In re Telsrow's Estate, 22 NW

2d 792, 796, 237 Iowa 672—In re Cooper's Estate, 206 NW 95, 200 Iowa 1180

37. Mich—In re Grow's Estate, 299 NW 836, 299 Mich 133  
 Tex—In re Caruthers' Estate, Civ App, 151 SW 2d 946, error dismissed, judgment correct  
 68 CJ p 792 note 62

38 Cal—In re Lombardi's Estate, 276 P 2d 67, 128 Cal App 2d 606—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re McGivern's Estate, 168 P 2d 232, 74 Cal App 2d 150—In re Hull's Estate, 146 P 2d 242, 63 Cal App 2d 135—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367  
 Ga—Ehlers v Rheinberger, 49 S E 2d 535, 204 Ga 226  
 Ky—Rough v Johnson, 274 SW 2d 376—Nunn v Williams, 254 S W 2d 693—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318—Coulter v Hardin, 119 SW 2d 562, 274 Ky 544—Hanna v Eiche, 79 SW 2d 950, 258 Ky 282  
 Or—In re Hill's Estate, 256 P 2d 735, 198 Or 307—In re Scott's Estate, 228 P 2d 417, 191 Or 90  
 RI—Brousseau v Messier, 84 A 2d 608, 79 RI 106  
 SD—In re Rowland's Estate, 18 NW 2d 290, 70 SD 419  
 Tex—In re Caruthers' Estate, Civ App, 151 SW 2d 946, error dismissed, judgment correct  
 68 CJ p 792 note 63

39. Iowa—Olsen v Corporation of New Melleray, 60 NW 2d 832, 245 Iowa 407  
 Neb—Eggert v Schroeder, 62 NW 2d 266, 158 Neb 65—In re Witte's Estate, 16 NW 2d 203, 145 Neb 295, rehearing denied 17 NW 2d 477, 145 Neb 295—Gidley v Gidley, 265 NW 245, 130 Neb 419  
 Wis—In re Dobson's Will, 46 NW 2d 758, 258 Wis 587  
 40 Wis—In re Roehl's Will, 53 NW 2d 180, 261 Wis 466—In re King's Will, 29 NW 2d 69, 251 Wis 269—In re Lee's Will, 23 NW 2d 405, 249 Wis 59—In re Raasch's Will, 284 NW 571, 230

Wis 548—In re Stanley's Will, 276 NW 353, 226 Wis 354—In re Link's Will, 231 NW 177, 202 Wis 1

41. Iowa—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315  
 Mich—In re Reynolds' Estate, 262 NW 649, 273 Mich 71  
 Miss—Rena v Wells, 167 So 620, 175 Miss 458  
 Mo—Doll v Fricke, 171 SW 2d 755, 237 Mo App 1148  
 NY—In re Henderson's Will, 1 NYS 2d 871, 253 App Div 140, reargument denied 1 NYS 2d 857, 253 App Div 869, motion granted 15 NE 2d 679, 278 NY 571  
 In re Boyle's Will, 128 NYS 2d 259, 205 Misc 497  
 NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91  
 Pa—In re Cookson's Estate, 188 A 904, 325 Pa 81  
 In re Geho's Estate, Orph, 33 Berks Co 43, affirmed 17 A 2d 312, 340 Pa 412—In re Freeman's Estate, Orph, 43 La k Jur 65  
 Tex—Hulme v Jaschke, Civ App, 168 SW 2d 326, error refused  
 68 CJ p 792 note 66

Admissibility of such declarations see supra § 247  
 Presumptive effect, if any, given declarations of testator see supra § 243  
 Weight given declarations of testator when combined with evidence of weakness of mind see infra § 258

### Wholly independent evidence

The exercise of undue influence in the execution of a will must be established by testimony wholly independent of statements or declarations of testator  
 Mich—In re Brady's Estate, 295 NW 230, 295 Mich 472

42 Mo—Coldwell v Coldwell, 228 SW 95  
 NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91

43. Pa—In re Murray's Estate, 11 Pa Co 263.

the effect that the instrument in question is his will,<sup>44</sup> that he had made no will,<sup>45</sup> that he had been unduly influenced to make the will,<sup>46</sup> that he was dissatisfied with some provisions of his will,<sup>47</sup> of things the proponent had told him,<sup>48</sup> or that he intended to dispose of his property by will in a certain way<sup>49</sup>

Declarations of the testator may be significant in connection with other evidence of undue influence,<sup>50</sup> and it has been held that an entire change from former testamentary intentions is a strong circumstance to support a claim of undue influence.<sup>51</sup> Evidence of declarations consistent with the will is entitled to weight.<sup>52</sup> In the absence of evidence of undue influence, statements of people other than the testator showing a disposition unduly to influence the testator have little evidentiary value.<sup>53</sup> Declarations made by a testator while he was insane have no weight as evidence.<sup>54</sup>

## § 258. — Physical or Mental Condition of Testator

While the testator's physical or mental weakness is not of itself sufficient to establish undue influence, it is a factor of considerable weight

To some extent the undue influence sufficient to set aside a will must depend on the physical and mental condition of the testator.<sup>55</sup> The two are intimately connected,<sup>56</sup> and what would be undue influence in a case of physical and mental weakness would not be undue influence where the testator was in full possession of his mental faculties.<sup>57</sup> The feebleness of the mind of the testator, no matter from what cause, the less evidence will be required to invalidate the will of such person,<sup>58</sup> conversely, very strong evidence is required to show undue influence where testator was of strong mind and determined nature.<sup>59</sup>

Evidence of physical weakness,<sup>60</sup> or weakness of mind,<sup>61</sup> on the part of the testator, standing alone

44. Ga.—Hughes v Meredith, 24 Ga 325, 71 Am D 127

45. Mo.—Cawthorn v Haynes, 24 Mo 236

68 C J p 793 note 70

46. Ala.—Kahalley v Kahalley, 28 So 2d 792, 248 Ala 624

NC—In re Turnage's Will, 179 SE 332, 208 NC 130

68 C J p 793 note 71

47. Pa.—Wetzel v Edwards, 16 A 2d 441, 340 Pa 121

48. Cal.—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709

Mo.—Adams v Kendrick, 11 S W 2d 16, 321 Mo 310

### Falsity of statement

Evidence that testatrix made statement that sole residuary legatee had informed her that one or more of relatives of testatrix' husband wanted to put her in an insane asylum was held insufficient to sustain finding of fraud on part of sole residuary legatee in absence of proof that, even though statement had been made by legatee, legatee's statement was false

Cal.—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709

49. Iowa.—In re Klein's Estate, 42 N W 2d 593, 241 Iowa 1103

68 C J p 793 note 73

**Proof of express testamentary intent contrary to that expressed in will is not of probative value in establishing undue influence, in absence of evidence that undue influence was in fact exerted**

Tex.—In re Caruthers' Estate, Civ App, 151 S W 2d 946, error dismissed, judgment correct

50. Mo.—Welch v Welch, 190 S W 2d 936, 354 Mo. 654.

NY—In re Limberg's Will, 13 NE 2d 605, 277 NY 129

In re Boyle's Will, 128 N Y S 2d 259, 205 Misc 497

Pa.—Buhan v Keslar, 194 A 917, 328 Pa 312

In re Freeman's Estate, Orph, 43 Lack Jur 65

51. Fla.—Newman v Smith, 82 So 236, 77 Fla. 633, 667

52. Ky.—Palmer v Richardson, 223 S W 2d 745, 311 Ky 190

Mich.—In re Hannan's Estate, 23 N W 2d 222, 315 Mich 102

68 C J p 793 note 75

53. N J.—In re Alper's Will, 60 A 2d 320, 142 N J Eq 529, affirmed 65 A 2d 736, 2 N J 104

68 C J p 793 note 76

### Creation of resentment and false impression

In will contest, evidence held to sustain finding that recipient of entire estate had continuously represented to testatrix that husband of contestant was misappropriating testatrix' estate, and that certain letters showed misapplication of her funds by husband

Utah.—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

54. Cal.—In re Lang's Estate, 2 P 491, 65 Cal 19

55. Mich.—In re Jackson's Estate, 190 N W 762, 220 Mich 565—In re Hoffmann's Estate, 115 N W 690, 151 Mich 595

56. Mich.—In re Jackson's Estate, 190 N W 762, 220 Mich 565

68 C J p 793 note 79

57. Tex.—Moore v Horne, Civ App, 136 S W 2d 638, error dismissed, judgment correct

68 C J p 793 note 80.

58. Ark.—Dunklin v Black, 275 S W 2d 447

Ill.—Mitchell v Van Scoyk, 115 NE 2d 226, 1 Ill 2d 160—Sulzberger v Sulzberger, 23 NE 2d 46, 372 Ill 240

Kan.—In re Casida's Estate, 131 P 2d 644, 156 Kan 73

Ky.—Hines v Price, 221 S W 2d 673, 310 Ky 758—Smith v Ridner, 168 S W 2d 559, 293 Ky 66

68 C J p 793 note 81

59. Pa.—In re Kline's Estate, 115 A 2d 364, 382 Pa 395

60. Cal.—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302

Fla.—In re Mach's Estate, 159 So 519, 118 Fla 421

Ill.—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321

Iowa.—Glaser v Melinski, 25 N W 2d 379, 238 Iowa 140

Ky.—Parks v Moore's Ex'r, 97 S W 2d 579, 265 Ky 678

NC—In re Hinton's Will, 104 SE 341, 180 NC 206

Pa.—In re Lauer's Estate, 41 A 2d 552, 351 Pa 438—In re Cookson's Estate, 188 A 904, 325 Pa. 81

Utah.—In re Lavelle's Estate, 248 P 2d 372—In re George's Estate, 112 P 2d 498, 100 Utah 230

61. Cal.—In re Haywood's Estate, 240 P 2d 1028, 109 Cal App 2d 388

—In re Kemp's Estate, App, 190 P 2d 619

Ky.—Karr v Karr's Ex'r, 141 S W 2d 279, 283 Ky 355

Pa.—In re Morrish's Estate, 40 A 2d 907, 156 Pa Super 394

In re Brooks' Estate, Orph, 27 Del Co 140—In re Singer's Estate, Orph, 45 Lanc L Rev 535.

is not sufficient to establish undue influence, but it is entitled to considerable weight,<sup>62</sup> and very little additional proof is required to justify a finding that the will was procured by undue influence.<sup>63</sup> Thus, undue influence may be deemed established, when there is evidence of the testator's weak mental condition combined with evidence that the will is inconsistent with a prior intent, expressed either in his declarations,<sup>64</sup> or in a former will,<sup>65</sup> or combined with evidence of an unnatural disposition.<sup>66</sup> The circumstances attending the execution of a will by a testator who is dangerously ill and expecting to die, at a time when he is surrounded exclusively by those who benefit by it, are subject to close scrutiny.<sup>67</sup> On the other hand, evidence of the strength of the testator's mind is entitled to considerable weight,<sup>68</sup> and before the will of a testator possessing

a strong and healthy mind will be set aside the proof should fairly and convincingly lead to the conclusion of undue influence.<sup>69</sup>

In particular cases, the evidence has been held sufficient<sup>70</sup> or insufficient,<sup>71</sup> in the light of the testator's mental and physical condition, to establish undue influence.

## § 259 — Secrecy in Execution

Secrecy as to the terms or execution of a will does not establish undue influence

The fact that the testator did not divulge the terms of the will,<sup>72</sup> or did not tell that he had made a will,<sup>73</sup> or secrecy in the execution of the will and suppression by the beneficiaries of the fact of its existence,<sup>74</sup> or the fact that the beneficiary failed

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444  
68 CJ p 793 note 83

**Fact that guardian had been appointed for testatrix was not conclusive on issues of testamentary capacity or undue influence**

Minn—In re Marsden's Estate, 13 N W 2d 765, 217 Minn 1

### Evidence held sufficient

To show mental weakness  
Wis—In re Feeley's Estate, 33 N W 2d 139, 253 Wis 201

### Evidence held insufficient

To show mental weakness  
NY—In re White's Will, 114 NYS 2d 431, 280 App Div 454  
Pa—In re Geist's Estate, 191 A 29, 325 Pa 401

62. Cal—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302  
Ky—Park v Moore's Ex'r, 97 S W 2d 579, 265 Ky 678  
NC—In re Ball's Will, 33 SE 2d 619, 225 NC 91  
68 CJ p 794 note 84

63. Iowa—In re Overpeck's Will, 120 N W 1044, 122 N W 928, 144 Iowa 400  
68 CJ p 794 note 85

**Where both undue influence and mental incapacity are relied on in contesting a will, the proof is not required to be as convincing as where mental incapacity alone is charged**  
Ky—Leach v Alger, 194 S W 2d 164, 302 Ky 149

64. Mich—In re Hillman's Estate, 185 N W 684 217 Mich 142  
68 CJ p 794 note 86  
Weight given declarations of testator generally see supra § 257

65. Wash—In re Hanson's Estate, 14 P 2d 702, 169 Wash 637  
68 CJ p 794 note 87  
Weight given prior wills generally see infra § 260

66. Minn—In re Stephens' Estate, 293 N W 90, 207 Minn 597

Tex—Moore v Horne Civ App. 136 S W 2d 638, error dismissed, judgment correct  
68 CJ p 794 note 88  
Weight given unnatural dispositions generally see supra § 255

67. Cal—In re Miller's Estate, 60 P 2d 498 16 Cal App 2d 151—In re Gallo's Estate, 214 P 496, 61 Cal App 163  
68 CJ p 794 note 89

68. Pa—In re Murray's Estate, 11 Pa Co 263

69. Cal—In re Anderson's Estate, 198 P 407, 185 Cal 700  
68 CJ p 794 note 91

70. Cal—Caldwell v Taylor, 52 P 2d 213, 4 Cal 2d 636  
In re Johnson's Estate 193 P 2d 782, 185 Cal App 2d 760—In re Johnson's Estate, 87 P 2d 900, 31 Cal App 2d 251—In re Miller's Estate, 60 P 2d 498, 16 Cal App 2d 154  
—In re Hartlev's Estate, 31 P 2d 240 137 Cal App 630

Fla—In re Palmer's Estate, 48 So 2d 732

Ind—Haas v Haas, 96 NE 2d 116, 121 Ind App 335, rehearing denied 98 NE 2d 232, 121 Ind App 335

Kan—Smith v Salthouse, 76 P 2d 836 147 Kan 354—In re Hooper's Estate, 61 P 2d 1335, 144 Kan 549  
Mass—Mooney v McKenzie, 88 NE 2d 546, 324 Mass 685—Duggan v Reannick, 77 NE 2d 639, 322 Mass 425—Viens v Viens, 19 NE 2d 306, 302 Mass 366

Minn—In re Olson's Estate, 35 N W 2d 439, 227 Minn 289

Pa—In re Schwartz' Estate, 16 A 2d 374, 340 Pa 170

Tex—Adamson v Burtle, Civ App. 186 S W 2d 388, refused for want of merit

Wis—In re Maxcy's Estate, 46 N W 2d 479, 258 Wis 360—In re Sow-

ka's Will, 19 N W 2d 898, 247 Wis 198

71. Cal—In re Leahy's Estate, 54 P 2d 704, 5 Cal 2d 301  
In re Short's Estate, 58 P 2d 186, 14 Cal App 2d 258

Ga—Ehlers v Rheinberger, 49 SE 2d 535, 204 Ga 226—Dutton v Nash, 197 SE 637, 186 Ga 292  
Mass—Ronan v Moroney, 47 NE 2d 933, 313 Mass 475

Neb—In re Hagan's Estate, 9 N W 2d 794, 143 Neb 459, 154 A L R 573  
NY—In re Jones' Estate, 278 NYS 887, 155 Misc 49

In re Silverman's Will, 97 NYS 2d 490—In re Jerrells' Will, 63 NYS 2d 499, appeal dismissed 70 NYS 2d 580

Pa—In re Roberts' Estate, 94 A 2d 760, 373 Pa 7

In re Boyd's Estate, 77 A 2d 662, 168 Pa Super 182

In re Sowers' Estate, Orph, 27 Wash Co 141

Tex—Firestone v Sims, Civ App. 174 S W 2d 279, error refused—In re Caruthers' Estate, Civ App. 151 S W 2d 946, error dismissed judgment correct—Davidson v Gray, Civ App. 97 S W 2d 488

Utah—In re Goldsberry's Estate, 81 P 2d 1106, 95 Utah 379, 117 A L R 1444

Wis—In re Dobson's Will, 46 N W 2d 758, 258 Wis 587—In re Stanley's Will, 276 N W 353, 226 Wis 351

Wyo—In re Nelson's Estate, 266 P 2d 238, 72 Wyo 444

72. Tex—Berry v Brown, Civ App. 148 S W 1117

73. Or—In re Heaverne's Estate, 246 P 720, 118 Or 308

Wis—In re Ball's Estate, 141 N W 8, 153 Wis 27

74. N J—In re Alper's Will, 60 A 2d 320, 142 N J Eq 529, affirmed 65 A 2d 736, 2 N J 104  
68 CJ p 794 note 94.

to inform disinherited relatives of the execution of the will,<sup>75</sup> has been held to be insufficient alone to show undue influence, but it has also been held that the fact that the beneficiaries kept execution of the will a secret from those who had an equal right to know of its execution is a badge of fraud or undue influence.<sup>76</sup> The fact that the will was prepared in accordance with directions given the draftsman by the testator when no one else was present is strong evidence of a lack of undue influence.<sup>77</sup> Execution of a will with great formality in the presence of many persons negatives undue influence.<sup>78</sup>

*Exclusion of contestants from presence of testator* The exclusion by the beneficiaries of the contestant from the presence of the testator is alone insufficient to prove undue influence,<sup>79</sup> although when considered with other evidence of undue influence it is entitled to considerable weight.<sup>80</sup> According to some authority the evidence, where the testator was surrounded exclusively by the beneficiaries at the execution of the will, must be weighed in the light of the fact that the circumstances surrounding the immediate execution of the will were within the exclusive knowledge of those upholding it while the opportunity of acquiring such knowledge was withheld from the contestants.<sup>81</sup>

## § 260. — Prior Wills

The mere fact that the testator's prior will contained different provisions is insufficient to establish undue influence.

Prior wills containing similar provisions have been held to be entitled to considerable weight to show that the will is not the result of undue influence.<sup>82</sup> Prior wills containing different dispositions than the one in question have been held to be insufficient to show undue influence,<sup>83</sup> particularly where there is evidence explaining the change,<sup>84</sup> but a change from the disposition made by a prior will is a circumstance to be considered on the question of undue influence,<sup>85</sup> particularly where the change is from a natural to an unnatural disposition.<sup>86</sup> A change from a will embodying a careful plan of distribution to one benefiting the person charged with undue influence is an important element for consideration on the question of undue influence.<sup>87</sup>

## § 261. — Indirect or Circumstantial Evidence

The execution of the will as the result of undue influence may be established by circumstantial evidence, the circumstances must be so connected and of such probative force as to lead to a reasonable conclusion that undue influence was exercised, and must be inconsistent with an absence of undue influence.

Since fraud and undue influence are rarely susceptible of direct proof, such proof is not required,<sup>88</sup>

75. Minn.—In re Meehan's Estate, 18 NW 2d 781, 220 Minn 1  
SD—In re Armstrong's Estate, 272 NW 799, 65 SD 233

### Evidence held insufficient

(1) To show that beneficiary secretly procured execution of will in her favor

Or.—In re Knutson's Will, 41 P 2d 793, 149 Or 467

(2) To show that any of the proponents had knowledge of will prior to time of its execution

Mo.—Hahn v Brueseke, 155 SW 2d 98, 348 Mo 708

76 Fla.—Corpus Juris cited in In re Burton's Estate, 45 So 2d 873, 875

68 CJ p 794 note 95

77. Cal.—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293

78. Minn.—In re Marsden's Estate, 13 NW 2d 765, 217 Minn 1  
Or.—In re Meier's Estate, 224 P 2d 572, 190 Or 140.

79. Miss.—Ward v Ward, 87 So 153, 124 Miss 697  
68 CJ p 783 note 72

Admissibility of exclusion of friends

or relatives from presence of testator see supra § 250

80. Cal.—In re Gallo's Estate, 214 P 496, 61 Cal App 163

81. Cal.—In re Gallo's Estate, supra

82. Cal.—In re King's Estate, 146 P 2d 952, 63 Cal App 2d 365  
68 CJ p 794 note 97

Admissibility of prior wills see supra § 245

Presumptions, if any, arising because of discrepancy between will and testator's declared intention see supra § 243

Weight given prior will coupled with evidence of weakness of mind see supra § 258

83. Tex.—Griffin v Griffin, Civ App, 271 SW 2d 714

Wis.—In re Bernhard's Will, 34 NW 2d 664, 253 Wis 521  
68 CJ p 794 note 98

A mere change of mind is not enough to show undue influence

Md.—Sellers v Qualls, 110 A 2d 73—Koppal v Soules, 56 A 2d 48, 189 Md 346

84. Cal.—In re Williams' Estate, 221 P 2d 714, 99 Cal App 2d 302—In re Llewellyn's Estate, 189 P 2d 822, 83 Cal App 2d 534, hearing denied 191 P 2d 419, 83 Cal App 2d 534.

85. Cal.—In re Lingenfelter's Estate, 241 P 2d 990, 38 Cal 2d 571  
Minn.—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289

86. Minn.—In re Olson's Estate, supra

87. NY.—In re Lachat's Estate, 52 NYS 2d 451, 184 Misc 492, appeal dismissed 60 NYS 2d 286

88. Cal.—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Monks' Estate, 120 P 2d 167, 48 Cal App 2d 603, appeal dismissed Monks v Lee, 63 S Ct 50, 317 US 590, 87 L Ed 483, rehearing denied 63 S Ct 223, 317 US 711, 87 L Ed 566

DC—Duckett v Duckett, 134 F 2d 527, 77 US App DC 303

Ga.—Stephens v Brady, 73 SE 2d 182, 209 Ga 428

Ind.—Workman v Workman, 46 NE 2d 718, 113 Ind App 245

Iowa.—In re Rogers' Estate, 47 NW 2d 818, 242 Iowa 627—In re Heller's Estate, 11 NW 2d 586, 233 Iowa 1356

Mass.—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429—Mirick v Phelps, 8 NE 2d 749, 297 Mass 250—Briggs v Weston, 2 NE 2d 466, 294 Mass 452

Miss.—Curry v Lucas, 180 So 397, 181 Miss 720



indirect or circumstantial evidence being sufficient,<sup>89</sup> | if there is sufficient affirmative evidence from which

Mo—Glover v. Bruce, 265 SW 2d 346—Welch v. Welch, 190 SW 2d 936, 354 Mo 654—Walter v. Alt, 152 SW 2d 135, 348 Mo 53—Callaway v. Blankenbaker, 141 SW 2d 810, 346 Mo 383—Rex v. Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589

McGill v. Wiltz, App, 148 SW 2d 822

Neb—In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915

NJ—In re Reynolds' Estate, 27 A 2d 226, 132 NJEq 141, affirmed 32 A 2d 853, 133 NJEq 344

NY—In re Richards' Will, 292 NY S 384, 249 App Div 793, motion denied 12 NE 2d 575, 276 NY 560, affirmed 13 NE 2d 455, 277 NY 520

68 CJ p 795 note 99

89. Ala—Cook v. Morton, 1 So 2d 890, 241 Ala 188

Cal—In re Jamison's Estate, 256 P 2d 984, 41 Cal 2d 1—In re Leahy's Estate, 54 P 2d 704, 5 Cal 3d 30

In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139—In re Hannam's Estate, 236 P 2d 208, 106 Cal App 2d 782—In re Ridgway's Estate, 206 P 2d 892, 92 Cal App 2d 325—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Pohlmann's Estate, 201 P 2d 446, 89 Cal App 2d 563—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Monks' Estate, 120 P 2d 167, 48 Cal App 2d 603, appeal dismissed Monks v. Lee, 63 S Ct 50, 317 US 590, 87 L Ed 483, rehearing denied 63 S Ct 323, 317 US 711, 87 L Ed 566—

In re Bucher's Estate, 120 P 2d 44, 48 Cal App 2d 465—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263—In re Greuner's Estate, 87 P 2d 872, 31 Cal App 2d 161—In re Miller's Estate, 60 P 2d 493, 16 Cal App 2d 154

Colo—Ofstad v. Sarconi, 252 P 2d 94, 126 Colo 565—In re Porter's Estate, 240 P 2d 516, 125 Colo 16

Conn—Lee v. Horrigan, 98 A 2d 909, 140 Conn 232

Fla—In re Burton's Estate, 45 So 2d 873

Ga—Stephens v. Brady, 73 SE 2d 182, 209 Ga 428—Norman v. Hubbard, 47 SE 2d 574, 203 Ga 530—Brum-below v. Hopkins, 29 SE 2d 42, 197 Ga 247

Ill—Hockersmith v. Cox, 95 NE 2d 464, 407 Ill 321—Knudson v. Knudson, 46 NE 2d 1011, 382 Ill 492

Ind—Cahill v. Cliver, 98 NE 2d 388, 122 Ind App. 75—Haas v. Haas, 96 NE 2d 116, 121 Ind App 335, re-

hearing denied 98 NE 2d 232, 121 Ind App 335—Conner v. First Nat Bank in Wabash, 76 NE 2d 262, 113 Ind App 173, rehearing denied 77 NE 2d 598, 118 Ind App 173—Workman v. Workman, 46 NE 2d 718, 113 Ind App 245

Iowa—Corpus Juris cited in Olsen v. Corporation of New Melleray, 60 NW 2d 832, 836, 245 Iowa 407—In re Farlow's Estate, 50 NW 2d 561, 243 Iowa 15—In re Klein's Estate, 42 NW 2d 593, 241 Iowa 1103—In re Lochmiller's Estate, 30 NW 2d 136, 238 Iowa 1232—In re Ankeny's Estate, 28 NW 2d 414, 238 Iowa 754—Glider v. Melinski, 25 NW 2d 379, 233 Iowa 140—Corpus Juris cited in In re Telsrow's Estate, 22 NW 2d 792, 796, 237 Iowa 672—Shaw v. Duro, 14 NW 2d 241, 234 Iowa 778—In re Hollis' Estate, 12 NW 2d 576, 234 Iowa 761—In re Eiker's Estate, 6 NW 2d 318, 233 Iowa 315—In re Brooks' Estate, 294 NW 735, 229 Iowa 485

Ky—McKinney v. Montgomery, 248 SW 2d 719—Marcum v. Gallup, 237 SW 2d 862—Allen v. Henderson, 184 SW 2d 885, 299 Ky 92—Madden v. Cornett, 160 SW 2d 607, 290 Ky 268—Clark v. Johnson, 105 S W 2d 576, 268 Ky 591

Mass—O'Brien v. Collins, 53 NE 2d 222, 315 Mass 429—Mirick v. Phelps, 8 NE 2d 749, 297 Mass 250

Minn—In re Hartz's Estate, 54 NW 2d 784, 237 Minn 313

Miss—Halford v. Hines, 79 So 2d 264

Mo—Glover v. Bruce, 265 SW 2d 346—Snell v. Seek, 250 SW 2d 336, 363 Mo 225—Wright v. Stevens, 246 S W 2d 817—Norris v. Bristow, 219 S W 2d 367, 358 Mo 1177, 11 ALR 2d 725—Baker v. Spears, 210 S W 2d 13, 357 Mo 601—Buckner v. Tuggle, 203 S W 2d 449, 356 Mo 718—State ex rel Smith v. Hughes, 200 S W 2d 360, 356 Mo 1—Welch v. Welch, 190 SW 2d 936, 354 Mo 654—Walter v. Alt, 152 SW 2d 135, 348 Mo 53—Callaway v. Blankenbaker, 141 SW 2d 810, 346 Mo 383—Larkin v. Larkin, 119 SW 2d 351—Rex v. Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589

McGill v. Wiltz, App, 148 SW 2d 822

Neb—In re Farr's Estate, 35 NW 2d 489, 150 Neb 615—In re Farr's Estate, 33 NW 2d 454, 150 Neb 67—In re George's Estate, 15 NW 2d 80, 144 Neb 887, modified on other grounds 18 NW 2d 68, 144 Neb 915

NJ—In re Nixon's Will, 41 A 2d 119, 136 NJEq 242—In re Reynolds' Estate, 27 A 2d 226, 132 NJEq 141, affirmed 32 A 2d 353, 133 NJEq 344

NY—In re Gatzke's Will, 58 NY S 2d 874, 269 App Div. 1054—In re Hen-

derson's Will, 1 NY S 2d 871, 253 App Div 140, motion granted 15 NE 2d 679, 278 NY 531

Okl—In re Hertholt's Estate, 213 P 2d 865, 202 Okl 351

Or—In re Ulrich's Estate, 242 P 2d 204, 194 Or 429—In re Porter's Estate, 235 P 2d 894, 192 Or 483

Pa—In re Queen's Estate, 62 A 2d 909, 361 Pa 133

In re Boyd's Estate, 77 A 2d 662, 168 Pa Super 182

RI—Brousseau v. Messier, 84 A 2d 608, 79 RI 106—Marsh v. Rhode Island Hospital Trust Co, 21 A 2d 540, 67 RI 229—Heroux v. Heroux, 191 A 265, 58 RI 79—Young v. Young, 185 A 901, 56 RI 401—Talbot v. Bridges, 173 A 72, 54 RI 337

Tex—Long v. Long, 125 SW 2d 1031, 133 Tex 96, mandate conformed to, Civ App, 129 SW 2d 1206, error dismissed 138 SW 2d 798, 133 Tex 623

Truelove v. Truelove, Civ App, 266 SW 2d 491, error refused—Price v. Talaferro, Civ App, 254 SW 2d 157, refused no reversible error—Breedon v. Miller, Civ App, 236 SW 2d 225—Olds v. Traylor, Civ App, 180 SW 2d 511, error refused—Cloutt v. Hutcherson, Civ App, 175 SW 2d 643, error refused—Ford v. Ross, Civ App, 150 S W 2d 144—Moore v. Horne, Civ App, 136 SW 2d 638, error dismissed, judgment correct—Koger v. Coker, Civ App, 111 SW 2d 357, error granted—Shofner v. Shofner, Civ App, 105 SW 2d 418, error refused

Utah—In re Hanson's Estate, 52 P 2d 1103, 87 Utah 580

Vt—Central Hanover Bank & Trust Co v. Froment, 49 A 2d 111, 114 Vt 523

Va—French v. Beville, 62 SE 2d 883, 191 Va 842—Mullins v. Coleman, 7 SE 2d 877, 175 Va 235

Wash—In re Martinson's Estate, 190 P 2d 96, 29 Wash 2d 912—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—Dean v. Jordan, 79 P 2d 331, 194 Wash 661—In re Swan's Estate, 74 P 2d 207, 192 Wash 627

W Va—Ritz v. Kingdon, 79 SE 2d 123—Ebert v. Ebert, 200 SE 831, 120 W Va 722

Wis—In re Kiofanda's Will, 36 NW 2d 71, 254 Wis 186—In re Ehlike's Will, 11 NW 2d 497, 244 Wis 115

68 CJ p 795 note 1

**What happened at the time of execution of will is not controlling, as the status of undue influence, by its very nature, usually is the result of accumulating forces, and it can often be shown only by circumstantial evidence**

Miss—Halford v. Hines, 79 So 2d 264.

their existence and exercise may be reasonably inferred<sup>90</sup> This does not mean that these issues may be established on slight and uncertain evidence,<sup>91</sup> or on mere suspicion or conjecture<sup>92</sup> The circumstances relied on must be so connected and of such probative force as to lead to a reasonable conclusion that such influence was exercised<sup>93</sup> Such facts and circumstances must, from their nature, savor of some act which by reasonable construction may be held to indicate a purpose on the part of the proponent to gain some advantage which would re-

dound to his own pecuniary profit<sup>94</sup> To invalidate a will on the ground of undue influence, there must be some evidence of facts that would justify the inference, at least, that undue influence had been exercised,<sup>95</sup> and the circumstances relied on to establish undue influence must be inconsistent with an absence of undue influence<sup>96</sup> One claiming that the will was the product of undue influence is entitled to the benefit of any inferences or presumptions which may arise from the evidence,<sup>97</sup> and circumstances which raise a legitimate presumption of

90 Cal—In re Sproston's Estate, 52 P 2d 924, 4 Cal 2d 717

In re Hannam's Estate, 236 P 2d 208, 106 Cal App 2d 782—In re Ducher's Estate, 120 P 2d 44, 48 Cal App 2d 465

Iowa—Gilder v Milinski, 25 NW 2d 379, 238 Iowa 140

Ky—Madden v Cornett, 160 SW 2d 607, 290 Ky 268

Mo—McGill v Wiltz, App, 148 SW 2d 822

NY—In re Wharton's Will, 62 NYS 2d 169, 270 App Div 670, affirmed 76 NE 2d 328, 297 NY 671

Tex—Black v Black, Civ App, 240 SW 2d 458, error refused no reversible error

68 CJ p 795 note 2

#### Irresistible inference not required

Circumstantial evidence relied on to show undue influence invalidating will need not raise irresistible inference of its exercise

NY—In re Hill's Will, 272 NYS 74, 241 App Div 911

91 Mo—McGill v Wiltz, App, 148 SW 2d 822

68 CJ p 796 note 3

**Undue influence cannot be established by mere inference**, even though circumstances may tend to do so

Ill—Hockersmith v Cox, 95 NE 2d 464, 407 Ill 321

92. Ala—Locke v Sparks, 81 So 2d 670

Cal—In re Leahy's Estate, 54 P 2d 704, 5 Cal 2d 301

In re Dunne's Estate, 278 P 2d 733, 130 Cal App 2d 216—In re Washington's Estate, 235 P 2d 60, 116 Cal App 139—In re Fraser's Estate, 170 P 2d 704, 75 Cal App 2d 99—In re Shields' Estate, 121 P 2d 795, 49 Cal App 2d 293—In re Allan's Estate, 59 P 2d 425, 15 Cal App 2d 272—In re Peterson's Estate, 57 P 2d 584, 13 Cal App 2d 709—In re Easton's Estate, 35 P 2d 614, 140 Cal App 367

Ga—Whitfield v Pitts, 53 SE 2d 549, 205 Ga 259

Iowa—In re Heller's Estate, 11 NW 2d 586, 233 Iowa 1356

Kan—Smith's Estate v Davis, 212 P 2d 322, 188 Kan 210—In re Hall's Estate, 195 P 2d 612, 165 Kan 465

Ky—Kiefer's Ex'r and Ex'x v Deibel, 166 SW 2d 430, 292 Ky 318

Md—Stocklager v Hartle, 92 A 2d 363, 200 Md 544—Koppal v Soules, 56 A 2d 48, 189 Md 346—Drury v King, 32 A 2d 371, 182 Md 64

Mass—Flynn v Prindle, 98 NE 2d 267, 327 Mass 266—O'Brien v Collins, 53 NE 2d 222, 315 Mass 429—Mirick v Phelps, 8 NE 2d 749, 297 Mass 250—Briggs v Weston, 2 NE 2d 466, 294 Mass 452

Minn—Appeal of Borstad, 45 NW 2d 828, 232 Minn 365—In re Schumacher's Estate, 39 NW 2d 604, 229 Minn 382

Mo—Glover v Bruce, 265 SW 2d 316—Baker v Spears, 210 SW 2d 13, 357 Mo 601—Walter v Alt, 152 SW 2d 135, 348 Mo 53—Rex v Masonic Home of Missouri, 108 SW 2d 72, 341 Mo 589

Neb—In re Maruska's Estate, 64 NW 2d 734, 158 Neb 723—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583—In re Fehrenkamp's Estate, 48 NW 2d 421, 154 Neb 488—In re Thompson's Estate, 44 NW 2d 814, 153 Neb 375

NJ—In re Harr's Estate, 73 A 2d 76, 8 NJ Super 3

Ohio—Spidel v Warrick, App, 78 NE 2d 746

Okl—Toombs v Matthesen, 241 P 2d 937, 206 Okl 139—In re Wilkins' Estate, 185 P 2d 213, 199 Okl 249

Tex—Shoubrouek v Welch, Civ App, 271 SW 2d 704, refused no reversible error

Wash—In re Mitchell's Estate, 249 P 2d 385, 41 Wash 2d 326—In re Bottger's Estate, 129 P 2d 518, 14 Wash 2d 676—In re Bradley's Estate, 59 P 2d 1129, 187 Wash 221

Wis—In re Scherrer's Estate, 7 NW 2d 848, 242 Wis 211

**There must be a solid foundation of established facts on which to rest an inference of the existence of undue influence**

Neb—In re O'Donnell's Estate, 64 NW 2d 116, 158 Neb 583

93. Ala—Cook v Morton, 1 So 2d 890, 241 Ala 188

Cal—In re Bucher's Estate, 120 P 2d 44, 48 Cal App 2d 465—In re Allan's Estate, 59 P 2d 425, 15 Cal App 2d 272

Iowa—In re Lochmiller's Estate, 30 NW 2d 136, 238 Iowa 1232

NY—In re Henderson's Will, 1 NY S 2d 871, 253 App Div 140, reargument denied 1 NYS 2d 857, 253 App Div 869, motion granted 15 NE 2d 679, 278 NY 531—In re Richards' Will, 293 NYS 384, 249 App Div 793, motion denied 12 NE 2d 575, 276 NY 560, affirmed 13 NE 2d 455, 277 NY 520

Tex—Koger v Coker, Civ App, 111 SW 2d 357—Taylor v Small, Civ App, 71 SW 2d 895, error dismissed

68 CJ p 796 note 5

94. Mo—Bushman v Barlow, 232 SW 1039, 316 Mo 916

95. NY—In re Dowdle's Will, 231 NYS 320, 224 App Div 450

96. Cal—In re Washington's Estate 253 P 2d 60, 116 Cal App 2d 139—In re Doty's Estate, 201 P 2d 823, 89 Cal App 2d 747—In re Fraser's Estate, 170 P 2d 404, 75 Cal App 2d 99

NJ—In re Merkel's Will, 134 A 340, 4 NJ Misc 656

NY—In re Stein's Estate, 21 NYS 2d 102, 174 Misc 465

Okl—In re Hertholt's Estate, 213 P 2d 865, 202 Okl 351

Va—Croft v Snidow, 33 SE 2d 208, 183 Va 649—Mullins v Coleman, 7 SE 2d 877, 175 Va 235

Wis—In re Dobson's Will, 46 NW 2d 758, 258 Wis 587

WVa—Ritz v Kingdon, 79 SE 2d 123

#### Beneficiary in position to help testator

Fact that person who allegedly exerted undue influence on the maker of a will was in position to do nice things for the testator is equally consistent with theories of innocence and of wrongdoing on part of such person, and, thus, there must in addition be some evidence of tangible nature that such influence was in fact exercised.

Tex—Price v Tahaferro, Civ App, 254 SW 2d 157, refused no reversible error

97. Cal—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50

Neb—In re George's Estate, 15 NW 2d 80, 144 Neb. 887, modified on

fraud, and are not explained in any way, are sufficient to sustain a finding of fraud <sup>98</sup>

The relationship between the testator and the beneficiary, as discussed supra §§ 252, 253, the participation of the beneficiary in the preparation and execution of the will, supra § 254, the nature of the distribution made by the will, supra § 255, opportunity and disposition to exercise undue influence, supra § 256, declarations of the testator and others, supra § 257, the physical and mental condition of the testator, supra § 258, secrecy as to the execution or terms of the will, supra § 259, and prior wills, supra § 260, are among the facts and circumstances which are to be given significant weight in determining whether the will was the product of undue influence <sup>99</sup> Fact that the alleged wrongdoer had the power or ability to control the testamentary act may be established by a variety of circumstances, such as control over the decedent's business affairs, dependency of the decedent on the beneficiary for care and attention, or domination on the part of the beneficiary and subserviency on the part of the testator <sup>1</sup>

The circumstances may be such that, taken together, they are sufficient to establish undue influence, although each circumstance by itself would be insufficient to support such a conclusion <sup>2</sup> Accordingly, it is only when considered in connection with other circumstances that weight is given to prior hostility between the proponents and the contestants, <sup>3</sup> that the testator did not have independent advice, <sup>4</sup> a departure by the draftsman of the

will, in one clause, from the instructions of the testator, <sup>5</sup> the failure of the attorney who drafted the will to question the testator privately, <sup>6</sup> the failure of the proponent, charged with exercising undue influence, to testify, <sup>7</sup> the fact that the beneficiaries advised the testator to bring a suit against one of the contestants, <sup>8</sup> the failure of the attestation clause to contain any negation of undue influence, <sup>9</sup> the failure of a stranger, before consenting to be a beneficiary, sufficiently to inquire of the testatrix concerning the situation of her property and her relation to her next of kin, <sup>10</sup> general good or bad treatment of the testator, <sup>11</sup> the fact that a beneficiary knew that the testator had made a will <sup>12</sup> or intended to make a will containing provisions in his favor, <sup>13</sup> the testator's belief in spiritualism, <sup>14</sup> belief of the husband that he would survive his wife who was chief beneficiary under his will, <sup>15</sup> the fact that the testator's wife requested him to appoint her executrix of his will, <sup>16</sup> the fact that the testator lived with the beneficiary, <sup>17</sup> suspicious circumstances in the conduct of a legatee toward the testator, <sup>18</sup> assent of the proponent to certain legacies in the will, <sup>19</sup> or the fact that the testator believed the devisee to be his child, which in fact he was not <sup>20</sup>

The fact that the testator himself drew up the will has been held to be convincing evidence of the absence of undue influence <sup>21</sup> An unexplained inter vivos transfer of property by the testator to the person alleged to have exercised undue influence is a circumstance tending to prove undue influence <sup>22</sup> A meaningless or inconsistent statement in the will

other grounds 18 NW 2d 68, 144 Neb 915—In re Bowman's Estate, 9 NW 2d 801, 143 Neb 440 68 C J p 796 note 9

98. NY—Svenarton v Hancock, 9 Abb N Cas 326, modified on other grounds 22 Hun 38, affirmed 84 NY 653, 9 Abb NC 326

99. Cal—In re Abert's Estate, 204 P 2d 347, 91 Cal App 2d 50 Conn—Lee v Horrigan, 98 A 2d 909, 140 Conn 232.

Ga.—Northwestern University v Crisp, 88 SE 2d 26, 211 Ga 636—Bowman v Bowman, 55 SE 2d 298, 205 Ga 796

Utah—In re Lavelle's Estate, 218 P 2d 372

Tex—Truelove v. Truelove, Civ App, 266 SW 2d 491, error refused

Wash—In re Schafer's Estate, 113 P 2d 41, 8 Wash 2d 517

1 Cal—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139

2 Ind—Workman v Workman, 46 NE 2d 718, 113 Ind App 245

Ky—Welch's Adm'r v. Clifton, 172

SW 2d 221, 294 Ky 514, 148 ALR 1220—Hanna v Elche, 79 SW 2d 950, 258 Ky 282

Tex—Barksdale v Dobbins, Civ App, 141 SW 2d 1035, error refused 68 C J p 783 note 53

3 Wash—In re Swan's Estate, 74 P 2d 207, 192 Wash 627 68 C J p 783 note 54

4. Cal—In re Tamagno's Estate, 38 P 2d 38, 139 Cal App 69

5. SC—Tomkins v Tomkins, 17 S CL 92, 19 Am D 656

6. Pa—In re Bhare's Estate, 88 Pa Dist & Co 191, 4 Fiduciary 246, 17 Som Leg J 1.

7. Mo—Byrne v Fulkerson, 162 S W 171, 254 Mo 97

8. Iowa—In re Renne's Will, 189 N W 776, 194 Iowa 938

9 Wis—In re Emerson's Will, 198 NW 441, 183 Wis 437

10 NY—Matter of Clausmann, 44 Hun 630, 9 NY St 182

11. Pa—Tawney v Long, 76 Pa 106 —McMahon v Ryan, 20 Pa 329

12 Va—Mullins v Coleman, 7 SE 2d 877, 175 Va 235 68 C J p 783 note 61

13 NY—Matter of Cornell's Will, 60 NYS 53, 43 App Div 211

14. Mich—In re Saunders' Estate, 209 NW 75, 235 Mich 342

15. Ill—Ater v McClure, 161 NE 129, 329 Ill 519

16 NJ—Black v Foljambe, 39 NJ Eq 234

17 Mich—In re Carlson's Estate, 187 NW 284, 218 Mich 262 68 C J p 783 note 66

18. NJ—Matter of Gleespin's Will, 26 NJ Eq 523

19. Cal—In re Brooks' Estate, 54 Cal 471

20 NC—Howell v. Troulman, 53 N C 304

21 NY—In re Wallace's Will, 265 NYS 898, 148 Misc 867

22 Cal—In re Washington's Estate, 253 P 2d 60, 116 Cal App 2d 139

is not evidence of undue influence<sup>23</sup> The fact that the lawyer who drafted the will and the witnesses to its execution observed no undue influence is not conclusive as to the absence of undue influence<sup>24</sup>

*Testimony of legatee* The testimony of the legatee, charged with having obtained the will by undue influence, unless contradicted by some other credible testimony,<sup>25</sup> or discredited by its improbability,<sup>26</sup> cannot be arbitrarily disregarded,<sup>27</sup> and it has been held, in the absence of contradicting evidence, that his testimony may be sufficient to sustain a finding that undue influence was not exerted,<sup>28</sup> and this is true, although the circumstances of the case, such as a confidential relationship between the testator and beneficiary, might raise a presumption of undue influence<sup>29</sup>

*Failure to change or revoke will* Although con-

clusive weight should not be given it,<sup>30</sup> the fact that a testator having the capacity and ability to do so failed for a substantial period of time to change or revoke a will alleged to be the product of undue influence negatives the claim of undue influence<sup>31</sup>

*Proof of formal execution* Under conditions giving rise to a presumption against the validity of the will, mere formal proof of the execution is insufficient to show the absence of undue influence<sup>32</sup>

*Opinion evidence* has been declared to be entitled to consideration only as far as it is sustained by facts<sup>33</sup>

*Remote matters.* Matters occurring a long time after the execution of the will have been held to be entitled to little weight<sup>34</sup> In the absence of connecting evidence, circumstances not relevant to the issue of undue influence have no weight<sup>35</sup>

23 Kan—In re Pallister's Estate, 152 P 2d 61, 159 Kan 7

24 Minn—In re Olson's Estate, 35 NW 2d 439, 227 Minn 289

25 NJ—In re Cooper's Will, 71 A 676, 75 NJ Eq 177, affirmed 75 A 1100, 76 NJ Eq 614  
66 C J p 781 note 75

26 NJ—In re Cooper's Will supra  
NY—In re Matter of Spratt's Will, 32 NYS 1032, 11 Misc 218, reversed on other grounds 38 NYS 329, 4 App Div 1

27 NJ—In re Cooper's Will, 71 A 676 75 NJ Eq 177, affirmed 75 A 1100, 76 NJ Eq 614

28 NJ—Grant v Stamler, 59 A 890, 68 NJ Eq 555

29 NJ—In re Eatley's Will, 89 A 776, 82 NJ Eq 591

30 Cal—In re Hettermann's Estate, 119 P 2d 788, 48 Cal App 2d 263  
68 C J p 784 note 83

31 Cal—In re Hettermann's Estate, supra

Colo—In re Piercen's Estate, 195 P 2d 725, 118 Colo 264—In re Brantner's Estate, 169 P 2d 326, 115 Colo 133  
Mich—In re Livingston's Estate, 295 NW 343, 295 Mich 637

NJ—In re Alper's Will, 60 A 2d 320, 142 NJ Eq 529, affirmed 65 A 2d 736, 2 NJ 104

Minn—In re Wilson's Estate, 27 N W 2d 429, 223 Minn 409

Pa—In re Buck's Estate, Orph, 53 Dauph Co 412

W Va—Ebert v Ebert, 200 SE 831, 120 W Va 723  
68 C J p 781 note 84

32 RI—Letts v Holgate, 165 A 222 53 RI 198

33 NJ—Moor's Ex'rs v Blauvelt, 15 NJ Eq 367

34 NJ—In re Tunison's Will, 90 A 695, 83 NJ Eq 277, affirmed 93 A 1087

68 C J p 784 note 82

35 Mo—Snell v Seek, 250 SW 2d 336, 363 Mo 225



# WORDS AND PHRASES

AND

## MAXIMS

### IN THIS VOLUME

	Page		Page
Waer .....	563	Wellhole . . .	564
Watershed . . .	464	Welsher . . .	564
Waterstones . . .	464	Welsh mortgage . . .	564
Watertight . . .	464	Wen . . .	564
Waterway . . .	465	Wench . . .	564
Waterworks . . .	465	Wer . . .	563
Watt . . . . .	465	Weregild . . .	564
Wave response device.	465	What . . .	607
Wax . . . . .	465	Whatever . . .	607
Way . . . . .	465	Whatsoever . . .	607
Waybill . . . . .	466	Wheat . . .	607
Wayfarer . . . . .	466	Wheel . . . . .	607
Waygoing crop . . . . .	466	Wheelers . . . . .	607
Waylay . . . . .	466	Wheelman . . . . .	607
Wayleave . . . . .	466	Wheelwright . . . . .	607
W D . . . . .	466	When . . . . .	607
We . . . . .	466	Whenever . . . . .	609
Weak . . . . .	467	Whensoever . . . . .	610
Wealth . . . . .	467	Where . . . . .	610
Wear . . . . .	534, 563	Whereas . . . . .	610
Wear and tear . . . . .	534	Whereby . . . . .	611
Wear of the creek . . . . .	534	Wherefore . . . . .	611
Wearing apparel . . . . .	534	Wherein . . . . .	611
Weather . . . . .	535	Whereupon . . . . .	611
Weathering . . . . .	535	Wherever . . . . .	611
Webster's unabridged dictionary . . . . .	535	Whether . . . . .	611
Wedge . . . . .	535	Which . . . . .	612
Wedlock . . . . .	535	Whiff . . . . .	612
Weed . . . . .	535	Whiffle board . . . . .	612
Week . . . . .	535	While . . . . .	612
Weekday . . . . .	535	Whip . . . . .	613
Weekly . . . . .	535	Whipping . . . . .	613
Weeper . . . . .	536	Whipstock . . . . .	613
Weighage . . . . .	536	Whiskey . . . . .	613
Weight . . . . .	536	Whistling . . . . .	613
Weir . . . . .	563	White . . . . .	613
Welcome . . . . .	563	White person . . . . .	613
Weld . . . . .	563	Whiting . . . . .	614
Welding . . . . .	563	Who . . . . .	614
Welfare . . . . .	563	Whoever . . . . .	614
Well . . . . .	563	Whole . . . . .	614

# WORDS & PHRASES

	Page		Page
Wholesale .. .... .	615	Width .. .	619
Wholesaler .. . . .	615	Wiener .	619
Wholesome .. . . .	615	Wife .	619
Wholly . .	615	Wifehood	619
Whom it may concern	615	Wilco	619
Whore .	615	Wild	619
Whoredog	615	Wildcat	619
Whoredom	616	Wile	619
Whorhouse	616	Will	620
Whoremaster . .	616	Willful	620
Whorish	616	Willfully	620
Wicked ..	616	Willfulness	637
Wide .	616	Willing .	639
Widen	616	Willingly	639
Widow . . . . .	616	Willingness ..	640
Widower . . . . .	618	Worn .	534
Widowhood .....	619	Would .. .	620

# INDEX

	Page
<b>Waters</b> .....	1147
<b>Weapons</b> .....	1246
<b>Weights and Measures</b> .....	1251
<b>Wharves</b> .....	1254





# INDEX TO WATERS

- Abandoned personal property, § 181  
Abandonment,  
    See, also, Forfeiture, generally, post  
Appropriation, § 170, p 909, § 193, p 904  
    Benefit of judgment, § 203, p 1033  
    Defenses, § 197  
    Effect of, § 193, p 1000, n 42  
    Evidence, § 201, p 1016  
    Inchoate rights, § 173, p 921  
    Judgment, amendment, etc., § 203, p 1028  
    Prior rights, burden of proof, § 201, p 1014  
    Questions of law and fact, § 203, p 1020  
    Weight and sufficiency of evidence, § 201, p 1016  
Burden of proof, § 101, p 784  
Dams, § 147, p 865  
Flowage of lands, rights, § 24  
Granted rights, § 212  
Inchoate rights, appropriation, § 173, p 921  
Irrigation, distribution and supply of water, § 352, p 404  
Irrigation district franchise, § 338  
Irrigation ditch, parcel license, § 219  
Irrigation rights of way, proceedings to acquire, § 349, p 389  
Municipal contract for supply of water, § 272  
Municipal water works, § 240  
Nonuser,  
    Power to regulate water company rates as, § 292  
    Water rights previously acquired by municipality, § 228  
Point of diversion, suit to change, priority, § 189, p 979, n 11  
Prescription, § 161  
Reserved rights, § 215  
Reservoir, prescription, § 164, n 38  
Return waters, § 185, p 959, n 2  
Right of way,  
    Irrigation purposes, § 349, p 395  
    Municipal pipe line, § 242, p 56  
Subterranean waters, intent, § 101, p 786, n 29  
Surface waters, drainage rights, § 120  
Termination of granted rights, § 212  
Abatement,  
    Diversion, § 66  
    Obstruction and detention, § 23  
Pollution,  
    Defenses, § 54  
    Summary proceedings, § 53  
Abnormal rainfall, flooding lands, defenses, § 36(5), n 5  
Abnormality, flood waters, § 112, n 3  
Abolishment of water district, § 243(9)  
Abrogation,  
    Municipality's option to purchase existing water system, § 237, p 36  
    Riparian rights, common-law doctrine, § 6  
Absence of negligence, pollution, defenses, § 54  
Absolute immunity, pollution, § 43, p 689  
Absolute ownership, appropriation, § 181, p 944  
Abstraction, appropriation, actions, § 194, p 1002  
Abundant water, prescription, § 159, p 884  
Abuse of franchise, public service water company, forfeiture, § 253  
Abuse of right,  
    Flowage of lands, § 29, p 648  
    Riparian rights, § 11  
Abutting property owners, defined, § 242, p 54, n 43  
Acceleration of flow,  
    Artificial channels, injuries from change in course of stream, § 134, n 16  
    Surface waters, § 116, p 815  
Acceptance,  
    Contracts as to rates and charges, § 287, p 167  
    Leases, § 224  
    Service, persons outside municipal limits, § 278, p 141  
Access,  
    Great ponds, § 110  
    Lakes and ponds, § 105  
    Stream, riparian rights, § 8  
Accidental bursting, dams, § 153  
Accidental damages, artificial channels, liability, § 130, p 849  
Accidental floods, obstruction and detention, § 19  
Accidents,  
    Artificial channels, injuries from, § 133  
    Irrigation purposes, excuses for failure to supply water, § 366, p 439  
    Stoppage of flow, liability for damage from, § 310  
Accord and satisfaction, rates and charges, proceedings for collection, § 304  
Accounting,  
    Irrigation and ditch companies, stock subscription and purchases, § 343, p 367  
    Municipal purchase of existing water system, § 239  
Rates and charges,  
    Proceedings by private consumer to recover, § 307, p 220  
    Wrongfully taken water, § 306  
Water district subject to jurisdiction, control and regulation of public utilities commission, § 243(1), n 43  
Accretions,  
    Appropriation states, equitable apportionment, § 170, p 911  
    Bed and banks of stream, § 76  
    Deeds and conveyances, § 206  
    Lakes and ponds, § 108  
    Obstruction and detention, § 17, n 76  
    Snows, riparian rights, § 9  
Accrued damages, flooding lands, occasional injury, § 38, p 683  
Accrued method, appropriation, § 177, n 51

# WATERS

- Accumulations, §§ 141-143, pp 856, 857
  - Heavy rains, § 4, p 603
  - Rain water and eavesdrip, § 124
  - Surface waters, § 112, n 89, § 116, p 815
  - Injunction, § 128, p 835
- Accumulative tax, irrigation districts, § 334, p 341
- Accuracy of water meter, § 280, p 151
- Presumptions, § 307, p 223
- Accustomed channel, obstruction and detention, § 15
- Accustomed channel flow, riparian rights, § 9
- Accustomed level, lakes and ponds, § 106
- Acids, pollution, § 49
- Acknowledgment, deeds and conveyances, § 208
- Acquiescence,
  - Appropriation, § 157
    - Actions, defenses, § 197
  - Construction and operation of plant, pollution, defenses, § 55, pp 713, 714
  - Consumers, public service water companies, installation on service connections, § 257, p 109
  - Diversion, defenses, § 68, p 737
  - Flooding lands,
    - Defenses, § 36(5)
    - Injunctive relief, defenses, § 37, p 675
  - Implied licenses, § 219
  - Prorating of distribution and supply to irrigation, § 359
  - Public service water companies, loss of exclusive rights, § 252
  - Secondary appropriation, estoppel, § 193, p 999
- Acquisition,
  - Mechanical and manufacturing purposes, § 370
  - Municipal water works and districts, post
  - Pollution right, § 50
  - Prior right, appropriation for wasteful and non-beneficial purpose, § 186, p 966
  - Property, irrigation and ditch companies, § 345, p 376
  - Public supply, § 228
  - Rights of way,
    - Appropriation, § 192, p 990
    - Irrigation purposes, § 349, p 388
  - System, reasonableness of rates of water companies, § 293, p 182
  - Water districts, § 243(5), p 74
  - Water rights for irrigation works, § 348
- Acre feet,
  - Equitable apportionment, § 170, p 911
  - Units of measurement, § 186, p 964
- Act of God,
  - Accumulation and storage, § 141
  - Artificial channels, injuries from change of course of stream, § 134
- Dam,
  - Breakage or overflow, § 153
    - Actions, § 156
    - Liability of municipality, § 309, p. 239
  - Injuries, § 148
  - Possibility of interference, § 148
  - Unprecedented storm or rainfall, § 18
- Diversion, § 59
- Flooding lands,
  - Burden of proof, § 36(9)
  - Defenses, § 36(5)
  - Questions of law and fact, § 36(10)
- Floods, § 20, p. 630
  - Burden of proof, § 20
- Act of God—Continued
  - Injuries incident to supply and use of water, § 312, p 246
  - Liability for injuries, § 29, p 649, n 30
  - Natural flow of stream, deprivation, § 15
  - Pollution, § 48
  - Prescription, interruptions, § 161
  - Riparian rights, natural flowage, § 9
  - Surface waters, action for damages, § 127, p 829
- Actions,
  - Accumulation and storage, § 143
  - Appeals, generally, post
  - Appropriation, generally, post
  - Artificial channels, injuries to, § 135
  - Assignment of water stock certificates, setting aside, § 343, p 367
  - Bed and banks of streams, § 83
  - Defenses, generally, post
  - Deprivation of waters, § 31
  - Diversion, generally, post
  - Ejectment, generally, post
  - Eminent domain, generally, post
  - Escaping waters, § 143
  - Flooding, § 36(1)
    - Nature and form, § 36(2)
  - Flowage of lands, §§ 31-38, pp 651-685
    - Acquisition of right, § 25, p 636
    - Instituted by owner of land flowed, § 25, p 637
  - Ice removal, § 386
  - Injunctions, generally, post
  - Injuries incident to supply and use, § 312, pp 243-250
  - Injuries to owners of irrigation works, § 351
  - Irrigation, establishment and protection of rights, § 317, pp 260-264
  - Irrigation districts,
    - Bondholders, § 331, p 323
    - By or against, § 321, p 304
    - Proceedings for dissolution, § 338
  - Irrigation purposes, liabilities and injuries incident to supply and use, § 367, pp 441-450
  - Irrigation works or easement, injuries to, § 351
  - Lakes and ponds, § 111
  - Liabilities and injuries incident to supply and use, § 312, pp 243-250
  - Lien for water rates and charges, enforcement, § 308, p 233
  - Mechanical and manufacturing purposes, injuries, § 375
  - Obstruction and detention,
    - Natural flow, § 15
    - Persons liable, § 22
  - Pollution, generally, post
  - Private consumer, excess charges, § 307, p 220
  - Public and municipal water supply, proceedings to protect rights, § 233
  - Quiet title actions, riparian rights, § 14
  - Rates and charges, amounts due, §§ 303-307, pp 214-228
  - Riparian rights, determine and protect, § 14
  - Sale of water for irrigation, recovery of rates and charges, § 363, pp 426, 430
  - Subterranean water,
    - Injuries, § 98
    - Obstruction or diversion, § 96

## Actions—Continued

- Supply and distribution of water to municipality, § 276, pp 133-138
- Surface waters, post
- Water district tax or assessment, attack on, § 243 (7), p 87
- Water districts, by or against, § 243(8)
- Water power companies, injuries incident to supply or use, § 382
- Wrongful discontinuance of service, § 307, p 226
- Acts,
  - Extent of appropriation, § 186, p 964
  - Prescriptive right, loss or termination, § 166
  - Unlawful diversion, burden of proof, § 101, p 783
- Actual application to useful purpose, appropriation, § 172
- Actual cost, determining reasonableness of rates and charges, § 289, p 175
- Actual damage,
  - Pollution, necessity, § 54, p 700
  - Subterranean waters, § 102
- Actual diversion, actions, § 67, p 730
- Actual existence, lakes and ponds, § 107
- Actual notice, appropriation, § 176
- Actual occupation or use, prescription, § 159, p 878
- Actual usage, appropriation, § 188
- Ad quod damnum, obstruction and detention, actions for damages, § 36(1)
- Additional burden, change of use, § 210, p 1054
- Additional land, irrigation, § 186, p 970
- Additional public supply, order requiring as supported by finding, § 229
- Adequate remedy at law, flooding lands, injunction, § 37
- Adequate supply,
  - Prescription, § 159, p 884
  - Private company's duty in furnishing to community, § 278, p 145
  - Public service water company franchise forfeited for failure to furnish, § 253
- Adjoining landowners,
  - Appropriation, § 171
  - Artificial channels, § 129, p 843
  - Joint construction, § 130, p 848
- Dams, § 145
- Liability of consumer for injuries caused to by leak in service pipe, § 309, p 237
- Subterranean waters, reasonable use, § 93, p 772
- Adjoining lands, injuries to lands adjoining irrigated tract, § 365, p 434
- Adjoining municipalities, supply and distribution of water, § 265, p. 118
- Adjudication, appropriation, necessity, § 180, p 937
- Administration of laws, irrigation, § 315
- Administrative approval, point of diversion, change, § 189, p 979
- Administrative offices, water district commissioner, § 243(4)
- Administrative proceedings, appropriation, actions, § 194, p. 1001
- Administrative questions, rate charged for furnishing water for municipal purposes, § 275
- Administrative remedies, regulation of water supply to public, § 280, p 153
- Admissibility of evidence,
  - Appropriation, § 201, p 1015
- Artificial channels, § 137

## Admissibility of evidence—Continued

- Bed and banks of stream, ownership, § 83
- Diversion, § 67, p 732
  - Injunctive relief, § 68, p 739
- Flooding lands, § 36(9), § 37, p 678
- Issues, proof and variance, § 36(8)
- Flowage of lands, § 32
  - Damages, § 25, p 639
- Injuries incident to supply and use, § 312, pp 245, 247
- Irrigation districts,
  - Actions by or against on bonds, § 331, p 325
  - Tax assessment proceedings, § 335, p 347
- Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 445
- Irrigation rights, establish and protect, § 317, p 263
- Irrigation works, damages or injuries to, § 351
- Municipality, water supply contract, § 276, p 137
- Municipality or water company failing to furnish water to consumer, § 281, p 156
- Point of diversion, application for change, § 189, p 981
- Pollution, § 54, p 705
- Rates and charges,
  - Proceedings for collection, § 304
  - Wrongful discontinuance of water service, § 307, p 227
- Right to use or be furnished, § 225, p 1076
- Sale of water for irrigation, review of orders of rate fixing body, § 363, p 427
- Subterranean waters, proceedings and relief, § 101, p 784
- Surface waters,
  - Actions for damages, § 127, p 829
  - Injunction, § 128, p 837
- Tax deeds, quieting title by or against water district, § 243(7), p 88, n 16
- Unreasonable rates, proceedings for relief, § 295, p 195
- Water districts, action by or against, § 243(8)
- Adoption, riparian rights, common-law doctrines, § 6
- Advance payment, rates and charges, § 302, p 213
  - Discrimination, § 297, p 204
- Adverse claims, riparian rights, § 8
- Adverse exercise of easement, flowage of lands, § 26
- Adverse possession Prescription, generally, post
- Advertisements, water district bonds sale, § 243(6), p 79
- Affidavits, subterranean waters, evidence, § 101, p 785
- Affirmative acquiescence, appropriation, § 157
- Affirmative defenses Defenses, post
- Affirmative easements, artificial lakes, § 129, p 844
- Affirmative relief, appropriation, pleading, § 200
- After-acquired property,
  - Deeds and conveyances, § 210, p 1048
  - Public service water companies, mortgages, § 259
- After-acquired rights, mortgages, § 218
- Agents,
  - Individual citizen, municipality as agent for in contracting for supply of water, § 265, p 116
  - Irrigation and ditch companies, § 344
  - Irrigation districts, power to employ, § 321, p 295
  - Water companies, contracts with consumers, § 279, p 148

# WATERS

## Agreements,

Prior appropriator, limiting amount of water, § 186, p 963

Use, prescription, § 162

## Agricultural lands,

See, also, Irrigation, generally, post

Amount necessary, appropriation, § 186, p 967

Appropriation, rights of way, § 192, p 990

Drainage beyond amount reasonably necessary, § 100, n 13

Equal rights of riparian proprietors, § 314, n 25

Flooding, damages, § 38, p 684

Lakes and ponds, § 105

Pollution,

Pleading damages, § 54, p 703

Rendering unfit, § 43, p 687

Subterranean waters, damages, evidence, § 101, p 784

Surface waters, artificial damage, § 116, p 811

Agricultural to municipal use, priorities, § 188, n 15

Airports, irrigation districts, lease, § 321, p 298, n 21

Alaska, prior appropriation, § 167, n 15

Allegation of power, authority to regulate matter connected with water service, § 280, p 151

Alleys Streets and alleys, generally, post

Allocation of damages, surface waters, actions, § 127, p 830, n 2

Allotment of water rights, irrigation districts, benefits for purpose of taxation, § 333, p 332

Allowances, municipal purchase of existing water system, § 238, p 41

Alluvion,

Bed and banks of stream, § 76

Grant, § 84

Alteration,

Dam flow, § 148, n 42

Natural watercourses, § 4, p 597

Water district, § 243(9)

Alternate use, time of use, § 187

Alternative method, appropriation, § 174

Altitude, duty or quantity needed for irrigation, § 186, p. 971

Ambiguities,

Franchise of public service water company, § 251

Language, notice of appropriation, § 176

Municipal contract for supply of water, § 271

Reservations, grants, § 214

Amendment,

Appropriation, application for permit, § 180, p 935

Charters, irrigation and ditch companies, § 342

Amendment of pleadings,

Flooding lands, injunctive relief, § 37, p 677

Flowage of lands, § 32

Amount,

Beneficially used, appropriation, § 186, p 966

Calendar year, prescription, § 165

Claimed, appropriation, notice, § 176

Excess of needs, use or disposal, § 186, p 968

Habitually withdrawn, prescription, § 165, n 70

Irrigation consumer entitled, § 352, p 407

Necessary for purposes of appropriation, § 186, p 967

Priority extends, appropriation, § 186, p 963

Rates and charges, generally, post

Storage, appropriation, § 186, p 972

## Amount—Continued

Subterranean waters,

Excessive award, § 101, p 786, n 28

Use, § 93, p 767

Anchorage right, lakes and ponds, § 105, n 82

Animals,

Heading on irrigation right of way, damages, § 351

Watering, riparian rights, reasonableness of use, § 12

Annexation of territory,

Municipal power to regulate rates and charges, § 292

Municipality's acquisition of town's water system, § 236

Annexation to land, natural flow of stream, right, § 15

Annoyance,

Obtaining water after shutting off of supply, damages, § 281, p 157

Subterranean waters, compensation, § 102

Annual contract, municipality for supply of water, § 268

Annual flooding, obstruction and detention, successive actions, § 36(1)

Annual rainfall, appropriation, fluctuating question, § 170, p. 909

Answer,

Appropriation, § 200

Diversion, § 67, p 732

Injunctive relief, § 68, p 738

Flooding lands, § 36(7)

Pollution, § 54, p 704

Surface waters, actions for damages, § 127, p 829

Anticipated event, bridges, trestles, culverts, etc, negligence, § 20, p 629

Anticipated injury,

Diversion, injunctive relief, § 68, p 736

Surface waters, injunction, § 128, p 836

Anticipated obligations, water districts, power to raise funds by taxation to meet, § 243(7), p 83, n 58

Anticipated overflow, liability for injuries, § 29, p 649, n 34

Anticipatory breach of contract, irrigation company's failure to supply water, § 366, p 437

Antiquity, natural watercourses, § 4, p 597

Apartment houses, rates and charges,

Classification for purpose of, § 297, p 202, n 24

Minimum water charge, application, § 300, n 3

Persons liable for payment, § 302, p 213

Single point meter service, § 302, p 211

Apparatus, water works district, contract for purchase, § 243(6), p 78

Appeals,

Absence, conclusiveness, § 203, p 1029, n 60

Application for permission to obtain water supplies, § 229

Appropriation, § 204, p 1035

Service of notice, § 204, p 1037

Board or commission order regulating water supply to public, § 280, p 153

Certiorari, generally, post

Dismissal, appropriation action, § 204, p 1039

Flowage of lands, assessment of damage, § 25, p 640

## Appeals—Continued

- Irrigation districts,
  - Confirmatory proceedings, § 319(5)
  - Issue and sale of bonds, § 328
  - Inclusion or exclusion of land after organization, § 319(3), p 282
  - Proceedings to determine validity of organization, § 319(4)
  - Taxes, § 335, pp 343-347
- Orders looking to protection of public water supply, § 232, p 20
- Point of diversion, proceedings for change, § 189, pp 979, 983
- Public service water companies, order of public service commission, § 261
- Quo warranto,
  - Irrigation districts, proceedings to determine validity of organization, § 319(4)
  - Water districts, review of proceedings to organize, § 243, p 66
- Rates and charges,
  - Orders of commission regulating, § 296, p 198
  - Public utility commission's order fixing, § 290
  - Reasonableness, § 289, p 176
- Scope, appropriation, § 204, p 1038
- Surface waters, actions for damages, § 127, p 832
- Water districts,
  - Apportionment of assessment, § 243(7), p 87
  - Benefits to be assessed, § 243(7), p 85
  - Inclusion of land, § 243(4)
  - Review of proceedings to organize, § 243(2), p 66
- Application Petition, generally, post
- Apportionment,
  - Bed and banks of stream, § 71
  - Deeds and conveyances, rights and privileges, § 210, p 1051
  - Diversion, damages, § 69
  - Expenses, dams, § 147, p 864
  - Irrigation district bonds, payments, § 330
  - Obligations, water districts, § 243(6), p 77
- Appraisal, existing water system before purchase by municipality, approval by municipal officers, § 238, p 41
- Appropriation, §§ 157-193, pp 873-1001
  - See, also, Prescription, generally, post
  - Abandoned personal property, § 181
  - Abandonment, ante
  - Absolute ownership, § 181, p. 944
  - Abstracting, § 194, p 1002
  - Accrued method, § 177, n 51
  - Acquiescence, § 157
    - Defenses, § 197
  - Acquisition,
    - Public supply, § 228
    - Rights of way, § 192, p 990
  - Acre foot, § 186, p 964
    - Equitable apportionment, § 170, p 911
  - Actions, §§ 194-205, pp 1001-1040
  - Acts prior to making of application, § 180, p 939
  - Actual application to useful purpose, § 172
  - Actual appropriation, § 186, p 964
  - Actual notice, § 176
  - Actual usage, § 188
  - Adequate remedy at law, § 194, p 1003
  - Adjoining landowners, § 171

## Appropriation—Continued

- Adjudication statutes, § 194, p 1004, n 15
- Administrative proceeding, § 194, p 1001
- Admissibility of evidence, § 201, p 1015
- Adverse possession,
  - Burden of proof, § 201, p 1014
  - Defenses, § 197
- Affirmative acquiescence, § 157
- Affirmative relief, pleading, § 200
- Agricultural to municipal use, § 188, n 15
- Alaska, § 167, n 15
- Alternative method, § 174
- Ambiguity, notice of appropriation, § 176
- Amended judgment, § 203, p 1028
- Amendment, application for permit, § 180, p 935
- Amount,
  - Beneficially used, § 186, p 966
  - Claim, notice, § 176
- Annual rainfall, fluctuating question, § 170, p 909
- Answer, § 200
- Appeal, § 204, p 1035
- Application for permit, § 180, p 934
- Application to beneficial use, § 178
- Applications, point of diversion, change, § 189, p 977, n 71
- Appropriation states, § 170, p 911
- Appropriators, § 171
- Approval,
  - Application, § 180, p. 933
  - Change of diversion, § 189, p 976
- Appurtenant rights, conveyance, § 190, p 985
- Area of land, § 181, p 947, n 39
- Artesian basins, § 170, p 906, n 66
- Artesian conservancy district, § 194, p 1003, n 90
- Artificial channel,
  - Capture or diversion, § 177
  - Construction and maintenance over lands of another, § 180, p 847
- Artificial waters, § 170, p 908
- Assignment, rights, § 180, p 939
- Attempted transfer, § 190, p 983
- Authority, federal and state governments, § 169
- Authorized appropriations, § 173
- Available supply, increasing, § 181
- Avoidance, waste, § 186, p 968
- Bank holidays, prosecution of enterprise, § 179
- Basis of right, § 168
- Beneficial use, post
- Benefit,
  - Judgment, § 203, p 1033
  - Prior appropriations, § 184
- Bill, § 200
- Bona fide contemplation, future application, § 175
- Burden of proof, § 201, p 1013
- Canals, § 192, p 989
- Cancellation of permit, § 180, p 943
- Capacity of system or works, § 186, p 965
- Capture, elements, §§ 174, 177
- Certainty, judgment, § 203, p 1026
- Certificate of appropriation, § 180, p 932
- Certificate of performance, § 180, p 942
- Certiorari, § 204, p 1036
- Chain of title, abandonment of right, § 193, p. 996, n 87
- Change of diversion, § 188; § 189, p 976
- Character of first step, priority, § 184
- Character of land designed to be benefited, § 172

# WATERS

## Appropriation—Continued

Circumstances, burden of proof, § 201, p 1015  
 Collateral attack, judgment, § 203, p 1031  
 Commenced before adoption of permit system, § 180, p 939  
 Common law, § 157  
 Communicated intention, § 175  
 Complaint, § 200  
 Completed appropriation, § 174  
 Compliance requisite to perfect rights under permit, § 180, p 939  
 Compromise and settlement, § 190, p 988  
 Condition subsequent, application to beneficial use, § 186, p 966, n 97  
 Conditional relief, § 203, p 1026  
 Conditional status, § 173, p 921  
 Conditions, § 169  
   Change in diversion, § 188  
   Locally prevailing, § 168  
   Permit, § 180, p 935  
 Conduct, constructive notice, § 176  
 Conflicting claims, contracts, § 190, p 988  
 Conflicting judgment, § 203, p 1033  
 Consent, defenses, § 197  
 Consideration, contracts, § 190, p 988  
 Constitutional and statutory provisions, post  
 Construction,  
   Findings, § 203, p 1023  
   Judgment, § 203, p 1031  
 Constructive appropriation, § 174  
 Constructive notice, § 176  
 Constructive parties, § 199  
 Contempt proceedings, § 203, p 1035  
 Contents, application for permit, § 180, p 934  
 Contest, § 180, p 938  
 Continuance of use, loss of rights, § 193, p 997  
 Continued maintenance of conditions, § 181, p 947  
 Continuous flow, § 170, p 906  
 Contour of earth's surface, § 172, n 89  
 Contracts, § 189, p 983  
   Appropriators, § 190, p 988  
 Control, federal and state government, § 169  
 Conveyances, § 190, p 983  
 Corporations, § 194, p 1002  
   Exercise of right, § 171  
   Parties, § 199  
 Corpus of water, title, § 181, p 944  
 Corruption of water, § 194, p 1001  
 Costs, § 205  
 Cross pleading, § 200  
 Culinary purposes, § 172  
 Cultivation of lands, diligence, § 179  
 Cumulative remedy, § 194, p 1005  
 Current of river, § 181, p 950  
 Damages, § 203, p 1020  
   Judgment, § 203, p 1027  
 Dams, capture or diversion, § 177  
 Date, burden of proof, § 201, p 1015  
 Debris, purpose of carrying off, § 173  
 Deed, burden of proof, § 201, p 1014  
 Defenses, § 197  
 Defilement of water, § 194, p 1001  
 Definiteness, judgment, § 203, p 1026  
 Definition, § 157  
 Delay, prosecution of enterprise, § 179  
 Demurrer, § 200  
 Depression, capture or diversion, § 177

## Appropriation—Continued

Description, transfers, § 190, p 986  
 Desert Land Act, effect, § 173, p 919  
 Detachment from land, transfers, § 190, p 983  
 Deterioration, quality of water, § 181, p 949  
 Detrimental changes, diversion, § 188  
 Developed waters, § 181, p 947  
 Developments, diligence, § 179  
 Device, capture or diversion, § 177  
 Diligence,  
   Cancellation of permit, § 180, p 943  
   Perfecting, § 175  
   Prosecution of enterprise, § 179  
 Direct appropriation, § 180, p 932, n 35  
 Direct mitigation purpose, § 186, p 970  
 Direction of verdict, § 203, p 1020  
 Discretion, grant or refusal of permit, § 180, p 935  
 Discretion of court,  
   Parties, § 199  
   Transfer or reference, § 203, p 1022  
 Dismissal of appeal, § 204, p 1039  
 Dismissal or nonsuit, § 203, p 1019  
 Disposal, amount in excess of needs, § 186, p 968  
 Disposition, excess or waste water, § 191  
 Distinguished from riparian rights, § 181, p 947  
 Districts, parties, § 199  
 Ditches, post  
 Diversion, post  
 Diversion of supply, § 194, pp 1001, 1002  
 Domestic purposes, § 170, p 909, § 172  
   Priority, § 183  
 Doubtful title, § 194, p 1003, n 91  
 Drainage of lands, purpose, § 172  
 Dual purpose, § 172  
 Duty of water,  
   Questions of law and fact, § 203, p 1020  
   Res judicata, § 203, p 1031  
 Earth's surface contour, § 172, n 89  
 Easement in gross, § 181, p 945  
 Economy to prevent unnecessary loss, § 186, p 968  
 Effective capture or diversion, § 177  
 Electric light plant, operation, § 172  
 Elements, § 174  
 Emergencies, extension of time, § 180, p 941  
 Endorsement on permits, § 180, p 939  
 Enforcement, judgment, § 203, p 1033  
 Enlargement of use, § 188  
 Enterprise, diligence in prosecution, § 179  
 Entry on land, § 171  
 Entrymen or patentees, § 173, p 919  
 Equitable action, point of diversion, change, § 180, p 977  
 Equitable apportionment, § 170, p 911  
 Essence, § 157  
 Estoppel,  
   Acquiescence, § 157  
   Change in diversion, § 188  
   Defenses, § 197  
   Judgment, modification, § 203, p 1028  
   Loss of rights, § 193, pp 994, 999  
   Rights, § 193, p 999  
   To deny right, § 157  
 Evaporation, secondary appropriations, § 185, p 958

## Appropriation—Continued

Evidence, § 201, p 1013  
 Intention to abandon, § 193, p 996  
 Excess water, disposition, § 191  
 Excessive appropriations, § 182  
 Excessive diversion, beneficial use, § 186, p 967  
 Exchange of water, secondary appropriator, § 185, p 962  
 Exchanges or loans, § 190, pp 987, 988  
 Exclusive use, § 181, p. 948  
 Exemptions, § 169  
 Existence, § 172, p 921  
 Other sources which will furnish necessary amount, § 186, p 967  
 Expiration,  
 Original time limit, § 180, p 942  
 Permit, § 180, p 939  
 Extension of time, § 180, p 940  
 Extent of rights, § 180, p 944  
 Federal forest reserves, at or through, § 180, p 940  
 Filing, notice of claim, § 176  
 Financial inability, extension of time, § 180, p 941  
 Findings, § 203, p 1023  
 First in time, § 183  
 First step, § 175  
 Flood waters, § 24; § 170, p 906  
 Flow of water, § 181, p 950  
 Flowing subterranean waters, § 93, p 769  
 Fluctuating question, unappropriated water, § 170, p 909  
 For more than one stream, § 173, p 918  
 Foreclosures, mortgages, § 190, p 987  
 Foreign waters, § 170, p 909  
 Forfeiture, post  
 Form of remedy, § 194, p 1001  
 Formula, equitable apportionment, § 170, p 911  
 Fraud, certificate of performance, § 180, p 943  
 Future appropriations, § 169  
 Geographical advantage, § 178  
 Grant of permit, § 180, p 938  
 Great ponds, § 110  
 Ground water, § 170, p 909  
 Grounds for extending time, § 180, p 941  
 Gulch, capture or diversion, § 177  
 Headgate, measuring quantity or amount, § 186, p 964  
 Hydrographic survey, necessity, § 180, p 937  
 Idea of equality, § 181, p 947  
 Illegal occupation of land, § 184  
 Illness, prosecution of enterprise, § 179  
 Impairment, vested rights, § 169  
 Implied reservation, § 170, p 909  
 Impounding without putting to beneficial use, § 172  
 In rem proceedings, § 194, p. 1004  
 Inch of water, units of measurement, § 186, p 964  
 Inchoate rights,  
 Loss or abandonment, § 173, p 921  
 Transfer, § 190, p. 984  
 Incident to riparian ownership, § 157  
 Incorporal hereditament, natural stream, § 181, p. 945  
 Increases in stream or watercourse, § 181, p 951  
 Independent right, § 181, p 945  
 Indication of purpose, priority, § 184

## Appropriation—Continued

Individuals, § 194, p 1002  
 Industrial needs, § 168  
 Information, notice, § 176  
 Inherent right, § 157  
 Initial step, § 176  
 Initiated but not perfected before statute, § 180, p 933  
 Injunction, post  
 Injuries to works, § 194, p 1002  
 Injurious changes, diversion, § 188  
 Instructions to jury, § 203, p 1020  
 Instruments transferring rights, § 190, p 985  
 Intended application to useful purpose, § 172  
 Intent, § 174  
 Use, § 175  
 Intentional relinquishment, § 173, p 921  
 Interested parties, extension of time, § 180, p 942  
 Interference with prior appropriator's works, § 185, p 962  
 Interstate streams, § 170, p 910  
 Intervening appropriations, § 186, p 963  
 Intervening appropriators, § 183  
 Invasion of private right, § 194, p 1001  
 Invasion of rights, burden of proof, § 201, p. 1014  
 Involuntary nonuser, § 193, p 996  
 Irrigation, post  
 Issues, proof and variance, § 200  
 Joint ownership, § 173, p 920  
 Joint tenants, sale of interest, § 190, p 984  
 Joint use of same works, § 192, p 993  
 Judgment, § 203, pp. 1020, 1024  
 Res judicata, § 203, p 1029  
 Jurisdiction of actions, § 195  
 Labor supply, prosecution of enterprise, § 179  
 Laches, § 196  
 Lakes, sources of supply, § 181, p 949  
 Land, conveyance apart from or in connection with, § 190, p 984  
 Language, notice, § 176  
 Lateral ditch, measuring quantity or amount, § 186, p 964  
 Leases, § 190, p 988  
 Level of water, § 181, p 950  
 License, defenses, § 197  
 Limit, beneficial use, § 186, p 966, n 97  
 Limitation of actions, § 196  
 Loans, § 190, pp 987, 988  
 Local customs and rules of miners, §§ 157, 168  
 Location, land designed to be benefited, § 172  
 Loss of rights, § 193, p 994  
 Inchoate rights, § 173, p 921  
 Transferee's right, § 190, p 984  
 Transportation, § 186, p 964  
 Lower proprietor, § 159, p 883  
 Manifested intention, § 175  
 Manner of diversion, § 188  
 Manufacturing purpose, § 172  
 Maps,  
 Accompanying application, § 180, p 937  
 Constructive notice, § 176  
 Costs, § 205  
 Notice, § 176  
 Meadow lands, § 186, p 970  
 Means of appropriation, § 181, p. 950  
 Measure, beneficial use, § 186, p 966, n 97  
 Measurement, prior appropriation right, § 181



# WATERS

## Appropriation—Continued

Measuring quantity or amount, place, § 186, p 964  
 Milling uses, § 172  
 Miner's inch, units of measurement, § 186, p 964  
 Miners, local customs and rules, § 168  
 Modified judgment, § 203, p 1028  
 Monopoly,  
     Prior appropriation, § 167  
     Purpose, § 175  
 Moratoriums, prosecution of enterprise, § 179  
 More beneficial use, § 180, p 936, n 74  
 More than one stream, § 173, p 918  
 Mortgages, § 190, p 987  
 Municipal corporations, priority, § 183  
 Natural overflow, § 177  
 Natural persons, exercise of right, § 171  
 Natural springs, § 170, p 907  
 Natural stream, use, § 192, p 994  
 Nature of right, § 181, p 944  
 Necessities of community, § 168  
 Necessity, hydrographic survey, § 180, p 937  
 Negative community, § 172  
 New trial, § 203, p 1020  
 Nonabsorbing purpose, taken for, § 185, p 961  
 Nonreturnable waters, § 185, p 960  
 Notice, §§ 176, 198  
     Intent, § 174  
     Point of diversion, change, § 189, p 977  
     Subsequent appropriation, § 185, p 957  
 Object, § 186, p 964  
     Secondary appropriation, § 185, p 956  
 Obstruction, § 194, p 1002  
 Off-channel reservoir, priority, § 183  
 On lands of others, § 171  
 Opportunity to take, § 171  
 Orders operating in personam, § 195  
 Origin of right, § 168  
 Original acquisition from government, § 157  
 Original action, § 194, p 1005  
 Original time limit, extension, § 180, p 942  
 Paramount authority, § 169  
 Parol transfer of right, § 190, p 985  
 Particularity, judgment, § 203, p 1026  
 Parties to action, § 199  
     Appeals, § 204, p 1036  
     Extension of time, § 180, p 942  
 Passive acquiescence, § 157  
 Patentees, § 173, p 919  
 Percolating waters, § 157  
 Perfect efficiency, § 177, n 52  
 Performance,  
     Certificate, § 180, p 942  
     Specification of time, § 180, p 939  
 Periods water not in use, § 185, p 962  
 Permission of state, § 180, p 933  
 Permissive use, presumption, § 201, p 1013, n 68  
 Permit, cancellation, § 180, p 943  
 Personal property, diverted water, § 181, p 944, n 8  
 Personal service, notice, § 198  
 Persons taking for use of other, § 171  
 Petition, § 200  
 Physical circumstances, prosecution of enterprise, § 179  
 Physical trespass, § 171, n 58

## Appropriation—Continued

Place of measuring quantity or amount, § 186, p 964  
 Place of use, change, § 194, p 1002  
 Placer mining claim, § 170, p 910, n 5  
 Plan of enterprise, prosecution, § 179  
 Pleading, § 200  
 Point of diversion on riparian lands, § 173, p 918  
 Political community, § 169  
 Political divisions, § 194, p 1002  
 Ponds, sources of supply, § 181, p 949  
 Possession, § 194, p 1002  
     Persons who may, § 171  
 Posting, notice of claim, § 176  
     Priority, § 184  
 Potential right, § 157  
 Power plant, operation, § 172  
 Practical inch, units of measurement, § 186, p 965, n 82  
 Precise nature of property, § 181, p 945  
 Preliminary injunction, § 194, p 1003, n 96  
 Present design, use, § 175  
 Preservation, vested rights, § 180, p 937  
 Presumptions, § 201, p 1013  
 Prima facie evidence of intent, § 180, p 938  
 Prior appropriation, §§ 157, 167, 169  
     Benefit, § 184  
 Priorities, §§ 182, 183, 195  
     Assignment, § 180, p 939, n 25  
 Privity, prior appropriations, § 184  
 Probable cause, perfecting application, § 180, p 936, n 74  
 Procedure, § 174  
     Statutory origin, § 180, p 931  
 Propagation of fish, purpose, § 172  
 Prosecution of enterprise, diligence, § 179  
 Protest, § 180, p 938  
 Public and municipal water supply, § 230  
 Public officers, parties, § 199  
 Public policy, §§ 157, 169  
 Public record, § 194, p 1004  
 Public waters and streams flowing on public domain, §§ 167-193, pp 899-1001  
 Publication, notice, §§ 174, 198  
 Purchasers, transfers, § 190, p 986  
 Purposes, § 172  
     Diversion, change, § 188  
     Priority, vesting of rights, time, § 184  
 Qualified right, § 169  
 Quality of water, § 181, p 948  
 Quantity of land irrigated, § 186, p 970  
 Quantity to which priority extends, § 186, p 963  
 Quasi in rem actions, § 194, p 1004  
 Questions of law and fact, post  
 Quiet title, § 194, p 1001, § 195  
 Railroads, necessities, § 172  
 Rains, sources of supply, § 181, p 949  
 Ravine, capture or diversion, § 177  
 Real property, rights of way, § 192, p 990  
 Reasonable needs, § 186, p 967  
 Reasonable time, beneficial application, § 174  
 Recapture, defenses, § 197  
 Recording, notice, § 176  
 Recreation purposes, § 172  
 Reference, § 203, p 1022  
 Refiling, defective application, § 180, p 935

## Appropriation—Continued

Regional conditions, prosecution of enterprise, § 179  
 Registered mail, service of notice, § 198  
 Relation doctrine, § 184  
 Relation to right to enter on land, § 171  
 Relative aridity, § 157  
 Relative priorities, determination, § 203, p 1022  
 Release, post  
 Relinquishment, loss of rights, § 193, p 994  
 Repairs, system or works, § 186, p 965  
 Reply, § 200  
 Requirements, statutory origin, § 180, p 931  
 Reservations, § 169  
     Transfers, § 190, p 987  
 Reservoir storage, § 172  
 Reservoirs, § 170, p 906, n 66  
 Restrictions, § 169  
     Permit, § 180, p 936  
     Public domain, § 170, p 910  
 Retention of jurisdiction, § 203, p 1021  
 Right of actions, § 194, p 1001  
 Rights of appropriator, § 173, pp 917, 921  
 Rights of way, § 192, p 989  
 Riparian proprietors, titles and rights against, § 173  
 Riparian rights,  
     Distinguished from, § 181, p 947  
     Modification, § 9  
 Rival claimants, priority, § 184  
 Rules and regulations, § 169  
 Sale, § 190, p 983  
     Amount in excess of needs, § 186, p 968  
     Squatter's rights, § 190, p 986, n 15  
 Salvaged waters, § 181, p 947  
 Same works, joint use, § 192, p 993  
 School lands, rights of way, § 192, p 990  
 Scientific method, diversion, § 186, p 968, n 33  
 Scope of appeal, § 204, p 1038  
 Scope of exclusion, § 180, p 932, n 30  
 Seasonal flow, fluctuating question, § 170, p 909  
 Seasonal nonuser, forfeiture, § 193, p 998  
 Seasonal storage of water, § 162, n 59  
     Power purposes, § 159, p 878, n 11  
 Second feet,  
     Equitable apportionment, § 170, p 911  
     Units of measurement, § 186, p 964  
 Second notice, filing, § 176  
 Secondary appropriation, § 185, p 956  
 Seepage,  
     Secondary appropriations, § 185, p 958  
     Sources of supply, § 181, p 949  
 Separate transfer, effect, § 190, p 985  
 Service ditch, measuring quantity or amount, § 186, p 964  
 Service of notice, appeals, § 204, p 1037  
 Share-contract, § 181, p 947  
 Shortages, priority, § 183  
 Simultaneous diversions, § 187  
 Situs, water right, § 181, p 947  
 Snows, sources of supply, § 181, p 949  
 Social needs, § 168  
 Sources of supply, tributaries, § 181, p 949  
 Special method, § 174  
 Specification, time for performance, § 180, p 939  
 Speculation, §§ 172, 175  
 Springs, sources of supply, § 181, p 949

## Appropriation—Continued

Squatter's rights, sale or release, § 190, p 986, n 15  
 State boards,  
     Jurisdiction, § 195  
     Transfer or reference, § 203, p 1022  
 State engineer,  
     Findings, § 203, p 1024  
     Parties, § 199  
 State lands, rights of way, § 192, p 990  
 Statement, accompanying application, § 180, p 937  
 Statute of frauds, rights of way, § 192, p 990  
 Statutory action or proceeding, § 194, p 1004  
 Statutory origin, procedural requirements, § 180, p 931  
 Stipulation, judgment, § 203, p 1024  
 Stockholders, parties, § 199  
 Storage in reservoir, § 172  
 Storage purposes, § 186, p 972  
 Stored waters, capture and diversion, § 181, p. 950  
 Storm waters, § 170, p 906  
 Stranded or floating property, § 82  
 Subflow of surface stream, § 170, p 906  
 Subject to appropriation, § 170, p 905  
 Subsequent purchasers, § 190, p 986  
 Substantial character, construction work, § 180, p 940, n 33  
 Substitute method, § 174  
 Subterranean waters, § 80, § 170, p 906  
     Sources of supply, § 181, p 950  
 Successive appropriations, § 185, p 956  
 Superior right, first in time, § 183  
 Supplemental judgment, § 203, p 1028  
 Supplemental statement, application for permit, § 180, p 935  
 Supporting water of surface stream, § 170, p 906  
 Surface waters, § 113, § 170, p 906  
     Capture and diversion, § 181, p 950  
 Surplus,  
     Determination, § 203, p 1021  
     Secondary appropriations, § 185, p 958  
 Surrender, loss of rights, § 193, p 994  
 Surrender for cancellation, permits, § 180, p 944  
 Surveys, costs, § 205  
 Swamp lands reclaimed for benefit of, § 172  
 Taken for nonabsorbing purpose, § 185, p 961  
 Technical trespass, § 171  
 Temporary injunction, § 202  
 Tenants in common, post  
 Term, leases, § 190, p 988  
 Theoretical inch, units of measurement, § 186, p 964  
 Time,  
     Performance, specification, § 180, p 939  
     Vesting of rights for purposes of priority, § 184  
 Title of appropriator, § 173, p 917  
 Transfer of actions, § 203, p 1022  
 Transferee, § 190, p 983  
 Transfers, § 190, p 983  
 Transportation, joint use of same works, § 192, p 993  
 Treaty reserves, § 173  
 Trespasser, acquisition of right, § 171  
 Trial, § 203, p 1019

# WATERS

## Appropriation—Continued

- Tributaries, use and natural flow, § 181, p 949
- Two or more decrees, § 203, p 1033
- Unclean hands, appeals, § 204, p 1039
- Undercurrent of surface stream, § 170, p 906
- Underground streams, § 170, p 906
- Units of measurement, § 186, p 964
- Unseasonally continuous flow, § 170, p 906
- Use of water, § 181, p 948
  - Amount in excess of needs, § 186, p 968
  - Change, § 188
  - Natural stream, § 192, p 993
- Usufructuary right, nature, § 181, p 944
- Validity, judgment, § 203, p 1031
- Value, § 194, p 1002
- Venue, § 195
- Verdict, § 203, p 1023
- Vested rights,
  - Preservation, § 180, p 937
  - Priority, time, § 184
- Volume of water, res judicata, § 203, p 1031
- Waiver,
  - Affirmative defense, § 200
  - Change in diversion, § 188
  - Loss of rights, § 193, pp 994, 999
  - Priority, § 183
- Wants of community, § 168
- War, extension of time, § 180, p 941
- Waste water, post
- Wasteful method, § 177
- Weather, prosecution of enterprise, § 179
- Weight and sufficiency of evidence, § 201, p 1016
- Western states, § 167
- Wild meadow lands, § 186, p 970
- Withdrawal of lands, § 170, p 910
- Works, § 192, p 989
  - Conveyance apart from or in connection with, § 190, p 984
- World, notice, § 176
- Writ of error, § 204, p 1036
- Written deed, § 190, p 985
- Written notice, § 176
- Wrongful entry on public lands, § 171
- Appropriator, distribution and supply of water for irrigation, distributor or consumer, § 352, p 406
- Approval,
  - District, state or federal officers of municipal contract, § 265, p 118
  - Municipal acquisition of existing water system, § 237, pp 36, 37
- Appurtenant rights,
  - Appropriation, transfer, § 190, p 985
  - Artificial channels, § 129, p 843
  - Passing by conveyance, § 217
  - Riparian rights, §§ 8, 9
  - Surface waters, suburban residential subdivision, § 120, n. 52
  - Water priority, § 183
- Aqueducts,
  - Appurtenances passing by conveyance, § 217
  - Constructing and maintaining over lands of another, § 130, p 847
  - Criminal responsibility for injury, § 140
  - Evidence, grants of right to use, § 225, p. 1076
  - Grants, place of use, § 210, p 1052
  - Interference, injunction, § 138
  - Parol licenses, revocation, § 219

## Aqueducts—Continued

- Reservations and exceptions, grants, § 213
- Right to construct and maintain, § 207
- Severance, water rights from land, § 207
- Springs, licenses, § 219
- Arbitration,
  - Claims for damages to Indian lands, § 54, p 701
  - Purchase price of existing water system, § 237, p 38
- Arbitrators, valuation of existing water system property, purchase by municipality, § 237, p 39, § 238, p 40
- Area basis, irrigation district taxes, § 334, p 339
- Area of land, appropriation, § 181, p 947, n 39
- Arid land, reclamation by public authorities, § 316, pp 255-260
- Arid or semi-arid states, natural watercourses, § 4, p 604, n 54
- Arm of government, irrigation districts, § 318, p 266
- Arroyo,
  - Classification, § 2
  - Obstruction and detention, § 15
- Artesian basins,
  - Appropriation, § 170, p 906, n 66
  - Subterranean waters, §§ 89, 92
- Artesian conservancy district,
  - Appropriation, actions, § 194, p 1003, n 90
  - Inclusion of land, § 319(3), p 280
- Artesian wells,
  - Bathing purposes, pollution, § 49
  - Franchise to sink, § 244, n 54
  - Freeholders, application to designated county official to establish, § 234, p 23
  - Municipal license to connect water works with, § 230
  - Source of supply, § 4
- Articles of incorporation, public service water companies, § 247
- Artificial accumulation and storage, § 141
- Artificial canals, § 129, p 842
- Artificial causes, subterranean water, § 90
- Artificial channels, §§ 129-140, pp 841-856
  - Abatement of obstruction, § 130, p 850
  - Accidental damages, liability, § 130, p 849
  - Act of God, injuries from change of course of stream, § 134
  - Actions at law, §§ 137, 138
  - Adjoining owners, § 129, p 843
  - Admissibility of evidence, actions, § 137
  - Adverse use, § 129, p 845
- Appropriation,
  - Capture or diversion, § 177
  - Construction and maintenance over lands of another, § 130, p 847
- Appurtenances to land, § 129, p 843
- Aqueducts, constructing and maintaining, § 130, p 847
- Banks, caving, actions, § 135
- Blasting too near, actions, § 135
- Blockage by others, injuries, § 134, n. 17
- Boundaries, § 129, p 842
- Breach of duty, upkeep and repairs, § 130, p 849
- Breakage, injuries from, § 133
- Bridging, § 130, p 850
- Burden of proof, actions, § 137
- Burden on property of adjoining owner, § 130, p 846

## Artificial channels—Continued

- Canals, § 129, p 842
- Changing course of stream, injuries from, § 134
- Cleaning out waterway, § 130, p 849
- Complaint, injuries, § 137
- Condemnation, § 129, p 843
- Construction, § 130, p 846
- Contracts, construction and maintenance over lands of another, § 130, p 847
- Costs, maintenance and repair, § 130 p 849
- Course of discharge, change, § 129, p 844
- Criminal responsibility for injury, § 140
- Cutting off, actions, § 135
- Damages, interference, § 139
- Damming, actions, § 135
- Dedication to class of public, § 129, p 842
- Deeds and conveyances, interest created, § 209
- Defenses, actions, § 137
- Definition, § 129, p 841
- Destruction, actions, § 135
- Determination by estate benefited, § 130, p 849
- Deviation, plan of construction, § 130, p 847
- Ditches, generally, post
- Diversion, § 59
- Diverting water, actions, § 135
- Duty to close or remove, § 131
- Duty to maintain or repair, § 210, p 1054
- Easements, § 129, p 843
- Evidence,
  - Actions, § 137
  - Injunction, § 138
- Exercise, prescriptive right, § 130, p 843
- Fencing, § 130, p 850
- Filling, actions, § 135
- Flume, § 129, p 841
- General public, § 129, p 843
- Grants,
  - Construction and maintenance over lands of another, § 130, p 847
  - Right to construct and maintain, § 207
- Gulch, § 130, p 847
- Hand of man, § 129, p 841
- Highways, bridging, § 130, p 850
- Implied rights and privileges in grant, § 210, p. 1048
- Incidental works, upkeep and repairs, § 130, p 849
- Incorporeal hereditament, § 129, p 843
- Increasing burden of servitude, § 210, p 1048
- Injunction, injuries, § 138
- Injuries to, § 135
- Interference with rights, § 135
- Irrevocable licenses, § 130, p 848
- Joint construction, § 130, p 848
- Leakage,
  - Injunction, § 138
  - Injuries from, § 133
- License, § 129, p 846, § 219
  - Construction and maintenance over lands of another, § 130, p. 847
- Maintenance, § 130, p 846
- Manner of use, reservations and exceptions, § 214, p 1062
- Mill race, § 129, p. 842
- Natural configuration of land, utilization, § 130, p. 847
- Natural watercourses, § 4

## Artificial channels—Continued

- Nature, § 129, p 841
- Notice, successors of grantor, § 210, p 1056
- Obstructions to flow or drainage, § 130, p 849
  - Actions, § 135
- Overflow,
  - Injunction, § 138
  - Injuries from, § 133
- Parol licenses, revocation, § 130, p 848, § 219
- Permissive use, § 129, p 846
- Persons liable for injuries, § 133
- Physical structure as real estate, § 129, p 842
- Piers, building, actions, § 135
- Plan of construction, deviation, § 130, p 847
- Pleading,
  - Injunction, § 138
  - Injuries to, § 137
- Polluted surface water, § 123
- Prescription, post
- Purpose of use, § 210, p 1054
- Quarrying too near, actions, § 135
- Rate of flow, § 133, n 5
- Ravines, § 130, p 847
- Repairs, § 130, p 849
- Reservations and exceptions, construction and operation, § 214, p 1060
- Right of entry, upkeep and repairs, § 130, p 849
- Right to maintain or repair, § 210, p 1055
- Riparian rights, § 129, p 844
- Rubbish, choking, actions, § 135
- Severance, water rights of land, § 207
- Size and enlargement, § 210, p 1054
- Slough, § 130, p 847
- Special duty as to maintenance, § 130, p 849
- Spring waters, § 130, p 847
- Status, § 129, p 841
- Stipulations, upkeep and repairs, § 130, p. 849
- Stream waters, § 130, p 847
- Streets, bridging, § 130, p 850
- Substitute channels, § 133, n 3
- Supply, § 129, p 844
- Trespass actions, § 137
- Underground conduit, § 130, p 846, n 21
- Uniform route, § 130, p. 848
- Upkeep and repairs, § 130, p 849
- Vested rights, § 129, p 845
- Viaducts, § 130, p 850
- Volume of flow, § 133, n. 5
- Weight and sufficiency of evidence, actions, § 137
- Well waters, § 130, p 847

## Artificial drainage,

- Increased flow, § 20, p 627
- Railroad companies, surface waters, § 118
- Surface waters, § 116, p 811

## Artificial lakes and ponds, § 103

## Artificial means,

- Reduction to possession, § 1, n 5
- Supply of water furnished, grants, § 216

## Artificial obstruction, drainage, surface waters, § 114, p 805

## Artificial person, prescription, § 163

## Artificial ponds,

- Removal of ice, § 384
- Tanks or water mains, surface waters, § 112, n 91

## Artificial structures, flowage of lands, § 24

## Artificial use,

- Appropriation, § 170, p 908

# WATERS

## Artificial use—Continued

Flowing subterranean waters, use, § 93, p 769  
 Mechanical and manufacturing purposes, § 373  
 Obstruction and detention, § 16  
 Artificial works, flowage of lands, injuries, liability, § 29, pp 648, 649, § 30  
 Artificially maintained lakes and ponds, § 107  
 Ascertainment, riparian rights, § 14  
 Assent of electors, purchase of existing water system by municipality, § 237, p 37  
 Assessments,  
   Bonds of water district secured by, § 243(6), p 79  
   Easement, burden of proof, § 201, p 1015, n 90  
   Flooding of lands, damages, § 37, p 674  
   Rates and charges considered as, § 284  
   State engineer, rates and charges, § 297, p 205  
   Taxes, generally, post  
   Water districts, authority to levy, § 243(7), p 82  
 Assets,  
   Depreciation reserve, reasonableness of rates, § 293, p 185  
   Irrigation districts, disposition of property on dissolution, § 338  
 Assignment,  
   Appropriation, rights, § 180, p 939  
   Contracts, irrigation and ditch companies, § 345, p 379  
   Deed conveying water rights, § 362  
   Flowage of lands, right, § 27, p 644  
   Lease of water power, § 380  
   Municipal contract for supply of water, § 271  
   Public service water company, water works, § 259  
   Right of way for irrigation purposes as forfeited by, § 349, p 395  
   Subterranean waters, proceedings and relief, § 101, p 783  
   Surface waters, easement or right of drainage, § 120  
   Water meter as security, § 280, p 151  
   Water stock certificates, action to set aside, § 343, p 369  
 Associations,  
   Irrigation and ditch companies, § 340  
   Members, rights to supply water available for irrigation, § 353  
 Assumpsit, rates and charges, remedies for collection, § 304  
 Assumption of obligations, municipality purchasing water system, § 279, p 147  
 Assumption of risk, pollution, § 54  
 Attempted appropriation, prescription, § 162  
 Attempted transfer, appropriation, § 190, p 983  
 Attorney general,  
   Enjoining use of unappropriated waters for irrigation, § 315, n 49  
   Irrigation district bonds, determining validity, § 331, p 324  
   State action to prevent unlawful diversion, § 233  
 Attorneys' fees,  
   Irrigation districts,  
   Taxes, actions for collection, § 337, p 352  
   Warrants to pay, § 324, p 313  
   Lien for services in condemnation proceedings § 308, p 232  
   Surface waters, actions for damages, § 127, p 833  
 Auditors, water districts, ministerial officers, § 243(4)  
 Authorization, erection of dams, § 18, § 37, p 674

Authorized appropriations, § 173  
 Auxiliary dam, appurtenances passing by conveyance, § 217  
 Available supply,  
   Appropriation states, equitable apportionment, § 170, p 911  
   Increasing, appropriation, § 181  
   Subterranean waters, § 86  
 Average daily abstraction, prescription, § 165, n 70  
 Average highest stage, bed and banks of stream, § 71  
 Avoidance,  
   Appropriation, waste, § 186, p 968  
   Contract or conveyance of existing water system to municipality, § 237, p 39  
   Injury, pollution, defenses, § 54, p 701  
 Avulsion, bed and banks of stream, § 79  
 Awards, flowage of lands, § 25, pp 639, 640  
 Bad faith Good faith, generally, post  
 Balance of convenience, surface waters, injunction, § 128, p 839  
 Balance of equities,  
   Diversion, § 68, p 735  
   Flooding lands, injunction, § 37, p 674  
   Obstruction and detention, § 19  
 Bank holidays, appropriation, prosecution of enterprise, § 179  
 Bankruptcy,  
   Public service water companies, extension of water mains and pipes, § 257, p 107  
   Unreasonable rates, proceedings for relief, § 295, p 193  
 Banks, natural watercourses, § 4, pp 596, 599  
 Barns, pollution, offensive matter, § 55, p 716  
 Barriers, surface waters, injunction, § 128, p 840  
 Basins, subterranean waters, § 92  
 Basis, appropriation, beneficial use, § 186, p 966, n 97  
 Basis of right, prior appropriation, § 168  
 Basis of valuation, existing water system before purchase by municipality, § 238, p 41  
 Bathing,  
   Artificial lake,  
   Prescriptive rights, § 129, p 845, n 96  
   Privileges, § 129, p 844  
 Easement,  
   Conveyance of interest, § 210, p 1048  
   Implied grant, § 207  
 Lakes and ponds, § 105, n 84  
 Liability of water company for failure to furnish water fit for, § 281, p 157  
 Pollution rendering unfit, § 43, p 687  
 Prescriptive right to pollute public water supply, § 232, p 20  
 Privileges, purpose of use, § 210, p 1053  
 Riparian rights, reasonableness of use, § 12  
 Batture, bed and banks of stream, § 77  
 Bayou, surface waters, § 112, n 91  
 Beach land taxes, nonpayment as termination of rights, § 212, n 66  
 Bed and banks of stream, §§ 71–85, pp. 745–761  
 Accretion, § 76  
 Acres granted, § 84  
 Admissibility of evidence, § 83  
 Alluvion, § 76  
 Apportionment, § 71  
 Average highest stage, § 71  
 Avulsion, § 79  
 Batture, § 77

## Bed and banks of stream—Continued

- Boundaries, § 71
- Building foundation, § 74
- Channel, § 41
- Colonial grant, § 85
- Commencement, title to alluvion, § 76
- Computation of area, grant, § 84
- Constitutional and statutory provisions, § 71
- Contracts, § 84
- Conveyances, § 84
- Damages, § 83
- Deposit, alluvion, § 76
- Dereliction, § 78
- Dikes, § 72
- Division of land formed by accretion, § 76
- Easements, § 71
- Elevation of land, § 72
- Embankment, § 72
- Erosion, § 80
- Fills, § 72
- Flats, ownership, § 73
- Floating property, § 82
- Flux of usual tide, § 71
- Foundation for building, § 74
- Gradual addition, § 76
- Gradual withdrawal of water, § 78
- Gravel, accretions, § 76
- High-water mark, § 71
- Imperceptible addition, § 76
- Instructions to jury, ownership, § 83
- Islands, ownership, § 73
- Judgments, ownership, § 83
- Lakes and ponds, § 107
- Law governing, § 71
- Levies, § 72
- Medial line, § 71
- Mining claim, § 75
- Natural watercourses, § 4, pp 596, 599
- New island, § 72
- Ordinary high-water mark, § 71
- Ownership, §§ 71, 72
  - Flats and islands, § 73
- Patents, public grant, § 85
- Piles, § 71
- Pleading, ownership, § 83
- Prescription, § 71
- Presumptions,
  - Grant, § 84
  - Ownership, § 83
- Private property, § 72
- Privileges, § 71
- Public domain, § 75
- Public rights and alluvion, § 76
- Questions of law and fact, ownership, § 83
- Reappearance after submergence or erosion, § 81
- Recession of waters, § 78
- Reclamation of improvement, § 74
- Reliction, § 78
- Remedies and procedure, § 83
- River flats, ownership, § 73
- Sand, accretion, § 76
- Sand bar, removal, § 73
- Shore, § 72
- Standard property, § 82
- State grant, § 85
- State rights, § 71
- Subterranean waters, § 89

## Bed and banks of stream—Continued

- Thread or medial line, § 71
- Time, accretion and alluvion, § 76
- Title, post
- Use in public domain, § 75
- Waiver, state rights, § 71
- Walls, § 74
- Weight and sufficiency of evidence, § 83
- Beneficial adverse use, flowage of lands, § 26
- Beneficial use,
  - Appropriation, §§ 172, 179, § 186, p 966, n 97
  - Application, § 178
  - Burden of proof, § 201, p 1015
  - Judgment, construction, § 203, p 1032
  - Priority, § 183
- Diversion, § 60, § 67, p 730
- Mortgages, § 218
- Passing water, § 9
- Prescription, § 159, p 879
- Reservations and exceptions, construction and operation, § 214, p 1061
- Riparian rights, reasonable use, § 12
- Temporary application of public and municipal water supply, § 230
- Benefits,
  - Accruing to land, diversion, damages, § 69
  - Consumers, municipal contracts for, § 279, p 146
  - Prior appropriations, § 184
  - Property, irrigation districts, property taxable, § 333, p 332
  - Public, pollution, defenses, § 54, p 701
  - Reasonableness of rates and charges, § 289, p 175
  - Surface water, artificial drainage, § 116, p 811
  - Water districts, assessment of property, § 243(7), p 84
- Benevolent corporations, statutory limitations on right to charge for water, § 283, p 100
- Bequest, construction of water system, § 239, n 44
- Bids, supply and distribution of water, § 266
- Bill,
  - Appropriation, actions, § 200
  - Diversion, injunctive relief, § 68, p 738
  - Pollution, equitable relief, § 55, p 714
  - Riparian rights, actions to determine and protect, § 14
  - Surface waters, injunction, § 128, p 837
- Binding nature, contract as to rates and charges, § 287, p 168
- Blasting operations, public service water companies, injuries to works mains or pipes, § 258
- Blockage by others, artificial channels, injuries, § 134, n 17
- Board of health, approval of municipal contract, § 265, p 119
- Boating,
  - Artificial lake, privileges, § 129, p 844
- Easement,
  - Conveyance of interest, § 210, p 1048
  - Implied grant, § 207
- Impounded waters, § 27, p 645, n 53
- Lakes and ponds, § 105, n 84
- Privileges,
  - Purpose of use, § 210, p 1053
  - Reservations and exceptions, grants, § 213
- Body of water, surface waters, § 112

# WATERS

## Bog,

Classification, § 103, n 70

Surface waters, § 112

Artificial drainage, § 116

Bona fide contemplation, future application, appropriation, § 175

Bona fide purchasers,

Sale of pipe line to as destroying rights of city, § 242, p 55, n 46

Surface waters, drainage rights, § 120

Bondholders, public service water companies, rights and duties, § 259

Bonds,

Irrigation and ditch companies, § 345, p 381

Irrigation districts, generally, post

Municipal water works and districts, post

Quasi public irrigation company, § 347, p 384

Water districts, § 243(6), p 78

Bonus,

Municipal supply of water as, § 278, p. 141

Sale of water for irrigation, rates and charges, § 363, p 423

Books, inspection by municipality of existing water system's books before exercising option to purchase, § 237, pp 36, 40

Borough, proceedings to protect rights, § 233

Boundaries and courses, § 2

Artificial channels, § 129, p 842

Bed and banks of stream, § 71

Diversion, injunctive relief, § 68, p 736

Irrigation districts, petition for organization, § 319(2), p 270

Lakes and ponds, § 107

Rates outside municipal boundaries, § 297, p 205

Water districts, § 243(3)

Branch, classification, § 2

Breach of condition subsequent, forfeiture in right of way for irrigation purposes, § 349, p 394

Breach of conditions,

Deeds and conveyances, § 210, p 1047

Flowage of lands, § 24

Termination of granted rights, § 212

Breach of contracts, § 222

Damages,

Municipality and water company, § 276, p 137

Rights and privileges acquired in grants, etc., § 225, p 1078

Injuries incident to supply and use, burden of proof, § 312, p. 245

Insufficiency of supply or pressure, § 310

Municipal supply of water,

Form of action, § 276, p 134

Purity and quality of water, § 269

Municipality and private water company, § 235

Rates and charges, defenses to action for collection, § 304

Remedies of parties, § 225, p 1073

Sale of water for irrigation, § 361, p 421

Supply municipality with water, § 273

Surface waters, action for damages, § 127, p 834

Water districts, § 243(8)

Breach of duty,

Artificial channels, upkeep and repairs, § 130, p 849

Public service water company, forfeiture of franchise, § 253

Breach of franchise, action by water company against city, § 251, n 57

Breach of peace, obstruction and detention, removal or abatement, § 23

Break in continuity, prescription, § 160

Breakage,

Artificial channels, injuries from, § 133

Dams, § 149

Injuries by, §§ 153-156, pp 870-873

Irrigation canal or ditch, liability for injuries, § 365, p 432

Bribery, irrigation districts, confirmatory proceedings, § 319(5)

Bridges,

Artificial channels, § 130, p 850

Degree of care and skill in construction, § 20, p 629

Destruction, damages, § 34, n 14

Flooding lands, defenses, § 36(5)

Irrigating canal or ditch crossing public highways, § 350, p 396

Obstruction and detention, § 20, p 627

Brook, classification, § 2

Buildings,

Eaves, surface waters, § 112

Flat rates and charges, § 298

Flooding lands, damages for injuries, § 38, p 681

Rain water and eavesdrip, § 124

Surface waters, actions for damages, § 127, p 833

Bulkhead, obstruction and detention, § 19

Burden of proof,

Appropriation, § 201, p 1013

Abandonment of rights, § 193, p 994

Right of way, § 193, p 1000, n 42

Artificial channels, § 137

Contract, rates and charges, § 287, p 171

Dams, § 156

Diversion, § 67, p 732

Injunctive relief, § 68, p 739

Flood as act of God, § 20

Flooding lands, § 36(9), § 37, p 678

Instructions to jury, § 36(10)

Flowage of lands, § 32

Flowing subterranean waters, § 93, p 769

Forfeiture of right of way, § 193, p 1000, n 42

Injuries incident to supply and use, § 312, p 245

Irrigation company asserting indebtedness of farmer for water furnished, § 363, p 431, n 89

Irrigation districts,

Actions by or against on bonds, § 331, p 325

Confirmation proceedings as to issue and sale of bonds, § 328

Exclusion of land, § 319(3), p 281

Illegality of tax assessment, § 335, p 347

Tax title actions, § 337, p 359

Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 443

Irrigation rights, actions to establish and protect, § 317, p 263

Lakes and ponds,

Amount of conveyance, § 111, n 74

Record title, § 111, n 75

Municipality water supply contract, § 276, p 136

Point of diversion, application for change, § 189, p 980

Pollution, § 54, pp 704, 705

Equitable relief, § 55, p. 716

## Burden of proof—Continued

- Priority right, § 189, p 981
- Public service water companies,
  - Confiscation of property, § 257, p 107, n 33
  - Unreasonableness of license fee, § 262
- Rates and charges,
  - Amount of water furnished, § 307, p 223
  - Charge by municipally owned utility, § 289, pp 173, 174
  - Duress in payment, § 307, p 225
  - Proceedings for relief, § 295, p 195
  - Setting aside findings or orders, § 296, p 198
  - Unlawfulness of order establishing, § 290
  - Unreasonable discrimination, § 293, p 191, § 297, p 202
- Right to use or be furnished, § 225, p 1076
- Subterranean waters, proceedings and relief, § 101, p. 783
- Surface waters,
  - Actions for damages, § 127, p 829
  - Injunction, § 128, p 837
- Water improvement district, right of recovery as to taxes, penalties and interest, § 337, p 351, n 63
- Burden on property of adjoining owner, artificial channels, § 130, p 846
- Bursting, underground pipes, liability for damage, § 309, p 234
- Business enterprise importance, pollution, recognition, § 55, p 712
- Business judgment, reasonableness of rates, § 289, p 173
- Business loss, pollution, damages, § 56, p 718
- Business purposes, annual rate basis, § 299, n 81
- By-laws,
  - Irrigation and ditch companies, § 342
  - Irrigation company, priority of appropriation, § 354
  - Public service water companies, members and stockholders, § 248
- By whom rights acquired, prescription, § 163
- Calamities, obstruction and detention, persons liable, § 22
- Calculation of depreciation, diversion, damages, § 69, n 83
- Calendar year,
  - Municipal contract for supply of water, § 268
  - Rate contracts, § 287, p 171
- Canal companies,
  - Action by minority stockholders to compel higher charges, § 343, p. 369
  - Quasi public corporation, § 347, p 383
- Canal lands, bed and banks of stream, state grant, § 85
- Canals,
  - Appropriation, § 192, p 989
  - Appurtenances passing by conveyance, § 217
  - Artificial channels, § 129, p 842
  - Boundary, § 129, p 842
  - Bridges and other highway crossings, § 350, p 396
  - Conservation and reclamation district, authority to purchase, § 321, p. 299, n. 34
  - Construction and maintenance over lands of another, § 130, p 847
  - Duty to maintain or repair, § 210, p 1054

## Canals—Continued

- Grants,
  - Place of use, § 210, p 1052
  - Right to construct and maintain, § 207
- Implied rights and privileges in grant, § 210, p. 1048
- Irrigation, drawing water through canal from one state into another, § 315
- Irrigation districts, construction, § 321, p 301
- Licenses, § 219
  - Weight and sufficiency of evidence, § 225, p 1077
- Notice, successors of grantor, § 210, p 1056
- Parol licenses, revocation, § 219
- Place of use, grants, § 210, p 1052
- Purpose of use, § 210, p 1054
- Reservations and exceptions,
  - Construction and operation, § 214, p 1060
  - Grants, § 213
- Reserved rights, termination, § 215
- Right to maintain or make repair, § 210, p 1055
- Severance, water rights from land, § 207
- Size and enlargement, § 210, p 1054
- Cancellation,
  - Contract or conveyance of existing water system to municipality, § 237, p 39
  - Franchise or privilege of private individual operating water system, § 245
- Irrigation district,
  - Bonds, § 327
  - Levy or assessment of tax, § 335, p 345
  - Tax deeds, § 337, p 359
- Option of municipality to purchase existing water system, § 237, p 36
- Permit, appropriation, § 180, p 943
- Canvass of votes,
  - Irrigation districts,
    - Bond issue, § 323
    - Election of officers, § 320, p 291
  - Water district, proposed creation, § 243(2), p 66
- Capacity for storage, flowage of lands, § 24
- Capacity of stream, unreasonable diversion, § 61
- Capacity of system or works, appropriation, § 186, p 965
- Capital stock, irrigation and ditch companies, § 343, pp 365-374
- Capitalization of earnings, existing water system purchased by municipality, § 238, p 42
- Capture,
  - Appropriation, § 177
  - Elements, § 174
  - Subterranean water, § 90
- Careful conduct of business, pollution, defenses, § 54
- Carey Act, reclamation of arid land, § 316, p 255
- Cash basis, irrigation districts, operation on, § 330
- Cash for improvement of river, irrigation district source of revenue, § 334, p 340
- Category of tax, compensation for water furnished by municipality, § 284
- Cattle, lakes and ponds, privilege of watering, § 105
- Cause of diversion, evidence, § 68, p 740
- Cause of injury, flooding lands, evidence, § 36(9)
- Cemetery, petition to enjoin establishment, § 101, p 783
- Cemetery drainage, pollution, § 49
- Certain danger, pollution, injunction, § 55, p. 712
- Certainty of agreement, contracts, § 220



# WATERS

- Certificate, irrigation district taxes, delinquency and foreclosure, § 337, p 352
- Certificate of appropriation, clarification, § 180, p 932
- Certificate of election, irrigation district officers, § 320, p 291
- Certificates of indebtedness, rate contracts between municipality and security holders, § 287, p 171
- Certificate of performance, appropriation, § 180, p 942
- Certification, irrigation district bonds, § 324, p 310
- Certiorari,
  - Appropriation, actions, § 204, p 1036
  - Irrigation districts, validity of organization, § 319 (4)
- Municipal water supply contract, review, § 276, p 133
- Rates and charges,
  - Laches, review of resolution and ordinance fixing, § 289, p 177
  - Review of public service commission order, § 296, p 199
- Sale of water for irrigation, orders of rate, § 363, p 427
- Water district officers, review of removal proceedings, § 243(4)
- Water districts,
  - Assessment of benefits, § 243(7), p 86
  - Inclusion of land, § 243(3)
  - Review of proceedings, § 243(2), p 60
- Cesspool, subterranean water, pollution, § 97
- Chain of title, appropriation, abandonment of right, § 193, p 996, n 87
- Chancery master, pollution, hearing before, § 55, p 716
- Change, prior appropriator's works, § 185, p 962
- Change of place, surface waters, discharge, § 116, p 813
- Changed conditions, rate contracts of municipal water system, § 287, p 170
- Channel of stream,
  - Avulsion, § 79
  - Diversion, § 61
- Channels,
  - Artificial channels, generally, ante
  - Defined, § 41
  - Flowing subterranean waters, § 93, p 769
  - Natural watercourses, § 3, § 4, p 509
  - Obstruction and detention, widening, straightening, etc., § 23
  - Subterranean waters, § 86
  - Surface waters, § 112
- Character,
  - First step, appropriation, priority, § 184
  - Public service water companies, § 247
  - Return flows, appropriation states, equitable apportionment, § 170, p 911
  - Surface waters, loss, § 112
  - Water use, rates and charges, § 297, p 201
- Character of land,
  - Designed to be benefited, appropriation, § 172
  - Irrigation purposes, § 314
  - Water priority, § 183
- Character of stream,
  - Bridges, trestles, etc., § 20
  - Riparian rights, reasonableness of use, § 11
  - Unreasonable diversion, § 61
- Characteristics, natural watercourses, § 4, p 596
- Charges. Rates and charges, generally, post
- Charitable institutions,
  - Municipal charge for water furnished to, § 285
  - Statutory limitations on right to charge for water, § 283, p 160
- Charitable purpose, free supply or nominal charge for water, § 283, p 158
- Charters,
  - Limitations on right to charge for water supply, § 283, p 159
  - Public service water companies, § 248
  - Quasi public water companies, forfeiture, § 347, p 384
- Chattel mortgages, machinery incorporated into municipal water works, power to foreclose, § 241
- Chemical analysis, pollution, evidence, § 54, p 708
- Chemical purity,
  - Municipal contract for supply of water, § 269
  - Private corporation's duty to furnish water, § 278, p 145
- Chemicals, pollution, § 48
- Chief source of supply, diversion, § 61
- Children and minors, irrigation district's liability for death by drowning in ditch, § 365, p 435
- Churches,
  - Statutory limitations on right to charge for water, § 283, p 159
  - Stipulations for free supply of water, § 283, p 160
- Circumstances,
  - Accretion and alluvion, § 76
  - Application, additional water to beneficial use, § 186, p 966
  - Appropriation,
    - Abandonment of rights, § 193, p 996
    - Burden of proof, § 201, p 1015
  - Artificial channels, upkeep and repairs, § 130, p 850
  - Contracts, construction and operation, § 221
  - Deepening natural channel, § 42
  - Diversion, evidence, § 67, p 732
  - Enjoyment as adverse, § 162
  - Flowage of lands, abandonment or loss of rights, § 24
  - Interest created by conveyance, § 209
  - Pollution, § 43, p 689
    - Presumed knowledge, § 50
  - Prescription, uninterrupted character, § 161
  - Subterranean waters, pollution, § 97
  - Unreasonable diversion, § 61
- Circumstantial evidence,
  - Flooding lands, § 36(9), n 34
  - Injuries incident to supply and use, § 312, p 248, n 70
  - Pollution, § 54, pp 705, 708
  - Subterranean waters, proceedings and relief, § 101, p 785
- Cistern,
  - Duty to maintain or repair, § 210, p 1054
  - Rights and privileges, § 210, p 1049
- Cities. Municipalities, generally, post
- Claim of right,
  - Pollution, § 50
  - Surface waters, drainage easement, § 121
- Claimed injury, point of diversion, change, § 189, p 980, n 23
- Claims, irrigation districts, § 321, pp 295, 299
- Clandestine user, prescription, § 159, p 881
- Clarification, certificate of appropriation, § 180, p 932

- Class discrimination, rates and charges, § 297, p 201, n 14
- Classes, subterranean waters, § 86
- Classification, § 2
  - Distribution and supply of water for irrigation, users of water, § 359
  - Lakes and ponds, § 103, n 70
  - Real property, § 1
  - Water users in determining rates and charges, § 297, p 201
- Clay, subterranean waters, § 88
- Clean hands, lakes and ponds, equitable relief, § 111
- Cleaning out waterway, artificial channels, § 130, p 849
- Clear title, prescription, § 105, n 54
- Climatic conditions,
  - Appropriation, prosecution of enterprise, § 179
  - Appropriation states, equitable apportionment, § 170, p 911
  - Bridges, trestles, etc., § 20
  - Duty or quantity needed for irrigation, § 186, p 971
  - Irrigation purposes, reasonable use of water, § 314
  - Riparian rights, reasonableness of use, § 11
  - Subterranean waters, § 86
  - Time of use, § 187
- Cloud on title,
  - Creation of water district, collateral attack on organization proceedings, § 243(2), p 66
  - Water district tax assessments, § 243(7), p 87, n 99
- Coal, subterranean waters, § 88
- Coal dirt, deposit in stream, § 21
- Coal mine operator, public service water companies, rights against, § 254
- Coequal rights, riparian owners to irrigate, § 314
- Coercion, rates or charges, cutting off supply for non-payment, § 305
- Collateral attack,
  - Irrigation district organization, § 319(6)
  - Water districts, organization, § 243(2), p 66
- Collateral covenants, municipal purchase of existing water system, § 239, n 71
- Collection,
  - Irrigation district bonds, § 330
  - Rates and charges, § 302, pp 210-214
  - Sale of water for irrigation, rates and charges, § 363, p 427
  - Surface waters, § 113
  - Water districts, taxes and assessments, § 243(7), p 88
- Collective powers, governing body of water district, § 243(4)
- Colonial grant, bed and banks of stream, § 85
- Color of sewage, pollution, § 45
- Collection of rates and charges, sale of water for irrigation, § 363, p 427
- Color of title, surface waters, drainage easement, § 121
- Commencement, title to alluvion, § 76
- Commencement of service, municipality accepting application for service of water, § 275, p 147
- Commercial character of business, riparian rights, § 12, n 87
- Commercial enterprise, conduct of municipal waterworks as, § 284, n 59
- Commercial establishments, rates and charges, right to meter service, § 302, p 211
- Commercial industrial users, classification, rates and charges, § 297, p 201, n 14
- Commercial navigation, lakes and ponds, § 103, n 70
- Commercial value, existing water system purchased by municipality, § 238, p 42
- Commodity prices, rates and charges, consideration in determining reasonableness, § 293, p 187
- Common basin, subterranean waters, use, § 93, p 772
- Common counts, lease of municipal water system, recovery of money expended in improving and operating system, § 240
- Common enemy,
  - Flood waters, § 19, n 33
  - Surface waters, § 114, p 806
- Common expense, railroads, surface waters, § 115
- Common injury, surface waters, injunction, § 128, p 837
- Common interest,
  - Diversion, parties, § 67, p 731
  - Subterranean waters, proceedings and relief, § 101, p 780
- Common law,
  - Appropriation, § 157
  - Deeds and conveyances, § 208
  - Diversion of water by riparian owners for irrigation purposes, § 314
  - Lakes and ponds, adjacent landowners, § 107, n 10
  - Railroads, surface waters, § 115
  - Riparian rights, §§ 5, 6
  - Subterranean waters, § 86
  - Use, § 93, p 770
  - Surface water, natural drainage, § 114
- Common nuisance, pollution, § 43, p 688
- Common ownership, artificial lake lands, severance, § 207
- Common pool, subterranean waters, § 93, p 772, n 27
- Common property, § 1
  - Diversion, § 59
- Common questions, subterranean waters, proceedings and relief, § 101, p 780
- Common usage, rates and charges, § 302, p 213
- Communicable diseases, ascertaining probability that water supply infected, § 311
- Communicated intention, appropriation, § 175
- Community in wrongdoing, pollution, § 52
- Community irrigation ditch, rights of ownership, § 330
- Community property, irrigation and ditch companies, lien for assessments to pay debts, § 343, p 373
- Community supply, subterranean waters, exhausting, § 93, p 772, n 21
- Comparative depth, lakes and ponds, § 103, n 70
- Comparative rates, reasonableness of rates and charges, § 293, p 184
- Compensation,
  - Appraisers of existing water system on purchase by municipality, § 238, p 45
  - Flowage of lands, § 25, p 637
  - Irrigation districts,
    - Employees, § 320, p 293
    - Officers, § 320, p 290
  - Municipal contract for supply of water, implied authority to pay, § 268
  - Point of diversion, change, § 180, p 982

# WATERS

## Compensation—Continued

- Prior appropriators, subsequent appropriator, § 185, p 958, n 91
- Public service water company to city for use of water pipes, § 257, p 106
- Riparian rights, deprivation, § 9
- Water district officers, items for which tax or assessment levied, § 243(7), p 86
- Compensatory benefits, diversion, § 59
- Competitive bids, irrigation districts, contract for construction of works, § 321, p 302, n 61
- Competitors, public service water companies, Connections with, § 257, p 109
- Rights or privileges, § 252
- Complaint,
  - Actions involving right to use or be furnished, § 225, p 1075
  - Appropriation, actions, § 200
  - Artificial channels, injuries, § 137
  - Dams, actions for damages, § 156
  - Diversion, § 67, p 731
    - Injunctive relief, § 68, p 738
  - Flooding lands, § 36(7)
    - Allegations, § 37, p 677
    - Burden of proof, § 36(9)
    - Issues, proof and variance, § 36(8)
  - Flowage of lands, § 32
    - Actions for damages, sufficiency, § 25
    - Proceedings to acquire right, § 25, p 638
  - Intervention, § 101, p 783
  - Pollution, § 54, p 703
    - Criminal responsibility, § 57
    - Equitable relief, § 55, p 714
  - Riparian rights, determine and protect, § 14
  - Subterranean waters, contents, § 101, p 782
  - Surface waters, actions for damages, § 127, p 828
- Complementary duties, surface waters, § 114, n 26
- Completed appropriation, § 174
- Composition of mains, public service water companies, replacement, § 257, p 106
- Compromise and settlement,
  - Contracts between appropriators, § 190, p 988
    - Ditch and water rights, § 190, p 984
- Computation, surplus supply, § 185, p 958
- Computation of area, bed and banks of stream, grant, § 84
- Concerted acts, pollution, § 52
- Concession, free water to private consumer in acknowledgment of gift of lands, § 283, p 159
- Conclusions of law, point of diversion, change, § 189, p 979
- Condemnation Eminent domain, generally, post
- Condition of improvement, riparian rights, reasonableness of use, § 11
- Condition of purity, § 43, p 686
- Condition subsequent,
  - Appropriation, application to beneficial use, § 186, p 966, n 97
  - Forfeiture, right of way for irrigation purposes on breach, § 349, p 394
- Conditional status, appropriation, § 173, p 921
- Conditions,
  - Appropriation, § 169
    - Permit, § 180, p 935
  - Breach of conditions, generally, ante
  - Change in diversion, § 188
  - Change of water company rates, § 293, p 190

## Conditions—Continued

- Contract for municipal supply and distribution of water, § 268
- Deepening natural channel, § 42
- Diversion, evidence, § 68, p 740
- Increase of rates, § 287, p 168
- Municipal water works and water districts, extension of mains, § 242, p 58
- Obstruction and detention, § 19
- Point of diversion, change, § 189, pp 977, 982
- Prescriptive right, § 165
- Private corporation's privilege to sell water, § 278, p 144
  - Use, rates and charges, § 297, p 201
- Conditions locally prevailing, prior appropriation, § 168
- Conditions precedent,
  - Actions by or against municipality in water supply contract, evidence, § 276, p 136
- Appropriation,
  - Completion, § 174
    - Right to use another's ditch, § 193, p 1000
  - Completed appropriation, § 174
  - Dams, erection, § 147, p 863
  - Distribution and supply of water for irrigation, right to supply, § 352, p 406
  - Flooding lands, injunctive relief, § 37, p 675
  - Injunction to compel distributor to supply water for irrigation, § 317, p 261, n 17
  - Irrigation purposes, remedies for injuries, § 367, p 441
  - Pollution, issuance of injunction, § 55, p 711
  - Public service water companies, laying mains, § 256
  - Taxation by water districts, § 243(7), p 84
  - Water districts, contracts, § 243(6), p 78
- Conduct,
  - Appropriation, constructive notice, § 176
  - Contracts, construction and operation, § 220, n. 61
  - Extent of appropriation, § 186, p 964
  - Prescription, interruption of use, § 161
- Conduits,
  - Appurtenances passing by conveyance, § 217
  - Size and enlargement, § 210, p 1054
- Confession and avoidance, pollution, defenses, § 54, p 704, n 86
- Confiscation,
  - Rate for water furnished municipality, § 275
  - Unreasonable rates, proceedings for relief, § 295, p 193
- Conflict of laws, irrigation districts, organization, § 319(1)
- Conflicting claims,
  - Appropriation, contracts, § 190, p 988
  - Subterranean waters, action to determine, § 101, p 780
- Confluence of two branches, riparian rights, § 8
- Conformation of country, § 4, p 603
- Congress, power to promote general welfare through reclamation, irrigation and improvement projects, § 316, p 257
- Connection cost, failure to pay and justifying cutting off service, § 305
- Connections, municipal water works and water districts, rights and obligations, § 242, pp. 54-60

## Consent,

- Appropriation, defenses, § 197
- Construction and operation of plant, pollution, § 55, pp 713, 714
- Ditch company, point of diversion, change, § 189, p 981, n 29
- Diversion, defenses, § 68, p 737
- Flooding lands, § 36(5)
- Flowage of lands, § 28
- Implied licenses, § 219
- Municipal corporation to county creation of water district, § 243(3), n 15
- Municipal officers to acquisition of existing water system, § 237, p 37
- Obstruction and detention,
  - Persons liable, § 22
  - Surface waters, § 122, n 16
- Owner, rights of way over private lands for irrigation purposes, § 349, p 390
- Pollution, § 54
- State authorities, acquisition of existing water system by municipality, § 236
- Surface waters, increase of flow, § 116, p 813
- Use, prescription, § 162
- Consequences, deepening natural channel, § 42
- Conservancy districts, irrigation districts, inclusion, § 319(3), p 280
- Conservation and development board, approval of municipal contract, § 265, p 119
- Consideration, § 220
  - Appropriators, contracts between, § 190, p 988
  - Deeds and conveyances, § 208
  - Flowage of lands, grants and reservation, § 27, p 643, § 28
  - Irrigation and ditch companies contracts, § 345, p 380
  - Licenses, § 219
  - Municipal contract for private consumers, § 279, p 147
  - Municipal supply of water for right of way, § 278, p 141
  - Option of municipality to purchase existing water system, § 237, p 35
  - Rates with patrons, § 287, p 169
  - Sale for irrigation, contracts with consumers, § 361, p 418, n 18
  - Stocks and stock certificates of irrigation and ditch companies, § 343, p 366
  - Surface waters, easement or right of drainage, § 120
- Consolidation,
  - Irrigation districts, § 321, p 296
  - Public service water companies, § 248
  - Water power companies, § 376
- Constant flowage,
  - Flowage of lands, § 26
  - Natural watercourses, § 4, p 604
- Constitutional and statutory provisions,
  - Appropriation, § 168
    - Procedural requirements, § 180, p 931
    - Rights of way, § 192, p 991
  - Bed and banks of stream, § 71
  - Change, point of diversion, § 189, p 977
  - Dams, § 147, p 861
  - Obstruction or detention, removal or abatement, § 23
  - Ownership, § 1

## Constitutional and statutory provisions—Continued

- Prior appropriation, § 168
- Reasonable use of water, § 191
- Rights of way, appropriation, § 192, p 991
- Riparian rights, § 6
- State commission, sewage pollution, § 45
- Waste or unreasonable use of water, § 191
- Construction,
  - Appropriation,
    - Findings of jury, § 203, p 1023
    - Transfers, § 190, p 985
  - Artificial channels, § 130, p 846
  - Dams, § 147, p 859
  - Injuries, § 148
  - Irrigation project, § 321, p 301
  - Irrigation works, liability for injuries, § 365, pp 432-437
  - Mill ponds, § 147, p 859
  - Municipal waterworks, § 234, pp 23-29
  - Waterworks,
    - Injuries from, § 309, p 233
    - Water districts, § 243(5), p 74
- Construction cost, reasonableness of rates of water companies, § 293, p 182
- Construction of instruments,
  - Consumer's contract for supply and distribution of water, § 279, p 149
  - Contracts, § 221
  - Deeds and conveyances, § 209
  - Franchise of public service water company, § 251
  - Leases, § 224
  - Municipal contracts for supply of water, § 271
  - Municipality's option to purchase existing water system, § 237, p 36
  - Sale of water for irrigation, § 361, p 420
- Constructive appropriation, § 174
- Constructive notice,
  - Appropriation, § 176
  - Irrigation and ditch companies,
    - Contracts to furnish water, § 345, p 381
    - Transfer of stock, § 343, p 368
  - Irrigation districts, confirmatory proceedings, § 319(5)
  - Pollution of water supply, questions of law and fact, § 312, p 249
  - Prescription, § 159, p 881
- Constructive parties, appropriation, actions, § 199
- Consumers,
  - Action by or against municipalities on water supply, § 281, pp 154-157
  - Contracts of municipalities with or for benefit of, § 279, p 146
  - Defined, § 277
  - Distribution and supply of water for irrigation,
    - Appropriator, § 352, p 406
    - Discrimination, § 355
    - Stockholders or members of company or association, § 353, p 409
  - Injunctions, against water company, § 281, p 154
  - Liability to on contract with municipality, § 310
  - Municipal extension of water mains under contract with, § 242, p 59
  - Municipality purchasing water for use of citizens as, § 275
  - Parties to actions concerning water supply contracts, § 276, p 136

# WATERS

## Consumers—Continued

- Premises, pipes on, public service water companies, § 257, p 106
- Rates and charges, generally, post
- Recovery back of amounts paid, § 307, p 223
- Right and duty of municipality to supply water to, § 278, pp 138-146
- Supply and distribution of water, § 277
- Consumptive use, appropriation states, equitable apportionment, § 170, p 911
- Contamination Pollution, generally, post
- Contempt proceedings,
  - Appropriation, judgment, § 203, p 1035
  - Riparian rights, violation of judgment, § 14
  - Surface waters, failure to close up drain, § 128, p 841
- Contentious use, prescription, § 159, p 879
- Contents,
  - Appropriation, application for permit, § 180, p 934
  - Flooding lands, pleadings, § 37, p 677
- Contest, appropriation, § 180, p 938
- Contest of election, irrigation district officers, § 320, p 291
- Contiguous municipalities, supply and distribution of water, § 265, p 118
- Contingent contract, § 220, n 62
- Contingent danger, pollution, injunction, § 55, p 712
- Continuance, further rights having independent source, prescription, § 165
- Continuing diversion, § 62
  - Injunction, § 68
- Continuing duty, railroads,
  - Passage of water, providing, § 20, p 628
  - Surface waters, § 115, n 64
- Continuing injury,
  - Flooding lands, damages, § 38, p 683
  - Interference with irrigation rights, § 317, p 262, n 22
  - Municipality's permanent and uncompensated diversion of waters, § 227
  - Pollution, injunction, § 55, p 711
  - Surface waters, injunction, § 128, p 835
- Continuing offer, water system, municipality's option to purchase, § 237, p 35
- Continuity of adverse user, flowage of lands, § 26
- Continuous character, prescription, § 161
- Continuous flow, appropriation, § 170, p 906
- Continuous hostile claim, riparian rights, § 13
- Contour, earth's surface, appropriation, § 172, n 80
- Contractors' bonds, irrigation district contracts, § 321, p 302
- Contracts, §§ 206-225, pp 1040-1078
  - Acquisition for public supply, § 228
  - Actions, § 225, p 1073
  - Appropriators, § 190, p 988
  - Artificial channels, construction and maintenance over lands of another, § 130, p 847
  - Bed and banks of stream, § 84
  - Breach of contract, generally, ante
  - Consideration, generally, ante
  - Consumers, sale of water for irrigation, § 361, pp 418-422
  - Damages, rights and privileges acquired, § 225, p 1078
  - Equitable relief, § 225, p 1074
  - Evidence, actions involving, § 225, p. 1076
  - Flooding lands, pleading, § 36(7)

## Contracts—Continued

- Flowage of lands, § 28
- Hydrants and hydrant rentals, § 270
- Ice, right to take, § 385
- Irrigation and ditch companies, § 345, p 378
- Irrigation companies, acquisition of water rights, § 348
- Irrigation districts, post
- Irrigation ditch transferable by, § 350, p 396
- Limitation of actions, § 225, p 1075
- Mechanical and manufacturing purposes,
  - Acquisition of rights, § 370
  - Artificial waters, § 373
- Municipal supply of water, form, § 266
- Municipalities to supply nonresidents, § 278, p. 142
- Obstruction and detention, § 21
- Operation of municipal water works system, § 241
- Parties, rights involving, § 225, p 1075
- Performance, § 222
- Pleading, rights involving, § 225, p 1075
- Public service water companies, powers and duties, § 254
- Purchase, municipality of existing water system, § 237, pp 34-40
- Rates and charges, § 287, pp 167-172
- Remedies of parties, § 225, p 1073
- Rescission, § 223
- Riparian rights, modification, § 9
- Specific performance, § 225, p 1073
- Supply and distribution of water, post
- Surface waters, easement or right of drainage, § 120
- Termination, § 223
- Ultra vires contracts, generally, post
- Water companies, § 282
- Water districts, § 243(5), pp 71-76
- Water supply, powers of municipality, § 234, pp. 25, 26
- Contributing cause, pollution, § 43, p 690
- Defenses, § 54, p 701
- Contributions, irrigation and ditch companies, stock subscription and purchase, § 343, p 367
- Contributory negligence,
  - Dams, breakage, actions, § 156
  - Distributor of water for irrigation, § 366, p. 437
  - Diversion, pleading, § 67, p 731
  - Flooding lands,
    - Defenses, § 36(5)
    - Instructions to jury, § 36(10)
    - Pleading, § 36(7)
- Injuries,
  - Construction or maintenance of waterworks, § 309, p 237
  - Incident to supply and use, § 312, pp 245, 249
  - Irrigation ditch owner, § 365, p 435
  - Questions of law and fact, § 36(10)
  - Surface waters, actions for damages, § 127, p. 827
- Control,
  - Irrigation, § 315
  - Municipal water system plant, § 241
  - Pollution, § 45
  - Prescription, essential elements, § 159
  - Prior appropriation, § 167
  - Public service water companies, § 247

## Control—Continued

- Subterranean waters, § 90
- Waste waters subject to appropriation, § 185, p 960
- Water districts, § 243(1)
- Water system by private individual, §§ 244–246
- Conversion,
  - Fire hydrants, water use without contract, § 276, p 133
  - Hostile ownership of water mains by municipality, § 242, p 55, n 46
  - Municipal water works and water districts, pipes laid by individual, § 242, p 57
  - Rates and charges, wrongfully taken water, § 306
  - Watercourse to sewer, pollution, § 45
- Conveyances Deeds and conveyances, generally, post
- Cookhouse, pollution, offensive matter, § 55, p 716
- Cooking, riparian rights, reasonableness of use, § 12
- Cooperative corporations, distribution and supply of water for irrigation, right to control and regulate, § 359
- Cooperative plantation project, limited easement, § 217, n 85
- Cooperative reservoir, contract between municipalities respecting surplus waters, § 241, n 96
- Cowowners of plant, pollution, § 52
- Corporate bodies,
  - Irrigation districts, § 318, p 265
  - Municipal water districts, § 243(1)
- Corporation commission, control over municipality furnishing domestic water to residents, § 234, p 24, n 60
- Corporations,
  - Appropriation, ante
  - Contracts with secretary of interior, § 316, p 258
  - Laying water pipes under contract, liability for injuries, § 309, p 237
  - Point of diversion, change, petition, § 189, p 977
  - Prescriptive rights, § 163
- Corporal hereditament,
  - Impounded waters, § 145, n 8
  - Natural flow of stream, § 15
  - Surface waters, § 113, n 14
- Corpus of water, title, appropriation, § 181, p 944
- Correct valuation of property, flooding lands, damages, § 38, p 682
- Correction, water district assessment roll, § 243(7), p 85, n 78
- Correlative rights doctrine,
  - Proceedings and relief, § 101, p 780
  - Subterranean waters, § 93, p 772
- Corruption of water, § 43, p 689
- Cost basis, municipal purchase of existing water system, § 238, p 42
- Costs,
  - Appraisers of existing water system on purchase by municipality, § 238, p 45
  - Appropriation actions, § 205
  - Artificial channels, maintenance and repair, § 130, p 849
  - Construction and maintenance of irrigation works, § 350, p 397
  - Diversion, injunctive relief, § 68, p 743
  - Flowage of land, actions, § 25, p 640
  - Installing service pipe, municipal water works and water districts, § 242, p 57

## Costs—Continued

- Irrigation rights, actions to establish and protect, § 317, p 264
- Municipality under obligation to furnish service at less than, § 289, p 173
- Point of diversion, proceedings for change, § 189, p 983
- Pollution, equitable relief, § 55, p 717
- Preventing damage, surface waters, actions, § 127, p 833, n 46
- Proceedings for relief from unreasonable rates, § 295, p 194
- Public service water companies, installation of service connections, § 257, p 107
- Riparian rights, actions to determine and protect, § 14
- Service furnished, rates and charges, § 297, p 201
- Cotenants, flowage of lands, parties to action for damages, § 25
- Counties,
  - Implied promise to pay municipality for water furnished, § 274
  - Municipal contract with for supply of water, § 279, p 147
  - Taxation of water district's property, § 243(7), p 88
  - Water works system, authority to establish, § 234, p 23
- County attorney, institution of proceedings against water district officer, § 243(8)
- County commission, sale of water for irrigation, regulation of rates and charges, § 363, p 424
- County highway, surface waters, easement to discharge across, § 119, n 50
- County lands, irrigation rights of way, § 349, p 389
- County liability, flowage of lands, § 30
- Course Channels, generally, ante
- Courts,
  - Discretion of court, generally, post
  - Questions of law and fact, generally, post
  - Rate making powers as managers of municipal water utilities, § 286
- Covenants,
  - Deeds and conveyances, § 211
  - Running with the land,
    - Acquisition of right to pollute, § 50
    - Contract of municipality to furnish premises with water, § 279, p 147
    - Distribution and supply of water for irrigation, § 352, p 405
    - Irrigation water rights, § 362, n 80
- Cow stables, pollution, § 49
- Creation,
  - Flowage of lands, easements by implications, § 27, p 646
  - Further rights having independent source, prescription, § 165
  - Surface waters, easement or drainage, § 120
- Credit,
  - Municipality, pledge for supply of water, § 265, p 117
  - Water districts, giving or lending, § 243(j), p 78
- Creditors' remedies, public service water companies, § 263

# WATERS

## Creeks,

- Classification, § 2
- Flowage of lands, liability of state, § 30
- Obstruction and detention, right of way, § 21

## Creosote in water,

- Admissibility of evidence, § 101, p 784
- Source, evidence, § 101, p 781, n 53

## Criminal responsibility,

- Dams, maliciously attempting to destroy, § 152
- Diversion, § 70
- Interference with water supply, § 313
- Irrigation purposes, liabilities and injuries incident to supply and use, § 368
- Obstruction of watercourse, §§ 39, 40
- Pollution, § 57
- Public water supply, § 232, p 20

## Crops,

- Damages for loss, § 38, p 684, § 351
- Deprivation of water, damages, § 34
- Flooding lands,
  - Damages, § 38, pp 682, 684
  - Defenses, § 36(5)
  - Issues, proof and variance, § 36(8)
  - Parties to action, § 36(6)
- Kind, duty or quantity needed for irrigation, § 186, p 971
- Liability for injuries, § 29, p 649, n 33
- Lien for rates and charges, sale of water for irrigation, § 363, p 429
- Nuisances, damages, § 38, p 684
- Pollution, damages, § 56, pp 718, 720
- Sale of water for irrigation, lien for rates and charges, § 363, p 429
- Subterranean waters, irrigation, § 93, p 768
- Time of use, § 187

## Cross examination of witnesses, water district officers, removal, § 243(4)

## Cross pleading, appropriation, actions, § 200

## Culinary purposes,

- Appropriation, § 172
- Pollution rendering unfit, § 43, p 688

## Cultivation,

- Appropriation, lands, diligence, § 179
- Irrigators allowed reasonable latitude in changing, § 188

## Culvert,

- Degree of care and skill in construction, § 20, p 629
- Obstruction and detention, § 20, p 627
- Railroads, surface waters, § 115
- Surface water floodings, persons liable, § 125

## Curb box, liability of water company for injuries to pedestrian caused by projection, § 309, p 238

## Currents,

- Natural lakes and ponds, § 103
- Natural watercourses, § 4, pp 596, 603
- River, appropriation, § 181, p 950

## Custom and usage,

- Contractual right of stockholder in water company as defeated by, § 353, n 90
- Ground waters, diversion, § 170, p 909, n 92
- Intersecting stream, passageway for water, § 20, p 629
- Pollution,
  - Defenses, § 55, p. 712
  - Mining operations, §§ 47, 48

## Custom and usage—Continued

### Prorating distribution and supply of water for irrigation, § 359

### Riparian rights, reasonableness of usage, § 11

### Segregation of property for rate making on basis of, § 289, p 174, n 18

### Storage and direct irrigation, § 348

### Surface waters, drainage right, § 120

### Unreasonable diversion, § 61

## Cutting off supply for nonpayment of rates and charges, § 305

## Cutting off use, prescription, § 161

## Daily abstraction, prescription, § 165, n 70

## Dairy barn and house, pollution, § 49

## Damages,

### Accumulation and storage, §§ 141, 143

### Appropriation,

#### Actions, § 203, p 1020

#### Right of action, § 194, p 1001

### Artificial channels, interference, § 139

### Bed and banks of stream, ownership, § 83

### Breach of contract between municipality and water company, § 276, p 137

### Breach of duty to consumer, § 281, p 157

### Contracts, rights and privileges acquired, § 225, p 1078

### Dams, actions for destruction or removal, § 151

### Deepening natural channel, § 42

### Deprivation of waters, §§ 32, 34

### Diversion, § 69

#### Injunctive relief, § 68, p 743

#### Pleading, § 67, p 731

### Escaping waters, § 143

### Flooding lands, § 38, p 680

#### Injunctive relief, § 37, p 680

#### Instructions to jury, § 36(10)

#### Questions of law and fact, § 36(10)

### Flowage of land, § 24, § 25, p 637, § 34

#### Assessment, § 25

#### Persons liable, § 30

### Grants, rights and privileges acquired, § 225, p 1078

### Ice removal, § 386

### Injuries incident to supply and use, § 312, pp 244, 250

### Irrigation purposes, liabilities and injuries incident to supply and use, remedies, § 367, p 448

### Leases, rights and privileges acquired, § 225, p 1078

### Mechanical and manufacturing purposes, injuries, § 375

### Pollution, § 54, p 700, § 56, p 718

#### Equitable relief, § 55, p 717

#### Public and municipal water supply, § 232, p 21

#### Special damages, pleading, § 54, p. 703

### Prescription, § 159, p 882

### Private consumer from city for wrongful refusal of water, § 281, p 154

### Public service water companies, injuries to works mains or pipes, § 258

### Punitive damages, generally, post

### Rates and charges, private consumer, §§ 306, 307

### Subterranean waters, § 102

#### Admissibility of evidence, § 101, pp 783, 784

## Damages—Continued

### Surface waters,

- Actions, § 127, pp 827, 833
- Artificial drainage, § 116, pp 811, 812
- Injunction, § 128, pp 830, 840
- Water districts, breach of contract, § 243(8)
- Wrongful discontinuance of water service, § 307, p. 226

## Dams, § 18, §§ 144–152, pp 857–870

- Abandonment, § 147, p 865
- Abatement, § 149
- Accidental bursting, § 153
- Act of God, ante
- Actions for damages, §§ 151, 156
  - Rights and privileges acquired by grants, leases or contracts, § 225, p 1078
- Adjoining owners, rights, § 145
- Alteration of flow, § 148, n 42
- Application to erect, § 147, p 861
- Apportionment of expenses, § 147, p 864
- Appropriation,
  - Capture or diversion, § 177
  - Rights of way, § 192, p 991
- Appurtenances passing by conveyance, § 217
- Breakage, injuries by, §§ 153–156, pp 870–873
- Breaking to abate nuisance, § 149
- Burden of proof, actions for damages, § 156
- Character of structure, § 147, p 863
- Condition precedent to erection, § 147, p 863
- Construction, § 147, p 859
  - Injuries, § 148
  - Trespass, § 147, p 860
- Contracts, construction and operation, § 221
- Corporeal hereditament, § 145, n 8
- Criminal responsibility for attempting to destroy, § 152
- Damages,
  - Failure to observe statute, § 147, p 862
  - Injuries to, § 150
- Deeds and conveyances, interest conveyed, § 210, p 1048
- Destruction, § 147, pp 864, 865
- Detain water, right, § 144
- Diminishing flow, § 147, p 860
- Duty to maintain or repair, § 210, p 1054
- Evidence, grants of right to use, § 225, p 1076
- Exclusive use of waters, § 145
- Expenses, apportionment, § 147, p 864
- Extent of right acquired, § 147, p 863
- Flood gates, liability for damage resulting from opening during storm, § 309, p 238
- Flooding lands,
  - Abatement, § 36(10)
  - Actions to abate, § 37
  - Authorized erection, § 37, p 674
  - Defenses, § 36(5)
  - Issues, proof and variance, § 36(8)
  - Joinder of actions, § 37, p 673
  - Judgment, § 37, p 679
  - Preliminary injunction against construction, § 37, p 679
- Floods, post
- Flowage of lands, § 24
  - Annual damages, § 30
  - Extraordinary and unprecedented storms and floods, liability, § 29, p 649
  - Flushing structure, § 27, p 645

## Dams—Continued

### Flowage of lands—Continued

- Grants, § 27, p 643
- Gross damages, § 30
- Head of water, § 27, p 645
- Leakages, repairing, § 29, p 648
- New dams, erection, § 24
- Perpetual rights, § 25, p 637
- Persons liable, § 30
- Proceedings to acquire right, § 25, p 637
- Public or statutory authority, § 29, p 648
- Raising, § 26
- Rebuilding dam, § 24
- Removal, § 26
- Repairs, § 26
- Reservations and grant, § 27, p 643
- Temporary washouts, § 24
- Transfer, § 27, p 646
- Giant, right to erect and maintain, § 207
- Head of water maintained, § 147, p 863
- Health regulations, § 147, p 862
- Highway protection, § 147, p 860
- Impound water, right, § 144
- Impounded diverted waters, § 153
- Incident to ownership, § 147, p 859
- Increase in height, § 147, p 864
- Injuries from construction and maintenance, § 148
- Injuries to, § 150
- Interference with operation, § 147, p 860, § 150
- Irrigation and ditch companies, implied power to construct, § 345, p 377
- Irrigation district constructing for irrigation purposes, § 350, p 395
- Issues, proof and variance, actions for damages, § 156
- Joint interests, § 145
- Leakage, injuries by, §§ 153–156, pp 870–873
- Lease of municipal water works, § 240
- Liability of water company for injuries resulting from negligence in construction or operation, § 309, p 238
- License, § 147, p 861, § 219
  - Weight and sufficiency of evidence, § 225, p 1077
- Maintenance, § 147, p 859
  - Injuries, § 148
- Manner of use, § 147, p 863
- Mosquito breeding body, § 148
- Municipal authority to construct and maintain, § 234, p 26
- Negligence, breakage or overflow, § 153
- Nonuser, loss of rights, § 147, p 865
- Notice, successors of grantor, § 210, p 1056
- Nuisance, § 147, p 859, n 28, § 147, p 863
- Obstruction and detention, § 18
- Offensive nature, § 148
- Ordinary care, maintenance and operation, § 148
- Overflow, injuries by, §§ 153–156, pp 870–873
- Owners of opposite ends, § 147, p 866
- Ownership of waters, § 145
- Parol license, revocation, § 219
- Percolation, § 154
- Persons liable, breakage, overflow, etc., § 155
- Phenomenal flood, breakage or overflow, § 153
- Pleadings, actions, § 156
- Pollution, § 147, p 862, n 63



# WATERS

## Dams—Continued

- Prescriptive right, § 147, p 862
- Interruption of use, § 161
- Private nuisance, § 144
- Proceedings to erect, § 147, p 861
- Proximate cause, breakage or overflow, § 153
- Public and municipal water supply, pollution, § 232, p 21
- Public authorities, compelling operation, § 147, p 866
- Public nuisance, § 37, p 675, § 144
- Public waters, § 145, n 8
- Pulling down to abate, § 149
- Reasonable use, § 145, § 147, p 860
- Rebuilding, injunctive relief, § 37, p 676
- Reciprocal rights, § 147, p 865
- Refuse, injuries, damages, § 150
- Relieving pressure in time of stress, § 153
- Removal, post
- Repairs, post
- Reservations and exceptions, § 214, p 1062
- Restoring water below, § 23
- Seepage, § 154
- Special injury, issues, proof and variance, § 37, p 677
- Special legislative act, § 147, p 861
- Special proceedings for removal, § 149
- Spillway, liability for damages resulting from opening during storm, § 309, p 238
- Stagnant nature, § 148
- Status of stream, § 145
- Statutory license or permission, § 147, p 861
- Surface water, common enemy, § 114, p 806
- Title to bed under impounded water, § 146
- Trespass, construction as, § 147, p 860
- Type of construction, § 147, p 859, n 30
- Undue retardation of flood water, § 148, n 42
- Washouts, flowage of lands, § 24
- Waste, injuries, damages, § 150
- Water districts, authority to construct, § 243(5), p 74
- Dangerous condition, surface water, pollution, § 123
- Dangerous situations, diligence of water company after notice of, § 309, p 235
- Date, appropriation, burden of proof, § 201, p 1015
- Date of filing, petition for organization of irrigation district, § 319(2), p 271
- De facto dissolution, irrigation districts, § 338
- De facto irrigation districts, collateral attack, § 319(6)
- De facto water district, § 243(2), p 64
- Dead-water zone, mill dam, § 145
- Death, person against whom prescriptive right exercised, § 161
- Debris,
  - Appropriation for purpose of carrying off, § 172
  - Mining operations, pollution, § 47
  - Obstruction and detention, § 17, n 76
  - Pollution, § 45
- Debt limitations, water supply districts, § 243(6), p 79, n 30
- Declarations,
  - Actions involving right to use or be furnished with, § 225, p 1075
  - Appropriation, forfeiture, § 193, p 999
  - Dams, action for damages, § 156
  - Diversion, § 67, p 731
  - Flooding lands, § 36(7)

## Declarations—Continued

- Flowage of lands, § 32
- Pollution, § 54, p 703
- Surface waters, action for damages, § 127, p 828
- Declaratory judgment, rates, review of reasonableness, § 289, p 177
- Decrease in rental value, nuisances, damages, § 38, p 684
- Decrees Judgments and decrees, generally, post
- Dedication,
  - Acquisition of water for public supply, § 228
  - Artificial channels, § 129, p 842
  - Distribution and supply of water for irrigation, § 352, p 405
  - Irrigation and ditch companies, § 345, p 376
  - Mains, connections and right of way to municipality, § 242, p 55
  - Public use, owner of water supply limiting, § 278, p 145
- Deductions, municipal purchase of existing water system, § 238, p 41
- Deeds and conveyances, §§ 206-225, pp 1040-1078
  - Accretions, § 206
  - Acknowledgments, § 208
  - Acquisition of right to pollute, § 50
  - Acquisition of waters for public supply, § 228
  - Actions, § 225, p 1073
  - After-acquired property, § 210, p 1048
  - Alluvion, § 84
  - Ancient grant, interest created, § 209
  - Apportionment of water, rights and privileges, § 210, p 1051
  - Appurtenances to land, §§ 216, 217
  - Artificial channels, § 129, p 843
    - Construction and maintenance over lands of another, § 130, p 847
  - Artificial watercourses, privileges and rights, implied, § 210, p 1048
  - Bathing and boating privileges, § 210, p 1048
  - Bed and banks of stream, § 84
    - United States, § 85
  - Breach of conditions, § 210, p 1047
  - Canals, implied rights and privileges, § 210, p 1048
  - City ordinance, effect, § 206, n 13
  - Common law, § 208
  - Consideration, § 208
  - Construction and operation, § 209, § 214, p 1050
  - Covenants, § 211
  - Damages, rights and privileges acquired, § 225, p 1078
  - Descriptions, § 208
  - Ditches, implied rights and privileges, § 210, p 1048
  - Diversion right, § 207
  - Division of water, rights and privileges, § 210, p 1051
  - Easements, § 207
  - Equitable relief, § 225, p 1074
  - Exceptions, § 213
  - Fishing privileges, § 210, p 1048
  - Flooding lands, defenses, § 36(5)
  - Flowage of lands, § 24, § 27, p 642
  - Foreclosure deed, § 218
  - Form, § 208
  - Ice, right to take, § 385
  - Implied reservation, § 213

## Deeds and conveyances—Continued

- Implied rights or privileges conveyed, § 210, pp 1047, 1051
- Incorporation by reference, § 213
- Inheritance, words of, § 209
- Intention of parties, construction and operation, § 209
- Irrigation ditch, property transferable, § 350, p 396
- Irrigation system, effect on right to supply water, § 358
- Laches, rights involving, § 225, p 1075
- Land entitled to supply of water for irrigation, § 357
- Land on which water used, § 190, p 983
- Liabilities of parties, § 210, p 1047
- Limitation of actions, rights involving, § 225, p 1075
- Location, description, § 208
- Measurement, rights and privileges, § 210, p 1050
- Merger by unity of title, § 212
- Misdescription of right, § 210, n 68
- Municipal purchase of existing water system, § 239
- Natural flow of stream, deprivation of right, § 15
- Obstruction and detention, § 21
- Ownership of waters impounded by dam, § 145
- Parties, § 208
  - Rights involving, § 225, p 1075
- Perpetuity, words of, § 209
- Pipe lines, implied rights and privileges, § 210, p 1048
- Place of use, rights and privileges, § 210, p 1052
- Pleadings, rights involving, § 225, p 1075
- Prescription, presumption, § 158
- Privileges and appurtenances to land, § 216
- Quantity of interest conveyed, § 209
  - Rights and privileges, § 210, p 1050
- Quasi public irrigation companies, § 347, p 384
- Rain water and eavesdrop, § 124
- Recording, § 208
- Remedies of parties, § 225, p 1073
- Repugnant reservation, § 213
- Revival of rights, § 212
- Right to use, transfer, § 207
- Rights of way,
  - Appropriation, § 192, p 990
  - Location, description, § 208
- Riparian rights, §§ 9, 206
  - Construction and operation, §§ 207, 209
- Sale of water for irrigation, water rights, § 362
- Salt water, right to inject into well, § 210, p 1049
- Stranded or floating property, § 82
- Surface waters,
  - Drainage, § 114, p 805
  - Easement or right of drainage, § 120
- Termination of reserved rights, §§ 212, 215
- Time of measurement, rights and privileges, § 210, p 1051
- Works as appurtenances to lands, § 216
- Deepening ditch, surface waters, artificial drainage, § 116, p 811, n 95
- Deepening natural channel, §§ 41, 42
- Default judgments,
  - Appropriation, mortgage foreclosure, § 190, pp 987, 988

## Default judgments—Continued

- Irrigation district, collection of taxes and assessments, § 337, p 352
- Defective contracts, supply and distribution of water, ratification, § 267
- Defective equipment, liability for injuries resulting from, § 309, p 235
- Defective means of diversion, prior appropriator, § 185, p 963
- Defective plumbing, private corporation supplying consumer, § 278, p 145
- Defenses,
  - Affirmative defenses,
    - Flooding lands, injunctive relief, pleading, § 37, p 677
    - Injuries incident to supply and use, § 312, p 245
    - Surface waters, injunction, § 128, p. 836
  - Appropriation, § 197
  - Artificial channels, actions, § 137
  - Diversion, § 67, p 730
    - Injunctive relief, § 68, p 737
  - Escaping waters, § 143
  - Flooding lands, § 36(5), § 37, p 678
    - Pleading, § 36(7)
  - Flowage of lands, § 32
  - Irrigation districts,
    - Actions by or against on bonds, § 331, p 324
    - Foreclosure of tax certificate of delinquency, § 337, p 352, n 69
  - Municipality or water company contracts to furnish water, § 281, p 155
  - Point of diversion, change, § 189, p 979
  - Pollution, § 54, p 701
    - Equitable relief, § 55, p 712
  - Rates and charges,
    - Furnished for irrigation, § 363, p 431
    - Proceedings for collection, § 304
  - Surface waters,
    - Actions for damages, § 127, p 827
    - Injunction, § 128, pp 836, 837
  - Water district officers, removal proceedings, § 243(4)
  - Water supply and distribution, action by or against municipality, § 276, p 134
- Defensive flood works, obstruction and detention, § 19
- Definite source of supply, natural watercourses, § 4, p. 598
- Definitions,
  - Abutting property owner, § 242, p 54, n 43
  - Appurtenances, § 242, p. 54, n 44
  - Assess, § 284, n 60
  - Avulsion, § 79
  - Bank of stream, § 72
  - Batture, § 77
  - Bed of stream, § 71
  - Bona fide resident property owner, § 242, p 59, n 95
  - Channel, § 41
  - Consumer, § 277
  - Dereliction, § 78
  - Diversion, § 58
  - Dividends, § 238, p 43, n 6
  - Drainage, § 316, p 258, n 92
  - Each consumer, § 300, n 6
  - Easement, § 242, p 54, n 43

# WATERS

## Definitions—Continued

- Erosion, § 80
- Extraordinary flood, § 20, p 630
- Franchise, § 277
- Head of water, § 27, p 644, n 52
- Maintaining, § 243(6), p. 77, n 15
- Natural flow, § 9, p 609, n 3
- Natural watercourse, § 3
- Quasi public corporations, § 347
- Reliction, § 78
- Return flow, § 316, p 258, n 92
- Riparian owner, § 8
- Submergence, § 80
- Subterranean waters, § 86
- Use of water for domestic purposes, § 277
- Water meter, § 280, p 150, n 1
- Water rents and water rates, § 284
- Waterworks, § 241, n 92
- Degree of care, bridges, culverts, etc., construction, § 20, p 629
- Delay, appropriation, prosecution of enterprise, § 179
- Delayed profits, flooding lands, damages, § 38, p 681
- Delegation of power,
  - Municipal corporation to regulate rates for water service, § 292
  - Public service water companies, § 250
  - Taxation to governing body of water district, § 243(7), p. 82
  - Water companies, rate regulation, § 292
- Delinquent assessments, water works district, collection, § 243(5), p 72, n 72
- Delinquent taxes, irrigation district, property acquired by, § 321, p 300
- Delivery,
  - Distribution and supply of water for irrigation, change in manner or place, § 356
  - Executed contracts by residents to municipality, § 242, p 59
  - Irrigation, distribution and supply of water, § 352, p 404
  - Leases, § 224
  - Sale for irrigation, contracts with consumers, § 361, p 418
- Demand, distribution and supply of water for irrigation, conditions precedent to right to supply, § 352, p 406
- Demand for performance, contracts, termination and rescission, § 223
- Demurrer,
  - Appropriation, actions, § 200
- Evidence,
  - Pollution, evidence, § 54, p 709
  - Subterranean waters, proceedings and relief, § 101, p 786
  - Flooding lands, actions, § 36(7)
  - Surface waters, injunction, § 128, p 839
- Denial, prescription, effect, § 161
- Density of population, subterranean waters, § 86
- Dependent covenants,
  - Contracts, performance of breach, § 222
  - Municipal contracts for supply of water, § 271
- Depletion of supply, subterranean waters, judgment, § 101, p 786
- Deposit,
  - Alluvion, § 76
  - Irrigation districts, contract bidder, § 321, p 302
  - Pollution, damages, § 56, p. 718

## Deposit—Continued

- Rates and charges, post
- Supply and distribution of water, § 266
- Depreciation,
  - Municipal purchase of existing water system, § 238, p 42
  - Pollution, land value, § 51
  - Property, damages, § 34
  - Rates and charges, consideration in determining reasonableness, § 293, p 184
  - System, consideration in determining reasonableness of rates and charges, § 289, p 175
- Depressions,
  - Appropriation,
    - Capture or diversion, § 177
    - Prosecution of enterprise, § 179
  - Line of flow, § 4, p 602
  - Railroad crossing, surface water, § 115
  - Rates and charges, consideration in determining reasonableness, § 293, p 187
  - Surface waters,
    - Drainage, § 117
    - Filling, § 114, n. 60
- Deprivation,
  - Actions, § 31
  - Prescription, § 159, p 882
  - Property use, surface waters, actions for damages, § 127, p 834
- Depth, natural watercourses, banks, § 3
- Dereliction, bed and banks of stream, § 78
- Descriptions,
  - Appropriation, transfers, § 190, p 986
  - Certificate of appropriation, land, correction, § 180, p 932
  - Deeds and conveyances, § 208
  - Flooding lands, pleading, § 37, p 677
  - Irrigation district,
    - Petition for proposed organization, § 319(2), p 272
    - Tax deeds, § 337, p 356
    - Water district as proposed in petition, § 243(2), p 63
- Desert Land Act, appropriation, effect, § 173, p 919
- Desert lands, reclamation under Carey Act, § 316, p 255
- Destroying underground source, § 100, n 13
- Destruction,
  - Crops, liability for injuries, § 29, p 640, n 33
  - Dam, § 147, p 865
    - Actions, § 151
  - Ditch as destruction of water right, § 193, p 1000, n 42
  - Irrigation district bonds, § 325
  - Riparian rights, § 13
  - Value, pollution, § 43, p 689
- Detachment from land, appropriation for irrigation, § 190, p 983
- Deterioration, quality of water, appropriation, § 181, p 949
- Detriment,
  - Lawful use, flooding lands, damages, § 38, p 681
  - Prescription, § 159, p 882
- Detrimental changes, diversion, § 188
- Developed waters, appropriation, § 181, p. 947

Development,  
 Abstraction of natural stores by foreign and artificial work, § 181, p 947  
 Appropriation, diligence, § 179  
 Deviation, plan of construction, artificial channels, § 130, p 847  
 Device, appropriation, capture or diversion, § 177  
 Different place of use, appropriation, transfer, § 190, p 983  
 Diffusion, surface waters, § 112  
 Dikes,  
 Bed and banks of stream, § 72  
 Flooding lands, injunction, § 37, p 673, n 99  
 Maintenance, surface waters, obstructing flow, § 122  
 Obstruction and detention, § 19, n 37  
 Unprecedented and unforeseeable floods, § 20, p 630, n 89  
 Diligence,  
 Appropriation,  
 Cancellation, permit, § 180, p 943  
 Perfecting, § 175  
 Artificial channels, discovery, § 130, p 848  
 Correcting defects in water company's instrumentalities, § 309, p 235  
 Lack, pollution, defenses, § 55, p 714  
 Prosecution of enterprise, appropriation, § 179  
 Dimensions of buildings, rates and charges established with respect to, § 284  
 Diminished current, diversion, § 59  
 Diminishing flow,  
 Dams, § 147, p 860  
 Prescription, § 165, n 70  
 Diminution of supply,  
 Appropriation, loss of rights, § 193, p 994  
 Diversion, injunctive relief, § 68, p 735  
 Diminution of use, flooding lands, damages, § 38, p 683  
 Direct appropriation, § 180, p 932, n 35  
 Direct irrigation,  
 Appropriation of water for, § 186, p 970; § 348  
 Change, manner of use in storage, § 188  
 Directed verdict,  
 Actions by or against municipality on water supply contract, § 276, p 137  
 Appropriation, actions, § 203, p 1020  
 Direction, natural watercourses, flow of water, § 4, p 603  
 Disagreeable condition, surface waters, pollution, § 123  
 Disasters, reproduction cost of plant, consideration in determining reasonableness of rates and charges, § 293, p 190  
 Discharge,  
 Rain water and eavesdrip, § 124  
 Surface waters, injunction, § 128, p 835  
 Discharge in body, surface waters, § 116, p 815  
 Disclaimer, salvage water, § 186, p 969, n 39  
 Discomfort, pollution, damages, § 56, p 719  
 Discontinuance of use, prescription, loss or termination of right, § 166  
 Discounts, rates and charges, prompt payment, § 302, p 213  
 Discretion,  
 Appropriation, application, grant or refusal, § 180, p 935

Discretion—Continued  
 Irrigation district officers, interference with, § 321, p 295  
 Irrigation districts, issuance of bonds, § 325  
 Irrigation purposes, liabilities for failure to supply water, § 366, p 440  
 Municipal extension of service to private consumers, § 278, p 139  
 Municipal water works and water districts, extension of mains, § 242, p 58  
 Pollution, state commission, § 45  
 Public service water companies, length of franchise granted, § 253  
 Rate producing profit, use of profit, § 289, p 174  
 Sale of water for irrigation, rates and charges, § 363, p 425  
 Discretion of court,  
 Appropriation,  
 Actions, parties, § 199  
 Transfer or reference of case, § 203, p 1022  
 Diversion, injunctive relief, § 68, p 736  
 Equitable relief, § 225, p 1074  
 Flooding of land, injunction, § 37, p 673  
 Pollution, injunction, § 55, p 710  
 Subterranean waters, admissibility of evidence, § 101, p 784  
 Discretionary power, municipal corporations, acquisition of existing water system, § 236  
 Discrimination,  
 Distribution and supply of water for irrigation, § 355  
 Free supply or nominal charge for water to private consumers, § 283, p 158  
 Rates and charges, § 297, pp 200-206  
 Rate contracts, special service, § 287, p 169  
 Sale of water for irrigation, rates and charges, § 363, p 425  
 Water company operating as public utility in supplying water, § 278, p 144  
 Dismissal or nonsuit,  
 Actions involving rights and privileges, § 225, p 1077  
 Appropriation, actions, § 203, p 1019  
 Diversion, § 67, p 734  
 Injunctive relief, § 68, p 741  
 Injuries incident to supply and use of water, actions, § 312, p 249  
 Point of diversion, application for change, § 189, p 980, n 23  
 Pollution, action, § 54, p 709  
 Disposal,  
 Appropriation, amount in excess of needs, § 186, p 968  
 Water system by private individual, §§ 244-246  
 Disputes,  
 Irrigation districts, contracts settling, § 321, p 299  
 Prescription, effect, § 161  
 Dissolution,  
 Injunction,  
 Diversion, damages, § 69  
 Prescription, § 159, p 881, n 52  
 Irrigation and ditch companies, § 346  
 Irrigation districts, § 338  
 Payment of bonds, § 330  
 Temporary injunction, diversion, § 68, p 742  
 Water districts, § 243(9)

# WATERS

Distinct channel, natural watercourses, § 4, p 600, n 97

Distinctions among nonresidents, municipal supply of water, § 278, p 142

Distribution of profits, mutual stock corporation, § 248, n 33

Distribution system, purchaser, § 210, p 1056, n 52

Distributor,

- Distribution and supply of water for irrigation, appropriator, § 352, p 406
- Right to refuse supplies for nonpayment of rates and charges, sale of water for irrigation, § 363, p. 428

District attorneys, institution or proceedings against water district officer, § 243(8)

District officers, approval of municipal contract, § 265, p 118

Districts, appropriation, actions, parties, § 199

Ditch companies Irrigation and ditch companies, generally, post

Ditches,

- Appropriation, § 192, p 989
  - Abandonment, § 193, p 1000
  - Capture or diversion, § 177
  - Conveyance, § 190, p 987
- Appurtenances passing by conveyance, § 217
- Boundaries, § 129, p 842
- Burden on property of adjoining owner, § 130, p 846
- Contracts, construction and operation, § 221
- Criminal responsibility for injury, § 140
- Deeds and conveyances,
  - Interest created, § 209
  - Place of use, § 210, p 1052
  - Right to construct and maintain, § 207
- Destruction, damages recoverable by grantor, § 225, p 1073
- Destruction by owner, § 129, p 845, n 13
- Ditch right, § 129, p 843
- Duty to maintain or repair, § 210, p 1054
- Emptying into ditch of another, § 130, p 847
- Evidence, grants of right to use, § 225, p 1076
- Granted rights, abandonment, § 212
- Implied rights and privileges in grant, § 210, p 1048
- Interference, injunction, § 138, § 225, p 1074
- Irrigation districts, construction, § 321, p 301
- Joint construction, § 130, p 848
- Licenses, § 219
  - Weight and sufficiency of evidence, § 225, p 1077
- Notice, successors of grantor, § 210, p 1056
- Obstruction and detention, §§ 15, 20
- Parol license, revocation, § 219
- Persons liable, § 125
- Pollution, protection, § 55, p 711
- Possessory rights, § 129, p 843
- Purpose of use, § 210, p 1054
- Railroads, surface waters, § 115
  - Drainage, § 118
- Repair, waste, § 186, p 968
- Reservations and exceptions,
  - Construction and operation, § 214, p 1060
  - Grants, § 213
- Right to maintain or make repair, § 210, p 1055
- Secondary appropriation, § 185, p 958
- Seepage water, transfer, § 190, p 987

## Ditches—Continued

- Severance, water rights of land, § 207
- Size and enlargement, § 210, p 1054
- Surface waters,
  - Collection in body and discharge, § 116, p 815
  - Persons liable, § 125
  - Water rights, § 129, p 843
- Ditching, surface waters, § 114, p 805
- Diversion, §§ 58-70, pp 722-745
  - Abatement, § 66
  - Acquiescence, defenses, § 68, p 737
  - Act of God, § 59
  - Admissibility of evidence, § 67, p 732
    - Injunctive relief, § 68, p 739
  - Answer, injunctive relief, § 68, p 738
  - Anticipated injury, § 68, p 736
  - Apportionment, damages, § 69
  - Appropriation, § 177, § 194, p 1002
    - Elements § 174
    - Joint use of same works, § 192, p 993
    - Measuring quantity or amount, § 186, p 964
  - Artificial channel, § 59
  - Balance of equities, § 68, p 735
  - Benefits accruing to land, consideration, § 69
  - Between states, § 59
  - Bill, injunctive relief, § 68, p 738
  - Boundary line change, § 68, p 736
  - Burden of proof, § 67, p 732
    - Injunctive relief, § 68, p 739
  - Change of diversion, § 189, p 976
  - Channel of stream, § 61
  - Chief source of supply, § 61
  - Common property, § 59
  - Compensatory benefits, § 59
  - Complaint, § 67, p 731
    - Injunctive relief, § 68, p 738
  - Consent, defenses, § 68, p 737
  - Continuance of diversion, §§ 62, 68
  - Costs, injunctive relief, § 68, p 743
  - Criminal responsibility, § 70
  - Custom and usage, § 61
  - Damages, § 69
    - Injunctive relief, § 68, p 743
  - Declaration, § 67, p 731
  - Deeds and conveyances, § 207
  - Defenses, § 67, p 730
    - Injunctive relief, § 68, p 737
  - Definition, § 58
  - Diminished current, § 59
  - Discretion of court, injunctive relief, § 68, p 736
  - Dissolution of injunction, damages, § 69
  - Domestic use, §§ 60, 61
  - Electric power, generating, § 60
  - Essential elements of prescription, § 159, p 878
  - Evidence, § 67, p 732
    - Injunctive relief, § 68, p 739
  - Excessive damages, § 69
  - Excessive diversion, § 60
  - Expense of procuring water from another source, § 69
  - Extent of injury, § 61, § 68, p 735
  - Extraordinary use, § 60
  - Flood waters, § 59
  - Flooding lands, § 61
  - Flowing subterranean waters, § 93, p 760, n 87
  - Form of action, § 67, p 730
  - Fraud, damages, § 69

## Diversion—Continued

- Indispensable necessity of cities and villages for drainage, § 61
- Injunction, post
- Injured persons, right to object, § 63
- Instructions to jury, § 67, p 733
- Interest on amounts actually expended, § 69
- Invasion of riparian rights, § 59
- Irreparable injury, § 68, p 736
- Irrigation, purpose, § 60
- Issues, proof and variance, § 67, p 732
- Liability, § 59
- Livestock watering, §§ 60, 61
- Lower riparian owner, § 59
- Malice,
  - Burden of proof, § 67, p. 732
  - Damages, § 69
- Mandatory injunction, § 68, p 742
- Material or perceptible injury, § 61
- Means, pleading, § 67, p 731
- Mechanical purposes, supplying of power, § 60
- Mitigation of damages, § 69
- Multiplicity of suits, § 68
- Nature, § 58
  - Injury, relief, § 68, p 735
  - Pleading, § 67, p 731
- Negligence, post
- Nonriparian owners, § 59
- Nonsuit, § 67, p 734
- Opposite riparian owners, § 59
- Oppression, damages, § 69
- Ordinary riparian purposes, § 59
- Owners of irrigation works, action by, § 351
- Parties to action, § 67, p 731
  - Injunctive relief, § 68, p 738
- Permanent injury, damages, § 69
- Persons liable, § 64
- Petition, § 67, p 731
  - Injunctive relief, § 68, p 738
- Pleading, § 67, p 731
- Police power, § 59
- Pollution of waters, § 59, n 46
- Pond, tapping, § 61
- Prescription, post
- Presumption, existence of damages, § 68, p 739
- Primary uses, § 61
- Public supervision, § 59
- Punitive damages, § 69
- Purpose of diversion, § 60
- Questions of law and fact, § 67, p 733
- Reasonable use, § 59
- Reservoir, tapping, § 61
- Restoration of water, § 62
- Resulting injury, pleading, § 67, p 731
- Right to.
  - Divert, § 59
  - Object, § 63
- Sale, § 60
  - Injunctive relief, § 68, p 735
- Secondary uses, § 61
- Special proceedings to ascertain damages, § 67, p. 729
- Speculative damages, § 69
- Storage of water, § 60
- Subterranean waters, § 96
  - Actions, § 99
  - Arresting and collecting, § 61

## Diversion—Continued

- Subterranean waters—Continued
  - Burden of proof, § 101, p 783
  - Damages, § 102
  - Injunction, § 100
  - Persons liable, § 125
  - Quiet title, § 101, p 786, n 29
- Tapping lake, § 61
- Technical sense, § 58, n 36
- Temporary injuries, damages, § 69
- Trial, § 67, p 733
- Unreasonable diminution of supply, § 68, p 735
- Use on nonriparian land, § 60
- Venue of action, § 67, p 731
  - Injunctive relief, § 68, p 736
- Vexatious litigation, § 68
- Waiver, restoration of water, § 62
- Wanton,
  - Burden of proof, § 67, p 732
  - Damages, § 69
- Wasteful diversion, § 61
  - Injunctive relief, § 68, p 735
- Weight and sufficiency of evidence, § 68, p 739
- Divestiture, riparian rights, § 13
- Dividends, irrigation companies, payment to stockholders, § 347, p 383, n 11
- Division,
  - Classification, § 2
  - Deeds and conveyances, rights and privileges, § 210, p 1051
  - Land formed by accretion, § 76
- Domestic use,
  - Adequate supply of water, private corporation's duty to furnish, § 278, p 145
  - Appropriation, § 170, p 909, § 172
  - Priorities, § 183
  - Artificial lake, § 129, p 844
  - Breach of contract to furnish water for as justifying damages for loss by fire, § 310
  - Diversion, §§ 60, 61
  - Drainage beyond amount reasonably necessary, § 100, n 13
  - Equal rights of riparian proprietors, § 314, n 25
  - Flowing underground waters, § 93, p 769
  - Lakes and ponds, § 105
  - Municipal contract for supply of water, purity and quality of water, § 260
  - Municipal corporation supplying waters to consumers as acting in capacity of private corporation, § 241
  - Pollution of water used for, § 43, p 687, § 311
  - Private corporation as bound under charter to supply water for, § 278, p 146
  - Riparian rights, reasonableness of use, § 12
  - Statutory obligation to furnish municipal waters, § 274
  - Subterranean waters, damages for loss of use, § 102
  - Unfit water furnished, injunction against collection of charges, § 307, p 221
- Donation, municipal supply of water as, § 278, p 141
- Double damages, flooding lands, § 38, p 683
- Doubtful title, appropriation, actions, § 194, p 1003, n 91
- Drainage areas, riparian rights, § 8
- Drainage assessments, irrigation districts, § 333, p 333

# WATERS

- Drainage commissioners, surface waters, injunction, § 128, p 837
- Drainage districts,
  - Pollution of waters, § 45
  - Surface waters, actions for damages, § 127, p 828
- Drainage ditch, irrigation district establishing across private land, § 349, p 393
- Drains and drainage,
  - Amount reasonably necessary, § 100, n 13
  - Appropriation for purpose, § 172
  - Artificial channels, injunction, § 138
  - Injury, diversion, damages, § 69
  - Obstruction and detention, § 20
  - Persons liable, § 125
  - Railroads, surface waters, § 115
    - Artificial drainage, § 118
  - Rain water and eavesdrip, § 124
  - Surface waters, § 112
  - System, destruction, injunctive relief, § 37, p 674, n 22
- Draw,
  - Classification, § 2
  - Obstruction and detention, § 15, § 10, n 23
- Driftwood, pollution, § 45
- Drinking purposes,
  - Injuries incident to supply and use of water, evidence, § 312, p 246
  - Liability of water company for failure to furnish water fit for, § 281, p 157
  - Municipal contract for supply of water, purity and quality of water, § 269
  - Pollution of water used for, § 311
  - Riparian rights, reasonableness of use, § 12
- Driveways, surface water flowing off, persons liable, § 125
- Drought,
  - Irrigation purposes, excuses for failure to supply water, § 366, p 439
  - Prorating distribution and supply of water for irrigation, § 359
  - Sale of water for irrigation, contract with consumers, § 361, p 419
- Dry lake bed, ownership, § 108
- Dry season, duty or quantity needed for irrigation, § 186, p 971
- Dual purpose, appropriation, § 172
- Duck farm, pollution, § 49, n 44
- Due care,
  - Dams, construction and maintenance, § 148
  - Diversion, pleading, § 67, p 731
  - Surface waters, gathering at drain, § 116, p 815
- Due process of law,
  - Irrigation districts, notice and hearing before inclusion of land within, § 318, p 269
  - Liens for water rates and charges, § 308, p 230
  - Riparian rights, deprivation, § 9
  - Valuation of existing water system's property before purchase by municipality, § 238, p 41
  - Water districts, taxes or assessments, § 243(7), p 86
- Duration,
  - Franchise or privilege of private individual operating water system, § 245
  - Licenses, § 219
  - Obstruction and detention, § 17
  - Municipal contract for supply of water, § 268
  - Prescriptive period, § 160
- Duration—Continued
  - Public service water companies, franchise, § 253
  - Service, municipal contract with consumer for supply of water, § 279, p 147
  - Use, obstruction and detention, reasonableness, § 16
- Duress, rates and charges, § 307, p 225
- Duties,
  - Public service water companies, § 254
  - Quasi public irrigation company, § 347, p 384
  - Surface waters, § 113
  - Water districts, § 243(5), pp 71-76
- Duty of water, appropriation, § 203, p 1020
- Dwelling houses, flat rates and charges, § 298
- Dynamiting,
  - Deepening natural channel, § 42
  - Ice gorge, removal or abatement of obstructions, § 23
- Earnings, existing water system purchased by municipality, determination of price, § 238, p 42
- Earth,
  - Bed and banks of stream, accretion, § 76
  - Surface contour, appropriation, § 172, n 89
- Easements,
  - Abandonment, evidence, § 36(9)
  - Acquisition of right to pollute, § 50
  - Action against town to enjoin misuser, § 232, p 22, n 30
  - Appropriation, rights of way, § 192, p 992
  - Artificial channels, § 129, p 843
  - Bed and banks of stream, § 71
  - Deeds and conveyances, § 207
  - Distribution and supply of water for irrigation, § 352, p 405
  - Drainage of upper land, § 117, n 32
  - Flooding lands,
    - Burden of proof, § 36(9)
    - Defenses, § 36(5)
    - Parties, § 36(6)
  - Flowage of lands, § 24
    - Creation by implication, § 27, p 646
    - Interference with easement, § 29, p 648
    - Intermittent easement, § 28
    - Prescriptive rights, § 26
  - Implied grant, § 207
  - In gross, appropriation, § 181, p 945
  - Interest created, § 209
  - Irrigation canal or ditch, § 350, p 398
  - Lakes and ponds, surface use, § 105
  - Loss by merger of titles, § 212
  - Mechanical and manufacturing purposes, § 373
  - Municipal water works and water districts, priorities, § 242, p 57
  - Municipality over lands to lay water mains and pipes, § 241
  - Pollution, § 43, p 688
  - Public service water companies, rights of way, § 255
  - Rain water and eavesdrip, § 124
  - Rights of way, actions to restrain interference with, § 351
  - Riparian rights, natural flow, § 9
  - Springs,
    - Restraining interference, § 101, p. 783
    - Rights to take from, § 209
  - Stock purposes, reservoir, § 142

## Easements—Continued

- Subterranean waters, verdict and findings, § 101, p 782
- Successors of grantor, § 210, p 1056
- Surface waters, drainage, §§ 114, 120
- Water line easements, ultra vires establishment of rates, § 287, p 170, n 77
- Water system by private individual, § 244
- Eavesdrip,
  - Rain water and eavesdrip, § 124
  - Surface waters, § 112
- Economical means of diversion, secondary appropriation, § 185, p 963
- Economy of states, equitable apportionment, § 170, p 911
- Economy of use, duty or quantity needed for irrigation, § 186, p 971
- Educational purposes, free supply or nominal charge for water, § 283, p 158
- Efficiency assessments, water districts, liability for, § 243(7), p 83, n 61
- Ejectment,
  - Invasion of grantee's rights, § 225, p 1073
  - Irrigation rights, actions to establish and protect, § 317, p 260
  - Riparian owner acquiescing in construction and operation of water plant for public supply
  - Estopped to maintain, § 227
- Elections,
  - Approval,
    - Acquisition of municipal water system, § 237, p 36
    - Municipal laying of new mains, § 242, p 57
  - Irrigation district officers, § 320, p 290
  - Irrigation districts,
    - Bond issues, § 243(b), p 80, § 323
    - Submission of proposed organization, § 319 (2), p 277
  - Municipal water works and water districts, establishment or acquisition, § 234, p 23
  - Voting privileges, grants, construction and operation, § 214, p 1060
  - Water district, submission of organization, § 243 (2), p 65
- Elective system of operation, water works district, § 243(5), p 72, n 71
- Electric light plant, appropriation, operation, § 172
- Electric power,
  - Development by irrigation district, § 318, p 268, n 79
  - Generating, diversion, purpose, § 60
  - Mechanical and manufacturing purposes, § 374
  - Water districts, extension of contract, § 243(5), p 74
- Electrical districts, petition for organization, § 319(7)
- Eleemosynary institution, municipal charge for water furnished to, § 285
- Elements,
  - Appropriation, § 174
  - Natural watercourses, § 4, p 596
  - Valuation, existing water system before purchase by municipality, § 238, p 41
- Elevation of land, bed and banks of stream, § 72
- Embankments,
  - Bed and banks of stream, § 72
  - Degree of care and skill in construction, § 20, p 629

## Embankments—Continued

- Flooding lands, defenses, § 36(5)
- Flowage of lands, liability for injuries, § 29, p 648
- Irrigation ditches, duty to enlarge and strengthen to withstand floods, § 350, p 396
- Obstruction and detention, § 19
  - Contracts, § 21
  - Persons liable, § 125
- Railroads, surface waters, § 115
  - Artificial drainage, § 118
- Surface waters, § 114, p 805
- Embarrassment, rates and charges, wrongful discontinuance of water service, § 307, p 228, n 3
- Emergencies,
  - Appropriation, extension of time, § 180, p 941
  - Municipal contract for supply of water, force or pressure, § 268
  - Subterranean waters, injunction, suspension of operation, § 100
  - Water districts, materials and services furnished as constituting valid contract, § 243(5), p 73, n 85
- Eminent danger, pollution, injunction, § 55, p 712
- Eminent domain,
  - Acquisition of water for public supply, § 228
  - Artificial channels, § 129, p 843
  - Diversion, injunctive relief, § 68, p 742
  - Existing water system purchase by municipality, proceedings in nature of, § 238, p 43
  - Flowage of lands, § 24
    - Milowners, § 25, p 637
  - Irrigation ditch as property subject to, § 350, p 396
  - Mechanical and manufacturing purposes, § 372
  - Municipal corporations, acquisition of existing water system, § 236
  - Natural flow of stream, deprivation, § 15
  - Non-riparian use, § 11
  - Public service water companies, § 247, n 1
    - Acquisition of rights of way, § 255
  - Public use, surface drainage, § 114, p 805
  - Railroads, surface waters, § 115
  - Rights of way, appropriation, § 192, p 990
    - Private lands for irrigation purposes, § 349, p 390
  - Subterranean waters, § 88
  - Surface waters, accumulation and discharge in body, § 116, p 815
  - Water districts, exercise of power to acquire existing water works system, § 243(5), p 75
- Encouragement, prior appropriation doctrine, § 173, p 917
- Encumbrances Liens, generally, post
- Endangering underground source, § 100, n 13
- Endorsements on permits, appropriation, § 180, p 939
- Enforcement,
  - Consumer's contract for supply and distribution of water, § 279, p 140
  - Liens, rates and charges, § 308, pp 228-234
- Engineering plans, irrigation district, contract for, § 321, p 301
- Enjoyment, prescription, manner of place, right to alter, § 165
- Enlargement, canals and irrigation ditches, § 350, p 397
- Enlargement of use,
  - Appropriation, § 188
  - Point of diversion, change, § 189, p 980



# WATERS

Enterprise, diligence in prosecution, appropriation, § 179

Entry on land, appropriation, § 171

Entrymen,  
 Appropriations, § 173, p 919  
 Contracts with secretary of interior, § 316, p 258

Ephemeral character, § 2

Equal riparian rights, § 10

Equalization, water district assessments, § 243(7), p 85, n 78

Equipment, public service water companies, power to sell, § 259

Equipment at well, evidence, grants of right to use, § 225, p 1076

Equitable apportionment, § 170, p 911

Equitable owner, municipal purchaser of existing water system, § 239

Equitable relief,  
 Diversion, § 68  
 Pollution, § 55, p 710  
 Riparian rights, § 14

Equitable title, flooding lands,  
 Issues, proof and variance, § 36(8)  
 Parties to action, § 36(6)

Equitable value, municipal purchase of existing water system, § 238, p 42

Equity jurisdiction, actions by or against municipality on water supply contract, § 276, p 135

Erection of piers, obstruction and detention, § 17

Erie, Lake Erie, § 103

Erosion,  
 Bed and banks of stream, § 80  
 Flood waters, release, damages, § 36(1), n 32

Errant water, natural watercourses, § 4, p 602

Escape,  
 Liability, § 141  
 Save and use, § 185, p 960  
 Subterranean water, § 90  
 Surface water, railroad, obstructing, § 115

Essence of appropriation, § 157

Essential elements, prescription, § 159, p 878

Established uses, appropriation states, equitable apportionment, § 170, p 911

Establishment of rates and charges, §§ 286, 294

Estimated value, crops, flooding lands, damages, § 38, p 684

Estoppel,  
 See, also, Waiver, generally, post  
 Appropriation, ante  
 Consumers, unreasonable rates, proceedings for relief, § 295, p 194  
 Diversion,  
 Change, objection, § 188  
 Defenses, § 67, p 730; § 68, p 737  
 Flood waters, restricting flow to material injury of others, § 19  
 Flooding lands, defenses, § 36(5), § 37, p 675  
 Flowage of lands, parcel agreement, § 28  
 Great ponds, state rights, § 110, n 57  
 Injured person to assert damage claim against irrigation company, § 365, p 433  
 Invalidity of municipal contract for supply of water, § 266  
 Irrigation companies, deny use of water in absence of fraud, deceit, etc., § 352, p 404, n 30

## Estoppel—Continued

Irrigation districts,  
 Attacking validity of organization, § 319(4)  
 Boundaries established, § 319(3), p 283  
 Taxation irregularities, § 335, p 343  
 Validity of bonds, § 324, p 311

Irrigation rights, actions to establish and protect, § 317, p 260

Lakes and ponds,  
 Grants, § 105  
 Title to bed, § 107

Lien for water rates and charges, enforcement, § 308, p 233

Mill dam, water level maintenance, § 147, p 865, n 25

Obstruction and detention of waters, claim to damage, § 15, n 39

Pollution, defenses, § 54; § 55, p 714

Power of municipality to establish rates, § 286

Purity and quality of water, failure to furnish as designated under contract, § 269

Rates and charges,  
 Proceedings for collection, § 304  
 Recovery back of amounts paid, § 307, p 224

Right of way,  
 Appropriation, § 192, p 990  
 Private lands for irrigation purposes, § 349, p 390

Special contracts fixing discriminatory rates, § 297, p 204

Subterranean waters, injunctive relief, § 100

Surface waters,  
 Artificial drainage, § 116, pp 811, 812  
 Injunction, § 128, p 836

Unreasonable rates, proceedings for relief, § 295, p 193

Water districts,  
 Inclusion of land, objections, § 243(3)  
 Organization and operation, attacking, § 243 (2), p 67

Estuary, § 2, n 18

Evaporation,  
 Appropriation, joint use of same works, § 192, p 993

Dams, loss, § 18

Secondary appropriations, § 185, p 958

Surface waters, § 112

Evidence,  
 Admissibility of evidence, generally, ante  
 Application for acquisition of public water supply, § 229  
 Appropriation, § 201, p 1013  
 Intention to abandon, § 193, p 996

Artificial channels, § 137  
 Injunction, § 138

Breakage, dams, § 156

Burden of proof, generally, ante

Circumstantial evidence, generally, ante

Contracts, rights involving, § 225, p. 1076

Dams, actions, §§ 151, 156

Deeds and conveyances, rights involving, § 225, p 1076

Diversion, § 67, p 732  
 Injunctive relief, § 68, p 739

Escaping waters, § 143

Existence of watercourse, § 4, p. 597

Flooding lands, post

## Evidence—Continued

Flowage of lands, post  
 Injuries incident to supply and use, § 312, p 245  
 Irrigation districts, post  
 Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 443  
 Irrigation rights, actions to establish and protect, § 317, p 262  
 Irrigation works, damages or injuries to, § 351  
 Lakes and ponds, actions, § 111, n 70  
 Leases, rights involving, § 225, p 1076  
 Mechanical and manufacturing purposes, injuries, § 375  
 Municipal purchase of existing water system, evaluation proceedings, § 238, p 44  
 Municipal water supply contract, actions, § 276, p 136  
 Opinion evidence, pollution, § 54, p 708  
 Point of diversion, change, § 189, p 979  
 Prescription, lack of knowledge, § 159, p 882  
 Presumptions, generally, post  
 Rates and charges,  
   Municipal water plant as reasonable, § 289, p 172, n 85  
   Wrongful discontinuance or water service, § 307, p 227  
 Riparian rights, actions to determine and protect, § 14  
 Sale of water for irrigation, reasonableness of rates and charges, § 363, p 426  
 Subterranean waters, proceedings and relief, § 101, p 783  
 Supply of water to private consumers, § 281, p 156  
 Surface waters,  
   Actions for damages, § 127, p 829  
   Injunction, § 128, p 837  
 Tampering with water meter, § 307, p 225  
 Timber on city watershed as part of city water system, § 240, n 83  
 Value, unreasonable rates, § 295  
 Water districts, post  
 Water power companies, injuries incident to supply or use, § 382  
 Weight and sufficiency of evidence, generally, post  
**Excavations,**  
   Injuries from construction or maintenance of waterworks, § 309, p 234  
   Parties liable for injuries incident to supply and use, § 312, p 244  
   Public service water companies, powers and duties, § 256  
   Subterranean water, § 96  
**Exceptions, deeds and conveyances, § 213**  
**Excess rates and charges, sale of water for irrigation, actions to recover, § 363, p 431**  
**Excess water, appropriation, disposition, §§ 182, 191**  
**Excessive diversion, §§ 60, 69**  
   Beneficial use, § 186, p 967  
   Subterranean waters, § 102  
**Excessive profits, reasonableness of rates of water companies, § 293, p 182**  
**Excessive use,**  
   Lakes and ponds, § 105  
   Riparian rights, § 11  
**Exchange of water, secondary appropriator, § 185, p. 962**

**Exclusive appropriation, § 181, p 948**  
   Banks of stream, § 72  
   Impounded waters, § 145  
   Prescription, § 158  
**Exclusive easements subject to eminent domain, § 242, p 55, n 44**  
**Exclusive enjoyment, pollution, § 43, p 687**  
**Excieta of domestic animals, pollution, § 49**  
**Excuse,**  
   Non-performance of contract, sale of water for irrigation, § 361, p 422  
   Pollution, § 43, p 690  
**Execution, irrigation districts, action by or against on bonds, § 331, p 326**  
**Executive officers, administration of irrigation laws, § 315**  
**Exemplary damages**    **Punitive damages, generally, post**  
**Exemptions,**  
   Appropriation, § 169  
   Irrigation and ditch companies, stockholders from assessments, § 343, p 371  
   Irrigation distributors from liability for injuries incident to supply and use, § 365, p 435  
   Irrigation districts, taxes, § 333, p 330  
   Liability for failure to supply water, § 366, p. 437  
   Taxes,  
     Municipal contract for supply of water, § 268  
     Public service water companies, § 262  
**Exhaustion of statutory remedy, municipality enforcing contract against water company, § 276, p 134**  
**Existence,**  
   Appropriation, § 173, p 921  
   Sources which will furnish necessary amount, § 186, p 967  
   Lakes and ponds, § 107  
**Existing system,**  
   Acquisition by,  
     Irrigation district, § 321, p 300  
     Municipality, § 236  
   Consent to acquisition by municipality, § 234, p 24  
**Expenses,**  
   Dams, apportionment, § 147, p 864  
   Disposing of contaminating matter, pollution, defenses, § 54, p 701  
   Diversion, damages, § 69  
   Flooding lands, damages, § 38, p 680  
   Irrigation districts, incident to organization, § 319(2), p 277  
   Procuring water from other source or diversion, § 69  
   Restoring premises, flooding lands, § 38, p 683  
   Subterranean waters, estoppel, § 100  
**Expert testimony,**  
   Flooding lands, issues, proof and variance, § 36(8)  
   Pollution, § 54, p 707  
   Unreasonable rates, proceedings for relief, § 295, p 193  
**Expiration,**  
   Original time limit, appropriation, § 180, p 942  
   Public service water corporation, franchise, § 253  
**Exposure, reliction or dereliction, § 78**  
**Exposure of buildings, rates and charges established with respect to, § 284**

# WATERS

Express verbal assertion of claim, prescription, § 162

Extension,  
 Canals and irrigation ditches, § 350, p 397  
 Corporate limits of municipality, contracts as to rates and charges, § 287  
 Municipal contract for supply of water, § 268  
 Municipal water system plant, § 241  
 System, reasonableness of rates, § 293, p 182  
 Time, appropriation, § 180, p 940

Extinguishment, prescriptive right, § 166

Extractions, subterranean waters, reasonable use, § 93, p 772

Extraordinary causes, source of supply, § 4, p 590

Extraordinary storms and floods,  
 Bridges, embankments, etc., § 20, p 629  
 Dams, § 18  
 Flooding lands, burden of proof, § 36(9)  
 Instructions to jury, § 36(10)  
 Liability for injuries, § 29, p 649  
 Obstruction and detention, § 19  
 Questions of law and fact, § 36(10)  
 Surface waters, § 114, p 808, n 58

Extraordinary uses, diversion, § 60

Factories, appurtenances passing by conveyance, § 217

Factors considered, irrigation district taxation, benefits basis, § 334, p 338

Factory refuse, pollution, § 48

Facts,  
 Findings of fact, generally, post  
 Questions of law and fact, generally, post

Failure to act, flooding lands, defenses, § 36(5)

Failure to supply, extent of liability, § 366, p 437

Fair return, reasonableness of rates by water companies, § 293, p 181

Fall of water, riparian rights, reasonableness of use, § 11

Fallen timber, pollution, § 49

False representations, rates and charges, users' non-liability, § 305

Family use, riparian rights, § 12

Farm purposes,  
 Pollution, § 43, p 689  
 Subterranean waters, damages for loss of use, § 102

Farms, surface waters, damages, § 127, p 833

Faucets, flat rates and charges varying with number or character of, § 298

Federal forest reserves, appropriations at or through, § 180, p 940

Federal government,  
 Appropriation, authority and control, § 169  
 Prescriptive rights, § 163  
 Rights and title of appropriator, § 173, p 917

Federal officers, approval of municipal contract, § 265, p 118

Federal reclamation statutes, irrigation districts, tax or benefit to excess holdings, § 333, p 334

Federal taxes, municipal contract for supply of water, remission or payment, § 268

Fees,  
 Appraisers of existing water system on purchase by municipality, § 238, p 45  
 Turning off water for nonpayment of charges, § 301

Fences,  
 Across nonnavigable stream, § 15

## Fences—Continued

Artificial channels, § 130, p 850

Irrigation companies, liability, injuries for failure to erect, § 365, p 433

Irrigation ditches, duty of owner, § 350, p 396

Fiction of law, prescriptive right, presumption, § 158

Fifteen years, prescription, § 160

Filing,  
 Appropriation, notice of claim, § 176  
 Rate schedules, § 294

Fills, bed and banks of stream, § 72

Filth discharge, pollution, § 43, p 688

Filtration plants, liability of municipality to riparian owners for damages resulting from operation, § 309, p 238

Financial inability, appropriation, extension of time, § 180, p 941

Financial loss,  
 Public service water companies, extension of mains and pipes, § 257, p 107  
 Rates and charges, wrongful discontinuance of service, § 307, p 228

Financing, municipal water works and water districts, § 241, § 234, p 26

Findings,  
 Appropriation, actions, § 203, p 1023  
 Flooding lands, § 36(10)  
 Flowage of lands, § 25, p 640

Findings of fact,  
 Actions involving rights and privileges, § 225, p 1077  
 Point of diversion, change, § 189, p 979  
 Subterranean waters, proceedings and relief, § 101, p 782  
 Surface waters,  
 Actions for damages, § 127, p 832  
 Injunction, § 128, p 839

Fire districts,  
 Abolishment and territorial limits changed, § 243(9)  
 Rates and charges, regulation by public utility commission, § 290

Fire hydrants, public service water company franchise forfeited for refusal to connect with main, § 253

Fire lines, statutory limitations on right to charge owners for water, § 283, p 160

Fire protection,  
 Adequate supply of water, private corporation's duty to furnish, § 278, p 145  
 Contract of municipality for water supply for extinguishment, § 234, p 26  
 Termination of contract, § 272  
 Municipal water works and water districts,  
 Extension of mains, § 242, p 58  
 Operation as governmental power, § 241  
 Rates fixed by water company for, reasonableness, § 275  
 Statutory obligations to furnish municipal waters, § 274  
 Unreasonable rates, admissibility of evidence, § 295, p 195

Fire protection equipment,  
 Taxation as not authorized to raise money to construct, § 243(7), p. 83, n. 58

## Fire protection equipment—Continued

- Water districts,
  - Authorized to purchase, own and operate, § 243(5), p. 71, n 60
  - Bonds, issue for purchase, § 243(6), p 79, n 29
- Fire protection service, charge for, § 285
- Flies,
  - Charge for water furnished for extinguishing, municipal contract with water company, § 283, p 160
  - Injuries incident to supply and use of water, evidence, § 312, p 246
  - Losses from insufficiency of supply to extinguish, liability, § 310
- First in time, appropriation, § 183
- First step, appropriation, § 175
- Fiscal management, water districts, § 243(6), pp 76-82
- Fish life, pollution, destructive, § 43, p 687
- Fishing,
  - Artificial lake, privileges, § 129, p 844
  - Great ponds, § 110
  - Impounded water, § 27, p 645, n 53
  - Lakes and ponds, § 105, n 84
  - Sufferance use, § 162, n 74
- Fishing easement, conveyance of interest, § 210, p 1048
- Fishing privileges,
  - Purpose of use, § 210, p 1053
  - Reservations and exceptions, grants, § 213
- Five years, prescription, § 160
- Flashboards as part of dam, questions of law and fact, § 36(10)
- Flat rates and charges, § 298
- Flats, bed and banks of stream, ownership, § 73
- Floating easement, municipal mains, connections and rights of way, § 242, p 54, n 43
- Floating property, bed and banks of stream, § 82
- Flood plane, § 4, p 603, n 33
  - Live stream, § 112, n 6
- Flood waters, § 4, p 602
  - Abnormality, § 112, n 3
  - Appropriation, § 170, p 906
  - Dams, undue retardation, § 148, n 42
  - Diversion, § 59
  - Obstruction and detention, § 10
  - Prescription, § 164
  - Riparian rights, § 13
  - Storage for direct irrigation, § 348, n 64
  - Surface waters, distinguished, § 112
- Flooding lands,
  - Complaint, ante
  - Contributory negligence, ante
  - Crops, ante
  - Damages, ante
  - Dams, ante
  - Defenses to action, § 36(5)
  - Diversion, § 61
  - Duty to prevent injury, defenses, § 36(5)
  - Easements, ante
  - Evidence,
    - Conformity of instructions, § 36(10)
    - Issues, proof and variance, § 36(8)
    - Injunctive relief, § 37, p 677
  - Extent of, injury, § 37, p 674
    - Evidence, § 36(9)
  - Irrigation districts, power to drain, § 321, p 295
  - Licenses, post

## Flooding lands—Continued

- Limitation of actions, § 36(4)
- Nature and form of actions, § 36(2)
- Negligence, post
- Obstruction and detention,
  - Burden of proof, § 36(9)
  - Defenses, § 36(5)
  - Issues, proof and variance, § 36(8)
  - Presumptions, § 36(9)
- Petition, post
- Pleading, post
- Public service water companies, reconstruction of highway after, § 256
- Questions of law and fact, post
- Right of action, § 36(1)
- Taking case to jury, § 36(10)
- Torts, post
- Trespass, post
- Venue of actions, § 36(3)
- Floods,
  - Act of God, ante
  - Artificial channels, injuries from change of course of stream, § 134
    - Liability of municipality, § 309, p 239
  - Dams, § 18, § 147, p 859, n 30
    - Breakage or overflow, § 153
    - Injuries, § 148
    - Possibility of interference, § 148
  - Escape of accumulated or stored water, § 141
  - Extraordinary storms and floods, generally, ante
  - Flowage of lands, liability, § 29, p 649
  - Injuries, post
  - Jurisdiction of action, § 36(3)
  - Lakes and ponds, equitable relief, § 111
  - Liability for injuries, § 29, p 649
  - Natural watercourses, § 4, p 602
  - Obstruction and detention, actionable injuries, § 17
    - Prescriptive rights, § 26
  - Railroads, surface waters, § 115
  - Surface waters, persons liable, § 125
- Flow of water,
  - Appropriation, § 181, p 950
  - Failure to return to stream as covenant, § 225, p 1073
  - Natural watercourses, § 4, p 603
- Flow-off waters, secondary appropriation, § 185, p 960
- Flowage of lands, §§ 24-30, pp 634-651
  - Abandonment of rights, § 24
  - Abuse of right, § 29, p 648
  - Actions, § 36(1)
  - Admissibility of evidence, § 32
  - Adverse exercise of easement, § 26
  - Adverse possession or user, § 24
  - Annual damages, § 30
  - Appeal from assessment of damages, § 25, p 640
  - Appropriation of flood waters, § 24
  - Artificial structures, § 24
  - Assignment of right, § 27, p 644
  - Award of damages, § 25, p 639
  - Beneficial adverse use, § 26
  - Breach of condition, § 24
  - Burden of proof, § 32
  - Capacity for storage, § 24
  - Compensation, § 25, p 637
  - Complaint, ante

# WATERS

## Flowage of lands—Continued

- Consideration,
  - Conveyance, § 27, p 643
  - Leases, licenses and contracts, § 28
- Constant flowage, § 26
- Construction of instrument, § 27, p 644
- Continuity of adverse user, § 26
- Contracts, § 28
- Costs, actions, § 25, p 640
- County liability, § 30
- Damages, ante
- Dams, ante
- Declaration, § 32
- Defenses to action, § 32
- Easements, ante
- Embankment, § 24
- Eminent domain, § 24
- Erecting new dam, § 24
- Evidence, § 32
  - Abandonment or loss of rights, § 24
  - Actions for damages, § 25, p 639
  - Injunction, § 33
- Extent of right, § 26
- Extraordinary storms and floods, liability, § 29, p 649
- Findings, § 25, p 640
- Grants, § 24, § 27, p 642
- Gross damages, § 30
- Hydroelectric plants, § 25, p 637
- Implied easements, § 27, p 646
- Impounding of flood waters, § 24
- Incidental rights, § 27, p 644
- Incidental use, § 26
- Independent contractor, liability, § 30, n 40
- Injunction, § 33
- Interference with easement, § 29, p 648
- Intermittent easement, § 28
- Interrupted exercise of easement, § 26
- Judgment, § 25, p 640
- Lakes and ponds, actions, § 111
- Land flowed, transfer, § 27, p 646
- Leases, § 27, p 643, § 28
- Liability for injuries, § 29, p 647
- Licenses, § 28
- Limited right, § 24
- Loss of rights, § 24
- Malice, § 32
- Merger of title, § 24
- Mill owners, § 24, § 25, p 637
- Mitigation of damages, § 25, p 639
- Natural obstruction, liability for injuries, § 29, p 648
- Nature of right conferred, § 25, p 637, § 26
- Nonperformance of condition, § 24
- Nonuser, § 24
- Notice, invasion of property, § 26
- Occasional overflows, § 26
- Open exercise of easement, § 26
- Options, § 27, p 643
- Parol agreements, § 28
- Percolation, liability for injuries, § 29, p 649
- Period of prescription, § 26
- Permissive invasion of premises, § 26
- Perpetual right, § 27, p 643
- Petition, § 32
- Pleading, post
- Prescriptive rights, §§ 24, 26

## Flowage of lands—Continued

- Preventive injunction, § 33
- Privilege, nature, § 28
- Proceedings instituted by owner of land flowed, § 25, p 637
- Public rights, § 26, n 83
- Public works, liability for injuries, § 29, p 648
- Questions of law and fact, post
- Radical change, § 27, p 645
- Reasonable use, § 24
- Reservations, § 27, p 642
- Right to flow land, § 24
- Running of prescriptive period, § 26
- Seasonal purposes, § 26
- State liability, § 30
- Statutory authority, liability for injuries, § 29, p 648
- Statutory proceedings to acquire rights, § 25, p 636
- Stipulations, § 25, p 639
- Stranger to instrument, § 27, p 644
- Successive floodings, § 26, n 96
- Temporary overflows, § 26
- Temporary purposes, § 24
- Temporary washouts of dam, § 24
- Termination of easement, § 27, p 644
- Terms of instrument, § 27, p 645
- Tolerated invasion of premises, § 26
- Trespass, § 24, n 60
- Trial, § 32
- Unprecedented storms and floods, liability, § 29, p 649
- Verdict, § 25, p 640
- Flowing waters,
  - Classification, § 2
  - Subterranean waters, §§ 86, 89
  - Use, § 93, p 769
- Fluctuating question, unappropriated water, § 170, p 909
- Flumes,
  - Appropriation, rights of way, § 192, p 991
  - Artificial channels, § 129, p 841
  - Evidence, grants of right to use, § 225, p 1076
  - Irrigation ditches, duty of owner of new ditch to build and maintain to carry waters of old ditch, § 350, p 397
  - Purpose of use, § 210, p 1054
  - Repair, waste, § 186, p 968
  - Secondary appropriation, § 185, p 958
- Fluoridation, municipality supplying water to private consumers, § 278, p 139
- Flushing sewers, municipal operation of water works system as exercise of governmental power, § 241
- Flux of usual tide, bed and banks of stream, § 71
- Foot front rule, water main, levy of cost, § 243(7), p 85, n 78
- For more than one stream, appropriation, § 173, p 918
- Forbidding use, prescription, § 161
- Force of water, municipal contract for supply, § 268
- Forcible use, prescription, § 159, p 879
- Foreclosure deed, § 218
- Foreclosures,
  - Appropriation, mortgages, § 190, p 987
  - Irrigation and ditch companies, lien given in connection with subscription to capital stock, § 343, p 367

## Foreclosures—Continued

- Irrigation districts,
  - Lien for assessments, § 336
  - Taxes, certificate of, § 337, p 352
- Lien for rates and charges, sale of water for irrigation, § 363, p 430
- Public service water companies, mortgages of, § 263
- Sale of water for irrigation, lien for rates and charges, § 363, p 430
- Water district bonds, § 243(6), p 82
- Foreign waters, appropriation, § 170, p 909
- Foreseeable consequence, surface water flooding, persons liable, § 125, n 43
- Forest preserve,
  - Acquisition of water for public use, § 228
  - Water district as part of, § 243(3), n 10
- Forests, clearing of lands, increased flow, § 20, p 627
- Forfeiture,
  - See, also, Abandonment, generally, ante
- Appropriation,
  - Loss of rights, § 193, pp 994, 997
  - Prior appropriations, § 170, p 909
  - Transferee's right, § 190, p 984
  - Vested rights, § 169
- Charters, quasi public water company, § 347, p 384
- Contracts, strangers, § 223
- Franchise or privilege of private individual operating water system, § 245
- Great ponds, state rights, § 110, n 57
- Prescriptive rights, loss or termination, § 166
- Prior appropriations, fluctuating question, § 170, p 909
- Public service water company franchises, § 253
- Right of way for irrigation purposes, § 349, p 394
- Sale of water for irrigation, nonpayment of rates and charges, § 363, p 429
- Surface waters, drainage rights, § 120
- Termination of granted rights, § 212
- Form,
  - Appropriations,
    - Actions, § 194, p 1001
    - Contract, § 190, p 986
  - Flooding, actions, § 36(2)
  - Municipal contract for supply of water, § 266
  - Pleading, flooding lands, § 36(7)
- Form of action,
  - Diversion, § 67, p 730
  - Pollution, damages, § 54, p 701
- Form of levy, water district taxes or assessments, § 243(7), p 86
- Formation of stream bed, riparian rights, § 10
- Formula,
  - Appropriation states, equitable apportionment, § 170, p 911
  - Ascertainment of fair value of water company's property as basis for reasonable rates, § 293, p 187
- Foundations for building, bed and banks of stream, § 74
- Fountains, limitations on right to charge for water used in, § 283, p 160
- Franchise,
  - Irrigation districts, abandonment and nonuser, § 338

## Franchise—Continued

- Public Service Water Companies, generally, post
- Right to collect compensation for use of water as, § 285
- Water companies to furnish municipalities for public purposes without charge, § 283, p 160
- Water system, benefits by service rendered as constituting consideration, § 237, p 35
- Water system by private individual, §§ 244-246
  - Duration, revocation, cancellation and forfeiture, § 245
- Franchise ordinance, municipal water system, reservation of option to purchase or renew, § 237, p 35
- Franchise tax, municipal water works and water districts, § 241
- Franchise value, municipal purchase of existing water system, § 238, p 42
- Fraud,
  - Appropriation, certificate of performance, § 180, p 943
  - Contracts, § 220
  - Diversion, damages, § 69
  - Irrigation districts,
    - Confirmatory proceedings, § 319(5)
    - Petition for organization, signatures, § 319(2), p 272
  - Judicial review of rates, § 289, p 177
  - Leases, § 224
  - Licenses, revocation, § 219, n 49
  - Ordinance for supply of water procured by, § 266
  - Petition for creation of water district, § 243(2), p 64
  - Public service water companies, forced extension of mains and pipes, § 257, pp 107, 108
  - Rates and charges,
    - Failure to protest against minimum charge, § 307, p 222
    - Wrongfully taken water, § 306
  - Tampering with water meter, presumptive evidence, § 307, p 225
- Fraudulent user, prescription, § 159, p 881
- Free use of water, seller of existing water system to municipality, § 237, p 39
- Free water furnished, obligation to municipality to pay, § 274
- Freezing of pipes, duty of water company to take precautions against, § 309, p 234
- Frequent interruptions of use, prescription, § 162, n 50
- Freshets,
  - Flowage of lands, liability for injuries, § 29, p 649
  - Natural watercourses, § 4, p 602
- Frontage basis, irrigation district taxes, § 334, p 339
- Frontage on stream, riparian rights, § 8
- Fruit trees, surface waters, actions for damages, § 127, p 834, n 55
- Fuel oil, pollution, § 49
- Full flow of stream, prescription, § 165
- Funds,
  - Irrigation districts, control and disbursement, § 321, p 303
  - Municipal water works and water districts, § 234, p 26
- Future appropriations, public domain, § 169
- Future damages,
  - Flowage of lands, assessment, § 25, p 639
  - Surface waters, actions, § 127, p 827.

# WATERS

- Garages, rates and charges, right to meter service, § 302, p 211
- Gardens, irrigation districts, lands included, § 319(3), p 280
- Gas,
  - Public service water companies, power to supply, § 254
  - Subterranean waters, § 97
- Gas plant operation, pollution, § 43, p 688, n 54
- Gas system, water district authorized to issue bonds for acquisition, § 243(6), p 79, n 29
- General denial,
  - Flooding lands, issues, proof and variance, § 36(8)
  - Surface waters, actions for damages, § 127, p. 829
- General fund levy, irrigation districts, issuance of warrants against, § 321, p 297
- General public, artificial channels, § 129, p 843
- General welfare, power of municipality to regulate rates and charges, § 292
- Geographical advantage, appropriation, § 178
- Gifts, concession of water in acknowledgment of, § 283, p 159
- Glaciers, source of supply, § 4, p 398
- Going concern, value of existing water system, municipal purchase, § 238, p 42
- Going value, rates and charges, determination of reasonableness, § 293, p 183
- Gold dredge pond, pollution, § 52, n 4
- Good faith,
  - Application of co-tenant for service after supply of water to tenant refused for nonpayment of rates, § 281, p 156
  - Appropriation, injunction suits, filing, § 194, p 1003
  - City council's waiver of compliance with contract as to quality of water, § 269
  - Municipal purchase of existing water system, determination of price, § 238, pp 41, 44
  - Municipality constructing water works in opposition to existing system, § 235
  - Notice of appropriation, § 176
  - Prescription, § 162, n 57
  - Public service water companies, sale or lease of property, § 259
  - Rates and charges, refusal to pay, § 305, § 307, p 226
  - Sale of water for irrigation, refusal to supply water for nonpayment of rates and charges, § 363, p 428
  - Supply and distribution of water, bids and deposits, § 266
  - Surface waters,
    - Artificial drainage, § 116, pp 811, 812
    - Drainage, § 114, p 807
  - Water works district, denial of protest against formation, § 243(2), p 66, n 90
- Good husbandry, duty or quantity needed for irrigation, § 186, p 971
- Goods sold and delivered, rates and charges, proceedings for collection, § 304
- Governing body, water districts, § 243(4)
- Governmental functions, municipal operation and maintenance of water works system, § 241
- Governmental prerogative, right to sell water as, § 244
- Gradual addition, bed and banks of stream, § 76
- Gradual process, erosion, § 80
- Giant of permit, appropriation, § 180, p 938
- Grants Deeds and conveyances, generally, ante
- Grass, removal, surface waters, artificial drainage, § 116, p 812, n 97
- Gratuitous use of water, schools and school districts, § 283, p 159
- Gravel,
  - Bed and banks of stream, accretion, § 76
  - Drainage for extraction, § 96, n 64
  - Mining operations, pollution, § 47
  - Subterranean waters, § 88
- Great Lakes, § 103
- Great ponds, private ownership, § 110
- Grievances, regulation of water supply to public, § 280, p 153
- Gross damages, flowage of lands, § 30
- Gross negligence, surface waters, actions for damages, § 127, p 835
- Gross receipts tax, public service water companies, § 262
- Ground rent, water rent as, § 284
- Ground water,
  - Appropriation, § 170, p 909
  - Not tributary stream, burden of proof, § 201, p 1013, n 78
- Grounds for extending time, appropriation, § 180, p 941
- Growing crops, time of use, § 187
- Gulch,
  - Appropriation, capture or diversion, § 177
  - Artificial channels, § 130, p 847
- Gulches,
  - Obstruction and detention, § 19, n 23
  - Railroad crossing, surface waters, § 115
- Gutters, rain water and eavesdrip, § 124
- Habits of stream, bridges, trestles, etc., § 20
- Hand of man, artificial channels, § 129, p 841
- Hardship,
  - Pollution, defenses, § 55, p 712
  - Reasonableness of rates of water companies, § 293, p 182
- Harm, flooding lands, issuance of injunction, § 37, p 674
- Harmful condition, surface waters, pollution, § 123
- Headgate,
  - Irrigation works, action for wrongful removal, § 351
  - Maintenance, prescription, § 158, p 876, n 83
  - Measuring quantity or amount, appropriation, § 186, p. 964
- Health,
  - Injury to, damages, § 38, p 684
  - Regulations, dams, § 147, p 862
  - Subterranean waters, damages, evidence, § 101, p 784
  - Surface waters, pollution, § 123
- Health of family, flooding lands, damages, § 38, p 682
- Hearing,
  - Diversion, injunctive relief, § 68, p. 740
  - Flooding lands, injunctive proceedings, § 37, p 678
  - Irrigation districts,
    - Proposed organization, § 319(2), p 275
    - Tax assessment, § 334, p. 342
  - Surface waters, injunction, § 128, p 839
  - Water district officers, removal, § 243(4)

## Hearing—Continued

### Water districts,

Petition for creation, § 243(2), p 63

Taxes or assessments, § 243(7), p 86

Hearsay evidence, irrigation districts, validity of organization, § 319(4)

### Heavy rains,

Accumulations, § 4, p 603

Liability for injuries, § 29, p 649, n 30

High water, natural watercourses, § 4, p 602

High water level, lakes and ponds, lowering, § 111

High-water mark, bed and banks of stream, § 71

Highways Roads and Highways, generally, post

Hinderance of flow, riparian rights, § 9

Historic cost, consideration in determining reasonableness of rates and charges, § 289, p 175

### History,

Stream, bridges, trestles, etc., § 20

Subterranean waters, § 86

### Hog pen or sties,

Pollution, § 49

Offensive matter, § 55, p 716

Hollow bed of running water, channel, § 41

Hollows ordinarily dry, § 4, p 599

Home rule, water districts, § 243(5), p 71, n 60

Homes, riparian rights, § 12

Homestead entryman, irrigation districts, qualifications of petitioners for organization, § 319(2), p 271

Housepower, reservations and exceptions, construction and operation, § 214, p 1061

### Hospitals,

Free supply or nominal charge for water, § 283, p 158

Riparian rights, § 12

Statutory limitations on right to charge for water, § 283, p 160

Hostile character, prescription, § 162

### Hotels, rates and charges,

Discrimination, § 297, p 203, n 41

Installation of water meters, § 302, p 211

Hours, time of use, § 210, p 1054

Hours of labor, riparian rights, reasonableness of use, § 11

Household uses, riparian rights, reasonableness, § 12

Human consumption, well water, fitness, instructions to jury, § 101, p 781

Humiliation, rates and charges, wrongful discontinuance of water service, § 307, p 228, n. 3

Hunting, great ponds, § 110

Huron, Lake Huron, § 103

### Husband and wife,

Petition for organization of irrigation district, § 319(2), p 271

Rates and charges,

Liability for payment, § 302, p 213

Wrongful discontinuance of water service, § 307, p 227

### Hydrant and hydrant rentals, § 270

Impeding travel or imperiling safety, liability for, § 309, p 236

Municipal contracts, renewal or extension and duration, § 268

Purity and quality of water as effecting municipal obligation to pay for water supply, § 269

Reasonable rental value, water company compensation, § 275

## Hydrant and hydrant rentals—Continued

Self-draining hydrants, liability of water company for failure to install in accordance with contract, § 310

Supply and distribution of water, § 270

Ultra vires contract, defense to actions for, § 276, p 135

Hydraulics laws, bridges, trestles, etc., § 20, p 630

Hydroelectric plants, flowage of lands, § 25, p 637

### Hydroelectric power,

Mechanical and manufacturing purposes, § 374

Place of use, grant, § 210, p 1052, n 85

Hydrographic survey, appropriation, necessity, § 180, p 937

### Ice, §§ 383-386

Appropriation, artificial lake, § 129, p 844

Contracts, § 385

Conveyances, § 385

Ice companies, § 383

Ice skating, § 383

Injuries and remedies, § 386

Liability for injuries sustained by fall on, § 309, p 235

Licenses, § 385

Municipality's right to take, § 384

Nuisance, § 124

Ownership, § 383

Property and ice, § 383

Public service water companies, power to cut and store for reservoirs, § 254

Right to cut and remove, § 384

Trespassers, ownership and property of ice, § 383

Ice cutting, sufferance use, § 162, n 74

Ice jam, obstruction and detention,

Negligence in permitting formation, § 17

Railroad bridge, § 20, p 628

Idea of equality, appropriation doctrine, § 181

Identification, return waters, § 185, p 959

Identity, stranded or floating property, § 82

Illegal occupation of land, appropriation, priority, § 184

Illegal system of water charges, § 288

Illegality, contracts, § 220

Illness, appropriation, prosecution of enterprise, § 179

Immaterial injury, surface waters, artificial drainage, § 116, p 811, n 91

Imminence of danger, pollution, injunction, § 55, p 712

Immunity, pollution, § 43, p 689

Impairing obligation of contracts, liens for water rates and charges, § 308, p 230

Impairment, appropriation, vested rights, § 169

Impairment of obligations, irrigation districts, assessment, levy and collection of taxes, § 333, p 328

Impairment of value, pollution, § 43, p 689

Imperceptible addition, bed and banks of stream, § 76

Imperceptible process, erosion, § 80

Imperfection in plaintiff's works, diversion, evidence, § 68, p 740

Implied assumpsit, action by water company against municipality for rentals, § 276, p 133

Implied attempt, abandonment of water, § 185, p 959, n 2

### Implied contracts,

Rate contracts of municipal water system, § 287, p 170

Sale of water for irrigation, § 361, p 419



# WATERS

## Implied contracts—Continued

- Water companies with private consumers, § 279, p 148
- Water districts, § 243(5), p 73, n 85
- Implied covenants, leases, § 224
- Implied grant of easement, § 207
- Implied license, § 219
- Implied limitation, purpose of use, § 214, p 1062, n 43
- Implied notice, surface waters, drainage easement, § 122
- Implied obligations, municipal supply of water, § 274
- Implied power, municipalities, contracts for supply and distribution of water, § 265, p 116
- Implied provisions, franchise of public service water company, § 251
- Implied reservation,
  - Appropriation, § 170, p 909
  - Deeds and conveyances, § 213
  - Surface waters, drainage easement, § 120
- Importance of use, diversion, defenses, § 67, p 730
- Impounding water, § 18, n 93
  - Diverted waters, dams, injuries, § 153
  - Flood waters, § 24
  - Grant of right, interest created, § 209
  - Springs, § 91
  - Surface waters, § 112, n 91
    - Common enemy, § 114, p 806
  - Without putting to beneficial use, § 172
- Improvement districts,
  - Petition for organization, § 319(7)
  - Water works taken over from by municipality as exercise of governmental function, § 241, n 4
- Improvement of water system, municipal obligation to pay hydrant rentals as dependent on, § 270
- Improvements,
  - Appropriation, forfeiture or loss, § 190, p 984
  - Bed and banks of stream, § 74
  - Consideration in determining reasonableness of rates and charges, § 293, p 187
  - Deeds and conveyances, rights and privileges, § 210, p 1051
  - Irrigation districts, taxes for, § 333, p 329
  - Rates as sufficient to cover, § 239, p 176
  - Water rents as, § 284
- Impure water,
  - Private consumer enjoining municipality furnishing, § 281, p 154
  - Public service water company franchise forfeited for furnishing, § 253
- Imputed knowledge, surface waters, drainage easement, § 121
- In rem proceedings,
  - Appropriation, actions, § 194, p 1004
  - Irrigation districts,
    - Confirmation proceedings, § 319(5), § 321, p 304
    - Issue and sale of bonds, § 328
    - Organization, § 319(1)
    - Refunding bond issue, § 324, p 311
    - Validation of securities issued, § 323
- Inaccuracy, water meter, § 302, p 211
- Inadequacy of channel to accommodate increased flow, § 117, n 33
- Inadequate damages, diversion, § 69
- Inattention to oil pipe line leak, allegations, § 101, p 782
- Inch of water, appropriation, units of measurement, § 186, p 964
- Inchoate rights, appropriation,
  - Loss or abandonment, § 173, p 921
  - Transfers, § 190, p 984
- Incident to ownership, dams, § 147, p 859
- Incidental damages, subterranean waters, § 102
- Incidental rights, flowage of lands, § 27, p 644
- Incidental use, flowage of lands, § 26
- Incidental works, artificial channels, upkeep and repairs, § 130, p 849
- Incidentally impairing purity, pollution, § 43, p 689
- Income, water districts, disposition, § 243(6), p 77
- Income loss, diversion, damages, § 69
- Income of company, rates and charges, determination of reasonableness, § 293, p 183
- Income tax, municipal water works and water districts, § 241
- Inconvenience,
  - Obtaining water after shutting off of supply, damages, § 281, p 157
  - Pollution, damages, § 56, p 719
  - Rates and charges, wrongful discontinuance of service, § 307, p 228
- Incorporation,
  - Irrigation and ditch companies, § 342
  - Public service water companies, § 248
- Incorporation by reference, deeds and conveyances, § 213
- Incorporeal hereditament,
  - Appropriation from natural stream, § 181, p 945
  - Artificial channels, § 129, p 843
  - Distribution and supply of water for irrigation, § 352, p 405
  - Prescription, § 165
  - Riparian rights, § 10
  - Springs, right to take from, § 209
- Incorporeal right,
  - Appropriation, § 181, p 945
  - Artificial channels, use of water, § 129, p 844
- Increase in height, dams, § 147, p 864
- Increase in use, prescriptive right, § 166
- Increase of flow, surface waters, § 116, p 813
- Increases in stream or watercourse, appropriation, § 181, p 951
- Increasing pollution, sewage, § 46
- Indebtedness,
  - Irrigation districts,
    - Payment on dissolution, § 338
    - Power to incur, § 321, p 296
  - Restrictions on power of municipality to contract for supply of water, § 265, p 116
  - Water districts, § 243(6), pp 76-82
- Indefinite term, municipal contract for supply of water, § 268
- Indemnity, rates and charges, recovery back of amounts paid, § 307, p 224
- Independent acts, pollution, § 52
- Independent contractor,
  - Flowage of lands, liability, § 30, n 40
  - Surface waters, actions for damages, defenses, § 127, p 827, n 67
- Independent covenants,
  - Contracts, performance of breach, § 222
  - Municipal contract for supply of water, § 271
- Independent right, water right, § 181, p 945

- Indian lands,
  - Desert Land Act, effect, § 173, p 919
  - Pollution, arbitration of claims for damages, § 54, p 701
- Indian reservations, rights of way for irrigation purposes, § 349, p 388
- Indication of purpose, appropriation, priority, § 184
- Indictment and information
  - Obstruction in a watercourse, criminal responsibility, §§ 39, 40
  - Pollution,
    - Criminal responsibility, § 57
    - Public water supply, § 313, n 5
- Indispensable necessity of cities and villages for drainage, diversion, § 61
- Indispensable to beneficial use, pollution, § 43, p 689
- Individual cases, deepening natural channel, § 42
- Individuals,
  - Diversion, persons liable, § 64
  - Municipality as agent for in contracting for supply of water, § 265, p 116
  - Pollution, liability, § 52
- Industrial needs, prior appropriation, § 168
- Industrial purposes, pollution, § 43, p 689
- Industrial rule, subterranean waters, pollution, § 97
- Infants, pollution, criminal responsibility, § 57
- Infection, guaranty of water free from, § 311
- Infiltrating water, subterranean waters, § 86
- Information, notice of appropriation, § 176
- Infringement,
  - Prescription, § 159, p 882
  - Property rights, obstruction and detention, § 15
- Inherent in the land, riparian rights, § 5
- Inherent right, appropriation, § 157
- Inheritance, words of, deeds and conveyances, § 209
- Initial step, appropriation, § 176
- Initiated but not perfected before statute, appropriation, § 180, p 933
- Initiation but before completion, appropriation, rights after, § 173, p 921
- Injunctions, § 37, p 672
  - Accumulation and storage, § 143
  - Appropriation, § 195
    - Actions, § 203, p 1027
    - Form of remedy, § 194, p 1001
    - Prosecution of enterprise, § 179
  - Artificial channels, interferences, § 138
  - Conveyances, license contracts, equitable relief, § 225, p 1074
  - Dams, destruction or removal, § 151
  - Deprivation of waters, § 33
  - Diversion, § 37, p 673, n 95, § 68, p 734
    - Laches, § 68, p 737
    - Threatened diversion, § 68
  - Water by public, riparian owners, § 227
- Escaping waters, § 143
- Flooding of land, § 37, p 672
  - Joinder of actions, § 37, p 673
- Flowage of lands, § 33
- Ice removal, § 386
- Irrigation and ditch companies, collection of stock assessments, § 343, p 373
- Irrigation districts,
  - Contract performance, § 321, p 305
  - Levy or assessment of tax, § 335, p 345
  - Taxation for payment of bonds, intervention of bondholder, § 331, p 325
- Injunctions—Continued
  - Irrigation purposes, failure to supply water, § 367, p 441
  - Irrigation rights, actions to establish and protect, § 317, p 260
  - Lakes and ponds, unlawful acts, § 111
  - Levy of assessments in water improvement district, collateral attack on water district organization, § 243(2), p 66
  - Municipality or officers, preventing shutting off of water supply, § 276, p 133
  - Obstruction and detention, § 33
  - Point of diversion, change, § 189, p 982
  - Pollution, post
  - Private water works system, order to extend system to additional consumers, § 246
  - Public and municipal water supply,
    - Prevention of pollution, § 232, p. 20
    - Proceedings to protect rights, § 233
  - Public service water companies,
    - Exceeding rights or violating duties, § 260
    - Restraining city operation of water works system, § 252
  - Rates and charges,
    - Private consumers, § 307, p 221
    - Review of reasonableness, § 289, p 177
  - Rights of way for irrigation purposes, restraining interference with, § 351
  - Riparian owner acquiescing in construction operation of water plant for public supply as estopped to claim relief by, § 227
  - Riparian rights, protection, § 14
  - Sale of water for irrigation, unreasonable rates, § 363, p 426
  - Subterranean waters,
    - Overdraft, § 101, p 780
    - Suspension of operation, § 100
  - Surface waters, drainage, § 128, p 835
  - Temporary injunctions, generally, post
  - Unreasonable rates, proceedings for relief against, § 295, p 192
  - Water district tax or assessment, enjoining collection on, § 243(7), p 87
- Injured persons, diversion, right to object, § 62
- Injuries,
  - Artificial channels,
    - Breakage, leakage or overflow, § 133
    - Changing course of stream, § 134
  - Attributable to other causes, flooding lands, defenses, § 36(5)
  - Construction of waterworks, § 309, p 233
  - Continuing injury, generally, ante
  - Dams, construction and maintenance, § 148
  - Deepening natural channel, § 42
  - Diversion,
    - Damages, § 69
    - Trial, § 67, p 733
  - Floods,
    - Damages, § 38, p 680
    - Nature and extent, § 37, p 674
    - Nominal damages, § 38, p 685
    - Pleading, § 37, p 677
    - Punitive damages, § 38, p 685
    - Questions of law and fact, § 36(10)
  - Flowage of lands, liability, § 28, p 647
  - Ice removal, § 386
  - Maintenance of waterworks, § 300, p. 233

# WATERS

## Injuries—Continued

Mechanical and manufacturing purposes, § 375  
 Nuisance, damages, § 38, p 684  
 Obstruction and detention,  
   Necessity, § 16  
   Persons liable, § 22  
 Owners of irrigation works, § 351  
 Pollution,  
   Issues, proof and variance, § 54, p 704  
   Necessity, § 55, p 711  
 Prescription, § 159, p 882  
 Previous year, flooding, acceptance of damages,  
   defenses, § 37, p 676  
 Public and municipal water supply, § 232, pp 18-  
   22  
 Underground wells or springs, § 93, p 768  
 Works mains or pipes, public service water com-  
   panies, § 258  
 Injurious changes, diversion, § 188  
 Inland bodies, lakes and ponds, § 103  
 Inland waters, classification, § 2  
 Innocent mistake, lakes and ponds, structures en-  
   croaching, § 111, n 75  
 Inquiry, flooding lands, evidence, § 36(9)  
 Insolvency,  
   Irrigation and ditch companies, § 346  
   Public service water companies, grounds for for-  
   feiture of franchise, § 253  
 Inspection,  
   Duty of water company at reasonable intervals,  
     § 309, p 235  
   Municipality of existing water system's books  
   and vouchers before exercising option to pur-  
   chase, § 237, p 36  
 Installation, water meters, § 280, p 150  
 Installments, rates and charges, refusal to supply for  
   nonpayment, § 305  
 Instructions to jury,  
   Actions involving,  
     Rights and privileges, § 225, p 1077  
     Supply of water to private consumers, § 281,  
       p 156  
   Appropriation, actions, § 203, p 1020  
   Bed and banks of stream, ownership, § 83  
   Dams, actions, § 151  
     Damages, § 156  
   Diversion, § 67, p 733  
   Existence of watercourse, § 4, p 597  
   Flooding lands, § 36(10)  
   Flowage of lands, § 32  
   Injuries incident to supply and use of water, § 312,  
     p 249  
   Irrigation district, action by or against, § 321,  
     p 306  
   Irrigation rights, actions to establish and pro-  
   tect, § 317, p 263  
   Irrigation works, injuries or damages to, § 351  
   Pollution, actions, § 54, p 709  
   Rates and charges,  
     Proceedings for collection, § 304  
     Wrongful discontinuance of service, § 307, p  
       227  
   Subterranean waters, proceedings and relief,  
     § 101, p 781  
   Surface waters, actions for damages, § 127, p 832  
 Instruments of title, Desert Land Act, effect, § 173,  
   p. 919

Insufficiency of supply or pressure, breach of contract,  
   § 310  
 Intangible property value, municipal purchase of ex-  
   isting water system, § 238, p 42  
 Intended application to useful purpose, appropriation,  
   § 172  
 Intent as to use, appropriation, § 175  
 Intention of owner, flowage of lands, abandonment or  
   loss of rights, § 24  
 Intention of parties,  
   Abandonment,  
     Granted right, § 212  
     Reserved rights, § 215  
   Appropriation, § 174  
     Transfers, § 190, p 986  
   Appurtenances passing by conveyance, § 217  
   Construction and operation, grants, § 214, p 1050  
   Contracts, construction and operation, § 221  
   Deeds and conveyances, construction and opera-  
     tion, § 209  
   Easements, creation, § 207  
   Interest created, § 209  
   Leases, construction and operation, § 224  
   License, creation, § 207  
   Mortgages, § 218  
   Quantity, deeds and conveyances, § 210, p 1050  
   Size and enlargement of artificial watercourse,  
     § 210, p 1055  
 Intention to abandon,  
   Appropriation,  
     Loss of rights, § 193, p 994  
     Right of way, § 193, p 1000  
   Surface waters, drainage rights, § 120  
 Intentional invasion of water rights, complaint, § 101,  
   p 782  
 Intentional relinquishment, appropriation, § 173, p.  
   921  
 Interest,  
   Flooding lands, damages, § 38, p 682  
   Irrigation districts, taxes, § 337, p 349  
   Municipal purchase of existing water system,  
     § 238, p 43  
   Pollution, damages, § 56, p 721  
   Rates and charges,  
     Wrongfully exacting payments, § 307, p 226  
     Wrongfully taken water, § 306  
   Water district bonds, § 243(6), p 82  
 Interest coupons, irrigation district bonds, negotia-  
   bility, § 329  
 Interest created, deeds and conveyances, § 209  
 Interest on amounts actually expended, diversion,  
   damages, § 69  
 Interest on cost of system, rates as sufficient to cover,  
   § 289, p 176  
 Interested parties, appropriation, extension of time,  
   § 180, p 942  
 Interference,  
   Artificial channels, § 135  
   Dams, § 147, p 860  
   Lakes and ponds, actions, § 111  
   Prior appropriator's works, § 185, p 962  
 Interference with drainage, equitable relief, § 225,  
   p 1074  
 Interference with easement, flowage of lands, § 29,  
   p 648  
 Interference with operation, dams, damages, § 150  
 Interference with use, prescription, § 159, p. 882

Interference with water supply, criminal offenses, § 313

Interim bonds, water improvement district, additional indebtedness, § 323, n 28

Interlocutory injunction, unreasonable rates, proceedings for relief, § 295, p 193

Intermittent easement, flowage of lands, § 28

Intermittent flow, natural watercourses, § 4, p 604

Intermittent use, right of way for irrigation purposes, loss of easement, § 349, p 391

Interrogatories, flooding lands, § 36(10)

Interruption, prescription, § 160

Interstate streams,  
     Appropriation, § 170, p 910  
     Priorities, § 183  
     Prior appropriation, § 170, p 910  
     Storage, § 188, n 10

Intervening appropriations, § 186, p 963

Intervening appropriators, § 183

Intervention,  
     Action on water supply contracts, § 276, p 136  
     Irrigation districts, action to cancel bonds, § 331, p 325  
     Obstructing ditches draining water from lakes, § 111, n 78  
     Pollution, equitable relief, § 55, p 714

Invalid sale, appropriation, abandonment of right, § 193, p 997

Invasion of right,  
     Prescription, § 159, p 882  
     Private right, pollution, § 43, p 688  
     Riparian rights, diversion, § 59

Investments, continuance of diversion, § 62

Involuntary bailees, stranded or floating property, § 82

Involuntary nonuser, appropriation, § 193, p 996

Irreparable injury,  
     Diversion, injunctive relief, § 68, p 736  
     Flooding lands, injunction, § 37, p 674

Irrigation, §§ 314-368, pp 251-451  
     See, also, Agricultural lands, generally, ante

Acquisition of water rights, § 348

Action to establish and protect rights, § 317, pp 260-264

Additional lands, § 186, p 970

Administration of laws, § 315

Appropriation, § 170, p 909, § 172  
     Classes, § 184, n 48  
     Priority, § 186, p 969  
     Water supply, § 348

Arid land, reclamation by public authorities, § 316, pp 255-260

Artificial channels, prescriptive rights, § 129, p 845

Carey Act reclamation of arid land, § 316, p 255

Construction of works, cost, § 350, p 398

Contract rights in canal or ditch, § 350, p 398

Contracts,  
     Acquisition of water rights, § 348  
     Construction, sale of water for irrigation, § 361, p 420

Control, § 315

County lands, rights of way, § 349, p 380

Direct irrigation, appropriation for, § 348

Distribution and supply of water, §§ 352-363, pp 402-431

Diversion, purpose, § 60

## Irrigation—Continued

Duty or quantity of water needed, § 186, p 970

Easement in canal or ditch, § 350, p 398

Economical use, § 186, p 969, n 47

Enlargement and extension of canals and ditches, § 350, p 397

Equitable owner of canal, § 350, p 398

Establishment of public ways, § 349, p 391

Fencing of ditches, duty of owner, § 350, p 396

Injuries to owners of irrigation works and action thereon, § 351

Landowner rights, § 316

Legislative grant of water rights, § 348

Liabilities and injuries incident to supply and use, §§ 364-368, pp 431-451

Maintenance of works, cost, § 350, p 398

National Reclamation Act, § 316, p 257

Nuisance, works as, § 350, p 399

Other persons than riparian owners, § 314

Parallel ditches, owners' rights, § 350, p 398

Place of taking and use, § 314

Prescription, acquisition of water rights, § 348

Priority, § 186, p 970  
     Appropriation, § 186, p 969

Private lands, rights of way, § 349, p 390

Proceedings to effect appropriation, § 348

Public rights, § 315

Public ways, establishment, § 349, p 391

Purchase of water rights, § 348

Quantity of use, § 314

Quantity of water needed, § 186, p 970

Reasonable use of water, § 314

Reclamation of arid land by public authorities, § 316, pp 255-260

Return waters, appropriation, § 348

Right to use water for, § 314

Rights of way, § 349, pp 388-395

Sale of water, §§ 360-363, pp 418-431  
     Assignment of deed conveying water rights, § 362  
     Contract with consumers, § 361, pp 418-422  
     Rates and charges, § 363, pp 422-431  
     Review of orders of rate fixing body, § 363, p 427  
     Subsequent purchaser of land, § 363, p 428

Schedule of amount, § 186, p 971

Secondary permits for use in direct irrigation, § 348

Seepage waters from constructed works, appropriation, § 348

State lands, rights of way, § 349, p 389

Storage, appropriation for, § 348

Subirrigation, § 186, p 971

Subterranean waters, use, § 93, p 768

Supervision, § 315

Supply and distribution of water, right to supply water, § 352, pp 402-408

Supplying of water as public use, § 315

Title and rights acquired in right of way, § 349, p 391

Water user rights, § 316

Withdrawal of lands from entry, § 316

Irrigation and ditch companies, §§ 339-347, pp 362-385  
     Agents, § 344  
     Amendment of charters, § 342  
     Appropriation of water, § 348

# WATERS

## Irrigation and ditch companies—Continued

Approval by stockholders, contracts, § 345, p 380  
 Articles of incorporation, members charged with notice of, § 343, p 369  
 Assessments for construction and maintenance, § 343, p 370  
 Associations, § 340  
 Bonds, § 345, p 381  
 By-laws, § 342  
 Capital stock, § 343, pp 365-374  
 Collection of stock assessments, enjoining, § 343, p 373  
 Community irrigation ditch, § 339  
 Community property, lien for assessments, § 343, p 373  
 Conflict of laws, § 342  
 Construction liens, priority over maintenance lien, § 343, p 374  
 Contracts, § 345, p 378  
 Conveyances, § 345, p 381  
 Corporate powers and liabilities, § 345, pp 375-381  
 Directors, action to determine, § 343, p 370  
 Dissolution, § 346  
 Election to office, disclosure of ballot, § 344  
 Implied power, § 345, p 377  
 Incorporation and organization, § 342  
 Insolvency and receivers, § 346  
 Joint stock companies, § 340  
 Labor, contributions by stockholders, § 343, p 370  
 Liability for representation by officers and agents, § 345, p 377  
 Lien, stock assessments, § 343, p 373  
 Maintenance lien, priority as to construction liens, § 343, p 374  
 Members or stockholders, § 343, pp 365-374  
 Mortgages, § 345, p 381  
 Mutual associations, § 340  
 Officers, § 344  
 Organization, § 342  
 Ownership of controlling stock, irrigation and ditch companies, § 343, p 369  
 Payment of stock lien, § 343, p 374  
 Point of diversion, right to petition for change, § 345, p 377  
 Private corporations, § 341  
 Quasi public corporations, § 347  
 Quorum, stockholders' meetings, § 343, p 370  
 Receivers, § 346  
 Refund, amount of stock assessment previously paid, § 343, p 373  
 Refusal to deliver water, § 345, p 377  
 Reorganization, § 346  
 Repudiation, stock assessment, § 344, p 375  
 Right to supply of water from, § 352, p 403  
 Rights of way, acquisition, § 349, pp 388-395  
 Sale of stock, § 343, p 367  
 Special meetings, § 344, p 375  
 Stock and stock certificate, § 343, pp 365-374  
 Ultra vires acts, § 345, p 377  
 Unincorporated mutual associations, § 340  
 Water right applications to federal government, § 343, p 373  
 Water users' association of laterals, § 342  
 Withdrawal of membership, § 343, p 369

## Irrigation districts, §§ 318-338, pp 264-362

Abatement of taxes, taking away security of bondholders, § 326  
 Actions, ante  
 Agents, powers to employ, § 321, p 295  
 Agreements of bondholders as to payment, § 330  
 Allotment of water rights, benefit to property, § 333, p 332  
 Amount of water to which entitled, § 352, p 407  
 Appeals, ante  
 Applications for exclusion or inclusion of land, § 319(3), p 280  
 Appointment of employees, § 320, p 293  
 Arm of government, § 318, p 266  
 Artificial irrigation, § 333, p 334  
 Assessments Taxes, generally, post this subhead  
 Benefit to property, taxes, § 333, p 332  
 Board of directors, regulation of rates and charges for sale of water, § 363, p 425  
 Bonding custodian of funds, § 321, p 303  
 Boundaries,  
     Established by legislature, § 319(3), p 279  
     Petition for formation, § 319(2), p 270  
 Burden of proof, ante  
 Canals, construction, § 321, p 301  
 Cancellation of bonds, § 327  
 Cash basis, operation on, § 330  
 Certificate of election, directors, § 320, p 291  
 Certification of bonds, § 324, p 310  
 Character, § 318  
 Character of tax, § 333, p 328  
 Claims, power with respect to presentation and allowance, § 321, p 295  
 Collateral attack on organization, § 319(6)  
 Collection for payment of outstanding bonds, § 330  
 Compensation,  
     District officers, § 320, p 290  
     Employees, § 320, p 293  
 Confirmation proceedings,  
     Issue and sale of bonds, § 328  
     Organization, § 319(5)  
     Special proceedings, § 321, p 304  
 Conflict of laws, organization of district, § 319(1)  
 Conservancy districts, inclusion, § 319(3), p 280  
 Consolidation of districts, § 321, p 296  
 Construction of project, § 321, p 301  
 Consumers outside area, right to supply, § 353  
 Consumers within area, right to supply of water, § 353  
 Contractors' bonds, § 321, p 302  
 Contracts,  
     Powers, § 321, p 298  
     Sale of bonds, § 324, p 310  
     Secretary of interior, § 316, p 258  
 Created for equal benefit and general welfare, § 352, p 403  
 Curative acts, § 318, p 269  
 Dams, construction for irrigation purposes, § 350, p 395  
 De facto districts, collateral attack, § 319(6)  
 Debts, power to incur, § 321, p 296  
 Defenses, actions on bonds, § 331, p 324  
 Delegation of taxing power to United States, § 333, p 328

## Irrigation districts—Continued

- Delinquent taxes, property acquired through, § 321, p 300
- Deposit of contractor, § 321, p 302
- Derivation of powers, § 321, p 293
- Description of district in petition, § 319(2), p 272
- Destruction of bonds, § 325
- Directors, liabilities for damages to landowners by seepage and raising of level, § 365, p 437
- Disbursement of funds, § 321, p 303
- Discretion of officers, interference with, § 321, p 295
- Discrimination as to consumers, § 355
- Disposition of bond, § 325
- Disposition of property, § 321, p 299
  - On dissolution, § 338
- Dissolution of district, § 338
  - Payment of bonds, § 330
- Ditches, construction, § 321, p 301
- Drainage assessments, § 333, p 333
- Drainage ditches across private lands, establishment, § 349, p 393
- Draining of flooded lands, § 321, p 295
- Due process of law as requiring notice and hearing before property included within, § 318, p 269
- Effect of dissolution and disposition of property, § 338
- Election contests, § 319(2), p 277
- Electrical districts to supply power to pump water, organization, § 319(7)
- Engineering plans, contracts for, § 321, p 301
- Engineer's report, feasibility of proposed district, § 319(2), p 274
- Equal benefit and general welfare, created for, § 352, p 403
- Equitable relief, bondholders, § 331, p 323
- Estoppel, ante
- Evidence,
  - Action by or against, § 321, p 306
  - Bonds, § 331, p 325
  - Confirmatory proceedings, § 319(5)
    - Bonds, § 328
  - Tax assessment, proceedings to cancel or enjoin levy or enforcement, § 335, p 347
  - Tax deeds, § 337, p 357
  - Validity of organization, § 319(4)
- Exclusion of land, § 319(3), pp 278, 283
  - After organization, § 319(3), p 281
- Exclusive governmental functions, § 318, p 266
- Execution of bonds, § 324, pp 309-313
- Existing system, acquisition, § 321, p 300
- Expenses incident to organization, § 319(2), p 277
- Flooded lands, power to drain, § 321, p 295
- Form of bonds, § 324, pp 300-313
- Franchise, abandonment, § 338
- Funds, control and disbursement, § 321, p 303
- General fund levy, issuance of warrants against, § 321, p 297
- General welfare, created for, § 352, p 403
- Governmental functions, § 318, p 266
- Hearing, proposed organization, § 319(2), p 275
- Impairment of obligation, assessment, levy and collection of taxes, § 333, p 328
- Improvement district formed within, § 319(7)
- In rem proceedings, ante

## Irrigation districts—Continued

- Incapacity of lands of irrigation, inclusion, § 319(3), p 279
- Incurring debt, powers, § 321, p 296
- Injunction, ante
- Interest coupons on bonds, § 325
- Interest of landowners, § 318, p 267
- Interference from water rights of private individuals, § 321, p 295
- Intervention, action to cancel bonds, § 331, p 325
- Irrigated land, inclusion within district, § 319(3), p 279
- Issuance of bonds, § 324, pp 309-313, § 325
- Judgment and decree,
  - Action by or against, § 321, p 306
  - Bonds, § 331, p 326
  - Confirmation proceedings, § 321, p 304
    - Issue and sale of bonds, § 328
  - Confirmatory proceedings, § 319(5)
  - Foreclosure of lien for taxes, § 336
  - Liabilities and injuries incident to supply and use, § 367, p 447
  - Proposed organization, § 319(2), pp 275, 276
- Landowners' action to cancel bonds, § 331, p 324
- Lands included, § 319(3), pp 278-284
- Law governing organization, § 319(1)
- Legal existence, § 318, p 264
- Levy to pay bonds and coupons, § 320
- Liabilities of officers, § 320, p 291
- Liability for torts, § 309, p 235
- Liens, § 321, p 297
  - Bond issues, § 319(3), p 283
  - Powers, § 321, p 297
  - Security of bondholders, § 326
  - Taxes, § 336
- Limitation of actions,
  - Action by on behalf of, bonds, § 331, p 324
  - Attacking validity of organization, § 319(4)
  - Confirmation proceedings, § 319(5)
  - Suit for delinquent taxes or assessments, § 337, p 351
  - Validity of tax assessment, § 335, p 345
- Maturity of bonds, § 324, p 310
- Mortgage as security for bonds, § 326
- Municipal corporation with respect to contracts, § 321, p 299
- Negotiability of bonds, § 329
- Nonirrigable land, taxation of benefits to, § 333, p 333
- Nonuser of franchise, § 338
- Notice,
  - Confirmatory proceedings, § 319(5)
  - Meeting to determine advisability of organizing, § 319(2), p 273
  - Taxes, § 334, p 342
- Objections to exclusion or inclusion of land, § 319(3), pp 278, 280
- Officers and employees, § 320, pp 289-293
- Organization of district, § 319(1)
- Parties,
  - Action by or against, § 321, p 306
  - Action to cancel bonds, § 331, p 325
  - Tax cancellation suit, § 335, p 346
- Patented lands not in federal reclamation project unit, taxation, § 333, p 330
- Payment of outstanding bonds, § 330

# WATERS

## Irrigation districts—Continued

- Petition,
  - Confirmatory proceedings, §§ 319(5), 328
  - Dissolution, § 338
  - Exclusion or inclusion of land, § 319(3), p 280
  - Organization, § 319(2), p 270
- Plans, power to make changes in, § 321, p 295
- Pleadings,
  - Action by or against, § 321, p 305
  - On bonds, § 331, p 325
  - Liabilities and injuries incident to supply and use, § 367, p 442
  - Validity of organization, § 319(5)
- Political activities prior to organization, § 319(1)
- Political subdivisions, § 318, p 266
- Post maturity interest, bonds, § 330
- Power of legislation to create, § 318
- Powers and duties, § 321, pp 293-307
- Preliminary proceedings, issuance of bonds, § 323
- Presentation of claims, powers and duties, § 321, p 295
- Presumptions,
  - Benefit to land, § 319(3), p 278
  - Tax title actions, § 337, p 359
  - Taxes or assessments, validity, § 335, p 347
- Priorities, bonds, § 330
- Privilege, elective franchise, § 320, p 290
- Proceedings to determine validity of organization, § 319(4)
- Proceedings to establish, § 319(2), pp 270-277
- Proceeds of bond, disposition, § 325
- Promissory notes, § 330
- Property,
  - Liable for taxes, § 333, p 330
  - Purchase and disposition, § 321, p 299
- Protest, proposed organization, § 319(2), p 271
- Public land, inclusion, § 319(3), p 280
- Public nature of water use, § 318, p 267
- Publication of notice, meeting to determine advisability of proposed organization, § 319(2), p 274
- Pumping plant, acquisition, § 321, p 300
- Purification and filtration plant, enlargement to purify water and properly discharge into stream, § 322, p 19
- Quasi municipal corporations, § 318, p 265
- Questions of law and fact,
  - Land as susceptible of irrigation, § 333, p 334
  - Proposed organization, § 319(2), p 275
  - Tax assessment or proceedings, § 335, p 347
  - Taxes, determination of benefits, § 334, p 339
  - Tort liability, § 321, p 306, n 16
- Railroad right of way, taxes, § 333, p 333
- Refunding bonds, § 324, p 311, § 325
- Registration of bonds, § 324, p 310
- Reports, feasibility of proposed organization, § 319(2), p 274
- Reservoirs, construction, § 321, p 301; § 350, p 395
- Return of bonds, § 327
- Rules and regulations, power to make and enforce, § 321, p 299
- Sale of bonds, contracts for, § 324, p 310
- Security of bondholders, § 326

## Irrigation districts—Continued

- Service of process, § 318, p 265, n 51
- Confirmatory proceedings, § 319(5)
- Tax deeds, § 337, p 356
- Signatures, bonds, § 324, p 310
- Similar districts, organization, § 319(7)
- Special election, bond issues, § 323
- Special taxes for local improvements, § 333, p 328
- State agencies, § 318, p 265
- Status, § 318
- Stockholder, right to supply of water, § 353
- Submission to voters of proposed organization, § 319(2), p 277
- Superimposing districts, § 319(1)
- Surface waters, drainage easement, § 121
- Surveys, contract for, § 321, p 301
- Taking away security of bondholders, § 326
- Tax collector, liability of surety on bond, § 320, p 291
- Tax warrants, power to issue, § 321, p 296
- Taxes, §§ 333-337, pp 327-360
  - Accumulative tax, § 334, p 341
  - Ad valorem taxes, § 334, p 337
  - Advance levy and assessment, § 334, p 336
  - Amount of assessment, § 334, p 339
  - Apportionment methods, § 334, p 337
  - Area basis, § 334, p 339
  - Assessment rolls and records, § 334, p 341
  - Attorneys' fees for collection, § 337, p 352
  - Authority to levy, § 334, p 335
  - Benefit basis, § 334, p 337
  - Benefit to property, § 333, p 332
  - Cancellation of levy or assessment, § 335, p 345
  - Cancellation of tax deed, § 337, p 359
  - Cash turned over for improvement of river, § 334, p 340
  - Certificate of delinquency and foreclosure, § 337, p 352
  - Certification of assessment roll, § 334, p 342
  - Character of tax, § 333, p 328
  - Collection, § 337, pp 348-360
    - Assessments, § 337, p 350
  - Computation of assessment amount, § 334, p 340
  - Confirmation of assessments, § 335, p 345
  - Constitutional limitation on amount, § 334, p 340
  - Contents of assessment, § 334, p 341
  - Contiguous lots, assessment, § 334, p 336
  - County as purchaser on sale, § 337, p 357
  - Credit for outstanding water rights, § 334, p 337
  - Default judgment for collection, § 337, p 352
  - Delegation of taxing power to United States, § 333, p 328
  - Delinquencies, assessing amount sufficient to cover, §§ 334, 341
  - Delinquency certificate, § 337, p 352
  - Description of property, § 334, p 342
  - Determination of benefits, § 334, p 339
  - Discrimination, review, § 335, p 344
  - Disposition of proceeds, § 337, pp 348-360
  - District as purchaser on sale, § 337, p 357
  - Drainage assessment, § 333, p 333; § 334, p 343

## Irrigation districts—Continued

### Taxes—Continued

Drainage necessitated by irrigation, § 333, p. 334  
 Duplicate certificate of sale, § 337, p. 354  
 Duty to assess and levy, § 333, pp. 327-334  
 Electors of district authorizing, § 334, p. 335  
 Enforcement of assessments, § 337, p. 350  
 Enjoining levy or enforcement of assessment, § 335, p. 345  
 Equalization, § 334, p. 341  
 Estimate of assessment amount, § 334, p. 340  
 Estoppel to object as to regularities, § 335, p. 343  
 Exemptions, § 333, p. 330  
 Factors considered where benefits basis, § 334, p. 338  
 Federal reclamation statutes, benefit to excess holdings under, § 333, p. 334  
 Filing certificate of sale, § 337, p. 354  
 Flat rate drainage assessments, § 334, p. 343  
 Foreclosure certificate, § 337, p. 352  
 Foreclosure of lien for assessments, § 336  
 Form of assessment, § 334, p. 341  
 Frontage basis, § 334, p. 339  
 Impairment of obligation, § 333, p. 328  
 Improvement of system, § 333, p. 329  
 Interest and penalties, § 337, p. 349  
 Issuance of tax deed, redemption before, § 337, p. 356  
 Law governing assessments, § 334, p. 336  
 Levy and assessment, § 318, p. 266, § 334, pp. 335-343  
 Lines, § 336  
 Listing of property, § 334, p. 342  
 Location of lands, § 333, p. 331  
 Manner of levy and assessment, § 334, p. 336  
 Manner of sale of property, § 337, p. 354  
 Meeting warrants, § 333, p. 329  
 Methods of apportionment, § 334, p. 337  
 Motion as necessary to authorize levy of assessment, § 334, p. 336  
 Municipal property, § 333, p. 331  
 Nature of tax, § 333, p. 328  
 Necessity of protest to recover, § 337, p. 350  
 Neglect to assess owner for past years as rendering property nonassessable, § 333, p. 330  
 Notice, § 334, p. 342  
 Objections to assessments, § 335, pp. 343-347  
 Officer authorized or obligated to collect assessment, § 337, p. 351  
 Opportunity for hearing, § 334, p. 342  
 Overvaluation of property, § 335, p. 343  
 Patented lands not in federal reclamation project unit, § 333, p. 330  
 Payment, § 337, pp. 348-360  
 Penalties, § 337, p. 349  
 Plan and estimate, § 334, p. 336  
 Power to assess and levy, § 333, pp. 327-334  
 Price property sold for, § 337, p. 354  
 Priorities of lien, § 336  
 Proceedings to confirm assessment, § 335, p. 345  
 Property liable, § 333, p. 330  
 Protest made on payment, § 337, p. 350

## Irrigation districts—Continued

### Taxes—Continued

Publication of delinquent list, § 337, p. 353  
 Purchase of land sold for, § 337, p. 354  
 Purposes of levy or assessment, § 333, p. 329  
 Railroad right of way, § 333, p. 333  
 Rate of assessment, § 334, p. 339  
 Recital of assessment amount in directors' resolution, § 334, p. 342  
 Recording certificate of sale, § 337, p. 354  
 Recovery of assessments paid, § 337, p. 350  
 Redemption from sale for delinquent assessments, § 337, p. 355  
 Repair of system, § 333, p. 329  
 Resale of land taken for, § 337, p. 357  
 Resolution as necessary to authorize levy of assessment, § 334, p. 336  
 Restraining sale of property for collection, § 337, p. 353  
 Review, § 335, pp. 343-347  
 Sale of property to collect, § 337, p. 353  
 Setting aside levy or assessment, § 335, p. 345  
 Special taxes for local improvements, § 333, p. 328  
 Statutory limitations on amount, § 334, p. 340  
 Subdivision assessment, § 334, p. 338  
 Suit for delinquent taxes, § 337, p. 351  
 Tax deeds, § 337, p. 356  
 Technical sense, § 333, p. 328  
 Time,  
     Levy and assessment, § 334, p. 335  
     Payment, § 337, p. 349  
     Redemption from sale, § 337, p. 355  
     Transfer of sale certificate, § 337, p. 355  
     Trust, lands taken in on delinquency, § 337, p. 357  
     United States property, § 333, p. 331  
     Value of property basis, § 334, p. 338  
     Waiver of irregularities, § 335, p. 343  
 Taxpayers' action to cancel bonds, § 331, p. 324  
 Term of office, officers, § 320, p. 289  
 Termination of district, § 338  
 Time for attacking organization, § 319(4)  
 Title to property, § 321, p. 301  
 Towns, inclusion within, § 319(3), p. 280  
 Transfer of funds, § 321, p. 304  
 Trust relationship of constituent landowners, § 318, p. 267, n. 75  
 Trustees, officers as, § 320, p. 289  
 Validity,  
     Bonds, § 324, pp. 309-313  
     Organization, proceedings to determine, § 319(4)  
 Villages, inclusion, § 319(3), p. 280  
 Warrants, § 330  
     Authority of officers to issue, § 325  
     Liability on, § 324, p. 313  
     Negotiability, § 329  
     Taxing for purpose of meeting, § 333, p. 329  
 Water storage districts, inclusion, § 319(3), p. 280  
 Withdrawal of petitioners for organization, § 319(2), p. 272  
 Irrigation ditch, licenses, § 219  
 Irrigation purposes,  
     Appropriation, § 172



# WATERS

## Irrigation purposes—Continued

- Liabilities and injuries incident to supply and use, § 367, p 446
- Pollution rendering unfit, § 43, p 687
- Irrigation waters, appropriation, § 170, p 909
- Irrigation works, § 350, pp 395-399
- Injury affecting, actions, § 351
- Islands,
  - Bed and banks of stream, ownership, § 73
  - Flooding resulting from raising of surface elevation, § 19
  - Riparian rights, § 8, n 72
- Isolated acts, pollution, injunction, § 55, p 711
- Issuance of stock, water power companies, § 378
- Issues, proof and variance,
  - Actions involving right to use or to be furnished, § 225, p 1076
  - Appropriation, actions, § 200
  - Dams, actions for damages, § 156
  - Diversion, § 67, p 732
  - Flooding lands, § 36(8)
  - Pleading, § 37, p 677
  - Flowage of lands, § 32
  - Injuries incident to supply and use, § 312, p 245
  - Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 443
  - Lakes and ponds, intervention, § 111, n 74
  - Point of diversion, change, § 189, p 979
  - Pollution, § 54, p 704
  - Surface waters,
    - Actions for damages, § 127, p 829
    - Injunction, § 128, p 837
- Item of damages, surface waters, actions for damages, § 127, p 833
- Itinerant trade, rates and charges, discrimination, § 297, p 203, n 41
- Johnson grass, pollution, defenses, § 54
- Joinder of actions, actions for injunction or abatement of dam with actions for damages, § 37, p 673
- Joinder of parties,
  - Diversion of waters, § 67, p 731
  - Injunctive relief, § 68, p 738
- Escaping waters, § 143
- Flooding lands, § 36(6)
- Injunctive relief, § 37, p 676
- Water district tax or assessment, attack on, § 243(7), p 87
- Joint acquisition, municipality of existing water system, § 236
- Joint actions, surface water floodings, persons liable, § 125
- Joint and several liability, irrigation company distributors, § 365, p 436
- Joint interest, dams, § 145
- Joint liability, pollution, § 52
- Joint ownership,
  - Appropriation, § 173, p 920
  - Pollution, parties, § 54
- Joint possession, prescription, § 162
- Joint stock companies, irrigation and ditch companies, § 340
- Joint tenants, appropriation, sale of interest, § 190, p 984
- Joint use of same works, appropriation, § 192, p 993
- Joint users, rates and charges, § 302, p 213
- Default of one of several, § 305

## Judgments and decrees,

- Amendments, appropriation, § 203, p 1028
- Appropriation,
  - Actions, § 203, pp 1020, 1024
- Artificial channels, injunction, § 138
- Bed and banks of stream, ownership, § 83
- Benefit, appropriation, § 203, p 1033
- Board or commission order regulating water supply to public, effect of, § 280, p 153
- Certainty, appropriation, § 203, p 1026
- Collateral attack, appropriation, § 203, p 1031
- Conditional relief, appropriation, § 203, p 1026
- Conflicting, appropriation, § 203, p 1033
- Construction, appropriation, § 203, p 1031
- Definiteness, appropriation, § 203, p 1026
- Diversion, injunctive relief, § 68, p 741
- Enforcement, appropriation, § 203, p 1033
- Flooding lands, § 36(10)
  - Abatement of nuisance, § 37, p 679
  - Injunctive proceedings, § 37, p 678
- Flowage of lands, § 25, pp 638, 640, § 33
- Injuries incident to supply and use of water, § 312
- Irrigation districts, ante
- Irrigation rights, actions to establish and protect, § 317, p 263
- Irrigation works, injuries or damages to, § 351
- Mechanical and manufacturing purposes, injuries, § 375
- Modification, appropriation, § 203, p 1028
- Municipality seeking conveyance of water plant under option to purchase, § 276, p 137
- Particularity, appropriation, § 203, p 1026
- Point of diversion, application for change, § 189, p 981
- Pollution,
  - Damages, § 54, p 710
  - Equitable relief, § 55, p 716
- Rate fixing bodies, sale of water for irrigation, review, § 363, p 427
- Rates and charges,
  - Proceedings for collection, § 304
  - Setting aside, § 296, p 198
- Remand, appropriation actions, § 204, p 1039
- Reversal, appropriation actions, § 204, p 1039
- Riparian rights, § 14
- Subterranean waters, proceedings and relief, § 101, p 786
- Suit for enforcement, appropriation, § 203, p 1034
- Suits or proceedings involving supply of water to consumers, § 281, p 157
- Supplemental, appropriation, § 203, p 1028
- Surface waters,
  - Actions for damages, § 127, p 832
  - Injunction, § 128, p 839
- Two or more, appropriation, § 203, p 1033
- Validity, appropriation, § 203, p 1031
- Judicial methods, municipal purchase of existing water system, price evaluation proceedings, § 238, p 44
- Judicial sale, irrigation system, effect on right to supply of water, § 358
- Junior appropriator, prescription, § 163
- Jurisdiction,
  - Actions,
    - Appropriation, § 195
    - By or against municipality on water supply contract, § 276, p 135

## Jurisdiction—Continued

- Determination of water company's right to make charge for particular type of service, § 285
- Flooding of land,
  - Injunction, § 37, p 672
  - Suit for damages, § 36(3)
- Infringement of consumer's legal right by municipal waterworks, § 281, p 155
- Pollution, § 43, p 690
- Riparian rights, actions to determine and protect, § 14
- Subterranean waters, reservation, § 101, p 787
- Unreasonable rates, proceedings for relief, § 295, p 194
- Jury,
  - Flowage of lands, assessment of damages, § 25
  - Instructions to jury, generally, ante
  - Questions of law and fact, generally, post
- Kind of crops, duty or quantity needed for irrigation, § 186, p 971
- Kind of water meter designated to be used, § 280, p 151
- Knowledge,
  - Flooding lands, issues, proof and variance, § 36(8)
  - Flowing subterranean waters, § 93, p 769
  - Obstruction and detention, persons liable, § 22
  - Pollution, § 50
- Knowledge of conditions, surface waters, § 114, p 805
- Knowledge of use, prescription, § 159, p 880
- Labor base price, rates and charges, consideration in determining reasonableness, § 293, p 188
- Labor, irrigation and ditch companies, stockholders' contributions, § 343, p 370
- Labor supply, appropriation, prosecution of enterprise, § 179
- Laches,
  - See, also, Limitation of actions, generally, post
  - Acquiescence in secondary appropriation, § 193, p 999
  - Appropriation, § 196
    - Judgment, amendment, etc., § 203, p 1028
  - Assignee of real estate development company's right to refund for money deposited, § 242, p 57, n 81
  - Contracts, rights involving, § 225, p 1075
  - Deeds and conveyances, rights involving, § 225, p 1075
  - Diversion,
    - Evidence, § 68, p 740
    - Injunctive relief, § 68, p 737
  - Flooding lands, injunctive relief, defenses, § 37, p 675
  - Great ponds, state rights, § 110, n 57
  - Irrigation districts,
    - Action by or against on bonds, § 331, p 324
    - Claims for service against, § 321, p 305, n 2
  - Irrigation rights, actions to establish and protect, § 317, n 260
  - Lakes and ponds, structures encroaching on property, § 111, n 75
  - Leases, rights involving, § 225, p 1075
  - Pollution, defenses, § 55, p 714
  - Public service water companies, loss of exclusive rights, § 252
  - Pueblo rights as lost by, § 231

## Laches—Continued

- Rates and charges,
  - Certiorari to review resolution and ordinance fixing, § 289, p 177
  - Delay in bringing suit for injunction and refund, § 307, p 225
- Subterranean waters, injunctive relief, § 101, p 780
- Surface waters, injunction, § 128, p 836
- Lack of knowledge, prescription, evidence, § 159, p 882
- Lakes and ponds,
  - Appurtenances passing by conveyance, § 217
  - Control in state in sovereign capacity, § 228
  - Diversion, tapping, § 61
  - Flowage of land,
    - Actions, § 111
    - Liability of state, § 30
  - Interference, injunction, § 225, p 1074
  - Natural lakes and ponds, generally, post
  - Ownership, actions, § 111
  - Source of supply, § 4, p 598
  - Stock purposes, § 142
  - Subterranean waters, § 89
  - Surface waters,
    - Artificial drainage, § 116
    - Collection in body and discharge, § 116, p 815
    - Tapping, diversion, § 61
- Land-locked basin, artificial drainage, § 116
- Land made by fill, lakes and ponds, § 108, n 42
- Landlord and tenant,
  - Appropriation, leases, § 190, p 988
  - Artificial channels, injunctive relief, § 138
  - Authority of tenant to subject leased property to lien for rates and charges, § 308, p 231
  - Diversion,
    - Persons liable, § 64
    - Right to object, § 63
  - Failure to comply with municipal regulations as affecting building owner, § 281, p 154
  - Flooding lands, parties to action, § 36(6)
  - Flowage of lands, persons liable, § 30
  - Occupant of premises as entitled to supply water, § 278, p 145
  - Persons liable for unpaid water bills, § 302, p 212
  - Pollution, liability, § 52
  - Prescriptions,
    - Privy of estate, § 163
    - User, § 159, p 879
  - Privy of estate, prescription, § 163
  - Rates and charges,
    - Bills incurred by third persons, § 305
    - Recovery by tenant from prior tenant, § 307, p 224
  - Surface waters,
    - Actions for damages, § 127, p 828
    - Injunction, § 128, p 836
- Landmarks, irrigation district, description of proposed district in petition, § 319(2), p 272
- Landowners, flooding lands, joinder of parties, § 36(6)
- Lands of others, appropriation on, § 171
- Landslides, pollution, mining operations, § 47
- Language, notice of appropriation, § 176
- Large lakes of North America, § 103
- Lateral ditch,
  - Appropriation, measuring quantity or amount, § 186, p 964

# WATERS

## Lateral ditch—Continued

- Point of diversion, proceedings for change, § 189, p 977
- Lateral service pipes, liability for repair and maintenance, § 309, p 237
- Law Questions of law and fact, generally, post
- Law governing,
  - Bed and banks of stream, § 71
  - Irrigation districts, organization, § 319(1)
  - Natural lakes and ponds, § 104
  - Prescriptive period, § 160
- Law of gravity, surface waters, § 112
- Lawful business, pollution, defenses, § 55, p 712
- Leader pipe, rain water and eavesdrip, § 124
- Leakage,
  - Accumulation and storage, § 141
  - Artificial channels, injuries from, § 133
  - Dams, § 154
    - Injuries by, §§ 153–156, pp 870–873
  - Irrigation canal or ditch, liability for injuries, § 365, p 432
  - Liability of city in trespass for damage from water from reservoir, § 309, p 238
  - Service pipes, collection of rates and charges, § 302, p 210
  - Underground pipes, liability for damage, § 309, p 234
- Leases, § 224
  - Abatement of rent, remedies, § 225, p 1073
- Actions,
  - Breach of covenant, damages, § 225, p 1078
  - Weight and sufficiency of evidence, § 225, p 1077
  - Appropriation, § 190, p 988
  - Damages, rights and privileges acquired, § 225, p 1078
  - Equitable relief, § 225, p 1074
  - Evidence, actions involving, § 225, p 1076
  - Flooding lands, parties to action, § 36(6)
  - Flowage of land, § 27, p 643, § 28
  - Laches, rights involving, § 225, p 1075
  - Land entitled to supply of water for irrigation, § 357
  - Limitation of actions, rights involving, § 225, p 1075
  - Municipal corporations, acquisition of existing water system, § 236
  - Municipal water works, § 240
  - Parties, rights involving, § 225, p 1075
  - Persons liable for unpaid water bills, § 302, p 212
  - Pleading, rights involving, § 225, p 1075
  - Public service water companies, water works, § 259
  - Stipulation for municipal free water supply, § 283, p 160
  - Surplus water power, power of municipality, § 234, p 26
  - Water power companies, water or power and supply to consumers, § 380
  - Water rights, municipal corporations, § 230
- Legal right, prescription, § 165
- Legality of contracts, sale of water for irrigation, § 361, p 420
- Legislative grant,
  - Acquisition of water for public supply, § 228
  - Acquisition of water rights for irrigation, § 348

- Legislature, exercise of power to regulate water supply to public, § 280, p 152
- Length, irrigation season, § 186, p 971
- Length of time, accretion and alluvion, § 76
- Lessee,
  - Appropriation, persons who may, § 171
  - Diversion, right to object, § 63
  - Flooding lands, joinder of parties, § 36(6)
  - Prescription, user, § 159, p 879
- Level of water, appropriation, § 181, p 950
- Levies,
  - Bed and banks of stream, § 72
  - Building to deepen natural channel, § 42
  - Contracts, construction and operation, § 221
  - Flooding lands,
    - Injunctive relief, evidence, § 37, p 677
    - Judgment compelling removal, § 37, p 679
  - Obstruction and detention, § 19
- Levy, water rents as, § 284
- Liabilities and injuries incident to supply and use, proximate cause, loss of crops, § 366, p 437
- Liabilities previously incurred, municipal purchase of existing water system, § 239
- Liability,
  - Diversion, § 59
  - Escaping waters, § 141
  - Injuries, flowage of lands, § 28, p 647
  - Rates and charges, § 302, p 212
  - Surface waters, § 113
  - Water districts, § 243(5), pp 71–76
- Liability of state, obstruction and detention, § 22
- Liability to third person, water district officers, § 243(4)
- Licensee,
  - Municipality having permission of landowner to lay water mains on land, § 242, p 56
  - Use of ditch, injunction, § 225, p 1074
- Licenses and license tax, §§ 206–225, pp 1040–1078
  - Actions, § 225, p 1073
    - Weight and sufficiency of evidence, § 225, p 1077
  - Appropriation, actions, defenses, § 197
  - Artificial channels,
    - Construction and maintenance over lands of another, § 130, p 847
    - Use, § 129, p 846
  - Creation, intention of parties, § 207
  - Dams, § 147, p 861
  - Diversion of public water supply, § 229
  - Flooding lands,
    - Defenses, § 36(5)
    - Issues, proof and variance, § 36(8)
    - Parties to action, § 36(6)
  - Flowage of lands, § 28
  - Ice, right to take, § 385
  - Lakes and ponds, surface use, § 105
  - Legislation authorizing municipality to fix water rates as in nature of, § 292
  - Municipal water works and water districts, § 241
  - Natural flow of stream, deprivation, § 15
  - Obstruction and detention, § 21
  - Public service water companies, § 262
  - Remedies of parties, § 225, p 1073
  - Revocation, § 219
    - Prescription, § 162
    - Tap private line of municipality, § 278, p 139
  - Rights of way, appropriation, § 192, p. 990

## Licenses and license tax—Continued

- Riparian rights, modification, § 9
- Surface drainage, § 114, p 805
- Surface waters, easement or right of drainage, § 120
- Tap private line of municipality, revocation, § 278, p 139
- Lien in rem, rates and charges, remedies for collection, § 304
- Liens,
  - Carey Act, reclamation of arid land, § 316, p 256, n 71
  - Irrigation and ditch companies, stock assessments, § 343, p 373
  - Irrigation districts, ante
  - Rates and charges, § 308, pp 228-234
    - Bills incurred by third persons, § 305
    - Cutting off water supply, § 305
    - Statutes providing for, § 305
  - Sale of water for irrigation, rates and charges on land or crops, § 363, p 429
  - Surface waters, drainage easement, § 121
  - Water rents or rates, § 302, p 212, n 55
- Limit, appropriation, beneficial use, § 186, p 966, n 97
- Limitation of actions,
  - See, also, Laches, generally, ante
  - Appropriation, § 196
  - Artificial canals, § 129, p 842
  - Artificial channels, injuries to, § 137
  - Contracts, rights involving, § 225, p 1075
  - Deeds and conveyances, § 225, p 1075
  - Diversion, pleading, § 67, p 732
  - Escaping waters, § 143
  - Flooding, § 36(4)
  - Flooding lands, injunctive relief, defenses, § 37, p 676
  - Injuries incident to supply and use, § 312, p 244
  - Irrigation districts, ante
  - Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 442
  - Leases, rights involving, § 225, p 1075
  - Municipality purchasing existing water system, § 239, p 40
  - Natural flow of stream, deprivation, § 15
  - Pollution, damages, § 54, p 701
  - Rates and charges, proceedings for collection, § 304
  - Surface waters,
    - Damages, § 127, p 828
    - Injunction, § 128, p 836
  - Water district,
    - Attack on validity, § 243(2), p 67
    - Cancellation of tax assessments as cloud on title, § 243(7), p 87, n 99
- Limitation of contracts, sale of water for irrigation, § 361, p 419
- Limitation of quantity, terms of grant, § 209, n 80
- Limitations,
  - Liability for failure to supply water, § 366, p 437
  - Point of diversion, requested change, § 189, p 982
  - Power of municipality to contract for supply of water, § 265, p 116
  - Sale or lease of water works property, § 240
- Limited dedication for public use, owner of water supply, § 278, p 145
- Limited periods, time of use, § 187
- Limited right, flowage of lands, § 24

## Line of flow, natural watercourses, § 4, p 602

- Live stream, flood waters, § 19
- Livestock,
  - Flooding lands, injuries, damages, § 38, p 684
  - Loss, pollution, damages, § 56, p 720
  - Pollution, maintaining in vicinity, § 49
  - Watering,
    - Diversion, §§ 60, 61
    - Flowing underground waters, § 93, p 769
    - Pollution rendering unfit, § 43, p 687
- Living stream with banks and channel, § 3
- Living watercourses, lowland purchaser charged with notice, § 206, n 13
- Loans, appropriations, § 190, pp 987, 988
- Local customs,
  - Appropriation, rights of way, § 192, p 991
  - Irrigation, appropriation, § 186, p 969
  - Mineis, prior appropriation, § 168
  - Rights of way, appropriation, § 192, p 991
- Local improvement districts, formation within water district, submission to voters, § 243(2), p 65
- Local law,
  - Appropriation, § 157
  - Riparian rights, § 5
- Local significance, water right, § 181, p 944, n 3
- Local subdivision, unit for rate making, § 293, p 182
- Location,
  - Description, deeds and conveyances, § 208
  - Duty or quantity needed for irrigation, § 186, p 971
  - Flowing subterranean waters, § 39, p 769
  - Land designed to be benefited, appropriation, § 172
  - Right of way for irrigation purposes, title and rights acquired, § 349, p 393
- Location of land, riparian rights, § 5
- Location of stream, riparian rights, reasonableness of use, § 11
- Lodging houses, rates and charges, installation of water meters, § 302, p 211
- Logging operations, inundation of land interfering with, damages, § 38, p 681, n 31
- Logs,
  - Obstruction and detention, § 18
  - Pollution, § 49
- Logs washed away, flooding lands, damages, § 38, p 682
- Loss,
  - Appropriation,
    - Rights, effect, § 183, p 1000, n 42
    - Transferee's right, § 190, p 984
  - Crops, damages, § 34
  - Diversion, damages, § 69
  - Flowage of lands, rights, § 24
  - Inchoate rights, appropriation, § 173, p 921
  - Prescriptive right, § 166
  - Public service water companies, exclusive rights, § 252
  - Riparian rights, § 13
  - Subterranean waters, pollution or diversion, § 102
  - Surface waters, § 112
    - Drainage rights, § 120
- Loss in transportation, appropriation, § 186, p 961
- Loss of accretion, flooding lands, damages, § 38, p 681, n 32
- Loss of interest, subterranean waters, § 101, p 786, n 30

# WATERS

- Loss of profits,
  - Flooding lands, damages, § 38, p 681
  - Pollution, evidence, § 54, p 706
- Loss of rights,
  - Appropriation, § 193, p 994
  - Dams, § 147, p 865
  - Pollution, § 50
- Losses from insufficiency of supply to extinguish fires, liability, § 310
- Lot lines, lakes and ponds, § 107
- Lower riparian owners, § 9
- Lowest average daily abstraction, prescription, § 165, n 70
- Machinery,
  - Obstruction and detention to run, § 16
  - Public service water companies, power to sell, § 259
- Mains,
  - Action by private individual against water company for failure to construct, § 281, p 155
  - Duty to extend mains and pipes, public service water companies, § 257, p 107
- Extension,
  - Cost considered in determining reasonableness of water rates, § 289, p 175
  - Municipal water works and water districts, § 242, p 58
  - Public service water companies, § 257, p 107
  - Lease or sale of municipal water works, § 240
  - Municipal water works and water districts, rights and obligations, § 242, pp 54-60
  - Public service water companies, post
- Maintaining natural state, lakes and ponds, § 106
- Maintenance,
  - Artificial channels, § 130, p 846
  - Dams, § 147, p 859
  - Injuries, § 148
  - Grants, duties, § 210, p 1054
  - Headgate, prescription, § 158, p 876, n 83
- Irrigation works,
  - Cost, § 350, p 398
  - Liability for injuries, § 365, pp 432-437
- Mill ponds, § 147, p 859
- Municipal water system plant, § 241
- Municipal water works or water districts, mains or pipes, § 242, p 60
- Public service water companies, service pipes, § 257, p 109
- Waterworks, injuries from, § 309, p 233
- Maintenance tax, water improvement district, § 323, n 28
- Malice,
  - Diversion,
    - Burden of proof, § 67, p 732
    - Damages, § 69
  - Flowage of lands, § 32
  - Injuries incident to supply and use of water, punitive damages, § 312, p 250
  - Losses from insufficiency of supply to extinguish fire, § 310
  - Pollution, § 48
    - Punitive damages, § 56, p 721
  - Subterranean waters, use, § 94
- Malicious conduct, surface waters, actions for damages, § 127, p 835
- Malicious injury, subterranean waters, punitive damages, § 102
- Malicious use of water privileges, riparian rights, § 11
- Management of business, riparian rights, reasonableness of use, § 11
- Managing corporate officers, prescription, § 163
- Mandamus,
  - Artificial channels, viaducts, constructing or repair, § 130, p 850
  - Irrigation district officers, compelling performance of duty, § 320, p 291
  - Irrigation purposes, failure to supply water, § 367, p 441
  - Parks, compelling supply of water to, § 276, p 133
  - Private consumer enforcing right to be supplied with water by water company, § 281, p 154
  - Water district taxes and assessments, collection, § 243(7), p 88
- Mandatory injunction,
  - Diversion, § 68, p 742
  - Irrigation works, arbitrary violation of property rights, § 351, n 70
- Manifested intention, appropriation, § 175
- Manner of discharge, surface waters, § 116, p 813
- Manner of diversion, § 61
  - Change, § 188
- Manner of use,
  - Deeds and conveyances, rights and privileges, § 210, p 1052
  - Rates and charges, § 297, p 201
  - Reservations and exceptions, § 214, p 1062
  - Water priority, § 183
- Manufacturing purpose,
  - Appropriation, § 172
    - Rights of way, § 192, p 990
  - Equal rights of riparian proprietors, § 314, n 25
  - Pollution, § 43, pp 687, 689
  - Supply of water by municipalities for, as not rendered domestic use, § 230
- Manure pile, pollution, offensive matter, § 55, p 716
- Maps,
  - Appropriation, ante
  - Irrigation district, description of proposed district in petition, § 319(2), p 272
- Market value,
  - Flooding lands, destruction of personal property, damages, § 38, p 681
  - Surface waters, actions for damages, § 127, p 833, n 46
- Marks, stranded or floating property, § 82
- Marsh,
  - Classification, § 103, n 70
  - Natural watercourses, § 4, p 602
  - Surface waters, § 112
    - Artificial drainage, § 116
- Material injury, diversion, § 61
- Materials, bed and banks of stream, accretion, § 76
- Maturity, irrigation district bonds, § 324, p 310
- Mayor, action to enforce municipal water supply contract, § 276
- Meadow lands, appropriation, § 186, p 970
- Meander line, lakes and ponds, § 107
- Means of appropriation, secondary consideration, § 181, p 950
- Means of diversion,
  - Appropriation, § 181, p 950
  - Change, § 188
  - Pleading, § 67, p 731

- Measure, appropriation, beneficial use, § 186, p 966, n 97
- Measure of damages,
  - Dams, breaking or overflowing, § 156
  - Diversion, § 69
  - Pollution, § 56, p 718
- Measurement of quantity, deeds and conveyances, rights and privileges, § 210, p 1050
- Measurement of right, prescription, § 165
- Measurements, surplus supply, § 185, p 958
- Measuring quantity or amount, appropriation, place, § 186, p 964
- Mechanical and manufacturing purposes, §§ 369-382, pp 451-462
  - Acquisition of water rights, § 370
  - Actions for injuries, § 375
  - Affected by rights of others, § 372
  - Artificial waters, § 373
  - Easements, § 373
  - Electricity, § 374
  - Eminent domain, § 372
  - Extent of use, § 372
  - Hydroelectric power, § 374
  - Injuries, § 375
  - Mills, § 374
  - Mines or quarries, § 374
  - Natural waters, § 369
  - Nature of right, § 371
  - Particular uses, § 374
  - Placer mining, § 374
  - Primary uses, § 372
  - Prior appropriation, § 372
  - Railroad uses, § 374
  - Reasonableness, § 372
  - Restrictions on use, § 372
  - Secondary uses, § 372
  - Supplying of power, diversion, purposes, § 60
- Mechanical use, lakes and ponds, § 105
- Mechanic's liens,
  - Acquisition on municipal water works, § 241
  - De facto irrigation districts not subject to, § 319(6)
  - Public service water companies, § 263
- Medial line, bed and banks of stream, § 71
- Medial thread, bed of stream, § 71
- Meetings, irrigation district officers, § 320, p 292
- Melting snow,
  - Flood waters, § 20, p 630, n 95
  - Source of supply, § 4, p 598
- Member,
  - Favorable votes to acquire existing water system by municipality, § 237, p 37
  - Public service water companies, § 248
- Mental incapacity, assignment of water stock certificates, action to set aside, § 343, p 369
- Merchandise in basement, flooding lands, damages, § 38, p 682, n 49
- Merger of title, flowage of lands, § 24
- Mergers, public service water companies, § 248
- Meteorologic conditions, flowage of lands, liability for injuries, § 29, p 649
- Meters,
  - Customers, permission to read, § 284
  - Installation, § 280, p 150
  - Liability of water companies for injuries resulting from condition, § 309, p 238
- Method employed to use, riparian rights, § 5
- Method of diversion, proceedings, § 189, p 977
- Methods of appropriation for irrigation, § 186, p 969
- Methods of establishment, municipal water works and water districts, § 235
- Metropolitan utilities district, power to extend water mains beyond city limits, § 243(9)
- Metropolitan water districts, liability for torts, § 309, p 235
- Mexican civil law, ownership, bed of stream, § 71, n 21
- Michigan, Lake Michigan, § 103
- Migratory character, subterranean waters, § 90
- Mileage fees, irrigation district officers, § 320, p 292
- Military use, riparian rights, reasonableness of use, § 12, n 86
- Milk loss from animals, pollution, damages, § 56, p 702
- Mill corporations, municipal distribution of water to, § 278, p 141
- Mill ponds and dams, §§ 144-152, pp 857-870
  - See, also, Dams, generally, ante
  - Appropriation, rights of way, § 192, p 991
  - Bed, appurtenances, § 216
  - Bridges, building and maintaining in repair, § 147, p 864
  - Damages for injuries to, § 150
  - Dead-water zone, § 145
  - Deeds and conveyances, interest conveyed, § 210, p 1048
  - Destitution, § 147, p 865
  - Flooding lands,
    - Issues, proof and variance, § 36(8)
    - Unlawful erection and maintenance, injunction, § 37
  - Floods, joinder of actions, § 36(1)
    - Lands, grant and reservations, § 27, p 643
  - Flowage of lands, annual damages, § 30
  - Forfeiture on failure to rebuild, § 147, p 865
  - Grant, right to erect and maintain, § 207
  - Injuries to, § 150
  - Maintenance, rights of others, § 147, p 865
  - Mill privilege, § 145, n 16
  - Mosquito breeding body, § 148
  - Nuisance, § 147, p 861
  - Offensive nature, § 148
  - Operation, rights of others, § 147, p 865
  - Reservation of right to raise and rebuild, § 214, p 1062
  - Rights of way, appropriation, § 192, p 991
  - Setting water back on upper mill, § 148
  - Stagnant or unhealthy nature, § 148
  - Water level, estoppel, § 147, p 865, n 25
- Mill privilege,
  - Grant, interest created, § 209
  - Proper measure of damages for flowage, § 38, p 681
- Mill race, boundaries, § 129, p. 842
- Mill refuse, pollution, § 48
- Milling uses, appropriation, § 172
- Milowners,
  - Flowage of land, § 24
    - Proceedings instituted to acquire right, § 25, p 637
- Mills,
  - Appurtenances passing by conveyance, § 217
  - Duty to maintain or repair, § 210, p 1054
  - Erection, licenses, § 219

# WATERS

## Mills—Continued

- Flowage of lands, transfer, § 27, p 646
- Mechanical and manufacturing purposes, § 374
- Miner's inch, appropriation, units of measurement, § 186, p 964
- Miners, local customs and rules, prior appropriation, § 168
- Mines, mechanical or manufacturing purposes, § 374
- Minimum water charge, § 300
- Mining claim, bed and banks of stream, § 75
- Mining debris, choking or filling up irrigation canal, action, § 351
- Mining operations, refuse, pollution, § 47
- Mining purposes, appropriation, rights of way, § 192, p 990
- Mining use, drainage beyond amount reasonably necessary, § 100, n 13
- Ministerial acts, irrigation district, tax deeds, § 337, p 356
- Ministerial officers, water districts, § 243(4)
- Miscellaneous causes, pollution, § 49
- Misjoinder of parties, surface waters, actions for damages, § 127, p 828
- Misrepresentation,
  - Contracts, § 220
  - Leases, § 224
- Mistake, contracts, § 220
- Mistaken belief, prescription, § 162, n 57
- Mistakes of fact or law,
  - Rate charge determination, § 275
  - Rates and charges, payment under, § 307, p 225
- Misuser, termination, reserved rights, § 215
- Mitigation of damages,
  - Diversion, § 69
  - Flooding lands, § 38, p. 682
  - Evidence, § 36(9)
  - Flowage of lands, § 25, p 639
  - Pollution, § 43, p 690
  - Consideration, § 56, p. 720
  - Surface waters, questions of law and fact, § 127, pp 831, 832
- Mode, appropriation, conveyance, § 190, p 985
- Modification,
  - Municipal contract for supply of water, § 272
  - Reservoir structure, § 185, p 958, n 82
  - Surface waters, injunction, § 128, p 840
- Modified common law, surface waters, § 114, p 806
- Money loss, subterranean waters, § 100
- Monopolies, contracts of municipalities for supply and distribution of water, § 265, p 117
  - Appropriation, purpose, § 175
  - Prior appropriation, § 167
- Monopoly of waters, lakes and ponds, § 111, n 75
- Moratoriums, appropriation, prosecution of enterprise, § 179
- More beneficial use, appropriation, § 180, p 936, n 74
- More than one stream, appropriation, § 173, p 918
- Mortgages,
  - Flooding lands, joinder of parties, § 36(6)
  - Parties to action by municipality to cancel water supply contract, § 276, p 136
  - Parties to suit to forfeit public service water company's franchise, § 253
  - Unreasonable rates, proceedings for relief, § 295, p 192

## Mortgages, § 218

- Appropriation, § 190, p 987
- Irrigation and ditch companies, § 345, p 381
  - Officers, powers, § 344
- Irrigation districts, security for bonds, § 326
- Municipal water works and water districts, securing bonds or certificates, § 234, p 49
- Public service water companies, § 259
- Water districts, authority, § 243(6), p 77
- Mosquitoes, pollution, increase in number, § 51
- Motive,
  - Pollution, defenses, § 55, p 712
  - Subterranean waters, use, § 94
- Moveable, wandering thing, § 1
- Moving body of water, § 4, p 604
- Mud from mining operations, pollution, § 47
- Multiplicity of actions,
  - Change, point of diversion, § 189, p 977
  - Diversion, injunction, § 68
  - Flooding land, injunction, § 37
  - Point of diversion, application for change, § 189, p 982, n 45
- Municipal water works and water districts, §§ 234-243(9), pp 23-91
  - Abandonment of municipal water works, § 240
  - Abolishment of water district, § 243(9)
  - Abrogation, option of municipality to purchase existing water system, § 237, p 36
  - Acquisition,
    - Existing system, § 236
    - Municipal water works, § 234, pp 23-29
    - Water works, § 243(5), p 74
  - Actions by or against water districts, § 243(8)
  - Administrative officers, water districts, § 243(4)
  - Allowances, purchase of existing system, § 238, p 41
  - Alteration of water district, § 243(9)
  - Anticipation of revenue collections, § 241
  - Appraisal of existing water system, approval by municipal officers before purchase, § 238, p 41
  - Approval,
    - Municipal officers of purchase of existing water system, § 237, p 37
    - Voters in respect of laying new mains, § 242, p 57
  - Assent of electors to purchase of existing water system, § 237, p 37
  - Assessments, authority of water district to levy, § 243(7), p 82
  - Avoidance, contract or conveyance of existing water system, § 237, p 39
  - Basis of valuation, existing water works system, § 238, p 41
  - Benefits, assessments for by water system, § 243(7), p 84
  - Bond for faithful performance, water district officers, § 243(4)
  - Bonds and certificates,
    - Issuance, § 234, p 27
    - Obligation of municipality, § 241
    - Water districts, § 243(6), p. 78
  - Boundaries, water districts, § 243(3)
  - Breach of contract, water districts, § 243(8)
  - Cancellation,
    - Contract or conveyance on existing water system, § 237, p 39

## Municipal water works and water districts—Cont'd

### Cancellation—Continued

- Municipality's option to purchase existing water system, § 237, p 36
- Certificates as negotiable instrument, § 234, p 29
- Chattel mortgages, § 241
- Choice of method for establishment, § 235
- Collateral attack, organization of water district, § 243(2), p 66
- Condemnation proceedings, purchase of existing water system as proceedings in nature of, § 238, p 43
- Connections, rights and obligations, § 242, pp 54-60
- Consent,
  - Municipal officers to purchase of existing water system, § 237, p 37
  - State authorities to acquisition of existing water system, § 236
- Construction,
  - Municipal water works, § 234, pp 23-29, § 243(5), p 74
  - Municipality's option to purchase, § 237, p 36
- Consumers, extension of mains under contract with, § 242, p 59
- Contract,
  - Purchase existing water system, § 237, pp 34-40
  - Water supply, § 234, p 25
- Contractor, unenforceable bonds issued to, § 234, p 29
- Contracts of water districts, § 243(5), pp 71-76
- Control of,
  - Plant, § 241
  - Water districts, § 243(1)
- Controlled by state commissioner of board, § 234, p 24
- Cost basis, determination of price of purchase of existing water system, § 238, p 42
- Cost of installing service pipes, § 242, p 57
- Damage to water system, recovery, § 241
- Dams, power to construct and maintain, § 234, p 26
- De facto water district, § 243(2), p. 64
- Deductions, purchase of existing water system, § 238, p 41
- Delivery of executed contract by residents, § 242, p 59
- Depreciation, determination before purchase, § 238, p. 42
- Dissolution of water districts, § 243(9)
- Duties of water districts, § 243(5), pp 71-76
- Electric service, extension of contract for by water district, § 243(5), p. 74
- Elements included in valuation, existing water system before purchase, § 238, p 41
- Evidence,
  - Attack on water district organization, § 243(2), p 67
  - Water district bonds, actions attacking validity, § 243(6), p 82
- Existence of other system, § 235
- Existing water district system, acquisition, § 243(5), p 75
- Extension of,
  - Mains, § 242, p. 58
  - Plant, § 241

## Municipal water works and water districts—Cont'd

- Extent of municipal authority, § 234, p 25
- Facts on property of contractor constructing supplemental water system, provision for payment, § 234, p 25
- Financing, § 241
- Fiscal management and indebtedness, water districts, § 243(6), pp 76-82
- Foreclosure, water district bonds, § 243(6), p 82
- Form of levy, water district taxes or assessments, § 243(7), p 86
- Formation of water districts, purpose, § 243(1)
- Franchise tax, § 241
- Free use of water by seller of existing water system, § 277, p 39
- Funds and financing, § 234, p 26
- Good faith in construction, § 235
- Governing body of water district, § 243(4)
- Highways, use of, § 242, p 56
  - By water district, § 243(5), p 76
- Incidental rights acquired by grant of right of way, § 242, p 60
- Increased cost of construction, imposition not taxed, § 243(7), p 86
- Indebtedness, water districts, § 243(6), pp 76-82
- Initiated proceedings to create water district, § 243(2), p 64
- Inspection,
  - Books and doctrines of existing system before exercising option to purchase, § 237, p 36
  - Books and vouchers of existing water system before purchase, § 237, p 40
- Interest, water district bonds, § 243(6), p. 82
- Items for which tax or assessment levied, § 243(7), p 86
- Joint acquisition of existing water system by several municipalities, § 236
- Lease of municipal water works, § 240
- Liabilities of water districts, § 243(5), pp 71-76
- Liability to third persons, water district officers, § 243(4)
- Licensee, municipality as, § 242, p 56
- Limitation of actions,
  - Acquisition of existing water system, § 237, p 40
  - Attack on validity of water district, § 243(2), p 67
- Limits of municipal authority, § 234, p 25
- Mains, rights and obligations, § 242, pp 54-60
- Maintenance of,
  - Mains or pipes, § 242, p 50
  - Plant, § 241
- Matters subsequent to creation of water district, § 243(2), p 64
- Mechanic's liens, § 241
- Method of establishment, choice, § 235, p 29
- Mortgages securing bonds or certificates, § 234, p 29
- Municipal acquisition of town's water system, § 236
- Municipal limits, extension of mains outside, § 242, p 59
- Natural facilities, use of, § 242, p 57
- Nature of business, water districts, § 243(5), p 74
- Notice, taxes and assessments, § 243(7), p 86
- Number of favorable votes, acquisition of existing water system, § 237, p 37



# WATERS

## Municipal water works and water districts—Cont'd

- Obligations imposed on contractor and vendor of existing water system, § 237, p 36
- Offer to purchase existing water system, § 237, pp 34-40
- Officers of water district, § 243(4)
- Official approval of acquisition of existing water system, § 237, p 36
- Operation of plant, § 241
- Opportunity for hearing, taxes and assessments, § 243(7), p 86
- Option to purchase existing water system, § 237, pp 34-40
- Organization of water districts, § 243(2), pp 62-67
- Ownership, § 234, p 25
  - Between two municipalities, § 242, p 57
- Payment of price on purchase of existing water system, § 237, p 38
- Personal interest of officer conducting election to purchase existing water system, § 237, p 37
- Personal property used in connection with plant, liability for, § 241
- Persons entitled to attack organization of water district, § 243(2), p 67
- Petition for organization of water district, § 243(2), p 63
- Pipes laid by individual, taking or converting, § 242, p 57
- Pleading, attack on water district organization, § 243(2), p 67
- Political corporate entity, § 243(1)
- Popular approval of acquisition of existing water system, § 237, p 36
- Possession of existing water system, transfer on sale, § 239
- Powers of water districts, § 243(5), pp 71-76
- Price of existing water system on purchase, § 238, pp 40-45
- Priority among easements, § 242, p 57
- Privilege tax, § 241
- Proceedings to,
  - Determine value of existing water system for sale to municipality, § 238, pp 43, 44
  - Tax water district tax or assessment, § 243(7), p 87
- Property included in contract for purchase of existing water system, § 237, p 38
- Property of water districts, § 243(5), pp 71-76
  - Taxation, § 243(7), p 88
- Public corporations, § 243(1)
- Ratification, ultra vires contract to purchase existing water system, § 237, p 36
- Referendum, acquisition of existing water system, § 236
- Regulation by,
  - Public service or utilities commission, § 241
  - State commissioner of board, § 234, p 24
- Remedies available to parties to purchase of existing water system, § 237, p 39
- Removal, water district officers, § 243(4)
- Repair of mains or pipes, § 242, p 60
- Reproduction costs, valuation of property before purchase, § 238, p 42
- Rescission, contract or conveyance of existing water system, § 237

## Municipal water works and water districts—Cont'd

- Retention of price on purchase of existing water system, § 237, p 38
- Revenue producing enterprise, § 234, p 26
- Review, proceedings to organize water district, § 243(2), p 66
- Rights of way, rights and obligations, § 242, pp 54-60
- Sale of municipal water works, § 240
- Security for performance on purchase of existing water system, § 237, p 38
- Selection, governing body of water district, § 243(4)
- Service pipes,
  - Cost of installing, § 242, p 57
  - Property included in purchase of existing water system, § 237, p 38
- Special administrative area, § 243(1)
- Special assessments, water districts, § 243(7), p 81
- State authorities, consent to acquisition of existing water system, § 236
- Statutory methods of valuation of existing water system, § 238, p 41
- Streets, use, § 242, p 56
  - By water district, § 243(5), p 76
- Submission to voters, § 234, p 23
  - Proposed organization of water district, § 243(2), p 65
  - Water district bond issue, § 243(6), p 80
- Suit to attack tax or assessment by water district, § 243(7), p 87
- Surplus water power, leases, § 234, p 26
- Tax on organization of water district, § 243(2), p 66
- Taxes, authority of water district to impose, § 243(7), p 82
- Tender of price on purchase of existing system, § 237, p 38
- Territorial limits, control beyond, § 241
- Territory included in water district, § 243(3)
- Time,
  - Acquisition by electors of contract to purchase existing water system, § 237, p 37
  - Acquisition of existing water system, § 236
- Title of existing water district, transfer, § 239
- Transfer of property of existing water system, § 239
- Transfer to town boards, governing bodies of water districts, § 243(4)
- Ultra vires contract to purchase existing water system, validation or ratification, § 237, p 36
- Unexpired franchise, purchase of existing water system by municipality, § 238, p 42
- Use and ownership, § 234, p 25
- Use of streets and highways, § 242, p 56
  - Water districts, § 243(5), p 76
- Validation,
  - Organization of water districts, § 243(2), p 64
  - Ultra vires contract to purchase existing water system, § 237, p 36
  - Water district bonds, § 243(6), p 81
- Validity of water district organization, § 243(2), pp 62-67
- Valuation of existing water works on purchase, § 238, pp 40-45

## Municipal water works and water districts—Cont'd

- Value of existing water system as growing concern, § 238, p 42
- Vendor's liens, § 241
- Withdrawal of municipality from water district, § 243(9)
- Municipalities,
  - Accretion rights, § 76
  - Appropriation, priority, § 183
  - Compelling acceptance of municipal service, persons outside territorial limits, § 278, p 141
  - Distribution and supply of water for irrigation, stockholder rights, § 353
  - Diversion, persons liable, § 64
  - Flowing subterranean waters, use, § 93, p 770
  - Future needs, prescription, § 165, n 80
  - Ice, power to take, § 384
  - Judicial protection, claim to flowage not constituting public or navigable stream, § 113
  - Lot owner, surface waters, § 114
  - Pollution,
    - Liability, § 52
    - Parties, § 55, p 715, n 35
  - Power to regulate water company rates, § 292
  - Proprietary capacity,
    - Acts in fixing rates, § 286
    - Collecting water rates, § 302, p 210
    - Furnishing water to private consumers, § 277
    - Supplying water to consumers as acting in, § 241
  - Regulation of water supply to public, § 280, p 153
  - Right to charge for water service, § 285
  - Riparian rights, § 8
  - Subterranean waters, proceedings and relief, § 101, p 780
  - Surface waters, natural drainage, § 114, n 26
- Mutual assent, contracts, § 220
- Mutual associations, irrigation and ditch companies, § 340
- Mutual irrigation company, right to supply water, § 352, p 404
- National reclamation act, irrigation works, § 316, p 257
- Natural causes,
  - Flooding lands, defenses, § 36(5)
  - Interruptions, prescriptive period, § 161
- Natural condition of punity, § 43, p 686
- Natural conditions, diversion, evidence, § 68, p 740
- Natural configuration of land, artificial channels, § 130, p 847
- Natural depressions,
  - Artificial channels, § 130, p 847
  - Railroads, surface waters, § 115
- Natural drainage, surface waters, §§ 112, 114
- Natural easement, pollution, § 43, p 688
- Natural facilities, municipal use of for storage and transportation of water, § 242, p 57
- Natural flow,
  - Obstruction and detention, § 15, n 30
  - Riparian rights, § 9
- Natural lakes and ponds, §§ 103–111, pp 780–790
  - Access to water, § 105
  - Accretion, § 108
  - Accustomed level, § 106
  - Actions, § 111
  - Actual existence, § 107
  - Adverse possession, lands underlying, § 107

## Natural lakes and ponds—Continued

- Agricultural use, § 105
- Anchorage right, § 105, n 82
- Appropriation, sources of supply, § 181, p 949
- Artificial, § 103
- Artificially maintained, § 107
- Bathing rights, § 105, n 84
- Bed and banks, § 107
- Boating rights, § 105, n 84
- Boundary lines, § 107
- Classification, § 103, n 70
- Clean hands, equitable relief § 111
- Commercial navigation, § 103, n 70
- Comparative depth, § 103, n 70
- Conveyance, riparian rights, § 104
- Currents, § 103
- Definition, § 103
- Depression in earth's surface, § 103
- Domestic uses, § 105
- Dry lake bed, ownership, § 108
- Easement, surface use, § 105
- Equitable remedies, § 111
- Erie, Lake Erie, § 103
- Estoppel, § 105
  - Title to bed, § 107
- Excessive use, § 105
- Existence, § 107
- Fishing rights, § 105, n 84
- Floods, equitable relief, § 111
- Great Lakes, § 103
- Great ponds, § 110
- High water level, lowering, § 111
- Huron, Lake Huron, § 103
- Injunction, riparian rights, § 111
- Inland bodies of water, § 103
- Issues, proof and variance, intervention, § 111, n 74
- Land underlying, ownership, § 107
- Large lakes of North America, § 103
- Law governing, § 104
- License, surface use, § 105
- Lot lines, § 107
- Maintaining natural state of water, § 106
- Meander line, § 107
- Mechanical use, § 105
- Michigan, Lake Michigan, § 103
- Monopoly of waters, § 111, n 75
- Navigability, common law, § 103, n 70
- Ontario, Lake Ontario, § 103
- Outlets, § 109
- Ownership of water, § 105
- Pier, § 105
- Presumptions, subsequent conveyance, § 107
- Public rather than private waters, § 103
- Public rights, § 105, n 86
- Quantity of bed owned, § 107
- Recession of waters, § 108
- Recreational purposes, § 105, n 84
- Reliction, § 108
- Remedies, § 111
- Retaining wall, erection, § 105, n 87
- Riparian rights, § 104
- Shallowness of water, § 103, n 70
- Sole proprietorship, § 107, n 10
- Source of supply, § 103, n 70
  - Appropriation, § 181, p 949
- State rights, beds and banks, § 107

# WATERS

## Natural lakes and ponds—Continued

- Subsequent conveyance, § 107
  - Substantially at rest, § 103
  - Superior, Lake Superior, § 103
  - Surface water becoming part of, § 112
  - Swimming rights, § 105, n 84
  - Time of attaching, riparian rights, § 104
  - Title, land underlying, § 107
  - Use of water, § 105
    - Member of public, § 159, p 879
    - Prescription, § 158
  - Watering cattle, privilege, § 105
  - Water's edge, § 107
  - Wharf, § 105
- ## Natural obstruction,
- Flowage of lands, liability for injuries, § 29, p 648
  - Removal or abatement, § 23
- ## Natural overflow, appropriation, § 177
- ## Natural persons,
- Appropriation, exercise of right, § 171
  - Prescription, § 163
- ## Natural resources, subterranean waters, § 95
- ## Natural springs, appropriation, § 170, p 907
- ## Natural state, § 1
- ## Natural streams, injuries to lands adjoining when used to conduct irrigation waters, § 365, p 435
- ## Natural volume, obstruction and detention, § 15
- ## Natural wants, riparian rights, reasonable use, § 12
- ## Natural watercourses, §§ 3-85, pp 596-761
- Air and water, § 4, p 602
    - Alteration, § 4, p 597
  - Antiquity, § 4, p 597
  - Arid or semi-arid states, § 4, p 605, n 54
  - Artificially created channel, § 4
  - Banks, § 4, pp 596, 599
  - Bed, § 4, pp 596, 599
  - Break up, § 4, p 604
  - Changes continued for prescriptive time, § 4, p 598
  - Channel, § 3; § 4, p 599
  - Characteristics, § 4, p 596
  - Conformation of country, § 4, p 603
  - Constant or continuous flow, § 4, p 604
  - Current of water, § 4, p 596
  - Definite source of supply, § 4, p 598
  - Definition, § 3
  - Direction, flow of water, § 4, p 603
  - Distinct channel, § 4, p 600, n 97
  - Diversion, generally, ante
  - Elements, § 4, p 596
  - Fed from permanent sources, § 3
  - Flow of water, § 4, p 603
  - Flowage of lands, generally, ante
  - Intermittent flow, § 4, p 604
  - Line of flow, § 4, p 602
  - Living stream with banks and channel, § 3
  - Marsh, § 4, p 602
  - Moving body of water, § 4, p 604
  - Obstruction and detention, generally, post
  - Origin, § 4, p 597
  - Permanent flow of water, § 4, p 604
  - Permanent source of supply, § 4, p 598
  - Place of discharge, § 4, p 596
  - Questions of law and fact, § 36(10)
  - Riparian rights, generally, post
  - Rocky Mountain region, § 4, p 605, n 55

## Natural watercourses—Continued

- Semi-arid states, § 4, p 605, n 54
  - Serviceable to persons along whose lands it flows, § 4
  - Size, § 4, p 597
  - Source, § 4, pp 596, 598
  - Stagnant pools, § 4, p 602
  - State of nature, § 4, p 596
  - Substantial existence, § 4, p 596
  - Surface waters, discharge into, § 117
  - Swale, § 4, p 602
  - Test, § 4
  - Time of flood, freshet or high water, § 4, p 602
  - Unchangeable banks, § 4, p 602
  - Velocity of water, § 4
  - Volume of water, § 4, p 597
  - Wide sheet of water, § 4, p 602
  - Width and depth, § 4, p 597
- ## Natural waters, mechanical and manufacturing purposes, § 369
- ## Natural watershed, riparian rights, § 8
- ## Nature, § 1
- Appropriation, right, § 181, p 944
  - Artificial channels, § 129, p 841
  - Diversion, § 58
    - Injury, injunctive relief, § 68, p 735
  - Flooding, actions, § 36(2)
  - Flooding lands, injury, § 37, p 674
  - Obstruction and detention, § 17
  - Subterranean waters, § 86
    - Presumptions, § 87
  - Water power companies, § 376
- ## Nature of banks, riparian rights, reasonableness of use, § 11
- ## Nature of business, water districts, § 243(5), p 74
- ## Nature of diversion, pleading, § 67, p 731
- ## Nature of franchise, public service water companies, § 251
- ## Nature of improvements, riparian rights, reasonableness of use, § 11
- ## Nature of right,
- Flowage of lands, § 25, p 637; § 26
  - Pollution, § 43, p 688
- ## Nature of rights acquired, prescription, § 165
- ## Nature of soil, duty or quantity needed, § 186, p 971
- ## Nature of supply, sale for irrigation, contracts with consumers, § 361, p 418
- ## Nature of use,
- Appropriation, change, abandonment, § 193, p 997
  - Determination of reasonableness of rates and charges, § 289, p 175
  - Prescription, § 161
  - Subterranean waters, § 93, p 767
- ## Nature wherein right claimed, prescription, § 164
- ## Navigability, common law, § 103, n 70
- ## Necessary parties,
- Flooding lands, injunctive relief, § 37, p 679
  - Surface waters, injunction, § 128, p 837
- ## Necessities of business, riparian rights, § 11
- ## Necessities of community, prior appropriation, § 168
- ## Necessity,
- Appropriation, hydrographic survey, § 180, p 937
  - Diversion, purpose, § 60
  - Express verbal assertion of claim, prescription, § 162
  - Obstruction and detention, reasonableness, § 16

## Necessity—Continued

- Pollution, § 48
  - Injury, § 55, p 711
- Riparian rights, reasonableness of use, § 11
- Necessity of adjudication, appropriation, § 180, p 937
- Negative community, appropriation, § 172
- Neglect,
  - Appropriation, right of way, loss, § 193, p 1000
  - Duty, water district officers, removal, § 243(4)
- Negligence,
  - Accumulation and storage, § 141
  - Artificial channels, injuries from, § 133
  - Breakage or overflow of dam, § 153
  - Contributory negligence, generally, ante
- Dams,
  - Breakage, actions, § 156
  - Operation, § 18
- Diversion,
  - Damages, § 69
  - Evidence, § 68, p 740
  - Pleading, § 67, p 731
- Flooding lands,
  - Burden of proof, § 36(9)
  - Defenses, § 36(5)
  - Evidence, § 36(9)
  - Issues, proof and variance, § 36(8)
  - Pleading, § 36(7)
  - Questions of law and fact, § 36(10)
- Flowage of lands, liability for injuries, § 29, p 649
- Injuries from construction or maintenance of waterworks, § 309, p 234
- Obstruction and detention, unprecedented storms or rainfalls, § 18
- Parties liable for injuries incident to supply and use, § 312, p 244
- Pleading, injuries incident to supply and use, § 312, p. 244
- Pollution, § 48
  - Burden of proof, § 54, p 704
  - Damages, § 54, p 701
  - Evidence, § 54, p 706
- Pueblo rights as lost by, § 231
- Railroads, surface waters, § 115
- Repair of water meter, § 302, p 211
- Subterranean waters,
  - Pollution, § 97
  - Pollution of well, § 101, p 782
- Surface waters,
  - Actions for damages, § 127, p 829
  - Artificial drainage, § 116
  - Questions of law and fact, § 127, pp 831, 832
- Negotiability, irrigation district bonds, § 329
- Negotiable bonds,
  - Quasi public irrigation companies, § 347, p 384
  - Water districts, power to issue, § 243(6), p 78, n 29
- Negotiable instruments, municipal water works and water districts, certificates payable as, § 234, p 29
- New buildings, manner of use, § 210, p 1053, n 92
- New islands, bed and banks of stream, § 72
- New land, accretion and alluvion, § 76
- New spring, § 91
- New trial, appropriation, actions, § 203, p 1020

## Nominal damages,

- Deprivation of water, § 34
- Diversion, § 69
- Flooding lands, § 38, p 685
- Flowage of lands, § 25, p 639
- Pollution, § 56, p 721
- Subterranean waters, § 102
- Nonabsorbing purpose, waters taken for, § 185, p 961
- Nonassessable stock, irrigation and ditch companies, § 343, p. 372
- Nonbeneficial purpose, appropriation, prior right, § 186, p 966
- Noncontiguous municipalities, supply and distribution of water, § 265, p 118
- Noncontiguous tracts, inclusion in water district, § 243(3)
- Noncontractual obligations, municipal supply of water, § 274
- Nonirrigable land, benefits by irrigation system, taxation, § 333, p 333
- Nonnavigable streams, appropriation and diversion for municipal inhabitants, rights of riparian and other owners, § 226
- Nonnavigable streams on public domain, § 1
- Nonperformance, contract for sale of water for irrigation, excuse, § 361, p 422
- Nonperformance of condition, flowage of lands, § 24
- Nonproductive land, diversion, defenses, § 67, p 730
- Nonresident bondholders, irrigation districts, parties to action to cancel bonds, § 331, p 325
- Nonresidents,
  - Municipal duty to supply water to, § 278, p 142
  - Municipal purchase of existing water system, duty to supply, § 239
  - Municipality supplying water to, § 278, p 140
  - Rates and charges for water service furnished by city to as tax, § 284, n 59
- Nonreturnable waters, appropriation, § 185, p 960
- Nonriparian owners, diversion, § 59
- Nonsuit Dismissal or nonsuit, generally, ante
- Nonuser,
  - Burden of proof, § 101, p 784
  - Dams, loss of rights, § 147, p 865
  - Flowage of lands, § 24
  - Irrigation district franchise, § 338
  - Pollution, loss of right, § 50
  - Power to regulate water company rates as abandonment, § 292
  - Pueblo rights as lost by, § 231
  - Riparian rights, § 13
  - Surface waters, drainage rights, § 120
  - Water rights previously acquired by municipality as working abandonment, § 228
- Nonwasteful use, subterranean waters, § 93, p 770
- Normal flow of springs, enjoining interference, § 101, p 783
- Normal height, dams, § 147, p 864
- Normal water, bed and banks of stream, § 72
- Notice,
  - Apparent easement, surface waters, § 120, n 66
  - Appropriation, ante
  - Change of rate or classification, § 290
  - Change of rates and charges, § 287
  - Constructive notice, generally, ante
  - Contracts,
    - Construction and operation, § 221
    - Irrigation and ditch companies, § 345, p 381

# WATERS

## Notice—Continued

- Duration, prescriptive period, § 160
  - Easements, successors of grantor, § 210, p 1056
  - Flooding lands, injunctive relief, conditions precedent, § 37, p 675
  - Flowage of lands, invasion of property, § 26
  - Irrigation and ditch companies,
    - Contracts to furnish water, § 345, p 381
    - Stockholders' meetings, § 343, p 370
  - Irrigation districts, ante
  - Municipal contract for supply of water,
    - Insufficient supply or pressure, § 268
    - Refusal to pay for failure to keep water pure, § 269
  - Obstruction and detention, removal or abatement, § 23
  - Petition for organization of water district, § 243 (2), p 63
  - Pleading, injunctive relief, § 68, p 730
  - Polluted condition of water, § 311
  - Prescriptive period, § 160
  - Publication, post
  - Railroads, nuisance, bridges, etc., § 20, p 628
  - Rates and charges,
    - Cutting off supply for nonpayment, § 305
    - Subsequent purchaser as charge with knowledge, § 308, p 232
  - Shutting off supply of water, violation of regulations, § 280, p 151
  - Subsequent appropriation, § 185, p 957
  - Termination of contract by municipality to furnish water to water company, § 282
  - Water districts, taxes or assessments, § 243(7), p 86
- Notice of use, prescription, § 159, p 880
- Noxious odors, pollution, § 43, p 687
- Nuisance,
- Acquisition of right to pollute, § 50
  - Acts on which prescriptive claim based, § 159, p 879
  - Criminal responsibility, §§ 39, 40
  - Dams, § 18, § 144, § 147, p 859, n 28, § 147, p 863
  - Fences erected to prevent use of dam water over land, § 145
  - Flooding lands,
    - Defenses, § 36(5)
    - Nominal and punitive damages, § 38, p 684
  - Flowage of land, persons liable, § 30
  - Impounding of waters, § 141
  - Injuries, damages, § 38, p 684
  - Irrigation ditch maintained in manner as to be, § 365, p 435
  - Irrigation rights, actions to establish and protect, § 317, p 260
  - Irrigation works, § 350, p 399
  - Mill ponds and dams, § 147, p 861
  - Obstruction and detention, § 15
    - Actions, § 36(1)
    - Persons liable, § 22
    - Removal or abatement, § 23
  - Pollution, § 43, p 688
    - Criminal responsibility, § 57
    - Equitable relief, § 55, p 710
  - Railroad bridge, etc., abatement, § 20, p 628
  - Railroads, surface waters, § 115
  - Rain water and eavesdrip, § 124

## Nuisance—Continued

- Recovery under petition alleging negligence, § 101, p 782
  - Regulation of water supply to public, § 280, p 153
  - Reservoir, § 141
  - Subterranean waters,
    - Cost of removing, damages, § 102
    - Pollution, § 97
    - Verdict and findings, § 101, p 782
  - Surface waters, § 113
    - Abatement, § 128, p 840, n 11
    - Actions, § 127, p 827, n 58
    - Common enemy, § 114, p 806
    - Dam preventing natural damage, § 114, n 27
    - Drainage easement, § 121
    - Floodings, persons liable, § 125
    - Pollution, § 123
- Object,
- Riparian rights, reasonableness of use, § 11
  - Secondary appropriations, § 185, p 956
- Object of grant, obstruction and detention, § 21
- Object of use, prescription, § 161
- Objections,
- Appropriation, actions, referee or master's report, § 203, p 1022
  - Irrigation district assessments, § 335, pp 343-347
  - Irrigation districts, exclusion or inclusion of land, § 319(3), p 280
  - Point of diversion, change, § 189, p 979
  - Water districts, inclusion of land, § 243(3)
- Objections to diversion, right, § 63
- Obligations assumed, municipal purchase of existing water system, § 239
- Obsolescence, reproduction cost of plant, consideration in determining reasonableness of rates and charges, § 293, p 190
- Obstruction and detention, §§ 15-23, pp 617-654
- Abatement, § 23
  - Accidental floods, § 19
  - Accretions, § 17, n 76
  - Accustomed channel, § 15
  - Actions, § 36(1)
  - Adverse user, § 16
  - Application of use, reasonableness, § 16
  - Appropriation,
    - Actions, § 194, p 1002
    - Use of natural stream, § 192, p 994
  - Arroyos, § 15
  - Artificial uses, § 16
  - Balancing equities, § 19
  - Bridges, § 20, p 627
    - Degree of care and skill, § 20, p 620
  - Bulkheads, § 19
  - Calamities, persons liable, § 22
  - Conditions, § 19
  - Continuing duties, railroads, passage of water, § 20, p 628
  - Contracts, § 21
  - Criminal responsibility, § 39, p 40
  - Culverts, § 20, p 627
    - Degree of care and skill, § 20, p 620
  - Dams, § 18
  - Debris or waste material, § 17, n 76
  - Deepening natural channel, §§ 41, 42
  - Defensive flood works, § 19
  - Dikes, § 19, n 37

## Obstruction and detention—Continued

- Ditch, §§ 15, 20
- Drains, § 20
- Draws, § 15, § 19, n 23
- Duration, § 17
  - Reasonableness, § 16
- Embankments, § 19
  - Degree of care and skill, § 20, p 629
- Extent, § 17
- Extent of use, reasonableness, § 16
- Extraordinary storms or floods, § 19
  - Dams, § 18
- Fence across nonnavigable stream, § 15
- Flood waters, § 19
- Flooding lands, ante
- Floods, dams, § 18
- Flow or drainage, artificial channels, § 130, p 849
- Flowage of lands, generally, ante
- Grants, § 20
- Gulches § 19, n 23
- Ice jam,
  - Negligence forbidding formation, § 17
  - Under bridge, § 20, p 628
- Infringement of property right, § 15
- Injunction, § 33
- Injuries,
  - Construction or maintenance of waterworks, § 309, p 234
  - Necessity, § 16
- Levees, § 19
- Liability of state, § 22
- Licenses, § 21
- Logs, § 18
- Machinery, enabling operation, § 16
- Natural drainways or depressions, § 114, p 807
- Natural obstruction, § 23
- Natural volume, § 15
- Nature and extent, § 17
- Necessity of use, reasonableness, § 16
- Nuisance, ante
- Object of grant, § 21
- Overflows, § 15
- Persons liable, § 22
- Piers, erection, § 17
- Piles driven into bed, § 17
- Prescription, §§ 16, 21
- Protective works, § 19
- Proximate cause, persons liable, § 22
- Purpose of use, reasonableness, § 16
- Railroad embankments, § 20, p 627
- Rainfalls, dams, § 18
- Ravines, § 15
- Reasonableness, § 16
- Removal, § 23
- Repairs, bridges, etc., § 20
- Right, § 16
- Right of way, § 21
- Roadbed of railroad, § 20, p 628
- Rubbish, § 17, n 76
- Sand bars, § 17
- Secondary uses, § 16
- Situation of premises, § 21
- State liability, § 22
- Storing water, § 15
- Storms or floods, dams, § 18
- Subterranean waters, § 96
- Successive actions, § 36(1)

## Obstruction and detention—Continued

- Surface waters, § 114
  - Artificial flow or drainage, § 119
  - Damages, § 127, p 827
  - Drainage, § 114
  - Natural drainways or depressions, § 114, p 807
- Surrounding circumstances, § 21
- Swale, § 15
- Temporary detention, § 18
- Time, cause of action accrues, § 36(1)
- Trees, § 23, n 49
- Trestles, § 20, p 627
- Unprecedented storms or rainfalls, dams, § 18
- Waste material, § 17, n 76
- Water power, dams, § 18
- Wire fence across nonnavigable stream, § 15
- Works to protect property, § 19
- Occasional flooding, obstruction and detention, successive actions, 36(1)
- Occasional injury, flooding lands, damages, § 38, p 683
- Occasional overflows, flowage of land, § 26
- Occasional pollution, § 48
- Occasional use, prescription, § 161
- Occupation, surface waters, drainage easement, § 121
- Off-channel reservoir, appropriation, priority, § 183
- Offenses,
  - Distribution and supply of water for irrigation, § 352, p 405
  - Irrigation purposes, liabilities and injuries incident to supply and use, § 368
- Offensive nature, dams, § 148
- Offensive odors, pollution, evidence, § 54, p 707
- Officers, water districts, § 243(4)
  - Suits based on allegedly wrongful acts, § 213(8)
- Official approval, municipal acquisition of existing water system, § 237, p 36
- Official bonds,
  - Irrigation districts, bonding custodian of funds, § 321, p 303
  - Water district officers, § 243(4)
    - Right to recover on, § 243(8)
- Oil,
  - Pollution, § 43, p 688
  - Subterranean waters, § 88
    - Pollution, § 97
- Oil and gas lease, pollution, consent, § 54
- Oil pipe leak, subterranean waters, pollution, § 101, p 781
- Oil well,
  - Improperly plugged, entry of oil from, § 101, p 781, n 53
  - Subterranean waters, pollution, burden of proof, § 101, p 784
- Ontario, Lake Ontario, § 103
- One tenant in common, prescription, § 162
- Oozing water, subterranean waters, § 86
- Open exercise of easement, flowage of lands, § 26
- Open to appropriation, § 170, p 905
- Openness, prescription, § 150, p 880
- Operating expenses,
  - Rates and charges, post
  - Water districts, authority, § 243(6), p 77
- Operation,
  - Appropriation, transfers, § 190, p 986
  - Consumer's contract for supply and distribution of water, § 279, p 149

# WATERS

## Operation—Continued

- Deeds and conveyances, § 209
- Leases, § 224
- Municipal contracts for supply of water, § 271
- Municipal water system plant, § 241
- Point of diversion, application for change, § 189, p 982
- Water system by private individual, §§ 244-246
- Operation of contracts, § 221
  - Sale of water for irrigation, § 361, p 420
- Operation of irrigation works, liability for injuries, § 365, pp 432-437
- Operation of law,
  - Irrigation ditch as property subject to transfer by, § 350, p 396
  - Prescriptive rights, loss or termination, § 166
- Opinion evidence, pollution, damages, § 54, p 708
- Opportunity to know, prescription, § 159, p 880
- Opportunity to take, appropriation, § 171
- Opposite sides of stream, riparian rights, § 10
- Oppression,
  - Diversion, damages, § 69
  - Injuries incident to supply and use of water, punitive damages, § 312, p 250
  - Pollution, punitive damages, § 56, p 721
- Option,
  - Flowage of lands, § 27, p 643
  - Municipality to purchase existing water works system, § 236; § 237, pp 34-40
  - Not exercised, § 222, n 1
  - Rates and charges, change from flat to meter rate, § 299
- Orchards, irrigation districts, lands included, § 319(3), p 280
- Orders Judgments and decrees, generally, ante
- Ordinances,
  - Form of municipal contract for supply of water, § 266
  - Riparian land, deeds and conveyances, § 206, n 13
- Ordinary and usual flow, riparian rights, § 9
- Ordinary care, dams, maintenance and operation, § 148
- Ordinary farm purposes, pollution, § 43, p 689
- Ordinary high-water mark, bed and banks of stream, § 71
- Ordinary rain, liability for damages, § 29, p 649, n 29
- Ordinary riparian purposes, diversion, § 59
- Ore reduction mills, pollution, § 52, n 98
- Organization,
  - Irrigation and ditch companies, § 342
  - Irrigation districts, § 319(1)
  - Public service water companies, § 248
  - Water districts, § 243(2), pp 62-67
  - Water power companies, § 376
- Origin, natural watercourses, § 4, p 597
- Origin of right, prior appropriation, § 168
- Original acquisition, appropriation, § 157
- Original action, appropriation, § 194, p 1005
- Original time limit, appropriation, extension, § 180, p 942
- Orphan asylums, statutory limitations on right to charge for water, § 283, p 160
- Osage Nation, pollution, arbitration of claims for damages, § 54, p 701
- Outhouses,
  - Pollution, offensive matter, § 55, p 716
  - Surface waters, actions for damages, § 127, p 833

## Outlets,

- Great ponds, § 110
- Lakes and ponds, § 109
- Surface waters, injunction, § 128, p 840
- Outrage, injuries incident to supply and use of water, punitive damages, § 312, p 250
- Overcharge, public service water companies franchise forfeited for, § 253
- Overdue rates and charges, cutting off supply for non-payment, § 305
- Overflow,
  - Accumulation and storage, § 141
  - Artificial channels, injuries from, § 133
  - Dams, injuries by, §§ 153-156, pp 870-873
  - Irrigation canal or ditch, liability for injuries, § 365, p 432
  - Lake, source of supply, § 4, p 598
  - Obstruction and detention, § 15
  - Standpipe, liability for injuries resulting from, § 309, p 235
- Overflow waters, surface waters distinguished, § 112
- Overhanging roof, rain water and eavesdrip, § 124, n 41
- Overhead cost items, rates and charges, determination of reasonableness, § 293, p 183
- Overhead expenses, minimum water charge, § 300
- Overlying rights, subterranean waters, § 88
- Overwhelming flood, bridge, trestle, etc., negligent construction, § 20, p 629
- Owners, dams, opposite ends, § 147, p 866
- Ownership, § 1
  - Bank, riparian rights, § 10
  - Bed and banks of stream, §§ 71, 72
  - Dams, § 145
  - Flooding lands, pleading, § 36(7)
  - Great ponds, § 110
  - Ice, § 383
  - Lakes and ponds, § 105
    - Actions, § 111
  - Land, pollution, burden of proof, § 54, p 704
  - Land underlying, lakes and ponds, § 107
  - Minerals, pollution from mining operations, § 47
  - Municipal water works and water districts, § 234, p 25
  - Percolating waters, § 93, p 770
  - Public waters, § 181, p 945
  - Seepage water, § 90, n 17
  - Springs, § 91
  - Surface waters, § 113
    - Waters diverted, evidence, § 68, p 740
- Parallel formation, departure from, alluvion, § 79, n 63
- Paramount authority, prior appropriation, § 169
- Paramount sovereign authority, riparian rights, § 9
- Parochial schools, municipal stipulations for free supply of water to, § 283, p 160
- Particular pollutions, § 44
- Particular purposes, restriction of use, § 210, p 1053
- Parks,
  - Limitations on right to charge for water used for watering, § 283, p 160
  - Mandamus to compel supply of water to municipal parks, § 276, p 133
- Parkways, degree of care exercisable by water company for safety of pedestrians, § 309, p 233, n. 88
- Parol agreement, flowage of lands, § 28
- Parol contracts, § 220

Parol license, § 219

Public service water companies, power to lay water mains across land, § 255

Parol transfers, probative rights, § 190, p 985

Partial change, point of diversion, § 189, p 982

Partial forfeiture, nonuser, § 193, p 998, n 8

Partial nonuser, prescription, § 159, p 883

Particular enjoyment, pollution, § 43 p 687

Parties,

Action by municipality to cancel water supply contract, § 276, p 136

Actions for injuries incident to supply and use, § 312, p 244

Appropriation, ante

Contracts, rights involving, § 225, p 1075

Deeds and conveyances, § 208

Rights involving, § 225, p 1075

Diversion, § 67, p 731

Injunctive relief, § 68, p 738

Flooding lands, § 36(6)

Injunctive relief, § 37, p 676

Flowage of lands, actions, § 25

Irrigation districts, ante

Irrigation purposes, liabilities and injuries incident to supply and use, remedies, § 367, p 442

Irrigation rights, actions to establish and protect, § 317, p 261

Irrigation works, actions or injuries affecting, § 351

Lakes and ponds, actions, § 111, n 70

Leases, rights involving, § 225, p 1075

Pollution,

Actions, § 54

Equitable relief, § 55, p 715

Rates and charges, private consumer seeking to enjoin discontinuance of service for nonpayment of rates and charges, § 307, p 222

Subterranean waters, proceedings and relief, § 101, p 780

Surface waters,

Actions for damages, § 127, p 828

Injunction, § 128, p 837

Unreasonable rates, proceedings for relief, § 295, p 194

Partition, right of way over private land for irrigation purposes acquired by, § 340, p 391

Partition decree, subterranean waters, § 101, p 787

Party in interest, rates and charges, proceedings to set aside order fixing, § 200

Passive acquiescence, appropriation, § 157

Past acts, pollution, injunction, § 55, p. 711

Past damages, flowage of lands, assessment, § 25, p. 639

Past losses and profits, rates and charges, determination of reasonableness, § 293, p 183

Pastures, flooding, damages, § 38, p 684

Patented lands not in federal reclamation project unit, taxation by irrigation district, § 333, p 330

Patentees, appropriation, § 173, p 919

Patents,

Bed and banks of stream, public grant, § 85

Desert Land Act, effect, § 173, p 919

Mechanical and manufacturing purposes, acquisition of water rights, § 370

Patrons. Consumers, generally, ante

Payment,

Distribution and supply of water for irrigation, conditions precedent to right to supply, § 352, p 406

Hydant rentals, § 270

Irrigation district bonds, § 330

Rates and charges, post

Payment of price, municipal purchase of existing water system, § 237, p 38

Payment of taxes,

Municipal contract for supply of water, § 268

Prescription, § 159, p 879

Peaceable use, prescription, § 159, p 879

Penalties,

Interference with water supply, § 313

Irrigation districts, taxes, § 337, p 349

Rates and charges, late payments, § 302, p 213

Per diem, irrigation district officers, § 320, p 292

Perceptible injury, diversion, § 61

Percolating waters,

Classification, § 2

Subterranean waters, generally, post

Percolation,

Dams, § 154

Flowage of lands, liability for injuries, § 29, p 649

Perennial stream, surface waters, obstruction or diversion, § 114, p 805

Perfect efficiency, appropriation, § 177, n 52

Performance,

Appropriation,

Certificate, § 180, p 942

Specification of time, § 180, p 939

Leases, excuse, § 224

Performance of contracts, §§ 222, 273

Sale of water for irrigation, § 361, p 421

Peril, accumulation and storage, § 141

Period for which damages recoverable, pollution, § 56, p 719

Period of prescription, flowage of lands, § 26

Periods of year, time of use, § 187

Periods water not in use or not appropriated, § 185, p 962

Perjury, irrigation districts, confirmatory proceedings, § 319(5)

Permanent channel, subterranean waters, § 89

Permanent damages, subterranean waters, § 102

Permanent flow of water, natural watercourses, § 4, p 604

Permanent injury,

Flooding lands, damages, § 38, p 682

Pollution, damages, § 56, p 719

Surface waters, actions for damages, § 127, p 834

Watercourse, damages, § 34

Permanent pollution, evidence, § 54, p 706

Permanent source of supply, natural watercourses, § 4, p 598

Permanent structures,

Flooding lands, parties to action, § 36(6)

Obstructing drainage, surface water, § 114, p 805

Permission,

Artificial channels, use, § 129, p 846

Flooding lands, defenses to injunctive relief, § 37, p 675

Point of diversion, change, § 189, p 979

Permissive invasion of premises, flowage of lands, § 26



# WATERS

Permissive use,  
 Levee obstructing natural drainage of surface waters, § 122, n 17  
 Prescription, § 162

Permit,  
 Appropriation, § 180, p 933  
 Cancellation, § 180, p 943  
 Change, point of diversion, § 189, p 977  
 Flooding lands, injunctive relief, defenses, § 37, p 676  
 Paved streets, opening for purpose of furnishing water service, § 280, p 153  
 Point of diversion, proceedings for change, § 189, p 981

Perpetual franchises, public service water companies, § 253

Perpetual obligation, public service water companies, extension of mains and pipes, § 257, p 108

Perpetual right,  
 Dam, maintenance, § 25, p 637  
 Flowage of lands, § 27, p 643

Perpetual right to pollute, grant, § 50

Perpetuity, words of, deeds and conveyances, § 209

Personal annoyance, surface waters, actions for damages, § 127, p 834

Personal interest, officer conducting election to purchase existing water system by municipality, § 237, p 37

Personal property, § 1  
 Diverted water, § 181, p 944, n 8  
 Riparian rights, § 10  
 Shares of stock in irrigation corporation organized for profit, § 343, p 366  
 Water delivered by irrigation company to stockholders' private pipeline, § 353

Personal relief, pollution, § 51

Personal service, appropriation, actions, notice, § 198

Personalty, flooded lands, damages for injuries, § 38, p 681

Persons causing pollution, evidence, § 54, p 706

Persons entitled to relief, pollution, § 51

Persons entitled to riparian rights, § 8

Persons liable,  
 Artificial channels, injuries, § 133  
 Dams, breakage, overflow, etc., § 155  
 Diversion, § 64  
 Flowage of lands, § 30  
 Injuries incident to supply and use, § 312, p 244  
 Obstruction and detention, § 22  
 Pollution, § 52  
 Surface water, drainage, § 125

Petition,  
 Acquisition of public and municipal water supply, § 229  
 Actions involving right to use or be furnished, § 225, p 1075  
 Appropriation, actions, § 200  
 Beneficial use, appropriation, § 178  
 Change, point of diversion, § 189, p 977  
 Dams, actions for damages, § 156  
 Diversion, § 67, p 731  
 Injunctive relief, § 68, p 738  
 Flooding lands, § 36(7)  
 Allegations, § 37, p 677  
 Burden of proof, § 36(9)  
 Issues, proof and variance, § 36(8)  
 Flowage of lands, § 32  
 Irrigation districts, ante

## Petition—Continued

Permit, appropriation, § 180, p 934  
 Point of diversion, change, § 189, p 977  
 Grant or denial, § 189, p 979  
 Pollution, equitable relief, § 55 p 714  
 Surface waters, actions for damages, § 127, p 828  
 Use, obstruction and detention, reasonableness, § 16  
 Water districts, creation, § 243(2), p 63

Phenomenal flood, dams, breakage or overflow, § 153

Physical circumstances, appropriation, prosecution of enterprise, § 179

Physical condition, appropriation states, equitable apportionment, § 170, p 911

Physical deterioration, reproduction cost of plant, consideration in determining reasonableness of rates and charges, § 293, p 190

Physical structure of irrigation works, action for injury to, § 351

Physical trespass, appropriation, § 171, n 78

Piers,  
 Erection, obstruction and detention, § 17  
 Lakes and ponds, § 105

Piles,  
 Bed and banks of stream, § 71  
 Driven into bed, obstruction and detention, § 17

Pipe lines,  
 Authoritative water district to construct and sell, § 243(5), p 73  
 Duty to maintain or repair, § 210, p 1054  
 Evidence, grants of right to use, § 225, p 1076  
 Implied rights and privileges in grant, § 210, p 1048  
 Interference, injunctions, § 225, p 1074  
 Licenses, § 219  
 Weight and sufficiency of evidence, § 255, p 1077

Parol licenses, revocation, § 219

Place of use, reservations and exceptions, § 214, p 1062

Right to maintain or make repair, § 210, p 1055

Severance, water rights from land, § 207

Size and enlargement, § 210, p 1054

Pipes,  
 Appropriation, rights of way, § 192, p 991  
 Lease or sale of municipal water works, § 240  
 Place of use, grants, § 210, p 1052  
 Private individual, water system by, § 244  
 Property included in municipal purchase of existing water system, § 237, p 38  
 Public service water companies, post  
 Secondary appropriation, § 185, p 958

Place of discharge, natural watercourses, § 4, p 596

Place of diversion, § 61  
 Change, § 188  
 Deeds and conveyances, rights and privileges, § 210, p 1049

Place of measurement, deeds and conveyances, rights and privileges, § 210, p 1051

Place of measuring quantity or amount, appropriation, § 186, p 964

Place of taking and use, irrigation purposes, § 314

Place of use,  
 Appropriation, change, abandonment, § 193, p 997  
 Deeds and conveyances, rights and privileges, § 210, p 1052  
 Diversion, § 188  
 Reservations and exceptions, § 214, p 1062

- Placer mining, mechanical and manufacturing purposes, § 374
- Placer mining claim, appropriation, § 170, p 910, n 5
- Plan of construction, artificial channels, deviation, § 130, p 847
- Plan of enterprise, appropriation, prosecution, § 179
- Plats, appropriation actions, costs, § 205
- Plea, surface waters, actions for damages, § 127, p 829
- Pleadings,
  - Action for injuries incident to supply and use, § 312, p 244
  - Actions by or against municipality in water supply contract, § 276, p 136
  - Amendment of commission's answer in proceedings for relief from unreasonable rates, § 295, p 193
  - Answer, generally, ante
  - Appropriation, actions, § 200
  - Artificial channels, injuries, § 137
  - Bed and banks of stream, ownership, § 83
  - Bill, generally, ante
  - Complaint, generally, ante
  - Contracts, rights involving, § 225, p 1075
  - Dams, actions, § 151
  - Damages, § 156
  - Deeds and conveyances, rights involving, § 25, p 1075
  - Demurrer, generally, ante
  - Diversion, § 67, p 731
  - Injunctive relief, § 68, p 738
  - Flooding lands, § 36(7)
  - Conformity of instructions, § 36(10)
  - Injunctive relief, § 37, p 677
  - Issues, proof and variance, § 36(8)
  - Flowage of lands, § 32
  - Actions, § 32
  - Actions for damages, § 25
  - Irrigation district tax, enjoining or restraining collection, § 335, p 346
  - Irrigation districts, ante
  - Irrigation rights, actions to establish and protect, § 317, p 262
  - Irrigation works, injuries or damages to, § 351
  - Leases, rights involving, § 225, p 1075
  - Mechanical and manufacturing purposes, injuries, § 375
  - Petition, generally, post
  - Pollution, § 54, p 703
  - Equitable relief, § 55, p 714
  - Rates and charges, post
  - Riparian rights, quiet title actions, § 14
  - Subterranean waters, proceedings and relief, § 101, p 782
  - Suit for injunction involving supply of water, § 281, p 156
  - Surface waters,
    - Actions for damages, § 127, p 828
    - Injunction, § 128, p 837
  - Unreasonable rates, proceedings for relief, § 295, p 195
  - Water district organizations, attack on proceedings, § 243(2), p 67
  - Water power companies, injuries incident to supply or use, § 382
- Pleasure purposes, sufferance use, § 162, n 74
- Pledge of municipal credit, contract for supply of water, § 265, p 117
- Pledges, irrigation and ditch companies, stock as security, § 343, p 368
- Plenary control, legislature,
  - Alteration or change of boundaries of water districts, § 243(9)
  - Organization of water districts, § 243(2), p 62
- Plenary power, legislature to change, or revoke powers conferred on municipal utility district, § 243(5), p 72
- Plumbing, private corporation as not required to furnish to consumer having defective plumbing, § 278, p 145
- Point of commencement, title to alluvion, § 76
- Point of diversion,
  - Appropriation, change, abandonment, § 193, p 997
  - Change, § 188
  - Riparian lands, appropriation, § 173, p 918
- Poisoning waters, pollution, § 43, p 688
- Poisonous substances, pollution, § 49
- Police power,
  - Adjudication statutes, enactment, § 194, p 1004, n 15
  - Contracts as to rates and charges as infringing upon, § 287, p 167
  - Dams, regulation, § 147, p 863
  - Distribution and supply of water for irrigation, regulation by public authority, § 359
  - Diversion, § 59
  - Irrigation, regulation and control, § 315
  - Irrigation district, creation, valid exercise, § 318, p 267
  - Irrigation works as nuisance, power of municipality to close down, § 350, p 399
  - Lien for rates and charges, exercise of, § 308, p 230
  - Municipality exercising and fixing water rate, § 302, p 210
  - Municipality waiving contract rights to pure and wholesome water as waiver of right to secure inhabitants such water, § 269
  - Pollution of public water supply as restricted by, § 232, p 19
  - Public service water companies,
    - Service connections, duty to install, § 257, p 109
    - Support and protection, § 247
  - Reasonable service water rate and charge, power to fix, § 289, p 172, n 85
  - Regulation of water company rates, § 292
  - Sale of water for irrigation, rates and charges, § 363, p 423
  - Water districts, § 243(5), p 72, n 67
- Political activity prior to organization of irrigation district, § 319(1)
- Political community, appropriation, § 169
- Political corporate entity, water districts, § 243(1)
- Political divisions, appropriation, actions, § 194, p 1002
- Political subdivisions,
  - Diversion, persons liable, § 64
  - Irrigation districts, § 318, p 266
  - Municipal water districts, § 243(1)
- Pollution, §§ 43-57, pp 686-722
  - Abatement, summary proceedings, § 53
  - Absolute immunity, § 43, p 689
  - Acids, § 49

# WATERS

## Pollution—Continued

Acquiescence in construction and operation of plant, defenses, § 55, pp 713, 714  
 Acquisition of right, § 50  
 Act of God, § 48  
 Actionable injury, § 43, p 688  
 Actions, § 53  
   Damages, § 54, p 700  
   Equitable relief, § 55, p 710  
   Public and municipal water supply, § 232, p 20  
 Admissibility of evidence, § 54, p 705  
 Adverse use, § 50  
 Agricultural land, pleading, § 54, p 703  
 Agricultural purposes, rendering unfit, § 43, p 687  
 Answer, § 54, p 704  
 Artesian well water used for bathing purposes, § 49  
 Assumption of risk, § 54  
 Barns, offensive matter, § 55, p 716  
 Bathing purposes, rendering unfit, § 43, p 687  
 Burden of proof, § 54, pp 704, 705  
 Business enterprise, importance, recognition, § 55, p 712  
 Business loss. damages, § 56, p 718  
 Cause,  
   Evidence, § 54, p 706  
   Subterranean waters, removal on knowledge of existence, § 100  
 Cemetery drainage, § 49  
 Certain danger, injunction, § 55, p 712  
 Chancery master, hearing before, § 55, p 716  
 Chemical analysis, evidence, § 54, p 708  
 Chemicals, § 48  
 Circumstances, § 43, p 689  
 Circumstantial evidence, § 54, p 708  
 City, liability, § 52  
 Claim of right, § 50  
 Color of sewage, § 45  
 Common nuisance, § 43, p 688  
 Community in wrongdoing, § 52  
 Competent evidence, § 54, p 705  
 Complaint, ante  
 Concerted acts, § 52  
 Condition of purity, § 43, p 686  
 Condition precedent, issuance of injunction, § 55, p 711  
 Confession and avoidance, defenses, § 54, p 704, n 86  
 Consent,  
   Construction and operation of plant, defenses, § 55, pp 713, 714  
   Oil and gas lease, § 54  
 Contingent danger, injunction, § 55, p 712  
 Continuing injury, injunction, § 55, p 711  
 Contributing cause, § 43, p 690  
 Control, § 45  
 Conversion of watercourse to sewer, § 45  
 Cookhouse, offensive matter, § 55, p 716  
 Cooperation to several persons, § 52  
 Coowners of plant, § 52  
 Corruption of water, § 43, p 689  
 Costs, equitable relief, § 55, p 717  
 Covenant running with land, § 50  
 Cow stables, § 49  
 Criminal responsibility, § 57

## Pollution—Continued

Crop damage, damages, § 56, p 718  
 Crop destruction, damages, § 56, p 720  
 Culinary purposes, rendering unfit, § 43, p 688  
 Custom and usage,  
   Defenses, § 55, p 712  
   Mills and mines, § 48  
 Dairy barn and house, § 49  
 Damages, ante  
 Dams, § 147, p 862, n 63  
 Debris, § 45  
   Mining operations, § 47  
 Declaration, § 54, p 703  
 Defenses,  
   Action for damages, § 54, p 701  
   Equitable relief, § 55, p 712  
 Deposits on land, damages, § 56, p 718  
 Depreciation in net value, § 51  
 Depreciation of land, damages, § 56, p 718  
 Destruction of value, § 43, p 689  
 Discomfort, damages, § 56, p 719  
 Ditch protection, § 55, p 711  
 Diversion of waters, § 59, n 46  
 Domestic purposes, rendering unfit, § 43, p 687  
 Drainage districts, § 45  
 Driftwood, § 45  
 Duck farm, acquisition, § 49, n 44  
 Eminent danger, injunction, § 55, p 712  
 Equitable relief, § 55, p 710  
   Evidence, § 55, p 716  
 Estoppel, defenses, § 55, p 714  
 Evidence, § 54, p 705  
   Admissible under pleadings, § 54, p 704  
   Criminal responsibility, § 57  
   Equitable relief, § 55, p 716  
 Exclusive enjoyment, § 43, p 687  
 Excreta of domestic animals, § 49  
 Excuse, § 43, p 690  
 Expert testimony, § 54, p 707  
 Extent of detriment, § 43, p 689  
 Factories, refuse, § 48  
 Fallen timber, § 49  
 Farm purposes, § 43, p 689  
 Filth discharge, § 43, p 688  
 Fish, destructive of life, § 43, p 687  
 Flooding lands, defenses, § 36(5)  
 Fuel oil, § 49  
 Gas plant operation, § 43, p 688, n 54  
 Gold dredge pond, § 52, n 4  
 Gravel from mining operations, § 47  
 Hardship, defenses, § 55, p 712  
 Herd of cattle, maintaining in vicinity, § 49  
 Hog pen offensive matter, § 55, p 716  
 Hog sties, § 49  
 Ice, remedies, § 386  
 Imminence of danger, injunction, § 55, p 712  
 Immunity, § 43, p 689  
 Impairment of value, § 43, p 689  
 Impurities from surface drainage, § 46  
 Incidentally impairing purity, § 43, p 689  
 Inconvenience, damages, § 56, p 719  
 Increasing, sewage, § 45  
 Independent acts, § 52  
 Indispensable to beneficial use, § 43, p 689  
 Individual, liability, § 52  
 Industrial purposes, § 43, p 689

Pollution—Continued

- Injunction, §§ 45, 52, 53
  - Equitable relief, § 53, p 710
  - Liability, § 52
- Injuries incident to supply and use of contaminated water, § 312, p 245
  - Evidence, § 312, p 246
- Instructions to jury, § 54, p 709
- Interest, damages, § 56, p 721
- Intervention, equitable relief, § 55, p 714
- Invasion of private right, § 43, p 688
- Irrigation purposes, rendering unfit, § 43, p 687
- Isolated acts, injunction, § 55, p 711
- Issues, proof and variance, § 54, p 704
- Johnson grass, defenses, § 54
- Joint and several liability, § 52
- Judgments, equitable relief, § 55, p 716
- Justification, § 43, p 690
- Knowledge of lower riparian proprietors, § 50
- Laches, defenses, § 55, p 714
- Landlords, liability, § 52
- Landslides, mining operations, § 47
- Lawful business, defenses, § 55, p 712
- Liability, § 52
  - Disease contracted by consumer of contaminated water, § 311
- Livestock,
  - Loss, damages, § 56, p 720
  - Pasturing, § 49
- Logs, § 49
- Loss of profits, evidence, § 54, p 706
- Loss of right, § 50
- Malice, § 48
  - Punitive damages, § 56, p 721
- Manufacturing purposes, § 43, p 689
  - Rendering unfit, § 43, p 687
- Manure pile, offensive matter, § 55, p 716
- Material evidence, § 54, p 705
- Measure of damages, § 56, p 718
- Milk loss, damages, § 56, p 720
- Mills, refuse, § 48
- Mines, refuse from, § 47
- Miscellaneous causes, § 49
- Mosquitoes, increase in number, § 51
- Motive, defenses, § 55, p 712
- Mud from mining operations, § 47
- Municipality, liability, § 52
- Natural condition of purity, § 43, p 686
- Natural easement, § 43, p 688
- Natural wash and drainage, § 46
- Nature of right, § 43, p 688
- Necessity, actual damage, § 54, p 700
- Necessity to mitigate damages, § 43, p 690
- Negligence, ante
- Nominal damages, § 56, p 721
- Nonabsorbing purpose, taken for, § 185, p 961
- Nonuser, loss of right, § 50
- Noxious odors, § 43, p 687
- Nuisance, ante
- Occasional pollution, § 48
- Offensive odors, evidence, § 54, p 707
- Oil, § 43, p 688
- Opinion evidence, damages, § 54, p 708
- Oppression, punitive damages, § 56, p 721
- Ordinary farm purposes, § 43, p 689
- Ore reduction mills, § 52, n 98
- Other sources, § 43, p 690

Pollution—Continued

- Outhouses, offensive matter, § 53, p 716
- Ownership of minerals, § 47
- Particular enjoyment, § 43, p 687
- Particular pollutions, § 44
- Parties,
  - Actions, § 54
  - Equitable relief, § 55, p 714
- Past acts, injunction, § 55, p 711
- Period, § 50
  - For which damages recoverable, § 56, p 719
- Permanent, evidence § 54, p 706
- Permanent injury, damages, § 56, p 719
- Perpetual right, grant, § 50
- Person causing, evidence, § 54, p 706
- Persons entitled to relief, § 51
- Persons liable, § 52
- Pleading, § 54, p 703
  - Equitable relief, § 55, p 714
- Poisoning waters, § 43, p 688
- Poisonous substances, § 49
- Potential harm, equitable relief, § 55, p 712
- Preliminary injunction, issuance, § 53, p 174
- Prescription,
  - Acquisition of right, § 50
  - Defenses, § 55, p 714
- Presumed knowledge, § 50
- Presumptions, § 54, p 705
- Preventive measures, defenses, § 55, p 712
- Principles governing, § 43, p 688
- Private corporation, liability, § 52
- Privilege, § 50
- Probable danger, injunction, § 53, p 712
- Profits, damages, § 56, p 718
- Proportion of injury, evidence, § 54, p 706
- Protection of ditch, § 55, p 711
- Proximate cause, § 52, n 4
- Public and municipal water supply, § 232, pp 18-22
- Public health, § 43, p 688
- Public interest, § 45
- Public policy, acquisition of right, § 50
- Punitive damages, § 56, p 721
- Purchase, acquisition of right, § 50
- Purchaser of property, relief, § 51
- Purity of water, right, § 43, p 686
- Questions of law and fact, § 43, p 689, § 54, p 708
- Railroad terminal yard refuse, § 49
- Reasonable care, § 43, p 690
- Reasonable use of stream, § 43, p 688
- Reasonableness of use, evidence, § 54, p 706
- Reclamation district, liability, § 52
- Recurring injury, injunction, § 55, p 711
- Refuse from,
  - Mills and factories, § 48
  - Mines and mining operations, § 47
- Regulatory state power, § 51
- Relevant evidence, § 54, p 705
- Relevant injury, injunction, § 55, p 712
- Relief in equity, § 55, p 710
- Remedies, § 53
- Remedying conditions, § 45
- Restoration costs, damages, § 56, p 718
- Resulting injuries, injunction, § 55, p 711
- Right to purity of water, § 43, p 686
- Rubbish distinguished from sewage, § 45

# WATERS

## Pollution—Continued

- Rule of necessity, § 48
- Salt content, § 47
- Salt water inflow, § 43, p 688
- Sand from mining operations, § 47
- Sawdust, § 48
- Sediment on grass, damages, § 56, p 718
- Separate acts, § 52
- Several liability, § 52
- Sewage, § 45
- Sickness, damages, § 56, p 719
- Single recovery, damages, § 56, p 719
- Slaughterhouses, § 49
- Slime from ore reduction mills, § 52, n 98
- Solid matter, § 45
- Special damages, § 56, p 721
  - Pleading, § 54, p 703
- Special right, § 43, p 687
- Stables, offensive matter, § 55, p 716
- State, liability, § 52
- State commission, § 45
- Sterilized sewage, § 45
- Stock watering, rendering unfit, § 43, p 687
- Stream,
  - Injunctive relief, defenses, § 37, p 676
  - Refuse and filth, § 43, p 688
- Subterranean waters, § 97
  - Actions, § 99
  - Acts of several producing one injury, § 101, p 781, n 54
  - Assignment of cause of action, § 101, p 783
  - Burden of proof, § 101, p 783
  - Damages, § 102
  - Injunction, § 100
  - Oil pipe leak, § 101, p 781
  - Res ipsa loquitur doctrine, § 101, p 784
  - Spring, instructions, § 101, p 781
  - Verdict and findings, § 101, p 782
  - Weight and sufficiency of evidence, § 101, p 785
- Successive recovery, damages, § 56, p 719
- Summary proceedings, § 53
- Supplemental petition, § 54, p 704
- Surface drainage, § 46
- Surface waters, § 113
  - Discharge, § 123
- Swamp mud, § 49
- Swimming purposes, rendering unfit, § 43, p 687
- Tailings and slime from ore reduction mills, § 52, n 98
- Tanbark, § 48
- Temporary, evidence, § 54, p 706
- Temporary injury, damages, § 56, p 719
- Tenants, liability, § 52
- Threatened pollution, injunction, § 55, p 712
- Trade loss, damages, § 56, p 718
- Transferee of property, relief, § 51
- Trees, destruction, damages, § 56, p 720
- Trial, damages, § 54, p 708
- Unborn calves, damages, § 56, p 720
- Unfiled waters, § 43, p 688
- Unfit for domestic purposes, § 43, p 687
- Unhealthy odors, § 43, p 687
- Uninterrupted use, § 50
- Unreasonable use, § 43, p 688
- Usage and custom, defenses, § 55, p 712
- Useful business, defenses, § 55, p 712

## Pollution—Continued

- Value of realty injured, evidence, § 54, p 706
- Warnings, consideration, § 55, p 713
- Waste materials, §§ 47, 48
- Watering of stock, rendering unfit, § 43, p 687
- Weight and sufficiency of evidence, § 54, p 707
- Ponds,
  - Lakes and ponds, generally, ante
  - Natural lakes and ponds, generally, ante
- Pools,
  - Accumulation and storage on land, §§ 141-143, pp 856, 857
  - Classification, § 2
  - Surface waters, collection in body and discharge, § 116, p 815
- Popular approval, municipal acquisition of existing water system, § 237, p 36
- Population density, subterranean waters, § 86
- Possession,
  - Diversion, pleading, § 67, p 731
  - Flooding lands, who may sue, § 36(6)
  - Prescription, essential elements, § 159
  - Subterranean waters, § 90
- Possessory right, appropriation, person who may, § 171
- Possibility of reverter, right of way for irrigation purposes, title and rights acquired, § 340, p 392
- Post maturity interest, irrigation district bonds, § 330
- Posting, appropriation, notice of claim, § 176
- Posting of notice, appropriation, priority, § 184
- Pot holes, surface waters, § 112, n 91
- Potential danger, injuries from construction or maintenance of waterworks, § 309, p 233
- Potential easement, surface waters, § 120
- Potential harm, pollution, injunction, § 55, p 712
- Potential injury, point of diversion, change, § 189, p 982
- Potential right, appropriation, § 157
- Power, grant, interest created, § 209
- Power plant, appropriation, operation, § 172
- Power purposes,
  - Dams, § 147, p 862, n 68
  - Secondary appropriation, § 185, p 961
- Power to control watercourses, § 7
- Power to regulate water company rates, § 202
- Powers,
  - Irrigation and ditch companies, § 345, p 375
  - Officers, § 344
- Irrigation districts, § 321, pp 293-307
- Public service water companies, § 254
- Quasi public irrigation company, § 347, p 384
- Water districts, § 243(5), pp 71-76
- Practical effect, wasteful uses on downstream areas, appropriation states, equitable apportionment, § 170, p 911
- Practical inch, appropriation, units of measurement, § 186, p 965
- Precautions,
  - Artificial channels, injuries from change in course of stream, § 134
  - Deepening natural channel, § 42
- Precedent, conditions precedent, generally, ante
- Precise nature of property, appropriation, § 181, p 945
- Preferential right, prior appropriator, § 185, p 963
- Prejudice, point of diversion, change, § 180, p 980
- Prejudice of lower proprietors, obstruction and detention, § 21

## Preliminary injunction,

Pollution, issuance, § 55, p 174

Unreasonable rates, proceedings for relief, § 295, p 193

Preliminary proceedings, irrigation district, bond issue, § 323

## Prescription, §§ 157-193, pp 873-1001

See, also, Appropriation, generally, ante

Abandonment, § 161

Reservoir, § 164, n 38

Abundant water, § 159, p 884

Acknowledging right, effect, § 162, n 56

Acts of God, interruptions, § 161

Actual occupation or use, § 159, p 878

Adequate supply for all, § 159, p 884

Adverse character, § 162

Against whom rights acquired, § 163

Agreements for use, § 162

Amount habitually withdrawn, § 165, n 70

Amount taken in calendar year, § 165

Artificial channels, § 129, pp 842, 843

Construction and maintenance over lands of another, § 130, p 847

Maintenance, § 130, p 848

Artificial person, § 163

Attempted appropriation, § 162

Average daily abstraction, § 165, n 70

Beneficial use, § 159, p 879

Break in continuity, § 160

By whom rights acquired, § 163

Character wherein right claimed, § 164

Circumstances, continuous character, § 161

City's future needs, § 165, n 80

Claim of right or title, § 162

Clandestine user, § 159, p 881

Clear title, § 165, n 54

Color of title, § 162

Conditions, § 165

Conduct, interruption of use, § 161

Consent to use, § 162

Constructive notice, § 159, p 881

Contentious use, § 159, p 879

Continuance, further rights having independent source, § 165

Continuance of diversion, § 62

Continuous character, § 161

Control, essential elements, § 159

Control of stream watershed, § 158

Corporations, § 163

Creation, further rights having independent source, § 165

Cutting off use, § 161

Daily abstraction, § 165, n 70

Damage, § 159, p 882

Dams, § 147, p 862

Death of person against whom right exercised, § 161

Defenses, § 197

Demol, effect, § 161

Deprivation, § 159, p 882

Detriment, § 159, p 882

Diminution of flow, § 165, n 70

Discontinuance of use, loss or termination of right, § 166

Disputes, effect, § 161

Dissolution of injunction, § 159, p 881, n 52

Distance to owner, § 159

## Prescription—Continued

Disuser, loss or termination of right, § 166

Diversion,

By lower proprietor, § 159, p 883

Continuance, § 62

Essential elements, § 159

Non-riparian use, § 158, n 87

Pleading, § 67, p 732

Duration, prescriptive period, § 160

Easements for flow of waters, § 158

Effect of nature wherein right claimed, § 164

Essential elements, § 159, p 878

Excess water, disposition, § 191

Exclusive use, § 158

Express verbal assertion of claim, § 162

Extent of invasion, § 159, p 882

Extent of rights acquired, § 165

Extinguishment of right, § 166

Federal government, § 163

Fiction of law, § 158

Fifteen years, § 160

Five years, § 160

Flood waters, § 164

Flooding lands, loss of right to injunction, § 37, p 673

Flowage of lands, §§ 24, 26

Evidence, § 25, p 639

Forbidding use, § 161

Forcible use, § 159, p 879

Fraudulent user, § 159, p 881

Frequent interruptions of use, § 162, n 59

Full flow of stream, § 165

Headgate, maintenance, § 158, p 876, n 83

Hostile character, § 162

Ice, right to remove, § 386

Incorporeal hereditament, § 165

Increase in,

Flow of spring, § 165, n 70

User, § 166

Infringement on right, § 159, p 882

Injury, § 159, p 882

Interference with use, § 159, p 882

Interruption, § 160

Invasion of right, § 159, p 882

Irrigation companies, acquisition of water rights, § 348

Irrigation ditch as property subject to, § 350, p 396

Joint possession, § 162

Junior appropriator, § 163

Knowledge, presumption, § 159, p 882

Knowledge of use, § 159, p 880

Lack of knowledge, evidence, § 159, p 882

Lake waters, § 158

Lakes and ponds, land underlying, § 107

Law governing period, § 160

Legal right, § 165

Lessee, user, § 159, p 879

Levee obstructing natural drainage of surface waters, § 122, n 17

Loss of right, § 166, § 193, p 994

Lower proprietor, § 159, p 883

Lowest average daily abstraction, § 165, n 70

Maintenance of headgate, § 158, p 876, n 83

Managing corporate officers, § 163

Manner of enjoyment, right to alter, § 165

Measurement of right, § 165

# WATERS

## Prescription—Continued

Mechanical and manufacturing purposes,  
 Acquisition of water rights, § 370  
 Artificial waters, § 373  
 Mistaken belief, § 162, n 57  
 Natural causes, interruptions, § 161  
 Natural person, § 163  
 Nature of rights acquired, § 165  
 Nature of use, § 161  
 Nature wherein right claimed, § 164  
 Necessity, express verbal assertion of claim, § 162  
 Notice, § 160  
   Duration, prescriptive period, § 160  
 Notice of use, § 159, p 880  
 Object of use, § 161  
 Obstruction and detention, §§ 16, 21  
 Occasional use, § 161  
 One tenant in common, § 162  
 Openness, § 159, p 880  
 Opportunity to know, § 159, p 880  
 Ordinary elements of adverse possession, § 159,  
   p 878  
 Ownership,  
   Bed of stream, § 71  
   Waters impounded by dam, § 145  
 Partial nonuser, § 159, p 883  
 Payment of taxes, § 159, p 879  
 Peaceable use, § 159, p 879  
 Percolating waters, § 164  
 Permissive use, § 162  
 Place of enjoyment, right to alter, § 165  
 Pollution,  
   Acquisition of right, § 50  
   Defenses, § 55, p 714  
 Possession, essential elements, § 159  
 Presumption, knowledge, § 159, p 882  
 Prior appropriation, § 162  
 Private corporations, § 163  
 Privity of estate, effect, § 163  
 Pro rata reduction, § 165, n 70  
 Protest, effect, § 161  
 Proximity to owner, § 159  
 Public enemy, interruptions, § 161  
 Public nuisance, acts on which claim based, § 159,  
   p 879  
 Public rights, § 163  
 Public utility corporations, § 163  
 Public water supply limited to such amount as  
   used during period, § 230  
 Pueblo rights as lost by, § 231  
 Quantity used, § 161  
 Questions of law and fact, § 203, p 1020  
 Rain water and eavesdrip, § 124  
 Rate of pumping, § 165, n 68  
 Reasonable persons, § 159, p 881  
 Remonstrance, effect, § 161  
 Repairs, right to make, § 165  
 Repudiation of license, § 162  
 Reserved rights, loss, § 215  
 Revocation of licenses, § 162  
 Rights of way, appropriation, § 192, p 990  
 Rights of way over private lands for irrigation  
   purposes, § 349, p 390  
 Riparian rights, § 13  
   Modifications, § 9  
 Riparians, § 163  
 Scrambling possession, § 161

## Prescription—Continued

Seasonal purposes, § 161  
 Secret interruption, § 161  
 Secret user, § 159, p 881  
 Seepage, § 164  
 Servitude on original title, § 165  
 Seven years, § 160  
 Sole control for mutual benefit, § 159, p 879  
 Source of title, § 163  
 Springs, § 164  
 Subsequent appropriation, § 159, p 881, n 53  
 Substantial invasion, § 159, p 882, n 70  
 Sub-surface flow, § 164  
 Subterranean waters, §§ 88, 90, 164  
   Use of surplus, § 100  
 Sufferance use, § 162, n 74  
 Surface waters, §§ 113, 164  
   Accumulation and discharge in body, § 116,  
     p 815  
   Drainage rights, § 121  
   Injunction, § 128, p 836  
   Questions of law and fact, § 127, pp 831, 832  
   Right to obstruct natural flow, § 122  
 Surplus waters, § 164  
 Taking possession, § 160  
 Taxes, payment, § 159, p 879  
 Ten years, § 160  
 Tenant, user, § 159, p 879  
 Tenants in common, § 162  
 Termination of right, § 166  
 Title, acquisition, § 158  
 Total nonuser, § 159, p 883  
 Trespasser, § 163  
 Twenty years, § 160  
 Underground water, § 164  
 Unequivocal intention, interruptions, § 161, n 40  
 Unexplained use of spring, § 164, n 38  
 Uninterrupted character, § 161  
 Unity of possession, § 162  
 Unlimited permission, § 162  
 Use as member of public, § 159, p 879  
 User by claimant or another, § 159, p 879  
 Usufructuary rights, § 165  
 Value of use, § 161  
 Varying manner of use, § 159, p 879  
 Verbal assertion of claim, § 162  
 Verbal objection, interruptions, § 161, n 52  
 Vested right, § 165  
 Vigilant man, § 159, p 881  
 Voluntary abandonment, § 161  
 Waste waters, § 164  
   Disposition, § 191  
 Weight and sufficiency of evidence, § 201, p 1016  
 Wells, § 164  
 Wharf on lake shore, § 160, n 17  
 When period starts to run, § 160  
 Prescriptive rights,  
   Flooding lands, defenses, § 36(5)  
   Impounded waters, burden of proof, § 101, p 784  
   Obstruct natural flow, surface waters, § 122  
   Pollute public water supply, § 232  
   Public street or highway by private individual oper-  
     ating water system, § 244  
 Prescriptive time, artificial changes of natural water  
   courses, § 4, p 598  
 Present design, appropriation, use, § 175

Present injury,  
 Flooding lands,  
   Damages, § 38, p 682  
   Pleading, § 37, p 677  
 Present irreparable injury, flooding lands, injunction  
   § 37, p 674  
 Pressure,  
   Insufficiency of as breach of contract, § 310  
   Municipal contract for supply, § 268  
 Presumption,  
   Accuracy of meter readings, § 307, p 223  
   Acquisition of title by adverse use, § 201, p 1013  
   Actions by or against municipality on water supply contract, § 276, p 136  
   Actions involving right to use or be furnished,  
     § 225, p 1076  
   Appropriation,  
     Abandonment of rights, § 193, p 996, n 87  
     Actions, § 201, p 1013  
   Bed and banks of stream,  
     Grant, § 84  
     Ownership, § 83  
   Corporate action to acquire, water rights, § 230  
   Deeds and conveyances, consideration, § 208  
   Flooding lands, § 38(9), § 37, p 678  
   Flowage of lands,  
     Prescriptive rights, § 26  
     Transfer of mill and dam, § 27, p 646  
   Illegal execution and municipal contract for supply of water, § 265, p 117  
   Injuries incident to supply and use of water,  
     § 312, p 246  
   Irrigation districts, ante  
   Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 443  
   Lakes and ponds, subsequent conveyance, § 107  
   Medial thread of watercourse, § 71, n 24  
   Mill pond dammed, adverse user, § 147, p 862, n 77  
   Point of diversion, application for change, § 180, p 981  
   Pollution, § 54, p 705  
     Knowledge, § 50  
   Prescription,  
     Grant, § 158  
     Knowledge, § 159, p 882  
   Public service water companies, perpetual franchises, § 253  
   Rates and charges, post  
   Reserved rights, loss, § 215  
   Right of grant to take water for public supply,  
     § 228  
   Riparian rights,  
     Acquisition of land, § 10  
     Quiet title actions, § 14  
   Subterranean waters,  
     Nature, § 87  
     Proceedings and relief, § 101, p 783  
   Surface water,  
     Actions for damages, § 127, p 829  
     Drainage easement, § 121  
     Injunction, § 128, p 837  
   Taking from land of neighbor, § 162, n 73  
   Time of use, § 210, p 1054  
   Title to bed under impounded water, § 146  
   Use by riparian owner, § 201, p 1013

Presumption—Continued  
   Water works district, good faith in denying protest against formation, § 243(2), p 66, n 90  
 Preventive injunction, flowage of lands, § 33, n 97  
 Preventive measures, pollution, defenses, § 55, p 712  
 Price, existing water system, purchase by municipality, § 238, pp 40-45  
 Prima facie evidence, intent to appropriate, § 180, p 937  
 Primary permits, storage of water in reservoirs for irrigation purposes, § 348  
 Primary uses,  
   Diversion, § 61  
   Mechanical and manufacturing purposes, § 372  
 Principles governing, pollution, § 43, p 688  
 Prior appropriation, § 157  
   Mechanical and manufacturing purposes, § 372  
 Prior builder, dams, superior right, § 147, p 860  
 Prior pollution, evidence, § 101, p 784  
 Prior settlement or appropriation, riparian rights, § 5  
 Priorities,  
   Appropriation, generally, ante  
   Extent of use, water priority, § 183  
 Private consumers Consumers, generally, ante  
 Private corporations,  
   Diversion, persons liable, § 64  
   Irrigation and ditch companies, §§ 320, 341  
   Pollutions, liability, § 52  
   Power to sell water to consumers in given community, § 278, p 143  
   Prescription, § 163  
   Riparian rights, § 8  
 Private fire protection, rates and charges, § 285  
 Private individuals, artificial channels, § 129, p 842  
 Private lands,  
   Bridges across canals or irrigation ditches, § 350, p 396  
   Irrigation rights of way, § 349, p 390  
   Way over for irrigation purposes, title and rights acquired, § 349, p 392  
 Private line of municipality, license to tap, revocation, § 278, p 139  
 Private nuisance Nuisance, generally, ante  
 Private owner, surface waters, injunction, § 128, p 838, n 97  
 Private ownership, § 1  
 Private parties, injunction sought by state to prevent flooding, sole benefit, § 37, p 673  
 Private property, banks of stream, § 72  
 Private roadway, reservation in mortgage, § 218, n 7  
 Private service line, action by owner to prevent unauthorized tapping, § 281, p 155  
 Private water works corporation,  
   Acquisition by municipal corporation, § 236  
   Municipal water works and water districts, establishment as affected by existence, § 235  
   Rates and charges, public regulation, § 292  
 Private waters,  
   Classification, § 2  
   Springs, § 91  
 Privilege tax License and license taxes, generally, ante  
 Privileges,  
   Appurtenances to land, § 216  
   Artificial lake, § 129, p 844  
   Bed and banks of stream, § 71



# WATERS

## Privileges—Continued

- Flowage of lands, nature, § 28
- Obnoxious sewage, discharge into waters of state, § 232, p 19, n 87
- Pollution, § 50
- Surface waters, drainage right, § 120
- Privy of estate, prescription, effect, § 163
- Pro rata reduction, prescription, § 165, n 70
- Probable cause, appropriation, perfecting application, § 180, p 936, n 74
- Probable danger, pollution, injunction, § 55, p 712
- Proceedings to determine and protect, riparian rights, § 14
- Procedure,
  - Appropriation, § 174
  - Statutory origin, § 180, p 931
  - Dams, application to erect, § 147, p 861
  - Flowage of lands, acquisition of right, § 25, p 638
- Productivity of land, diversion, damages, § 69
- Profits,
  - Breach of covenant, damages, § 225, p 1078
  - Flooding lands, measure of damages, § 38, p 682
  - Municipal purchase of existing water system, transfer of property, etc., § 239
  - Municipality selling water for as operating in proprietary capacity, § 241
  - Pollution, damages, § 56, p 718
  - Rate producing profit, § 289, p 174
- Project, surface waters, injunction, § 128, p 835
- Promissory notes, irrigation districts, § 330
- Promoters' fees and expenses, rates and charges, consideration in determining reasonableness, § 293, p 188
- Promulgation, rate schedules, § 294
- Propagation of fish, appropriation for, § 172
- Property,
  - Ice, § 383
  - Water districts, § 243(5), pp 71-76
  - Water priority, § 183
- Property included, municipal contract for purchase of existing water system, § 237, p 38
- Property injuries, flooding lands, damages, § 38, p 681
- Property rights,
  - Franchise of public service water company, § 251
  - Subterranean waters, § 90
- Proportion of injury, pollution, evidence, § 54, p 706
- Proportional share, riparian rights, § 10, n 31
- Proposed change, point of diversion, objection, § 189, p 980
- Proprietary capacity,
  - Irrigation district,
    - Acting in, § 318, p 267
    - Ownership of land, § 321, p 301
  - Municipalities, ante
- Propriety, rates of water companies, § 291
- Propulsion of machinery, purpose of use, § 210, p 1053
- Prorating, distribution and supply of water for irrigation, § 359
- Prosecution, obstruction and watercourse, maintenance, § 40
- Prosecution of enterprise, diligence, appropriation, § 179
- Prospective damages, flowage of lands, assessment, § 25, p 630
- Prospective injuries,
  - Flooding lands,
    - Damages, § 38, p 682
    - Pleading, § 37, p 677

## Protective works, obstruction and detention, § 19

- Protest,
  - Appropriation, § 180, p 938
  - Irrigation districts, proposed formation, § 319(2), p 271
  - Prescription, effect, § 161
  - Water districts, creation, § 243(2), p 63
- Proximate cause,
  - Artificial channels, injuries from change in course of stream, § 134
  - Damage, extraordinary rain or flood, § 20, pp 629, 630
- Dams,
  - Actions for damages, § 156
  - Breakage or overflow, § 153
- Diversion, persons liable, § 64
- Flooding lands, § 36(5)
  - Pleading, § 36(7), n 63
- Injuries incident to supply and use, evidence, § 312, p 245
- Irrigation districts, loss of crops for failure to supply water, § 366, p 437
- Liabilities and injuries incident to supply and use for irrigation, § 365, p 435
- Liability of water company for injuries resulting from, § 309, p 236
- Obstruction and detention, persons liable, § 22
- Pollution, § 52, n 4
- Surface waters, actions for damages, § 127, p 830, n 2
- Prudence, artificial channels, injuries, § 133
- Public, prescriptive rights, § 163
- Public and municipal water supply, §§ 226-313, pp 7-251
  - Acquisition of water for public supply, § 228
  - Action for damages from pollution, § 232, p 21
  - Appropriation, § 230
  - Consent of state board of health to acquisition, § 229
  - Control by state and state authorities, § 229
  - Criminal or penal proceedings for pollution, § 232, p 20
  - Extent of rights and obligations, § 230
  - Imposition of obligation in respect of maintenance of flow, § 230
  - Injuries to water supply, § 232, pp 18-22
  - Lease of water rights, § 230
  - License tax on diversion, § 229
  - License to connect water works with artesian well, § 230
  - Municipal water works and water districts, generally, ante
  - Nature of rights and obligations, § 230
  - Order requiring additional supply, § 229
  - Persons affected by acts of municipality, remedies, § 232, p 22
  - Pollution of water supply, § 232, pp 18-22
  - Prescriptive right to pollute water, § 232, p 20
  - Presumption as to corporate action to supply rights, § 230
  - Proceedings to protect rights, § 233
  - Public service water companies, generally, post
  - Pueblo rights, § 231
  - Purification and filtration plant, § 232, p 19
  - Regulation by state and state authorities, § 229

## Public and municipal water supply—Continued

- Remedies,
  - Prevent pollution, § 232, p 20
  - Riparian and other owners against public for diversion, § 227
- Review of orders looking to protection of waters, § 232, p 20
- Successor to Pueblo rights, § 231
- Tributary streams, right of undiminished flow, § 230
- Public authorities,
  - Dams, compelling operation, § 147, p 866
  - Flowage of lands, liability for injuries, § 29, p 648
- Public body, judicial protection, claim to flowage not constituting public or navigable stream, § 113
- Public contractor, diversion, persons liable, § 64
- Public corporations,
  - Irrigation districts, § 318, p 265
  - Municipal water districts, § 243(1)
- Public debt, water rents as, § 284
- Public domain, § 1
- Public enemy,
  - Accumulation and storage, § 141
  - Prescription, interruptions, § 161
- Public entry, withdrawal of lands required for irrigation works, § 316
- Public garages, rates and charges, right to meter service, § 302, p 211
- Public grant, bed and banks of stream, § 85
- Public health,
  - Mill ponds and dams, § 147, p 861
  - Obstruction and watercourse, criminal responsibility, §§ 39, 40
  - Pollution, § 43, p 688
- Public hearing, acquisition of public and municipal water supply, § 229
- Public interest,
  - Abandonment, water rights, § 193, p 905, n 75
  - Pollution, § 45
- Public lands,
  - Irrigation districts, inclusion within, § 319(3), p 280
  - Springs upon, § 91
  - Way over for irrigation purposes, title and rights acquired, § 349, p 391
- Public nuisance Nuisance, generally, ante
- Public officers, appropriation, actions, parties, § 199
- Public offices, irrigation district offices, § 320, p 289
- Public policy,
  - Acquisition of right to pollute, § 50
  - Appropriation, §§ 157, 169
  - Contracts as to rates and charges, § 287, p 167
  - Free supply or nominal charge for water to private consumers, § 283, p 158
  - Obligation of water company to provide service for fire protection, § 310
  - Point of diversion, change, § 189, p 979
  - Rights of appropriator, § 173, p 918
  - Sale of water for irrigation, contracts with consumers, § 361, p 418
  - Separation of title of land and adjacent strips in highway beds, § 107, n 32
  - Subterranean waters, waste, § 95
  - Title of appropriator, § 173, p 918
- Public power and irrigation district, surface water, § 114, p 804, n 48
- Public record, appropriation, actions, § 194, p 1004

## Public rights,

- Alluvion, § 76
- Flowage of lands, § 26, n 83
- Irrigation, § 315
- Lakes and ponds, § 105, n 86
- Public service commission,
  - Approval of lease of municipal water system, § 240, n 81
  - Authority to require water company to furnish adequate supply of pure water, § 276, p 138
  - Consent to municipality extending mains into locality already supplied by water company, § 234, p 24
  - Contracts for municipalities for supply of water, regulation, § 238
  - Exercise of power to regulate water supply to public, § 280, p 152
  - Jurisdiction to regulate municipal water works, § 280, p 152
  - Modification of municipal contract for supply of water, § 272
- Municipal water mains,
  - Consent to extension into locality supplied by water company, § 235
  - Order requiring extension, § 242, p 59
- Municipal water works and water districts, powers with respect to funds and financing, § 234, p 27
- Municipality operating water supply system as subject to regulation by, § 241
- Private water works system, transfer without authorization, § 246
- Public service water companies, authority relative to, § 261
- Rate order violations as defense to action by water company against municipality, § 276, p 135
- Rates and charges,
  - Approval, § 287, p 171
  - Declaration of reasonableness, § 275
  - Regulation, § 290
- Sale of water for irrigation, regulation of rates and charges, § 363, p 424
- Unreasonable rates, proceedings for relief, § 295, p 194
- Value of company's properties, consideration in determining reasonableness of rates and charges, § 293, p 187
- Public service water companies, §§ 247-264, pp 94-116
  - Acquiescence of consumers, installation of service connections, § 257, p 109
  - After acquired property, mortgages, § 259
  - Assignment of water works, § 250
  - Bondholders, rights and duties, § 259
  - Character, § 247
  - Competitors, connections with, § 257, p 109
  - Composition of mains, § 257, p 106
  - Consolidation, § 248
  - Consumers' premises, pipes on, § 257, p. 106
  - Creditors' remedies, § 263
  - Duration of franchise, § 253
  - Duties, § 254
    - Extend mains and pipes, § 257, p 107
  - Exclusiveness of rights and privileges, § 252
  - Exceeding right, proceedings to restrain from, § 216

# WATERS

## Public service water companies—Continued

- Expiration of franchise, § 253
  - Extended territory, § 251
  - Extensions of mains, § 257, p. 107
  - Forfeiture of franchise, § 253
  - Furnishing water beyond municipal limits, § 250
  - Grants, privileges or franchises, § 250
  - Gross receipts tax, § 262
  - Highways, supervision and control in use of, § 256
  - Incorporation, § 248
  - Injuries to work mains or pipes, § 258
  - Lease of water works, § 259
  - Liabilities, enforcement of, § 263
  - Licenses, § 262
  - Loss of exclusive rights, § 252
  - Mains,
    - Authority to lay, § 250
    - Duty to relocate, § 257, p. 109
    - Injuries to, § 258
    - Property of, § 257
  - Maintenance, service pipes, § 257, p. 109
  - Mechanic's liens, § 263
  - Members, § 248
  - Mortgages, § 259
  - Nature of franchise, § 251
  - Officers and agents, § 249
  - Organization, § 248
  - Perpetual franchises, § 253
  - Pipes,
    - Authority to lay, § 250
    - Duty to relocate, § 257, p. 109
    - Injuries to, § 258
    - Property of, § 257, p. 106
  - Powers, § 254
  - Privately owned mains and pipes, use, § 257, p. 106
  - Proceedings to restrain from exceeding rights or violating duties, § 260
  - Public service commissions, authority relative to construction and operation of water works, § 261
  - Purchase of water works, § 259
  - Reconstruction of highway flooding, § 256
  - Relocation of mains and pipes, duty, § 257, p. 109
  - Rights, § 254
  - Rights of way, § 255
  - Sale, water works, § 259
  - Sales tax, § 262
  - Scope of franchise, § 251
  - Service connections, duty to install, § 257, p. 108
  - Status, § 247
  - Stockholders, § 248
  - Streets and alleys, supervision and control in use of, § 256
  - Taxes, § 262
  - Termination,
    - Exclusive rights, § 252
    - Franchise, § 253
  - Territorial extent, § 251
  - Violating duties, proceedings to restrain from, § 260
- Public supervision, diversion, § 59
- Public use,
  - Secondary appropriator, § 185, p. 962
  - Subterranean waters, § 100
- Public utility,
  - Manufacture and sale of ice, § 383

## Public utility—Continued

- Obstruction and detention, damages, § 30(1), n. 24
- Public service water companies, § 247
- Water districts, § 243(1)
- Waterworks plant as, § 297, p. 200, n. 5
- Waterworks system owned and operated by private individual, § 246
- Public utility corporations, prescription, § 163
- Public utility districts, petition for organization, § 319(7)
- Public utility law, acquisition of existing water system by municipality under, § 239
- Public water supply, riparian owners, rights of public as against, § 226
- Public waters and streams,
  - Appropriation, generally, ante
  - Dams, § 145, n. 8
  - Dedication to use of public, § 170, p. 910, n. 3
  - Removal of ice, § 384
- Publication,
  - Irrigation districts, delinquent list, § 337, p. 353
- Notice,
  - Appropriation, actions, § 198
  - Irrigation districts, meeting to determine advisability of organizing, § 319(2), p. 274
  - Petition for creation of water district, § 243(2), p. 63
  - Water district, taxes or assessments, § 243(7), p. 86
- Publication of intent, appropriation, § 174
- Pueblo lands, irrigation districts, property subject to tax of, § 333, p. 331
- Pueblo rights, public and municipal water supply, § 231
- Pueblos, flowing subterranean waters, § 93, p. 770
- Pulling down, dams, § 149
- Pump at well, inspection of premises, § 210, p. 1056, n. 54
- Pumping, flowing subterranean waters, use, § 93, p. 769, n. 82
- Pumping plant, irrigation district, acquisition, § 321, p. 300
- Pumps, land provided with water by for irrigation as includable within irrigation district, § 319(3), p. 279, n. 65
- Punishment, obstruction and watercourse, maintenance, § 40
- Punitive damages,
  - Dams, actions for destruction, § 151
  - Diversion, § 69
  - Flooding lands, § 38, p. 685
  - Injuries incident to supply and use of water, § 312, p. 250
  - Irrigation works, injuries or damages to, § 351
  - Pollution, § 56, p. 721
  - Rates and charges, wrongful discontinuance of service, § 307, p. 228
  - Subterranean waters, § 102
  - Surface waters, actions for damages, § 127, p. 835
- Purchase,
  - Acquisition of right to pollute, § 50
  - Existing water system by municipality, § 236
  - Irrigation companies, acquisition of water rights, § 348
  - Municipal corporations, acquisition of existing water system, § 236
  - Public service water companies, water works, § 259

- Purchaser,
  - Flooding lands, injunctive relief, defenses, § 37, p 676
  - House property, liability for unpaid water bills, § 302, p 212
  - Property, pollution, relief, § 51
- Pure and wholesome water, private corporation's duty to supply, § 278, p 145
- Pure water,
  - Jurisdiction of suit against water company on complaint of citizen to enforce duty to furnish, § 281, p 155
  - Public service commission authority to require water company to furnish, § 276, p 138
- Purification and filtration plant, public and municipal water supply, § 232, p 19
- Purified water, public and municipal water supply, sale to third persons, § 230
- Purity of water,
  - Municipal contract for supply, § 269
  - Right, § 43, p 686
  - Water company as insurer or guarantor of, § 311
- Purpose of diversion, § 60
  - Change, § 188
- Purpose of use,
  - Deeds and conveyances, rights and privileges, § 210, p 1052
  - Municipal contract to supply water to private consumers, § 279, p 148
  - Obstruction and detention, reasonableness, § 16
  - Reservations and exceptions, § 214, p 1062
- Purposes of appropriation, § 172
- Qualifications,
  - Irrigation district officers, § 320, p 289
  - Petition for organization of irrigation districts, § 319(2), p 271
- Qualified right, appropriation, § 169
- Quality of flow, riparian rights, § 9
- Quality of water,
  - Appropriation, § 181, p 948
  - Duty or quantity needed for irrigation, § 186, p 971
  - Municipal contract for supply, § 269
  - Municipality furnishing to private consumers, § 278, p 139
  - Regulation of water supply to public, § 280, p 153
- Quantity,
  - Contracts, § 221
  - Deeds and conveyances, rights and privileges, § 210, p 1050
  - Interest conveyed, intention of parties, § 209
  - Irrigation consumer entitled to, § 352, p 407
  - Municipal contract for supply, § 268
  - Reservations and exceptions, construction and operation, § 214, p 1061
  - Sale for irrigation, contracts with consumers, § 361, p 418
  - Surface waters, discharge, § 116, p 813
- Quantity of bed owned, lakes and ponds, § 107
- Quantity of land irrigated, appropriation, § 186, p 970
- Quantity of use, irrigation purposes, § 314
- Quantity of water used,
  - Flat rates and charges, § 298
  - Minimum water charge, § 300
  - Prescription, § 161
  - Rates and charges, § 297, p 201
  - Diminishing with, § 299
- Quantity to which priority extends, appropriation, § 186, p 963
- Quantum meruit,
  - Hydriant rentals, expiration of municipal contract of water company, § 274
  - Municipal corporation operating water system for profit as obligated to pay others on, § 241
  - Rates and charges, proceedings for collection, § 304, n 82
- Quarries,
  - Discharge of water, injunctive relief, § 37, p 680, n 27
  - Mechanical and manufacturing purposes, § 374
- Quasi easement, surface waters, § 120
- Quasi in rem proceedings, appropriation, actions, § 194, p 1004
- Quasi judicial duties, administration of irrigation law, § 315
- Quasi-municipal corporations,
  - Irrigation districts, § 316, p 265
  - Rates and charges, regulation by public utility commission, § 290
- Quasi public capacity, municipal corporation supplying water to consumers as acting in, § 241
- Quasi public corporation,
  - Irrigation and ditch companies, §§ 339, 347
  - Municipal water districts, § 243(1)
  - Public service water companies, § 247
- Quasi public water corporation, acquisition of system by municipal corporation, § 236
- Questions of law and fact,
  - See, also, Trial, generally, post
  - Action by or against municipality on water supply contract, § 276, p 137
- Actions involving,
  - Rights and privileges, § 225, p 1077
  - Supply of water to private consumers, § 281, p 156
- Anticipated revenue from water system, sufficiency to retire certificates, § 243(6), p 81, n 49
- Appropriation, § 174
  - Abandonment of rights, § 193, p 995
  - Actions, § 203, p 1020
  - Application, § 180, p 933
- Appurtenances to land, § 216
- Bed and banks of stream, ownership, § 83
- Contributory negligence, § 36(10)
- Dams, actions, § 151
- Depreciation, disputed questions in determining reasonableness of rates, § 293, p 185
- Discrimination, rates and charges, § 297, p 201
- Diversion, § 67, p 733
- Existence of watercourse, § 4, pp 596, 597
- Extraordinary or unprecedented rain or flood, § 36(10)
- Flashboards as part of dam, § 36(10)
- Flooding lands, § 36(10)
  - Act of God, § 36(10)
  - Injunctive relief, damages, § 37, p 680
  - Negligence, § 36(10)
- Flowage of lands, § 32
  - Abandonment or loss of rights, § 24
  - Damages, § 25, p 640
- Injuries,
  - Incident to supply and use of water, § 312, p 248
  - Result of flooding, § 36(10)

# WATERS

## Questions of law and fact—Continued

- Irrigation, standard, duty or quantity needed, § 186, p. 971
- Irrigation districts, ante
- Irrigation purposes,
  - Liabilities and injuries incident to supply and use, § 367, p. 446
  - Reasonable use of water, § 314
- Irrigation rights, actions to establish and protect, § 317, p. 263
- Lakes and ponds, maintenance of fence, § 111, n 75
- Natural watercourses, § 36(10)
- Pollution, § 43, p. 689, § 54, p. 708
- Rates and charges,
  - Wrongful discontinuance of water service, § 307, p. 227
  - Wrongfully taking water, § 306
- Reasonableness,
  - Exercise of right to flow land, § 36(10)
  - Rates, § 289, p. 173, § 293, p. 182
- Right to flow land, § 36(10)
- Riparian rights, reasonableness of use, § 11
- Subterranean waters, proceedings and relief, § 101, p. 780
- Surface waters,
  - Artificial drainage, reasonable use, § 116, p. 813
  - Actions for damages, § 127, p. 831
- Unreasonable rates, proceedings for relief, § 295, p. 195
- Water districts, benefits to be assessed, § 243(7), p. 85
- Quiet enjoyment, leases, § 224
- Quieting title, § 225, p. 1074
  - Appropriation, § 195
    - Form of remedy, § 194, p. 1001
- Irrigation districts,
  - Actions concerning tax title, § 337, p. 359
  - Tax lien of irrigation district for assessment, § 335, p. 344
- Irrigation rights, actions to establish and protect, § 317, p. 260
- Municipal corporation to Pueblo rights, § 231
- Riparian rights, § 14
- Subterranean waters, evidence, § 101, p. 785
- Water district tax title, 243(7), p. 88
- Quitclaim deeds, appropriation, inchoate rights, § 190, p. 984
- Quo warranto,
  - Irrigation districts, proceedings to determine validity of organization, § 319(4)
  - Water districts, review of proceedings to organize, § 243(2), p. 66
- Quorum, irrigation and ditch companies, stockholders' meetings, § 343, p. 370
- Raceways,
  - Contracts, construction and operation, § 221
  - Evidence, grants of right to use, § 225, p. 1076
- Radical change, flowage of land, dams, § 27, p. 645
- Railroad bridge, abatement, nuisance, § 20, p. 628
- Railroad commission, sale of water for irrigation, regulation of rates and charges, § 363, p. 424
- Railroads,
  - Accumulation and storage, § 141
  - Action to enforce rights to water supply, § 281, p. 155

## Railroads—Continued

- Appropriation, rights of way, § 192, p. 991
- Artificial drainage, surface waters, § 118
- Civil law, surface waters, § 115
- Embankments, obstruction and detention, § 20, p. 627
- Mechanical and manufacturing purposes, § 374
- Municipal power to deliver city water from water works system to, § 278, p. 141
- Necessities, appropriation, § 172
- Obstruction and detention, persons liable, § 22
- Right of way, irrigation districts, taxes, § 333, p. 333
- Surface waters,
  - Actions for damages, § 127, pp. 828, 833
  - Artificial drainage, § 118
  - Construction and maintenance, § 115
  - Floodings, persons liable, § 125
  - Terminal yard refuse, pollution, § 49
  - Washing of fill onto adjoining property, § 118
- Rain water and eavesdrip, surface waters, § 124
- Rain waters, subterranean waters, § 86
- Rains,
  - Appropriation, sources of supply, § 181, p. 949
  - Artificial channels, injuries from change in course of stream, § 134
  - Extraordinary storms and floods, generally, ante
  - Flood waters, § 20, p. 630, n. 95
  - Obstruction and detention, dams, § 18
  - Source of supply, § 4, p. 598
  - Surface waters, § 112, n. 89
- Raising of dam, flowage of lands, § 26
- Rate, artificial channels, § 133, n. 5
- Rate of compensation, noncontractual or implied contractual duty of municipality to pay for water furnished, § 274
- Rate of depreciation, municipal purchase of existing water system, § 238, p. 42
- Rate of pumping, prescription, § 165
- Rate of return flows, appropriation states, equitable apportionment, § 170, p. 911
- Rates and charges, §§ 284-308, pp. 161-233
  - Acquisition of system, reasonableness of rates of water companies, § 293, p. 182
  - Action for amount due, § 304
    - Sale of water for irrigation, § 363, p. 430
  - Actual cost, consideration in determining reasonableness of rates and charges, § 289, p. 175
  - Advance payment, § 302, p. 213
    - Discrimination as to, § 297, p. 204
  - Amendment of commission's answer in proceedings for relief against unreasonable rates, § 295, p. 193
  - Amount of rates, § 289, pp. 172-177, § 302, pp. 210-214
    - Noncontractual or implied contractual duty of municipality to pay for water furnished, § 274
    - Voluntarily paid by other communities, § 289, p. 176
- Annexation of territory, power of municipality to regulate, § 292
- Annoyance, wrongful discontinuance of service, § 307, p. 228
- Appeals, ante
- Applicable rates, § 299

## Rates and charges—Continued

Approval by public service commission, § 287, p 171  
 Assessments by state engineer, § 297, p 205  
 Assumpsit for collection, § 304  
 Average price in other cities, § 291, n 72  
 Benefits obtained, consideration in determining reasonableness, § 289, p 175  
 Bills incurred by third person, § 305  
 Binding nature of contracts, § 287, p 168  
 Bona fide dispute, procedure, § 307, p 220  
 Burden of proof, ante  
 Business judgment, § 289, p 173  
 Change of rates, § 293, p 190, § 299  
 Character of water use, § 297, p 201  
 Charter restriction on amount of property company may hold, § 293, p 191  
 Classification, service charges, § 301  
 Collection, § 302, pp 210-214  
 Commodity prices, consideration in determining reasonableness, § 293, p 187  
 Common labor base price, consideration in determining reasonableness, § 293, p 188  
 Company exceeding lawfully established rates, § 307, p 221  
 Comparative rates, consideration in determining reasonableness, § 293, p 184  
 Compensation for water consumed, § 284  
 Condition of water use, § 297, p 201  
 Connection cost, failure to pay as justifying refusal to supply, § 305  
 Construction cost, reasonableness of water company rates, § 293  
 Continuing power to regulate water company rates, § 292  
 Contracts, § 287, pp 167-172  
 Control of state, § 292  
 Cost of meters and installation, § 301  
 Cost of rate proceeding, § 296, p 198  
 Cost of service furnished, § 297, p 201  
 Courts, rate making powers, § 286  
 Customers, permitting to read meters, § 284  
 Cutting off supply for nonpayment, § 305  
 Debt service charge, consideration of, § 289, p 176  
 Default in payment, cutting off supply, § 305  
 Delegation of power to regulate, § 292  
 Deposit as security for payment, § 302, p 213  
   Discrimination as to, § 297, p 204  
   Separate and additional charge, § 301  
   Water meter as security, § 280, p 151  
 Depreciation, consideration in determining reasonableness, § 289, p 175, § 293, pp 184, 191  
 Depressions, consideration in determining reasonableness, § 293, p 187  
 Determination, sale of water for irrigation, § 363, p 424  
 Diminishing with quantity used, § 299  
 Discontinuance of service, action for wrongful discontinuance, § 307, p 226  
 Discount for prompt payment, § 302, p. 213  
 Discrimination, § 297, pp 200-206  
   Sale of water for irrigation, § 363, p 425  
 Domestic rates, § 299  
 Duress, payments under, recovery back, § 307, p. 224

## Rates and charges—Continued

Enforcement of liens, § 308, pp 228-234  
 Equality of rates, § 297, p 200  
 Establishment of rates, §§ 286, 294  
 Evidence of value, unreasonable rates, § 295  
 Excessive payment, proceedings in action for recovery, § 307, p 225  
 Excessive profits, water companies, § 293, p 182  
 Existing contracts with patrons, municipality acquiring water system as bound by, § 287, p 171  
 Expense of turning water off and on on nonpayment, § 305  
 Extension of corporate limits of municipality, § 287, p 168  
 Extension of system, reasonableness of rates of water companies, § 293, p 182  
 Failure of meter to register, § 302, p 211  
 Failure to protest against minimum charge, § 307, pp 221, 222  
 Fair return,  
   Municipality, § 289, p 173  
   Water companies, § 293, p 181  
 Fee for turning off water for nonpayment of charges, § 301  
 Filing rate schedules, § 294  
 Fire districts, regulation, § 290  
 Fire protection service, § 285  
 Flat rates, § 298  
   Applicability, § 299  
 Formulas, ascertainment of fair value of property, § 293, p 187  
 Franchise, right to collect compensation for use of water as, § 285  
 Free supply or nominal charge for water to private consumers, § 283, p 158  
 Going value, determination of reasonableness, § 293, p 183  
 Governing rates, § 299  
 Hardship, water company rates, § 293, p 182  
 Historic cost, consideration in determining reasonableness of rates, § 289, p 175  
 Illegal system of water charges, § 288  
 Improvements and betterments,  
   Consideration in determining reasonableness of rates, § 293, p 187  
   Sufficiency of rates to cover, § 289, p 176  
 Inaccuracy of meter, § 302, p 211  
 Income of company, determination in considering reasonableness, § 293, p 183  
 Increase of rates, § 297, p 204  
 Indeterminate contracts as to time, § 287, p 168  
 Injunction, private consumer, § 307, p. 221  
 Installation charges, § 301  
 Interest on cost of system, rates as sufficient to cover, § 289, p 176  
 Intracity rates, § 287, p 169, n 41  
 Irrigation, sale of water for, § 363, pp 422-431  
 Issuance of stock, consideration in determining reasonableness, § 293, p 188  
 Joint users, default of one of several, § 305  
 Judicial review of reasonableness, § 289, p 176  
 Late payments, penalties, § 302, p 213  
 Liens, ante  
 Lower than lawful maximum, § 286  
 Manner of water use, § 297, p 201

# WATERS

## Rates and charges—Continued

- Matters considered,
  - Determining amount or reasonableness, § 289, p 174
  - Water companies, § 293, p 182
- Maximum rates,
  - Contract fixing, § 287, p 168
  - Rates lower than lawful maximum, § 286
- Meter charge, § 301
  - Applicability, § 299
- Minimum charge, § 300
  - Failure to protest against, § 307, p 222
- Mistake of fact or law, payment under, § 307, p 225
- Modification of contract rates, § 287, p 168
- Municipal power to regulate, § 292
- Municipality for service from municipally operated system, § 286
- Municipality operating water system, § 284
- Nature of lien, § 308, p 231
- Nature of use, determination of reasonableness of rates, § 289, p 175
- Notice,
  - Change of rate or classification, § 290
  - Cutting off supply for nonpayment, § 305
- Operating expenses,
  - Consideration in determining reasonableness, § 293, p 183
  - Reasonableness of rates of water companies, § 293, p 181
  - Sufficiency to cover, § 289, p 176
- Operation of lien, § 308, p 231
- Oppressive rates, matters considered, § 289, p 174
- Outside municipal boundaries, § 297, p 205
- Overhead cost items, consideration in determining reasonableness, § 293, p 183
- Party in interest to set aside order fixing, § 290
- Past losses and profits, consideration in determining reasonableness, § 293, p 183
- Patrons, contracts with, § 287, p 169
- Payment, § 302, pp 210-214
  - Sale of water for irrigation, § 363, p 427
  - Under duress, § 307, p 224
  - Under mistake of fact or law, § 307, p 225
- Penalty for late payment, § 302, p 213
- Pendente lite injunction, unreasonable rates, § 295, p 195
- Perfected lien, § 308, p 231
- Period of default, cutting off supply, § 305
- Permitting customers to read meters, § 284
- Perpetuity, amount charged fixed in, § 287, p 169
- Persons liable, § 302, p 212
- Pleading,
  - Private consumers seeking to prevent discontinuance of service for failure to pay, § 307, p 223
  - Proceedings for collection, § 304
  - Wrongful discontinuance of service, § 307, p 227
- Power to regulate water company rates, § 292
- Presumptions,
  - Accuracy of meter readings, § 307, p 223
  - Reasonableness of,
    - Municipal water rate, § 289, p 173
    - Water companies' rates, § 293, p 191
- Preventing discontinuance of supply to force payment, § 307, p 221

## Rates and charges—Continued

- Private water companies, regulation, § 292
- Proceedings,
  - Action for recovery, § 307, p 225
  - Collection, § 304
- Profit, producing, § 289, p 174
- Promulgation of rate schedules, § 294
- Propriety of rates,
  - Municipal water system, § 288
  - Water companies, § 291
- Public utility commission, regulation by, § 290
- Quantity of use, § 297, p 201
  - Criterion of reasonableness of rate, § 289, p 175
- Quasi-municipal corporations, regulation, § 290
- Reading meters, § 301
- Reasonableness of rates, § 289, pp 172-177
  - Water companies, § 293, pp 181-191
- Receiver, self-liquidating municipal water system, § 275
- Recovery back of amounts paid, § 307, p 223
- Reduction of rates, § 297, p 204
- Refusal to supply for nonpayment, § 305
- Regulation,
  - By board or commission, § 290, § 296, pp 196-200
  - By public authority, § 363, p 424
  - Municipal water system, § 288
  - Sale of water for irrigation, § 363, p 423
  - Water companies, § 291
- Relief against unreasonable rates, proceedings for, § 295, pp 192-196
- Remedies to assure payment for water furnished, § 303
- Repair of meter, § 301
- Repairs, sufficiency to cover, § 289, p 176
- Repeal of rate ordinance, § 286
- Replacement of water meter, § 302, p 211
- Reproduction cost,
  - Consideration in determining reasonableness, § 293, pp 185, 189
  - Determination of reasonableness, § 289, p 175
- Restaurants, § 299
- Retroactive increase, § 287, p 171
- Right to,
  - Charge for water service, § 285
  - Meter service, § 302, p 211
- Schedules, establishment, filing and promulgation, § 294
- Security holders, contracts between municipality and, § 287, p 171
- Segregation of property on basis of usage, § 289, p 174, n 18
- Service charges, § 301
- Setting aside,
  - Finding or order of board or commission, § 296, p 198
  - Orders establishing, § 290
- Similarity in conditions, consideration in determining reasonableness, § 293, p 184
- Single point meter service, § 302, p 211
- Single unit rate, applicability, § 299
- Sliding scales, § 299
- Special contracts fixing discriminatory rates, § 297, p 204
- Specific lien, § 308, p 231
- State engineer, assessments by, § 297, p 205

## Rates and charges—Continued

- Supply and distribution of water, § 275
  - Surplus revenue, § 289, p 174
  - Taxes,
    - Consideration in determining reasonableness, § 293, p 183
    - Considered as, § 284
  - Tender of full amount due as defeating right to shut off water, § 305
  - Territory annexed to municipality subject to existing ordinance, § 287, p 170
  - Third persons, bills incurred by, § 305
  - Time for payment, § 302, p 213
  - Time of use of water, § 297, p 201
  - Ultimate conclusion, reasonableness of charge by water company, § 293, p 181
  - Uniformity, § 297, pp 200-206
  - Unit for rate making, § 293, p 182
  - Unreasonable rates, proceedings for relief, § 295, pp 192-196
  - Validation of lien, § 308, p 230
  - Value of company's properties, consideration in determining reasonableness, § 293, p 185
  - Voluntary payment, recovery back, § 307, p 224
  - Waste, discontinuance of service for nonpayment of accounts as authorized by, § 305
  - Water authorities, regulation, § 290
  - Water districts, regulation, § 290
  - Water power companies, § 381
  - Working capital, determination of reasonableness, § 293, p 183
  - Wrongful discontinuance of service, action for, § 307, p 226
  - Wrongful payment, proceedings in action for recovery, § 307, p 225
  - Wrongfully taken water, § 306
- Ratification,
- Irrigation and ditch companies, purchase contract, § 343, p 372
  - Supply and distribution of water, defective contract, § 267
  - Ultra vires contract of municipality to purchase existing water system, § 237, p 36
  - Water district contract, § 243(5), p 73
- Ravines,
- Appropriation, capture or diversion, § 177
  - Artificial channels, § 130, p 847
  - Obstruction and detention, § 15
    - Right of way, § 21
  - Railroad crossing, surface waters, § 115
  - Surface waters, drainage, § 117
- Ravines ordinarily dry, § 4, p 599
- Reading meters, charges for, § 301
- Real property,
- Appropriation, ditches, canals or other works, § 192, p 980
  - Artificial channels, § 129, p 842
  - Classification as, § 1
  - Irrigation and ditch companies, acquisition, § 345, p 376
  - Irrigation ditch as property in nature of, § 350, p 395
  - Sale of water for irrigation, lien for rates and charges, § 363, p 429
  - Subterranean waters, § 88

## Real property—Continued

- Value of water company's property considered in determining reasonableness of rates and charges, § 293, p 188
- Real property right, irrigation, supply and distribution of water for, § 352, p 405
- Real servitude, surface waters, drainage and passage, § 120, n 52
- Reappearance, land after submergence or erosion, § 81
- Reasonable care,
  - Artificial channels, injuries, § 133
  - Pollution, § 43, p 690
  - Surface waters, artificial drainage, § 116, p 811, n 88
- Reasonable exercise of riparian rights, § 10
- Reasonable manner, manner of use, grants, § 210, p 1052
- Reasonable needs, appropriation, § 186, p 967
- Reasonable persons, prescription, § 159, p 881
- Reasonable time, appropriation,
  - Application of additional water to beneficial use, § 186, p 966
  - Beneficial application, § 174
- Reasonable use,
  - Conveyance entitling grantee, § 206
  - Dams, § 145
  - Diversion, § 59
    - Trial, § 67, p 733
  - Flowage of lands, § 24
  - Flowing subterranean waters, § 93, p 769
  - Pollution, § 43, p 688
  - Riparian rights, § 9
  - Springs, § 91
  - Subterranean waters, § 93, p 767
  - Surface waters,
    - Artificial drainage, § 116, pp 811, 812
    - Injunction, § 128, p 839
- Reasonable use doctrine, subterranean waters, § 93, p 771
- Reasonableness,
  - Flowage of lands, questions of law and fact, § 36 (10)
  - Mechanical and manufacturing purposes, § 372
  - Obstruction and detention, § 16
  - Rates, § 289, pp 172-177
    - Sale of water for irrigation, § 363, p 425
    - Minimum water charge, § 300
  - Use,
    - Pollution, evidence, § 54, p 706
    - Riparian rights, § 11
    - Surface waters, § 114, p 805
- Rebuilding, dams, § 147, p 864
- Recall, irrigation district officers, § 320, p 292
- Recapture,
  - Appropriation, actions, defenses, § 197
  - Prior appropriator, § 185, p 959
- Receivers,
  - Charges, self-liquidating municipal water system, § 275
  - Irrigation and ditch companies, § 346
  - Unreasonable rates, proceedings for relief, § 295, p 192
- Recession of waters, reliction or dereliction, § 78
- Reciprocal duties, contract to supply municipality with water, § 273
- Reciprocal rights, dams, § 147, p 865



# WATERS

- Recitals, municipal contract for supply of water, construction and operation, § 271
- Reckless manner, surface waters, common enemy, § 114, p 806
- Recklessness, injuries incident to supply and use of water, punitive damages, § 312, p 250
- Reclamation,
  - Arid land by public authorities, § 316, pp 255-260
  - Bed and banks of stream, § 74
- Reclamation districts,
  - Bonds as contract, § 325
  - Pollution, liability, § 52
- Recognition, prior appropriation doctrine, § 173, p 917
- Record title, lakes and ponds, burden of proof, § 111, n 75
- Recording,
  - Contracts, § 220
  - Deeds and conveyances, § 208
  - Irrigation district certificate of tax sale, § 337, p 354
  - Mortgages, § 218, n 7
  - Notice of appropriation, § 176
- Recreation purposes,
  - Appropriation, § 172
  - Lakes and ponds, § 105, n 84
- Recurring injury, pollution, injunction, § 55, p 711
- Redemption, irrigation districts, tax sale, § 337, p 355
- Reduction to possession, § 1
- Reference, appropriation, actions, § 203, p 1022
- Referendum,
  - Modification of rates, § 287, p 169, n 41
  - Municipal corporations, acquisition of existing water system, § 236
  - Rate regulation subject to, § 275
- Refiling, appropriation, defective application, § 180, p 935
- Refunding bonds,
  - Irrigation districts, § 325
  - Confirmation proceedings, § 328, n 56
  - Water districts, power to issue, § 243(6), p 78, n 29
- Refuse, dams, damages for injuries, § 150
- Regional conditions, appropriations, prosecution of enterprise, § 179
- Registered mail, appropriation, actions, service of notice, § 198
- Registration, irrigation, district bonds, § 324, p 310
- Regulation,
  - Public service water companies, § 247
  - Rates and charges, ante
  - Supply and use,
    - Proprietor, water company or municipality, § 280, pp 149-154
    - Subterranean waters, judgment, § 101, p 786
  - Watercourses, § 7
- Regulatory state power, pollution, § 51
- Reimbursement, rates and charges, recovery back of amounts paid, § 307, p 224
- Relation back, conveyance of existing water system to municipality, § 239
- Relation doctrine, appropriation, priority, § 184
- Relation to right to enter on land, appropriation, § 171
- Relative audit, appropriation, § 157
- Relative priorities, appropriation, determination, § 203, p. 1022
- Release,
  - Appropriation,
    - Loss of rights, § 193, p 999
    - Mortgages, § 190, pp 987, 988
    - Squatter's rights, § 190, p 986, n 15
  - Reserved rights, § 215
- Release from future damage, flooding lands, burden of proof, § 36(9)
- Relevant facts, appropriation states, equitable apportionment, § 170, p 911
- Relevant injury, pollution, injunction, § 55, p 712
- Reliction,
  - Bed and banks of stream, § 78
  - Lakes and ponds, § 108
- Relief, flooding lands, injunctive proceedings, § 37, p 678
- Relieving pressure in time of stress, dams, § 153
- Religious purposes, free supply or nominal charge for water, § 283, p 158
- Relinquishment, appropriation, loss of rights, § 193, p 994
- Relocation of mains and pipes,
  - Duty, § 257, p 109
  - Public service water companies, duties, § 257, p 109
- Remaindermen, artificial channels, injunctive relief, § 138
- Remand, appropriation actions, § 204, p 1039
- Remedial injury, flooding lands, damages, § 38, p 683
- Remedies Actions, generally, ante
- Remedying conditions, pollution, § 45
- Remission of taxes, municipal contract for supply of water, § 268
- Remonstrance, prescription, effect, § 161
- Remote cause, obstruction and detention, overflow, § 22, n 37
- Remote damages,
  - Diversion, § 69
  - Flooding lands, § 38, p 681
- Removable obstructions, damages, § 34
- Removal,
  - Bed and banks of stream, sand bar, § 73
  - Dams, § 149
    - Actions, § 151
    - Flooding lands, judgment, § 37, p 679
    - Flowage of lands, § 26
  - Flooding lands, obstructions, § 37, p 678
  - Ice, rights, § 384
  - Irrigation district officers, § 320, p 292
  - Obstruction and detention, § 23
  - Water district officers, § 243(4)
- Renewal, municipal contract for supply of water, § 268
- Rent loss, flooding lands, damages, § 38, p 683
- Rental value, diminution, diversion, damages, § 69
- Rents paid in advance, breach of covenant, damages, § 225, p 1078
- Reorganization, irrigation and ditch companies, §§ 346, 347
- Repairing leakages, flowage of lands, injuries, § 29, p 648
- Repairs,
  - Appropriation, rights of way, extent of rights, § 192, p 992
  - Aqueducts, licenses, § 219
  - Artificial channels, § 130, p 849
  - Bridges, embankments, etc., § 20

## Repairs—Continued

- Dams, § 147, p 864
  - Flooding lands, judgment, § 37, p 679
  - Flowage of lands, § 26
  - Leases, § 224
- Flooding lands,
  - Damages, § 38, p 680
  - Issues, proof and variance, § 36(8)
- Grants,
  - Duties, § 210, p 1054
  - Water company of right to lay pipes as carrying obligation to keep in, § 309, p 236
- Irrigation districts, taxation for, § 333, p 329
- Leases, § 224
- Municipal water works and water districts, mains or pipes, § 242, p 60
- Prescription, right to make, § 165
- Rate sufficient to cover, § 289, p 176
- Rights of way for irrigation purposes, § 349, p 394
- Springs, § 91
- System or works, appropriation, § 186, p 965
- Water pipes, consumer's contract with water supply company, § 279, p 149
- Reparations, rents and charges, excessive payments, § 307, p 224
- Repeals, rate ordinances, § 286
- Repetition of acts, surface waters, injunction, § 128, p 835
- Replacement,
  - Dam, flowage of dams, § 26
  - Water meter, § 302, p 211
- Replevin, hostile ownership of water mains by municipality, § 242, p 55, n 46
- Reply,
  - Appropriation, actions, § 200
  - Flooding lands, § 36(7)
- Reports, irrigation districts, feasibility of organization, § 319(2), p 274
- Representative capacity, water district taxpayer suing to compel restoration of funds wrongfully disbursed, § 243(8)
- Reproduction cost,
  - Determining reasonableness of rates, § 289, p. 175, § 293, pp 185, 189
  - Municipal purchase of existing water system, § 238, p 42
- Repudiation of license, prescription, § 162
- Requirements, appropriation, statutory origin, § 180, p 931
- Res ipsa loquitur,
  - Injuries incident to supply and use, § 312, p 246
  - Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 443
  - Subterranean waters, pollution, § 101, p 784
- Res judicata,
  - Appropriation, judgment, § 203, p. 1029
  - Diversion, injunctive proceedings, § 68, p 742
  - Irrigation districts, confirmation proceedings as to issue and sale of bonds, § 328
  - Point of diversion, change, administrative denial, § 189, p 979
- Resale, resident obtaining water from town for resale to others, § 278, pp 139, 140
- Rescission,
  - Contracts, § 223
  - Conveyance of existing water system to municipality, § 237, p. 39

## Rescission—Continued

- Irrigation and ditch companies, fraudulent sale of stock, § 343, p 367
- Municipal contract for supply of water, § 272
- Water system, contract to purchase by municipality, § 237, p 35
- Reservation of jurisdiction, subterranean waters, § 101, p 787
- Reservations,
  - Appropriation, § 169
  - Transfers, § 190, p 987
- Artificial channels, construction and maintenance over lands of another, § 130, p 847
- Bed and banks of stream, public grant, § 85
- Conveyance or lease of land, right to supply of water for irrigation purposes, § 357
- Deeds and conveyances, §§ 206, 213
- Flowage of lands, § 27, p 642
- Mortgages, § 218
- Surface waters, easement or right of drainage, § 120
- Reservoir companies, certificates of stock, mortgage, § 218, n 8
- Reservoir storage, appropriation, § 172
- Reservoir structure, modification, § 185, p 958, n 82
- Reservoirs,
  - Accumulation and storage on land, §§ 141-143, pp 856, 857
  - Actions, escaping waters, § 143
  - Appropriation, § 170, p 906, n 66
  - Appurtenances passing by conveyance, § 217
  - Contracts, construction and operation, § 221
  - Diversion, tapping, § 61
  - Escaping waters, liability, § 141
  - Impounding waters, § 141
  - Injuries, persons liable, § 133
  - Injuries to, § 96
  - Irrigation company or ditch constructed for irrigation purposes, § 350, p 395
  - Irrigation districts, construction, § 321, p 301
  - Liability of water company for injuries resulting from negligence in construction or operation, § 309, p 238
  - Nuisance, § 141
  - Right to maintain on land of another, § 142
  - Subterranean waters, § 89
  - Water districts, authority to construct, § 243(5), p 74
- Responsibility, flooding lands, evidence, § 36(9)
- Restaurants, flat water rates, § 299
- Restoration,
  - Funds, rates and charges, misapplication of municipal funds, § 307, p 220
  - Pollution, damages, § 56, p 718
  - Premises, expenses, flooding lands, damages, § 38, p 683
- Restoration expenses, temporary damage to irrigation ditch recoverable, § 351
- Restoration of water, diversion, § 62
- Restrictions,
  - Appropriation, § 169
  - Permit, § 180, p 935
  - Municipality to contract for supply of water, § 265, p 116
  - Surface waters, artificial drainage, § 116, p 811
- Restrictions on use, mechanical and manufacturing purposes, § 372
- Restrictive conditions, leases, § 224

# WATERS

Resulting injury,  
 Diversion, pleading, § 67, p 731  
 Pollution, injunction, § 55, p 711  
 Retaining wall, lakes and ponds, § 103, n 87  
 Retention of price, municipal purchase of existing water system, § 237, p 38  
 Retroactive operation, point of diversion, change, § 189, p 978, n 86  
 Return waters,  
 Appropriation for irrigation, § 348  
 Diversion, changes, § 188  
 Secondary appropriation, § 185, p 959  
 Revenue certificates, rate contracts between municipality and security holders, § 287, p 172  
 Revenue collections, municipal water works and water districts, anticipation, § 241  
 Revenue producing enterprise, municipal water works system, § 234, p 26  
 Revenues,  
 Derived from property, flooding lands, damages, § 38, p 682  
 Water districts, application, § 243(6), p 80  
 Reversal, appropriation actions, § 204, p 1039  
 Reversion, appropriation, ditch and water rights, § 190, p 984  
 Reverter, possibility of, right of way for irrigation purposes, title and rights acquired, § 349, p 392  
 Revival,  
 Granted rights, § 212  
 Rates and charges, right to maintain action for collection, § 304, n 82  
 Revocation,  
 Franchise or privilege of private individual operating water system, § 245  
 Licenses and License tax, ante  
 Surface waters, easement or right of drainage, § 120  
 Right of entry, artificial channels, upkeep and repairs, § 130, p 849  
 Right of way by necessity, manner of use, § 214, p 1062  
 Right to divert, § 59  
 Right to use, transfer, § 207  
 Rights, subterranean waters, § 88  
 Rights of appropriator, § 173, p 917  
 Rights of United States, § 1  
 Rights of way,  
 Appropriation, § 192, p 989  
 Abandonment, § 193, p 1000  
 Deeds and conveyances, location, description, § 208  
 Extent of rights, § 192, p 992  
 Irrigation districts, contracting to obtain, § 321, p 299  
 Irrigation purposes, § 349, pp 388-395  
 Actions to restrain interference with, § 351  
 Municipal supply of water as consideration for, § 278, p 141  
 Municipal water works and water districts, rights and obligations, § 242, pp 54-60  
 Obstruction and detention, § 21  
 Public service water companies, § 255  
 Railroads, surface waters, § 115  
 Traps, personal injuries resulting from concealed danger in irrigation system, § 365, p 434  
 Riparian claimant and appropriator, priority, § 173  
 Riparian owners,

## Riparian owners—Continued

Liability of city to for damages resulting from operation of dams, reservoirs and filtration plants, § 309, p 238  
 Limited right to use water to irrigate, § 314  
 Rights of public as against, § 226  
 Riparian rights, §§ 5-14, pp 605-616  
 Abrogation, common-law doctrine, § 6  
 Abuse of privileges, § 11  
 Access to stream, § 8  
 Accretion, § 76  
 From snows, § 9  
 Accustomed channel flow, § 9  
 Act of God, flowage, § 9  
 Actions, § 14  
 Adoption, common-law doctrine, § 6  
 Adverse claims, § 8  
 Adverse possession, § 13  
 All water consumed, § 12  
 Appropriation,  
 Distinguished from, § 181, p 947  
 Modification, § 9  
 Appurtenance, § 9  
 Appurtenant to lands, § 8  
 Artificial channels, § 129, p 844  
 Artificial ones, § 12  
 Ascertainment by action, § 14  
 Bathing, reasonableness of use, § 12  
 Beneficial purpose, reasonable use, § 12  
 Beneficial use of passing water, § 9  
 Character of stream, reasonableness of use, § 11  
 Climatic conditions, reasonableness of use, § 11  
 Commercial character of business, § 12, n 87  
 Common law, § 5  
 Adoption or abrogation, § 6  
 Common rights, § 10  
 Compensation on deprivation, § 9  
 Condition of improvements, reasonableness of use, § 11  
 Confluence of two branches, § 8  
 Constitutional and statutory provisions, § 6  
 Consumption of all of water, § 12  
 Contempt proceedings for violation of decree, § 14  
 Continuous hostile claim, § 13  
 Contracts, modification of relative rights, § 9  
 Conveyance separate from land, § 207  
 Cooking, reasonableness of use, § 12  
 Custom and usage, reasonableness of use, § 11  
 Deeds and conveyances, construction and operation, § 209  
 Deepening natural channel, § 42  
 Deprivation, due process of law, § 9  
 Dereliction, § 78  
 Destruction, § 13  
 Determination by action, § 14  
 Diversion, generally, ante  
 Divesture, § 13  
 Domestic purposes, reasonableness of use, § 12  
 Drainage areas, § 8  
 Drinking, reasonableness of use, § 12  
 Easements, § 9  
 Eminent domain, non-riparian use, § 11  
 Equal rights, § 10  
 Equitable actions, § 14  
 Excessive use, § 11  
 Extent, reasonableness of use, § 11  
 Fall of water, reasonableness of use, § 11

## Riparian rights—Continued

Family use, § 12  
 Flood waters, § 13  
 Formation of stream bed, § 10  
 Frontage on stream, § 8  
 Giant, modification, § 9  
 Hindrance of flow, § 9  
 Homes, § 12  
 Hospitals, § 12  
 Hours of labor, reasonableness of use, § 11  
 Household uses, reasonableness, § 12  
 Incorporeal hereditaments, § 10  
 Injunctions to protect, § 14  
 Islands, § 8, n 72  
 Lakes and ponds, § 104  
 License, modification, § 9  
 Local law, § 5  
 Location of stream, reasonableness of use, § 11  
 Loss, § 13  
 Lower riparian owner, § 9  
 Malicious use of water privileges, § 11  
 Management of business, reasonableness of use, § 11  
 Military use, § 12, n 86  
 Municipal corporations, § 8  
 Natural flow, § 9  
 Natural lakes and ponds, § 104  
 Natural wants, reasonable use, § 12  
 Natural watershed, § 8  
 Nature of banks, reasonableness of use, § 11  
 Nature of improvement, reasonableness of use, § 11  
 Necessities of business, § 11  
 Necessity as measure, § 11  
 Nonuser, § 13  
 Object, reasonableness of use, § 11  
 Obstruction and detention, generally, ante  
 Opposite sides of stream, § 10  
 Ordinary and usual flow, § 9  
 Ownership of bank, § 10  
 Paramount sovereign authority, § 9  
 Personal property, § 10  
 Persons entitled, § 8  
 Power to control watercourses, § 7  
 Prescription, § 163  
     Modification, § 9  
 Presumption, acquisition of land, § 10  
 Prior settlement or appropriation, § 5  
 Priority of use, § 10  
 Private corporations, § 8  
 Proceedings to determine and protect, § 14  
 Proportional share, § 10, n 31  
 Quality of flow, § 9  
 Quiet title actions, § 14  
 Reasonable exercise of right, § 10  
 Reasonable usage, §§ 9, 11  
 Regulation of watercourses, § 7  
 Reliction or dereliction, § 78  
 Remedy at law, § 14  
 Reservations and exceptions, construction and operation, § 214, p 1060  
 Right to use water, § 10  
 Seasonal storage, § 10, n 31  
 Seasonal wash or arroyo, § 8, n 73  
 Self-use, § 12  
 Separate conveyance, § 207  
 Separate tracts, § 8  
 Servants from land by prescription, § 158

## Riparian rights—Continued

Size of drainage area, § 8  
 Size of stream, reasonableness of use, § 11  
 Specific amount of water, § 10, n 31  
 State of civilization, reasonableness of use, § 11  
 Subject matter of use, reasonableness of use, § 11  
 Subservient uses, § 11  
 Surface drainage, § 8, n 88  
 Surface waters, § 113  
 Suspension, § 13  
 Swimming pools, § 12, n 87, 90  
 Topography, § 8  
 Trespasser or intruder, § 8  
 Tributary and main waters, § 8, n 90  
 Undiminished flow, § 9  
 Upper riparian owner, § 9  
 Use of water, §§ 10, 12  
 Usual flow, § 9  
 Valid appropriation superior to subsequently acquire, § 173  
 Valuable, vested right, § 9  
 Varying depth of stream bed, § 10  
 Velocity of water, reasonableness of use, § 11  
 Volume of water, reasonableness of use, § 11  
 Wanton use of water privileges, § 11  
 Washing, reasonableness of use, § 12  
 Watering animals, reasonableness of use, § 12  
 Wind direction, § 8, n 74  
 Rival claimants, appropriation, priority, § 184  
 Rival companies, public service water companies, rights or privileges, § 252  
 River basin, surplus water, burden of proof, § 101, p 783  
 River flats, ownership, § 73  
 River regulating districts, creation and power, § 147, p 861, n 50  
 Rivers, classification, § 2  
 Rivulet,  
     Classification, § 2  
     Subterranean waters, § 86  
 Roadbed of railroad, obstruction and detention, § 20  
 Roads and highways,  
     Artificial channels, bridging, § 130, p 850  
     Bridge over irrigating canal or ditch crossing, § 350, p 396  
     Municipal authority, power in respect of laying mains, § 242, p 56  
     Protection, dams, § 147, p 860  
     Public service water companies,  
         Privilege to use, § 250  
         Supervision and control in use of, § 256  
     Water districts, use of, § 243(5), p 76  
     Water system operated by private individual, prescriptive rights, § 244  
 Rocks,  
     Batture, § 77  
     Rainwater carrying, § 114, n 62  
 Rocky Mountain region, natural watercourses, § 4, p 605, n 55  
 Rooms, flat rates and charges varying with number of, § 298  
 Rotating crops, irrigators allowed reasonable latitude in changing, § 188  
 Rotation, time of use, § 187  
 Rubbish,  
     Distinguished from sewage, pollution, § 45  
     Obstruction and detention, § 17, n 76  
 Rules and regulations, appropriation, § 169

# WATERS

Run, classification, § 2  
 Running of prescriptive period, flowage of lands, § 26  
 Running streams, control resting in state in sovereign capacity, § 228  
 Running with the land Covenants, ante  
 Rural districts, surface waters, § 114, p 805  
 Rural property, surface waters, injunction, § 128, p 836  
 Rust, liability for injuries caused by in water resulting from water company's negligence, § 309, p 235  
 Safe yield, taking from underground basin in excess, § 100, n 13  
 Sale,  
   Appropriation, ante  
   Diversion, § 60  
     Injunctive relief, § 68, p 735  
   Ice, § 384  
   Irrigation, ante  
   Irrigation and ditch companies, powers, § 345, p 376  
   Irrigation district, disposition of property, § 321, p 301  
   Municipal water works, § 240  
   Private water works system, § 246  
   Rates and charges, generally, ante  
   Spring water, § 91  
   Subterranean waters, reasonable use doctrine, § 93, p 772  
   Water district bonds, § 243(6), p 79  
   Water power companies, water or power and supply to consumers, § 380  
 Sale of stock, water power companies, § 378  
 Sale of water district property, § 243(5), p 72  
 Sales tax,  
   Municipal water works and water districts, § 241  
   Public service water companies, § 262  
 Salt content, pollution, § 47  
 Salt water,  
   Right to inject into well, § 210, p 1049  
   Subterranean waters, pollution, § 97  
 Salt water inflow, pollution, § 43, p 688  
 Salt water pollution, subterranean waters, burden of proof, § 101, p 784  
 Salvaged waters,  
   Appropriation, § 181, p 947  
   Disclaimer, § 186, p 969, n 39  
 Sand,  
   Batture, § 77  
   Bed and banks of stream, accretion, § 76  
   Presence in plumbing system as evidence of negligence, § 312, p 246  
 Sand bar,  
   Bed and banks of stream, removal, § 73  
   Obstruction and detention, § 17  
 Sand from mining operations, pollution, § 47  
 Saturated strata, subterranean waters, use, § 93, p 772  
 Saturation, artificial irrigation contributing to swampy condition of lands, § 333, p 334  
 Sawdust, pollution, § 48  
 Schedule of amount, irrigation, § 186, p 971  
 School lands, rights of way, appropriation, § 192, p 990  
 Schools and school districts,  
   Municipal charge for water furnished to, § 285  
   Municipal stipulations for free supply to, § 283, p 100

Schools and school districts—Continued  
   Municipalities, rights to shut off water supply because of rates unpaid by board of education, § 272  
   Prescriptive right to free supply of water, § 283, p 159  
   Statutory limitations on right to charge for water, § 283, pp 159, 160  
 Scientific method, appropriation, diversion, § 186, p 968, n 33  
 Scope of exclusion, appropriation, § 180, p 932, n 30  
 Scope of franchise, public service water companies, § 251  
 Scrambling possession, prescription, § 161  
 Seasonal flow, appropriation, fluctuating question, § 170, p 909  
 Seasonal nonuser, appropriation, forfeiture, § 193, p 908  
 Seasonal purposes,  
   Flowage of lands, § 26  
   Prescription, § 161  
 Seasonal storage,  
   Power purposes, appropriation, § 159, p 878, n 11  
   Riparian rights, § 10, n 31  
 Seasonal wash or alloyo, riparian rights, § 8, n 73  
 Seasons,  
   Irrigation purposes, reasonable use of water, § 314  
   Time of year, § 187  
 Second foot, appropriation, units of measurement, § 186, p 964  
 Second notice, appropriation, filing, § 176  
 Secondary appropriation, § 185, p 956  
 Secondary franchise, irrigation company, § 347, p 382, n 99  
 Secondary permits, use of stored water for irrigation purposes, § 348  
 Secondary uses,  
   Diversion, § 61  
   Mechanical and manufacturing purposes, § 372  
   Obstruction and detention, § 16  
 Secret interruptions, prescriptions, § 161  
 Secret profits, water districts, § 243(5), p 72  
 Secret user, prescription, § 159, p 881  
 Secretary of interior,  
   Administration of national reclamation act, § 316, p 257  
   Irrigation works, party to construct, operate and maintain, § 316, p 257  
   Rights of way for irrigation purposes, approval, § 349, p 389  
   Vested rights of water users as destroyed by action of, § 316  
 Securities, water meter as alternative to deposit, § 280, p 151  
 Security, irrigation district bondholders, § 326  
 Security for payment, distribution and supply of water for irrigation, § 352, p 407  
 Security for performance, municipal purchase of existing water system, § 237, p 38  
 Security holders, rate contracts with municipality, § 287, p 171  
 Sediment in water, liability of water company for damage to plumbing system and property, § 309, p 235  
 Sediment on grass, pollution, damages, § 56, p 718

- Seepage waters,
  - Appropriation,
    - Joint use of same works, § 192, p 993
    - Sources of supply, § 181, p 949
  - Artificial irrigation contributing to swampy condition of lands, § 333, p 334
  - Cause of action against irrigation district, § 365, p 432, n 7
  - Constructed works, appropriation of water for irrigation, § 348
  - Dams, § 154
    - Liability for injuries, § 29, p 649
  - Irrigation districts as acquired to provide proper drainage, § 365, p 432, n 6
  - Mortgages, § 218
  - Obstruction and diversion, § 96
  - Prescription, § 164
  - Right of United States under reclamation act, § 316, p 258, n 91
  - Secondary appropriation, § 185, pp 958, 959
  - Subterranean waters, § 86
- Seizure, arbitrary seizure of irrigation right of way, § 349, p 390, n 23
- Self draining hydrants, liability of water company for failure to put in as in accordance with contract, § 310
- Self-liquidating municipal water system, charges by receiver, § 275
- Self-use, riparian rights, § 12
- Semiarid country, storage of water by riparian owners, § 314, n 12
- Semiarid lands, injuries to lands adjoining irrigated tracts, § 365, p 434
- Semiarid states, natural watercourses, § 4, p 605, n 54
- Semipublic places, surface water flowing off, persons liable, § 125
- Separate acts, pollution, § 52
- Separate proprietors, surface waters, injunction, § 128, p 837
- Separate tracts, riparian rights, § 8
- Separate transfer, prior water right, effect, § 190, p 985
- Serial bonds, irrigation districts, payment, § 330, n 1
- Service connections, public service water companies, duty to install, § 257, p 108
- Service ditch, appropriation, measuring quantity of amount, § 186, p 964
- Service of process irrigation districts, ante
- Service pipes,
  - Leakage, collection of rates and charges, § 302, p 210
- Liability,
  - Consumer for injuries caused by leak, § 309, p 237
  - Negligent construction, § 309, p 236
- Municipal water works and water districts, cost of installing, § 242, p 57
- Property included in municipal purchase of existing water system, § 237, p 38
- Repair, consumer's contract with water supply company, § 279, p 149
- Serviceable to persons along lands of flowage, § 4
- Services rendered, irrigation districts, contracts to pay for, § 321, p 299
- Servitude, distribution and supply of water for irrigation, § 352, p 405
- Servitude on original title, prescription, § 165
- Set-off,
  - Actions by or against municipality on water supply contract, § 276, p 135
  - Rates and charges, proceedings for collection, § 304
- Setting aside,
  - Irrigation district dissolution proceedings, default of creditor, § 338
  - Irrigation districts, levy or assessment of taxes, § 335, p 345
- Seven years, prescription, § 160
- Several liability, pollution, § 52
- Severance,
  - Right to supply water from land, § 337
  - Water right from lands, § 207
- Severance of tenements,
  - Rain water and eavesdrip, § 124, n 37
  - Surface waters, § 120
- Sewage,
  - Emptying into subterranean stream, evidence, § 101, p 784
  - Pollution, § 45
  - Surface waters, discharge, § 123
- Sewers,
  - Emptying into private canal, § 129, p 845, n 96
  - Limitations on right to charge for water used to flush, § 283, p 160
  - Municipal operation of water works system for flushing as exercise of governmental power, § 241
  - Municipal water works system combined with, allocation of revenue, § 234, p 27
  - Municipality using water acquired by appropriation in as required to purify and return to stream, § 230
  - Taxation as not authorized to raise money to construct, § 243(7), p 83, n 58
  - Water district as authorized to construct and operate, § 243(5), p 71, n 60
- Shallowness of water, lakes and ponds, § 103, n 70
- Share-contract, appropriation, § 181, p 947
- Share croppers, flooding lands, parties to actions, § 36(6)
- Shore, bed and banks of stream, § 72
- Shortage of supply,
  - Distribution and supply of water for irrigation, priorities, § 354
  - Prorating distribution and supply of water for irrigation, § 359
- Shortages, appropriation, priority, § 183
- Sickness, pollution, damages, § 56, p 719
- Sickness in family,
  - Flooding lands, damages for, § 38, p 681
  - Surface waters, actions for damages, § 127, p 834
- Signatures,
  - Irrigation district bonds, § 324, p 310
  - Petition for creation of water district, § 243(2), p 64
- Similarity of conditions, consideration in determining reasonableness of rates and charges, § 293, p 184
- Simultaneous conveyances, severance or title, § 207, n 56
- Simultaneous diversions, § 187
- Single recovery, pollution, damages, § 56, p 719
- Single unit water rate, applicability, § 299
- Sink hole, deflection of surface waters, § 101, p 780
- Sinking funds, water districts, § 243(6), p 77, n 16

# WATERS

- Situation of premises, obstruction and detention, § 21
- Situs of water right, appropriation, § 181, p 947
- Size,
  - Drainage area, riparian rights, § 8
  - Natural watercourses, § 4, p 597
  - Stream,
    - Riparian rights, reasonableness of use, § 11
    - Unreasonable diversion, § 61
- Skill, bridges, culverts, etc, construction, § 20, p 629
- Skillful conduct of business, pollution, defenses, § 54
- Slaughterhouses, pollution, § 49
- Sliding scales, rates and charges, § 299
- Slight injury, flooding lands, injunction, § 37, p 674
- Slime from ore reduction mills, pollution, § 52, n 98
- Sloughs,
  - Artificial channels, § 130, p 847
  - Classification, § 2
  - Surface waters, § 112, n 91
- Small body of standing or stagnant water, § 2
- Small communities, rates and charges, § 297, p 202, n. 33
- Snows,
  - Appropriation, sources of supply, § 181, p 949
  - Nuisance, § 124
  - Source of supply, § 4, p 598
  - Surface waters, § 112, n 89
- Social needs, prior appropriation, § 168
- Soil, rainwater carrying, § 114, n 62
- Soil peculiarities, subterranean waters, § 86
- Sole control for mutual benefit, prescription, § 150, p 879
- Sole proprietorship, lakes and ponds, § 107, n 10
- Sole source of supply, diversion, § 61
- Solid matter, pollution, § 45
- Source,
  - Natural watercourses, § 4, p 596
  - Pollution, § 43, p 690
- Sources of supply,
  - Appropriation, tributaries, § 181, p 949
  - Deeds and conveyances, rights and privileges, § 210, p 1049
  - Lakes and ponds, § 103, n 70
  - Natural watercourses, § 4, p 598
  - Water for municipality, § 265, p 117
- Source of title, prescription, § 163
- Source of watercourse, spring, § 91
- Sovereign states, interstate streams, § 170, p 911
- Sovereignty, § 1, n 9
  - Power to control or regulate watercourses, § 7
- Sparsely settled communities, right and duty of water companies to supply, § 278, p 144
- Special administrative area, municipal water districts, § 243(1)
- Special agreements, appropriation, joint ownership, § 173, p 920
- Special assessment,
  - Nature of lien for water rates and charges, § 308, p. 231
  - Water districts, § 243(7), p 84
- Special assessment lien, irrigation district bonds, § 326, n 39
- Special charters, right to supply water under, § 278, p 145
- Special contracts,
  - Fixing discriminatory rates, § 297, p 204
  - Municipality with individual consumers in establishment of rates, § 286
- Special damages,
  - Deprivation of water, § 34
  - Pollution, § 56, p 721
  - Pleading, § 54, p 703
- Subterranean waters, § 102
  - Proceedings and relief, § 101, p 783
- Special defenses, flooding lands, pleading, § 36(7)
- Special duty, artificial channels, maintenance, § 130, p 849
- Special election, irrigation districts, bond issues, § 323
- Special findings,
  - Flooding lands, § 36(10)
  - Point of diversion, application for change, § 189, p 983
  - Pollution, damages, § 54, p 710
- Special injury, flooding lands, abatement of dam as public nuisance, § 37, p 677
- Special interest, irrigation district, qualifications of petitioners for organization, § 319(2), p 271
- Special legislative act, dams, § 147, p 861
- Special mention, appurtenances passing with conveyance, § 217
- Special method, appropriation, § 174
- Special plea, surface waters, actions for damages, § 127, p 829
- Special proceedings,
  - Dams, removal, § 149
  - Right of way for irrigation purposes, acquisition, § 349, p 391
- Special right, pollution, § 43, p 687
- Special services, contract of rates with patrons, § 287, p 169
- Special taxes, irrigation districts, local improvements, § 333, p 328
- Specific amount of water, riparian rights, § 10, n 31
- Specific performance,
  - Contracts, § 225, p 1073
  - Municipal purchase of existing water system, § 237, p 39
  - Municipal water contract against water company, § 276, p 134
- Specification, appropriation, time for performance, § 180, p 939
- Specification of purpose as measure of quantity, § 210, pp 1053, 1054
- Speculation,
  - Appropriation, § 172
  - Purpose, § 175
  - Subterranean waters, proceedings and relief, § 101, p 781
- Speculative damages,
  - Diversion, § 69
  - Flooding lands, § 38, p 681
- Spouts, rain water and eavesdrop, § 124
- Springs,
  - Appropriation, § 170, p 907
  - Appurtenances passing by conveyance, § 217
  - Artificial channels, diversion, § 130, p 847
  - Contracts,
    - Construction and operation, § 221
    - Preventing performance, § 225, p 1073, n 46
  - Deeds and conveyances, interest created, § 210, p. 1049
  - Destruction, § 93, p. 771, n 12
  - Evidence, grants of right to use, § 225, p 1076
  - Granted rights, right to terminate, § 212

## Springs—Continued

- Increase in flow, prescription, § 165, n 70
  - Injuries to, § 96
  - Licenses, § 219
    - Weight and sufficiency of evidence, § 225, p 1077
  - Manner of use, reservations and exceptions, § 214, p 1062
  - Mortgages, § 218
  - Pollution, instructions to jury, § 101, p 781
  - Prescription, § 164
  - Public land, § 91
  - Purpose of use, reservations and exceptions, § 214, p 1062
  - Reservations and exceptions,
    - Construction and operation, § 214, p 1060
    - Grants, § 213
  - Right to take from,
    - Grant, § 207
    - Interest created, § 209
  - Source of supply, § 4, p 598
    - Appropriation, § 181, p 949
  - Use, injunction, § 225, p 1074
- Sprinkler system, assessment of furniture warehouse for water fire line service, § 285, n 89
- Sprinkling purposes, use of hydrants for, § 270
- Sprinkling streets, contract limitations for right to charge for water used for, § 283, p 160
- Squatters, appropriation, persons who may, § 171
- Squatter's rights, sale or release, § 190, p 986, n 15
- Stables, pollution, offensive matter, § 55, p 716
- Stagnant nature, dams, § 148
- Stagnant pools, natural watercourses, § 4, p 602
- Standards,
  - Classification of rates and charges, § 297, p 201, n. 14
  - Ordinance prohibiting sale for human consumption of water containing certain elements or compounds, § 280, p 154
- Standing water, § 1
- State agencies, irrigation districts, § 318, p 265
- State authorities,
  - Consent to acquisition of existing water system by municipality, § 236
  - Exercise of power to regulate water supply to public, § 280, p 152
- State board of health,
  - Approval of municipal contract, § 265, p 110
  - Consent to acquisition of public water supply, § 229
  - Orders protecting public water supply, review of, § 232, p 20
- State commission or board,
  - Appropriation,
    - Actions, transfer or reference, § 203, p 1022
    - Jurisdiction, § 195
  - Municipal water works and water districts, regulation or control, § 234, p 24
  - Pollution, § 45
  - Violation of orders as defense to action by water company against municipality, § 276, p 135
- State control, public water supply, § 229
- State engineer,
  - Appropriation, actions,
    - Findings, § 203, p 1024
    - Parties, § 199

## State engineer—Continued

- Findings presumed correct on appeal, § 204, p 1039
- Presumption, performance of statutory duties, § 201, p 1013
- Rates and charges, assessments, § 297, p 205
- State forest preserve lake, acquisition of water for public supply, § 228
- State government,
  - Appropriation, authority and control, § 169
  - Rights and title of appropriator, § 173, p 917
- State grant, bed or banks of stream, § 85
- State hospitals, statutory limitations on right to charge for water, § 283, p 159
- State lands,
  - Irrigation rights of way, § 349, p 389
  - Rights of way, appropriation, § 192, p 990
- State liability, obstruction and detention, § 22
- State of civilization, riparian rights, reasonableness of use, § 11
- State of efficiency, artificial channels, maintaining, § 130, p 849
- State of nature, natural watercourses, § 4, p 596
- State officers, approval of municipal contract, § 265, p 118
- State regulations,
  - Rates, municipal supply of water, § 275
  - Water works system owned and operated by private individual, § 246
- State rights, § 1
  - Bed and banks of stream, § 71
  - Lakes and ponds, beds and banks, § 107
- State tax, municipal contract for supply of water, remission or payment under, § 268
- Statement, appropriation, accompanying application, § 180, p 937
- States,
  - Diversion, § 59
  - Pollution, liability, § 52
  - Regulation and control of public water supply, § 229
- Status,
  - Public service water companies, § 247
  - Quasi public irrigation and ditch companies, § 347
- Status of stream, dams, § 145
- Statute of frauds, rights of way, appropriation, § 192, p 990
- Statute of limitations Limitation of actions, generally, ante
- Statutory provisions Constitutional and statutory provisions, generally, ante
- Stealing, rates and charges, wrongfully taken water, § 306
- Steam mill, flooding lands, issues, proof and variance, § 36(8)
- Sterilized sewage, pollution, § 45
- Stipulated rents or rentals,
  - Action by water company against municipality to recover, § 276, p 133
  - Fire hydrants, § 270
- Stipulated supply, contracts, § 221
- Stipulations,
  - Appropriation, actions, judgment, § 203, p 1024
  - Artificial channels, upkeep and repairs, § 130, p 849
  - Flooding lands, damages, § 38, p 683
  - Flowage of lands, § 25, p 639



# WATERS

## Stipulations—Continued

- Municipal purposes, charge for water used for, § 283, p 160
- Rates and charges, § 287, p 167
- Sale of water for irrigation, contracts with consumers, § 361, p 421
- Subterranean waters, judgment, § 101, p 787
- Stock and stock certificate, irrigation and ditch companies, § 343, pp 365-374
- Stock issue, rates and charges, consideration in determining reasonableness, § 293, p 188
- Stock watering, artificial lake, § 129, p 844
- Stockholders,
  - Appropriation, actions, parties, § 199
  - Irrigation companies, right to supply, § 353
  - Municipal corporation and private water supply corporation, § 234, p 26
  - Public service water companies, § 248
- Stone, batture, § 77
- Stop boxes, liability of water companies for injuries resulting from condition, § 309, p 238
- Storage, §§ 141-143, pp 856, 857
  - Appropriation for direct irrigation, § 348
  - Diversion, § 60
  - Municipal use of natural facilities, § 242, p 57
- Storage in reservoir, appropriation, § 172
- Storage of water, riparian owners, § 314, n 12
- Storage purposes, appropriation, § 186, p 972
- Storage reservoirs, municipality imposing requirements of on water company as condition of supply, § 282
- Stored waters, appropriation, capture and diversion, § 181, p 950
- Storerooms, rates and charges, basis of family or individual business units, § 302, p 212, n 46
- Storing water, § 15
- Storm waters,
  - Appropriation, § 170, p 906
  - Artificial channels, § 130, p 847
  - Persons liable for damages, § 125
- Storms,
  - Break in irrigation canal causing damage to adjoining lands, § 365, p 433, n 11
  - Extraordinary storms and floods, generally, ante
  - Flowage of lands, liability for injuries, § 29, p 640
- Stranded property, bed and banks of stream, § 82
- Stranger to instrument, flowage of lands, § 27, p 644
- Streams,
  - Artificial channels, § 130, p 847
  - Changing course, injuries from, § 134
  - Character of stream, generally, ante
  - Classification, § 2
  - Refuse and filth, pollution, § 43, p 688
- Streets and alleys,
  - Artificial channels, bridging, § 130, p 850
  - Municipal authority, power in respect of laying mains, § 242, p 56
  - Municipal contract for use of, § 265, p 119
  - Permit to open paved street for premises on, § 280, p 153
  - Public service water companies, privilege to use, § 250
  - Surface water flowing off, persons liable, § 125
  - Water districts, use of, § 243(5), p 76

## Streets and alleys—Continued

- Water system operated by private individual, prescriptive rights, § 244
- Strip mining, public and municipal water supply, prevention of pollution, § 232, p 20, n 15
- Structures,
  - Dams, generally, ante
  - Diversion, evidence, § 68, p 740
- Subdivision, artificial lake, § 129, p 844
- Subdivision assessment, irrigation districts, § 334, p 338
- Subdivision owners, advancement, cost of installing municipal water mains, § 242, p 59
- Subflow of surface stream, appropriation, § 170, p 906
- Subirrigation, § 186, p 971
- Subject matter, riparian rights, reasonableness of use, § 11
- Submission to voters Municipal water works and districts, ante
- Subrogation, rates and charges, purchaser at sheriff sale, § 304, n 80
- Subsequent appropriation, notice of adverse claim, § 159, p 881, n 53
- Subsequent purchasers,
  - Appropriation, transfers, § 190, p 986
  - Flooding lands, defenses, § 36(5)
  - Lien for rates and charges, knowledge, § 308, p 232
  - Sale or water for irrigation, rates and charges, § 363, p 428
- Subservient uses, riparian rights, § 11
- Substantial character, appropriation, construction work, § 180, p 940, n 33
- Substantial existence, natural watercourses, § 4, p 596
- Substantial injury, flooding lands, injunction, § 37, p 674
- Substantial invasion, prescription, § 159, p 882, n 70
- Substitute artificial channels, § 133, n 3
- Substitute for taxes, rates and charges as, § 284
- Substitute method, appropriation, § 174
- Sub-surface flow, prescription, § 164
- Subterranean waters, §§ 86-102, pp 761, 789
  - Abandonment, intent, § 101, p 786, n 29
  - Absolute test of ownership, § 90
  - Actions at law, § 99
  - Obstruction or diversion, § 96
  - Actual damages, § 102
  - Adjoining landowners, use, § 93, p 772
  - Admissibility of evidence, proceedings and relief, § 101, p 784
  - Allowing to run to waste, § 95
  - Amount of use, § 93, p 767
  - Annoyance, compensation, § 102
  - Appropriation, § 170, p 906
  - Appropriative right, § 88
  - Arresting and collecting, diversion, § 61
  - Artesian basins, §§ 89, 92
  - Artificial causes, § 90
  - Assignment, cause of action for pollution, § 101, p 783
  - Available supply, § 86
  - Avoidable injury, § 93, p 771, n 14
  - Bed and banks of stream, § 89
  - Burden of proof, proceedings and relief, § 101, p 783
  - Capture, § 90

## Subterranean waters—Continued

Cesspool, pollution, § 97  
 Channel, § 86  
 Circumstantial evidence, proceedings and relief, § 101, p 785  
 Cities, proceedings and relief, § 101, p 780  
 Classes, § 86  
 Clay, § 88  
 Climate peculiarities, § 86  
 Coal, § 88  
 Common basin, use, § 93, p 772  
 Common law, § 86  
 Common-law doctrine, ownership, § 93, p 770  
 Common pool, § 93, p 772, n 27  
 Common questions, proceedings and relief, § 101, p 780  
 Compensation for annoyance, § 102  
 Complaint in intervention, § 101, p 783  
 Component parts, § 88  
 Condition of pipe, partition decree, § 101, p 787  
 Conflicting rights, action to determine, § 101, p 780  
 Conjecture, proceedings and relief, § 101, p 781  
 Control, § 90  
 Correlative rights doctrine, § 93, p 772  
 Course of flow, § 93, p 769  
 Creosote, source, § 101, p 781, n 53  
 Crops, irrigation, § 93, p 768  
 Damages, ante  
   Deeds and conveyances, interest created, § 209  
 Definite channel, § 86  
 Definition, § 86  
 Demurrer to the evidence, § 101, p 786  
 Density of population, § 86  
 Depletion of supply, judgment, § 101, p 786  
 Destruction of spring, § 93, p 771, n 12  
 Diversion, ante  
   Easements, verdict and findings, § 101, p 782  
 Emergency, suspension, operation of injunction, § 100  
 Eminent domain, § 88  
 Escapes, § 90  
 Estoppel, injunctive relief, § 100  
 Evidence, proceedings and relief, § 101, p 783  
 Excavations, making, § 96  
 Excessive diversion, damages, § 102  
 Exhausting community supply, § 93, p 772, n 21  
 Expense,  
   Development, § 100  
   Estoppel, § 100  
 Extent of use, § 93, p 767  
 Extractions, reasonable use, § 93, p 772  
 Findings of fact, proceedings and relief, § 101, p 782  
 Flowing waters, § 89  
   Use, § 93, p 769  
 Gas, pollution, § 97  
 Gravel, § 88  
 History, § 86  
 Human consumption, well water, fitness, instructions, § 101, p 781  
 Impounded from springs, § 91  
 Impurities, introducing, § 99  
 Incidental damages, § 102  
 Infiltrating water, § 86  
 Injunction for diversion, pollution, etc, § 100

## Subterranean waters—Continued

Injuries,  
   Actions, § 98  
   Wells, or springs, § 93, p 768  
 Instructions to jury, proceedings and relief, § 101, p 781  
 Irrigation of crops, § 93, p 768  
 Judgment, proceedings and relief, § 101, p 786  
 Jurisdiction, reservation, § 101, p 787  
 Knowledge of flow, § 93, p 769  
 Laches, injunctive relief, § 101, p 780  
 Lakes, § 89  
 Liability for diversion, § 96  
 Limitation on use, § 93  
 Location of flow, § 93, p 769  
 Loss of interest, § 101, p 786, n 30  
 Malice, use, § 94  
 Malicious injury, punitive damages, § 102  
 Measure, damages, § 102  
 Migratory character, § 90  
 Money loss, § 100  
 Motive, use, § 94  
 Municipality as having rights of owner, § 226  
 Natural resources, § 95  
 Nature, § 86  
 Nature of use, § 93, p 767  
 New spring, § 91  
 Nominal damages, § 102  
 Nonwasteful use, § 93, p 770  
 Nuisance, ante  
 Obstruction, § 96  
 Oil, § 88  
   Pollution, § 97  
 Oil pipe leak, pollution, § 101, p 781  
 Oozing waters, § 86  
 Overdraft, injunction, § 101, p 780  
 Overlying rights, § 88  
 Ownership, § 93, p 770  
 Part of soil, § 90  
 Parties, proceedings and relief, § 101, p 780  
 Partition decree, § 101, p 787  
 Permanent channel, § 89  
 Permanent damages, § 102  
 Place of rise and flow, evidence, § 101, p 786, n 31  
 Pleading, proceedings and relief, § 101, p 782  
 Pollution, ante  
   Population density, § 86  
   Possession, § 90  
   Prescription, § 164  
   Prescriptive rights, §§ 88, 90  
   Presumptions, proceedings and relief, § 101, p 783  
   Presumptions as to nature, § 87  
   Prior pollution, evidence, § 101, p 784  
   Proceedings and relief, § 101, p 780  
   Property right, § 90  
   Public policy, waste, § 95  
   Public use, § 100  
   Punitive damages, § 102  
   Questions of law and fact, § 101, p 780  
   Quiet title, evidence, § 101, p 785  
   Rain waters, § 86  
   Real property, § 88  
   Reasonable use, § 93, p 767  
     Proceedings and relief, § 101, p 780  
   Reasonable use doctrine, § 93, p 771  
   Regulations for use, judgment, § 101, p 786  
   Reservation of jurisdiction, § 101, p 787

# WATERS

## Subterranean waters—Continued

Reservoirs, § 89  
 Injury to, § 96  
 Right to take, grant, § 207  
 Rights, § 88  
 Rivulets, § 86  
 Salt water, pollution, § 97  
 Saturated strata, use, § 93, p 772  
 Seepage, § 86  
 Seepage water, obstruction and diversion, § 96  
 Sewage, emptying, evidence, § 101, p 784  
 Soil peculiarities, § 86  
 Sources of supply, appropriation, § 181, p 950  
 Special damages, § 102  
   Proceedings and relief, § 101, p 783  
 Speculation, proceedings and relief, § 101, p 781  
 Springs, generally, ante  
 State boards, powers, § 93, p 769  
 Stipulations, judgment, § 101, p 787  
 Surplus, § 100  
 Suspension, operation of injunction, § 100  
 Temporary damages, § 102  
 Terms, judgment, § 101, pp 786, 787  
 Title, § 90  
 Tributary to stream, § 80  
 Underground basins, § 92  
 Underground streams, § 86  
 Vein, § 86  
 Verdict, proceedings and relief, § 101, p 782  
 Wandering character, § 90  
 Wanton injury, punitive damages, § 102  
 Waste, post  
 Watershed, § 89  
 Weight and sufficiency of evidence, proceedings and relief, § 101, p 785  
 Well-known channel, § 89  
 Well water, fitness for human consumption, instructions, § 101, p 781  
 Wells, § 90  
   Injury to, § 96  
 Suburb,  
   Distributing system reselling water, § 297, p 205, n 60  
   Fire protection service, rates and charges, § 285, n 90  
   Service, rates and charges, § 297, p 202, n 24  
 Successive actions,  
   Diversion, § 67, p 729  
   Flooding lands, continuing injuries, damages, § 38, p 683  
   Obstruction and detention, flooding, § 36(1)  
 Successive appropriations, § 185, p 956  
 Successive floodings, flowage of lands, § 26, p 96  
 Successive recovery, pollution, damages, § 56, p 719  
 Successive suits, surface waters, damages, § 127, p 827  
 Successors of grantor, easements, § 210, p 1056  
 Suffrance user, prescription, § 162, n 74  
 Sufficiency, appropriation, conveyance, § 190, p 985  
 Sufficiency of supplies, municipal contract with private consumer, § 279, p 148  
 Summary proceedings, pollution, § 53  
 Superimposing irrigation districts on another, § 319(1)  
 Superintendent of irrigation, administration of laws, § 315  
 Superior, Lake Superior, § 103  
 Superior right,  
   Appropriation, first in time, § 183  
   Prior builder, dams, § 147, p 860

Superiority, valid appropriation to subsequently acquire riparian rights, § 173  
 Supervision, irrigation, § 315  
 Supplemental petition, pollution, § 54, p 704  
 Supplemental statement, appropriation, application for permit, § 180, p 965  
 Supply, artificial channel, § 129, p 844  
 Supply and distribution of water, §§ 264-283, pp 116-161  
   Abandonment, municipal contract, § 272  
   Actions and proceedings by and against municipality, § 276, pp 133-138  
   Adequate supply, § 278, p 145  
   Adjoining municipality, § 265, p 118  
   Amount of compensation, noncontractual or implied contractual duty to pay for water furnished, § 274, p 129  
   Annual contract of municipality, § 268  
   Approval, district, state or federal officers, § 265, p 118  
   Assignments and municipal contracts, § 271  
   Authority,  
     Municipal officers to contract, § 279, p 147  
     Municipality to contract, § 265, pp 116-119  
   Benefit of consumers, contracts of municipalities for, § 279, p 146  
   Bids and deposits, § 266  
   Breach of municipal contract, § 273  
   Certiorari, review of municipal water supply contract, § 276, p 133  
   Charges by receiver of self-liquidating municipal water system, § 275  
   Charter limitations on right to charge, § 283, p 159  
   Compensation, implied authority of municipality to pay, § 268  
   Conditional payments, hydrant and hydrant rentals, § 270  
   Conditions of contract, § 268  
   Construction of municipal contracts, § 271  
   Consumers,  
     Contracts of as municipalities with or for benefit of, § 279, p 146  
     Municipality purchasing water for use of citizens as, § 275  
   Contiguous municipalities, § 265, p 118  
   Contracts,  
     Between water companies, § 282  
     Failure to furnish, action, § 225, p 1073  
     Municipalities, § 265, pp 116-119  
       Benefit of consumers, § 279, p 146  
       Municipalities with consumers, § 279, p 146  
       Terms and conditions, § 268  
   Conversion, tort liability of municipality, § 276, p 133  
   Covenant running with land, § 279, p 147  
   Credit of municipality, pledge for supply, § 265, p 117  
   Defective contract, ratification, § 267  
   Defenses, action by or against municipality, § 276, p 134  
   Dependent covenants, municipal contracts, § 271  
   Deposits, § 266  
   District officers, approval of municipal contract, § 265, p 118  
   Duration,  
     Municipal contract, § 268  
     Service, private consumers, § 279, p 148

## Supply and distribution of water—Continued

- Equitable remedy of municipality against water company, § 276, p 134
- Exhaustion of municipal authority to contract, § 265, p 117
- Extension of municipal contract, § 268
- Federal officers, approval of municipal contract, § 265, p 118
- Federal taxes, remission or payment under municipal contract, § 268
- Force or pressure, municipal contracts, § 268
- Form of action, breach of contract, § 276, p 134
- Form of municipal contract, § 266
- Fraud, ordinance procured by, § 266
- Free supply, § 283, p 158
  - Obligation to pay, § 274
- Function of obligations, municipality purchasing water system, § 279, p 147
- Furnishing water directly to municipality, § 265, p 119
- Further or other supply of municipality, § 265, p 119
- Greater supply at less pressure, § 273
- Hydrant and hydrant rentals, § 270
  - Obligation of municipality to pay as affected by purity and quality of water, § 269
- Implied obligations, § 274
- Improvement of water system, obligation to pay hydrant rentals as dependent on, § 270
- Indefinite term, municipal contract, § 268
- Independent covenants, municipal contracts, § 271
- Injunctions, right to prevent municipality or officers from shutting off water supply, § 276, p 133
- Invalid ordinances, § 266
- Kind of meter designated to be used, § 280, p 151
- Mandamus to compel supply of water to municipal parks, § 276, p 133
- Modification, municipal contract, § 272
- Monopolies, contracts of municipalities, § 265, p 117
- Municipal contracts with other municipalities, § 265, p 118
- Nominal charge, § 283, p 158
- Noncontiguous municipalities, § 265, p 118
- Noncontractual obligations, § 274
- Operation as municipal contracts, § 271
- Ordinance procured by fraud, § 266
- Payment,
  - Hydrant rentals, § 270
  - Taxes, § 268
- Performance of municipal contract, § 273
- Pledge of municipal credit, § 265, p 117
- Portion of town, § 265, p 117
- Power of municipality to contract, § 265, pp 116-119
- Pressure, municipal contracts, § 268
- Private consumers, § 277
- Priorating of supply, § 359
- Public utilities commission, regulation and municipal contract, § 268
- Purity and quality of water, § 269
- Quantity of water, municipal contracts, § 268
- Rates, § 275
  - Municipal contract with other parties, § 268
  - Noncontractual and implied contractual duty to pay for water furnished municipality, § 274

## Supply and distribution of water—Continued

- Ratification, defective contracts, § 267
- Receivers, charges, self-liquidating municipal water system, § 275
- Referendum, rate regulation subject to, § 275
- Refusal to supply for nonpayment of rates and charges, § 305
- Regulation,
  - Rates by municipality, § 275
  - Supply and use, § 280, pp 149-154
- Remission of taxes, § 268
- Renewal of municipal contract, § 268
- Rescission, municipal contract, § 272
- Restrictions by contracts, § 265, p 118
- Sale of goods, § 279, p 147
  - Water company to private consumer, § 279, p 148
- Shutting off supply for violation and regulation, § 280, p 151
- Source of supply, § 265, p 117
- State officers, approval of municipal contract, § 265, p 118
- State regulation, rates of municipal water supply, § 275
- State regulatory agency, abrogation of municipal contract, § 272
- State tax, remission or payment according to municipal contract, § 268
- Statutory limits on right to charge, § 283, p 159
- Statutory obligation to furnish water, § 274
- Sufficiency of supply, water company's contract with private consumer, § 279, p 149
- Terms of contracts, § 268
- Use of streets, municipal contracts, § 265, p 119
- Water commissioners board, contracts, § 265, p 119
- Water company by municipality, § 282
- Water company contract with private consumer, § 279, p 149
- Water supply commission,
  - Power and authority to contract with municipality, § 265, p 118
  - Rates, power to determine, § 275
- Supplying water for irrigation as public use, § 315
- Supporting water of surface stream, appropriation, § 170, p 906
- Sureties, irrigation districts, contractors' bonds, § 321, p 302
- Surface drain, § 112, n 91
- Surface drainage,
  - Pollution, § 46
  - Public and municipal water supply, § 232, p 21
- Riparian rights, § 8, n 88
- Surface elevation of island, flooding resulting from raising, § 19
- Surface of earth, beneath, § 2
- Surface waters, §§ 112-128, pp 799-841
  - Abandonment, drainage right, § 120
  - Acceleration of flow, § 116, p 815
  - Accumulations, ante
  - Actions, §§ 126-128
    - Act of God, § 127, p 829
    - Admissibility of evidence, § 127, p 829
    - Answer, § 127, p 829
    - Appeal, § 127, p 832
    - Attorney fees, § 127, p 833
    - Breach of contract, § 127, p 834

# WATERS

## Surface waters—Continued

### Actions—Continued

Burden of proof, § 127, p 829  
 Complaint, § 127, p 828  
 Damages, § 127, pp 827, 833  
 Declaration, § 127, p 828  
 Defenses, § 127, p 827  
 Evidence, § 127, p 829  
 Findings of fact, § 127, p 832  
 Future damages, § 127, p 827  
 General denial, § 127, p 829  
 Injunction, § 128, p 835  
 Instructions to jury, § 127, p 832  
 Issues, proof and variance, § 127, p 829  
 Judgment, § 127, p 832  
 Limitations, § 127, p 828  
 Parties, § 127, p 828  
 Petition, § 127, p 828  
 Plea, § 127, p 829  
 Pleadings, § 127, p 828  
 Presumptions, § 127, p 829  
 Questions of law and fact, § 127, p 831  
 Special plea, § 127, p 829  
 Successive suits, § 127, p 827  
 Verdict, § 127, p 832  
 Weight and sufficiency of evidence, § 127, p 829  
 Adverse use, § 113  
 Appropriation, § 113, § 170, p 906  
     Capture and diversion, § 181, p 950  
 Artificial drainage, § 116, p 811  
     Reasonable use, § 116, p 813  
 Artificial obstruction of drainage, § 114, p 805  
 Artificial ponds, tanks or water mains, § 112, n 91  
 Bavou, § 112, n 91  
 Body of water, § 112  
 Bog, § 112  
     Artificial drainage, § 116  
 Bona fide purchaser, drainage rights, § 120  
 Building eaves, § 112  
 Change of place, discharge, § 116, p 813  
 Character, loss, § 112  
 Cities, natural drainage, § 114, n 26  
 Civil law, natural drainage and obstruction, § 114  
 Collection, § 113  
 Common enemy, § 114, p 806  
 Condemnation, drainage for public use, § 114, p 805  
 Consent, increase of flow, § 116, p 813  
 Contempt, failure to close up drain, § 128, p 841  
 Contracts, easement or right of drainage, § 120  
 Contractual right to obstruct natural flow, § 122  
 Corporeal hereditament, § 113, n 14  
 Course or channel, § 112  
 Creation, right of drainage, § 120  
 Damages, ante  
 Definition, § 112  
 Deflection into sink hole, § 101, p 780  
 Diffused surface waters, § 112, n 91  
 Diffusion, § 112  
 Discharge in body, § 116, p 815  
 Discharge into natural watercourse or depression, § 117  
 Ditches, collection in body and discharge, § 116, p 815  
 Ditching, § 114, p 805  
 Drainage, § 112

## Surface waters—Continued

Duties, § 113  
 Easement, natural drainage, § 114  
 Eaves of buildings, § 112  
 Eavesdrip, § 124  
 Embanking, § 114, p 805  
 Evaporation, § 112  
 Extraordinary rainfalls, § 114, p 808, n 58  
 Falling rain, § 112, n 89  
 Flood waters, § 19  
     Distinguished, § 112  
 Forfeiture, drainage rights, § 120  
 Grant,  
     Drainage, § 114, p 805  
     Easement or right of drainage, § 120  
 Impounded waters, § 112, n 91  
 Improper drainage, actions, § 127, p 827  
 Increase of flow, § 116, p 813  
 Injunction, § 128, pp 835, 839  
 Knowledge of conditions, § 114, p 805  
 Land-locked basin, artificial drainage, § 116  
 Law of gravity, § 112  
 Liabilities, § 113  
 License,  
     Drainage, § 114, p 805  
     Easement or right of drainage, § 120  
 Loss, § 112  
     Drainage rights, § 120  
 Manner of discharge, change, § 116, p 813  
 Marsh, § 112  
     Artificial drainage, § 116  
 Maxims, § 116, p 813  
 Melting snow, § 112, n 89  
 Modified common-law rule, § 114, p 806  
 Natural drainage, §§ 112, 114  
 Natural drainways or depressions, obstruction § 114, p 807  
 Negligence, ante  
 New artificial channels, § 116, p 814  
 Nonuser, drainage rights, § 120  
 Notice, apparent easement, § 120, n 66  
 Nuisance, ante  
 Obstruction and detention, ante  
 Overflow waters distinguished, § 112  
 Ownership, § 113  
 Perennial stream, obstruction or diversion, § 114 p 805  
 Permanent structure obstructing drainage, § 114 p 805  
 Persons liable, drainage, § 125  
 Pollution, § 113  
 Pond,  
     Artificial drainage, § 116  
     Collection in body and discharge, § 116, p 815  
 Pool, collection in body and discharge, § 116, p 815  
 Pot holes, § 112, n 91  
 Potential easement, § 120  
 Prescription, ante  
 Private nuisance, dam preventing drainage, § 114 n 27  
 Privilege, drainage rights, § 120  
 Public power and irrigation district, § 114, p 804 n 48  
 Quantity, discharge, § 116, p 813  
 Quasi easement, § 120  
 Railroads, ante

## Surface waters—Continued

- Rain water and eavesdrop, § 112, n 89, § 124
- Reasonableness of use, § 114, p 805
- Restoration, land to natural level, § 114, n 27
- Rights, § 113
- Riparian rights, § 113
- Rural districts, § 114, p 805
- Severance of tenements, § 120
- Slough, § 112, n 91
- Snow, § 112, n 89
- Source of supply, § 4, p 598
- Swale, § 113
- Swamps, artificial drainage, § 116
- System of drainage, § 120
- Title, § 113
- Transfer, right of drainage, § 120
- Urban property, drainage, § 114, p 808
- Use, drainage, rights, § 120
- Villages without sewer system, § 114, p 805
- Volume, discharge, § 116, p 813
- Surmise, subterranean waters, proceedings and relief, § 101, p 785
- Surplus, appropriation, determination, § 203, p 1021
- Surplus revenue, rates and charges producing, § 289, p 174
- Surplus waters.
  - Appropriation, transfer, § 190, p 987
  - Burden of proof, § 101, p 783
  - Distinctions among nonresidents, municipal supply of water, § 278, p 142
  - Irrigation, remaining after as property of landowner, § 314
  - Municipal waterworks and water districts, extension of water mains outside municipal limits, § 242, p 59
  - Municipality disposing to nonresidents, § 278, p 140
  - Prescription, § 164
  - Restoration after diversion, § 62
  - Sale to prevent waste, § 352, p 403, n 12
  - Secondary appropriation, § 185, p 958
  - Temporary application by political subdivision to other beneficial uses, § 230
  - Third persons, compelling purchase, § 185, p 958
- Surplusage, riparian rights, actions to determine and protect, § 14
- Surrender, appropriation, loss of rights, § 193, p 994
- Surrender for cancellation, appropriation, permit, § 180, p 943
- Surrounding circumstances, obstruction and detention, § 21
- Survey,
  - Appropriation actions, costs, § 205
  - Irrigation districts, contract for, § 321, p 301
- Suspension, riparian rights, § 13
- Swale,
  - Line of flow, § 4, p 602
  - Natural watercourses, § 4, p 602
  - Obstruction and detention, § 15
  - Surface waters, § 113
  - Drainage, § 117
- Swamp,
  - Classification, § 103, n 70
  - Source of supply, § 4, p 598
  - Surface water, artificial drainage, § 116
- Swamp land, apportioning water of irrigation ditch, § 352, p 407, n 77

- Swamp lands reclaimed, appropriation for benefit, § 172
- Swamp mud, pollution, § 49
- Swimming,
  - Lakes and ponds, § 105, n 84
  - Sufferance use, § 162, n 74
- Swimming pools, riparian rights, § 12, n 87, 90
- Swimming purposes, pollution rendering unfit, § 43, p 687
- System of drainage, surface water, § 120
- Tailings and slime from ore reduction mills, pollution, § 52, n 98
- Taking possession, prescription, § 160
- Tanbark, pollution, § 48
- Tanks, accumulation and storage on land, §§ 141-143, pp 856, 857
- Tapping lake, diversion, § 61
- Tax deeds,
  - Action to quiet title by or against water district, admissibility of evidence, § 243(7), p 88, n 16
  - Irrigation districts, § 337, p 356
- Tax liens, water districts, § 243(7), p 88
- Tax warrants, irrigation districts, power to issue, § 321, p 296
- Taxes,
  - Bonds of water districts secured by, § 243(6), p 79
  - Irrigation districts, ante
  - Nature of lien for water rates and charges, § 308, p 231
  - Payment,
    - Municipal contract for supply of water, § 268
    - Prescription, § 159, p 879
  - Public service water companies, § 262
  - Rates and charges,
    - Considered as, §§ 275, 284
    - Determination of reasonableness, § 293, p 183
  - Remission, municipal contract for supply of water, § 268
  - Water districts, authority to levy, § 243(7), p 82
- Taxpayers, irrigation district bond, action to cancel, § 331, p 324
- Technical definitions, grants, construction and operation, § 214
- Technical sense, diversion, § 58, n 36
- Technical trespass, appropriation, § 171
- Telephone lines, liability for damage to in construction or maintenance of works, § 309, p 234, n 96
- Temporary damages, subterranean waters, § 102
- Temporary detention, dams, § 18
- Temporary existence, § 2
- Temporary injunctions,
  - Appropriation, actions, § 202
  - Diversion, § 68, p 742
  - Flooding lands, maintenance of dam, § 37, p 679
  - Rates and charges, private consumer, discontinuance of supply, § 307, p 222
  - Sale of water for irrigation, enforcement of rates and charges, § 363, p 426
  - Unreasonable rates, proceedings for relief, § 295, p 193
- Temporary injuries, pollution, damages, § 56, p 719
- Temporary obstructions, damages, § 34
- Temporary overflows, flowage of lands, §§ 24, 26
- Temporary pollution, evidence, § 54, p 706
- Ten years, prescription, § 160
- Tenants Landlord and tenant, generally, ante

# WATERS

## Tenants in common,

- Appropriation, § 173, p 920
- Abandonment of right, § 193, p 997
- Joint use of same works, § 192, p 993
- Parties, § 199

## Contracts, § 221

- Diversion, changes, § 188
- Flooding lands, parties to action, § 36(6)
- Pollution, parties, § 54
- Prescription, § 162

## Tender of performance, contracts, § 222

## Tender of purchase price, municipal purchase of existing water system, § 237, p 38

## Tenure of office,

- Irrigation officers and employees, § 320, p 289
- Water districts officers, § 243(4)

## Term,

- Appropriation, leases, § 190, p 988
- Franchise of public service water companies, § 252

## Termination,

- Contracts, § 223
- Flowage of lands, easement, § 27, p 644
- Granted rights, § 212
- Irrigation districts, § 338
- Licenses, § 219
- Municipal contract for supply of water, § 272
- Prescriptive right, § 166
- Public service water companies,
  - Exclusive rights, § 252
  - Franchise, § 253
- Surface waters, easement or right of drainage, § 120

## Termini method, water districts, assessment method, § 243(7), p 85, n 78

## Territorial limits,

- Control of municipality operating water system beyond, § 241
- Municipality compelling acceptance of service to persons outside, § 278, p 141
- Public service water companies, § 251
- Water districts, § 243(3)

## Territory annexed to municipality, rates and charges, § 287, p 170

## Test, natural watercourses, § 4

## Test of water meter, § 280, p 151

## Theoretical inch, appropriation, units of measurement, § 186, p 964

## Third persons,

- Accretion rights, § 76
- Action by private service line owner to prevent unauthorized tapping of line, § 281, p 155
- Acts, flooding lands, burden of proof, § 36(9)
- Diversion, defenses, § 67, p 730
- Liability of officers of water district to, § 243(4)
- Rates and charges, bills incurred by, § 305
- Stranded or floating property, § 82
- Subterranean waters, partition decree, § 101, p 787
- Surface waters, actions for damages, defenses, § 127, p 827

## Thread or medial line, bed and banks of stream, § 71

## Threatened diversion, injunction, § 68

## Threatened irreparable injury, flooding lands, injunction, § 37, p 674

## Threatened pollution, injunction, § 55, p 712

## Tide waters, classification, § 2

## Tile drains, surface waters, persons liable, § 125

## Timber,

- Destroyed, flooding lands, damages, § 38, p 681
- Municipal watershed as part of city water system, § 240, n 83
- Stranded or floating property, § 82

## Time,

- Acceptance by electors of contract to purchase existing water system, § 237, p 37
- Accretion and alluvion, § 76
- Acquisition of existing water system by municipality, § 236
- Flooding and flowage, cause of action accrues, § 36(1)
- Measurement of quantity,
  - Grants, § 210, p 1051
  - Reservation and exceptions, § 214, p 1062
- Municipal purchase of existing water system, conveyance, § 239
- Obstruction and detention, removal or abatement, § 23
- Payment of rates and charges, § 302, p 213
- Performance,
  - Appropriation, specification, § 180, p 939
  - Contracts, § 222
  - Prescription, generally, ante
  - Riparian rights, attaching to lakes and ponds, § 104
  - Secondary appropriations, § 185, p 962
  - Surface waters, actions for damages, § 127, p 827

## Time of use,

- Appropriation, § 187
- Deeds and conveyances, rights and privileges § 210, p 1052
- Rates and charges, § 297, p 201

## Time to sue. Limitation of actions, generally, ante

## Title,

- Alluvion, § 76
- Appropriation,
  - Mortgages, § 190, pp 987, 988
  - Rights of way, § 192, p 991
- Appropriator, § 173, p 917
- Bed and banks of stream, § 71
- Grants, § 84
- Impounded water, § 146
- Legal remedies, § 83
- Desert Land Act, effect, § 173, p 919
- Great ponds, § 110
- Impounded water, § 145
- Irrigation and ditch companies, sale and transfer of stock, § 343, p 363
- Irrigation districts, property, § 321, p 301
- Lakes and ponds, land underlying, § 107
- Land, natural flow of stream, right as incident, § 15
- Municipal purchase of existing water system, § 239
- Reappearance of land after submergence or erosion, § 81
- Right of way for irrigation purposes, § 349, p 391
- Subterranean water, § 90
- Surface waters, § 113
- Third person, flooding lands, injunctive relief, defenses, § 37, p 676
- Tolerated invasion of premises, flowage of lands, § 26
- Tolls, water power companies, § 381
- Top soil, removal, surface waters, drainage, § 116, p 812, n 97

Topography,  
 Flood waters, § 20, p 630, n 97  
 Riparian rights, § 8

Torts,  
 Conversion, generally, ante  
 Dams, actions for damages, § 156  
 Division, venue of actions, § 67, p 731  
 Flooding lands,  
   Issues, proof and variance, § 36(8)  
   Joinder of parties, § 36(6)  
   Pleading, § 36(7)  
 Irrigation districts, § 309, p 235  
   Sale of bonds, § 324, p 312  
 Metropolitan water districts, § 309, p 235  
 Notice of claim, § 312, p 243  
 Rates and charges, wrongfully taken water, § 306  
 Total nonuser, prescription, § 159, p 883  
 Tourist camps, rates and charges, discrimination,  
   § 297, p 203, n 41

Town boards,  
 Contracts to supply village with supply of water,  
   § 265, p 118  
 Water districts, transfer of governing bodies to,  
   § 243(4)

Towns,  
 Irrigation districts, inclusion, § 319(3), p 280  
 Lot owners, surface waters, § 114  
 Water system, municipal acquisition, § 236

Trade loss, pollution, damages, § 56, p 718  
 Transfer, surface waters, easement or drainage, § 120  
 Transferee of property, pollution, relief, § 51  
 Transfers Deeds and conveyances, generally, ante  
 Transient property, § 1

Transportation,  
 Joint use of same works, § 192, p 993  
 Municipal use of natural facilities, § 242, p 57

Treaties, appropriation, § 173

Treble damages, rates and charges, recovery back of  
 amounts paid, § 307, pp 224, 226

Trees,  
 Destruction, pollution, damages, § 56, p 720  
 Injuries to, damages, § 38, p 684  
 Obstruction and detention, removal, § 23, n 49  
 Owner of irrigation canal easement liable for cut-  
   ting down, § 349, p 394, n 78

Trespass, § 151  
 Dams, construction as, § 147, p 860  
 Deliberate trespass, liability of irrigation dis-  
   tributor, § 365, p 434  
 Diversion, defenses, § 67, p 730  
 Entry on premises to disconnect water appliances,  
   § 307, p 226  
 Flooding, § 36(2)  
 Flooding lands,  
   Injunction, § 37  
   Issues, proof and variance, § 36(8)  
   Joinder of parties, § 36(6)  
 Flowage of lands, § 24, n 60  
 Interference with irrigation rights, § 317, p 262,  
   n 22  
 Liability of municipality for damage from wa-  
   ter leaking from reservoir, § 309, p. 238  
 Permanent and uncompensated diversion of wa-  
   ters by public, § 227  
 Pollution, form of action, § 54, p 701

Trespasser,  
 Appropriation, acquisition of rights, §§ 171, 176

Trespasser—Continued  
 Dams, safekeeping, § 148, n 43, 44  
 Ownership of property and ice, § 383  
 Prescription, § 163  
 Riparian rights, § 8  
 Stranded or floating property, § 82

Trestles, obstruction and detention, § 20, p 627

Trial,  
 See, also, Questions of law and fact, general-  
   ly, ante  
 Appropriation, § 203, p 1019  
 Artificial channels, injuries, § 137  
 Dams, actions, §§ 151, 156  
 Diversion, § 67, p 733  
 Escaping waters, § 143  
 Flooding lands, § 36(10)  
 Flowage of lands, § 32  
 Injuries incident to supply and use of water,  
   § 312, p 248  
 Irrigation district,  
   Action by or against, § 321, p 306, § 331,  
     p 326  
   Tax assessments, § 335, p 347  
 Irrigation purposes, liabilities and injuries inci-  
   dent to supply and use, § 367, p 446  
 Irrigation right, actions to establish and protect,  
   § 317, p 262  
 Irrigation works, injuries or damages to, § 351  
 Mechanical and manufacturing purposes, injuries,  
   § 375  
 Municipality on water supply contract, actions by  
   or against, § 276, p 137  
 Point of diversion, change, § 189, p 979  
 Pollution, damages, § 54, p 708  
 Private consumers, supply to, § 281, p 156  
 Surface waters, injunction, § 128, p 839  
 Water power companies, injuries incident to sup-  
   ply or use, § 382

Trial by court, appropriation, findings, § 203, p 1023

Tributaries,  
 Appropriation, use and natural flow, § 181, p 949  
 Municipal corporation's right to undiminished  
   flow, § 230  
 Particular stream, burden of proof, § 101, p 783  
 Riparian rights, § 8, n 90  
 Subterranean waters, § 89

Trust funds, water districts, establishment from gross  
 income to guaranty payment of local improve-  
 ment bonds, § 243(6), p 80, n 36

Trust property, irrigation districts,  
 Land acquired because of delinquencies in assess-  
   ment, § 321, p. 300, n 44  
 Title to water and works, § 352, p 403

Trustees,  
 Irrigation district officers, § 320, p 289  
 Municipal purchase of existing water system,  
   § 239  
 Public service water companies, § 259  
 Unreasonable rates, proceedings for relief, § 295,  
   p 192

Trusts, great ponds, § 110

Tunnels,  
 Appropriation, rights of way, § 192, p 991  
 Contracts, construction and operation, § 221

Twenty years, prescription, § 160

Type of construction, dams, § 147, p 859, n 30



# WATERS

## Typhoid,

Contaminated water, admissibility of evidence, § 312, p 247, n 69

Liability of municipality for death from, § 311, n. 14

## Ultra vires contracts,

Irrigation district contracts, § 321, p 209, n 28, § 345, p 377

Municipal contract for supply of water, defense to action for hydrant rentals, § 276, p 135

Municipal corporation acquiring existing water system, § 236, § 237, p 36

Power to regulate stream flow as part of plan to improve municipal water supply as, § 230

Rate contracts of municipal water system, § 287, p 170

Supply and distribution of water contracts, validation, § 267

Unborn calves, pollution, damages, § 56, p 720

Unchangeable banks, natural watercourses, § 4, p 602

Unclean hands,

Appropriation, appeals, § 204, p 1039

Rates and charges, failure to protest against minimum charge, § 307, p 222

Undefined waters, pollution, § 43, p 688

Undercurrent of surface stream, appropriation, § 170, p 906

## Underground conduit,

Artificial channels, § 130, p 846, n 21

Implied grant, § 207, n 58

## Underground stream, § 86

Appropriation, § 170, p 906

Course alleged, burden of proof, § 101, p 783

Undiminished flow, riparian rights, § 9

Undue retardation of flood water, dams, § 148, n 42

Unequivocal intention, prescriptions, interruption, § 161

Unfit for domestic purposes, pollution, § 43, p 687

Unhealthy nature, dams, § 148

Unhealthy odors, pollution, § 43, p 687

Unincorporated mutual associations, irrigation and ditch companies, § 340

Uniform route, artificial channels, § 130, p 848

Uniformity, rates and charges, § 297, pp 200-206, § 300

Unilateral contracts, municipalities, extension of water mains under contract with consumers, § 242, p 59

Uninterrupted exercise of easement, flowage of lands, § 26

## Uninterrupted use,

Pollution, § 50

Prescription, § 161

Unit for rate making, § 293, p 182

United States, acquisition of public water supply by contract with, § 228, n 90

United States property, irrigation districts, taxation, § 333, p 331

United States rights, § 1

United States War Department, consent to municipal contract, § 265, p 119

Units of measurement, appropriation, § 186, p 964

## Unity of possession,

Appropriation, tenancy in common, § 173, p 920

Prescription, §§ 162, 166

Universities, free supply or nominal charge for water supply, § 283, p 158, n 99

Unlimited permission, prescription, § 162

Unprecedented storms and floods,

Liability for injuries, § 29, p 649

Obstruction and detention, dams, § 18

Unreasonable diversion, § 61, § 68, p 735

Unreasonable rates, proceedings for relief, § 205 pp 192-196

Sale of water for irrigation, § 363, p 426

Unreasonable use, pollution, § 43, p 688

Unsanitary condition, surface water, pollution, § 123

Unusual freshets, source of supply, § 4, p 599

## Upkeep,

Artificial channels, § 130, p 849

Dams, § 147, p 864

Upper riparian owner, § 9

Urban property, surface waters, § 114, p 808

Injunction, § 128, p 836

Usage Custom and usage, generally, ante

Appropriation, § 181, p 948

Amount in excess of needs, § 186, p 903

Bed and banks of stream, § 75

Changes, § 188

Diversion, defenses, § 67, p 730

Interference, injunction, § 225, p 1074

Irrigation purposes, § 314

Lakes and ponds, § 105

Member of public, prescription, § 159, p 870

Municipal water works and water districts, § 234, p 25

Natural lakes and ponds, ante

Natural stream, appropriation, § 192, p 993

Nonriparian lands, diversion, § 60

Public without appropriation, § 170, p 910, n 3

Riparian rights, §§ 5, 10, 12

Subterranean waters, nature and extent, § 93, p 767

Use of buildings, rates and charges established with respect to, § 284

Use of property, flooding lands, damages, § 38, p 682

Useful business, pollution, defenses, § 55, p 712

Usual flow, riparian rights, § 9

Usufruct, riparian rights, § 5

## Usufructuary right,

Appropriation, nature, § 181, p 944

Flowing water, § 15, n 37

Impounded waters behind dam, § 145

Prescription, § 165

Utility, surface waters, artificial drainage, § 116, p 813

Utility commission Public service commission, generally, ante

Utilization, natural configuration of land, artificial channels, § 130, p 847

Vacancies, irrigation districts, board of directors, § 320, p 293

## Validation,

Contract for supply and distribution of water, § 267

Irrigation districts, § 318, p 269

Taxes and assessments, § 335, p 344

Lien for rates and charges, § 308, p 230

Municipal water works and districts, ante

Water district,

Bonds, § 243(6), p 81, § 243(7), p 87

Organization, § 243(2), p 64, § 243(7), p 87

Validity, water district creation, § 243(2), pp 62-67

## Value,

- Appropriation, actions, § 194, p 1002
- Buildings, rates and charges established with respect to, § 284
- Company's properties, consideration in determining reasonableness of rates, § 293, p 185
- Crops, surface waters, actions for damages, § 127, p 833
- Existing water system on purchase by municipality, § 238, pp 40-45
- Flooding lands,
  - Burden of proof, § 36(9), n 24
  - Injunctive relief, defenses, § 37, p 675
  - Issues, proof and variance, § 36(8)
- Really injured, pollution, evidence, § 54, p 706
- Value of use, prescription, § 161
- Varying depth of stream bed, riparian rights, § 10
- Varying manner of use, prescription, § 159, p 879
- Vegetation, removal, surface waters, drainage, § 116, p 812, n 97
- Veins, subterranean waters, § 86
- Velocity,
  - Natural watercourses, § 4
  - Riparian rights, reasonableness of use, § 11
  - Tributary streams, floods, § 20, p 631
  - Unreasonable diversion, § 61

Vendor's lien, machinery incorporated into municipal water works, power to foreclose, § 241

## Venue,

- Appropriation actions, § 195
- Diversion actions, § 67, p 731
  - Injunctive relief, § 68, p 736
- Flooding lands, damages, § 36(3)
- Irrigation districts, flat rate water assessments, § 337, p 351, n 63
- Private landowner's action against mutual water storage and canal company for damages and injunctive relief, § 367, p 446, n 80

Verbal assertion of claim, prescription, § 162

## Verdicts,

- Actions involving rights and privileges, § 225, p 1077
- Appropriation actions, § 203, p 1023
- Directed verdict, irrigation works, injuries or damages to, § 351
- Flooding lands, § 36(10)
- Flowage of lands, § 25, p 640
- Injuries incident to supply and use of water, § 312, p 249
- Irrigation district, action by or against, § 321, p 306
- Irrigation purposes, liabilities and injuries incident to supply and use, § 367, p 447
- Mechanical and manufacturing purposes, injuries, § 375
- Municipal water supply contract actions, § 276, p 137
- Pollution, damages, § 54, pp 709, 710
- Subterranean waters, proceedings and relief, § 101, p 782
- Surface waters, actions for damages, § 127, p 832

## Vested rights,

- Artificial channels, § 129, p 845
- Change, point of diversion, § 188, n. 18
- Forfeiture, § 169
- Impairment, § 169

## Vested rights—Continued

- Mutual nonprofit irrigation company, shares of stock, § 343, p 365
- Prescription, § 165
- Preservation, § 180, p 937
- Riparian owners to use water for irrigation, § 314, n 7
- Riparian rights, § 9
- Vexatious litigation, diversion, injunction, § 68
- Viaducts, artificial channels, § 130, p 850
- Vigilant man, prescription, § 159, p 881
- Villages,
  - Contract of town board to supply water to, § 265, p 118
  - Irrigation districts, inclusion, § 319(3), p 280
  - Sewer system, surface waters, § 114, p 805
- Violence, injuries incident to supply and use of water, punitive damages, § 312, p 250
- Volume of water,
  - Appropriation, judgment, res judicata, § 203, p 1031
  - Artificial channels, § 133, n 5
  - Natural watercourses, § 4, p 597
  - Riparian rights, reasonableness of use, § 11
  - Sale for irrigation, contracts with consumers, § 361, p 418
  - Surface waters, discharge, § 116, p 813
  - Tributary streams, floods, § 20, p 631
- Voluntary abandonment, prescription, §§ 161, 166
- Voluntary extension, public service water companies, mains and pipes, § 257, p 107
- Voluntary payments of rates and charges, recovery back, § 307, p 224
- Votes and voting Elections, generally, ante
- Vouchers, inspection by municipality with option to purchase existing water system, § 237, pp 36, 40
- Wage assignments, acceptance of payment of water bills, § 302, p 210, n 28
- Wages, breach of covenant, damages, § 225, p 1078
- Waiver,
  - See, also, Estoppel, generally, ante
  - Appropriation, ante
  - Assignment by water company of rights and privileges under contract with city, right to question, § 271
  - Bed and banks of stream, state rights, § 71
  - Diversion,
    - Objection to change, § 188
    - Restoration of water, § 62
  - Flooding lands, objections to title, § 36(5)
  - Free use of flow, § 15, n 39
  - Great ponds, state rights, § 110, n 57
  - Injured person of right to damages against irrigation company, § 365, p 433
  - Irrigation district, tax irregularities, § 335, p 343
  - Leases, damages, § 224
  - Municipality of right to complete system on purchase of existing water system, § 237, p 39
  - Obstruction and detention, damages, § 36(1)
  - Pollution, damages, evidence, § 54, p 708
  - Public service water companies, right to forfeiture franchise of for breach of duty, § 253
  - Purity and quality of water contracted by municipality, § 269
  - Rates and charges,
    - Action to collect, § 304

# WATERS

## Waiver—Continued

### Rates and charges—Continued

Company turning on water on false representation and user's nonliability, § 305

Regulations of water company, § 280, p 150

Riparian owners, rights and claim as appropriators, § 200

Water district bonds, right to tax validity, § 243(6), p 82

Water district organization and operation, § 243(2), p 67

Walls, bed and banks of stream, § 74

Wandering character, § 1

Subterranean waters, § 90

Want of title, flooding land, defenses, § 36(5)

Wanton use,

Burden of proof, § 67, p 732

Injuries incident to supply and use of water, punitive damages, § 312, p 250

Privileges, riparian rights, § 11

Subterranean waters, punitive damages, § 102

Surface waters, actions for damages, § 127, p 835

Wants of community, prior appropriation, § 168

War, appropriation, extension of time, § 180, p 941

Warehouse sprinkler system, assessment for water fire line service, § 285, n 89

Warnings, pollution, consideration, § 55, p 712

Warrants Irrigation districts, ante

Warranty of title, municipal purchase of existing water system, § 239

Wash, classification, § 2

Washing, riparian rights, reasonableness of use, § 12

Waste material,

Obstruction and detention, § 17, n 76

Pollution, §§ 47, 48

Waste water,

Appropriation, § 170, p 909

Avoidance, § 186, p 968

Disposition, § 191

Sources of supply, § 181, p 949

Criminal offenses, § 313

Dams, damages for injuries, § 150

Decree adjudicating priority, § 185, p 959, n 96

Distribution and supply for irrigation, § 352, p 404

Diversion, injunctive relief, § 68, p 735

Equitable right of irrigation company's stockholder to use of, § 353

Flat rates and charges conducive to, § 298

Flooding lands, injunctive relief, § 37, p 679

Injunction to prevent disposal into irrigation canal, § 351

Irrigation purposes,

Remedies for interference with, § 367, p 441

Unreasonable use of water, § 314

Obstruction and diversion, § 96

Prescription, § 164

Reservations and exceptions, construction and operation, § 214, p 1061

Secondary appropriations, § 185, pp 958, 959

Subterranean waters,

Allowing to run, § 95

Burden of proof, § 101, p 783

Damages, § 102

Injunction, § 100

Obstruction and diversion, § 96

## Waste water—Continued

### Subterranean waters—Continued

Weight and sufficiency of evidence, § 101, p 785

Wasteful diversion, § 61

Wasteful use, appropriation, § 177

Forfeiture, § 193, p 999

Water authority, rates and charges, regulation by public utility commission, § 290

Water commissioners board,

Action to enforce municipal water supply contract, § 276, p 134

Contracts for municipal supply of water, § 265, p 119

Water districts,

Appeals, ante

Charter as grant of proprietary rights, § 226, n 16

Evidence,

Acts by or against, § 243(8)

Bonds, validity, § 243(6), p 82

Organization, attack on proceedings, § 243(2), p 67

Proceedings to protect rights, § 233

Rates and charges, regulation by public utility commission, § 290

Water improvement districts,

Governing board, § 243(4), n 27

Remedy for enforcement of irrigation law, § 317, p 262

Water line, alluvion, necessity of title, § 76

Water power,

Great ponds, § 110

Obstruction and detention, dams, § 18

Water power companies, §§ 376-382, pp 458-462

Assignment of lease of water power, § 380

Charges by state for diversion of water, § 377

Consolidation, § 376

Construction of plant, § 379

Injuries incident to supply and use and remedies, § 382

Issuance of stock, § 378

Lease of water or power, § 380

Nature and organization, § 376

Rates and charges, § 381

Remedies for injuries incident to supply or use, § 382

Rights and powers, § 378

Sale of stock, § 378

Tolls and other charges, § 381

Water storage districts, irrigation districts, inclusion, § 319(3), p 280

Water supply commission,

Power and authority to contract with municipalities, § 265, p 118

Rates, power to determine, § 275

Sale of water to municipality, action to recover for, § 276, pp 173, 174

Water supply company, diversion, persons liable, § 64

Water users' association, contracts with secretary of interior, § 316, p 258

Water works company, diversion, persons liable, § 64

Watering Livestock, ante

Water's edge, lakes and ponds, § 107

Watershed,

Control, prescription, § 158

Subterranean waters, § 89

**Weather** Climatic conditions, generally, ante  
**Weight and sufficiency of evidence,**

Appropriation, § 201, p 1016

Artificial channels, § 137

Bed and banks of stream, ownership, § 83

Diversion, § 67, p 733

Injunctive relief, § 68, p 739

Flooding lands, § 36(9)

Forfeiture of right of way for irrigation purposes, § 349, p 395

Injuries incident to supply and use of water, § 312, p 247

Irrigation districts,

Actions by or against on bonds, § 331, p 325

Exclusion of lands, § 319(3), p 281

Tax title actions, § 337, p 359

Validity of organization, § 319(4)

Irrigation works, damages or injuries to, § 351

Municipality on water supply contract, action by or against, § 276, p 137

Point of diversion, application for change, § 189, p 981

Pollution, § 54, p 707

Rates and charges, duress in payment, § 307, pp 226, 227

Right to use or be furnished, § 225, p 1076

Subterranean waters, proceedings and relief, § 101, p 785

Supply of water to private consumer, § 281, p 156

Surface waters,

Actions for damages, § 127, p 829

Injunction, § 128, p 837

Unreasonable rates, proceedings for relief, § 295, p 195

Water districts, action by or against, § 243(8)

**Weights and charges,** water power companies, diversion of water, § 377

**Well water,** fitness for human consumption, instructions to jury, § 101, p 781

**Wells,**

Appurtenances passing by conveyance, § 217

Artesian wells, generally, ante

Artificial channels, diversion, § 130, p 847

Contracts, construction and operation, § 221

Deeds and conveyances, interest conveyed, § 210, p 1049

Evidence, grants of rights to use, § 225, p 1076

Granted rights, abandonment, § 212

Injury to, § 96

Manner of use, reservations and exceptions, § 214, p 1062

Prescription, § 164

Reservations and exceptions,

Construction and operation, § 214, p. 1060

Grants, § 213

**Wells—Continued**

Right to take from, grant, § 207

Salt water, right to inject, § 210, p 1049

Severance, water rights from lands, § 207

Subterranean waters, § 90

Termination of granted rights, § 212

Use, interference, injunction, § 225, p 1074

Well-known channel, subterranean waters, § 89

Western states, appropriation, § 167

Wharf, lakes and ponds, § 105

Prescription, § 160, n 17

Wide sheet of water, § 4, p 602

Widening ditch, surface waters, artificial drainage, § 116, p 811, n 95

Widest channel, defined, § 41

Width and depth,

Natural watercourses, banks, § 3

Right of way for irrigation purposes, title and rights acquired, § 349, p 393

Wild meadow lands, appropriation, § 186, p 970

Wind direction, riparian rights, § 8, n 74

Winter flow waters, storage for direct irrigation, § 348, n 64

Wire fence across nonnavigable stream, § 15

Withdrawal,

Lands, appropriation, § 170, p 910

Municipality from water district, § 243(9)

Reliction or dereliction, § 78

**Witnesses,**

Credibility,

Injuries incident to supply and use of water, § 312, p 247

Validity of irrigation district organization, § 319(4)

Expert testimony, generally, ante

Water district officers, removal proceedings, § 243 (4)

Wood, stranded or floating property, § 82

Wood washed away, flooding lands, damages, § 38, p. 682

Wooden mains, public service water company compelled to replace, § 257, p 106

Working capital, rates and charges, determination of reasonableness, § 293, p 183

World, appropriation, notice, § 176

Writ of error, appropriation, actions, § 204, p 1036

Written licenses, § 219

Written notice, appropriation, § 176

Wrongful entry on public lands, appropriation, § 171

Wrongfully taken water, rates and charges, § 306

Year, time of use, § 187

Zone method, assessments by water district, § 243(7), p 85, n 78

Zone of service, water company as bound to supply water beyond, § 278, p. 144

# INDEX TO WEAPONS

- Actions for damages occasioned by discharge, § 29
- Admissibility of evidence,
  - Actions for damages for discharge of fire arm, § 29
  - Civil liability for sale, gift or loan, § 32
  - Criminal responsibility,
    - Carrying or possessing, § 13, p 510
    - Shooting fire arms, § 21
- Advertising for sale, regulations, § 2, p 479
- Affirmative defense,
  - Civil liability for sale, gift or loan, § 32
  - Criminal responsibility for carrying or possessing, § 13, p. 510, n 43
- Aggravated assault, criminal responsibility, shooting fire arms, § 19
- Aliens, restrictions on right to bear arms, § 2, p 478
- Ammunition, carrying of weapon to procure, § 5, p 486
- Animals, injuries resulting to from fright, § 28
- Another's property, criminal responsibility for shooting fire arms on, § 20
- Appeal and error, criminal responsibility,
  - Carrying or possessing, § 14
  - Pointing or exhibiting, § 18
  - Shooting fire arms, § 21
- Arms, definitions, § 1, § 2, p 473
- Assumption of risk, civil liability, § 29, n 50
- Attack, persons fearing as privileged to carry, § 9, p 500
- Automatic pistol, definitions, § 1, n 24
- Bailiff, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495
- Bayonet, criminal responsibility for carrying or possessing, § 6
- Belt pistol, definitions, § 1
- Bill of rights, right to bear arms, § 2, p 474
- Billies, criminal responsibility, prohibited weapons, § 6
- Billy club, deadly weapons, § 1, n 48
- Blackjacks,
  - Criminal responsibility, prohibited weapons, § 6
  - Restrictions on right to bear arms, § 2, p 476
- Bludgeons,
  - Criminal responsibility, prohibited weapons, § 6
  - Definitions, § 1
  - Restrictions on right to bear arms, § 2, p 476
- Borrowers, criminal responsibility, § 5, p 485
- Bowie knives, criminal responsibility, prohibited weapons, § 6
- Brass knuckles,
  - Criminal responsibility, prohibited weapons, § 6
  - Self-defense weapons, § 9, p 501
- Breach of peace, carrying or possession, § 3
- Breaking continuity of journey, exemption of traveler for carrying, § 9, p 499
- Bundle, criminal responsibility for carrying or possessing in, § 8
- Burden of proof,
  - Actions for damages for discharge of fire arm, § 29
  - Civil liability for sale, gift or loan, § 32
- Burden of proof—Continued
  - Criminal responsibility,
    - Carrying or possessing, § 13, p 508
    - Pointing or exhibiting, § 18
    - Shooting fire arms, § 21
  - Business place, criminal responsibility for carrying or possessing in, § 9, p 502
  - Butchering, criminal responsibility for possession and carrying for, § 5, pp 483, 486
  - Buyers, criminal responsibility, § 5, p 485
  - Carriers, criminal responsibility of persons carrying while engaged in business of, § 9, p 501
  - Carrying,
    - Criminal responsibility, § 3
    - Regulating right to bear arms, § 2, p 475
  - Cartridges, criminal responsibility for carrying on possession of fire arms for purpose of procuring, § 5, p 483
  - Children and minors,
    - Damages for injuries to, § 28, n 23
    - Liability for negligent sale to, § 31
    - Restrictions on right to bear arms, § 2, p 478
  - Circumstantial evidence, criminal responsibility for carrying or possessing, § 13, p 513
  - Civil officers, criminal responsibility for carrying on possessing, exemption or privilege, § 9, p 495
  - Civil procedure, § 29
  - Claw hammer, deadly weapons, § 1, n 48
  - Club, pointing or exhibiting, criminal responsibility, § 17
  - Colored persons, restrictions on right to bear arms, § 2, p 478
  - Concealed weapons,
    - Criminal responsibility, § 4
    - Persons fearing attack, § 9, p 500
    - Prohibition against carrying, § 2, p 475
  - Conditions precedent, right to bear arms, § 2, p 477
  - Confiscation, weapon involved in offense, § 25
  - Conservators of the peace, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495
  - Constitutional and statutory regulation, right to bear arms, § 2, pp 472-480
  - Constructive carrying, criminal responsibility, § 4
  - Containers, criminal responsibility for carrying on possessing in, § 8
  - Contributory negligence,
    - Actions for damages, § 29
    - Civil liability for violation of statutory ordinance, § 31
  - Convicted persons, transporting, shipping or receiving of fire arms, § 2, p 477
  - Corpus delicti, carrying of weapon as, § 11
  - Criminal responsibility, §§ 3-23, pp 480-524
    - Admissibility of evidence, carrying or possessing, § 13, p 510
    - Appeal and error, carrying or possessing, § 14
    - Bayonets, carrying or possessing, § 6
    - Billies, prohibited weapons, § 6
    - Blackjacks, prohibited weapons, § 6
    - Bludgeons, prohibited weapons, § 6
    - Borrowers, § 5, p 485

## Criminal responsibility—Continued

Bowie knives, prohibited weapons, § 6  
 Brass knuckles, prohibited weapons, § 6  
 Burden of proof, carrying or possessing, § 13, p 508  
 Butchering, possession and carrying for, § 5, p 486  
 Buyers, § 5, p 485  
 Carrying of weapons, § 3  
 Circumstantial evidence from carrying or possessing, § 13, p 513  
 Common carriers, carrying or possessing by persons engaged in business of, § 9, p 501  
 Concealment, § 4  
     Trial and review, § 14  
 Constructive carrying, § 4  
 Daggers, prohibited weapons, § 6  
 Dangerous weapons, carrying or possession, § 6  
 Deadly weapons, carrying or possession, § 6  
 Defective pistols, carrying or possession, § 6, p 488  
 Defenses, § 10  
     Trial and review, § 14  
 Duks, prohibited weapons, § 6  
 Disarming another, carrying and possession after, § 5, p 486  
 Discharge of official duty, § 9, p 496  
 Donees, § 5, p 485  
 Elements of offenses, § 4  
 Evidence, carrying or possessing, § 13, pp 508-513  
 Exemptions, carrying or possessing, § 9  
 Federal fire arms laws, § 3  
 Finders, § 5, p 485  
 Gift of weapons, § 22  
 Home, carrying or possessing in, § 9, p 501  
 Hunting, possession and carrying for, § 5, p 483  
 Husband and wife, carrying and possessing, § 9, p 502  
 Indictment and information, carrying or possessing, § 12  
 Instructions to jury, carrying or possessing, § 14  
 Intent, § 5, pp 482-487  
     Indictment or information, § 12  
     Trial and review, § 14  
 Iron bar, carrying or possessing, § 6  
 Issuance, proof and variance for carrying or possessing, § 12  
 Justice court, carrying or possessing in, § 7  
 Knives, prohibited weapons, § 6  
 Landlord and tenant, carrying or possessing, § 9, p 503  
 Lenders, § 5, p 485  
 Lengths of time of carrying or possession, § 4  
 License to carry, § 11  
 Licensees, carrying or possessing, § 9, p 503  
 Life, possession and carrying for purpose of protecting, § 5, p 486  
 Loan of weapons, § 22  
 Machine guns, prohibited weapons, § 6  
 Mail carriers, carrying or possessing, § 9, p 501  
 Manner of carrying, concealing or possessing, § 8  
 Master and servant, carrying or possessing, § 9, p 503  
 Momentary possession, § 5, p 484  
 Motive, § 5, pp 482-487  
     Trial and review, § 14  
 Motor vehicles, carrying or possessing in, § 8

## Criminal responsibility—Continued

Occasions exempted or privileged, § 9  
 On the person, carrying or possessing, § 8  
 One's own premises, carrying or possessing on, § 9, p 501  
 Ownership of weapon illegally carried, § 4  
 Parent and child, carrying or possessing, § 9, p 502  
 Partial concealment, § 8  
 Pawnbrokers, possession by, § 5, p 486  
 Peace officers, exemption or privilege to carry or possess, § 9, p 495  
 Penknives, carrying or possessing, § 6  
 Permit to carry, § 11  
 Persons exempted or privileged, § 9  
 Pistols, prohibited weapons, § 6  
 Places exempted or privileged, § 9  
 Places prohibited for carrying or possessing, § 7  
 Pledgee, § 5, p 485  
 Pointing or exhibiting, post  
 Possession of weapons, § 3  
 Postmasters, carrying or possessing, § 9, p 501  
 Presumptions, carrying or possessing, § 13, p 508  
 Privilege, carrying or possessing, § 9  
 Prohibited weapons, § 6  
 Property, carrying and possession for purpose of protecting, § 5, p 486  
 Public authorities, carrying to, § 5, p 485  
 Purpose, § 5, pp 482-487  
 Questions of law and fact, carrying or possessing, § 14  
 Razors, prohibited weapons, § 6  
 Revocation of license or permit to carry or possess, § 11  
 Route of transportation, loitering and delay, § 5, p 484  
 Rubber hose, carrying or possessing, § 6  
 Sale of weapons, § 22  
 Sawed off shotguns, prohibited weapons, § 6  
 Sentence and punishment, § 15  
 Shooting fire arms, post  
 Slung shots, prohibited weapons, § 6  
 Soldiers, carrying or possessing, § 9, p 501  
 Territorial limits,  
     License or permit to carry or possess, § 11  
     Police officer carrying or possessing, § 9, p 496  
 Travellers, carrying or possessing, § 9, p 497  
 Trial, hearing or possessing, § 14  
 Unloaded pistols, prohibited carrying of, § 6, p 488  
 Vehicles, carrying or possessing in, § 8  
 Very pistol, possession, § 6, n 57  
 Weight and sufficiency of evidence, carrying or possessing, § 13, p 511  
 Workmen, possession and carrying by, § 5, p 486  
 Wrongful use, § 4  
 Custody of dangerous weapons, civil liability, § 28  
 Daggers, criminal responsibility, prohibited weapons, § 6  
 Dangerous agency, loaded gun, § 28, n 11  
 Dangerous or deadly weapons,  
     Criminal responsibility for carrying or possessing, § 6  
     Definitions, § 1  
 Defective pistols, criminal responsibility for carrying and possession, § 6

# WEAPONS

## Defenses,

- Actions for damages, § 29
- Criminal responsibility, § 10
- Trial and review, § 14
- Persons fearing attack as privileged to carry, § 9, p 500

## Definitions, § 1

- An pistol, § 22, n 84
- Pointing or exhibiting, § 16

## Degree of care, civil liability, § 28

## Description of weapon, indictment or information for carrying or possessing, § 12

## Dirks, criminal responsibility, prohibited weapons, § 6

## Disarming another, criminal responsibility for carrying and possession after, § 5, p 486

## Discharge of official duty, criminal responsibility of officer, in carrying or possessing, § 9, p 496

## Discretion of court, sentence and punishment for carrying or possessing, § 15

## Discretion of jury, damages for injuries, civil liability, § 29

## Donees, criminal responsibility, § 5, p 485

## Drilling with arms, § 2, p 477

### Criminal responsibility, § 23

## Due process of law, right to bear arms, § 2, p 476

## Dwelling house, criminal responsibility for shooting fire arms in vicinity, § 20

## Elements of offenses, § 4

## Equal protection of laws, right to bear arms, § 2, p 476

## Evidence,

- Actions for damages, § 29
- Civil liability for sale, gift or loan, § 32
- Criminal responsibility,
  - Carrying or possessing, § 13, pp. 508-513
  - Pointing or exhibiting, § 18
  - Shooting fire arms, § 21

## Exemptions, criminal responsibility,

- Carrying or possessing, § 9
- Pointing or exhibiting, § 17

## Exhibiting,

- Pointing or exhibiting, generally, post
- Sale, regulations, § 2, p 479

## Express company agents, right to bear arms, § 2, p 476

## Factories, criminal responsibility for carrying or possessing in, § 9, p 503

## Farming, criminal responsibility for carrying or possessing in, § 9, p 503

## Federal officers, civil liability of United States, § 28

## Felons, restrictions on right to bear arms, § 2, p 478

## Finders, criminal responsibility, § 5, p 485

## Fines, criminal responsibility for carrying or possessing, § 15

## Fingerprinting, applicants for permits to carry pistols, § 2, p 477

## Fire arms, definitions, § 1

## Foreign commerce, transporting, shipping or receiving of fire arms, § 2, p 477

## Forfeiture,

- Hunting license, § 2, p 475, n 92
- Weapon involved in offense, § 25

## Free Negroes, restrictions on right to bear arms, § 2, p 478

## Fright, injuries resulting from, § 28

## Fugitive from justice,

- Criminal responsibility for carrying or possessing, travellers, § 9, p 499

## Fugitive from justice—Continued

- Transporting, shipping or receiving of fire arms, § 2, p 477

### Traveller, § 9, p 499

## Game wardens, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495

## General right to bear arms, § 2, p 472

## Generic terms, § 1

## Gift,

- Civil liability, §§ 26-33, pp 525-533

- Criminal responsibility, § 22

- Regulations, § 2, p 478

## Good faith, criminal responsibility for carrying by owner away from home, § 5, p 484

## Gun, definitions, § 1

## Hand bag, criminal responsibility for carrying or possessing in, § 8

## Hands, deadly weapons, § 1, n 48

## Harm, persons fearing as privileged to carry, § 9, p 500

## Hatchet, pointing or exhibiting, criminal responsibility, § 17

## Highways, criminal responsibility for shooting fire arms in vicinity, § 20

## Home, criminal responsibility for carrying or possessing in, § 9, p 501

## Hunting, criminal responsibility for possession and carrying for, § 5, pp 483, 486

## Hunting license, forfeiture as exercise of police power, § 2, p 475, n 92

## Husband and wife, criminal responsibility for carrying or possessing, § 9, p 502

## Illegal use, civil liability, §§ 26-33, pp 525-533

## Illness, damages recoverable for physical injuries, § 28

## Indictment and information,

- Carrying or possessing, § 12
- Pointing or exhibiting, § 18
- Shooting fire arms, § 21

## Inherent rights, right to bear arms, § 2, p 472

## Instructions to jury,

- Actions for damages for injuries, § 29
- Criminal responsibility,
  - Carrying or possessing, § 14
  - Pointing or exhibiting, § 18
  - Shooting fire arms, § 21

## Intent, criminal responsibility, § 5, pp 482-487

### Indictment or information, § 12

### Trial and review, § 14

## Interstate commerce, transporting, shipping or receiving of fire arms, § 2, p 477, § 3

## Intoxicated persons, restrictions on right to bear arms, § 2, p 478

## Iron bar, criminal responsibility for carrying or possessing, § 6

## Issues, proof and variance,

- Criminal responsibility,
  - Carrying or possessing, § 12
  - Pointing or exhibiting, § 18

## Jury,

- Instructions to jury, generally, ante
- Questions of law and fact, generally, post

## Justice court, criminal responsibility for carrying or possessing in, § 7

## Knapsack, criminal responsibility for carrying or possessing in, § 8

- Knives,
  - Criminal responsibility, prohibited weapons, § 6
  - Deadly weapons, § 1, n 48
- Landlord and tenant, criminal responsibility for carrying or possessing, § 9, p 503
- Lenders, criminal responsibility, § 5, p 485
- Length of time, carrying or possession of weapons, § 4
- Lethal weapon, definitions, § 1
- Licensees, criminal responsibility for carrying or possessing, § 9, p 503, § 11
- Licenses, conditions precedent to bearing of arms, § 2, p 477
- Life, criminal responsibility for carrying and possessing for purpose of protecting, § 5, p 486
- Loan, civil liability, §§ 26-33, pp 525-533
  - Criminal responsibility, § 22
  - Regulations, § 2, p 478
- Machine guns, criminal responsibility, prohibited weapons, § 6
- Mail carriers, criminal responsibility for carrying or possessing, § 9, p 501
- Mandamus, compelling return of confiscated weapon, § 25
- Manner of carrying, concealing or possessing, criminal responsibility, § 8
- Manufacturer,
  - Civil liability, §§ 26-33, pp 525-533
  - Regulations, § 2, p 478
- Master and servant, criminal responsibility for carrying or possessing, § 9, p 503
- Metal knuckles, restrictions on right to bear arms, § 2, p 477
- Metal knucks, deadly weapons, § 1, n 48
- Ministerial officers, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495
- Miscarriage, damages recoverable for physical injury, § 28
- Momentary possession, criminal responsibility, § 5, p 484
- Motive, criminal responsibility,
  - Carrying or possessing, § 5, pp 482-487
  - Trial and review, § 14
- Motor vehicles, criminal responsibility for carrying or possessing in, § 8
- Municipal limits, criminal responsibility for shooting fire arms within, § 20
- Nature of right to bear arms, § 2, p 472
- Negligence, civil liability, §§ 26-33, pp 525-533
- Occasion exempted or privileged from criminal responsibility for carrying or possessing, § 9
- On the person, criminal responsibility for carrying or possessing, § 8
- Owner, criminal responsibility for carrying to, § 5, p 484
- Ownership of weapon illegally carried, § 4
- Parading with arms, § 2, p 477
  - Criminal responsibility, § 23
- Parent and child, criminal responsibility for carrying or possessing, § 9, p 502
- Partial concealment, criminal responsibility, § 8
- Parties,
  - Action for damages, § 29
  - Civil liability for sale, gift or loan, § 32
- Pawnbrokers, criminal responsibility for possession by, § 5, p 486
- Peace officers, criminal responsibility for carrying or possessing,
  - Exemption of privilege, § 9, p 495
  - In aid of, § 5, p 483
- Penalties and forfeitures, §§ 24, 25
  - Criminal responsibility for carrying or possessing, § 15
- Penknives, criminal responsibility for carrying or possessing, § 6
- Permits,
  - Conditions precedent to bearing of arms, § 2, p 477
  - Criminal responsibility, § 11
- Persons exempted from criminal responsibility for carrying or possessing, § 9
- Physical injuries resulting from fright, § 28
- Pistols,
  - Criminal responsibility, prohibited weapons, § 6
  - Definitions, § 1
  - Pointing or exhibiting, criminal responsibility, § 17
- Places exempted or privileged from criminal responsibility for carrying or possessing, § 9
- Pleadings,
  - Actions for damages, § 29
  - Civil liability for sale, gift or loan, § 32
- Pledge, carrying of weapons for purpose of making, § 5, p 486
- Pledgee, criminal responsibility, § 5, p 485
- Pocket knife, pointing or exhibiting, criminal responsibility, § 17
- Pocket pistol, definitions, § 1
- Pointing or exhibiting, criminal responsibility, § 16
  - Appeal and error, § 18
  - Defenses, § 17
  - Definitions, § 16
  - Elements of offenses, § 17
  - Evidence, § 18
  - Exempt persons, § 17
  - Indictment and information, § 18
  - Manner of pointing or exhibiting, § 17
  - Prosecution and punishment, § 18
  - Trial, § 18
- Police officers, right to bear arms, § 2, p 476
- Police power, regulating right to bear arms, § 2, p 475
- Possession,
  - Criminal responsibility, § 3
  - Regulating right to bear arms, § 2, p 475
- Postmasters, criminal responsibility for carrying or possessing, § 9, p 501
- Power to regulate, right to bear arms, § 2, p. 474
- Presumptions,
  - Actions for damages, discharge of fire arms, § 29
  - Civil liability for sale, gift or loan, § 32
  - Criminal responsibility,
    - Carrying or possessing, § 13, p 508
    - Pointing or exhibiting, § 18
    - Shooting fire arms, § 21
- Privileges, criminal responsibility for carrying or possessing, § 9
- Prohibited weapons, criminal responsibility, § 6
- Property, criminal responsibility for carrying and possessing for purpose of protecting, § 5, p 486
- Provocation, defense in action for damages, § 29
- Proximate cause, actions for damages, § 20
- Public authorities, criminal responsibility for carrying to, § 5, p 485



# WEAPONS

- Public places or assemblies, criminal responsibility,
  - Carrying or possessing in, § 7
  - Shooting fire arms in vicinity, § 20
- Public safety, statutes designed to minimize danger, § 2, p. 480
- Purpose, criminal responsibility, § 5, pp 482-487
- Questions of law and fact,
  - Actions for damages for injuries, § 29
  - Civil liability for sale, gift or loan, § 32
  - Criminal responsibility,
    - Carrying or possessing, § 14
    - Pointing or exhibiting, § 18
- Railroad agents, right to bear arms, § 2, p 476
- Razors, criminal responsibility, prohibited weapons, § 6
- Receiving of fire arms in interstate or foreign commerce, § 2, p 477
- Repairs, carrying weapon for purpose of having made, § 5, pp 483, 486
- Repeater, definitions, § 1
- Res ipsa loquitur doctrine, actions for damages on discharge of fire arm, § 29
- Revocation, license to carry or possess, § 11
- Revolver, definitions, § 1
- Rifle, definitions, § 1
  - Pointing or exhibiting, criminal responsibility, § 17
- Right to bear arms, § 2, pp 472-480
- Rocks, deadly weapons, § 1, n 48
- Route of transportation, criminal responsibility, § 5, p 484
- Rubber hose, criminal responsibility for carrying or possessing, § 6
- Sack, criminal responsibility for carrying or possessing in, § 8
- Saddle bag, criminal responsibility for carrying or possessing in, § 8
- Sale,
  - Carrying of weapon for purpose of, § 5, p 486
  - Civil liability, §§ 26-33, pp 525-533
  - Criminal responsibility, § 22
  - Regulations, § 2, p 478
- Sap,
  - Definitions, § 1
  - Restrictions on right to bear arms, § 2, p 476
- Satchel, criminal responsibility for carrying or possessing in, § 8
- Sawed off shot guns, criminal responsibility, prohibited weapons, § 6
- Scabbard, criminal responsibility for carrying or possessing in, § 8
- Schoolhouse, criminal responsibility for shooting fire arms in vicinity, § 20
- Self-defense weapons, § 9, p 501
- Sentence and punishment, criminal responsibility for carrying or possessing, § 15
- Sheriffs and constables, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495
- Shipping of fire arms in interstate or foreign commerce, § 2, p 477
- Shooting fire arms, criminal responsibility, § 19
  - Defenses, § 20
  - Elements of offenses, § 20
  - Evidence, § 21
  - Indictment or information, § 21
  - Nature of offenses, § 20
  - Prosecution and punishment, § 21
- Shooting gallery, criminal responsibility to have or use in conducting, § 5, p 483
- Shops, criminal responsibility for carrying or possessing in, § 9, p 503
- Slaves, restrictions on right to bear arms, § 2, p 478
- Slung shots,
  - Criminal responsibility, prohibited weapons, § 6
  - Definitions, § 1
  - Restrictions on right to bear arms, § 2, p 476
  - Self-defense weapons, § 9, p 501
- Small arms, definitions, § 1
- Soldiers, criminal responsibility for carrying or possessing, § 9, p 501
- Special agents, right to bear arms, § 2, p 476
- Special bailiffs, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495
- Stores, criminal responsibility for carrying or possessing in, § 9, p 503
- Suitcase, criminal responsibility for carrying or possessing in, § 8
- Territorial jurisdiction, criminal responsibility, police officer carrying or possessing, § 9, p 496
- Territorial limits, criminal responsibility for carrying or possessing, license or permit, § 11
- Threat, persons fearing attack as privileged to carry, § 9, p 500
- Town sergeant, criminal responsibility for carrying or possessing, exemption or privilege, § 9, p 495
- Toy pistols, provision of sale, § 2, p 479
- Tramps, restrictions on right to bear arms, § 2, p 478
- Transitory offense, carrying of weapons, § 3
- Transportation in interstate or foreign commerce, § 2, p 477
- Travellers, criminal responsibility for carrying or possessing, § 9, p 497
- Treble responsibility, borrowers, § 5, p 485
- Trespass, actions for injuries caused by discharge of fire arms, § 29
- Trespassers, criminal responsibility for pointing or exhibiting weapon in resisting, § 17, n 77
- Trial,
  - Actions for damages for discharge of fire arm, § 29
  - Civil liability for sale, gift or loan, § 32
  - Criminal responsibility,
    - Carrying or possessing, § 14
    - Pointing or exhibiting, § 18
    - Shooting fire arms, § 21
- United States, civil liability, § 28
- Unloaded pistols, criminal responsibility for carrying and possessing, § 6
- Unnaturalized foreign born residents, restrictions on right to bear arms, § 2, p 478
- Vehicles, criminal responsibility for carrying or possessing in, § 8
- Very pistol, criminal responsibility for possession, § 6, n 57
- Watchmen, right to bear arms, § 2, p 476
- Weight and sufficiency of evidence,
  - Actions for damages for discharge of fire arm, § 29
  - Criminal responsibility,
    - Carrying or possessing, § 13, p 511
    - Pointing or exhibiting, § 18
    - Shooting fire arms, § 21
- Workmen, criminal responsibility for possession and carrying by, § 5, p 486
- Wrongful use, criminal responsibility, § 4

# INDEX TO WEIGHTS AND MEASURES

- Admissibility of evidence,
  - False weights and measures, § 9
  - Short weights, § 12, p 562
- Agents, short weights and measures, § 12
- Ampere, definitions, § 1
- Appeal and error, decision of inspector or sealer, § 5
- Appointment,
  - Deputy public weigher, § 6
  - Inspectors or sealers, § 5
- Apert, definitions, § 1
- Attempt to sell less than quantity represented, § 12
- Avoirdupois, definitions, § 1
- Bail, definitions, § 1
- Bailments, public weighers and measurers, § 6
- Bale of cotton,
  - Definitions, § 1, n 11
  - Falsely packed, § 13
- Barleycorn, definitions, § 1
- Barrel, definitions, § 1
- Baskets, standard containers, sale of products, § 4, p 549
- Benefit to defendant, false weights or measures, § 9
- Block, definitions, § 1
- Board of trade, deduction by reason of rule, § 4, p 547
- Bread, quantities of designated weights or sizes, § 4, p 548
- Burden of proof,
  - Fraudulent alteration of weights or measures, § 11
  - Short weights, § 12, p 562
- Bushel, definitions, § 1
- Carat, definitions, § 1
- Case, public weighers and measurers, § 6
- Case, definitions, § 1
- Centimeter-Gram-Second System, definitions, § 1
- Certipoise, definitions, § 1
- Certificate showing weight, § 4, p 550
- Certiorari, decision of sealer quashed on, § 5
- Chain, definitions, § 1
- Chaldron, definitions, § 1
- Chopped feed, sale by dry measure or numerical count, § 4, p 548
- Citrus fruits, standard containers, § 4, p 549
- Civil liability, public weighers and measurers, § 6
- Coal,
  - Packing in containers substance foreign to contents, § 14
  - Public officer weighing, measuring or surveying, § 4, p 547
  - Public weighers, § 7
  - Ticket or certificate showing weight, § 4, p 550
- Coke, public officer weighing, measuring or surveying, § 4, p 547
- Commercial feeding stuff, forfeiture proceedings, § 4, p 547, n 69
- Compensation,
  - Inspectors or sealers, § 5
  - Public weighers and measurers, § 6
- Complaints,
  - Pleadings, generally, post
  - False weights or measures, § 9
- Confiscation,
  - False weights or measures, § 10
  - Unauthorized measures, § 8
- Containers, packing substance foreign to contents, § 14
- Control of weighing device, short weights, § 12, p 561
- Cord, definitions, § 1
- Cordwood, public officer weighing, measuring or surveying, § 4, p 547
- Cornmeal, sale by dry measure or numerical count, § 4, p 548
- Cotton, falsely packed bales, § 13
- Coulomb, definitions, § 1
- Criminal liabilities, public weighers and measurers, § 7
- Criminal offenses, false weights and measures, § 9
- Criminal responsibility,
  - Falsely packed bales of cotton, § 13
  - Fraudulent alteration of weights and measures, § 11
  - Public weighers and measurers, § 6
- Cuerda, definitions, § 1
- Custom houses, standards of weights and measures, § 3
- Cwt, definitions, § 1
- Defenses,
  - False weights and measures, § 9
  - Short weights and measures, § 12
- Definitions, § 1
- Delivery, less of commodity than quantity represented, § 12, p 561
- Deputy, public weighers, duration of term and removal, § 6
- Discharge, inspectors or sealers, § 5
- Discontinuance of office, inspectors or sealers, § 5
- Dram, definitions, § 1
- Dry gallon, definitions, § 1
- Dry measure, sale by, § 4, p 548
- Earth, falsely packed bales of cotton, § 13
- Elements of offense,
  - False weights and measures, § 9
  - Short weights and measures, § 12
- Ell, definitions, § 1
- Evidence,
  - False weights or measures, § 9
  - Short weights, § 12, p 562
  - Unsealed scales, weights on, § 8
  - Weights by public weighmaster, § 6
- Exclusiveness of right given public weigher, § 6
- False weights and measures, § 9
  - Possession, § 10
- Falsely packed bales of cotton, § 13
- Farad, definitions, § 1
- Fathom, definitions, § 1
- Fees,
  - Inspectors or sealers, § 5
  - Public weighers and measurers, § 6
- Fish, sale by dry measure or numerical count, § 4, p 548

# WEIGHTS AND MEASURES

- Flour, sale by dry measure or numerical count, § 4, p 548
- Foot, definitions, § 1
- Foreign substances, falsely packed bales of cotton, § 13
- Forfeiture, false weights or measures, § 10
- Fraud,
  - False weights and measures, § 9
  - Public weighers and measurers, § 6
- Fraudulent alteration of weights and measures, § 11
- Fruits,
  - Sale by dry measure or numerical count, § 4, p 548
  - Standard containers, § 4, p 549
- Furlong, definitions, § 1
- Gallon, definitions, § 1
- Game, sale by dry measure or numerical count, § 4, p 548
- Gill, definitions, § 1
- Grain, definitions, § 1
- Gramme, definitions, § 1
- Gross, definitions, § 1
- Hallocks, standard containers, § 4, p 549
- Hampers, standard containers, sale of products, § 4, p 549
- Hogshead, definitions, § 1
- Horse power, definitions, § 1
- Hundredweight, definitions, § 1
- Ice, quantities of designated weights or sizes, § 4, p 548, n 82
- Imperial bushel, definitions, § 1, n 18
- Inch, definitions, § 1
- Indictment or information,
  - False weights or measures, § 9
  - Falsely packed bales of cotton, § 13
  - Short weights, § 12, p 561
  - Use of unauthorized or unsealed weights or measures, § 8
- Injury,
  - False weights and measures, § 9
  - Misrepresentation of quantity, § 12, p 560
- Inspectors, § 5
- Instructions to jury, false weights and measures, § 9
- Intent, false weights and measures, § 9
- Iron, definitions, § 1
- Issuance, proof and variance, short weights, § 12, p 561
- Joule, definitions, § 1
- Judgment, false weights and measures, § 9
- Kilderkin, definitions, § 1
- Kilogram, definitions, § 1
- Kilovolt, definitions, § 1
- Kilowatt, definitions, § 1
- Knot, definitions, § 1
- Labels, affixing to packages or containers, § 4, p 546
- Lace, definitions, § 1
- Lard, quantities of designated weights or sizes, § 4, p 548, n 82
- League, definitions, § 1
- Litre, definitions, § 1
- Loaf of bread, quantities of designated weights or sizes, § 4, p 548
- Loss of commodities, liability of public weighers and measurers, § 6
- Lumber, public officer weighing, measuring or surveying, § 4, p 547
- Mark, definitions, § 1
- Meat, sale by dry measure or numerical count, § 4, p 548
- Metre, definitions, § 1
- Metric system, definitions, § 1
- Micron, definitions, § 1
- Mile, definitions, § 1
- Milk, standard containers, § 4, p 549
- Minute, definitions, § 1
- Misdemeanors, public weighers and measurers, § 6
- Misrepresentation of quantity, § 12, § 560
- Mistake, public weighers and measurers, § 6
- Negligence, public weighers and measurers, § 6
- Net horse power, definitions, § 1, n 52
- Number of acts, false weights or measures, § 9
- Numerical count, sale by, § 4, p 548
- Nuts, sale by dry measure or numerical count, § 4, p 548
- Ohm, definitions, § 1
- Ounce, definitions, § 1
- Pace, definitions, § 1
- Packing in containers substance foreign to contents, § 14
- Penalties,
  - Public weighers and measurers, § 7
  - Use of unauthorized or unsealed weights or measures, § 8
- Pennyweight, definitions, § 1
- Perch, definitions, § 1
- Picul, definitions, § 1
- Pint, definitions, § 1
- Pleadings,
  - False weights or measures, § 9
  - Short weights, § 12, p 561
- Pocket, definitions, § 1
- Pole, definitions, § 1
- Police power,
  - Public weighers and measurers, § 6
  - Regulation under, § 3
- Possession, false weights and measures, § 10
- Poultry, sale by weight, § 4, p 547
- Pound, definitions, § 1
- Privileges, public weighers and measurers, § 6
- Public officers,
  - Inspectors or sealers, § 5
  - Weighing, measuring or surveying by, § 4, p 547
- Public weighers and measurers, § 6
  - Criminal liabilities, § 7
- Quantities of designated weights or sizes, sales, § 4, p 548
- Quart, definitions, § 1
- Quarter, definitions, § 1
- Questions of law and fact, false weights and measures, § 9
- Raspberries, standard containers, § 4, p 549
- Regulations, § 2
- Removal,
  - Deputy public weigher, § 6
  - Inspectors or sealers, § 5
- Representations, sale of quantity less than, § 12, pp 558-562
- Retailers,
  - Reasonable regulations, § 4, p 546
  - Short weights and measures, § 12
- Revocation of office, inspectors or sealers, § 5
- Sack, definitions, § 1
- Sale, quantity less than represented, § 12, pp 558-562

## WEIGHTS AND MEASURES

Sales of particular commodities, § 4, pp 546-551  
Sand, falsely packed bales of cotton, § 13  
Sealers, § 5  
Second, definitions, § 1  
Section, definitions, § 1  
Sentence and punishment, false weights and measures, § 9  
Shingles, public officer weighing, measuring or surveying, § 4, p 547  
Short weight, false weights or measures, § 9  
Skill, public weighers and measurers, § 6  
Square, definitions, § 1  
Standard containers, sales, § 4, p 549  
State standards, § 3  
Stone, falsely packed bales of cotton, § 13  
Strawberries, standard containers, § 4, p 549  
Tenure of office, public weighers and measurers, § 6  
Ticket showing weight, § 4, p 550  
Ton, definitions, § 1  
Tonnage, definitions, § 1

Township, definitions, § 1  
Trial, false weights and measures, § 9  
Troy, definitions, § 1  
Uniform standard, § 3  
Use of unauthorized or unsealed weights or measures, § 8  
Vain, definitions, § 1  
Variance, indictment or complaint for false weights and measures, § 9  
Vegetables,  
    Sale by dry measure or numerical count, § 4, p 548  
        Standard containers, § 4, p 549  
Volt, definitions, § 1  
Watt, definitions, § 1  
Weight and sufficiency of evidence,  
    False weights or measures, § 9  
        Short weights, § 12, p 562  
Wholesalers, short weights and measures, § 12  
Yard, definitions, § 1

# INDEX TO WHARVES

---

- Abandonment, lessee of wharf, § 5
- Accidents,
  - Defenses to action for injury to vessel, § 19
  - Injuries to persons, § 23
- Actions,
  - Claims for wharfage, § 15
  - Injuries to vessel or cargo, § 22
  - Injuries to wharves, §§ 25, 26
  - Personal injuries, § 24
- Actual loss, damages to pier or wharf, § 27
- Admiralty proceeding,
  - Actions for damages, § 22
  - Actions for wharfage charges, § 15
  - Enforcement of wharfage lien, § 14
- Admissibility of evidence,
  - Action on wharfage claims, § 15
  - Actions for damages, § 22
  - Injuries to wharves, § 26
  - Personal injury actions, § 24
- Adverse possession, § 2
- Adverse right by public as against private owner, § 9
- Affirmative negligence, injuries to persons, § 23
- Agents, liability for injuries to vessels and cargo, § 21
- Amount of wharfage, § 13
- Appurtenances included, grant of wharf right, § 3
- Artificial landing-place, § 1
- Assignment, license to construct dock on state land, § 4
- Assumpsit, action on wharfage claims, § 15
- Assumption of risk,
  - Injury by vessels of wharf, § 25
  - Jury questions in action for damages, § 22
- Attachments, claims for wharfage, § 15
- Barge captains,
  - Injuries to invitees, § 23
  - Injuries to licensees, § 23
- Basis of right to erect, § 2
- Beneficial use, rights of lessee, § 5
- Boardwalks, § 1
- Boathouse,
  - Charge for wharfage, § 12
  - Wharf property as including, § 1
- Breach of covenant, lease of wharves, § 5
- Bridge pier, definitions, § 1
- Bulkheads, dock as including, § 1
- Burden of proof,
  - Action on wharfage claims, § 15
  - Actions for damages, § 22
  - Injuries to wharves, § 26
  - Personal injury actions, § 24
- Capsizing of vessel, liability for loss due to, § 16
- Car passengers, injuries to persons, § 23
- Cargo surveyors, injuries to invitees, § 23
- Cargoes, injuries to, § 16
- Chartered vessel, liability of owner for wharfage, § 12
- Children and minors, injuries to persons, § 23
- Choice of berths, control of dockmaster, § 10
- Cinders, liability for injuries to vessels, § 17
- Claims for wharfage, actions, § 15
- Coal, liability for injuries to vessels, § 17
- Collapse of wharves, liability for loss due to, § 16
- Collision, damage to vessel or cargo from, § 16
- Commerce, state construction and maintenance in aid of, § 2
- Compensation,
  - Dockage, nature of rent, § 1
  - Wharfage, § 1
- Compulsory pilotage, injury to wharves, § 25
- Concealed defects and obstructions, injuries to vessels and cargo, § 17
- Condition of wharf, lease as warranting, § 5
- Conflict of laws, liability of tugboat owners for damage to pier, § 26, n 34
- Consignee of cargo, liability for wharfage, § 12
- Construction,
  - Grants, franchises and privileges, § 3
  - Leases of wharves, § 5
- Contingent damages, damages to pier or wharf, § 27
- Contract for sale, construction, § 6
- Contracts, right to wharfage, § 13
- Contributory negligence,
  - Injuries to vessels, § 20
  - Injury by vessels of wharf, § 25
  - Questions for jury in action for damages, § 22
- Conveyance of rights, § 6
- Creation of lien, wharfage charges, § 14
- Damages,
  - Action for damages to pier or wharf, § 27
  - Action for injury to vessel or cargo, § 22
  - Action on wharfage claim, § 15
  - Injuries or obstruction of wharf, § 26
- Dangerous access, liability for injuries to vessels, § 17
- Dead ship, charge for wharfage, § 12
- Dedications, property to use of public, § 9
- Defective condition of dock, § 16
- Defenses,
  - Actions for rent under lease of wharf, § 5
  - Claims for wharfage, § 15
  - Injuries to persons, § 23
  - Liabilities for injuries to vessels or cargo, § 19
- Definitions, § 1
- Degree of care, safe berth, § 16
- Demurrage or storage charges, § 7, n 55
- Division of damages, injuries to vessel or cargo, § 22
- Dockage, definitions, § 1
- Docks,
  - Definitions, § 1
  - Prescription or adverse possession, § 2
- Dolphins, § 1
- Double charges for wharfage, § 13
- Drawbridge, § 1
- Drayman, license to enter on in following employment, § 10
- Dredging, injuries to wharves, § 25
- Dredging companies, liabilities for injuries to vessels and cargo, § 21
- Dry dock, definitions, § 1

Dry dockage, definitions, § 1  
 Ejectment, nonpayment of rent for lease of wharf, § 5  
 Eminent domain, basis of right to erect, § 2  
 Enforcement of lien for wharfage charges, § 14  
 Eviction, defenses to actions for rent or lease of wharf, § 5  
 Evidence,  
     Actions for damages, § 22  
     Actions on wharfage claims, § 15  
     Admissibility of evidence, generally, ante  
     Burden of proof, generally, ante  
     Injuries by vessel to wharf, § 26  
     Personal injury actions, § 24  
     Weight and sufficiency of evidence, generally, post  
 Excessive charges for wharfage, § 13  
 Exclusive privileges, § 3  
 Exclusive use and enjoyment, § 9  
 Exempt goods, right to wharfage, § 13  
 Explosions, liability for loss due to, § 16  
 Express contract, compensation for wharfage, § 12  
 Extent of use, right to wharfage, §§ 12, 13  
 Extortionate wharfage, government regulation and supervision, § 7  
 Extra charges for wharfage, § 13  
 Extraordinary accidents, liabilities for injuries to persons, § 23  
 Factor, liability for wharfage, § 12  
 Fastenings, liability for injuries to vessel and cargo, § 18  
 Fire, liability for loss due to, § 16  
 Floating dock, definitions, § 1  
 Floating dry dock, charge for wharfage, § 12  
 Forfeiture, breach of lease covenant, § 5  
 Franchise of wharfage, lease as letting of, § 5  
 Franchises, privilege of erecting, § 3  
 Free time, government regulation and supervision, § 7, n 55  
 Free wharfage, § 13  
 Freezing, damage to vessel or cargo from, § 16  
 Gangplank, injuries to persons, § 23  
 Government regulation and supervision, § 7  
 Graduated charges for wharfage, § 13  
 Grants, privilege of erecting, § 3  
 Graven dock, definitions, § 1  
 Gross tonnage, amount of wharfage, § 13  
 Harbor commissioners, privilege or license to use piers for docking vessels, § 3  
 Hazards, injuries to vessels or cargoes, § 17  
 Hidden defects, injuries to persons, § 23  
 Hostile possession, prescription or adverse possession, § 2  
 Houseboats, § 1  
 Ice, liability for loss due to, § 16  
 Ice floes, defenses to injury to vessel caused by, § 19  
 Illegal charges for wharfage, § 13  
 Implied contract, compensation for wharfage, § 12  
 In personam proceedings, enforcement of wharfage lien, § 14  
 In rem proceedings, enforcement of wharfage lien, § 14  
 Incorporal right, right to wharfage, § 12  
 Independent contractors, liability for injuries to vessels and cargo, § 21  
 Inevitable accidents, injuries to persons, § 23  
 Injunctions, creation or continuance of obstruction to use of wharf, § 26

Injuries to persons, § 23  
 Injuries to vessels or cargo, § 16  
 Injury to wharves, § 25  
 Instructions to jury,  
     Injuries to wharves, § 26  
     Personal injury actions, § 24  
 Insurer of dock safety, § 16  
 Intention of parties, leases of wharves, § 5  
 Invitees, injuries to persons, § 23  
 Jury,  
     Instructions to jury, generally, ante  
     Questions of law and fact, generally, post  
 Key, definitions, § 1  
 Keyage, definitions, § 1  
 Laborers, injuries to persons, § 23  
 Laches,  
     Action for damages, § 22  
     Defenses to action on wharfage claims, § 15  
 Landing, definitions, § 1  
 Landing place, definitions, § 1  
 Landlord and tenant,  
     Injuries to persons, § 23  
     Liability for injuries to vessel or cargo, § 21  
     Prescription or adverse possession, § 2  
     Rights to wharfage, § 12  
 Landslide, injury to vessel or cargo caused by, § 16  
 Leases, § 5  
 Liabilities of lessee, § 5  
 Liability of lessor, § 5  
 Licensee,  
     Duty of care to, § 16  
     Injuries to persons, § 23  
 Licenses and taxes, § 8  
 Liens, wharfage charges, § 14  
 Loading of vessels, right to wharfage, § 12  
 Maintenance,  
     Government regulation and supervision, § 7  
     Lease of wharves, § 5  
 Management, § 9  
 Manner and purpose of use, § 10  
 Manner of use, right to wharfage, §§ 12, 13  
 Marginal street, definition, § 1  
 Marine engineers, injuries to invitees, § 23  
 Marine railway, definitions, § 1  
 Market rate, amount of wharfage, § 13  
 Monopoly, power to create, § 10  
 Moorage, definitions, § 1  
 Mooring of vessels, right to wharfage, § 12  
 Mooring, liability for injuries to vessel and cargo, § 18  
 Nature of use, right to wharfage, § 13  
 Negligence,  
     Action for damages, § 22  
     Injuries to vessels or cargoes, § 16  
     Jury questions in action for damages, § 22  
     Mooring and fastening, liability for injuries, § 18  
 Notice, prescription or adverse possession, § 2  
 Nuisance,  
     Enjoining creation or continuance of obstruction to use of wharf, § 26  
     Prescription or adverse possession as means of obtaining title, § 2  
 Obstructions, injuries to wharves, § 25  
 Occupation taxes, § 8  
 Ordinary care, duty of patrons to exercise, § 20  
 Overlapping use, right to wharfage, § 12  
 Ownership of soil, basis of right to erect, § 2

# WHARVES

Oyster barge, charge for wharfage, § 12  
 Parties, actions on wharfage claims, § 15  
 Patrons of store, injuries to invitees, § 23  
 Persons,  
   Entitled to wharfage, § 12  
   Liable for injuries to vessels and cargo, § 21  
 Pierhead, definitions, § 1  
 Piers,  
   Definitions, § 1  
   Dock as including, § 1  
 Piling, § 1  
 Piping, § 1  
 Pleading,  
   Actions for damages, § 22  
   Personal injury actions, § 24  
 Prerogative of sovereignty, ownership, control and operation of port facilities, § 2, n 25  
 Prescription, § 2  
 Presumptions,  
   Actions for damages, § 22  
   Notice of prescription or adverse possession, § 2  
   Personal injury actions, § 24  
   Purchaser of knowledge of facts on sale and conveyance of rights, § 6  
 Priorities, lien for wharfage charges, § 14  
 Private rules and regulations, § 10  
 Private wharf, definitions, § 1  
 Privilege of erecting, § 3  
 Proprietary rights in soil, grant of wharfage, § 3  
 Public areas, leasing for private purposes, § 5  
 Public landing, definitions, § 1  
 Public officers, injuries to persons, § 23  
 Public pier, definitions, § 1  
 Public slip, definitions, § 1  
 Public wharf, definitions, § 1  
 Quasi public wharf, definitions, § 1  
 Quay, definitions, § 1  
 Questions of law and fact,  
   Actions for damages, § 22  
   Actions on wharfage claim, § 15  
   Injuries to wharves, § 26  
   Personal injury actions, § 24  
 Railroads furnishing wharfage, § 7, n 43  
 Rates and charges, government regulation and supervision, § 7  
 Recoupment, wharfage charges, § 15  
 Reduced rates, wharfage, § 13  
 Registered tonnage, amount of wharfage, § 13  
 Renewal of lease, § 5  
 Rent,  
   Dockage as compensation in nature of, § 1  
   Lease of wharves, § 5  
   Wharfage as, § 1  
 Repairs, lease of wharves, § 5  
 Res ipsa loquitur doctrine, action for damages, § 22  
 Retaking of possession, lease of wharves, § 5  
 Retroactive effect, leases, § 5  
 Revival of lien, wharfage charges, § 14  
 Revocability, grant, franchises and privileges, § 3  
 Right to construct and maintain, § 2  
 Right to wharfage, § 12  
   Actions on claims, § 15  
   Amount of wharfage, § 13  
   Contracts, § 13  
   Creation of lien, § 14  
   Damages, action for, § 15  
   Defenses to actions, § 15

## Right to wharfage—Continued

Double charges, § 13  
 Enforcement of lien, § 14  
 Evidence in actions on claims, § 15  
 Excessive charges, § 13  
 Exempt goods, § 13  
 Extent of use, § 13  
 Extra charges, § 13  
 Free wharfage, § 13  
 Illegal charges, § 13  
 Laches, § 15  
 Liens, § 14  
 Manner of use, § 13  
 Nature of use, § 13  
 Overlapping use, § 12  
 Parties to actions on claims, § 15  
 Persons entitled, § 12  
 Priorities of lien, § 14  
 Reduced rates, § 13  
 Revival of lien, § 14  
 Set-off and counterclaim, § 15  
 Statutory liens, § 14  
 Tenants in common, § 12  
 Termination of lien, § 14  
 Trial of action, § 15  
 Vessels liable, § 12  
 Waiver of lien, § 14  
 Rights of lessee, § 5  
 Rights of lessor, § 5  
 Rock, liability for injuries to vessels, § 17  
 Sale, § 6  
 Scale of charges, amount of wharfage, § 13  
 Seamen, injuries to invitees, § 23  
 Sea-worthy vessels, duty of patrons to furnish, § 20  
 Set-off and counterclaim, right to wharfage charges, § 15  
 Shallow water, injuries to vessels and cargo, § 17  
 Shed hire, definitions, § 1  
 Ship repairs, injuries to licensees, § 23  
 Sidewalks over title lands, wharf property as including, § 1  
 Slip,  
   Definitions, § 1  
   Dock as including, § 1  
 Speculative damages, action for damages to pier or wharf, § 27  
 Spiles, liability for injuries to vessels, § 17  
 State construction and maintenance, § 2  
 Statutory liens, wharfage charges, § 14  
 Stevedores, injuries to persons, § 23  
 Storms, duty of patrons to take notice of approaching, § 20  
 Storms, liability for loss due to, § 16  
 Stress of weather, ship compelled to moor as liable to wharfage charge, § 13  
 Structure on margin of navigable waters, § 1  
 Subletting, lease of wharves, § 5  
 Submerged obstructions, liability for injuries to vessels, § 17  
 Sunken ships, liability for injuries to vessels, § 17  
 Surrender, lease of wharves, § 5  
 Tax sale, wharfage rights, § 6  
 Taxes, § 8  
 Termination of franchise, § 3  
 Termination of lien, wharfage charges, § 14  
 Time, duty of patrons to watch, § 20  
 Title, adverse claim of lessee, § 5

Title by prescription or adverse possession, § 2	Vessels—Continued
Tonnage taxes, § 8	Injuries to wharves, § 25
Top wharfage, definitions, § 1	Liable for wharfage, § 12
Trade, state construction and maintenance in aid of, § 2	Vis major defense, weight and sufficiency of evidence, § 22
Transfer of wharf rights by owners, § 4	Waiver,
Trespassers,	Lien for wharfage charges, § 14
Duty of care to, § 16	Unloading rights, § 10
Injuries to persons, § 23	Warehouses, § 1
Trial,	Waterway, docks as including, § 1
Action for damages, § 22	Weight and sufficiency of evidence,
Action on wharfage claim, § 15	Action for damages, § 22
Truckmen, injuries to licensees, § 23	Action on wharfage claim, § 15
Uneven bottom, liability for injuries to vessels, § 17	Injuries to wharves, § 26
Unloading, time, § 10	Personal injury actions, § 24
Unloading of vessels, right to wharfage, § 12	Wharf property, definitions, § 1
Unsafe condition of dock, § 16	Wharfage, definitions, § 1
Unseaworthiness, action for damages, evidence, § 22	Wharfboat, definitions, § 1
Unusual and unaccustomed purposes, use of wharf, § 10	Wharfinger, definitions, § 1
Use, § 9	Wharves,
Venue, actions for damages, § 22	Dock as including, § 1
Vessels,	Lease of wharf, § 5
Injuries to, § 16	Wind, defenses to injury to vessel caused by, § 19
	Workmen, injuries to invitees, § 23

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